

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

January 9, 2019

Environmental

---

The ongoing partial government shutdown has halted most operations of the agencies regulating product safety, including the Consumer Product Safety Commission (“CPSC”), the National Highway Traffic Safety Administration (“NHTSA”), and the Environmental Protection Agency (“EPA”). With these agencies 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, NHTSA, and EPA operations are halted.

- The CPSC, NHTSA, and EPA 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 EPA's contingency plan furloughs nearly 95% of all agency employees. EPA will only continue to work on projects affecting national security or to respond to imminent threats to public health, human safety, or property.
- The shutdown dramatically curtails EPA's ability to fulfill its statutory and regulatory obligations. EPA is responsible for administering recalls of pesticide products under the Federal Insecticide, Fungicide, and Rodenticide Act and will experience similar difficulties to CPSC and NHTSA regarding recalls of those products. EPA will cease reviewing new and existing chemicals under the Toxic Substances Control Act, meaning the agency will halt risk evaluations and stop designating chemical substances on the TSCA Chemical Substance Inventory as either "active" or "inactive" in U.S. commerce. The agency has already cancelled numerous public hearings on Superfund cleanups, and it is currently evaluating Superfund sites to determine which ones pose the worst public health threats and warrant cleanup during the shutdown.
- Recipients of EPA funded grants can continue working on their projects during the shutdown, but EPA will not be able to disburse new funds or approve expenditures. EPA will also halt all operations at its laboratories, except for those measures needed to "ensure the physical integrity of the EPA's research property" and those "needed to ensure critical operating requirements are not impaired."
- The shutdown will also significantly delay the agency rulemaking process. For instance, EPA is publishing on an abbreviated schedule in the Federal Register during the funding lapse. Consequently, notice and comment periods for proposed rules are not commencing and will be delayed. Because agencies establish the length of comment periods for each rule, and EPA often sets a comment period of 45 to 60 days after a notice appears in the Federal Register, comment periods are not beginning to run for proposed rules.
- 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. The EPA will neither review new compliance documents nor conduct on-site inspections to monitor hazardous waste, drinking water, and chemical facilities. But the lapse in appropriations does not affect companies' obligations to make timely reports to regulators, or self-monitor environmental conditions, under applicable federal law.
- 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), 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. Likewise, the shutdown does not affect the requirements to report adverse incidents under § 8(e) of the Toxic Substances Control Act within 30 days, or to incidents relating to pesticides under FIFRA within 30 days, 40 C.F.R. § 159.155.
- 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), 15 U.S.C. §§ 2607(a)

2615(b), 7 U.S.C. § 136I (EPA), 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. Companies must also continue to carefully evaluate whether their recalled products would be considered hazardous waste and subject to disposal requirements under the Resource Conservation and Recovery Act, or transportation requirements administered by the Pipeline and Hazardous Materials Safety administration.

### 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, NHTSA, or EPA 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.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Environmental practice:

<b><u>Sarah Wilson</u></b> (CPSC/NHTSA)	+1 202 662 5397	<a href="mailto:swilson@cov.com">swilson@cov.com</a>
<b><u>Don Elliott</u></b> (EPA/OSHA)	+1 202 662 5631	<a href="mailto:delliott@cov.com">delliott@cov.com</a>
<b><u>Thomas Brugato</u></b> (EPA)	+1 202 662 5515	<a href="mailto:tbrugato@cov.com">tbrugato@cov.com</a>
<b><u>Benjamin Cavataro</u></b> (CPSC/NHTSA)	+1 202 662 5018	<a href="mailto:bcavataro@cov.com">bcavataro@cov.com</a>
<b><u>Brandon Rattiner</u></b> (EPA)	+1 202 662 5275	<a href="mailto:brattiner@cov.com">brattiner@cov.com</a>

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

Covington & Burling LLP, an international law firm, provides corporate, litigation and regulatory expertise to enable clients to achieve their goals. This communication is intended to bring relevant developments to our

Environmental

clients and other interested colleagues. Please send an email to [unsubscribe@cov.com](mailto:unsubscribe@cov.com) if you do not wish to receive future emails or electronic alerts.