

# Four Things You Should Know to Navigate the CPSC Shutdown

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As the partial federal government shutdown enters its second week, businesses both large and small should be aware of the shutdown's implications for the U.S. Consumer Product Safety Commission (CPSC) and for product safety. Companies should be aware that their obligations under CPSC continue, despite that their partner in product safety is absent until its funding is restored.

Particularly regarding any potentially severe hazards, the role of counsel in recommending a course that will make the best of a difficult and uncertain situation is vital. The CPSC cat may be begrudgingly away, but it will not be happy about any mice who choose to play. Here are four things you need to know now:

1. The CPSC **is** absolutely affected by the shutdown. The appropriations bills passed this year that funded defense and some other government functions did not cover the CPSC. The agency is funded by the Financial Services and General Government Appropriations bill, which has stalled.
2. Almost all of the CPSC is affected. The agency has announced on its website that it is "closed," though its hotline (operated by a contractor) remains available. Preparations for shutdowns have become sadly routine, so agencies have developed thorough plans to prepare for suspended functions that are sufficiently "essential" – though the employees that perform them receive no pay. These plans can vary depending on the vagaries of each particular lapse in appropriations, but for the CPSC, they essentially keep the commissioners and very few senior staff on the job to make emergency decisions, while sending home almost all of the agency's more than 500 employees. This leaves the CPSC without its field agents, its port inspectors, its hazard analysts, and so on.
3. Even though the CPSC's law enforcement function is suspended, the laws it enforces are not. Companies still have all of their obligations under the Consumer Product Safety Act (CPSA) and other CPSC-administered statutes, including testing to and meeting standards and, most notably, reporting potential product safety issues. Though no one will likely read a new Section 15 report for some time, a company that determines it has an obligation to file a

report should do so without delay, either through the CPSC's portal or by email. Filing creates a clear electronic record and timestamp; not doing so violates the law, and "no one was home" will not be a sufficient defense.

4. Because the CPSC is not equipped to evaluate reports for the foreseeable future – let alone to formulate and announce a recall – companies may find their own abilities to respond to product safety issues hampered. A company that seeks to protect its customers by alerting them to a potential hazard or removing a product from the marketplace will be deprived of the megaphone of federal government, limiting the reach of any announcement.

In general, the limitations on the effectiveness of recalls in which the CPSC is not involved argue strongly in favor of bringing the agency on board, even if that means waiting through the shutdown. Intermediate steps, such as stopping distribution or retail sale, may be appropriate, but it's generally best to ring consumers' bells only once, and the CPSC's help in doing so is valuable. For more pressing hazards, however, companies may need to act more aggressively and conduct their own recalls in order to protect their customers and their brands.

Key to any of these actions is reporting. The CPSC generally disfavors unilateral recalls, both because the agency understands the value of a government announcement and from an ordinary human instinct to protect its own role. However, taking action to address a hazard without it having been first or simultaneously reported risks looking like a "silent recall" is something the CPSC despises. The CPSC sees this as a company's seeming attempt to limit its product liability exposure without the stigma (or effectiveness) of a proper recall and without drawing agency attention. Silent recalls may lead the CPSC to think a company has something to hide, which is not a comfortable position for a company to be in. So, if a company feels that it must act urgently – either during or in the aftermath of the CPSC shutdown – consider consulting experienced CPSC counsel on the best way to promote those objectives while staying in compliance with CPSC expectations and notification requirements.

In a nutshell, consumers, businesses, product safety professionals are better off with a funded and functioning CPSC, and we should hope to see a prompt and reasonable end to the shutdown soon.

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