Published on *The National Law Review* https://natlawreview.com

Falling off the Fast Track: CPSC's new "Stop Sale" Demand

Article By:

Jonathan Judge

When a company sells a consumer product that poses a potential hazard to consumers, federal law requires that a report be filed with the U.S. Consumer Product Safety Commission (CPSC). 15 U.S.C. § 2064(b). Companies who fail to do so risk severe civil penalties. After the company's report has been filed, the CPSC offers companies one of two tracks: (1) the Standard Track, in which the CPSC (eventually) makes a Preliminary Determination (PD) of whether the product is defective; or (2) the Fast Track, in which the company can request to conduct a recall and, in exchange, the CPSC will refrain from making an official determination of defect and help speed the process along.

For years, the Fast Track process has been a winning formula for CPSC and companies alike. The CPSC saves engineering and bureaucratic resources because it no longer has to conduct a full-blown investigation. Similarly, a company who wants to improve their product and/or protect consumers can launch a national campaign within a few weeks of filing to address problems with the product.

Over the last few months, however, the CPSC has instituted a new requirement for participating in the Fast Track Program: a "stop sale" obligation. The "stop sale" obligation means that companies are required to immediately tell their retailers to stop selling all affected versions of the product. The CPSC has further insisted that companies comply with this requirement even before the company's proposed remedy has been approved and without any timetable as to when the proposed recall would be announced if the remedy were to be approved.

As currently implemented, this stop-sale requirement can often be unfair and counterproductive. First, many companies who report potential hazards are doing so in an abundance of caution, not because they believe their product is defective. Often, the company's internal investigation is still ongoing and may well find the product to be satisfactory. Stopping sale on a product line is potentially ruinous, particularly for smaller companies or companies who sell smaller numbers of higher-margin products. The CPSC is fond of saying that it wants companies in so-called "borderline" situations to report concerning products, even if the company doesn't feel the product is defective. Needless to say, companies who know that the mere filing of a report risks shutting down their assembly line will be understandably reluctant to report potential hazards to CPSC. If this is what happens, the "stop sale" requirement will reduce, rather than improve consumer safety.

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Of equal concern is the manner in which this stop-sale requirement is being imposed. Fast Track compliance officers often demand the company's agreement to stop all sales of the affected product(s) up front: before the company's proposed remedy has even been approved and before there is even a date set for corrective action. This can leave an affected company in limbo for weeks. Furthermore, if the CPSC is not inclined to approve the company's proposed remedy, or if CPSC and the company cannot agree on the process for announcing corrective action, the company has every right to withdraw from the Fast Track process and perhaps not undertake any corrective action at all. Given these possibilities, sophisticated companies have few incentives to agree to a stop-sale on their products without knowing what they will be getting in return. This, in turn, reduces the incentives to participate in the Fast Track program and once again shows the potential to reduce consumer safety.

The "stop-sale" requirement is the latest in a serious of CPSC actions that suggests the agency does not understand that the "voluntary" nature of most corrective actions is what makes them work most effectively. In November of 2013, the agency proposed to grant itself a wide range of powers to make voluntary recalls more unpleasant for manufacturers. Although that proposal appears to have run aground, the Fast Track program's new and inflexible "stop sale" demand appears to be cut from the same cloth.

The CPSC claims that it "is committed to accommodating all participants seeking to participate in good faith in the Fast-Track Program." Demonstrating some flexibility with its new "stop sale" requirement would be an excellent way to put that principle into action.

In the meantime, companies who face a hazard-reporting obligation should consider engaging counsel who have meaningful experience responding to and negotiating stop-sale demands made by the CPSC. Companies have a variety of options to respond to such demands, including, but not limited to, withdrawing from the Fast Track process.

To see CPSC's response to this article, please click here.

National Law Review, Volume V, Number 179