

Client Alert

June 18, 2014

CPSC Emphasizes Internet Presence with New Monthly Progress Reporting Template

By Erin M. Bosman, Ellen Nudelman Adler and Julie Y. Park

NEW MONTHLY PROGRESS REPORT

In May 2014, the Consumer Product Safety Commission (CPSC) rolled out a new monthly progress report for companies executing a product recall. The form is available [here](#). The new template reflects CPSC's push on recalling companies to take advantage of current technology and social media to conduct more exhaustive notification campaigns.

The new template contains three sections: (I) Products Corrected by the Firm; (II) Incident Update; and (III) Notifications Made by Firm and Consumer Response. The first two sections are largely the same as the old template.

The most significant changes involve Section III: "Notifications Made by Firm and Consumer Response." Whereas the old monthly progress report requested information on telephone, mail, newspaper, product catalog, and several other traditional types of direct and indirect notification methods, the new progress form only asks for statistics on direct notifications and customer contacts made by phone, email, or regular mail.

The remainder of Section III is new and focuses on Internet awareness, asking for information on how many website hits the company had for the recall period, whether the recalled product was sold on online auction sites, and the number of recall-related social media postings, shares, likes, re-tweets, and Twitter followers (see Figure 1).

Figure 1

Is the recall currently posted on your homepage? _____, If no, explain: _____			
How many website hits did your Firm have this reporting period for this recall? # _____			
Did you find the recalled product on any online auction sites? (circle) Y N - Described action taken: _____			
How many times this reporting period did your Firm post the recall notice on the following?			
Facebook:	# _____	# of shares: _____	# of Likes: _____
Twitter:	# _____	# of Re-Tweets: _____	# of Twitter Followers: _____
Other:	# _____	Explain: _____	
Ad Placements:	# _____	Explain: _____	

Client Alert

CPSC SHIFTS FOCUS FROM TRADITIONAL TO SOCIAL MEDIA

The new form is consistent with the CPSC's heightened focus on social media, which is also reflected in the CPSC's "Social Media Guide for Recalling Companies" (available [here](#)). The social media guide encourages companies to post on Facebook, tweet about the recall, and conduct other social media notifications through sites such as Pinterest, Google+, and Instagram. The CPSC informs companies that tweets can be up to 140 characters, but notes that its own "recall tweets are 97 characters so that we can include a link to a document and a photo of the product." The CPSC makes substantial efforts to use the very forums it encourages recalling companies to use, and posts recall information on Twitter, Flickr, and Google+ (although the CPSC has yet to set up a Facebook presence).

While the CPSC's goal to increase consumer recall awareness through social media is laudable, the new form raises numerous questions regarding what the CPSC will require companies to do in the future. Will posters in retail locations no longer be sufficient for notice? What social media obligations will small businesses with no online presence have? As companies and their advocates negotiate corrective action plans (CAPs) with the CPSC, they will need to negotiate these notification methods based on the severity of the potential hazard, how widespread the issue is, and the company's social media presence and capabilities.

NEW TEMPLATE SUGGESTS OBLIGATION TO POLICE ONLINE AUCTION SITES FOR ILLEGAL SALES OF RECALLED PRODUCTS

One particularly noteworthy item on the new monthly progress reporting template is the question "Did you find the recalled products on any online auction sites? (circle) Y N – Described [sic] action taken:" This question suggests an obligation—where there previously was none—for recalling companies to monitor online auction sites for the sale of recalled products. While it is widely known that selling a recalled product is illegal, companies have traditionally taken the position that policing online auction websites for recalled products is the CPSC's obligation.

The implication of this new online auction question is unclear. Will monitoring online auction sites be part of new CAPs? In the last few weeks there have been reports of recalling companies receiving CAPs that require monitoring online auction sites. It remains unknown whether this will be a standard component of CAPs going forward or whether companies can negotiate around this new onerous task. Such a requirement opens up a host of questions for a recalling company. How often does a company need to check online auction sites? Which online auction sites need to be checked? What do companies do that don't have the manpower to add this requirement to their ongoing recall responsibilities? And even if a company finds one of its recalled products, what authority does it have to "take action" against illegal sales on online auction sites? These questions have yet to be answered. Until the CPSC provides further direction, companies must try to negotiate with their compliance officer prior to issuance of the CAP so that the compliance officer can clarify these questions and tailor each CAP to the specific recalled product and the recalling company's capabilities.

IMPLICATIONS OF NEW REPORTING FORM

We anticipate that the CPSC's shift in focus from traditional to social media will affect Fast Track and regular recalls alike. As the CPSC continues to move more towards online and social media notification outlets, we expect the CPSC will continue to require increased notification methods and tracking of such notifications for all

Client Alert

recalling companies. Even though these will not be legally mandatory requirements in the absence of formal rulemaking under the Administrative Procedures Act, companies that choose not to comply will face numerous risks. They may lose Fast Track status, delay a regular recall because the CPSC will not approve their CAP, need to challenge these new requirements through litigation, and/or risk their CPSC compliance officer concluding that they are not cooperating with the recall (which could also impact any potential penalties investigation).

It is unclear what obligation recalling companies have to use the new reporting form for recalls that were instituted prior to May 2014. The CPSC is instructing some companies to use the new reporting form even though their recalls have been underway for many months. Other companies are still being allowed to use the old reporting form. This inconsistent rollout makes it difficult to discern whether a company has to respond to the new social media questions, particularly if those questions were not part of the agreed-upon CAP. If the CPSC asks a company to start using the new reporting form after a recall is underway and the CAP has already been agreed to, it would be prudent to raise any concerns with the CPSC. This will allow the recalling company to discuss any limitations the company may have that would hinder its ability to track the new Internet and social media items or any questions regarding its obligations to monitor online auction sites.

Going forward, careful review and negotiation of the CAP requirements will be required to ensure that each CAP is tailored to the specific recalled product and that recalling companies have the capability to follow through and comply with what they have agreed to provide to the CPSC.

Contact:

Erin Bosman

(858) 720-5178

ebosman@mofo.com

Morrison & Foerster's Product Liability Group defends and provides counsel to product manufacturers and suppliers of all types of products. We serve as trial and national coordinating counsel in product liability and toxic tort cases, including class actions, multiparty serial tort litigation, mass tort litigation, and multidistrict litigation proceedings. We bring to every case a wealth of experience, a keen understanding of the multifaceted issues confronted by manufacturers, and the skills and knowledge to communicate scientific and medical defenses to juries. To learn more about our product liability practice, [click here](#).

Client Alert

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer's* A-List for 10 straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.