Recommendation 84-2

Procedures for Product Recalls

(Adopted June 28, 1984)

Each year manufacturers recall millions of consumer products—ranging from toys and household appliances to drugs and autos—under an array of Federal health and safety statutes. Most recalls are undertaken voluntarily, either on the manufacturer's own initiative or at the urging of a Federal agency with recall authority. The recall remedy, while a valuable enforcement tool, is also one that is difficult to implement. A recall must be undertaken promptly if it is to serve its purpose of preventing injury. Further, to be effective, it must be implemented in a way that encourages public responsiveness.

For purposes of this recommendation, the term "recall" encompasses a variety of post-sale remedial actions by manufacturers and sellers of products, including: (1) Notifying consumers of problems or potential problems with products; (2) offering to repair products; and (3) offering to refund the cost or to replace products. The recommendation is based, in part, on a study of the recall programs of three Federal agencies that account for the great majority of recalls—the National Highway Traffic Safety Administration (NHTSA), the Food and Drug Administration (FDA) and the Consumer Product Safety Commission (CPSC).[1] Each of the three agencies studied has the authority to order at least one of the post-sale remedial actions noted above. Each is actively involved in recalls of consumer products that pose health or safety risks to the general public, instances where the need for effective use of the recall remedy is the greatest and its implementation is the most difficult. However, these recall programs differ with respect to standards for ordering recalls, the scope of the remedy, and administrative procedures. Some of the differences are statutorily based; others grow out of varied methods of implementing the programs.

Although all three agencies make extensive use of recalls to implement their statutes, recalls have certain inherent limitations as enforcement tools. Consumers can, and sometimes do, render them ineffective by failing to respond. Further, recalls generally work well only if they are undertaken promptly and after a minimum of agency prodding. Recalcitrant firms can often thwart the effectiveness of the remedy merely by invoking available administrative procedures. There are a number of reasons for firms to be recalcitrant when faced with a possible recall.

[1] Other agencies that engage in product recalls include EPA, FAA, HUD and USDA.

Companies may not enjoy much protection against product liability claims by recalling defective products—indeed, recalls can stimulate additional law suits. Recalls often bring adverse publicity, and they can be very expensive, requiring refunds or replacements of products that have already been produced and marketed. Because recalls often work better than other remedies, however, they are a major enforcement tool of the three agencies studied. There are a number of reasons for their popularity. From the agencies' standpoint:

—Recalls do promote safety. Although response rates are lower than agencies would like, consumers in significant numbers do return or discard recalled products or use them more safely.

—Recalls establish precedents for what constitutes an unacceptably hazardous product.

—Recalls operate more quickly and efficiently than most standard setting. In recall cases, government and industry often share a sense of urgency that a hazardous product should be removed from the marketplace. This has led agencies to adopt informal, flexible settlement procedures which have made it easier for companies to agree to undertake recalls.

Industry also may prefer recalls to standards as an enforcement tool because recalls generally affect only the makers of unsafe products rather than all product manufacturers. Recalls, unlike many standards, do not impose across-the-board certification requirements and may impose fewer recordkeeping requirements.

Agencies must reconcile several interests in implementing their recall programs. They must be sensitive to the potential for consumers to disregard recalls if the remedy is overused. They must stress voluntary agreements to achieve prompt—and therefore effective—recalls, yet be willing to use their enforcement powers if voluntary efforts stall. They must be flexible in negotiating the terms of recalls to encourage voluntarism, yet assure that the notice and remedy are adequate to inform and protect product owners.

In general, agencies should work together to develop a more uniform approach to recalls. Despite the differences in the agencies' programs, they share common characteristics and goals, and they must all deal with the general public. Agencies could benefit from sharing with each other what they have learned about recalls, and the public could benefit from more consistency in the recall programs.

Agencies should also consider publicly classifying their recalls according to risk to help the public assess the hazards of recalled products. While this approach may present some problems

in negotiating recalls, it recognizes the important role that the consumer plays as a partner with government and business in the recall process and the need to provide that partner with adequate information.

Moreover, additional enforcement tools are warranted for some agencies. As a practical matter, agencies cannot bring many enforcement actions, but the availability of these additional powers, and their occasional use when necessary, can assist agencies in negotiating voluntary recalls and in carrying out the overall aims of the recall programs. Even a relatively small number of enforcement actions ultimately serves the broader aim of encouraging voluntary compliance by others, and should therefore be streamlined where possible.

Three procedural reforms are recommended for the consideration of agencies with recall programs. First, such agencies should consider seeking broader statutory authority to require manufacturers to report safety defects. A provision similar to Section 15(b) of the Consumer Product Safety Act, which requires reporting of defects that "could create" a potential hazard would give agencies earlier warning of defects and reduce their information gathering burden without changing the standard for recalls.

The second recommended change would give agencies additional authority in cases involving serious or imminent safety problems. In general, if a case must be taken through both administrative and judicial proceedings, the process may be so lengthy that the recall could be ineffective, since most of the injuries will have occurred and the response rate will be low. Therefore, agencies should consider asking for authority in especially hazardous cases to bypass the administrative hearing and to seek court-ordered recalls.

The third general reform is based on the premise that the availability of a variety of enforcement tools, such as court-ordered seizures and civil penalties, helps to induce voluntary cooperation with an agency's recall program. Seizure is not always an effective tool, however, unless the agency is able to detain products administratively at the point of distribution prior to filing a seizure action. CPSC and FDA, which have authority to seek court-ordered seizures, should consider the desirability of detention authority where it would aid their use of this enforcement tool. FDA should also consider seeking civil penalty authority for statutory violations where it now only may seek criminal penalties.

Paragraph B.4 of the recommendation is addressed specifically to the CPSC. The CPSC enforces four significant safety statutes: the Consumer Product Safety Act (CPSA), the Federal Hazardous Substances Act (FHSA), the Flammable Fabrics Act (FFA), and the Poison Prevention

Packaging Act (PPPA). Both the CPSA and the FHSA give the agency the authority to order recalls, and this has become a favored enforcement tool of the agency. Under these two Acts, if a voluntary recall is not achieved, the agency must conduct a formal administrative hearing prior to ordering a recall. Under the CPSA, the agency may go directly to court to seek a recall if the product involved is "imminently hazardous." Under the FHSA, the agency may proceed administratively against imminently hazardous products. Neither Act contains a judicial review provision, with the result that "non-statutory" review of agency recall orders occurs in the United States District Courts. The absence of a judicial review provision for recall orders under the CPSA and FHSA should be corrected. Congress should provide for judicial review in the United States Courts of Appeals under 5 U.S.C. § 706.[2] This would eliminate the existing, lengthy, two-tiered judicial review procedure. The FFA and PPPA omit recall provisions entirely, causing uncertainty as to the Commission's ability to use recalls against unsafe products governed by either of these Acts. It would promote recall uniformity and reduce delay if the Commission could address the risks posed by all products under its jurisdiction under the procedures of Section 15 of the CPSA.

Recommendation

A. Coordination of Recall Activities

1. *Interagency recall liaison group*. A group consisting of representatives from all agencies with recall programs should be established to inform each other about their programs and to share research in areas of common interest, such as how to improve consumer response rates and how to use new technology to improve recall notification.

2. *Recall notices*. Recall notices should clearly describe the nature of the defect and the nature and extent of the risk of harm that prompts the recall. Individual agencies should consider whether their mission would be advanced by classifying recalls according to risk. The interagency liaison group could explore the possibility of coordinating the classification systems so that the agencies use similar terminology to designate levels of risk.

3. *Improved handling of consumer inquiries and complaints*. Consumers do not always know which agency takes complaints or has information about recalls. Agencies with recall programs

[2] See ACUS Recommendation 75-3, The Choice of Forum for Judicial Review of Administrative Action, 1 CFR 305.75-3.

should establish a central interagency switchboard to take all calls and refer them to the appropriate agency. As an alternative, agency personnel designated to receive inquiries or complaints relating to product defects should be made aware of the recall programs of other agencies, so that inquiries or complaints will be referred to the proper office.

4. *Publicizing recalls*. Each agency should seek to develop a method of publishing periodically an up-to-date list of active recalls within the agency's jurisdiction.

B. Procedural Improvements

1. Agencies with recall programs should consider whether to ask Congress for authority to require manufacturers to give such agencies information in their possession about potential safety-related defects in their products which could create a substantial risk of injury to the public. Such authority, if granted, should be accompanied by appropriate incentives for compliance.

2. Agencies with recall programs for defective products should consider whether to ask Congress for authority to bypass administrative hearings and to seek court-ordered recalls in cases of serious safety problems as defined by the relevant statute.

3. Agencies authorized to seek seizures should consider whether to ask Congress to augment their seizure authority by giving them the power to detain defective products administratively prior to seizure.

4. Congress should streamline the Consumer Product Safety Commission's recall authority by amending the Consumer Product Safety Act (a) to give the Commission specific authority under that Act to seek recalls of all products within its jurisdiction including those now subject to the Federal Hazardous Substances Act, the Flammable Fabrics Act and the Poison Prevention Packaging Act; and (b) to provide for judicial review of agency ordered recalls in the United States Court of Appeals under 5 U.S.C. § 706.

5. The Food and Drug Administration should consider whether to ask Congress for civil money penalty authority as an option where only criminal penalties are now available.[3]

6. The foregoing recommendations are not intended to encourage agencies to use recalls as a substitute for rulemaking, but merely to streamline the process of obtaining recalls where appropriate.

[3] See ACUS Recommendation 72-6, Civil Money Penalties as a Sanction, 1 CFR 305.72-6.

Citations:

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