

Product recall: how well have you prepared?

PRODUCT RECALLS OFTEN TAKE businesses by surprise. A suspected safety risk in a product will need immediate attention and your business will be at risk if it does not have a comprehensive, effective and up-to-date recall system in place.

Once a potential recall arises, in-house counsel will quickly become tied up with risk assessment investigations, recall logistics and notifications to the relevant authorities. Given the speed at which negative publicity can spread via social media, investing the time to prepare and test your recall policies and procedures in advance will ensure that operational, reputational and financial risks are minimised.

Alison Newstead, partner with Shook Hardy & Bacon, outlines the areas that in-house counsel need to consider and review regularly.

PRODUCT RECALL POLICY AND RECALL PLAN

In reviewing the company's policy and separate plan for product recalls:

- Look at the system that your business has in place.
- Does it clearly state how to differentiate between quality and safety issues?
- Is there clear guidance as to what steps should be taken in each instance?
- Are all those in business familiar with how the system works?

Assuming that a recall plan is in place, does it provide enough detail about how a recall should be organised, and who has responsibility? The plan should include relevant contact details and checklists. It is a good idea to 'test-drive' the plan with a dry run to see how effective it is in practice and identify any areas of weakness.

The recall plan and policy are important documents that should be reviewed and updated on a regular basis.

INCIDENT MANAGEMENT TEAM

If your business does not have an incident management team in place, now is the time to draw together suitable individuals. A wide range of individuals from across the business need to be involved, including the board. Representatives from technical and engineering teams are crucial, as are those in marketing and PR, legal, regulatory, finance and sales. All will have crucial information and experience that will be needed at some point in the recall process.

How individuals manage their roles is also important. Sometimes those 'in charge' on a daily basis are not the best placed or even perform best in a stressful recall situation. If this is a concern, it should be addressed now rather than during the recall process when there will not be time for poor performance.

Adequate delegation contingencies should be made for absence due to illness and holidays. It is important that each nominated decision maker has an identified deputy who will stand in during periods of absence and who will have access to all necessary information and the requisite authority to make decisions in their field. The whole recall process can grind to a halt very quickly if key decision makers are away from the office and those left in charge do not have the necessary tools to make decisions quickly and effectively.

In smaller companies, a recall can potentially overwhelm the number of available 'hands on deck'. If this is the case, you should give consideration as to how, and at what cost, temporary staff may be obtained. Clarification should also be sought as to who would need to authorise the hiring of the extra staff.



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TRAINING

Different levels of training may be required for senior management, the incident team, and the wider business and suppliers.

All members of the incident management team, and their deputies, should be familiar with recall requirements, processes and procedures within the business (and, indeed, the particular industry) and be familiar with the scope of their role during a recall situation.

Others within the business and suppliers are likely to benefit from at least basic information as to how the recall process works and communication protocols.

CONTRACTUAL AGREEMENTS

Do your contractual terms and conditions cover a recall situation adequately? It is good practice to ensure that all members of the supply chain are aware of their obligations and that this is contractually documented.

The main question an in-house lawyer needs to ask is whether the business has contractual agreements in place that specifically set out how companies up and down the supply chain will assist in a recall situation and, importantly, who will be responsible for any costs associated with, or arising out of, the recall. When a recall happens, it is a fast-moving environment and the co-operation of all parties is essential. Being able to refer a supplier to a contractual provision will help ensure that matters run smoothly.

Having clear contractual provisions as to where cost liabilities lie will also avoid future disputes and potentially costly litigation. It should be remembered that recalls are often extremely costly processes. It is important that the potential financial

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implications are identified and addressed at an early stage. The availability of insurance, to both your company and those in the supply chain, may be something that you will wish to explore.

INTERNAL SUPPORT SYSTEMS

When a recall situation first occurs, information needs to be at the fingertips of the key decision makers. Of prime importance is the ability to identify and trace numbers of potentially affected products. Consideration also needs to be given as to whether remote access to stock lists and similar information is possible. IT systems need to be easily searchable, stock lists need to be current and those who know how to search the systems need to be identified and briefed as to what would be expected of them in a recall situation.

Remote access to information should also be explored. Sometimes people in different locations and jurisdictions will need instant access to key information. Exploring the IT issues involved in making such information available now will save time (and stress) in the long run.

TRACEABILITY AND DOCUMENTATION

It is important to evaluate the ease at which potentially affected models and batches of products could be identified and retrieved. Questions that need to be asked are:

- Are traceability systems adequate?
- If necessary, could you easily identify (i) what stock was affected; and (ii) where it is?

Some industries have very tight controls and requirements for traceability. It is important to be familiar with these and how the system within your business works. If no such system is in place, now is the time to introduce one.

COMMUNICATIONS: INTERNAL AND EXTERNAL

Bad publicity can quickly spiral out of control. You therefore require very clear protocols about how information will be disseminated and by whom. Contact lists must be kept up-to-date with accurate contact numbers. Working with a PR agency that is experienced in crisis management can help to minimise the risk damage to your brand.

CONCLUSION

Once a recall is under way, speed is of the essence. In such a dynamic environment with many players, the potential for chaos is huge, but risks can be minimised with a robust and effective recall plan, and forward planning.

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