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Selling Recalled Products: CPSC Fines Home Depot

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Last week, Home Depot became the latest mass retailer to pay a civil penalty for selling products previously recalled by the U.S. Consumer Product Safety Commission (CPSC).

By our count, this is the third such penalty to be imposed, at least in recent years. In 2014, Meijer was penalized $2 million for selling 1,700 units of 12 different recalled products. In 2016, Best Buy agreed to pay $3.8 million for selling 600 units of 16 different products. Now, Home Depot has agreed to pay $5.7 million, having distributed just over 2,800 units cutting across 33 different recalls.

The size of these penalties should be sufficient to put other retailers on notice that the presence of a recalled product cannot be treated as just another inventory issue.

More Compliance Challenges for Brick-and-Mortar Retailers

The Consumer Product Safety Act prohibits any person from selling products subject to "voluntary corrective action," typically known as a recall. Congress amended the act to officially bar such sales in 2008, but CPSC has only recently begun to negotiate sizeable penalties based on retailers' failure to comply with the law.

None of the recent fines is particularly large, and many of them seem to stem from one-off problems with particular stores or products. In this day and age, large retailers can generally shut down sales of virtually any product by blocking entire product codes. This is probably easier to do for online retailers, who have very limited means of access for consumers.

Brick-and-mortar retailers, on the other hand, have a tougher job: previously sold products are constantly being returned to stores, often with no indication there was anything wrong with it. Physical stores specialize in customer service, which understandably leads to a willingness to override an otherwise blocked sale holding up a busy checkout line, particularly when the cashier has no idea why the product is not being allowed to check through.

Indeed, it seems that these challenges were behind many of the cited non-compliances. Best Buy was accused of overriding codes, and Home Depot allegedly sold recalled products through its return and special services desks. Home Depot also allegedly distributed some of the recalled products as donations; in what can only be described as a double-whammy, the CPSC treated these donated products the same as those off of which Home Depot had actually profited.

How to Spot These Sales Transactions Early

All three retailers agreed to adopt improved procedures in the future, suggesting that more rigorous reverse logistics should be able to prevent such transactions from happening. Beyond infrastructure, however, these penalties also suggest the need for cashiers to receive better information as to ***why*** a product cannot be sold. A customer who simply receives an error message is likely to pressure a hassled manager to override an error, and may often be successful. On the other hand, a cashier whose monitor alerts her that the product in question is under a recall is likely to get a much more understanding response. Moreover, the ability to state with confidence that the sale is "out of our hands" provides a much sounder basis for a manager to put an end to the potential transaction, and perhaps offer the customer some other compensation for their trouble.

It may not be possible to prevent all such sales, but the CPSC clearly expects retailers to have a robust discovery system in place. Retailers unsure as to whether their existing protocols pass muster may wish to consult experienced CPSC counsel.