



U.S. CONSUMER PRODUCT SAFETY COMMISSION
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STATEMENT OF COMMISSIONER NANCY NORD
ON THE ISSUANCE OF THE INTERIM FINAL RULE INTERPRETING FACTORS TO BE
CONSIDERED WHEN SEEKING CIVIL PENALTIES
August 18, 2009

I am voting not to issue the proposed interim final rule because I believe that this version falls short of its intended purpose. We have missed the opportunity to provide useful guidance on the Commission's interpretation of civil penalty factors.

Even though the rule is being issued as an interim final rule, the Commission is requesting comments on it and may revise it after consideration of those comments. I emphasize this point up front because the federal register notice calls for a 30 day comment period, but the rest of the text emphasizes the final nature of the rule. There is a disconnect between the final nature of the rule and the fact that comments are being requested on serious issues. Therefore, if the rule is issued, it is important that the public clearly understand that comments are not only welcome but requested, and that the agency has an obligation to review, analyze and consider them as quickly as possible. It is also important to note that to affect change strong public feedback is needed.

The interim rule states: "the CPSIA requirement for the Commission to interpret the civil penalty factors gives transparency ... and may provide incentives for greater compliance." I find neither transparency nor compliance incentives in this rule.

The rule makes very clear that virtually everything associated with civil penalties is solely within the discretion and judgment of the agency and that the agency is reserving total flexibility. Civil penalties are increasing seven-fold and I believe that the CPSC has an obligation to the public to provide more concrete guidance as to how these penalties will be imposed. Instead the rule describes things that may or may not be considered without providing much direction as to what weight will be given to certain kinds of behavior. Transparency is not furthered by this rule and the public deserves a better effort.

As for incentives for better compliance, this interim final rule misses the mark on a few key points. For example:

- *Compliance programs:* I believe the rule's emphasis on mere data collection in a compliance program is misleading, to the detriment of safety. The rule seems to equate a compliance program with information collection activities and/or premarket testing programs (which the CPSIA now requires for many of the products we regulate). We have missed a golden opportunity to describe elements of a good quality assurance and safety compliance program and to encourage companies to use such programs.
- *Compliance with voluntary standards:* I strongly believe our penalty assessment process should include consideration of product compliance with voluntary standards for particular risks. If there is a consensus standard that addresses a risk and the product does not comply with that standard, then that is very relevant to a penalty determination. The importance of voluntary consensus standards is recognized in the Consumer Product Safety Act (CPSA) and in the Section 15 reporting regulations; I believe they should be recognized here as well. Such compliance is so fundamental to advancing safety that I believe it should be specifically called out in the rule.

To be fair, here is one example where the rule got it right:

- *Compliance History:* The rule states that we can consider the violator's past history of both compliance and noncompliance. It would be unfortunate if this were changed to consider only noncompliance.

Several penalty issues are not adequately addressed in the rule. For example:

Process for penalty assessment: The Commission considered and rejected following a formulaic or matrix approach to penalty assessments. While I agree that a matrix approach is not appropriate, I believe that we could and should give better guidance as to how we will determine the size of the penalty. Since our utmost goal is consumer safety, the size of the penalties should relate to the hazard presented by the violation. A higher penalty is appropriate when death or grievous injury has occurred or is likely; a lower penalty is appropriate when there is little likelihood of injury or where there is a technical or minor violation (and given how many things are now illegal, this is a real possibility). Nowhere in the rule do we weight the elements that are considered in establishing penalties.

Definition of product defect: The CPSA and implementing regulations define “product defect” and this definition has been used and understood for many years. The Act and implementing regulations also make the distinction between noncompliance with a rule or regulation, and a product defect. This interim final rule expands the definition of defect to include any activity associated with a prohibited act, thereby eliminating any distinction between defect and noncompliance. While I fully agree that noncompliance needs to be considered, it is not properly part of our analysis of the nature of the product defect. By blending the two concepts here, we add a lack of precision to this rule and risk adding confusion to the other rules which also use the term “product defect.”

Hidden or emerging hazards: The rule states that, in our product defect analysis, we will consider the complexity of a particular product hazard in assessing penalties only when the business has reported in a timely manner. In a significant departure from established practice, this interpretation does away with the concept of a hidden or emerging hazard that was not immediately apparent (since it would not be a hidden or emerging hazard if the company reported). I hope we will receive comments addressing the significance of this change.

Number of defective products distributed: I believe that the statute allows consideration of the number of products actually in consumer’s hands as a part of our analysis because to do otherwise would ignore our basic mission to protect consumers. For example, with respect to a product with a long life span and a failure at the end of its useful life, the number of products in consumer’s hands is the only relevant consideration and this notion would be contemplated if the term “product defect” had its normal meaning rather than the expansive definition discussed above. As another example, with respect to a product that was discovered to contain a defect (or noncompliance) before the product was distributed to retailers and, hence, to consumers, it is not clear how the interim final rule’s treatment of this factor would have any relevance to what the penalty amount should be. The rule, on one hand, does not allow for consideration of the number of products actually in consumer’s hands, yet the preamble, on the other hand, does not preclude its consideration. The rule needs clarity here but delivers ambiguity instead.

Small business mitigation factors: The rule states that to mitigate a penalty in order to avoid “undue” adverse economic consequences on small business violators, we are to consider the gravity of the offense—i.e., the nature, circumstances, extent and gravity of the violation(s). This is incorrect. The gravity of the offense was already considered in determining the amount of the fine. At this point, we should be looking at the economic impact that the fine will have on small businesses and, if necessary, how to mitigate it. The dictionary definition of “undue” is “greater than is reasonable; excessive.” To comply with the statute we should look at the gravity of the impact of the fine, not the gravity of the offense.

Effective date: The rule does not make clear that the new penalty amounts apply to violations that occur after August 14, 2009. While the law is clear on this point, the rule is not.

Instead of transparency, we have put out an opaque and oblique interpretation and left the public to read between the lines. I believe the Commission should take the additional time necessary to provide an interpretative rule that will actually give clear and useful guidance to the public.