requirement for this prohibited area, it considers reducing prohibited airspace area appropriate at this time. This action restores previously prohibited airspace to public use within the National Airspace System.

DATES: Effective date 0901 UTC, June 3, 2010.

FOR FURTHER INFORMATION CONTACT: Colby Abbott, Airspace and Rules Group, Office of System Operations Airspace and AIM, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

History

On October 5, 2009, the Department of the Treasury, USSS, notified the FAA that while the security requirements for establishing P–49 Crawford, TX (66 FR 16391) remain valid, consideration of a modification of the existing prohibited area was appropriate. After a six-month security review of P–49, the USSS determined the dimensions (boundary and altitude) of the prohibited area could be reduced. This action responds to that notification.

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) part 73 by revising the legal description for P–49 Crawford, TX. After conducting a security review of P–49, the USSS notified the FAA to reduce the boundary and altitude dimensions of the prohibited area. This action reduces the boundary from a 3 NM radius to a 2 NM radius of lat. 31°34′45″ N., 97°32′00″ W., and lowers the designated altitude from "Surface to but not including 5,000 feet MSL" to "Surface to but not including 2,000 feet MSL."

Because this action restores previously prohibited airspace to public use, I find that notice and public procedures under 5 U.S.C. 553(b) are unnecessary as it would only delay the return of the airspace to public use.

Section 73.89 of Title 14 CFR part 73 was republished in FAA Order 7400.8S, effective February 16, 2010.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation: (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in subtitle VII, part A, subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends prohibited airspace in Crawford, Texas.

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with paragraph 311c, FAA Order 1050.1E, Environmental Impacts: Policies and Procedures. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant preparation of an environmental assessment.

List of Subjects in 14 CFR Part 73

Airspace, Prohibited areas, Restricted areas.

Adoption of Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 73 as follows:

PART 73—SPECIAL USE AIRSPACE

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 73.89 [Amended]

■ 2. § 73.89 is amended as follows:

* * * * *

P–49 Crawford, TX [Revised]

Boundaries. That airspace within a 2 NM radius of lat. 31°34′45″ N., long. 97°32′00″ W.

Designated altitudes. Surface to 2,000 feet MSL.

Time of designation. Continuous.

Using agency. United States Secret Service, Washington, DC.

Issued in Washington, DC, on March 25, 2010.

Kelly Neubecker,

Acting Manager, Airspace and Rules Group.

[FR Doc. 2010–7242 Filed 3–30–10; 8:45 am]

BILLING CODE 4910–13–P

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1119

Civil Penalty Factors

AGENCY: Consumer Product Safety Commission.

ACTION: Final interpretative rule.

SUMMARY: The Consumer Product Safety Improvement Act of 2008 ("CPSIA") requires the Consumer Product Safety Commission ("Commission") to issue a final rule providing its interpretation of the civil penalty factors found in the Consumer Product Safety Act ("CPSA"), the Federal Hazardous Substances Act ("FHSA"), and the Flammable Fabrics Act ("FFA"), as amended by section 217 of the CPSIA. These statutory provisions require the Commission to consider certain factors in determining the amount of any civil penalty to seek. The Commission published an interim final rule on September 1, 2009, providing its interpretation of the statutory factors and seeking public comment. The Commission is now issuing a final rule interpreting the statutory factors.

DATES: This rule is effective March 31, 2010.

FOR FURTHER INFORMATION CONTACT: Melissa V. Hampshire, Assistant General Counsel, Division of Enforcement and Information, Office of the General Counsel, Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, Maryland 20814, telephone: 301–504–7631, e-mail: *mhampshire@cpsc.gov.*

SUPPLEMENTARY INFORMATION:

A. Background

The CPSIA specified that the Commission, by August 14, 2009, issue a final regulation providing its interpretation of civil penalty factors in section 20(b) of the CPSA, section 5(c)(3) of the FHSA, and section 5(e)(2) of the FFA.[1] The Commission issued an

[1] The Commission voted 4–1 to approve the Final Rule as amended. Chairman Tenenbaum, Commissioner Nord, Commissioner Adler, and Moore voted to approve the final rule as amended.

Continued

interim final rule providing its interpretation on September 1, 2009, and sought public comment. As a result of the comments received and review of the interim final rule, certain information and terms are clarified in this final rule. This rule interprets the factors in section 20(b) of the CPSA, section 5(c)(3) of the FHSA and section 5(e)(2) of the FFA, and describes other factors the Commission may consider in determining the amount of a civil penalty to be sought for knowing violations of section 19 of the CPSA, section 4 of the FHSA, and section 5 of the FFA. The statutory factors the Commission is required to consider in determining the amount of a civil penalty to seek are the following: The nature, circumstances, extent and gravity of the violation, including the nature of the product defect or of the substance, the severity of the risk of injury, the occurrence or absence of injury, the number of defective products distributed or the amount of substance distributed, the appropriateness of the penalty in relation to the size of the business of the person charged, including how to mitigate undue adverse economic impacts on small businesses, and such other factors as appropriate.

The statutory factors the Commission is required to consider in determining the amount of a civil penalty to seek are the same factors identified in section 20(c) of the CPSA, section 5(c)(4) of the FHSA, and section 5(e)(3) of the FFA for determining whether a civil penalty may be compromised by the Commission. These statutory provisions instruct the Commission to consider the following factors in determining the amount of a compromised penalty, whether it should be remitted or mitigated by the Commission, and, in what amount: The nature, circumstances, extent and gravity of the violation, including the nature of the product defect,[2] the severity of the risk of injury, the occurrence or absence of injury, the number of defective products distributed,[3] the appropriateness of such penalty in relation to the size of the business of the person charged, including how to mitigate undue adverse economic impacts on small businesses, and such other factors as appropriate. The Commission will apply its interpretation to these statutory terms in determining whether and in what amounts any penalties may be compromised.

As set forth in section 217(a)(4) of the CPSIA, new penalty amounts specified in section 217(a) of the CPSIA became effective on August 14, 2009 (one year after the date of enactment of the CPSIA). Under the amendments, the maximum penalty amounts increase from $8,000 to $100,000 for each knowing violation under the CPSA, FHSA, and FFA. Maximum penalty amounts for any related series of violations increase from $1,825,000 to $15,000,000.

B. Prior Proposal on Civil Penalty Factors

On July 12, 2006, the Commission published a proposed interpretative rule (71 FR 39248) that identified additional factors to be considered in assessing and compromising civil penalties under sections 20(b) and (c) of the CPSA. The comment period closed August 11, 2006. The Commission received four comments.

C. CPSIA Requirements

The enactment of the CPSIA superseded the proposed rule by requiring that the Commission provide its interpretation of the enumerated statutory factors under section 20(b) of the CPSA, section 5(c)(3) of the FHSA, and section 5(e)(2) of the FFA. The CPSIA also indicated that under the CPSA, FHSA, and FFA, the Commission should consider the nature, circumstances, extent, and gravity of the violation in determining the appropriate penalty amount. The statute provides examples of elements that should go into that consideration. The CPSIA modified the factor of appropriateness of the penalty in relation to the size of the business of the person charged by requiring that this factor include a consideration of how to mitigate undue adverse economic impacts on small businesses. This small business analysis element was added to the CPSA and FHSA but not added to the FFA factor. The Commission will consider the undue adverse economic impacts on small businesses as another appropriate factor under the FFA. The CPSIA also added to the CPSA, FHSA, and FFA a new catch-all statutory factor "other factors as appropriate." The effect of the CPSIA amendments was noted in the Fall 2008 Current Regulatory Plan and the Unified Agenda (RIN: 3041–AC40) by stating that the proposed July 2006 rule would be withdrawn. In the **Federal Register** of August 26, 2009 (74 FR 43084), the Commission withdrew the July 12, 2006, notice of proposed rulemaking (71 FR 39248).

On November 18, 2008, the Commission staff posted a notice on the Commission Web site inviting comment on information the Commission should address in considering the amended statutory factors under the CPSA, FHSA, and FFA. The Commission staff also invited comment on what other factors are appropriate to consider in penalty determinations including: (1) A previous record of compliance; (2) timeliness of response; (3) safety and compliance monitoring; (4) cooperation and good faith; (5) economic gain from noncompliance; (6) product failure rate; and (7) what information the Commission should consider in determining how to mitigate the adverse economic impact of a particular penalty on a small business. The Commission staff also invited comment on whether it should develop a formula or matrix for weighing any or all of the various factors and what criteria it should use in any weighting formula or matrix. The Commission received 16 comments in response to the 2008 Web site notice and considered the comments in issuing the interim final rule.

On September 1, 2009, the Commission published an interim final interpretative rule setting forth the Commission's interpretation of the statutory factors under the CPSA, FHSA, and FFA, for seeking and compromising civil penalties. The Commission sought comments on the interim final rule. The Commission received 10 comments in response to the September 1, 2009 notice. Some commenters responded on behalf of their trade or industry associations.

D. Statutory Discussion

1. What Are the Requirements for Imposition of Civil Penalties?

The determination of the amount of any civil penalty to seek and/or compromise should allow for maximum flexibility within an identified framework. The CPSIA requirement for the Commission to interpret the civil penalty factors gives transparency to the regulated community about the framework the Commission will use to guide its penalty calculations in the enforcement process and may provide incentives for greater compliance. The changes made by various CPSIA provisions to the CPSA, FHSA, and FFA, including those to the CPSA's prohibited acts and the addition of new prohibited acts, present the regulated community with many new compliance challenges and responsibilities.

Chairman Tenenbaum, Commissioner Moore and Adler issued a joint statement. Commissioners Nord and Northup each issued statements. All statements are available at *http://www.cpsc.gov/pr/statements.html.*

[2] This factor applies only to the CPSA. The FHSA factor is "the nature of the substance." The FFA has no comparable separate factor apart from the nature, circumstances, extent, and gravity of the violation.

[3] The FHSA factor is the "amount of the substance."

Any proposed civil penalty determination is based first on a violation of a prohibited act under the CPSA, FHSA, or FFA. Civil penalties may then be sought against any person who "knowingly violates" section 19 of the CPSA, section 4 of the FHSA, or a regulation or standard under section 4 of the FFA. The term "knowingly" is defined in section 20(d) of the CPSA, 15 U.S.C. 2069(d), section 5(c)(5) of the FHSA, 15 U.S.C. 1264(c)(5), and section 5(e)(1) of the FFA, 15 U.S.C. 1194(e)(1), to mean the having of actual knowledge or the presumed having of knowledge deemed to be possessed by a "reasonable man" who acts in the circumstances, including knowledge obtainable upon the exercise of due care to ascertain the truth of representations. Since its enactment in 1973, the CPSA always contained a civil penalty provision; however, until 1990, the FHSA and FFA did not contain comparable provisions for civil penalties. Under the FFA, the Commission had to seek civil penalties under the Federal Trade Commission Act, using the authorities under that act. The FHSA had no civil penalty provision. The Consumer Product Safety Improvement Act of 1990, Public Law 101–608, 104 Stat. 3110, November 16, 1990, amended section 5 of the FHSA and section 5 of the FFA giving the Commission authority to seek civil penalties for knowing violations of those acts. If a penalty settlement cannot be negotiated between the Commission and a person, the Commission may seek an action in Federal court to obtain a penalty. *See, Advance Machine Co.* v. *Consumer Product Safety Commission,* 666 F.2d 1166 (8th Cir. 1981); *Athlone Industries, Inc.* v. *Consumer Product Safety Commission,* 707 F.2d 1485 (DC Cir. 1983).

2. How Do the CPSIA Amendments to the CPSA's Prohibited Acts Affect Civil Penalties?

In the past, the majority of civil penalties for prohibited acts were imposed either for a knowing failure to furnish information required by section 15(b) of the CPSA, or for regulatory violations under the CPSA, FHSA, or FFA. The interim final rule described how the CPSIA amended these three statutes to strengthen the Commission's enforcement ability and allow for more uniform enforcement under the CPSA.

The new amendments expand the acts prohibited under the CPSA and give the Commission the ability to enforce violations of the FHSA, FFA, and other acts enforced by the Commission as prohibited acts under the CPSA. Thus, the amended CPSA now prohibits the sale, offer for sale, distribution in commerce, or importation into the United States of any consumer product, or other product or substance that is regulated under the CPSA or any other act enforced by the Commission, that is not in conformity with an applicable consumer product safety rule under the CPSA, or any similar rule, regulation, standard, or ban under any other act enforced by the Commission. 15 U.S.C. 2068(a)(1).

The CPSA, as amended, adds a new prohibited act for the sale, manufacture, distribution, or importation of products subject to a voluntary corrective action taken by the manufacturer, in consultation with the Commission, and publicly announced by the Commission, or if the seller, distributor, or manufacturer knew or should have known of such voluntary corrective action. 15 U.S.C. 2068(a)(2)(B).

The CPSA, as amended, broadens the prohibited act for the sale, offer for sale, manufacture for sale, or distribution or importation of any consumer product or other product or substance subject to a section 15 mandatory recall order to include products subject to a section 12 order. A section 15 order is imposed in an adjudicative proceeding to declare a product a "substantial product hazard" under section 15 of the CPSA, 15 U.S.C. 2064. A section 12 order, which may include a mandatory order requiring notification to purchasers, and repair, replacement, or refund, is one imposed by a District Court after an "imminent hazard" proceeding under section 12 of the CPSA, 15 U.S.C. 2061.

The amended prohibited acts section of the CPSA is also broadened to include the sale, offer for sale, manufacture for sale, distribution in commerce, or importation into the United States of a banned hazardous substance under the FHSA as an act prohibited under the CPSA. 15 U.S.C. 2068(a)(2)(D).

The prohibited act in section 19(a)(6) of the CPSA relating to certification under section 14 of the CPSA is newly expanded to make the failure to furnish a certificate required by any other act enforced by the Commission a prohibited act under the CPSA. This prohibited act now also references a new tracking label requirement of CPSA section 14(a)(5) by specifying that the failure to comply with any requirement of section 14 includes the failure to comply with the requirement for tracking labels or any rule or regulation promulgated under section 14.

The CPSA statutory language has also been expanded to include a new prohibited act for the sale, offer for sale, distribution in commerce, or importation into the United States of any consumer product containing an unauthorized third-party certification mark. 15 U.S.C. 2068(a)(12).

Any misrepresentation to Commission officers or employees about the scope of consumer products subject to recall or material misrepresentation in the course of an investigation under any act enforced by the Commission also is a new prohibited act under the CPSA. 15 U.S.C. 2068(a)(13).

In addition, the CPSA now contains a new prohibited act for the exercise or attempt to exercise undue influence on a third-party conformity assessment body that tests products for compliance under laws administered by the Commission. *15 U.S.C. 2068(a)(14).*

The CPSIA adds to the Commission's export prohibition authority section 19(a)(15) of the CPSA, making it illegal to export from the United States for purposes of sale any consumer product or other product or substance (other than the export of a product or substance permitted by the Secretary of the Treasury under section 17(e) of the CPSA) that is subject to court- or Commission-ordered recall or that is banned under the FHSA or subject to a voluntary recall announced by the Commission. 15 U.S.C. 2068(a)(15).

The CPSIA also adds a new prohibited act that makes it illegal to violate a Commission order issued under new section 18(c) of the CPSA, which allows the Commission to prohibit export for sale of any consumer product not in conformity with an applicable consumer product safety rule. *15 U.S.C. 2068(a)(16).*

E. Discussion and Response to Comments on the Interim Final Rule

The comments that the Commission received on the Interim Final Rule and the Commission's responses are discussed in this section of the preamble.

1. Should Penalties Involving Actual Knowledge Be Higher Than Those Involving Presumed Knowledge?

Some commenters stated that the Commission should reserve seeking the highest penalties only for those violations involving actual knowledge where death or serious injury is likely. The commenters suggested that penalties involving presumed knowledge and circumstances where no injury or only minor injury occurred should result in lower or no penalties. Some commenters also suggested that technical violations should not involve a penalty at all. These commenters sought clarification of these concepts in the rule.

The CPSA, FHSA, and FFA define "knowingly" as the having of actual knowledge, or the presumed having of knowledge deemed to be possessed by a "reasonable man" who acts in the circumstances, including knowledge obtainable upon the exercise of due care to ascertain the truth of representations. Thus, the knowledge requirements in the CPSA, FHSA, and FFA include presumed knowledge, as well as actual knowledge. Only in section 20(a)(2) is a distinction made and this limits the civil penalty liability of certain persons without actual knowledge to those who are not the manufacturer, private labeler or distributor of the products involved. Aside from this limitation, actual and presumed knowledge are treated equally under the statutes, and both could have the same consequence for civil penalty liability. Thus, the Commission declines to follow the commenters' suggestion to seek a higher penalty only where there is evidence of actual knowledge and serious injury or death, or a lower or no penalty where there is evidence of presumed knowledge. To follow the commenters' position would treat the "presumed knowledge" element differently than it is treated in the statute. However, the presence or absence of actual knowledge could reflect on a person's culpability and affect the size of the penalty. Moreover, the adoption of the distinction sought by the commenters would be a formulaic approach to penalty determinations. Almost all the commenters opposed the idea that the Commission adopt such a formulaic approach. However, the Commission has attempted to further clarify in the final rule its guidance about what factors may influence the Commission's determination under the various statutory and other factors. Importantly, in an individual case, the Commission would review the facts and circumstances surrounding the violations and the proposed assessment of penalties in light of the factors and framework described in the rule. Specific comments relating to each factor are discussed below. The CPSIA has greatly expanded the number of prohibited acts. Accordingly the Commission intends to use its civil penalty authority in a manner best designed to promote the underlying goals of the CPSA—specifically that of protecting the public against unreasonable risks of injury associated with consumer products. In so doing, the Commission may reserve the highest civil penalty for more serious or extensive violations.

2. In the Final Rule, How Does the Commission Interpret the Civil Penalty Factors?

Section 1119.1—Purpose

Section 1119.1 describes the purpose of new Part 1119 "Civil Penalty Factors," explaining that it is the Commission's interpretation of the statutory civil penalty factors set forth in the Consumer Product Safety Act (15 U.S.C. 2051–2089), the Federal Hazardous Substances Act (15 U.S.C. 1261–1278), and the Flammable Fabrics Act (15 U.S.C. 1191–1204). The Commission has revised the interim final rule's text in the final rule to add clarification on the underlying goals and policies of civil penalties.

Section 1119.2—Applicability

Section 1119.2 explains that the part applies to all civil penalty determinations that the Commission proposes to seek or compromise for knowing violations of the CPSA, the FHSA, or the FFA.

Section 1119.3—Definitions

Section 1119.3 defines certain terms used in the rule. The Commission has revised the definition of the term "product defect" from that in the interim final rule. The term is defined in the final rule to have the same meaning as the term "defect" referenced in the CPSA and the Commission's definition of "defect" at 16 CFR 1115.4. The term "violator" has been revised to reflect the statutory terminology that any "person" is subject to civil penalties. As noted in the rule, "person" includes any legally responsible party who committed a knowing violation of the CPSA, FHSA or FFA. The rule explains that the definitions apply for purposes of the rule.

Section 1119.4(a)(2)—Nature, Circumstances, Extent, and Gravity of the Violation

The Commission believes that this factor allows the Commission to consider the totality of the circumstances surrounding a violation while recognizing that depending upon the case, the significance and importance of each factor may vary. The Commission also believes that this particular factor allows for consideration of the seriousness and extent of a particular violation that may not otherwise be considered with respect to the other enumerated statutory factors. Therefore, in each case, the Commission will continue to look at the enumerated statutory factors, as well as other factors (described in section 1119.4(b) below) that the Commission may determine are appropriate, and consider all of the factors in determining the civil penalty amount.

Section 1119.4(a)(3)—Nature of the Product Defect

The interim final rule indicated that the Commission would consider, under this provision, where appropriate and applicable in each particular case, the nature of the hazard presented by the product for which a penalty is sought. The Commission construed this factor as applying broadly to products or substances that may in fact contain a defect which could create a substantial product hazard (as defined and explained in 16 CFR 1115.4), to products which present a hazard because of a violation of a rule, regulation, standard, or ban under the CPSA, FHSA, and FFA, as well as to any other violation and how the nature of those violations relate to the underlying products or substances.

A number of commenters addressed the definition of "product defect" in section 1119.3 of the interim final rule as overly broad and unnecessarily expansive and inconsistent with the Commission's interpretation of defect as used in 16 CFR 1115.4. The commenters pointed out that defining "product defect" beyond the definition in section 1115.4 as a product or substance "associated with a prohibited act" had no basis in the statutory language of the CPSA and that the definition should be clarified to refer only to the Commission's definition in 16 CFR 1115.4.

The Commission agrees that the definition of "product defect" in the interim final rule should be revised. The Commission agrees that certain CPSA violations may not involve a "product defect" or a "defective product." For example, failure to supply a required General Conformity Certification that a product complies with an applicable consumer product safety rule may not necessarily involve a product defect or a defective product. Thus, "product defect" may not be a relevant consideration in such a circumstance. Therefore, the Commission has revised the final rule to clarify that where "product defect" or "defective product" does not apply, in such circumstances, the other statutory factors will be considered.

Section 1119.4(a)(4)—Severity of the Risk of Injury

Several commenters noted that penalties should not be sought for violations where the products presented risks of minor or moderate injury.

The Commission declines to follow this suggestion. However, the Commission notes that minor or moderate injury is considered as a factor in the determination of the overall penalty. The Commission refers to the discussion of 16 CFR 1115.12 which specifies that severity of the risk includes a consideration of the likelihood of an injury occurring, the intended or reasonably foreseeable use or misuse of the product, and the population group exposed. The Commission retains these references in the final rule. The Commission also notes that the interim final rule has been modified in the final rule to further clarify that the Commission will consider "illness" along with injury and death as a consideration under this factor. The Commission believes that consideration of illness is consistent with the statutory direction which defines a "risk of injury" in section 3(a)(14) of the CPSA to mean a risk of death, personal injury, or serious or frequent illness.

Section 1119.4(a)(5)—The Occurrence or Absence of Injury

The Commission received several comments suggesting that it should not seek a penalty where the information the Commission evaluates reveals that the violation involved no injury or only minor injuries have occurred.

The Commission declines to follow this suggestion because a violative product, a product about which a person did not report as required, or another type of violation, may present a serious risk to consumers even though no injuries have occurred. However, the final rule is further clarified to state that the Commission would consider under this factor whether illnesses or deaths have occurred, in addition to considering whether injuries have or have not occurred. The rule is further clarified to explain that this consideration will also involve the number and nature of such injuries, illnesses, or deaths. Finally, the Commission has pointed out that both acute and the likelihood for chronic illness will be considered.

Section 1119.4(a)(6)—The Number of Defective Products Distributed

The Commission is required to consider the number of defective products or amount of substances distributed in commerce. The Commission recognizes, as some commenters pointed out, that the number of defective products in consumers' hands may be different from the number of defective products distributed. However, the statutory language makes no distinction between those defective products distributed in commerce that consumers received, and those defective products distributed in commerce that consumers have not received. Therefore both could be considered in appropriate cases. With respect to the number of defective products or amount of substances involved in a recall, the Commission clarifies in the rule that the Commission does not intend to penalize a person's decision to conduct a wider-than-necessary recall undertaken out of an abundance of caution. This would not include situations where such a recall is conducted due to a person's uncertainty concerning how many or which products may need to be recalled.

Section 1119.4(a)(7)—The Appropriateness of Such Penalty in Relation to the Size of the Business of the Person Charged, Including How To Mitigate Undue Adverse Economic Impacts on Small Businesses

The Commission is required to consider the size of a business in relation to the amount of the penalty. This factor reflects the relationship between the size of the business of the person charged and the deterrent effect of, and other policies underlying, civil penalties. In considering business "size," the Commission may look to several factors including but not limited to the number of employees, net worth, and annual sales. The Commission may be guided, where appropriate, by any relevant financial factors to help determine a person's ability to pay a penalty including but not limited to:

- Liquidity factors—factors that help measure a person's ability to pay its short-term obligations;
- Solvency factors—factors that help measure a person's ability to pay its long-term obligations; and
- Profitability factors— factors that measure a person's level of return on investment.

The Commission is aware that penalties may have adverse economic consequences on persons, including small businesses. The statute requires the Commission to consider how to mitigate the adverse economic consequences on small businesses only if those consequences would be "undue." What the Commission considers in determining what is "undue" may include, but is not limited to, the business's size and financial factors relating to its ability to pay. The interim final rule is modified in the final rule to explain that the burden to present clear, reliable, relevant, and sufficient evidence relating to a business's size and ability to pay rests on the business. When considering how to mitigate undue adverse economic consequences, the Commission will, as appropriate, follow its Small Business Enforcement Policy set forth at 16 CFR 1020.5. In determining a small business's ability to pay a proposed penalty, the Commission may be guided, where appropriate, by the financial factors set forth above. The Commission recognizes that on occasion its announced civil penalty amounts do not seem to reflect the seriousness of the violations due to the Commission's mitigation of the amount of the penalty based on ability to pay. While the Commission, unlike certain other federal agencies, has never publicized the amount it would have sought absent the mitigation, it acknowledges that it has that authority and may exercise that authority in appropriate circumstances.

Section 1119.4(b)—Other Factors as Appropriate

Some commenters suggested that the Commission should identify other factors that will be considered in penalty determinations. The factors the commenters suggested included previous record of compliance, good faith, efforts taken to respond to the violations, duration of the violations, and compliance with mandatory and/or voluntary standards. The Commission has determined that some of these factors would already be evaluated in the context of the enumerated statutory factors to consider, such as the nature, circumstances, extent, and gravity of the violation. Therefore, it is not necessary to separately enumerate these factors.

Congress clarified in the CPSIA that the Commission has the ability to consider factors in addition to the ones enumerated in the act in individual cases, as appropriate. However, the Commission retains the concept from the interim final rule in the final rule that in any penalty matter the Commission and the person are free to raise any other factors they believe are relevant in determining an appropriate civil penalty amount. Factors not identified below could therefore be raised in a penalty matter. The Commission has determined that the factors listed below should remain with changes and other clarifications as noted:

- *Safety/Compliance Program and/or System Relating to a Violation:* The Commission listed a number of factors relating to consideration of a safety/compliance program or system in the interim final rule. The Commission received comments seeking further definition of a safety or compliance program. The rule is intended to

provide examples of information that a person should consider, but not to provide one particular model of a program or system. The Commission intends to allow flexibility for the regulated community. However, the Commission has modified the final rule from the interim final rule in two important respects. First, the rule now makes explicit that the burden to present clear, reliable, relevant, and sufficient evidence of any such program and its relevance is on the person seeking consideration of this factor. Second, the rule makes explicit that any such program being asserted as relevant to a penalty matter must specifically relate to the violation or violations at issue and must be reasonable and effective. The Commission recognizes that the mere fact of a violation does not necessarily render a program ineffective.

- *History of Noncompliance:* Some commenters sought greater clarification on this factor and stated that the Commission should consider a history of compliance as well as noncompliance. The Commission declines to add "compliance" in the final rule because the factor by its nature is intended to address repeat violators. However, the Commission clarifies in the final rule that repeat violations of the same law or regulation, or prior violations of a different law or regulation enforced by the Commission, as well as the number of such violations, will be considerations.
- *Economic Gain from Noncompliance:* Some comments suggested that the Commission consider this factor after consideration of the statutory factors in determining a penalty amount. The Commission agrees that economic gain may be a consideration that should be factored in, where appropriate, with other factors.
- *Failure to respond in a timely and complete fashion to the Commission's requests for information or remedial action:* The Commission received a number of comments suggesting that this factor as written implied that a person may be penalized for exercising their legal rights to disagree and seek counsel on the Commission's requests for information or remedial action. The Commission agrees that a person has the legal right to decline to respond or act voluntarily and the legal right to seek advice on information and remedial action requests from the Commission and, therefore, is clarifying that it did not intend to impede such rights. This factor was intended to address egregious and dilatory tactics in response to the Commission's written requests for information or remedial action but not to impede any person's lawful rights. The rule is clarified to reflect this consideration.

Which additional factors the Commission considers in determining an appropriate penalty amount, including, but not limited to, those listed above, will be unique to each case.

A person will be notified of any factors beyond those enumerated in the statutes that the Commission relies on as aggravating factors for purposes of determining a civil penalty amount.

Section 1119.5—Enforcement Notification

Section 1119.5 of the rule sets forth a notification provision whereby, if it is believed that a person has violated the law and a penalty is sought, the person will be so advised. This provision has been informally followed by the Commission in determining the amount of a civil penalty to seek or compromise for knowing violations. The Commission has provided further clarification of this process in the rule.

F. Immediate Effective Date

The Commission issued an interim final rule, in accordance with the procedures set forth at 5 U.S.C. 553 of the Administrative Procedure Act, on September 1, 2009, providing its interpretation of the penalty factors in section 20(b) of the CPSA, section 5(c)(3) of the FHSA, and section 5(e)(2) of the FFA. Maximum civil penalty amounts have increased for violations that occurred on or after August 14, 2009. This final rule is effective upon publication. The rule is interpretative and does not impose obligations on regulated parties beyond those imposed by the CPSA, FHSA, and FFA. Therefore, there is no need to provide a delayed effective date in order to allow for regulated parties to prepare for the rule.

G. Regulatory Flexibility Certification

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612, directs agencies to consider the potential impact of regulations on small business and other small entities. However, the RFA does not apply to rulemaking that is not subject to the notice and comment requirement of the Administrative Procedure Act, 5 U.S.C. 553. Interpretative rules, such as the one issued by this notice, are not subject to the notice and comment requirement. Accordingly, neither an initial nor a final regulatory flexibility analysis is required for this rule.

H. Paperwork Reduction Act

The rule does not impose any information collection requirements. Rather, it describes the statutory civil penalty factors and how the Commission interprets those factors. Accordingly, it is not subject to the Paperwork Reduction Act, 44 U.S.C. 3501–3520.

I. Environmental Considerations

The Commission's regulations at 16 CFR 1021.5(a) provide that there are no CPSC actions that ordinarily produce significant environmental effects. The rule does not fall within the categories in 16 CFR 1021.5(b) of CPSC actions that have the potential for producing environmental effects. The rule does not have any potential for adversely affecting the quality of the human environment. Council of Environmental Quality regulations at 40 CFR 1508.18(a) provide that agency actions subject to environmental review "do not include bringing judicial or administrative enforcement actions." Therefore, no environmental assessment or environmental impact statement is required.

List of Subjects in 16 CFR Part 1119

Administrative practice and procedure, Business and Industry, Consumer protection, Reporting and recordkeeping requirements.

■ Accordingly, the Commission revises 16 CFR Part 1119 to read as follows:

PART 1119—CIVIL PENALTY FACTORS

Sec.

Authority: 15 U.S.C. 2058, 2063, 2064, 2067(b), 2068, 2069, 2076(e), 2084, 1261, 1263, 1264, 1270, 1273, 1278, 1191, 1192, 1193, 1194, 1195, 1196.

§ 1119.1 Purpose.

This part sets forth the Consumer Product Safety Commission's (Commission) interpretation of the statutory factors considered in determining the amount of civil penalties that the Commission may seek or compromise. The policies behind, and purposes of, civil penalties include the following: Deterring violations; providing just punishment; promoting respect for the law; promoting full compliance with the law; reflecting the seriousness of the violation; and protecting the public.

§ 1119.2 Applicability.

This part applies to all civil penalty determinations the Commission may seek or compromise under the Consumer Product Safety Act (CPSA) (15 U.S.C. 2051–2089), the Federal Hazardous Substances Act (FHSA) (15 U.S.C. 1261–1278), and the Flammable Fabrics Act (FFA) (15 U.S.C. 1191–1204). Any person who knowingly violates section 19 of the CPSA, section 4 of the FHSA, or section 5(e) of the FFA, is subject to a civil penalty.

§ 1119.3 Definitions.

For purposes of this rule, the following definitions apply:

(a) *Product defect* means a defect as referenced in the CPSA and defined in Commission regulations at 16 CFR 1115.4.

(b) *Violation* means a violation committed knowingly, as the term "knowingly" is defined in section 19 of the CPSA, section 4 of the FHSA, or section 5 of the FFA.

(c) *Person* means any manufacturer (including importer), distributor, or retailer, as those terms are defined in the CPSA, FHSA, or FFA, and any other legally responsible party.

§ 1119.4 Factors considered in determining civil penalties.

(a) *Statutory Factors.* (1) Section 20(b) of the CPSA, section 5(c)(3) of the FHSA, and section 5(e)(2) of the FFA, specify factors considered by the Commission in determining the amount of a civil penalty to be sought upon commencing an action for knowing violations of each act. These factors are:

(i) *CPSA (15 U.S.C. 2069(b)).* The nature, circumstances, extent, and gravity of the violation, including:

(A) The nature of the product defect;

(B) The severity of the risk of injury;

(C) The occurrence or absence of injury;

(D) The number of defective products distributed;

(E) The appropriateness of such penalty in relation to the size of the business of the person charged, including how to mitigate undue adverse economic impacts on small businesses; and

(F) Such other factors as appropriate.

(ii) *FHSA (15 U.S.C. 1264 (c)(3)).* The nature, circumstances, extent, and gravity of the violation, including:

(A) The nature of the substance;

(B) Severity of the risk of injury;

(C) The occurrence or absence of injury;

(D) The amount of substance distributed;

(E) The appropriateness of such penalty in relation to the size of the business of the person charged, including how to mitigate undue adverse economic impacts on small businesses; and

(F) Such other factors as appropriate.

(iii) *FFA (15 U.S.C. 1194 (e)(2)).* The nature, circumstances, extent, and gravity of the violations:

(A) The severity of the risk of injury;

(B) The occurrence or absence of injury;

(C) The appropriateness of such penalty in relation to the size of the business of the person charged; and

(D) Such other factors as appropriate.

(2) *The nature, circumstances, extent, and gravity of the violation.* Under this factor, the Commission will consider the totality of the circumstances and all other facts concerning a violation. The Commission will consider the enumerated statutory factors, as well as the factors described in paragraph (b) of this section.

(3) *Nature of the product defect.* The Commission will consider the nature of the product defect associated with a CPSA violation. This consideration will include, for example, whether the defect arises from the product's design, composition, contents, construction, manufacture, packaging, warnings, or instructions, and will include consideration of conditions or circumstances in which the defect arises. The Commission will also consider the nature of the substance associated with an FHSA violation. Two of the statutory factors in the CPSA civil penalty factors include the terms "product defect" or "defective products." However, certain violations of the CPSA, for example, failing to supply a required certificate that the product complies with an applicable consumer product safety rule, do not necessarily require that there be a product defect or defective product. The terms "product defect" or "defective products" would not apply to such situation. In such cases, however, the other civil penalty factors would still be considered.

(4) *Severity of the risk of injury.* Consistent with its discussion of severity of the risk at 16 CFR 1115.12, the Commission will consider, among other factors, the potential for serious injury, illness, or death (and whether any injury or illness required medical treatment including hospitalization or surgery); the likelihood of injury; the intended or reasonably foreseeable use or misuse of the product; and the population at risk (including vulnerable populations such as children, the elderly, or those with disabilities).

(5) *The occurrence or absence of injury.* The Commission will consider whether injuries, illnesses, or deaths have or have not occurred with respect to any product or substance associated with a violation, and, if so, the number and nature of injuries, illnesses, or deaths. Both acute illnesses and the likelihood of chronic illnesses will be considered.

(6) *The number of defective products distributed.* The Commission will consider the number of defective products or amount of substance distributed in commerce. The statutory language makes no distinction between those defective products distributed in commerce that consumers received and those defective products distributed in commerce that consumers have not received. Therefore both could be considered in appropriate cases. This factor will not be used to penalize a person's decision to conduct a wider-than-necessary recall out of an abundance of caution. This would not include situations where such a recall is conducted due to a person's uncertainty concerning how many or which products may need to be recalled.

(7) The appropriateness of such penalty in relation to the size of the business of the person charged, including how to mitigate undue adverse economic impacts on small businesses.

(i) The Commission is required to consider the size of the business of the person charged in relation to the amount of the penalty. This factor reflects the relationship between the size of a business and the policies behind, and purposes of, a penalty (as noted above in § 1119.1). In considering business size, the Commission may look to several factors including, but not limited to, the number of employees, net worth, and annual sales. A business's size and a business's ability to pay a penalty are separate considerations. In some cases for small businesses, however, these two considerations may relate to each other. The Commission will be guided, where appropriate, by relevant financial factors to determine a small business's ability to pay a penalty, including, but not limited to, liquidity, solvency, and profitability. The burden to present clear, reliable, relevant, and sufficient evidence relating to a business's size and ability to pay rests on the business.

(ii) The statute requires the Commission to consider how to mitigate the adverse economic impacts on small businesses only if those impacts would be undue. What the Commission considers in determining what is undue may include, but is not limited to, the business's size and financial factors relating to its ability to pay. When considering how to mitigate undue

adverse economic impacts, the Commission will, as appropriate, also follow its Small Business Enforcement Policy set forth at § 1020.5.

(b) *Other factors as appropriate.* In determining the amount of any civil penalty to be sought for a violation of the CPSA, FHSA, or FFA, the Commission may consider, as appropriate, such other factors in addition to those listed in the statutes. Both the Commission and a person may raise any factors they believe are relevant in determining an appropriate penalty amount. A person will be notified of any factors beyond those enumerated in the statutes that the Commission relies on as aggravating factors for purposes of determining a civil penalty amount. Additional factors that may be considered in a case include, but are not limited to, the following:

(1) *Safety/compliance program and/or system relating to a violation.* The Commission may consider, when a safety/compliance program and/or system as established is relevant to a violation, whether a person had at the time of the violation a reasonable and effective program or system for collecting and analyzing information related to safety issues. Examples of such information would include incident reports, lawsuits, warranty claims, and safety-related issues related to repairs or returns. The Commission may also consider whether a person conducted adequate and relevant premarket and production testing of the product at issue; had a program in place for continued compliance with all relevant mandatory and voluntary safety standards; and other factors as the Commission deems appropriate. The burden to present clear, reliable, relevant, and sufficient evidence of such program, system, or testing rests on the person seeking consideration of this factor.

(2) *History of noncompliance.* The Commission may consider whether or not a person's history of noncompliance with the CPSA, FHSA, FFA, and other laws that the CPSC enforces, and the regulations thereunder, should increase the amount of the penalty. A person's history of noncompliance may be indicated by, for example, multiple violations of one or more laws or regulations that the CPSC enforces, including repeated violations of the same law or regulation. History of noncompliance may include the number of previous violations or how recently a previous violation occurred.

(3) *Economic gain from noncompliance.* The Commission may consider whether a person benefitted economically from a failure to comply, including a delay in complying, with the CPSA, FHSA, FFA, and other laws that the CPSC enforces, and the regulations thereunder.

(4) Failure to respond in a timely and complete fashion to the Commission's requests for information or remedial action. The Commission may consider whether a person's failure to respond in a timely and complete fashion to requests from the Commission for information or for remedial action should increase a penalty. This factor is intended to address a person's dilatory and egregious conduct in responding to written requests for information or remedial action sought by the Commission, but not to impede any person's lawful rights.

§ 1119.5 Enforcement notification.

A person will be informed in writing if it is believed that the person has violated the law and if the Commission intends to seek a civil penalty. Any person who receives such a writing will have an opportunity to submit evidence and arguments that it should not pay a penalty or should not pay a penalty in the amount sought by the Commission.

Dated: March 24, 2010.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

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DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

Temporary Employment of Foreign Workers in the United States

CFR Correction

In Title 20 of the Code of Federal Regulations, Part 500 to End, revised as of April 1, 2009, on page 466, remove § 655.0 and correctly reinstate it to read as follows:

§ 655.0 Scope and purpose of part.

(a) *Subparts A, B, and C*—(1) *General.* Subparts A, B, and C of this part set out the procedures adopted by the Secretary to secure information sufficient to make factual determinations of: (i) Whether U.S. workers are available to perform temporary employment in the United States, for which an employer desires to employ nonimmigrant foreign workers, and (ii) whether the employment of aliens for such temporary work will adversely affect the wages or working conditions of similarly employed U.S. workers. These factual determinations (or a determination that there are not sufficient facts to make one or both of these determinations) are required to carry out the policies of the Immigration and Nationality Act (INA), that a nonimmigrant alien worker not be admitted to fill a particular temporary job opportunity unless no qualifed U.S. worker is available to fill the job opportunity, and unless the employment of the foreign worker in the job opportunity will not adversely affect the wages or working conditions of similarly employed U.S. workers.

(2) *The Secretary's determinations.* Before any factual determination can be made concerning the availability of U.S. workers to perform particular job opportunities, two steps must be taken. First, the minimum level of wages, terms, benefits, and conditions for the particular job opportunities, below which similarly employed U.S. workers would be adversely affected, must be established. (The regulations in this part establish such minimum levels for wages, terms, benefits, and conditions of employment.) Second, the wages, terms, benefits, and conditions offered and afforded to the aliens must be compared to the established minimum levels. If it is concluded that adverse effect would result, the ultimate determination of availability within the meaning of the INA cannot be made since U.S. workers cannot be expected to accept employment under conditions below the established minimum levels. *Florida Sugar Cane League, Inc.* v. *Usery,* 531 F. 2d 299 (5th Cir. 1976).

Once a determination of no adverse effect has been made, the availability of U.S. workers can be tested only if U.S. workers are actively recruited through the offer of wages, terms, benefits, and conditions at least at the minimum level or the level offered to the aliens, whichever is higher. The regulations in this part set forth requirements for recruiting U.S. workers in accordance with this principle.

(3) *Construction.* This part and its subparts shall be construed to effectuate the purpose of the INA that U.S. workers rather than aliens be employed wherever possible. *Elton Orchards, Inc.* v. *Brennan,* 508 F. 2d 493, 500 (1st Cir. 1974), *Flecha* v. *Quiros,* 567 F. 2d 1154 (1st Cir. 1977). Where temporary alien workers are admitted, the terms and conditions of their employment must not result in a lowering of the terms and conditions of domestic workers similarly employed, *Williams* v. *Usery,* 531 F. 2d 305 (5th Cir. 1976); *Florida Sugar Cane League, Inc.* v. *Usery,* 531 F.