



UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

STATEMENT OF THE HONORABLE THOMAS H. MOORE
ON THE INTERIM FINAL RULE INTERPRETING FACTORS TO BE CONSIDERED
WHEN SEEKING CIVIL PENALTIES

August 14, 2009

It is a relatively rare occurrence for this agency to pursue a civil penalty against a company. Over the last twenty years we typically averaged eight civil penalty determinations a year. This year and last year were atypical due to a rash of drawstring and lead-based paint cases--a state of affairs I sincerely hope we do not see repeated in the future. The drawstring violations are particularly distressing as the presence of drawstrings on children's garments is obvious to any importer, retailer or distributor who looks at the product.

We do not pursue civil penalties lightly and we only do so if we have good cause to believe that a company has committed a violation that is serious enough to warrant a civil penalty. The statutory factors described in this rule come into play once a decision has been made to pursue a penalty. They give guidance on the amount of the penalty that should be imposed on companies we believe have committed a fairly serious violation of our laws.

The Commission has been applying most of the enumerated statutory factors for a long time. They are not new to the regulated community. There should also not be any surprises in the nonexclusive list of other factors that the Commission singled out for special mention, as they have been discussed by the Commission in the past. Repeat violators, violators with a cavalier attitude about product safety, and violators, who by their dilatory actions in dealing with the Commission put more consumers at risk, should expect to pay higher penalties.

The interim final rule does not include "product failure rate" as a factor to be considered by the Commission. As I have said in the past, there is no acceptable rate of failure for a product that fails in a way that could create a substantial product hazard or creates an unreasonable risk of serious injury or death. While consumers do expect their products to fail eventually, they do not expect them to fail in a way that could harm them or their families.

The rule also does not contain a "good/bad faith" factor. This is too subjective a factor to be useful as a guide to companies. One of the new statutory prohibitions, misrepresenting the scope of products subject to a recall or making a material misrepresentation in the course of an investigation by the Commission already addresses certain aspects of "bad faith."

Factor “(iv) Failure of the violator to respond in a timely and complete fashion to the Commission’s requests for information or remedial action” is not to be confused with the “timeliness of response” factor that was contained in the Commission’s 2006 proposal. Companies must report under section 15(b) *immediately* upon obtaining the information described in that provision. It is a separate violation of the law to fail to provide that information. Thus, the timeliness described here has to do with a company’s response to requests from the Commission, either to take remedial action, or to supply information the Commission has asked the company to provide after a particular problem has come to the Commission’s attention, regardless of how or when the Commission was first notified of the problem.

The Commission chose not to list every conceivable factor that either it or a violator might want considered in a civil penalty case. Factors can work in combination with each other. New factors may arise in the future that the Commission has not encountered before. It would be impossible, and not necessarily very enlightening, to try to list every possible factor that might come into play in a hypothetical case. The important thing is that the factors that pertain to each particular case are thoroughly discussed with the violator.