

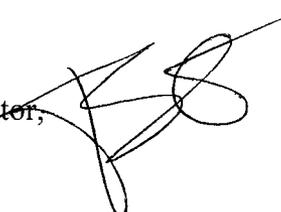


UNITED STATES  
CONSUMER PRODUCT SAFETY COMMISSION  
4330 EAST WEST HIGHWAY  
BETHESDA, MARYLAND 20814

**Memorandum**

Date: January 22, 2009

TO : Office of the General Counsel

FROM : Todd A. Stevenson, Director,  
Office of the Secretary 

SUBJECT : Civil Penalty Criteria  
Section 217(b)(2) of the Consumer Product Safety Improvement Act (CPSIA)  
**Comments due – December 12, 2008**

<u>COMMENT</u>	<u>DATE</u>	<u>SIGNED BY</u>	<u>AFFILIATION</u>
1	11/19/08	Jack Summersell President	Educators Resource 2575 Schillinger Rd. N Semmes, AL 36575
2	11/19/08	Blair Everett	Babalu, Inc. PO Box 23026 Santa Barbara, CA 93121
3	11/26/08	James Joyce Executive Director	Wellesley Cable Access Corporation <a href="mailto:wellesleytv@verizon.net">wellesleytv@verizon.net</a>
4	12/08/08	John S. Satagaj President and General Counsel	Small Business Legislative Council 1100 H St., NW, Suite 540 Washington, DC 20005
5	12/17/08	James H. Rice CEO	Creative Catalog Concepts LLC 2745 Rebecca Lane Orange City, FL 32763

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 Section 217(b)(2) of the Consumer Product Safety Improvement Act (CPSIA)

<u>COMMENT</u>	<u>DATE</u>	<u>SIGNED BY</u>	<u>AFFILIATION</u>
6	12/17/08	Richard Woldenberg Chairman	Learning Resources, Inc. 380 North Fairway Drive Vernon Hills, IL 60061
7	12/18/08	Jody Arthur	<a href="mailto:happygirl lucky@gmail.com">happygirl lucky@gmail.com</a>
8	12/18/08	Stephanie Lester VP – International Trade	Retail Industry Leaders Association 1700 N. Moore Street Suite 2250 Arlington, VA 22209
9	12/18/08	David Arkush Director, Congress Watch	Public Citizen
		Janell Mayo Duncan Senior Counsel	Consumers Union
		Donald L. Mays Senior Director, Product Safety & Technical Public Policy	Consumers Union
		Rachel Weintraub Director of Product Safety and Senior Counsel	Consumer Federation of America
		Nancy A. Cowles Executive Director	Kids in Danger
		Diana Zuckerman President	National Center for Women & Families

## Civil Penalty Criteria

## Section 217(b)(2) of the Consumer Product Safety Improvement Act (CPSIA)

<u>COMMENT</u>	<u>DATE</u>	<u>SIGNED BY</u>	<u>AFFILIATION</u>
10	12/18/08	Wayne Morris VP – Division Services	Association of Home Appliance Manufacturers 1111 19 <sup>th</sup> Street, NW Suite 402 Washington, DC 20036
11	12/18/08	Steve Pfister Senior Vice President Government Affairs	National Retail Federation Liberty Place 325 7 <sup>th</sup> Street, NW Suite 1100 Washington, DC 20004
12	12/18/08	Sheila A. Millar	Keller and Heckman LLP 1001 G Street, NW Suite 500 West Washington, DC 20001
13	12/18/08	Christopher A. McLean Executive Director	Consumer Electronics Retailers Coalition 317 Massachusetts Ave., NE Suite 200 Washington, DC 20002
14	12/18/08	William Willen Counsel for →	American Honda Motor Co., Inc. 1919 Torrance Boulevard MS: 5002C-10A Torrance, CA 90501-2746
		Annamarie Daley Counsel for Arctic Cat Inc.	Robins, Kaplan, Miller & Ciresi LLP 2800 LaSalle Plaza 800 LaSalle Avenue Minneapolis, MN 55402-2015
		Michael A. Wiegard Counsel for Kawasaki Motors Corp., U.S.A.	Eckert Seamans Cherin & Mellot 1747 Pennsylvania Ave., NW Washington, DC 20037

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<u>COMMENT</u>	<u>DATE</u>	<u>SIGNED BY</u>	<u>AFFILIATION</u>
14 cont'd.	12/18/08	David P. Murray Counsel for Yamaha Motor Corp., U.S.A.	Willkie Farr & Gallagher LLP 1875 K Street, NW Washington, DC 20006
		Yves St. Arnaud Counsel for →	Bombardier Recreational Products Inc. 726 Saint-Joseph Street Valcourt, Quebec, Canada JOE 2L0
		Mary McConnell Counsel for →	Polaris Industries Inc. 2100 Highway 55 Medina, MN 55340-9770
		Erika Z. Jones Counsel for American Suzuki Motor Corp.	Mayer Brown LLP 1909 K Street, NW Washington, DC 20006
15	12/18/08	Marianne Rowden General Counsel	American Association of Exporters and Importers 1050 17 <sup>th</sup> Street, NW Suite 810 Washington, DC 20036-5514
16	12/22/08	Carter Keithley President	Toy Industry Association 1115 Broadway, Suite 400 New York, NY 10010

Stevenson, Todd

From: Jack Summersell [jack.summersell@edresource.com]  
Sent: Wednesday, November 19, 2008 12:14 PM  
To: Civil Penalty Factors  
Cc: Jason Hagmaier; 'Mike Druhan'; 'Brad Summersell'; 'Dan Hartung'  
Subject: Section 217(b)(2) Civil Penalty Criteria - Educators Resource - SPECIAL PERSPECTIVE OF NON-MANUFACTURER

Dear CPSC:

Thank you for your request for comments and information relating to Section 217 of the CPSIA. I respectfully ask that you consider the unique perspective and facts provided by a NON-MANUFACTURER carrying millions of dollars in inventory. I do not presume to speak on behalf of other distributors and retailers (i.e. those companies who are neither manufacturers, importers, nor private labelers). But I would venture to guess that other distributors and retailers, the vast majority of whom are not yet educated on this new law, would echo these comments.

Please consider the following in defense of the position of distributors and retailers (NON-MANUFACTURERS). I will address each of the four topics on which you have invited comment:

### **EXISTING PENALTY FACTORS**

Penalties should apply ONLY to MANUFACTURERS. In most U.S. consumer industries, such as toy, apparel, school and sporting goods, there are hundreds of distributors and retailers who are not in a position to determine whether a particular product is defective (CPSA) or represents a particular personnel hazard (FHSA). We do not have the financial means to conduct the requisite testing necessary to make such representations. Manufacturers are **relatively large and manage a relatively small number of products** (for example \$100M in annual revenues spread across 1,000 products, or **\$100k in revenue per product**). Whereas distributors and retailers are **relatively small and manage a relatively large number of products** (for example \$1M in annual revenues spread across 20,000 products, or a mere **\$50 in revenue per product**). In the example, the distributor/retailer is 1% of the size of the manufacturer but carries 25 times as many products !! ). Product testing, at an estimated \$350-\$500 per product, is not feasible for distributors and small independent retailers (a \$1M annual revenue firm cannot afford \$10M in testing costs; this point is elementary, but I want to be sure that it is made clear – distributors and retailers are CANNOT TEST because it is not economically feasible).

Furthermore, DISTRIBUTORS AND RETAILERS SHOULD NOT BE HELD ACCOUNTABLE FOR PRODUCT SAFETY RELATING TO THE CHEMISTRY OF THE RAW MATERIALS, regardless of the nature of the product defect, nature of the substance, severity of the risk of injury, the occurrence or absence of injury, the number of defective products distributed, and the amount of substance distributed. It is simply unrealistic to expect that distributors and retailers can be accountable for "chemistry-level" consumer product safety. Despite the desire and passion that my company, our retail customers and our employees have for product safety, the truth is that we are AT THE MERCY of the manufacturer when it comes to "chemistry-level" product safety (and to a large extent, mechanical-level safety as well).

The fundamental principle which underlies the existence of the CPSC is the fact that an individual consumer has little power to protect themselves from manufacturers who are either unscrupulous, careless, or lethargic). This principle also APPLIES TO RETAILERS and DISTRIBUTORS – we are tiny compared to the manufacturers. LIKE THE CONSUMER, WE NEED THE PROTECTION OF THE CPSC, NOT THE THREAT OF FINES and criminal penalties LEVIED AS THE RESULT OF FACTORS BEYOND OUR CONTROL. Most of these companies I am referring to are small, closely held family businesses whose principal owners represent the consumer community as much as they do the business community.

A distinction must be made to address the differences between manufacturers/importers and non-manufacturers.

### **OTHER PENALTY FACTORS TO CONSIDER**

As this pertains to distributors and retailers, the factor that should be considered most seriously is "co-operation in good faith." Distributors and retailers who have taken reasonable steps to ask their suppliers (manufacturers and importers) for certification, should be given safe harbor if the manufacturer has failed to provide a timely, thorough and accurate response. This principle was applied in Section 105 of CPSIA. Those of us who have documented our request to manufacturers to provide choking hazard information are NOT panicking when 250 out of 400 manufacturers have not responded. But when 250 out of 400 manufacturers have not responded to our request for certification of compliance with the retroactive lead law, WE ARE PANICKING because the law and the Commission's interpretations have left those of us wishing to comply with NO WAY to protect ourselves in the event the manufacturers are unable or unwilling to provide the information.

### **WEIGHTING FORMULA OR MATRIX**

No comment.

### **MITIGATION OF ADVERSE ECONOMIC IMPACT ON SMALL BUSINESS**

Much attention has been given in recent years, and rightly so, to the civil liberties inherent to each American citizen. We are so incredibly sensitive to the possibility of trampling on those inalienable rights. But when a man or woman has built a family business, and, through hard work, dedication, American ingenuity and the willingness to take a risk, has created a good life for his family, we tend to protect the needs of that person with less zeal than the individual who desires to burn the American flag under the protection of the First Amendment. PLEASE recognize that this legislation, if enforced retroactively, presents the real possibility of the destruction of THOUSANDS of small family NON-MANUFACTURING businesses (and the resulting loss of thousands of jobs during a time when the U.S. economy is weakening). Very few, if any, of the 1,000+ independent retailers in our industry would be able to come up with the funds to pay a fine of \$100k.

Thank you for considering my comments.

Respectfully,

**Jack Summersell**  
President  
Educators Resource

T 800-868-2368 x337 | F 251-645-5704  
[jack.summersell@edresource.com](mailto:jack.summersell@edresource.com)  
[www.ERdealer.com](http://www.ERdealer.com)



2575 Schillinger Rd N · Semmes, AL 36575

2 sent 2/17

**Stevenson, Todd**

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**From:** Blair Everett [sbtoyman@verizon.net]  
**Sent:** Wednesday, November 19, 2008 2:15 PM  
**To:** Civil Penalty Factors  
**Subject:** Civil Penalty recommendations

Yes, develop a matrix to determine penalty for initial vs repeat offenders. As to repetition, 2nd time is a doubling effect. If the source is a foreign manufacturer, the domestic partner / importer has the weight of any priors to bear for that foreign manufacturer. This would effect all private labelers to then scrutinize who they work with.

I do think the nature of the defect or the nature of the substance could be categorized or weighted by the extent of the violation, i.e., amount of lead, etc.

Happy to embellish where needed.

**Blair Everett**

Babalu, Inc  
PO Box 23026  
Santa Barbara, CA 93121-3026  
805.963.8180 X300- phone  
805.456.3613 - fax

**Stevenson, Todd**

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**From:** The Wellesley Channel [wellesleytv@verizon.net]  
**Sent:** Wednesday, November 26, 2008 6:17 PM  
**To:** Civil Penalty Factors  
**Subject:** "Section 217(b)(2) Civil Penalty Criteria."

"Section 217(b)(2) Civil Penalty Criteria. "

**Previous record of compliance**

Businesses that repeatedly jeopardize human health and/or safety should be shut down.

**Timeliness of response**

Should be considered - goes along with cooperation and good faith item below.

There should be a window of time in which businesses are required to respond to claims.

**Safety and compliance monitoring**

Should be considered - helps to differentiate between negligence and accidental.

**Cooperation and good faith**

Penalties should be more severe for companies that don't comply with requests within time set forth.

**Economic gain from noncompliance**

Definitely considered - again helps to differentiate between negligence and accidental.

**Product failure rate**

Important to ascertain overall concern for public safety and/or poor judgement/performance in industry and penalize accordingly.

"Whether the Commission should develop a formula or matrix to weigh any or all of the various factors and the criteria it should use in any weighting formula or matrix."

A formula would assure a fair and equitable penalty and remove any question as to subjective judgement.

The formula should be weighted to penalize negligence and degree of danger posed to public health and safety.

Businesses with a previous record of compliance would have to be classified based on size and have that taken into account.

Occurrence or absence of injury and risk of injury

"Information the Commission should consider in determining how to mitigate the adverse economic impact of a particular penalty on small business."

Number of prior offenses

Degree of hazard posed to public

Length of time hazardous conditions existed

Prior knowledge of offense with no subsequent action taken to correct it

Occurrence or absence of injury and risk of injury

James Joyce  
Executive Director  
Wellesley Cable Access Corporation  
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**Stevenson, Todd**

4 Sent 2:17 PM  
Civil Penalty Factors

**From:** John S Satagaj [email@sbllc.org]  
**Sent:** Monday, December 08, 2008 5:50 PM  
**To:** Civil Penalty Factors  
**Subject:** civil penalty factor comments

On behalf of the Small Business Legislative Council (SBLC), I would like to comment on the provisions of the CPSIA regarding mitigation of penalties for small businesses.

We do not have any quick and easy answers about how to best design such a mitigation program. Obviously, we would expect the CPSC to use some of the methodologies used by agencies to comply with the Regulatory Flexibility Act and to utilize the resources of the Office of Advocacy of the Small Business Administration.

There is no doubt that if penalties at the new levels are assessed equally against small and big businesses, the resulting impact will be distinctly different. If the goal is to correct behavior, putting a small business out of business fails to achieve the goal, and our economy loses another business. At a minimum, an appropriate proportionate assessment based on the size of business is important.

However, equally important is the reaction we are hearing from small businesses about the new penalties. Many of them are reading about the new possible penalties and it is making them think twice about whether they want to be in the business of making, importing, distributing, or selling a consumer product at all. Whether it is through safe harbors or other objective protections, we believe CPSC must provide more than a "this is just the maximums we can assess, we do not automatically assess the maximum amount" type of assurances. It has to be an assurance upon which small businesses can rely, independent of a subjective assessment process.

While this request for comments is concerned with the penalties, we must note this new law places a tremendous disproportionate burden on small businesses. The "up front" and ongoing costs of compliance are significant and favor those who can take advantage of economies of scale. As the law is implemented, we urge the CPSC to be mindful to find ways the government can mitigate the costs of compliance. If you can do so, we believe it will result in fewer situations when violations will incur in the first place and thus mitigate the impact of penalties. A simple example is that the law makes a proprietary standard mandatory for children's products' safety hazards. While we applaud the voluntary standard system and have supported it, will each small business have to go out and buy that standard? What can the federal government do to help?

Finally, this brings us to small business' biggest worry, the "gotcha." Compliance with this new law is fraught with technical challenges. The current situation with General Conformity Certificates is one example. Everyday, we hear from small business owners asking the same question, "Why can't the government just tell us for which products a GCC is required?" We recognize the CPSC has been inundated with such questions, and we understand the challenges you face as outlined in the recent final rule regarding certificates. However, if you want to mitigate the impact of penalties on small businesses, you must find a way to provide small business more specific guidance on the technical aspects of compliance.

We would be happy to continue this dialogue with you.

*The Small Business Legislative Council (SBLC) is a permanent, independent coalition of over 60 trade and professional associations that share a common commitment to the future of small business. Our members represent the interests of small businesses in such diverse economic sectors as manufacturing, retailing, distribution, professional and technical services, construction, transportation, and agriculture. Our policies*

*are developed through a consensus among our membership. Individual associations may express their own views.*

John S Satagaj  
President and General Counsel  
Small Business Legislative Council  
1100 H Street NW Suite 540  
Washington DC 20005  
202-639-8500

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# Creative Catalog Concepts

*"Marketing Success for Specialty Product Industries"*

December 17, 2008

Office of the Secretary  
Consumer Product Safety Commission  
Room 502  
4330 East West Highway  
Bethesda, MD 20814

## Section 17(b)(2) Civil Penalty Criteria

To Whom It May Concern:

Thank you for requesting comments on civil penalty criteria for the Consumer Product Safety Improvement Act of 2008.

### **We are responsible for CPSIA compliance for hundreds of small retailers**

Creative Catalog Concepts LLC is a specialized advertising agency that develops product catalogs and websites for approximately 550 retailers of educational materials, specialty toys, and art materials. Most of our customers are small businesses in the United States. Our catalogs and websites feature thousands of children's products from a few hundred manufacturers. Most of the manufacturers are also small businesses in the United States.

We have worked hard to understand Section 105 and we have developed industry-wide hazard reporting templates and a tracking database. We care deeply about our retailer and manufacturer customers and their compliance with Section 105.

### **Comment #1: Defendant's role and power in the industry value chain should be considered to put potential violation in context**

The original FHSA primarily regulates manufacturers. The amended FHSA now affects all members of value chains in several industries including retailers, wholesale distributors, and manufacturers. In general, manufacturers have the most control over product safety and information, except when directed by large and powerful retailers. In general, small retailers are at the mercy of manufacturers to provide accurate product information. If a business violates any aspect of CPSIA, its position in the value chain should be considered to fairly determine culpability and administer justice.

For example, we believe it would be a more egregious violation of Section 105 for a manufacturer to omit a choking hazard warning on a website than for a retailer because the manufacturer is in control of its product line.

### **Comment #2: Non-compliant advertisements probably pose a relatively low severity of risk of injury**

If a catalog or website omits a choking hazard warning in a product advertisement, we would argue that the severity of risk of injury is low. First, a consumer would need to

purchase the product for the risk of injury to materialize. Second, if a consumer did purchase the product from a non-compliant advertisement, we believe the consumer would be adequately warned by the choking hazard warning printed on product packaging, as already required by FHSA. We believe that responsible consumers would simply return the product instead of ignoring the cautionary statements printed on product packaging.

Cautionary statements in advertisements are important, but we believe that the omission of such warnings poses a low severity of risk of injury relative to other potential violations of CPSIA.

**Comment #3: Feasibility, within reason, should also be a penalty factor**

Catalogs take time to print. Large catalogs may take 4 to 6 weeks “on press” alone, not counting the time it takes to design catalog pages. Cutoff dates are required and feasibility must be considered in some situations.

For example, if a retailer needs a catalog on January 5, it might need to send electronic files to its printer on December 17. It might need to finish accepting feedback from vendors on November 28 to complete the project on time. If a manufacturer notifies the retailer of a choking hazard on December 31, it is not feasible for the retailer to place the choking hazard warning in the catalog.

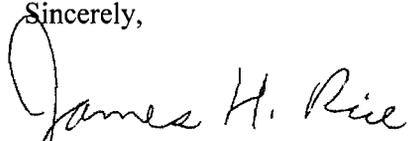
We humbly recommend that CPSC adds economic practicality and feasibility as a penalty factor. We do not believe it was Congress’ intent to force small businesses to decide between “comply” or “go out of business”, especially during this economic climate.

**Comment #4: Penalty formula or matrix is likely to be problematic for CPSC. We do not recommend it.**

We believe the penalty factors are comprehensive and fair, notwithstanding our comments above. However, we believe there are too many factors for CPSC to develop a practical penalty formula or matrix. After publishing such a formula or matrix with weightings, CPSC may find itself restricted when applying it to a specific case. The circumstances of any individual case could affect CPSC’s weightings on penalty criteria. In our opinion, CPSC should evaluate any violation of CPSIA in a case-by-case manner, continuing to balance safety, economic, legal, and environmental concerns. Over time, CPSC may develop a list of standard penalties for violations that seem similar and repetitive, and some of these could be formulaic based on a relevant subset of penalty criteria.

Thank you for your consideration.

Sincerely,

  
James H. Rice  
CEO  
Creative Catalog Concepts LLC

## Stevenson, Todd

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**From:** Jay Rice [jay@creativecatalogs.com]  
**Sent:** Wednesday, December 17, 2008 4:40 PM  
**To:** Civil Penalty Factors; Toro, Mary; Parisi, Barbara  
**Cc:** Mary Ann Everett  
**Subject:** Section 217(b)(2) Civil Penalty Criteria  
**Attachments:** CPSIA Civil Penalty Criteria-CCC response.pdf

To Whom It May Concern:

Thank you for requesting comments on Civil Penalty Criteria for CPSIA. Our comments are in the attached letter.

Sincerely,

James H. (Jay) Rice  
CEO  
Creative Catalog Concepts LLC  
2745 Rebecca Lane  
Orange City, FL 32763

Tel: (386) 774-8815  
Fax: (386) 774-9220  
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[www.creativecatalogs.com](http://www.creativecatalogs.com)

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Wald Pen

## Stevenson, Todd

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**From:** Rick Woldenberg [rwoldenberg@learningresources.com]  
**Sent:** Wednesday, December 17, 2008 11:00 AM  
**To:** Civil Penalty Factors  
**Cc:** Etienne Veber; Larry Lynn; dbrown@muchshelist.com; mjg@brown-gidding.com; Falvey, Cheryl; judith.bailey@mail.house.gov; Christian.Fjeld@mail.house.gov; brian.mccullough@mail.house.gov; shannon.weinberg@mail.house.gov; william.carty@mail.house.gov; brian\_hendricks@hutchison.senate.gov; Nord, Nancy; Martyak, Joseph; Moore, Thomas  
**Subject:** Section 217(b)(2) Civil Penalty Criteria

I am writing in response to the CPSC's Call for Comments on Civil Penalty Criteria under the Consumer Product Safety Improvement Act of 2008 (CPSIA). These comments are due on December 18, 2008.

General Remarks: We strongly urge the CPSC to reserve the imposition of penalties for only the most egregious and dangerous situations. Penalties under the CPSIA should NOT be to punish but instead to motivate better legal compliance. This is consistent with the mission of the CPSC - to protect the public. Notably, the CPSC does not have a mission to mete out "justice" so the use of penalties should be purposeful and not motivated by retribution. The CPSIA penalties can be used selectively to create compliance incentives when the facts demonstrate a need for such an incentive. We believe that the vast majority of safety incidents do not involve bad intentions or ill will so the need for "justice" will be infrequent. Penalties must be understood in light of the extremely high direct and indirect costs of any CPSC-imposed corrective action plan. Companies subject to corrective action plans incur tremendous costs in virtually all cases. Simple cases cost \$50,000 but most cases quickly pass \$100,000 in cost and skyrocket upward from there. The most notorious recalls in 2007 cost the affected companies tens of millions of dollars out of pocket - what would additional penalties accomplish? In addition, most companies experience commercial embarrassment and shame from these interactions, which must be seen as another form of high cost. The financial and other pain implicit in virtually any conflict with the CPSC typically accomplishes the mission of penalties - to modify behavior and ensure better future safety monitoring and legal compliance. In other cases (a factual inquiry), the CPSIA provides ample penalty firepower to up the ante and gain the cooperation of any recalcitrant company.

The complexity of the CPSIA is another factor which should be considered in penalty policy. In my experience, the CPSIA is too complex for most small and medium-sized companies to master - or even manage compliance with adequate resources. Perhaps the basics, the newspaper-worthy elements of the law, are clear but the rules are too sprawling and very specific. With so many rules to remember, properly implement and monitor across large product lines and evolving markets, and taking into account normal personnel ebb and flow affecting every company, the odds of complete compliance with this law is virtually nil at all times. Even Six Sigma companies (defined as organizations making 3.4 errors per 1,000,000 actions) will fail routinely to fully comply with the CPSIA if they are managing product lines of 500 items or more. At lower quality performance levels (even Five Sigma, 200 errors per 1,000,000 actions), regular full compliance will be impossible as a practical matter for virtually any product line over 25-50 products. [Typical competent companies are probably at Three Sigma or Four Sigma quality levels with experienced and knowledgeable personnel, and at lower levels after personnel turnover.] At the prevailing low value of most children's products, it is not possible for most (any?) children's product companies to invest the money in becoming Six Sigma companies - that's unrealistic on many levels. If this analysis is correct, good companies will now become serial violators of the law against their will and despite their constructive efforts and heavy compliance investments. It also implies that it will become much harder for the CPSC (or the public) to distinguish good companies from bad companies. We will all look "bad". If the complexity of the CPSIA essentially manufactures violations, the opportunity to penalize will rise exponentially - and if overused, will choke off markets and harm good companies. This is another strong argument against use of penalties except where there is a demonstrated (factual) need to ensure compliance in the future.

We are fearful that the power to impose high penalties will be used coercively by the CPSC, ending any notions that law-abiding companies can work openly and in partnership with the CPSC. At present, the CPSC encourages a practice of "when in doubt, file". In a regulatory environment where minimum penalties are \$100,000, how many companies will take up the CPSC's suggestion to file "when in doubt"? Only the crazy ones. To be a truly effective safety agency, the CPSC cannot set penalty policies in a vacuum. If the CPSC sees value in having good (open and cooperative) relations with the business community, it may have to demonstrate restraint in the use of penalties. For the vast majority of companies subject to regulation, this approach will work very well. The CPSC has the legal authority to impose recalls without the consent of the offending companies, so there is already a power imbalance favoring the CPSC. If penalties are used inappropriately, we believe a moral hazard will be created - there will be a perverse incentive to hide safety violations

(rather than disclose them) specifically out of fear of penalties. The CPSC cannot afford rules that discourage good and cooperative behavior.

Impact of Small and Medium-Sized Businesses: If imposed, penalties on the order of \$100,000 per violation will kill or severely damage many small and medium-sized companies. We do not see the purpose of such high penalties (as explained above). The best way to mitigate the impact of high penalties is not use them except in extreme situations. As noted, the cost to small and medium-sized companies of most corrective action plans is so high that behavior change will almost always follow. Penalties on small and medium-sized companies should be reserved for egregious conduct or a lack of appropriate cooperation. In these troublesome cases, where companies subject to a corrective action plan demonstrate an active disregard for the law or CPSC process, imposing a penalty to coerce better behavior might serve the interests of the public. We certainly believe penalties at the \$100,000 should be reserved for only the most shocking situations. At the levels specified in the CPSIA, penalties could be counter-productive with small and medium-sized companies, encouraging evasive and uncooperative behavior.

Penalty Factors Under Sec. 217(b)(2): We would like the CPSC to consider the interplay between (a) the nature of the product defect, (b) the occurrence or absence of injury, (c) empirical market data in the possession of the company. Companies must and do exercise business judgment in the daily administration of their affairs. We believe exercise of appropriate business judgment must be respected in any fair penalty scheme. This is an essentially factual inquiry using a "reasonable man" standard. Unfortunately, the listed factors might give the CPSC the opportunity to determine penalties using 20-20 hindsight ("you should have known . . ."). The problem with 20-20 hindsight is that it cannot be used prospectively - you have to know the unknowable. In light of the many "traps for the unwary" in the CPSIA, adding the impossible burden of satisfying 20-20 hindsight could drive more companies from the children's products market. As per my earlier comment letter, it is worth considering that one way to cure cancer is to kill the patient. I don't think we want to do that here.

There are cases where technical violations may occur (especially in a "when in doubt, file" situation) without the occurrence of any injuries. In this fact pattern, the absence of injury should be enough to justify no penalty - after all, the CPSC wants good companies to bring ambiguous issues to its attention early, so punishment for doing so should be very rare. In those cases, the economics of any corrective action plan must also be carefully weighed to not discourage further participation in the "when in doubt, file" program.

A more critical factor, in my view, is whether the company in question exercised good business judgment in its decision to sell or continue to sell the product. This would be a "reasonable man" standard and would take into account the need to exercise a duty of care toward consumers. Companies making consumer products must continually reassess what they know about their products and how they are being used in the field, and regularly remake the judgment that it is a responsible act to continue to sell their products. This takes into account that facts as they emerge can change what a "reasonable man" might think about his product - a reasonable decision to sell a product on "day one" could change if information is received later that suggests the presence of latent defects. We do not think it will benefit consumers or the market to make penalty rules so strict that companies must become entirely risk-averse in what they do. That would be a terrible overreaction to past recalls.

The factor "number of defective products distributed" is not as relevant as the other criteria, unless it has a knowledge component (knowingly distributed). In the case of latent defects, that is defects which were hidden at the time of initial sale (reasonable man standard), the number of defective products distributed can be rather large before discovery of the defect. I do not see that this factor is relevant in the absence of knowledge (including appropriate diligence).

All in all, the CPSC must be very careful to not create a menu of "gotcha" penalties. The CPSC's penalty policy or rules will be part of the "game play" between the regulators and the regulated companies. If the rules encourage cooperation, the CPSC has a chance to partner with industry to improve safety. If industry believes that penalties are viewed as a revenue source or are being handed out in a way disproportionate to the infraction, then interplay between industry and the CPSC will change for the worse. If the penalties are too great, companies will exit the business (find something less regulated to do) or start hiding infractions as a survival technique. This outcome would not contribute to the safety of American children, and must be carefully considered in crafting the CPSC's penalty policies.

Other Factors to Consider When Setting Penalties: We believe that penalties, if appropriate, are best set in light of the factual situation of each particular case. We do not like the notion of a menu of penalties, in part because it seems to suggest a price tag for bad behavior (encouraging dangerous behavior when it is a profitable "bet" to risk the penalty). As the saying goes, the penalty should fit the "crime" so careful case-by-case factual analysis and consideration of the purpose of the penalty should be part of any penalty decision.

We believe the additional factors listed in your call for comments (past record of compliance, timeliness (and quality/completeness) of response, safety and compliance monitoring (and procedures), cooperation and good faith, economic gain from noncompliance, and product failure rate) are all appropriate factors. We consider record of compliance, cooperation and good faith to be critical mitigating factors.

We recommend that the CPSC also take note of the investment of the company in legal compliance and safety monitoring. Many companies will engage experienced counsel to advise them on appropriate safety and compliance practices. They may establish written procedures to govern their practices. Careful recordkeeping, general management involvement and awareness of the laws are other indicia of good citizenship. We believe economic gain from noncompliance is rare (but egregious), as bad behavior is a poor business strategy for the long term. Finally, we are suspicious of the value of failure rates as a factor. Failure rates can vary based on many factors, and high rates may not be evidence of egregious conduct - it could equally well be innocent. The implication is that a high failure rate necessarily reflects on character, which we think is not always true.

Thank you for considering our views on this important subject.

Sincerely,

Richard Woldenberg  
Chairman  
Learning Resources, Inc.  
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Vernon Hills, IL 60061  
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Stevenson, Todd

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7 Set 217  
Civil Pen

**From:** Jody Arthur [happygirlucky@gmail.com]  
**Sent:** Thursday, December 18, 2008 11:56 PM  
**To:** Civil Penalty Factors  
**Subject:** Section 217(b)(2) Civil Penalty Criteria

**Section 217(b)(2) Civil Penalty Criteria**

Comments submitted by J. Arthur

In addition to the factors stated in the request for comments, the CPSC should consider and address the following items in its determination of the civil penalty factors specific to the CPSA:

1. The CPSIA has such a broad scope as to make it nearly impossible to implement in a fair and just manner in the timeframes established by Congress. To date, the CPSIA has provided very little guidance to help manufacturers spanning the broad spectrum of children's products understand, much less comply with the law as written. The law is broad in scope and too vague to provide sufficient guidance to manufacturers. And, given the thousands of different types of products to which it applies, it seem impossible to expect the CPSC to issue clear guidance for each type of industry. This lack of guidance in the short term and the overall level of specific guidance available in general should be considered when determining civil penalties for a manufacturer of children's product who may, through no purposeful disregard of the law, find themselves out of compliance with it.

**Manufacturers have a responsibility to comply with the law. However, the CPSC has the responsibility to implement the law in a way that helps manufacturers to understand how to comply. The adequacy of available guidance from the CPSC should be a factor in determining civil penalties.**

2. Another factor that is particularly relevant to this legislation is the appropriateness of the penalty in relation to the size of the business of the person charged. There are thousands of small, home-based businesses that are affected by this legislation, a fact that Congress likely did not consider when drafting this legislation. Or perhaps Congress was simply not interested in the CPSIA's impact on such businesses, which is what the decision to suspend the Regulatory Flexibility Act requirements for this legislation would seem to imply. Regardless, comments from more than 4500 small businesses, many of which are home-based sole proprietorships, can be found on a petition regarding the CPSIA, which can be viewed at:  
<http://www.ipetitions.com/petition/economicimpactsofCPSIA/index.html>

**Given the far-reaching impact of this legislation and to avoid unintended and devastating consequences to all businesses that manufacture children's products, the scale of the business must be considered in determining civil penalties.**



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8  
Sect 217  
Civil Pen

December 18, 2008

Todd A. Stevenson, Secretary  
Office of the Secretary  
U.S. Consumer Product Safety Commission  
Room 502  
4330 East West Highway  
Bethesda, MD 20814

Re: Section 217(b)(2) Civil Penalty Criteria

Dear Secretary Stevenson:

Please accept the following comments from the Retail Industry Leaders Association (RILA) on behalf of its members in response to the Consumer Product Safety Commission's ("Commission" or "CPSC") Request for Comments and Information; Section 217(b)(2), Civil Penalty Criteria, of the Consumer Product Safety Improvement Act ("CPSIA" or "Act"). Section 217(b)(2) of the CPSIA directs the Commission to issue final regulations interpreting the penalty factors described in section 20(b) of the Consumer Product Safety Act (15 U.S.C. 2069(b)), section 5(c)(3) of the Federal Hazardous Substances Act (15 U.S.C. 1264(c)(3)), and section 5(e)(2) of the Flammable Fabrics Act (15 U.S.C. 1194(e)(2)), as amended.

By way of background, RILA promotes consumer choice and economic freedom through public policy and industry operational excellence. Our members include the largest and fastest growing companies in the retail industry--retailers, product manufacturers, and service suppliers--which together account for more than \$1.5 trillion in annual sales. RILA members provide millions of jobs and operate more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

RILA applauds the Commission for soliciting public comments on how it should create guidelines for determining civil penalties for product safety violations. The Commission should take care to ensure the guidelines it adopts are sufficiently flexible to respond to the specific facts of each case, and ensure that penalties are proportionate to the severity of the violation and negligence. RILA also recommends that the Commission not adopt a penalty matrix as it would tend to limit the Commission's flexibility while it examines the specifics of each case. Civil penalties should not be assessed strictly on the basis of a company's size or the number of units recalled. Most importantly, civil penalties should be proportionate to the violation at hand.

## **Clear and Transparent Civil Penalty Criteria Are Critical**

RILA welcome's the Commission's effort to implement section 217(b)(2) of the CPSIA to promulgate clear, transparent, and critical guidance to industry and the public. RILA is in full support of regulations on civil penalties to aid the regulated industry and the public in understanding the criteria and rationale behind the Commission's penalty decisions. This is particularly needed now that the CPSIA has greatly increased maximum civil penalties. The criteria and rationale should be clear to all who are affected by and interested in government policies. Whether and what level of penalty might be assessed for failure to file or late filings of safety reports under section 15 of the Consumer Product Safety Act, as amended by section 214 of the CPSIA, for example, is critical information for the regulated community, consumers, and other interested parties.

At present, only Commission staff and a small coterie of lawyers have a good sense of what the Commission considers relevant in determining whether to seek penalties and the amounts. There are no public guidelines, though other government agencies have had such policies for many years. The CPSC penalty decisions, as incorporated in press releases and Federal Register announcements, do not provide specific or useful general explanations. Even experienced company staff and counsel are left to sift through the press releases to discern patterns relating to lateness of reporting, the number of products involved, and other factors that seem to be relevant. But in discussions with Commission staff these attempts to find patterns and precedent can be easily dismissed on the ground that outsiders cannot know relevant confidential information about particular uses.

Just as important as clear and transparent civil penalty guidelines is sufficient flexibility by the Commission to assess civil penalties. RILA believes that the Commission should not develop a matrix to determine penalties as this would hinder the Commission's ability to assess each case based on the facts at hand. The Commission has sufficient expertise in the area of assessing the severity of the case, a company's compliance and monitoring records, product failure rates and previous records of compliance, which are all factors that do not lend themselves well to a matrix. For the reasons stated above, RILA urges that the Commission not adopt a penalty matrix for the purpose of assessing civil penalties.

## **Size of Business as Mitigating Factor**

Section 217(b)(2) of the CPSIA includes language directing the Commission to issue penalties based on the "appropriateness of such penalty in relation to the size of the business of the person charged."

RILA members are the largest, most successful companies in the retail industry. These companies allocate considerable amounts of time and resources toward assuring the safety and quality of the products they sell, and they take great pride in promoting best practices among the industry in product safety as well as many other areas. RILA believes it is inappropriate to interpret section 217(b)(2) to be an aggravating factor under which the largest importers and manufacturers would always be more harshly penalized than smaller companies.

Instead, RILA believes this factor should be interpreted as a mitigating factor to reduce the burden in small and medium sized enterprises. RILA recognizes it is appropriate to take into account a company's size, the unique burdens placed on smaller retailers such as mom and pop stores, and a company's ability to pay as a mitigating factor.

### **Strong Safety and Compliance Records Should be Recognized and Rewarded**

The Commission should take into consideration companies that act in good faith and have effective safety and compliance programs. Retailers dedicate significant resources that focus specifically and solely on product safety. For example, some RILA members participate in the Commission's retailer reporting model whereby companies voluntarily notify the agency of consumer contacts regarding product safety. Many retailers also have fulsome monitoring programs in place to collect and analyze safety information and to evaluate reporting issues. These programs demonstrate companies' awareness of and commitment to safety issues, and a strong program should indicate to the Commission that the company makes significant efforts to prevent safety issues and promptly report any issues that do arise. All of these efforts promote best practices in the industry and should be recognized and encouraged by the Commission.

### **Cooperation and Good Faith**

The Commission should reward companies that cooperate with Commission staff and act in good faith both in general and with regard to the matter at issue. Companies that act in bad faith or consistently fail to report in the face of reasonable information that a report is required are the violators that deserve to be penalized and should be on notice that they are more likely to be the subject of a civil penalty than those firms that cooperate and act in good faith.

Likewise, as importers begin implementing third-party testing programs, there may be some instances where a product that initially tests as being compliant with new requirements is placed onto a store shelf, yet subsequent testing reveals some abnormalities or that the product has higher levels of lead or phthalates. In such instances, importers would immediately bring the results to the attention of Commission staff and consult on how to proceed. If the importer acted in good faith and, after having received subsequent testing information contradicting earlier results which it shared it with Commission staff, the Commission should encourage information sharing between the private sector and its regulator and not unduly penalize the company if violations are found.

Finally, RILA also supports a six-month grace period for enforcement of the new penalties for violations of the new standards, if they are not intentional, and if the company cooperated and acted in good faith. Recognizing the significant difficulties industry is facing to implement provisions of the CPSIA, this proposed grace period would encourage dialogue between the Commission and good actors while alleviating some resources to focus on bad actors in the industry.

**Conclusion**

RILA members place the highest priority on ensuring the safety of their customers and the products they sell, and RILA appreciates this opportunity to comment on the Commission's Request for Comments and Information; Section 217(b)(2), Civil Penalty Criteria. Should you have any questions about the comments as submitted, please don't hesitate to contact me by phone at (703) 600-2046 or by email at [stephanie.lester@rila.org](mailto:stephanie.lester@rila.org).

Respectfully submitted,

A handwritten signature in black ink that reads "Stephanie Lester". The signature is written in a cursive style with a long horizontal flourish at the end.

Stephanie Lester  
Vice President, International Trade

## Stevenson, Todd

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**From:** Andrew Szente [Andrew.Szente@retail-leaders.org]  
**Sent:** Thursday, December 18, 2008 5:03 PM  
**To:** Civil Penalty Factors  
**Cc:** Falvey, Cheryl; stephanie.lester@rila.org  
**Subject:** Section 217(b)(2) Civil Penalty Criteria, comments by the Retail Industry Leaders Association (RILA)  
**Attachments:** RILA Civil Penalty Comments to the CPSC 12 18 08.pdf

Dear Secretary Stevenson,

Please find attached comments by the Retail Industry Leaders Association (RILA) in response to the Commission's request for comments and information regarding section 217(b)(2), civil penalty criteria, of the CPSIA. Thank you for your consideration and please let me know if you have any questions about the submission.

Sincerely,  
Andrew Szente

Andrew E. Szente  
Director, Government Affairs  
Retail Industry Leaders Association (RILA)  
1700 N. Moore St., Ste. 2250, Arlington, VA 22209  
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9 Sect 217 Civil Penalty

**\*Consumers Union \* Consumer Federation of America\***  
**\* Kids in Danger \* National Research Center for Women & Families**  
**\* Public Citizen \***

December 18, 2008

Office of the Secretary  
Consumer Product Safety Commission  
Room 502  
4330 East-West Highway  
Bethesda, Maryland 20814  
Via: [civilpenaltyfactors@cpsc.gov](mailto:civilpenaltyfactors@cpsc.gov)  
Facsimile: (301) 504-0127

Comments of  
Consumers Union, Consumer Federation of America, Kids in Danger, National Research Center  
for Women & Families, and Public Citizen  
Regarding Civil Penalty Criteria Under Section 217(b)(2) of the  
Consumer Product Safety Improvement Act

Introduction

Public Citizen, joined by Consumers Union of U.S., Inc. (CU), Consumer Federation of America (CFA), Kids in Danger, and National Research Center for Women & Families (jointly "We") offer comments concerning criteria to be considered in determining the amount of civil penalties under section 217(b)(2) of the Consumer Product Safety Improvement Act of 2008, Public Law 110-314, (CPSIA). The language in the request for comments indicates that the CPSC is inclined to review or adopt the civil penalty factors which were set forth in a 2006 proposed interpretative rule (71 Fed. Reg. 39,248 (July 12, 2006)), for which the Consumer Product Safety Commission did not issue a final rule. We strongly support the effort to establish criteria in determining the amount of civil penalties to issue to entities who fail to report defective products. However, we question whether certain suggested factors contained in the request for comments and the 2006 proposed rule will reasonably deter reporting violations by CPSC-regulated entities. We also offer other factors for the CPSC to consider in determining appropriate penalty amounts.

Background

The CPSIA Section 217 amends the civil penalty provisions in section 20(b) of the Consumer Product Safety Act (CPSA), section 5(c)(3) of the Federal Hazardous Substances Act (FHSA), and section 5(e)(2) of the Flammable Fabrics Act (FFA). The CPSIA Section 217(a) increases the maximum civil penalties from \$8,000 to \$100,000 for each violation under the CPSA, FHSA, and FFA and from \$1.825 million to \$15 million for a related series of violations. Section 217(b)(2) requires that within one year of the date of enactment, the Commission issue a final regulation providing its interpretation of factors that it will take into account when determining civil penalty amounts.

The CPSA, FHSA, and FFA provide specific factors for determining penalties and they grant the CPSC authority to determine “other factors as appropriate.” The “other factors” listed in the CPSC staff’s request for comments are also contained in the Commission’s 2006 proposed interpretative rule. These other factors are: previous record of compliance, timeliness of response, safety and compliance monitoring, cooperation and good faith, economic gain from non-compliance, and product failure rate.

In addition, as stated above, the CPSIA substantially increases the amount of civil penalties that the Commission is authorized to issue. These penalties were increased to deter regulated entities from breaking the law and placing harmful consumer products on store shelves. Therefore, it is imperative that the CPSC set fair rules that will ensure that penalties are issued on a basis that will help it to achieve its purpose.

### Recommendations

We urge the CPSC to adopt the following recommendations in setting forth criteria to determine civil penalties for violations of the CPSA, FHSA, and FFA:

#### General Recommendations

Civil penalties are meant to be an effective deterrent against violations of the law. Such penalties should discourage manufacturers from taking risks with products that might injure or kill consumers or result in costly property damage and encourage manufacturers to report potential product safety hazards as soon as they learn about them. Civil penalties will fail to further the purposes of the Act and fail to protect consumers if they are insufficient to induce compliance with the law. Further, in many instances the cost of complying with the law exceeds the amount of the civil penalty typically assessed by the CPSC. For these reasons, the CPSC must use its new authority to apply higher penalties for violations. The higher fines will increase the incentive to report potential product hazards in a timely manner and encourage compliance with consumer product safety laws and regulations as well.

#### Information the Commission Should Consider Under Each Factor:

Under the factors set out in the CPSIA, the CPSC should always consider the number of consumers injured or killed; the number of consumers based on the products distributed that could potentially be harmed; and the cost and extent of property damage caused by the violation.

#### “Other” Factors to Consider

1) The Commission lists “economic gain from noncompliance” as a factor to consider in assessing penalty amounts. We agree. Economic benefit should be a primary factor in such an assessment, and the Commission should consider potential economic benefits in addition to actual gains. Economic benefits include avoided costs, where the company determines that it is more expensive to comply with the federal law than it is to keep harmful products on the shelves. In addition, the Commission should consider the possible pecuniary benefits of a delay in

reporting harmful products or a delay in remedying other legal violations. The Commission should further consider other possible benefits of noncompliance, such as avoiding damage to a name brand by keeping hazardous products a secret from the CPSC and the public. In essence, the Commission should ensure that penalties for violations outweigh all potential benefits of noncompliance.

2) The Commission would like to consider the violator's "previous record of compliance." The CPSC seems inclined to consider the violator's past good behavior. We recommend that the CPSC consider the history of violations as well. Whether an entity is a repeat offender, including the violator's past record of wrongdoing, the number of prior violations, the number of past recalls of the firm's harmful products (even if the products are unrelated to the current violating product), and the dollar amount of penalties previously imposed on the firm should be considered.

3) The Commission also lists as a factor a firm's "timeliness of response" and how "quickly" it responded to relevant information. The Commission must also consider the length of time that a company waited before it reported a violation. Penalties must be significantly higher for companies that knew or should have known of violations, but failed to report the information to the CPSC and the public in a reasonable amount of time. Further, CPSC should consider the amount of time the violator knowingly and unknowingly put the public at risk, while continuing to benefit from the sale of the product.

4) The Commission suggests that a company's adoption of a "safety and compliance monitoring" system should be a factor in considering penalties. We also suggest that the Commission consider the effectiveness of compliance systems. The mere existence of an internal monitoring system should not be a factor if companies fail to use the diligence and resources required to establish monitoring programs that work. The Commission should also consider a firm's failure to adopt a safety and compliance monitoring program. Companies should have a reliable system that would help them to reasonably monitor their products' safety and help them to timely report product defects and other CPSIA violations to the CPSC and to the public.

5) The Commission proposes a company's "cooperation and good faith" as criteria in determining penalties. Cooperation and good faith with a federal agency should be expected of all regulated entities and should not be used to justify "awards" of lower penalties. The criteria should be used to determine whether the companies in fact failed to cooperate or act with good faith in accordance with CPSC-related laws and regulations.

6) The Commission suggests using "product failure rate" as a factor in considering the amount of civil penalties. The 2006 proposed interpretative rule states that the "Commission and the staff may consider the reasonably expected rate of failure for that type of product over time." This factor should be clarified to state that regulated entities should not be excused from reporting hazards merely because they have determined on their own that their products have a low rate of failure. It is the Commission and not the violator who may consider the reasonableness of a product failure rate. Further, a product's failure rate should be irrelevant where the harm or potential for harm from its use is substantial.

7) The company's negligence should be considered. The CPSC should take into account the company's degree of fault in violating the law, or the failure to correct a violation.

Whether the Commission Should Develop a Formula or Matrix to Weigh Factors

The list of factors enumerated in the CPSIA as well as the Commission's upcoming interpretation of factors will provide a sufficient guide for determining civil penalties and will provide notice to regulated entities of the potential consequence of unlawful actions. In addition, a formula may have been more useful if there was no limit on the amount of potential penalties that could be rendered. However, the CPSIA specifically provides a ceiling on the amount of civil penalties that the Commission is authorized to issue. Therefore, a specific formula is probably unnecessary. From a safety perspective, it is better to deny entities the ability to do a specific cost-effective analysis to determine whether penalties will or will not outweigh the cost of a product recall or other rehabilitative actions.

Information in Determining How to Mitigate Adverse Economic Impact on Small Business

All suppliers of consumer products, including small businesses, should comply with federal law to ensure the public's health and safety. Small businesses will probably have smaller distribution and less occurrences of harm, which will factor into the Commission's determination of penalties. In addition, we also suggest that to further aid small businesses, the CPSC offer a delayed payment schedule with interest for businesses in need of assistance.

Conclusion

For the foregoing reasons, we urge the Commission to adopt these recommendations in its implementation of section 217(b)(2) of the CPSIA.

Respectfully submitted,

David Arkush  
Director, Congress Watch  
Public Citizen

Janell Mayo Duncan  
Senior Counsel  
Consumers Union

Donald L. Mays  
Senior Director, Product Safety & Technical Public Policy  
Consumers Union

Rachel Weintraub  
Director of Product Safety and Senior Counsel  
Consumer Federation of America

Nancy A. Cowles  
Executive Director  
Kids in Danger

Diana Zuckerman  
President  
National Center for Women & Families

## Stevenson, Todd

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**From:** Christine Hines [chines@citizen.org]  
**Sent:** Thursday, December 18, 2008 10:09 AM  
**To:** Civil Penalty Factors  
**Subject:** Section 217(b)(2) Civil Penalty Criteria  
**Attachments:** civil\_penalty\_factors\_PC.pdf

Dear Sir or Madam,

Attached in a PDF document are the joint Comments of Consumers Union, Consumer Federation of America, Kids in Danger, National Research Center for Women & Families, and Public Citizen regarding Civil Penalty Criteria Under Section 217(b)(2) of the Consumer Product Safety Improvement Act.

Thank you for the opportunity to provide comments. Please let us know if you have any questions.

Sincerely,

Christine Hines  
Consumer and Civil Justice Counsel  
Public Citizen's Congress Watch  
215 Pennsylvania Ave., SE  
Washington, D.C. 20003  
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[www.thewatchdogblog.org](http://www.thewatchdogblog.org)



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December 18, 2008

Mr. Todd Stevenson  
Office of the Secretary  
U.S. Consumer Product Safety Commission  
4330 East West Highway  
Bethesda, MD 20814

Dear Mr. Stevenson:

**AHAM Comments on Section 217(b)(2) Civil Penalty Criteria**

The Consumer Product Safety Commission (“Commission” or “CPSC”) invited comments on § 217(b)(2) of the Consumer Product Safety Improvement Act (“CPSIA”), Public Law 110-314, which directs the Commission to issue a regulation interpreting the civil penalty factors as amended by the CPSIA, and to list any other factors the Commission will consider in setting civil penalties. We commend the CPSC for soliciting comments. The Association of Home Appliance Manufacturers (“AHAM”) has long been a proponent of a more fully elaborated, but flexible penalty regulation.

**I. Clear And Transparent Civil Penalty Criteria Are Critical.**

AHAM is in full support of efforts that will aid the regulated industry and the public in understanding the criteria and rationale behind the Commission’s penalty decisions. This is particularly needed now that the CPSIA has greatly increased maximum civil penalties. A government agency should act in a transparent manner. The criteria and rationale for critical actions should be clear to all who are affected by and interested in government policies. Whether and what level of penalty might be assessed for failure to file or late filings of safety reports under § 15 of the Consumer Product Safety Act, as amended by § 214 of the CPSIA, for example, is critical information for the regulated community, consumers, and other interested parties.

At present, only Commission staff and a small coterie of lawyers and larger company in-house safety staff have a good sense of what the Commission considers relevant in determining whether to seek penalties and the amounts. There are no public guidelines, though other government agencies have had such policies for many years. The CPSC penalty decisions, as incorporated in press releases and Federal Register announcements, do not provide specific or useful general explanations. Even experienced company staff and counsel are left to sift through the press releases to discern patterns relating to lateness of reporting, the number of products involved, and other factors that seem to be relevant. But in discussions with Commission staff

these attempts to find patterns and precedent can be easily dismissed on the ground that outsiders cannot know relevant confidential information about particular uses.

In 2006, the Commission proposed an Interpretative Rule on its penalty policy. AHAM, along with other regulated parties, fully supported the Commission's efforts at that time.<sup>1/</sup> It is unfortunate that the proposed rule was not adopted by the Commission. The CPSIA, through its mandate to the Commission in § 217(b)(2), renews the opportunity for the CPSC to promulgate clear, transparent, and critical guidance to industry and the public.

## II. The Commission Should Consider A Variety Of Factors.

### A. Mandatory Factors

The civil penalty factors, as amended by the CPSIA, are: 1) the nature, circumstances, extent, and gravity of the violation, including; 2) the nature of the product defect; 3) the severity of the risk of injury; 4) the occurrence or absence of injury; 5) the number of defective products distributed; 6) the appropriateness of such penalty in relation to the size of business of the person charged, including how to mitigate undue adverse economic impacts on small businesses; and 7) such other factors as appropriate. These factors are slightly different in the Federal Hazardous Substances Act and the Flammable Fabrics Act, but are substantially similar, and the Commission outlined the distinctions in its Request for Comments and Information. With regard to these mandatory factors, AHAM believes that the Commission should take a holistic, comprehensive approach rather than focus on one or more specific factors or unduly weighing them. Penalty determinations should not be made in a formulaic fashion.

#### 1. *Nature Of The Product Defect*

When evaluating the nature of the product defect, the Commission should consider the particular product at issue. Rates of replacement and repair vary for different product categories and the component parts that make up each product. The Commission should consider replacement and repair rates when it considers the nature of the defect. The Commission should consider factors such as whether the defect was caused by (a) the owner's failure to properly maintain the product; (b) the owner's misuse and/or abuse of the product; and/or (c) the owner ignoring safety guidelines or warnings issued with the product.

#### 2. *Severity Of The Risk Of Injury*

When evaluating the severity of the risk of injury, the Commission should specifically consider the likelihood that a serious injury will occur.<sup>2/</sup> Part of this analysis should include the

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<sup>1/</sup> See AHAM Comments on Proposed Interpretative Rule on CPSC Penalty Policy (Aug. 11, 2006).

<sup>2/</sup> See 16 C.F.R. § 1115.12(g)(1)(iii) ("In considering the likelihood of any injury the Commission and the staff will consider the number of injuries reported to have occurred, the intended or reasonably foreseeable use or misuse of the product, and the population group exposed to the product (e.g., children, elderly, handicapped).").

product's failure rate, which we address below in section B.5. In instances where the product failure rate is low, the risk of injury is likely to also be low. If an injury has occurred, this factor should also be considered when the Commission evaluates the "occurrence or absence of injury" factor. The Commission should also consider the relative product life-span and frequency of product use to determine the risk level.

### 3. *The Number of Defective Products Distributed*

When taking into account the number of defective products distributed, the Commission should find out how many defective products are likely to remain in consumers' hands.<sup>3/</sup> The Commission should work with the firm to assess the number of products that consumers are likely to take out of service, dispose of, or restrict their use away from the at-risk population. The determination should be based on reasonable considerations of product life and self-help, not just the present "recall effectiveness" calculation.

## B. Factors The Commission Proposes

In addition to the mandatory factors listed in the CPSIA, the Commission has suggested the following factors: 1) previous record of compliance; 2) timeliness of response; 3) safety and compliance monitoring; 4) cooperation and good faith; 5) economic gain from noncompliance; and 6) product failure rate. *See* Civil Penalty Criteria, Section 217(b)(2) of the Consumer Product Safety Improvement Act ("CPSIA"), Request for Comments and Information. AHAM supports consideration of those factors in addition to the factors listed in the statute. The factors should be clearly stated in order to give the regulated industry and the public guidance as to what the Commission will be considering when it examines those factors.

### 1. *Previous Record Of Compliance*

In considering a firm's previous record of compliance, the Commission should examine whether the violation is a first offense. A firm that is a repeat offender should be subject to a higher penalty than a firm that has committed its first offense. In instances where the firm is not a first offender, the Commission should also examine whether the firm has improved its compliance with applicable safety requirements after prior violations.

### 2. *Timeliness Of Response*

When evaluating the timeliness of a firm's response, the Commission should consider the length of the delay between the firm becoming aware of the violation and the firm reporting the violation. Firms should be encouraged to report in a timely manner, as soon as it is reasonable to determine that reporting is appropriate. When evaluating this factor, the Commission should consider the complexity of the information involved and how it relates to other information the

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<sup>3/</sup> The Commission has previously recognized the importance of this factor. *See* Substantial Product Hazard Reports, 71 Fed. Reg. 42,028, 42030 (July 25, 2006) ("When a potential hazard first appears long after a product was sold, however, the more relevant number is not the number of products originally sold but the number still with consumers.").

firm possesses. The Commission should acknowledge that testing or an investigation of the violation may be an adequate response rather than immediate reporting to the Commission if the early information does not appear to reasonably support a conclusion that a violation has occurred. In other words, the Commission should review the timeliness of the firm's response from the firm's perspective at the time it first received information about a potential violation, rather than taking a hindsight approach to evaluate the timeliness of a firm's response.

The Commission should also consider the extent to which injuries might have been prevented by more timely reporting. If a firm's delay in reporting a violation to the Commission after becoming aware of the violation caused a substantial number of additional injuries, that firm should be on notice that it may be more likely than a firm whose delay caused few or no additional injuries to be the subject of a civil penalty. If, however, a firm shows good faith, the Commission should consider that the firm's reason for delay may be the result of factors beyond the firm's control such as product testing and time lags in receiving the product back for analysis. Such delays may especially occur when firms engage third party testing laboratories, which are increasingly tied up with other product safety related business.

### 3. *Safety And Compliance Monitoring*

The Commission should give credit to firms that have effective systems for collecting and analyzing safety information and for evaluating reporting issues. It is clearly in the public's and the CPSC's interest to encourage manufacturers to develop and use product safety and compliance monitoring business processes not only to minimize the creation of unsafe product designs, but also to thoroughly analyze product failures in the field to determine if the product contains a defect that caused a failure (including analysis of the severity of the potential risk). Such programs demonstrate a firm's awareness of and commitment to safety issues, and a strong program should indicate to the Commission that the firm makes significant efforts to prevent safety issues and promptly report any issues that do arise. Firms that have a documented plan for monitoring and responding to reports should be encouraged.

### 4. *Cooperation And Good Faith*

The CPSC should reward firms that cooperate with the Commission staff and act in good faith both in general and with regard to the matter at issue. Firms that act in bad faith or consistently fail to report in the face of reasonable information that a report is required are the firms that deserve to be penalized and that should be on notice that they are more likely to be the subject of a civil penalty than those firms that cooperate and act in good faith.

### 5. *Product Failure Rate*

Firms that consistently have higher safety-related failures than other firms that produce the same products should be on notice that they are more likely to be the subject of a civil penalty than firms that have lower rates of safety-related failures. But this does require consideration where information is available for qualifying product life and normal failure rates; certain product categories or product components are expected to have varying rates of replacement and repair. It is important to compare some of the reported incidents against normal

end-of-life failure as well as wear and tear on the product. The Commission should also consider whether the cause of the incident was related to substantial abuse of the product. While companies should anticipate some elements of normal abuse, each manufacturer is continuously learning from new products. The Commission should also consider whether the product incorporates a completely new technology for which known failure rates are not currently known.

### C. Additional Factors AHAM Proposes

AHAM proposes that the Commission also consider: 1) the violator's degree of culpability; and 2) the product's compliance with relevant standards.

#### 1. *Violator's Degree Of Culpability*

The Commission should consider how culpable the violator was in the violation. Generally, the Commission should examine the knowledge the violator had before reporting, and what finally prompted the violator to report. Specifically, the Commission should consider whether the firm reported the violation before being prompted to do so, whether the delay in reporting the violation was lengthy, and whether the firm was aware of other firms having reported under similar circumstances. A violator who tries to hide a known violation and reports only when the Commission prompts it to do so should be subject to a higher penalty than a violator who promptly reports a violation when it becomes known. On the other hand, a firm should be credited with good faith when it shows that it engaged in a reasonable and meaningful internal review and dialogue regarding safety issues which resulted in a decision not to report even if, in hindsight, the Commission determines that decision to be incorrect. The violator's degree of culpability can be considered as a separate factor or along with the Commission's suggested factor examining the timeliness of the response.

#### 2. *The Product's Compliance With Relevant Standards*

Many products, including several home appliances, are subject to voluntary and/or mandatory standards. Voluntary standards are developed by and vetted through industry and public groups often with significant CPSC input and often are quite rigorous. The Commission should consider whether the product at issue complies with relevant mandatory or voluntary standards. Manufacturers that make products that do not comply with voluntary or mandatory standards should be on notice that they may be more likely be subject to a civil penalty than manufacturers that produce products that do comply with applicable standards.

### **III. The Commission Should Not Develop A Formula Or Matrix To Weigh The Penalty Factors.**

The Commission sought comment on whether it should develop a formula or matrix to weigh any or all of the penalty factors. It also sought comment on what criteria it should use in any weighting formula or matrix. AHAM does not support the use of a formula or matrix to weigh factors in a penalty determination.

The rigidity of a formula does not provide the Commission with the flexibility it needs to fairly determine penalty levels. Although the idea behind a formula is a good one, i.e., to promote even-handed application of the penalty factors, it is unlikely that a formula will have that result in practice. A formula will remove the Commission's capability to consider each case and its unique circumstances and will instead force every firm into a box.<sup>4/</sup> The mandatory factors and the additional factors suggested for consideration by the CPSC and AHAM are difficult to quantify and a formula or matrix would create the perception of more rigorous quantification than will occur. In the future, as the CPSC gains experience with applying these civil penalty factors, and develops an explanatory rationale, a more formulaic approach may be considered.

**IV. The Commission Should Mitigate Adverse Economic Impact On All Firms, Including Smaller And Medium Size Businesses.**

The Commission sought comment on what information it should consider in determining how to mitigate the adverse economic impact of a particular penalty on small businesses. The adverse economic impact should be considered for all firms. Whether a firm is a small or medium size business is relevant to a penalty determination but should be considered in the context of the industry it competes in not some predetermined formula. The Commission should consider a firm's, including small or medium size business's, ability to pay in determining the penalty assessment. The Commission should also consider the economic impact of a penalty on a business, regardless of the firm's size.

\* \* \*

AHAM appreciates the opportunity to file these comments and looks forward to the Commission's notice of proposed rulemaking on this subject. We would be glad to provide further information as requested.

Respectfully submitted,



Wayne Morris  
Vice President, Division Services

Cc: Ms. Cheryl Falvey, General Counsel  
Mr. John G. Mullan, Director of Compliance

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<sup>4/</sup> Congress intended the penalty factors to be flexible. *See* 20 Cong. Rec. H11341 (daily ed. Oct. 9, 2007) (statement of Rep. Rush) ("Furthermore, the bill, as amended in this subcommittee, renders the factors used in assessing the amount of penalties more expansive and flexible . . . This flexibility will allow the commission to take into account factors such as whether the manufacturer is a recidivist or a first-time offender when imposing these civil penalties.").

## Stevenson, Todd

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**From:** Morris, Wayne [WMorris@AHAM.org]  
**Sent:** Thursday, December 18, 2008 4:57 PM  
**To:** Stevenson, Todd; Civil Penalty Factors  
**Cc:** Falvey, Cheryl; Mullan, John  
**Subject:** AHAM Response on Penalty Policy  
**Attachments:** AHAM Response PenaltyPolicy\_121808.pdf

Mr. Stevenson,

Enclosed is the response from AHAM to the CPSC Request for Information on the Penalty Policy. We thank you for the opportunity to comment on this important part of the CPSIA and we believe that the adoption of such a policy will enhance the work of the Agency.

If there are any questions, please contact me.

Kind regards,

**Wayne Morris**  
**Vice President, Division Services**  
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December 18, 2008

Todd A. Stevenson  
Secretary  
Consumer Product Safety Commission  
4330 East-West Highway  
Room 502  
Bethesda, MD 20814

RE: Comments on CPSIA Section 217(b)(2) Civil Penalty Criteria

Dear Mr. Stevenson:

The following comments are submitted on behalf of the National Retail Federation (NRF) in response to the Consumer Product Safety Commission's (CPSC) Request for Comments on Section 217(b)(2) of the Consumer Product Safety Improvement Act (CPSIA). NRF strongly encourages the CPSC to develop clear and concise policies and criteria with regards to the administration of civil penalties.

By way of background, the NRF is the world's largest retail trade association, with membership that comprises all retail formats and channels of distribution including department, specialty, discount, catalog, Internet, independent stores, chain restaurants, drug stores and grocery stores as well as the industry's key trading partners of retail goods and services. NRF represents an industry with more than 1.6 million U.S. retail companies, more than 25 million employees - about one in five American workers - and 2007 sales of \$4.5 trillion. As the industry umbrella group, NRF also represents more than 100 state, national and international retail associations.

## Overview

NRF strongly supports the efforts of the CPSC to clearly define the criteria used to administer civil penalties. It is critical that both industry and the general public fully understand how the CPSC determines the levels of civil penalties that may be assessed upon businesses that violate CPSC administered laws. This is especially important now as the CPSIA includes many new requirements for retailers and manufacturers. Penalty decisions cannot be made in a vacuum. There are numerous factors that should be considered, as identified in Section 217(b)(2) of the CPSIA. We believe that the factors identified in the CPSIA as well as the factors identified by industry's response to the CPSC's request for comments should be considered in whole and not individually. It is critical that any penalty policy consider all of the factors involved.

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We believe there should be a grace period from civil penalties during the initial 6 months of each new requirement, except in cases of intentional violations or violations which occurred due to gross negligence. The new CPSIA regulations are exceedingly complex, and in many cases are being applied to products that were ordered and manufactured before the law was even enacted. This argues for a phase-in period for the civil penalties.

### **Information the Commission should consider under each factor**

As amended by the CPSIA, the civil penalty factors to be considered by the CPSC are the nature, circumstances, extent, and gravity of the violation, including: 1) the nature of the product defect; 2) the severity of the risk of injury; 3) the occurrence or absence of injury; 4) the number of defective products distributed; 5) the appropriateness of such penalty in relation to the size of business of the person charged, including how to mitigate undue adverse economic impacts on small businesses; and 6) other such other factors as appropriate. These are all important factors that need to be considered as a whole when the CPSC is deciding upon a civil penalty.

- **Nature of the Product Defect** – It is important for the CPSC to determine what the actual defect is with regards to the product when considering a penalty decision. Was this a case of mislabeling, failure to meet specific standards for lead or some other defect? Was this a case of a new requirement under the CPSIA or an older requirement that was violated? There are still significant questions and guidance required by industry to comply with the new CPSIA requirements. There are numerous factors that should be considered for this point.
- **Severity of the Risk of Injury** – Here again there are numerous factors that the CPSC needs to take into consideration. There are varying degrees of the risk of injury due to a product defect that requires a recall. Some factors include the age level of the target market for the consumer product and the risk of injury through reasonable use and abuse of the product. The Commission should also consider the relative life-span of the product to determine the risk level. If an injury has occurred, this factor should also be considered when the Commission evaluates the “occurrence or absence of injury” factor.
- **Occurrence or Absence of Injury** – This is important to consider as part of the penalty policy. The CPSC should evaluate whether or not an injury has occurred and the severity of the injury in determining a potential civil penalty, in conjunction with the other factors.
- **The Number of Defective Products Distributed** - Under this factor, the CPSC should evaluate the number of injuries relative to the total number of products distributed.

- **Appropriateness of Penalty in Relation to the Size of Business** – This is a critical factor for the CPSC to consider when determining a civil penalty. All parties are subject to the same standard for purposes of determining whether a violation has occurred. After a finding of a violation, when determining the level of a civil penalty, the CPSC should consider the potential impact of the civil penalty on the business. Because a large civil penalty could have a significantly greater impact on the smaller businesses, retailers and manufacturers, the CPSC should consider the size of a business as a mitigating factor in determining the amount of a civil penalty. A civil penalty that could effectively shut down a small business should not be contemplated.

**Information about what other factors are appropriate to consider, including:**

In its request for comments, the CPSC has suggested additional factors to consider when determining a civil penalty: 1) previous record of compliance; 2) timeliness of response; 3) safety and compliance monitoring; 4) cooperation and good faith; 5) economic gain from noncompliance; and 6) product failure rate. While these additional factors can give an indication of the responsiveness of a company, it must be understood that not all recalls or violations will be the same.

The goal of civil penalties should be to encourage companies to implement strong compliance programs and to promptly correct any inadvertent non-compliance issues; therefore civil penalties should be significantly mitigated for companies which are trying to do the right thing. The focus should be on the nature of the violation and not on an individual factor. NRF believes these additional factors should be considered as mitigating factors when determining whether to issue a civil penalty and the amount of the civil penalty.

**Whether the Commission should develop a formula or matrix to weigh any or all of the various factors and the criteria it should use in any weighing formula or matrix.**

While developing a formula or matrix to weigh the numerous factors for determining a civil penalty seems like an easy way to make determinations, there are some concerns that such an approach would remove any subjectivity from the final determination. The determination for a civil penalty cannot be solely based on plugging numbers into a formula. Each factor must be considered carefully when arriving at a final decision. Each case that comes before the CPSC will have its unique circumstances that cannot be easily addressed by a simple formula or matrix. The CPSC needs to be flexible in its consideration of the totality of the factors when making a final determination. A matrix or formula will not allow that flexibility to occur.

**Information the Commission should consider in determining how to mitigate the adverse economic impact of a particular penalty on small business.**

The penalty should be commensurate with the violation, regardless of the size of the business, but special considerations must be taken into account for smaller businesses. As stated above in the "Appropriateness of Penalty in Relation to the Size of Business," the CPSC must take into consideration all factors and information

regarding small and medium sized businesses when determining the amount of a civil penalty. The penalty should not be of the size that would force a particular company to go out of business.

## **Conclusion**

NRF welcomes the opportunity to share our thoughts on the development of a clear and concise policy for the determination of civil penalties. It is important for the CPSC to consider all of the factors before deciding upon a civil penalty. It is also important for the CPSC to understand that decisions cannot be made in a vacuum and that there should not be a one size fits all approach to civil penalty determinations.

We appreciate the opportunity to provide input on this important issue. If you have any questions, please contact Jonathan Gold ([goldj@nrf.com](mailto:goldj@nrf.com)), NRF's Vice President, Supply Chain and Customs Policy in the NRF office.

Sincerely,

A handwritten signature in black ink that reads "Steve Pfister". The signature is written in a cursive, flowing style.

Steve Pfister  
Senior Vice President  
Government Relations

**Stevenson, Todd**

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**From:** Gold, Jon [GoldJ@NRF.com]  
**Sent:** Thursday, December 18, 2008 4:42 PM  
**To:** Civil Penalty Factors  
**Subject:** Section 217(b)(2) Civil Penalty Criteria  
**Attachments:** NRF Final Comments on Section 217 Civil Penalties 121808.pdf

Attached please find comments from the National Retail Federation. If you have any questions, please contact me in the NRF Office. Thank you for your consideration.

<<NRF Final Comments on Section 217 Civil Penalties 121808.pdf>>

Jonathan E. Gold  
Vice President, Supply Chain and Customs Policy  
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**Sheila A. Millar**  
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December 18, 2008

**Via Electronic Mail**

Todd A. Stevenson  
Director, Office of the Secretary  
U.S. Consumer Product Safety Commission  
4330 East-West Highway  
Room 502  
Bethesda, MD 20814

**Re: Section 217(b)(2) Civil Penalty Criteria**

Dear Mr. Stevenson:

Thank you for the opportunity to submit comments on a possible regulation interpreting the civil penalty factors under the laws administered by the Consumer Product Safety Commission (CPSC) pursuant to § 217(b)(2) of the Consumer Product Safety Improvement Act ("CPSIA"), Public Law 110-314. The Fashion Jewelry Trade Association (FJTA) supports adoption of a civil penalty policy and provides these comments on the specific suggestions outlined by the Commission. We believe that a clear, transparent but flexible framework will help the Commission, industry, and ultimately the consuming public promote a safer consumer product marketplace. While clarity on the factors considered is vital, a one-size-fits all approach is simply unworkable in practice. Consequently a formula or matrix is both undesirable and likely to be unfair.

The Commission has provided in its request for comments a useful summary of penalty factors under the Consumer Product Safety Act (CPSA), Federal Hazardous Substances Act (FHSA), and Flammable Fabrics Act (FFA). *See* <http://www.cpsc.gov/ABOUT/Cpsia/civilpenalties.pdf>. In general, while each statute has some slight variations, civil penalty factors include the nature, circumstances, extent, and gravity of the violation, including;

- the nature of the product defect;
- the severity of the risk of injury;
- the occurrence or absence of injury;
- the number of defective products distributed;

## KELLER AND HECKMAN LLP

December 18, 2008

Page 2.

- the appropriateness of such penalty in relation to the size of business of the person charged, including how to mitigate undue adverse economic impacts on small businesses; and
- such other factors as appropriate.

The Commission has requested additional comments on information it should consider under these factors and information on other factors that it should consider, including 1) previous record of compliance; 2) timeliness of response; 3) safety and compliance monitoring; 4) cooperation and good faith; 5) economic gain from noncompliance; and 6) product failure rate. We address first the mandatory factors.

### **Mandatory Civil Penalty Criteria**

The mandatory criteria provide a useful way to assess whether civil penalties are appropriate, recognizing that product and industry-specific evaluations will be needed in practice to fairly apply these criteria in specific situations. The nature of the product defect is a key consideration. Potential defects will naturally vary widely from product category to product category. Violations of regulatory standards that do not involve actual risk or harm, but rather the potential for harm, should be weighted differently than those that do involve real potential for significant injury. For some product sectors normal wear and tear and rates of repair, or provision of warnings, labels and instructions, are relevant to determining if indeed there is a product hazard or defect. The severity of potential actual injury and the existence or absence of actual injury are also key considerations. However, in some cases the first time a company becomes aware of a potential defect is when an injury is reported, illustrating the pitfalls of looking at only one criteria in determining if civil penalties should be applied. Similarly, the number of defective products distributed, including those that may remain in the hands of consumers, may be important, particularly if the risk of severe illness or injury is high, but this factor may be tempered by the firm's cooperation and good faith in seeking to work with the Commission to voluntarily recall or repair the item. Many FJTA members are small or medium-size businesses. The size of the business and potential adverse impact on such entities are also important factors in civil penalty cases.

We agree that these factors should be considered with other factors identified by the Commission in a non-formulaic way. A formula or matrix cannot possibly allow the Commission to do justice to the complex array of considerations that may apply in particular situations.

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**Proposed Civil Penalty Criteria**

The Commission has outlined some important additional factors that should be considered in civil penalty determinations. We provide some observations on how these factors should be interpreted.

*Previous Record of Compliance.* Repeat offenses involving the same or a similar type of violation or defect may be a factor that would suggest higher penalties, recognizing that this should not be a strict numbers game. Large manufacturers and retailers handling many different SKUs of products may be involved in multiple recalls in a given year. The Commission should consider the scope and extent of products manufactured, imported, distributed or sold by the particular firm involved, and not simply add up recalls or violations in determining civil penalties. The specific nature of the violations, specific products and type of business are all relevant to the previous record of compliance as to any particular instance of violation.

*Timeliness of Response.* Timeliness of reports to the Commission of potential product defects or hazards is an obvious consideration, but the Commission should not apply 20/20 hindsight to good faith responses to reports of incidents or defects. Sometimes reports seem unfounded, a consumer does not respond to an inquiry for more information, or in-house or third party testing triggered by a report demonstrates compliance with mandatory or voluntary standards. Failure to investigate legitimate reports in the wake of a consumer or other complaint, on the other hand, may well be a factor that affects consideration of timeliness.

*Safety and Compliance Monitoring.* Our consumer product safety system in the U.S. involves substantial reliance on voluntary safety and compliance monitoring, and firms with appropriate compliance programs should be accorded significant credit for those efforts. This encompasses both an effective consumer affairs process that involves timely referral of possible safety-related complaints to knowledgeable firm personnel, and also quality control and assurance procedures. This may include in house testing, supplier verification, third party testing, and similar actions. Given the breadth of consumer product companies in the U.S., the Commission should consider the appropriateness of the program for the individual company involved.

*Cooperation and Good Faith.* Effective product safety depends on timely voluntary action and awareness. A firm's cooperation and good faith in its operations and decisions, including decisions about how and when to report, should be given great weight. The occasional difference of opinion about whether a report of a product defect or violation was timely should certainly not be grounds for enhanced civil penalties, for example, if the firm's decision was based on a reasonable internal review and investigation. The firm's decisions again should be judged on knowledge the firm had at the time the decision was made. In contrast, the firm that repeatedly fails to report violations despite reasonable information, judged at the time, that a

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December 18, 2008

Page 4

violation or defect might have occurred, should be considered for enhanced penalties, especially if the firm took no action to investigate or test.

Similarly, the CPSIA imposes many new obligations on makers of children's products, as defined in the statute, which do not apply to products not primarily designed or intended for children 12 and under. A good faith determination that a product is not a children's product should be given deference. That determination may be reflected in associated product labels, age grading or warnings. Good faith is also evidenced by efforts to understand and comply with voluntary or other standards that may apply to the product, indicating both awareness of product safety concerns and an effort to comply. An unintentional lapse in internal quality control systems, or problems with component or raw material suppliers, assuming a generally acceptable product safety program, is not indicative of bad faith. In contrast, lack of good faith may be evidenced by a pattern of repeatedly ignoring complaints or other signs of defects in products and failure to investigate complaints or reports of failure in a reasonably prompt fashion.

*Product Failure Rate.* Product failure rates, as with the previous record of compliance, should be assessed as to the specific product involved. Consideration of this factor may be informed by available industry-wide information on failure rates within the category and an assessment of whether the product is new or has unique features. Failure rates may be higher with novel products until more experience is gained in producing and using them.

**Conclusion**

FJTA supports adoption of additional guidance on application of civil penalties. We urge that the Commission avoid a matrix or formula, consistent with its desire to promote clarity and transparency, minimizing impacts on small and medium-size businesses in particular. Many aspects of decisions related to product safety are subjective; a firm's good faith and compliance efforts should be given significant consideration in penalty decisions. In addition, it is important to evaluate the reasonableness of a firm's actions based on the information the firm had at the time. We appreciate the opportunity to submit these comments.

Sincerely,



Sheila A. Millar

cc: Michael Gale

## Stevenson, Todd

---

**From:** Millar, Sheila A. [Millar@khlaw.com]  
**Sent:** Thursday, December 18, 2008 4:11 PM  
**To:** Civil Penalty Factors  
**Cc:** Falvey, Cheryl; gmullan@cpsc.gov  
**Subject:** Section 217(b)(2) Civil Penalty Criteria  
**Attachments:** 2008\_12\_18 Comments to CPSC.pdf

Attached please find comments of the Fashion Jewelry Trade Association in response to the request for comments on Section 217(b)(2) Civil Penalty Criteria.

Sheila A. Millar  
tel: 202.434.4143 | fax: 202.434.4646 |  
[millar@khlaw.com](mailto:millar@khlaw.com)  
1001 G Street, N.W., Suite 500 West |  
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Consumer Electronics Retailers Coalition



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December 18, 2008

Mr. Todd A. Stevenson  
Secretary  
Consumer Product Safety Commission  
4330 East-West Highway  
Room 502  
Bethesda, Maryland 20814

RE: Comments on CPSC Civil Penalties

Dear Mr. Stevenson:

The Consumer Electronics Retailers Coalition (CERC) is a public policy organization consisting of the major retailers of consumer electronics products including Amazon.com, Best Buy, Circuit City, K-Mart, RadioShack, Sears, Target, Wal-Mart, and the leading retail industry trade associations – National Retail Federation and RILA.

All of our retail members are committed to the health, safety and satisfaction of their customers. Our members take great pride and care selecting the products and services offered to our customers, especially products marketed to children. Our members have been working individually and through CERC to help the Consumer Products Safety Commission (CPSC) and its staff understand the nature of components used in consumer electronics and the complexity of the retail supply chain. We share a desire to successfully implement the Consumer Products Safety Improvement Act (CPSIA) in a way that maximizes safety without unnecessarily disrupting commerce.

The CPSC should certainly look to each of the factors outlined in its staff document on civil penalty. As you know, modern retail supply chains are complex and retail organizations are rather large. It is critically important to distinguish between a simple human error and an effort to blatantly disobey the rules of the CPSC. The elements mentioned CPSC staff document including an entity's:

- Previous record of compliance;
- Timeliness of response;
- Safety and compliance monitoring;
- Cooperation and good faith;
- Economic gain from noncompliance; and
- Product failure rate;

All place in context the action alleged to be in violation of CPSC rules. Context is important in light of the thousands of suppliers, hundreds of thousands of employees and millions of transactions completed by retailers. Most reputable retailers, such as the members of CERC, expend considerable amounts of effort and resources to screen products and suppliers. Our members also work to ensure that sales staff are fully trained on product requirements and labeling and to comply with a host of federal and state regulations. Every CERC member maintains a high level of vigilance on product safety.

The challenge for retailers, especially as the CPSIA is being implemented, is that no matter what level of vigilance, there remains a lack of clarity on what is required under the new CPSIA. As compliance deadlines rapidly approach, Congressionally approved exemptions have not been promulgated, suitable substitute components do not exist and the CPSC has not named types of products/parts/components exempted from the lead restrictions.

We are hopeful that the CPSC and staff are working diligently to promulgate additional rules on these issues. The CPSC also needs to take into account supply chain realities to avoid waste and unnecessary economic harm. Retailers and manufacturers should therefore be given a reasonable amount of time to comply with any new regulation whether from the CPSC or any other regulatory body. Overnight compliance is not realistic even in retail organizations with sophisticated product management systems. Compliance will be even more difficult for small retailers who do not closely monitor federal, state and local regulatory requirements.

CERC respectfully urges additional considerations to be taken into account before civil penalties are assessed and with respect to the level of penalty assessed, including:

- The objective clarity of the regulation involved;
- The timing of the regulation in relationship to the alleged violation;
- Whether a prior warning had been issued;
- The actual risk to consumers related to the violation;
- The opportunity resolve the alleged violation through cooperative measures; and
- Whether the alleged violation represents isolated error, conscious violation or systemic risk.

The object of the enforcement process should be first and foremost to encourage timely compliance with the clear rules established by the CPSC and the Congress. The discovery of minor human errors, for example the placement on the shelves of returned products which have recently become non-compliant or a good faith disagreement on the interpretation of a mandate, should not expose large or small retailers to liability. This is especially so when the risk to consumers is extremely small.

Each and every day consumer electronic retailers demonstrate their commitment to consumer safety by screening products and suppliers, removing known dangers from the stream of commerce and responding quickly to voluntary and mandatory product recalls.

Without a doubt, blatant systemic violation of law should be punished with civil penalties. However, cooperative efforts, clear rules and clear communications to enhance

compliance rather than “gotcha” efforts to generate fines are more likely to enhance general consumer and children’s safety.

I appreciate the opportunity to express these additional comments on behalf of the members of CERC.

Respectfully,

Christopher A. McLean  
Executive Director  
Consumer Electronics Retailers Coalition  
317 Massachusetts Avenue, NE  
Suite 200  
Washington, DC 20002  
(tel.) 202.292.4600

CC: Cheryl A. Falvey, General Counsel

**Stevenson, Todd**

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**From:** Glen Cooney [glen.cooney@e-copernicus.com]  
**Sent:** Thursday, December 18, 2008 5:32 PM  
**To:** CPSC-OS  
**Cc:** Falvey, Cheryl; McLean, Christopher  
**Subject:** CERC comments and information on proposed CPSC Civil Penalties  
**Attachments:** CERC.CPSC.Civil.Penalties.12.17.08 (5).doc

CPSC Staff:

Please accept the attached document on behalf of the Consumer Electronics Retailers Coalition (CERC). The attached letter offers comments and information on proposed CPSC Civil Penalties.

Thank you,

**Glen Cooney**  
**e-Copernicus**  
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*Sec 217  
Civil Penalty*

*14*

December 18, 2008

**VIA ELECTRONIC MAIL**

U.S. Consumer Product Safety Commission  
Office of the Secretary, Room 502  
4330 East West Highway  
Bethesda, MD 20814-4408

Re: Section 217(b)(2) Civil Penalty Criteria

Dear Sir/Madam:

These joint comments are submitted on behalf of American Honda Motor Co., Inc., American Suzuki Motor Corporation, Arctic Cat Inc., Bombardier Recreational Products Inc., Kawasaki Motors Corp., U.S.A., Polaris Industries Inc. and Yamaha Motor Corporation, U.S.A. (the "Companies") in response to the Consumer Product Safety Commission's ("CPSC") request for comments and information regarding the interpretation of the factors to be considered in determining the appropriateness and amount of civil penalties under the Consumer Product Safety Act ("CPSA"), Federal Hazardous Substances Act ("FHSA"), and Flammable Fabrics Act ("FFA"), as amended by Section 217(b) of the Consumer Product Safety Improvement Act ("CPSIA"), Public Law 110-314. The Companies are manufacturers, importers and/or distributors of all-terrain vehicles and other motorized recreational products.

**I. RELEVANT STATUTORY PROVISIONS**

Section 217(b)(1) of the CPSIA amended the relevant sections of the CPSA, FHSA and FFA to specify that in determining the amount of any civil penalty to be sought for a knowing violation, the Commission must consider "the nature, circumstances, extent and gravity of the violation," including five enumerated statutory factors, as well as "such other factors as appropriate." The five enumerated statutory factors are "the nature of the product defect, the severity of the risk of injury, the occurrence or absence of injury, the number of defective products distributed, and 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." Section 217(b)(2) of the CPSIA directs that not later than one year after the date of enactment, CPSC shall issue a final regulation providing its interpretation of these civil penalty factors.

## II. ANALYSIS AND INTERPRETATION

By specifying that CPSC is to consider “the nature, circumstances, extent and gravity of the violation” in determining the amount of any civil penalty, Congress made clear its intention that penalty determinations be based on a holistic assessment of all relevant information, rather than an undue emphasis on one or more specific factors. Moreover, the added directive that the Commission consider “such other factors as appropriate” further confirms the Congressional intention that all pertinent information, not simply the enumerated factors in the statute, be fully and objectively considered by the Commission in making determinations regarding the appropriateness and amount of civil penalties sought, and of civil penalty settlements, under the various statutes.

### A. Statutory Factors

#### 1. Nature of the Product Defect

In some instances, the nature of a product defect may be fairly straightforward, such as a production or design defect which results directly in breakage or other product failure after a limited amount of normal use. In other cases however, the defect is much more difficult to identify and confirm. For example, certain products typically require component replacement or repair in some number of cases due to user failure to maintain the product. In such circumstances, the fact that certain product components are expected to have particular rates of replacement and repair may substantially complicate the process of determining that such a component in fact contains a defect. In other words, consideration of the nature of the defect should encompass the relative complexity of identifying and confirming its presence given the context in which the defect manifests itself.

#### 2. Severity of the Risk of Injury

Consideration of the severity of the risk of injury entails a threshold consideration when the issue relates to a report made to the Commission because the product “creates an unreasonable risk of serious injury or death.” The regulations implementing this provision make clear that the Commission expects a report when “a reasonable person *could* conclude” that the risk is present, which may result in protective reporting when the risk assessment is uncertain or incomplete. Particularly because the actual risk will often be uncertain in such cases, a firm should not be subject to any civil penalty when the risk is most reasonably assessed as a risk of minor or moderate injury.

The consideration of the severity of the risk entails two additional components: the relative likelihood that injury will occur, and the nature of the potential injury. See 16 C.F.R. §1115.12(g)(1)(iii) (risk is severe if the injury which might occur is serious and/or if the injury is likely to occur). The likelihood of injury depends in the first instance on the product

failure rate due to the defect. A defect which results in product failure in only a limited number of instances presents a lower risk of injury than a defect which leads to product failure in many if not most units. The number of injuries reported to have occurred is also a relevant consideration with respect to the likelihood of injury.

Fatality obviously represents the most severe form of injury, followed by those categories of injury encompassed within the definition of “grievous bodily injury” in CPSC’s interpretative rule regarding the reporting requirements of Section 37 of the CPSA, 16 C.F.R. Section 1116.2(b), followed by the categories of injuries described as “serious” in the Section 15 reporting rules, 16 C.F.R. Section 1115.6(c), followed by moderate injuries, and ending with minor injuries, such as abrasions, bruises or minor burns or cuts.

3. Occurrence or Absence of Injury

If injuries have occurred, this factor should also include consideration of their level of severity. The occurrence of fatalities or grievous bodily injuries should be of greater concern than the occurrence of only relatively minor injuries.

4. Number of Defective Products Distributed

The number of defective products distributed is likewise a statutorily specified factor in determining whether to file a substantial product hazard report under Section 15 of the CPSA. 15 U.S.C. §2064(a)(2). While the number of defective products originally distributed is clearly the starting point, in its recent revision of the final interpretative rule under Section 15, the Commission explicitly recognize that the number of such products remaining with consumers is also a relevant consideration. 16 C.F.R. §1115.12(g)(1)(ii). The Commission stated that in the situation where “a potential hazard first appears long after a product was sold, . . . the more relevant number is not the number of products originally sold, but the number still with consumers.” 71 Fed. Reg. 42,028, 42,030, (July 25, 2006).

The Commission should include a corresponding statement in the proposed new interpretative rule regarding civil penalty factors regarding the relevance of the number of defective products remaining with consumers at the time of the alleged violation. The interpretative rule should also clarify that this factor focuses on the number of product units that actually contain a defect, which, depending on the type of defect involved, may be substantially less than the total number of products initially distributed or remaining with consumers.

5. Mitigation of Adverse Impacts on Small Businesses

A company or proprietor should be considered a “small business” and thus within the scope of this mitigation factor if it falls within the size limits established by the Small

Business Administration ("SBA") and set forth in 13 C.F.R. §121.201. In keeping with CPSC's Small Business Enforcement Policy, 16 C.F.R. §1020.5(a), such mitigation efforts should include waiving or reducing any civil penalty and/or considering the small business's ability to pay in determining the amount of the penalty.

**B. Other Factors Appropriate to Consider**

As previously noted, Congress has directed CPSC to consider "such other factors as appropriate" in determining the appropriateness and amount of the civil penalty sought, and of civil penalty settlements. The Commission staff information request seeks comments on six specific additional factors. The Companies believe that the specified factors are all relevant and appropriate for consideration in making such determinations. However, the Companies also believe that it is important for CPSC to provide further explanation and interpretation of these factors and how they should be considered.

1. Previous Record of Compliance

It is fully appropriate that the Commission and staff consider the previous record of compliance by the alleged violator with statutory and regulatory requirements, including, among other things, previous timely notifications under Section 15. In the event that the staff notes a previous reporting or other violation by the party, it should also take account of any action subsequently taken to address and remedy these violations and to improve compliance with applicable CPSC safety requirements.

2. Timeliness of Response

While the Commission and staff may consider how quickly the firm responded to relevant information it obtained (or reasonably should have obtained) with regard to the matter under review, the Commission should expressly acknowledge that assessing the timeliness of response depends on the type of information involved, the circumstances in which it was obtained, when it was obtained, and how it relates to other information, if any, in the firm's possession at the time. For example, a timely response may include testing or investigation rather than immediate notification if the available information does not at that point appear to be relevant or to reasonably support the conclusion that non-compliance has occurred or a defect is present.

This acknowledgement is important because determining the appropriateness or amount of a civil penalty for an alleged Section 15 reporting violation -- which constitute most of the civil penalty cases to date -- inevitably occurs after the fact. The firm's response thus is inherently susceptible to second-guessing by CPSC staff with the benefit of hindsight, when the progression or pattern of information leading to the conclusion that notification was appropriate appears much clearer than it did when the information was first obtained, often in

combination with other information that ultimately proved extraneous, but nonetheless had to be reviewed and analyzed. Such “20/20 hindsight” is neither a fair nor appropriate basis for making civil penalty determinations.

3. Safety and Compliance Monitoring

To the degree that a firm has adopted a system for collecting and analyzing safety information and evaluating possible reporting issues, it should be considered as a positive factor on the firm’s behalf regardless of whether the CPSC believes that the system should have resulted in the earlier reporting of a possible defect or non-compliance in the matter under review.

4. Cooperation and Good Faith

It is fully appropriate for the Commission and staff to consider the degree to which the firm has cooperated and acted in good faith to address reporting or other product safety issues, both generally and with regard to the specific matter under review, as to a possible penalty determination. This factor is highly relevant and should receive more emphasis and importance in making civil penalty determinations than it has in the past.

A review of past civil penalty settlements does not reveal any discernible difference in penalty amounts between situations when a firm has reported voluntarily and instances where it did not. Many companies which have made good faith attempts to comply with Section 15 and nevertheless subsequently received letters announcing the Commission staff’s intention to seek the imposition of civil penalties have been left to wonder whether with respect to voluntary reporting “no good deed goes unpunished.”

The Environmental Protection Agency (“EPA”) has established an “Audit Policy,” 65 Fed. Reg. 19,618 (Apr. 11, 2000), which provides regulated companies up to a 75 percent reduction in the proposed penalty assessment for voluntarily reporting a violation, cooperating with EPA, and taking corrective action. While CPSC does not (and as noted below should not) approach penalty assessment in the same quantitative manner as EPA, the Companies believe that the Commission and staff should accord greater recognition to cooperation and good faith by a company, including particularly initial voluntary self-reporting as well as subsequent cooperation, in determining the appropriateness and amount of any civil penalty, as compared to situations where reporting is triggered by an initial CPSC investigation and the company fails to cooperate.

5. Economic Gain from Noncompliance

It would seem appropriate for the Commission and staff to consider the extent to which a firm profited from the knowing distribution or sale of a product that failed to comply

with a mandatory standard or ban regulation. On the other hand, the Commission must recognize this factor is not necessarily relevant to an alleged improper delay in reporting a potential substantial product hazard under Section 15, because reporting does not necessarily require a commitment to conduct a recall, including corrective action and a stop sale. A firm can report as a protective matter, and then still reasonably defend the position that a recall is not required given all the facts and circumstances. It would therefore be inappropriate for the Commission and staff to consider as a negative factor the “economic gain” from a firm continuing to sell a product that has been reported, but which has not yet been agreed or determined to require a recall.

6. Expected Product Failure Rate

The Commission should make clear that in determining the reasonableness of a firm’s review and response to possible safety related information, it is appropriate to consider the reasonably expected rate of the occurrence of repairs, replacements, and/or end of useful life over time for the type of product or component under review. Consideration of this information is both appropriate and very important with respect to certain types of consumer products that, because of the ways in which they are used or misused, exhibit significant numbers of use and wear-related occurrences over time.

ATVs and other complex motorized vehicles that may be used for recreational and utility purposes are good examples. These vehicles typically require component replacement or repair due to, among other things, user failure to maintain the product, unacknowledged destructive use or misuse, such as collision with solid objects, and user modifications and addition of accessories to the vehicles.

In some cases, reasonably expected repair or replacement rates for particular product components may complicate substantially the process of determining whether a defect in that component is present. A firm should be able to reasonably conclude that it need not report such product occurrences taking place at a rate which, based on its own experience, is expected for that type of product, absent some other indication of the presence of a reportable defect.

C. Additional Topics for Comment

1. Possible Formula/Matrix for Weighing Civil Penalty Factors

The Companies do not believe that it would be feasible or appropriate for the Commission to develop a quantitative formula or matrix for consideration of the various factors in determining the amount of a civil penalty or in civil penalty settlements. Any such “mechanistic” approach to civil penalty determinations is incompatible with the inherently subjective nature of a number of the factors that are appropriate for consideration. In

particularly, with respect to alleged reporting violations, assessing the context in which information was received or in which a defect was initially manifested is simply not susceptible to any sort of numerical quantification.

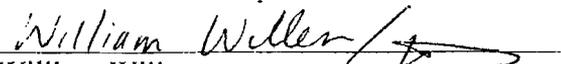
## 2. Mitigating Adverse Impacts on Small Businesses

As previously noted, CPSC should consider a company or proprietor to be a small business if it falls within the SBA size limits set forth in 13 C.F.R. §121.201. Consistent with CPSC's Small Business Enforcement Policy, 16 C.F.R. §1020.5(a), the adverse economic impacts of a penalty on a small business should be mitigated by waiving or reducing the civil penalty, and/or by considering the small business's ability to pay in determining the amount of the penalty or penalty settlement. Such mitigation measures should be taken unless the Commission determines that the violation involved a serious health or safety threat or willful criminal conduct, or that the small business has failed to make appropriate efforts to correct the violation or to make a good faith effort to comply with the law. See 16 C.F.R. §1020.5(b). In any other circumstances, the Commission should proceed to mitigate the adverse economic impacts on the small business by waiving or reducing the civil penalty.

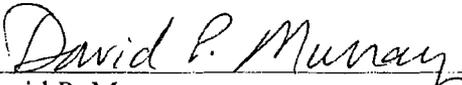
## III. CONCLUSION

The Companies believe that it is very important for the Commission to incorporate the interpretations, explanations and clarifications noted in these comments in its forthcoming interpretative rule under Section 217(b)(2) of the CPSIA in order to provide the regulated community with clear guidance regarding the relevant and appropriate factors governing civil penalty determinations and settlements.

Respectfully submitted,

  
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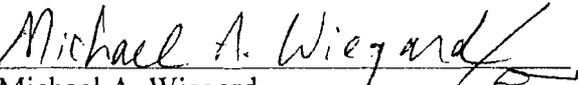
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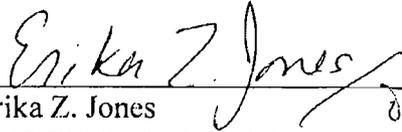
  
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U.S. Consumer Product Safety Commission

December 18, 2008

Page 9

A handwritten signature in cursive script that reads "Erika Z. Jones". The signature is written in black ink and is positioned above a horizontal line.

Erika Z. Jones

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*Counsel for American Suzuki Motor  
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**Stevenson, Todd**

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**From:** Staron, Ann [astaron@WILLKIE.COM]  
**Sent:** Thursday, December 18, 2008 3:47 PM  
**To:** Civil Penalty Factors  
**Subject:** Comments - Civil Penalty Criteria  
**Attachments:** Scan001.PDF

Please see the attached comments filed on behalf of American Honda Motor Co., Inc., American Suzuki Motor Corporation, Arctic Cat Inc., Bombardier Recreational Products Inc., Kawasaki Motors Corp., U.S.A., Polaris Industries Inc. and Yamaha Motor Corporation, U.S.A.

Thanks,  
Ann

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Sub 217  
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December 18, 2008

**Via E-Mail:** [civilpenaltyfactors@cpsc.gov](mailto:civilpenaltyfactors@cpsc.gov)

Office of the Secretary  
U.S. Consumer Product Safety Commission  
4330 East West Highway  
Room 502  
Bethesda, MD 20814

2008 DEC 30 A 11:09  
OFFICE OF THE SECRETARY  
FEDERAL BUREAU OF INVESTIGATION

**Re: Section 217(b)(2) Civil Penalty Criteria**

Dear Sir/Madame:

We are writing to submit comments in response to the above-captioned notice posted on the website of the U.S. Consumer Product Safety Commission ("CPSC") regarding civil penalty criteria under section 217(b)(2) of the Consumer Product Safety Improvement Act, P.L. 110-314, amending section 20(b) of the Consumer Product Safety Act, section 5(c)(3) of the Federal Hazardous Substances Act ("FHSA"), and section 5(e)(2) of the Flammable Fabrics Act ("FFA"). We understand that CPSC intends to issue a notice of proposed rulemaking in the Federal Register as the agency must issue a final regulation by August 14, 2009. The American Association of Exporters and Importers ("AAEI") greatly appreciates the opportunity to submit these comments. We hope that our comments below assist the CPSC in its review efforts.

**Introduction**

AAEI has been a national voice for the international trade community in the United States since 1921. Our unique role in representing the trade community is driven by our broad base of members, including manufacturers, importers, exporters, retailers and service providers, many of which are small businesses seeking to export to foreign markets. With promotion of fair and open trade policy and practice at its core, AAEI speaks to international trade, supply chain, export controls, non-tariff barriers, and customs and border protection issues covering the expanse of legal, technical and policy-driven concerns.

As a representative of private sector participants engaged in and impacted by developments pertaining to international trade, national security and supply chain security, AAEI is deeply interested in the policies and practices of the United States government that affects the ability of U.S. companies to import and export goods. Because product safety regulation impacts U.S. importers and exporters, AAEI submits these comments on behalf of its members.

AAEI, on behalf of members that manufacture, import and export products covered by the CPSIA, submits these comments to express our views regarding information that the CPSC should take into consideration for the civil penalty factors. We understand that the civil penalty factors under the CPSIA provide for the nature, circumstances, extent and gravity of the violation, including:

- nature of the product,
- severity of the product defect,

- occurrence or absence of injury,
- number of defective products distributed,
- the appropriateness of the penalty in relation to the size of the business (including how to mitigate undue adverse economic impact on small business), and
- other such factors as appropriate.

In particular, the CPSC is interested in comments regarding information that the CPSC to consider for each of the penalty factors, other appropriate factors (e.g., previous record of compliance, timeliness of response, safety and compliance monitoring, cooperation and good faith, economic gain from noncompliance, and product failure rate). Additionally, the CPSC seeks comments on how to weigh the various factors and criteria as well as how to mitigate the adverse economic impact of penalties on small businesses.

Based on the experience of AAEI members in the penalty process of many federal agencies, it is our experience that any penalty regime must include the following features: due process, an enforcement mechanism, and a mitigation schedule.

### **1. Due Process**

For civil penalties to be imposed on U.S. importers and exporters, it is very important for CPSC to have a civil administrative procedure for handling penalty cases. In particular, importers and exporters are very familiar with administrative pre-penalty and penalty notices issued by federal agencies regulating trade (e.g., U.S. Customs and Border Protection, Bureau of Industry and Security, etc.) which provide companies with an opportunity to make a submission in response to the notice within a certain time period (e.g., 30 days). Companies prefer to deal with penalty cases relating to imported and exported goods on an administrative basis, rather than by complaint filed in court, because the process is generally quicker and less expensive than litigation.

### **2. Enforcement**

As part of the penalty process, we believe that it is important for CPSC to describe how it intends to enforce violations of CPSA, FHSA, and FFA as amended by the CPSIA. For example, penalties cases by the U.S. Food Administration ("FDA") relating to imported goods are typically issued by and handled through CBP. However, FDA retains ultimate authority over the penalty amount and any mitigation afforded to the importer. AAEI recommends that CPSC consider using a similar enforcement mechanism, and advise the trade community in the proposed rulemaking about how enforcement will be handled.

### **3. Mitigation**

AAEI appreciates that CPSC seeks to develop mitigating factors that comport with the penalty factors of the CPSA, FHSA, and FFA as amended by the CPSIA. However, U.S. importers and exporters currently deal with various sets of mitigating factors, which differ by agency (e.g., CBP, BIS, etc.), and we are concerned that CPSC will issue yet another set of mitigating factors which may not comport with those of other federal agencies.

We recommend that CPSC take into consideration CBP's mitigation of penalties for violations of 19 U.S.C. § 1592, which are set forth at 19 C.F.R. Part 171 Appendix B. Additionally, we recommend that CPSC confer with CBP about its "Fines, penalties & Forfeitures Handbook" which set forth the percentage of mitigation for particular penalties of other government agencies.

AAEI agrees that for mitigating factors, CPSC should take into account a company's previous record of compliance to encourage companies which have invested resources in good compliance practices and procedures. We also support CPSC's consideration of timeliness of response, safety and compliance monitoring, cooperation with CPSC in good faith, and product safety record rate as additional mitigating factors. However, we do not believe that economic gain from noncompliance is appropriate. Unlike customs penalties, which are designed to be proportionate to the U.S. government's loss of revenue, the CPSIA penalties are designed to protect the health and safety of the U.S. consumer. Therefore, we believe that the severity of the risk of injury is a better gauge of the commensurate penalty.

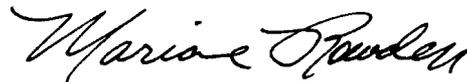
Finally, we believe that the size of the business should be an important factor when assessing a penalty under the CPSIA. Generally, a small or medium size business ("SME") will not have the distribution reach of a large business, and thus, the likely volume and potential harm of defective products should be less for an SME, which will also reflect its ability to pay appropriate penalties. These factors should be considered by the CPSC.

### **Conclusion**

For these reasons, AAEI requests that CPSC consider our comments set forth above when developing its notice of proposed rulemaking regarding CPSIA penalties and mitigation factors.

If you have any questions regarding these comments, or wish to discuss our position in further detail, please do not hesitate to contact us.

Sincerely,



Marianne Rowden  
General Counsel

cc: Lee Sandler, Co-Chair, AAEI Regulated Industries Committee

16 Sec 217 Civil penalty



Toy Industry Association, Inc.

December 22, 2008

Cheryl Falvey, General Counsel  
Office of the General Counsel  
U.S. Consumer Product Safety Commission  
4330 East West Highway  
Bethesda, MD 20814

Gib Mullan, Assistant Executive Director  
Office of Compliance and Field Operations

**RE: SECTION 217(B)(2) CIVIL PENALTY CRITERIA**

In response to the request by the Consumer Product Safety Commission (“Commission” or “CPSC”) for comments on Section 217(b)(2) of the Consumer Product Safety Improvement Act (“CPSIA”), Public Law No. 110-314, the Toy Industry Association, Inc. (“TIA”), on behalf of its 500 members submits these comments in addition to those submitted by other manufacturers to provide insight into how the civil penalty factors impact an industry, such as the toy industry, where the nature of the industry is high-volume, low-cost products with a short shelf-life.

The CPSIA directs the Commission to issue a regulation interpreting the civil penalty factors and to list any other factors the Commission will consider in setting civil penalties. TIA fully supports regulations that will aid in standardizing and articulating the criteria the Commission uses in assessing civil penalties. Section 217 does just that. Under the CPSIA, the factors the Commission should use to assess civil penalties are: 1) the nature, circumstances, extent, and gravity of the violation, including; 2) the nature of the product defect; 3) the severity of the risk of the injury; 4) the occurrence or absence of injury; 5) the number of defective products distributed; 6) 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 7) other factors as appropriate. These factors are substantially similar to those in the Federal Hazardous Substances Act and the Flammable Fabrics Act. While TIA is in full support of regulations that will aid industry and the public in understanding the criteria and rationale behind the Commission’s penalty decisions, several of the factors are of importance to its members.

**Mandatory Factors**

1. *Nature of the Product Defect*

TIA believes that in examining the nature of the product defect, it would be useful for the Commission to determine whether the product defect arose due to the fault of the person to whom the penalty would apply. For example, did the person responsible for the defect take steps

or implement procedures to prevent the violation and detect a problem. Was the defect reasonably foreseeable? In addition, compliance with an applicable mandatory CPSC safety regulation or standard that addresses the hazard or a consensus standard that the CPSC relies upon or is customarily relied upon in the industry, should create a presumption that the defect was not foreseeable and that compliance with the standard means that the product was safe (i.e. that no substantial product hazard was indicated when the product was subject to foreseeable use and abuse).

2. *The Occurrence or Absence of Injury*

When evaluating the occurrence or absence of injury, the Commission should also evaluate the procedures designed to prevent noncompliance from occurring in the first place. Credit should be given where firms have designed and implemented quality assurance programs or taken part in certification programs to prevent defective products. The quantitative lack of real world injuries in relation to products sold and used within their ordinary useful life should be a significant factor accorded great weight in assessing and mitigating against imposition of penalties.

3. *The Number of Defective Products Distributed*

TIA's members typically manufacture and distribute large volumes of low-cost products. There are likely to be more of these products distributed than higher cost items. The Commission should examine the number of defective products distributed in light of other factors, namely the severity of the risk of injury. For example, the penalty should be lower where the severity or occurrence of injury is low, even if the number of products manufactured is large. To impose a greater penalty on responsible parties simply because they distribute a greater number of products without regard to the occurrence of injury and the severity of the injury caused penalizes manufacturers that produce low-cost, high-volume products, such as toys. Also in many instances the nature of the violation is unrelated to the number of units distributed. For example the untimely failure, under Section 15, to inform the Commission of a failure to comply, of a defect, or of a risk about a product constitutes the violation or distinct prohibited act unrelated to the sale of a violative product, which is a separate and distinct prohibited act under the applicable underlying statutes. As such, the number of units sold would be unrelated to the violation.

**Additional Factors Suggested by the CPSC's Request for Comments**

In addition to the mandatory factors listed in the CPSIA, the Commission has suggested the following factors: 1) previous record of compliance; 2) timeliness of response; 3) safety and compliance monitoring; 4) cooperation and good faith; 5) economic gain from noncompliance; and 6) product failure rate. See Civil Penalty Criteria, Section 217(b)(2) of the Consumer Product Safety Improvement Act ("CPSIA"), Request for Comments and Information. TIA offers the following comments on these additional factors.

1. *Previous Record of Compliance*

If this factor is to be considered, it should be analyzed in the context of the number of products made by the subject firm, that is, the rate of compliance. The Commission should take

into account potentially mitigating factors such as the rate of past noncompliance as a function of the range of different products sold by a firm and the volume of those products sold. A firm that has a relatively small number of noncompliances across a large number of product lines sold in high volumes should not be assessed higher penalties based solely on the absolute number of prior issues. However, this should not overcome the fundamental due process requirements related to fair standards for imputing knowledge merely because of the occurrence of previous violations.

## 2. *Timeliness of Response*

When examining the timeliness of a firm's response, the Commission should consider that testing or other investigation of an alleged violation can take time. A firm should take reasonable steps to determine whether a violation occurred and if so, to what extent. The Commission also should view the timeliness of response from the perspective of the firm at the time it received information about a possible violation, not with hindsight that a violation occurred. Delay should not always result in a higher penalty.

## 3. *Safety and Compliance Monitoring*

TIA believes that firms should be given credit for such monitoring. Additionally, the Commission should give credit for quality assurance systems designed to prevent noncompliance from occurring in the first place. The same is true for participation in certification or conformity assessment programs.

## 4. *Cooperation and Good Faith*

Cooperation and good faith should be rewarded by the Commission staff. However, a firm should not be penalized for taking reasonable steps to ascertain facts, state its legal position or protect legitimate business interests such as confidentiality of proprietary data. In addition, it should be required that it be clear from the established record that any FHSA violations are "knowing" violations as that term is referenced in 15 U.S.C. §1264(c)(1) and as defined in 15 U.S.C. §1264(c)(5). 15 U.S.C. §1264(c)(1) only authorizes civil penalties to be sought against "Any person who knowingly violates Section 1263" and 15 U.S.C. §1264(c)(5) provides that "knowingly" means "(A) having actual knowledge, or (B) the presumed having of knowledge deemed to be possessed by a reasonable person who acts in the circumstances, including knowledge obtainable upon the exercise of due care to ascertain the truth of representations." 15 U.S.C. §1264(c)(2)(B) provides that the second sentence of 15 U.S.C. §1264(c)(1) shall not apply to violations of 15 U.S.C. §1263(a) or (c) "if such person did not have either (i) actual knowledge that such person's distribution or sale of the substance violated such subsections, or (ii) notice from the Commission that such distribution or sale would be a violation of such subsection." With significant increases in both minimum and maximum penalties under the CPSIA, the development of clear rules that preserve and highlight this requirement are required in the interest of due process. The Court's determination in U.S. v. Shelton Wholesale, Inc., 34 F. Supp.2d 1147 (1999), involving interpretation of the circumstances that constitute a "knowing" violation in the context of "presumed knowledge" under the FHSA, suggests that in the absence of actual knowledge, undertaking reasonable steps to comply with CPSC regulations will prevent such knowledge from being imputed. This decision needs to be carefully considered in crafting and updating CPSC rules. The standard the Court applied involved the degree to which an

importer takes reasonable steps to reduce the number of violative products. In doing so, the Court acknowledged that, provided the company acts reasonably, a violation or series of violations in and of itself does not constitute the requisite knowledge.

#### 5. *Product Failure Rate*

If the Commission chooses to promulgate this factor, it should describe the factor so as to take into account the differences among industries. Certain products in certain industries may have higher reported failure rates simply because of the nature of the product or injury risk, not because of higher rates of underlying noncompliance. In short, reported failure rates may be imperfect metrics of compliance. It would be preferable to more directly assess rates of compliance and compliance efforts, such as a firm's quality assurance and monitoring systems. To the extent that reported failure rates are a factor in determining the appropriateness of civil penalties, they should at a minimum be examined in context taking into account information, such as baseline reported failure rates normally occurring within a particular product category over its ordinary useful life, a firm's quality assurance and monitoring systems, and the firm's actions to comply after becoming aware of higher than normal reported failure rates for a product.

#### **Other Civil Penalty Factors on Which the CPSC Sought Comment**

In addition to seeking comment on the civil penalty factors, the Commission sought comment on whether or not it should develop a formula or matrix to weigh any or all of the penalty factors. It also sought comment on what criteria it should use in creating a weighting formula or matrix. Other agencies, such as the EPA, have developed models that assist in computing penalties for violations. Specifically, the BEN Model developed by the EPA, computes the economic benefit to a violator from delaying or avoiding necessary pollution control expenses. The TIA does not support the creation or use of such a model to assist the Commission in assessing penalties.

The creation and use of a formula or matrix to weigh the penalty factors provides far too rigid an approach by which to assess penalties. It treats all violations similarly and, as evidenced by TIA's comments above, all violations are not the same. Each case poses a unique set of circumstances. There are different levels of risk, different possible injuries, and the amount of knowledge that a firm possesses about a whether a defect or violation was reasonably foreseeable varies based on the parties involved. A formulaic approach to civil penalties, while attempting to create a level playing field, will ultimately create circumstances where, because of the mathematical formula, violators are assessed too high or low a penalty given the circumstances. The Commission should retain its authority to consider each case individually.

Finally, the Commission sought comment on how to mitigate adverse economic impact on small and medium sized businesses. The economic impact of the imposition of a civil penalty in relation to the size and profitability of the firm should receive great consideration, especially if it negatively impacts the viability of the firm and its ability to continue in business. There is a significant public benefit in insuring that firms which are subject to CPSC recalls remain viable and capable of servicing the needs of the public and the requirements of any corrective action program imposed by the Commission.

Thank you for the opportunity to continue our participation in your deliberations on how to implement the Consumer Product Safety Improvement Act. The Commission has indicated that it intends to issue a proposed rulemaking on Section 217. TIA looks forward to the issuance of this proposed rulemaking and reserves the right to supplement its comments at that time.

Sincerely,

A handwritten signature in black ink, appearing to read "Carter Keithley". The signature is written in a cursive style with a large initial "C".

Carter Keithley  
President  
Toy Industry Association

## Stevenson, Todd

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**From:** Herriott, Rob [rherriott@toyassociation.org]  
**Sent:** Monday, December 22, 2008 12:25 PM  
**To:** CPSC-OS; Wolfson, Scott; Falvey, Cheryl; Parisi, Barbara; Smith, Timothy; Mullan, John  
**Cc:** Keithley, Carter; Lawrence, Joan; Desmond, Edward  
**Attachments:** TIA Civil Penalty comments.pdf

Attached please find the Toy Industry Association's response to the CPSC request for comments on Civil Penalties factors. We appreciate your consideration of our views and are happy to add further clarification if you deem it necessary.

If any questions arise, please do not hesitate to contact me.

Rob Herriott  
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