



U.S. CONSUMER PRODUCT SAFETY COMMISSION

4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814-4408

Record of Commission Action Commissioners Voting by Ballot*

Commissioners Voting: Chairman Inez M. Tenenbaum
Commissioner Thomas H. Moore
Commissioner Nancy A. Nord
Commissioner Anne M. Northup
Commissioner Robert S. Adler

ITEM:

(I) Interim Final Rule Interpreting Factors to be Considered When Seeking Civil Penalties and (II) Withdrawal of Previous Proposed Interpretative Rule on Civil Penalty Factors (Briefing Package dated August 7, 2009 OS no. 3557)

DECISION:

The Commission voted (3-1-1) to publish two draft notices in the *Federal Register* ("FR") with changes that issue (I) the interim final rule interpreting penalty factors to be considered when seeking civil penalties as 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) and (II) the withdrawal of the previously proposed interpretation concerning civil penalty factors. The interim final rule complies with the requirement of section 217(b)(2) of the Consumer Product Safety Improvement Action of 2008.

Chairman Tenenbaum, Commissioner Moore and Commissioner Adler voted to publish the draft *FR* notices with changes. Commissioner Northup abstained from the voting. Commissioner Nord voted not to publish the notices. Chairman Tenenbaum and Commissioners Moore, Nord and Northup issued the attached statements.

For the Commission:

A handwritten signature in black ink, appearing to read "Todd A. Stevenson".

Todd A. Stevenson
Secretary

* Ballot vote due August 18, 2009



UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
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BETHESDA, MD 20814

CHAIRMAN INEZ M. TENENBAUM

STATEMENT OF CHAIRMAN INEZ M. TENENBAUM
ON THE INTERIM FINAL RULE INTERPRETING FACTORS
TO BE CONSIDERED WHEN SEEKING CIVIL PENALTIES

August 18, 2009

On August 14, 2009, new and substantially higher maximum civil penalty amounts specified in the CPSIA went into effect. Under the CPSIA, the Commission is required to issue a final rule interpreting the factors it considers when determining an appropriate civil penalty amount. The determination of the amount of any civil penalty to seek and/or compromise should allow for maximum flexibility within an identified framework. The Commission has chosen to issue an *interim* final rule, in order to provide immediate guidance to industry while also providing a comment period for interested parties prior to issuance of the final rule.

As a basis for understanding the Commission's interpretation of the civil penalty factors, it is important to understand at what point in time these factors are used by the Commission. Not every violation of the CPSA and other Acts enforced Commission results in the Commission's pursuit of civil penalties. Under the law, the Commission seeks civil penalties only when a firm "knowingly" commits a violation. Whether a firm acted "knowingly" is examined and evaluated prior to the decision to seek civil penalties. It is important to recognize that the factors set forth in the interim final rule are not used to determine whether or not to seek a civil penalty, the factors are utilized after a decision has been made to pursue a civil penalty.

Many of the statutory factors used to determine an appropriate civil penalty amount have been codified in previously enacted statutes enforced by the Commission. Our interpretation of those statutory factors reflects and clarifies the Commission's well established interpretations of those factors.

The CPSIA added the following three factors: the nature, circumstances, extent and gravity of the violation; how to mitigate undue adverse economic impacts on small businesses; and other factors as appropriate. Under the factor "nature, circumstances, extent and gravity of the violation," the Commission will consider the totality of the circumstances surrounding a violation, including how many provisions of law were violated. With respect to the factor "how to mitigate undue adverse economic impacts on small businesses," the Commission recognizes that civil penalties may have an adverse impact on small businesses, and will consider how to mitigate if it believes the adverse

impact is undue. What the Commission considers to be undue will vary based upon the alleged violator's business size and financial condition as well as the nature, circumstances, extent, and gravity of the violation.

Congress recognized that in addition to the factors enumerated in the statute, the Commission may consider other factors where the Commission believes it is appropriate. The interim final rule provides four examples of "other factors" that have been important considerations in past cases and may be considered in individual cases going forward. As we made clear in the rule, both the Commission and the alleged violator may raise any additional appropriate factors for consideration in an individual case. The "other factors" identified in the rule do not constitute an exhaustive list, nor do we believe it helpful to potential violators to try and identify every conceivable "other factor" that may be relevant in a given case. Each case is different and the "other factors" applicable in one case may not be applicable in another case. Therefore, in every case, when and if the Commission considers "other factors" not enumerated in the statute, whether they were raised by the alleged violator or by the Commission, those factors will be made known and discussed with the alleged violator.



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

August 14, 2009

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

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

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

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

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

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

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



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STATEMENT OF COMMISSIONER NANCY NORD
ON THE ISSUANCE OF THE INTERIM FINAL RULE INTERPRETING FACTORS TO BE
CONSIDERED WHEN SEEKING CIVIL PENALTIES
August 18, 2009

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STATEMENT OF THE HONORABLE ANNE NORTHUP
COMMISSIONER
U.S. CONSUMER PRODUCT SAFETY COMMISSION
ON THE INTERIM FINAL RULE INTERPRETING FACTORS
TO BE CONSIDERED WHEN SEEKING CIVIL PENALTIES

August 18, 2009

Yesterday I began my tenure as a Commissioner at the United States Consumer Product Safety Commission at the end of the ballot vote period for this matter. Due to the complexity of and far reaching impact of the interim rule under consideration, I am abstaining from casting a vote. The issues presented in the interim rule deserve far more deliberation and involvement in the entire rule making process than the twenty-four hours since my arrival will allow.
