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:

RC2 Corporation - Proposed Civil Penalty Settlement of $1,250,000.00
(Briefing package dated December 1, 2009, OS No. 3261)

DECISION:

The Commission voted unanimously (5-0) to provisionally accept the Settlement Agreement and Order, which would order RC2 Corporation to pay a civil penalty of $1,250,000.00. The provisional Settlement Agreement and Final Order will be announced in a *Federal Register* Notice. The Commission's Office of General Counsel Compliance Division staff negotiated a proposed agreement that resolves the staff's allegations that the firm violated section 19(a)(1) and 20(d) of the Consumer Product Safety Act ("CPSA"), 15 U.S.C. §§ 2068(a)(1) and 2069(d). The staff alleges that RC2's importation, sale or offering for sale, units of the Thomas & Friends™ Wooden Railway Toys, violated the Lead Paint Ban, and that RC2 committed these prohibited acts "knowingly" as that term is defined in section 20(d) of the CPSA. The settlement agreement also resolves certain possible liabilities of Sections 19(a)(1) and 19(a)(4) of the CPSA for possible CPSA violations with other products. Section 20(a)(1) of the CPSA, 15 U.S.C. § 2069(a)(1), permits the imposition of civil penalties for the violations.

Commissioner Northup submitted the attached comment with her vote.

For the Commission:

Todd A. Stevenson
Secretary

Ballot vote due December 28, 2009

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BETHESDA, MD 20814

STATEMENT OF COMMISSIONER ANNE M. NORTHUP ON THE PROPOSED CIVIL PENALTY SETTLEMENT OF $1,250,000.00 FOR RC2 CORPORATION

December 29, 2009

I was pleased to join in yesterday's unanimous vote to impose a civil penalty on RC2 for $1.25 million for its 2007 importation of toys in violation of the lead paint ban. Unlike lead content within metal substrates, for example, lead surface paint on the wooden toys at issue here poses a genuine risk to children. The Thomas the Tank Engine trains and related items appeal to children who are still at an age when they might put toys in their mouths, and any child who mouthed these toys or scraped paint off of these toys with their teeth could have been exposed to lead levels well in excess of the 600ppm limit in effect at the time of these violations. The safety imperative at the heart of the CPSC's mission demands that we take strong action in cases like this one.

The lead paint ban RC2 violated had been in effect since 1978, and it is entirely appropriate for the agency to assess civil penalties against companies that mistakenly import products in violation of federal safety standards. The tremendous costs associated with a voluntary or CPSC-ordered recall (over $42 million in this case) provide a significant financial deterrent against companies taking a casual approach toward their product safety compliance responsibilities. In addition, civil penalties like the one assessed against RC2 serve as a further reputational disincentive against treating product safety responsibilities too lightly. I believe that the civil penalty assessed in this case and the other steps taken under pre-existing law sufficed to correct the situation adequately and will deter future lead paint violations in toys made by RC2.

It is worth noting that RC2 had a newly revised compliance system in place at the time these violations occurred, a fact for which the agency may not have given the company enough credit. RC2 *already* required its contract manufacturers to complete lead paint testing at independent certified labs and obtain certifications from their paint suppliers that all paints met applicable standards for lead levels (steps akin to what the CPSIA now requires of all companies). In addition, RC2 *already* conducted a good deal of final product testing of the kind envisioned by the CPSIA. When RC2 leadership in the United States learned of the problems at issue here, the company cut off the responsible contract manufacturer in China, cut off the paint supplier in Hong Kong for use by its other contract manufacturers, conducted an extensive internal investigation, took a very broad approach in determining the appropriate size of its recall—a fact that should not count against companies when the CPSC then decides the size of a civil penalty to be assessed—and instituted many new internal measures even beyond what the CPSIA requires well before agreeing to this settlement. Staff have also informed the commissioners that the company was very co-operative and in no way dismissive of agency inquiries when the problem surfaced. This entire incident has cost the company greatly. RC2's net income declined from more than $34M in 2006 (the year before the recall) to a net loss of more than $200K in 2008 (the year after the recall). Its number of employees declined from 830 at 2007 year end to 740 at 2008 year end.

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The Commission is nearing the end of lead cases for which civil penalties will be assessed under the pre-CPSIA regime. As we look to the future and to implementing the new law on lead in toys, I hope this agency will continue to apply penalties in a manner that creates proper incentives to produce safe products, but that does not cripple companies that operate lawfully the vast majority of the time. A civil penalty is not a death sentence. Fines are meant to deter non-compliance. Civil penalties are not meant to sink a company that is providing jobs or to unduly interfere with the future operations of a company that manufactures other safe products. They should not prevent it from spurring competition, innovation, and increasing the choices available to consumers in the marketplace. The goal should be to ensure safe products, with manufacturers competing equally on that basis, while imposing the least punitive measures necessary to achieve the desired level of safety.

Just because Congress has given this agency the ability to apply much tougher sanctions under the CPSIA does not mean the agency should go looking for opportunities to impose those new sanctions with a vindictive attitude. We should not go looking for high penalties, nor should civil penalty dollar amounts under the new statute simply be upgraded to reflect similar percentages of the maximum penalty available. In other words, the fact that this was a $1.25M case under the old statute does not mean this would become a more than $10M case under the new statute. The new authority should be reserved for cases far more flagrant than the facts of this case.

In addition, going forward, I believe that the statutory definition of "knowing" used by this agency should receive further scrutiny. 15 U.S.C. § 2069(d) defines knowing under the CPSA to not only mean the "having of actual knowledge" (which is fine), but also "the presumed having of knowledge deemed to be possessed by a reasonable man who acts in the circumstances, including knowledge obtainable upon the exercise of due care to ascertain the truth of representations" (which is a barely intelligible standard of *mens rea*). As greater civil penalties are at stake in the future, some defendant will challenge this standard unless the agency does a far better job than it has to date of articulating what it means and applying it in a manner that is not merely conclusory. If the standard as written is too difficult to apply clearly and consistently, then it should be discarded in favor of a less tortured definition of knowing. The agency should act before a litigant forces us to do so, both to provide greater clarity to the regulated community as well as greater protection for our own future enforcement decisions.