

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION

Staff Guidance on

ENFORCEMENT OF CIVIL PENALTIES

Office of General Counsel

September 2015

This guidance expresses the views of OGC and does not necessarily reflect the views of the CPSC, the Office of the Chairman or any of the Commissioners of the CPSC.

CPSC STAFF ENFORCEMENT GUIDANCE FOR CIVIL PENALTIES^{*}

Vigorous Enforcement.

CPSC policy is to enforce vigorously all the laws, rules, regulations, and orders under the laws that the CPSC administers. The Commission has directed staff to use every appropriate remedy available under those laws, rules, regulations and orders, as necessary, to ensure compliance.

Purpose and Scope.

This guidance is intended to help entities subject to CPSC jurisdiction understand more about the process followed by the CPSC Office of General Counsel (“OGC”) in enforcing civil penalties for CPSC-administered laws and regulations. The guidance does not bind the CPSC and does not create any rights, benefits or defenses, substantive or procedural, that are enforceable by any party in any manner.

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Mission.

OGC strives to advance the mission and objectives of CPSC. We are committed to protecting the public from defects, violations and unreasonable risks associated with consumer products. The importance of this mission is reflected in the dedication with which we fulfill our duties.

Background.

One of CPSC’s most important functions is the effective enforcement of laws and regulations within the agency’s jurisdiction. OGC is responsible for investigating potential legal violations and pursuing appropriate remedial and civil penalty actions.

OGC pursues a broad range of enforcement matters. Applicable statutory and regulatory provisions confer a variety of mechanisms that OGC may use to support these efforts. For instance, OGC may access subpoena authority to compel the production of documents and the appearance of individuals for the purpose of providing information. Additionally, although civil penalty enforcement matters that are not resolved through settlement may be referred to the U.S. Department of Justice (“DOJ”) for initiation of litigation, the CPSA allows OGC in certain circumstances to pursue such matters directly in federal court. Should OGC investigation reveal possible criminal activity, OGC also may refer such matters to DOJ in accordance with agency procedures.

^{*} This guidance is intended to provide information to the regulated community about the Commission staff’s enforcement of civil penalties under Commission-administered statutes.

Procedures and Managerial Oversight.

OGC investigations and subsequent enforcement follow comprehensive internal procedures and are subject to multilayered managerial review at several stages. Among other things, that review focuses on the substantive evidence developed during the investigation and an analysis of applicable statutes, rules and case precedent.

Investigations.

OGC is responsible for investigating potential violations of laws enforced by the CPSC and pursuing appropriate civil penalties and other remedies. OGC investigations may be based on internal and external referrals from a variety of sources. The agency's investigatory authority is broad.

As a general matter, the initial step in the investigation process is obtaining and evaluating preliminary information. If preliminary information indicates the potential existence of a legal violation, then OGC forwards an investigatory letter designed to elicit relevant information. If preliminary information does not indicate the potential existence of a statutory violation, then OGC does not pursue the matter.

Investigatory letter. In addition to soliciting documents and information, the investigatory letter notifies the recipient that OGC staff is conducting an investigation and sets forth the specific matters that are the subject of the investigation. The investigatory letter also advises the recipient of the possibility of enforcement, including litigation, and the recipient's related document preservation obligations.

Those responding to an investigatory letter will be asked to attest that a diligent search for responsive information has been made and as to the accuracy and completeness of the response.

Production of information, documentary and physical evidence and testimony; subpoenas. Although subpoena authority generally is available to staff with Commission approval, the principal means of gathering documents, data and other information generally is the voluntary production of documents. Staff also may request the voluntary creation of summary documents, such as chronologies of events. Witnesses may be asked to agree to voluntary interviews and testimony. In CPSC staff's experience, nearly all regulated entities, individuals and other parties are able to provide responsive materials without provision of a subpoena.

Notwithstanding typical cooperation by the subjects of OGC investigations, CPSC utilizes subpoena authority in appropriate circumstances. Subpoenas have been shown to have an effect on a company's responsiveness and the degree of diligence used to search for documents and information.

Failure to respond to investigatory requests in a timely and complete fashion – including such failures that lead to subpoenas – may result in increased civil penalties.

Counsel. An entity that is the subject of enforcement investigation is entitled to be represented by counsel. The subject company should clearly identify in a written communication to OGC the counsel

representing the company. CPSC correspondence will be directed both to the subject company and counsel.

Truth, accuracy and complete responses. Parties providing documents and information to OGC in response to an investigatory letter should take care to confirm the accuracy and completeness of submissions. Material misrepresentations made to staff are prohibited acts that can result in civil and criminal penalties under CPSC statutes. In addition, knowing willful misrepresentations may lead to criminal prosecution.

Counsel representing a subject company also has an ethical obligation to be truthful when dealing with CPSC on the client's behalf.

Privilege. If any document or information is withheld from production on the basis of any asserted privilege or protection, a detailed privilege log must be produced at the same time as the responsive documents. Failure to substantiate the privilege claim with sufficient information may result in waiver of the privilege. Specific instructions regarding the required information are included in the investigatory letter.

Tolling agreements. To facilitate settlement negotiations between the parties and in consideration for the deferral by CPSC of litigation or other proceedings, staff may request an agreement from the subject company which suspends the running of the statute of limitations applicable to civil penalty actions. Such requests may be made during settlement negotiations to allow time to pursue a settlement.

Review of Sufficiency of Evidence.

At the conclusion of an investigation, staff analyzes the evidence and applicable law and determines whether a statutory violation appears to have occurred. This review involves several layers of management.

If a violation appears to have occurred, staff will evaluate potential civil penalty enforcement, including the need for remedial action, such as the implementation of internal controls and a compliance program. Depending on the facts and circumstances as well as other considerations, OGC may take a variety of approaches. Staff may decide to seek a civil penalty, determine that other actions are appropriate, or conclude that the matter should not be pursued at that time. In some situations calling for remedial action where applicable factors may not compel civil penalties, staff may consider closing the matter without any civil penalty if the potential defendant formally agrees to implement appropriate remedial action.

Termination of Case.

In most cases where an investigatory letter has been sent and parties therefore are subject to preservation obligations, OGC will notify the applicable entities and individuals of a staff determination not to pursue civil penalty action. The provision of a termination letter should not be construed as exonerating the party. Nor does such a letter imply that no action may ultimately result from staff's

investigation of that particular matter. The import of such a letter is that staff has completed its investigation and that no enforcement action is being pursued at that time.

Civil Penalty Enforcement

Should OGC staff decide to pursue civil penalties, the initial step is the preparation of enforcement notification as explained in 16 C.F.R. § 1119.5, also known as a show cause letter. A show cause letter informs the applicable parties of the staff's charges and intent to seek a civil penalty, the primary evidence supporting the charges and staff's legal analysis. In addition to providing formal notice of staff's charges, the purpose of the show cause letter is to give the subject company an opportunity to respond to staff's factual and legal analysis.

Although the show cause letter process is used in virtually every case, the process may be expedited should public safety or other exigent circumstances demand immediate action.

After reviewing staff's charges as set forth in a show cause letter, the subject entity may initiate settlement discussions instead of submitting a response. Prompt resolution, particularly where facts are not in dispute, can be effective and efficient for the subject company and can assist staff in quickly addressing situations involving non-compliance.

In responding to a show cause letter, firms should review carefully applicable statutory and regulatory civil penalty factors. In particular, subject companies should note the regulatory language that places on the company the burden of "present[ing] clear, reliable, relevant, and sufficient evidence" relating to a number of the factors.

Where the subject company does respond to the show cause letter, OGC staff, including senior managers, carefully review the response in assessing the case. Depending on the circumstances, additional information or evidence may be sought.

In considering the applicable facts and a company's response to a show cause letter, OGC staff will consider the appropriateness of separate and distinct remedial actions in addition to potential civil penalties. For instance, factual circumstances that support allegations of untimely section 15(b) reporting typically call for the creation of or improvements to company compliance programs, internal controls, supply chain logistics or recordkeeping procedures, or some combination of such actions, among other things, in furtherance of consumer product safety.

Settlement discussions. Staff may attempt to initiate settlement discussions with the recipient of a show cause letter. In such situations, staff often will suggest an appropriate settlement based on application of the civil penalty factors and informed by a variety of considerations, which may include consultation with DOJ.

Should settlement discussions prove unduly protracted or otherwise plainly appear to lack good faith, staff may inform the subject company that staff will not engage in a process that would delay timely consideration of the matter by the Commission. In addition, staff may set timing expectations for the course of settlement discussions.

In formulating settlement offers, companies should be mindful of the significantly increased civil penalty maximum amount applicable to conduct occurring after August 2009.

Meetings. Firms subject to civil penalty investigations may request a meeting with staff to discuss the substance of the staff's proposed recommendation to the Commission. Depending on the circumstances, such meetings often are granted in the context of good faith discussions that include a specific, good faith settlement offer from the subject company and that are expected to lead to an out-of-court resolution. Such meetings may be predicated upon the presence of a representative from the subject company. Firms should be prepared to address all applicable points at such a meeting with staff, and should not anticipate that more than one meeting request will be granted.

Referral to DOJ:

OGC and DOJ coordinate and work closely on CPSC enforcement matters. DOJ is routinely apprised of matters being pursued by OGC, including internal staff discussions regarding appropriate settlement terms and meetings with external parties representing subject firms.

If staff and the subject company are unable to agree on a civil penalty settlement terms within an appropriate time frame, staff may recommend to the Commission referral of the matter to DOJ to initiate civil penalty litigation.

Referral to DOJ to pursue civil penalties requires Commission approval. Where staff seeks such a referral, OGC staff will convey comprehensive information about the matter to the Commission. If the Commission approves referral of the matter to DOJ, DOJ will contact the subject company in due course.

Once referred to DOJ, the civil penalty process will be handled by DOJ in accordance with DOJ policies and procedures. In addition to civil proceedings, DOJ may consider whether any criminal charges (including those relating to material misrepresentations under 18 U.S.C. § 1001) are appropriate.

Civil penalty actions are a matter of public record; DOJ's regular practice is to announce the filing of a complaint in a press release.

As reflected in publicly-available information, DOJ settlements – in those cases that are resolved rather than litigated – are in the form of a federal district court consent decree and order. In addition to civil penalty payments, such consent decrees may include injunctive relief that requires defendant firms to take specified actions. Consent decrees also may include provisions that are not typically included in settlement agreements with CPSC. As court orders, the consent decrees can be enforced by way of contempt actions.