UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
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STATEMENT OF
THE HONORABLE THOMAS H. MOORE
THE HONORABLE ROBERT S. ADLER
AND
THE HONORABLE INEZ M. TENENBAUM
ON THE FINAL INTERPRETIVE RULE ON CIVIL PENALTY FACTORS
March 10, 2010

Historically, the Commission has sought relatively few fines against those who violated our statutes compared to the hundreds of violations that came to our attention each year. The policies behind, and purposes of, those civil penalties included deterring violations and thereby protecting the public, promoting respect for the law as well as promoting full compliance with the law, and noting the seriousness of the violation. Through passage of the Consumer Product Safety Improvement Act of 2008 (CPSIA), Congress increased the Commission's powers in an effort to improve this nation's product safety system. Section 217 of the CPSIA increased the maximum civil penalty amount the Commission could levy to $100,000 for each violation, and to $15,000,000 for a series of violations. Further, section 217(b)(2) of the CPSIA directed the Commission to "issue a final regulation providing [the Commission's] interpretation of the penalty factors" considered by the Commission in determining the penalty amount sought. The factors described in this Final Rule are applied after the Commission has determined that a person has violated the law and that the violation is serious enough to warrant a civil penalty. The factors are used to determine the appropriate amount of the penalty to be sought or compromised once such a determination has been made.

The Commission has applied most of the statutorily required factors for many years and there is nothing in the Final Rule that changes the way those factors will be applied. Even the additional factors that are discussed should come as no surprise to the industries over which we have jurisdiction.

The Commission declines to include certain factors that were raised in some comments on the Interim Final Rule. The Commission acknowledges that certain other factors that were suggested will be considered in the context of evaluating the nature, circumstances, extent and gravity of the violation. For example, "duration of the violation," which was listed as a separate factor in the draft of this document, will be considered in the Final Rule as part of the extent of the violation. The word "extent" encompasses the notion that the Commission may consider the length of time for which a person committed a violation.

Some commenters thought companies should receive credit for having a previous record of good compliance. A *record* of good compliance may not be very probative of good behavior. It may simply mean the Commission has not discovered previous violations. As a practical matter, however, when the Commission is evaluating the nature, circumstances, extent and gravity of a violation, it does take into consideration whether a person appears to be a first time violator and looks at the totality of the circumstances surrounding the violation to determine whether that merits any consideration. It is important to again note that the Commission is applying these factors in cases where it has been determined that a serious violation warranting a penalty has occurred.

It was also suggested that the relative complexity of identifying and confirming the presence of a defect in a product be taken into consideration by the Commission to mitigate the amount of a penalty. This consideration would normally come into play in determining whether a company had reported a defect to the Commission in a timely fashion. Section 1115.12 of our regulations already makes clear that firms should "not delay reporting in order to determine to a certainty the existence of a reportable noncompliance, defect or unreasonable risk. The obligation to report arises upon receipt of information from which one could reasonably conclude the existence of a reportable noncompliance, defect which could create a substantial product hazard, or unreasonable risk of serious injury or death. Thus an obligation to report may arise when a subject firm received the first information regarding a potential hazard, noncompliance or risk." Also see *United States of America v. Mirama Enterprises*, Inc., United States Court of Appeals for the Ninth Circuit at http://www.cpsc.gov/cpscpub/prerel/prhtml05/05033.pdf where the court found:

> It makes sense for Congress to have imposed fines for reporting failures even *when a product turns out not to be defective*. Information about a possible defect triggers the duty to report, which in turn allows the Commission either to conclude that no defect exists or to require appropriate corrective action. Congress's decision to impose penalties for reporting violations without requiring proof of a product defect encourages companies to provide necessary information to the Commission. [Emphasis added.]

Thus, we agree with the Commission's decision to decline to include this factor in this interpretive rule.

With regard to certain of the "other factors" that were listed, the Commission has always taken into account a history of noncompliance with the laws the CPSC enforces and their underlying regulations. The Commission will continue to consider previous violations as it has in the past when determining the amount of penalties to seek or compromise. We voted to delete the examples of violations that the Commission would consider as we saw no need to try to capture all of the types of violations that the Commission has traditionally recognized, fearing that if we inadvertently left something off the list it would take on unintended significance. Similarly, there is no significance in deleting the list as no change in Commission policy is implied by our having done so.

The safety/compliance program factor takes into account the extent to which a person (including an importer of goods) has sound, effective programs/systems in place to ensure that the products he makes, sells or distributes are safe. Having effective safety programs dramatically lessens the likelihood that a person will have to worry about the application of this civil penalty rule. Any good program will make sure that there is continuing compliance with all relevant mandatory and voluntary safety standards. This is not the same as saying if one's product meets all mandatory and voluntary standards that the Commission will not seek a civil penalty in appropriate cases. The Commission expects companies to follow all mandatory and voluntary safety standards as a matter of course. Not all companies do this, however. This factor, as all the others, is looked at as part of the totality of the circumstances surrounding the violation(s) and is just one of many factors considered. It also has to be relevant to the violation and in many circumstances it will not be relevant. For example, one can have the best safety program in the world in terms of identifying product hazards, but if he or she does not report the hazards to the Commission in a timely manner, the person will still be subject to a penalty for failing to report.

We appreciate the effort that has gone into this interpretive rule. We think it is a significant improvement over the rule the Commission was considering prior to the passage of the CPSIA. We also recognize the willingness of our colleagues to work cooperatively to achieve a large measure of agreement on this rule.