Comments
Civil Penalty Factors
Interim Final Interpretative Rule
Docket – CPSC-2009-0068

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0002

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Comment On: CPSC-2009-0068-0001
Civil Penalty Factors

Document: CPSC-2009-0068-0002
Comment from Daniel Bosch

Submitter Information

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Address: United States,
Submitter's Representative: Daniel Bosch
Organization: National Federation of Independent Business

General Comment

See attached comments.

Attachments

CPSC-2009-0068-0002.1: Comment from Daniel Bosch

October 1, 2009

Acting Secretary Alberta E. Mills
Consumer Product Safety Commission
Office of the Secretary
4330 East West Highway
Room 502
Bethesda, MD 20814

Re: Civil Penalty Factors — Docket No. CPSC–2009–0068

These comments are submitted for the record to the Consumer Product Safety Commission (CPSC) on behalf of the National Federation of Independent Business (NFIB) and the NFIB Small Business Legal Center in response to the interim final interpretative rule for civil penalty factors published in the *Federal Register* on September 1, 2009. In the rule, the CPSC requested feedback on factors it should consider when determining violations and penalties of consumer protection law. NFIB appreciates the opportunity to comment on these factors.

NFIB is the nation's leading small business advocacy association, representing members in Washington, D.C. and all 50 state capitols. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents about 350,000 independent business owners who are located throughout the United States. The NFIB Legal Center, a nonprofit, public-interest law firm established to be the voice for small business in the nation's courts and the legal resource for small business, is the legal arm of NFIB.

NFIB Urges the CPSC to Weigh Firm Size When Considering Violations and Penalties

The Consumer Product Safety Improvement Act of 2008 requires the CPSC to consider a "penalty in relation to the size of the business of the person charged by requiring that this factor include a consideration of how to mitigate undue adverse economic impacts on small businesses."

On the whole, the CPSC discussion on its consideration of size is encouraging for small business owners. NFIB is pleased to see the CPSC acknowledge that firm size will be among the primary factors it will use to determine the severity of violations. In addition, we were glad to see that among its criteria for "size" the CPSC includes a firm's number of employees, net worth, and annual sales.

However, NFIB would like to take this opportunity to remind the CPSC of the importance in following this guideline in each case it handles. The typical NFIB member employs 10 people and reports gross sales of about $500,000 per year. Most, if not all, of the gross revenue of the vast

majority of our members goes toward covering operational costs. Therefore, levying a fine in the range of tens of thousands of dollars for a single, unintentional violation can be the death knell for a small business.

CPSC Should Consider the Responsibilities of Small Business Owners and Compliance Assistance

NFIB also urges the CPSC to weigh the responsibilities of the typical small business owner when considering the seriousness of a violation. Unlike larger firms, the average NFIB business owner does not have specialized staff to handle regulatory compliance. This burden generally falls on the owner, who must navigate the maze of federal and local regulations affecting his or her business — all while serving customers, ordering inventory, supervising employees, and even taking out the trash at the end of the day. Innocent mistakes will happen, and we ask CPSC to account for the lack of compliance resources a small business has when assessing vioations.

To further help this burden, the CPSC should make every effort to educate regulated entities about their compliance obligations. A guide created specifically for the small business audience would be a good start. Other ideas include email alerts and partnering with trade groups and associations to notify affected businesses about the latest recalls and product safety warnings.

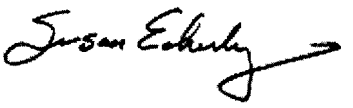
NFIB Comments on Other Factors Listed in the CPSC's Federal Register Notice

NFIB is encouraged by the other factors that are likely to be considered by the CPSC. These include, but are not limited to: the existence of a safety/compliance program or system, a violator's history of noncompliance, any economic gain from noncompliance, and response time to CPSC requests for information. These factors are important indicators of a regulated entity's good faith and merit consideration by the CPSC when issuing penalties.

Small businesses care greatly about the safety of the products they sell. This rule takes reasonable steps to ensure that businesses are not unfairly punished for good faith violations of consumer protection laws. However, in order to ensure that small business owners are not inappropriately penalized, the CPSC must take great care to consider these factors in each and every case it handles.

Thank you for your time and consideration. Should you require further information, please contact Daniel Bosch at 202-314-2052.

Sincerely,



Susan Eckerly
Senior Vice President
Public Policy

0003

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Civil Penalty Factors

Document: CPSC-2009-0068-0003
Comment from Sheila Millar

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General Comment

Attached please find comments on behalf of the Fashion Jewelry Trade Association.

Attachments

CPSC-2009-0068-0003.1: Comment from Sheila Millar

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September 30, 2009

Electronic Mail

Todd A. Stevenson
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Re: Docket # CPSC 2009-0068

Dear Mr. Stevenson:

Thank you for the opportunity to submit comments on the Interim Final Interpretive Rule regarding 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. Civil Penalty Factors, 74 Fed. Reg. 45,101 (Sept. 1, 2009) ("Interim Policy"). As indicated in previous comments,[1] the Fashion Jewelry Trade Association (FJTA) supports adoption of a flexible civil penalty policy that provides clarity on the factors but avoids a one-size-fits all approach. The goal of any penalty policy is to provide a reasonably transparent way to for the regulated community and the public to understand factors that are considered in penalty determinations so that a proposed penalty is proportionate to the violation and just under the circumstances. While we agree that a formula would not offer the requisite flexibility, and that the Commission should consider the totality of factors, we believe that further guidance and clarifications are necessary in the proposed Interim Policy. This is particularly critical as the CPSIA broadened the number of prohibited acts that could constitute violations.

In issuing an Interim Final Rule, the Commission has signaled its desire to refine the policy to further clarify it, an approach with which FJTA agrees. In particular, FJTA believes that further clarification is required to address the actual potential for consumer harm, conform the definition of a "product defect" to existing law, assure that the company's history of compliance, as well as non-compliance, and good faith, evinced by, for example, internal compliance programs, General Certificates of Conformity (GCCs) and the like, and degree of culpability, are fully considered within the totality of the circumstances.

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1 *See* Comments of FJTA, December 17, 2008.

In addition, the process by which penalties are derived merits transparency in negotiations with potential violators so that those companies receive from the Commission a written explanation of how the proposed penalty was derived, including factors considered or not considered, and weights applied to them. Consequently, these comments expand on FJTA's December 17, 2008 submittal.

Civil Penalty Factors

We agree that the Commission should consider the "nature, circumstances, extent and gravity of the violation," examining "the totality of the circumstances surrounding the violation." See 74 Fed. Reg. 45107 (Part 119.4(a)(2)). This examination should not be a mathematical exercise of counting up how many violations might have occurred, especially given the expanded universe of violations. In updating the Interim Policy, we suggest that the following factors be identified as important to consider in examining the totality of the circumstances:

- level of culpability, *i.e.,* whether the violation occurred with actual knowledge or reckless disregard of safety;
- the nature of the product defect, considering the potential for actual harm;
- the severity of the risk of injury;
- the occurrence or absence of injury;
- the number of defective products distributed;
- compliance with voluntary standards;
- the appropriateness of such penalty in relation to the size of business of the person charged;
- the good faith of the company; and
- the overall appropriateness of the penalty considering the totality of the circumstances.

Underlying these factors is the concept of *proportionality.* Civil penalties should be proportional to the risk of actual or potential harm to consumer, within the framework of the violator's "knowledge" of a violation.

Level of Culpability. A predicate for imposition of civil penalties under relevant statutes is that the violation be "knowing." Higher penalties are appropriate against companies who acted

with actual knowledge that a product was defective or unreasonably dangerous than those whose conduct may have been reckless or grossly negligent. Simple negligence or lack of care suggests a lower order of culpability that merits lower penalties. Further, with adoption of the Consumer Product Safety Improvement Act of 2008 (CPSIA), the Commission should clarify that a business does not have "knowledge" of a violation where a consumer product is accompanied by a General Certificate of Conformity (GCC) or certificate based on third party testing by an accredited conformity assessment body issued in good faith. The staff is bound to apply standards of "knowledge" based on the underlying statutes. Certainly, without evidence of scienter or intent, higher penalties would be manifestly unjust and disproportionate, especially if there is no actual risk of harm to consumers. These points should be clarified in the final policy.

Nature of the Product Defect. The suggested definition of a "product defect" in the Interim Policy should be revised to comport with existing law, which distinguishes a "product defect" from a "failure to comply with an applicable consumer product safety rule." The Commission should adhere to existing definitions and not redefine terms that have established meaning under existing law in developing the policy. Further, the nature of the defect may vary. Certain defects are well known and understood, while others may be novel or emerging. Defects in the emerging category, even if potentially serious, merit a comparatively lower penalty, and we believe that applying a rule under which penalties may only be reduced if a company has reported a violation will unjustly penalize companies that legitimately may not have recognized a new or emerging hazard. The age of the product involved is also important in some instances. Few products are intended to last forever, and defects must be considered from the perspective of the product design and manufacture at the time the product was placed on the market.

Severity of the Risk of Injury. The potential for *actual* harm is an important consideration that logically should be applied in civil penalty calculations. Imposing very high penalties in the absence of any risk of actual harm for technical violations that do not increase the risk of injury or illness to consumers is disproportionate and contrary to sound public policy. With an expanded universe of prohibited acts under the CPSIA, this factor must be part of the totality of the circumstances considered by the Commission. Product lifetimes and expected failure rates may also be important considerations in specific instances.

Occurrence or Absence of Injury. Instances of actual injury, as well as the seriousness of the injury, are important factors. From this standpoint, it would be appropriate to consider if the violator's conduct contributed to additional serious injuries to consumers.

Number of Defective Products. The number of defective products distributed is an important factor, but the number in consumer hands must be the most important consideration. Again, the age and expected useful life of the product must be key considerations. The Commission's comment that the statute does not distinguish between defective products that consumers receive and those distributed in commerce disregards the fact that the Commission has and should exercise discretion to distinguish between the two, consistent with past practice.

Compliance with Voluntary Standards. Many voluntary standards may exist that address aspects of product safety. Compliance with relevant standards should be a positive consideration in civil penalty analyses.

Previous Record of Compliance. The previous record of compliance encompasses both a history of compliance as well as instances of non-compliance. The Interim Policy, however, simply references "noncompliance" as a factor. While repeat offenses involving the same or a similar type of violation or defect may be a factor that would suggest higher penalties, this is not simply a numbers game. Again, the concept of proportionality must be considered. Both the record of compliance as well as instances of non-compliance necessarily must be part of the analysis. Large manufacturers and retailers handling many different SKUs of products may be involved in multiple recalls in a given year that involve different products or issues. The Commission should consider the scope and extent of products manufactured, imported, distributed or sold by the particular firm involved, and the types and differences between the products, and not simply add up recalls or violations in determining civil penalties. The specific nature of the violations, specific products, type of business and the totality of the company's prior record of both compliance and noncompliance should all be considered.

Safety and Compliance Programs and Systems. Companies that have instituted reasonable programs and systems to manage safety should be given credit for those systems. The Interim Policy appears focused principally on statistical evaluations of incident data. Small companies, in particular, may not have the ability to monitor and review industry data and information. Their focus often is on internal management of their products, components and raw materials to identify and meet appropriate safety requirements. Lapses in quality control system, or problems with component or raw material suppliers, may occur despite sound product safety programs, and manufacturers should be given credit for good faith efforts to adopt and implement safety systems and their demonstrated willingness to adopt improvements when problems are identified. 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.

Appropriateness of the Penalty in Relation to the Size of the Business The Commission is required to consider the size of a business in relation to the amount of the proposed penalty, and may consider a variety of factors in this analysis. We agree that the impact on small businesses merits special consideration.

Cooperation and Good Faith. 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. We believe the Commission's use of the phrase "failure of the violator to respond in a timely and complete fashion to the Commission's requests for information or remedial action" is unduly narrow. Overall good faith includes many factors. From the standpoint of timeliness, the timeliness of reporting should be judged on knowledge the firm had at the time the decision was

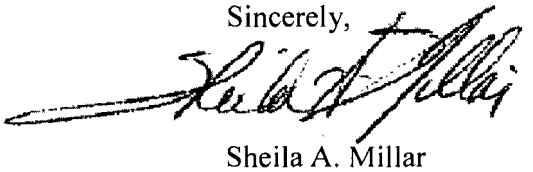
made. Again, the Commission should not apply 20/20 hindsight to good faith responses to reports of incidents or defects, and the nature of the defect – particularly if it is novel or not well-understood – is an important consideration in the context of timeliness of reporting of substantial product hazards, defects or violations. Timeliness and responsiveness to reasonable requests from the Commission are appropriate factors to consider, but companies should not be penalized for raising reasonable objections to Commission requests for information or action, consistent with their rights under applicable rules. As noted above, companies should be given credit for commitments to refine and improve product safety systems and to cooperate with the Commission. Repeated and deliberate failures to report, actions designed to mislead the Commission, or bad faith should result in higher penalties.

Appropriateness of the Penalty Given the Totality of the Circumstances. The Commission proposes to consider as a separate factor economic gain from noncompliance. This appears to be simply part of the general consideration of "appropriateness" of the penalty, which includes both the size of the business, economic benefit from a failure to comply, the culpability of the company, its good faith and other factors. The Commission should assure that proposed penalties reflects all of the factors considered so that the penalty is fair and just given the totality of the circumstances.

Conclusion

FJTA agrees that a clear penalty policy and transparent procedures so that in individual cases the affected violator understands the proposed application will benefit the Commission and the public. We appreciate the opportunity to submit these comments.

Sincerely,



Sheila A. Millar

cc: Melissa Hampshire
Michael Gale

0004

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Comment from Ann Staron

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General Comment

DOCKET NO. CPSC - 2009-0068 - JOINT COMMENTS 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.

Attachments

CPSC-2009-0068-0004.1: Comment from Ann Staron

BEFORE THE
UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION

JOINT COMMENTS
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.

16 C.F.R. Part 1119 Civil Penalty Factors Interim Final Interpretative Rule 74 Fed. Reg. 45,101 (Sept. 1, 2009)	)	DOCKET NO. CPSC – 2009-0068

October 1, 2009

I. INTRODUCTION

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") submit these joint comments in response to the U.S. Consumer Product Safety Commission's ("CPSC") notice regarding the opportunity to submit comments concerning the interim final rule presenting the Commission's interpretation of the factors to be considered in determining the amount of any civil penalty 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. 74 Fed. Reg. 45,101 (Sept. 1, 2009). The Companies are manufacturers, importers and/or distributors of all-terrain vehicles and other motorized recreational products.

Section 217 of the CPSIA vastly increased the maximum amount of potential civil penalties under the various statutes administered by CPSC. In addition, Section 216 substantially expanded the number and type of prohibited acts for which companies may incur potential liability for such penalties. In order to insure that the regulated community has a clear understanding of how these enhanced enforcement authorities regarding civil penalties will be applied, Section 217(b)(2) required CPSC, within one year of enactment, to issue a final regulation providing its interpretation of the factors to be considered in determining the amount of such civil penalties.

Unfortunately, the Commission's interim final interpretative rule on civil penalty factors, 74 Fed. Reg. 45,101 (Sept. 1, 2009) (to be codified at 16 C.F.R. Part 1119), fails to achieve these goals. Whether warranted or not, there is a perception in some quarters of the regulated

community that past Commission determinations of civil penalty amounts have been somewhat arbitrary, and that it is therefore difficult to understand what steps firms should take to avoid or mitigate the risk of the imposition of such penalties in the future. The Companies accordingly suggest the following specific revisions and clarifications to the interim final interpretative rule in order to ensure that relevant factors are fully and fairly considered, as well as to provide clearer guidance to the regulated community regarding the consideration and application of relevant and appropriate factors in civil penalty determinations and settlements.

II. SUGGESTED REVISIONS TO INTERIM FINAL RULE

1. Section 1119.4(a)(3) – 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, such as motorized recreational vehicles, typically require component replacement or repair in some number of cases due to user failure to maintain the product or wear during the intended use of 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. Consideration of the nature of the product defect should thus encompass the relative complexity of identifying and confirming the presence of a particular defect given the context in which the defect manifests itself.

In contrast, the preamble discussion to the interim final rule states that consideration of information about the complexity of investigating and identifying a particular product defect is limited to situations where a company has timely reported under Section 15. See 74 Fed. Reg. at

45,104. On the contrary, such information is directly relevant to whether there was timely reporting under Section 15 and specifically in instances where a civil penalty is being sought because of an alleged failure to timely report. Indeed, it is not clear why CPSC would even be seeking a civil penalty if it had determined that the product defect was timely reported.

The interim final interpretative rule should be revised to explicitly state that information about the complexity of investigating and identifying a particular product defect is a relevant component of the nature of the product defect and will be considered in all cases.

The Commission should also 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.

2. Section 1119.4(a)(6) – Number of Defective Products Distributed

The "number of defective products distributed" is a statutorily specified factor in determining the amount of any civil penalty to be sought. See, e.g., 15 U.S.C. § 2069(b). However, the text of Section 1119.4(a)(6) of the interim final rule directs the Commission to consider the "actual number of products" imported or placed in the stream of commerce. This section should be revised to state that the Commission will consider the "actual number of defective products" imported or placed in the stream of commerce.

In some cases, the total number of products imported or distributed is not the same as the number of defective products, such as where the defect is manifested in some but not all of the product units. The final interpretative rule should thus be revised to track the statutory language which 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 imported or distributed.

In addition, in some instances the number of defective products actually in the hands of consumers may differ substantially from the number imported or placed in the stream of commerce. This could occur where most product units have exceeded their useful life, or where a defect was discovered before all product units were distributed to retailers and sold to consumers. Indeed, the Commission's interpretative rule regarding whether a product defect presents a substantial risk of injury and thus must be reported under Section 15 of the CPSA currently specifies this factor as a relevant consideration with respect to the "number of defective products distributed." See 16 C.F.R. § 1115.12(g)(1)(ii). The interim final rule should be

revised to note that to the extent it differs from the number of defective products imported or placed in the stream of commerce, the number of such defective products actually in the hands of consumers will also be considered because it relates to the exposure to risk of injury.

3. Section 1119.4(b)(2) – Other Factors as Appropriate

The CPSIA amended the CPSA and the other acts administered by CPSC to provide that the Commission "shall consider . . . other factors as appropriate" in determining the amount of any penalty. In contrast, Section 1119.4(b) of the interim final rule provides that the Commission "may consider, where appropriate, other factors" in determining the amount of any civil penalty to be pursued. This section of the interim final rule should be revised to track the statutory language and specify that "the Commission will consider, as appropriate, other factors" in determining the amount of any penalty.

In addition, the final sentence in this section should be revised to read as follows: "Additional factors which will be considered when present in an individual case include, but are not limited to the following:". Sections 1119.4(b)(1) through (4) should correspondingly be revised to provide that the Commission "will consider" each of the identified factors. It should also include an additional subsection (5) that states that the Commission will evaluate each identified additional factor, rather than making that a discretionary exercise as the current language of the rule implies.

4. Section 1119.4(b)(2) – Previous Record of Compliance

Section 1119.4(b)(2) of the interim final rule provides for consideration if the violator has a history of non-compliance with the CPSC and whether a higher penalty should be assessed for repeated non-compliance. It is also fully appropriate -- and indeed only fair -- that the Commission and staff consider if the alleged violator has a previous history of compliance with

CPSC statutory and regulatory requirements, including, among other things, previous timely notifications and corrective actions under Section 15 of the CPSA, and correspondingly whether a lower penalty should be assessed in view of such previous repeated compliance. This section should be revised to specify that the Commission consider if the violator has a history of compliance with the CPSC and whether a lower penalty should be assessed in view of previous compliance.

5. Section 1119.4(b) – Failure to Respond in a Timely and Complete Fashion

Section 1119.4(b) of the interim final rule provides for consideration whether a violator's failure to respond in a timely and complete fashion to requests from the Commission for information or for remedial action should increase the amount of the penalty. It is also fully appropriate -- and likewise only fair -- that the Commission and staff consider whether the degree to which the company 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, should lessen the amount of the penalty.

This factor is highly relevant and should receive more emphasis and importance in making civil penalty determinations than it has in the past. Indeed, 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.

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 the Companies do not believe CPSC should approach penalty assessment in the same quantitative manner as EPA, the Commission and staff

should accord greater recognition to cooperation and good faith by a company, including particularly initial voluntary self-reporting, in determining the amount of any civil penalty, as compared to situations where reporting is triggered by an initial CPSC investigation and the company fails to cooperate.

A new Section 1119.4(b)(5), entitled "Cooperation and Good Faith," should accordingly be added to the final interpretative rule. This new section should provide that the Commission consider whether an alleged violator's good faith cooperation, including timely and complete responses to requests from the Commission for information or for remedial action, should lessen the amount of the penalty. Addition of this section is necessary to ensure even-handed consideration of a company's level of responsiveness and cooperation.

We also recommend that the interpretative rule make it clear that the reference to the failure to respond to requests for remedial action in a timely and complete manner be deleted or clarified to state that it is in no way intended to abrogate a firm's right to due process. Firms often disagree with the Commission staff's preliminary determinations that products present substantial product hazards. In some cases, the staff is able to reach an agreed-upon corrective action after a period of negotiation. If this does not happen, the firm is entitled to due process in an administrative proceeding, should the staff choose to initiate one. As it is currently written, the rule raises the specter of retaliation against firms who disagree with the staff or pursue their due process rights.

6. Section 1119.5 – Enforcement Notification

The preamble to the interim final interpretative rule notes that the underlying purpose of the CPSIA requirement for the Commission to publish a rule interpreting the civil penalty factors is to give "transparency to the regulated community about the framework the Commission will

use to guide its penalty calculations in the enforcement process and may provide incentives for greater compliance." 74 Fed. Reg. at 45,103. As noted above, this is particularly important given the huge increase in maximum penalties and the large number of newly prohibited acts. Unfortunately, the mere recitation of the various relevant factors in the final rule will not provide such transparency without the ability of the regulated community to see how these factors are considered and applied in practice to set penalty amounts on a case-by-case basis.

Accordingly, Section 1119.5 should be revised by adding the following provision at the end thereof: "The Commission will provide the alleged violator with a written explanation of the basis for setting the amount of the penalty sought. This explanation will specify the factors considered, the relative weight given each factor, as well as any of the factors identified in the rule that were not considered and the reasons for such non-consideration. The Commission will also provide such a written explanation of the final penalty amount in all final penalty settlement agreements."

III. CONCLUSION

The Companies believe that it is very important for the Commission to incorporate the revisions and clarifications noted in these comments in its final 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, as well as assurance that these factors will be applied in a consistent and even-handed manner.

Respectfully submitted,

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Civil Penalty Factors

Document: CPSC-2009-0068-0005
Comment from Steve Pfister

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General Comment

Please see the attached comments regarding Docket No. CPSC-2009-0068-0001.

Attachments

CPSC-2009-0068-0005.1: Comment from Steve Pfister

National Retail Federation®
The Voice of Retail Worldwide

October 1, 2009

Ms. Alberta Mills
Acting Secretary
Consumer Product Safety Commission
4330 East-West Highway
Room 502
Bethesda, MD 20814

RE: Comments on Civil Penalty Factors Interim Final Interpretative Rule (Docket No. CPSC-2009-0068)

Dear Ms. Mills:

The following comments are submitted on behalf of the National Retail Federation (NRF) in response to the Consumer Product Safety Commission's (CPSC) Civil Penalty Factor Interim Final Interpretative Rule. NRF previously provided comments on December 18, 2008 when the CPSC issued a request for comments on Section 217(b)(2) of the Consumer Product Safety Improvement Act (CPSIA). We appreciate the opportunity to comment on the Interim Final Rule.

By way of background, 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 establishments, more than 24 million employees - about one in five American workers - and 2008 sales of $4.6 trillion. As the industry umbrella group, NRF also represents more than 100 state, national and international retail associations.

In our previous comments, NRF strongly encouraged the CPSC to develop clear and concise policies and criteria with regard to the administration of civil penalties. While we support the direction that the CPSC has taken, we believe further clarification is needed in the Interim Final Rule, especially as it relates to the definition of "product defect" and the additional factors that may be considered. 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

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violate CPSC administered laws. This is especially important now as the CPSIA has broadened the number of prohibited acts that could constitute a violation.

We appreciate the CPSC's willingness not to consider a matrix or formulaic approach to determine civil penalties. It is critical that the penalty policy consider all of the factors involved. It is just as important that the CPSC allow for transparency in the process so companies can fully understand how a civil penalty decision was achieved. The CPSC should identify all of the civil penalty factors that were or were not considered when negotiating with a potential violator.

Civil Penalty Factors

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 the business of the person charged, including how to mitigate undue adverse economic impacts on small businesses; and 6) other such other factors as appropriate. We are pleased to see that the CPSC will recognize the "nature, circumstances, extent and gravity of the violation" as well as the "totality of the circumstances surrounding the violation." As we stated in our previous comments, these are all important factors that need to be considered as a whole when the CPSC is deciding upon a civil penalty.

As the CPSC works to develop a final rule, we would encourage the clarification of several of the factors that the CPSC will consider. These include:

- **Nature of the Product Defect** – It is important for the CPSC to determine what the actual defect is with regard 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? The CPSC should distinguish between an actual "product defect" and a "failure to comply with an applicable consumer product safety rule." This is critical as industry continues to wait on guidance to comply with the new CPSIA requirements.

- **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 of these 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. Higher penalties should be applied when there is a greater risk of actual injury.

- **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. We would ask the CPSC to reconsider the distinction between the number of defective products distributed and the number of defective products in consumers' hands. We believe the CPSC has the authority to exercise discretion between the two and should do so.

- **Appropriateness of Penalty in Relation to the Size of a 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 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.

Other Factors As Appropriate

In the original request for comments, the CPSC suggested a number of additional factors to consider when determining a civil penalty. These included: 1) previous record of compliance; 2) timeliness of response; 3) safety and compliance programs and system; 4) cooperation and good faith; 5) economic gain from noncompliance; and 6) product failure rate. These additional factors have been included in the Interim Final Rule. 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.

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 that are trying to do the right thing. The focus should be on the nature of the violation and not on an individual factor.

We would encourage the CPSC to consider the following when considering these additional factors:

- **Previous Record of Compliance** – The Interim Final Rule only references whether or not a potential violator has a history of noncompliance with the CPSC. While we agree that there should be higher penalties for those who have not complied with CPSC regulations, the CPSC should also consider lower penalty amounts for those companies who have a strong history of complying with the CPSC.

- **Safety and Compliance Programs and Systems** – NRF strongly supports the inclusion of safety and compliance programs as a factor in the consideration of a civil penalty. This is extremely important as most, if not all, NRF members have such programs in place and have updated those programs to include the requirements of the CPSIA. These programs are only bolstered by the information and guidance received from the CPSC. We strongly encourage the CPSC to further define what a "reasonable" program would entail.

- **Cooperation and Good Faith** – As identified in the original request for comments, we believe that the CPSC should consider whether or not a company cooperates and acts in good faith with CPSC staff. Those who cooperate should be rewarded, while those who do not and have a history of not cooperating should be penalized. Included within the determination of whether or not a company cooperates is whether or not a company responds in a timely manner. This should not be judged solely on the number of days that it takes for a company to respond to a product hazard, defect or violation. These can be very complex issues that may take time to fully understand. This could include a request for additional information from the CPSC. This should not be viewed negatively as these companies are more likely trying to identify all of the issues to be able to respond appropriately to the CPSC.

Conclusion

NRF welcomes the opportunity to share our thoughts on the Interim Final Rule. We believe that a clear policy and transparent procedures will benefit the CPSC and affected parties. We strongly support the CPSC's recognition that there are many factors that need to be considered when determining a civil penalty and it is not a one size fits all approach. If you have any questions, please contact Jonathan Gold (goldj@nrf.com), NRF's Vice President, Supply Chain and Customs Policy.

Sincerely,

Steve Pfister
Senior Vice President
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Comment On: CPSC-2009-0068-0001
Civil Penalty Factors

Document: CPSC-2009-0068-0006
Comment from Richard Woldenberg

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General Comment

I have attached an eight-page comment letter on Civil Penalty Factors for your consideration.

Thank you.

Attachments

CPSC-2009-0068-0006.1: Comment from Richard Woldenberg

October 1, 2009

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

Re: Docket No. CPSC–2009–0068 Civil Penalty Factors

Dear Mr. Stevenson:

I am hereby submitting comments in response to the Solicitation of Comments on Civil Penalty Factors (.Docket No. CPSC–2009–0068) dated September 1, 2009 (the "Factors"). I have previously submitted comments on December 17, 2008 regarding Section 217(b)(2) Civil Penalty Criteria which are posted online at the CPSC website.

The Civil Penalties Factors are Especially Significant for an Administrative Agency. Because the CPSC is an independent federal agency (15 U.S.C. §2053), enormous governmental power is held by the agency. As noted by some commentators, "[independent] agencies typically exercise all three constitutionally divided powers within a single bureaucratic body: That is, agencies legislate (a power vested solely in the legislature by the Constitution) through delegated rulemaking authority; investigate, execute, and enforce such rules (via the executive power these agencies are typically organized under); and apply, interpret, and enforce compliance with such rules (a power separately vested in the judicial branch)." [Footnotes omitted.] See http://en.wikipedia.org/wiki/Fourth_branch_of_government. With one agency standing essentially as judge, jury and legislature and with fewer checks-and-balances in place, penalties imposed by the CPSC under the Factors have the potential to be abusive.

The unchecked authority to punish can be damaging to markets regulated by the CPSC. Problems arising out of self-oversight or a possible lack of due process can be anticipated, as well. Without placing clear limits on the CPSC's authority or process to impose penalties, the agency's enforcement activities may become economically depressing. The CPSC may believe that large penalties will simply spur the market to uphold its compliance responsibilities: "'These highly publicized toy recalls were among many that helped spur action last year to impose even stricter limits on lead paint on toys,' said CPSC Chairman Inez Tenenbaum. 'This penalty should remind importers and retailers that they have always had the same obligation to meet the strict lead limits as the manufacturers.'" [CPSC Press Release dated October 1, 2009.] While that effect will certainly be felt, other less positive impacts will also be generated. Applying the rule of "once burned, twice shy", we anticipate that retailers will clamp down tightly on compliance, making the sale of low volume items unprofitable and triggering a Darwinian "survival of the fittest" selection in children's markets. For instance, implementation of new compliance rules at Toys R Us make it difficult or near impossible for small businesses to sell through that retail outlet (16% market share in the U.S. toy market). In addition, other market participants may conclude that the CPSC is now enforcing a strict liability standard and just exit the market altogether, abandoning their customers. The effects will be both direct and indirect.

Arbitrary results are already noticeable. Recent penalties announced for lead or lead-in-paint follow no apparent pattern, are "round numbers" and equate to per-unit penalties ranging between $.01 and $2.17 (July 7 press release). Likewise, recent penalties for drawstring violations have ranged as high as $10.63 per unit (and up to a breathtaking 60% of revenue), again without apparent pattern. These widely varying penalties appear to be arbitrary. A fear of arbitrary penalties is certain to depress markets by discouraging investment in new products or new markets.

The penalty imposed on Target today in the amount of $600,000 provides another chilling example. The Target penalty is the equivalent of $1.10 per unit recalled. The October 2009 penalty applies to sales made between May 2006 and August 2007, and two of the three voluntary recalls resulted from Target's unprompted, good faith self-reporting. The Settlement Agreement and Order even states: "Target's quality assurance procedures were reasonable and satisfied the standard of care. Target's knowledge when the subject products were imported and offered for sale was that they complied with the lead paint standard. **Notwithstanding satisfactory pre-production test results**, certain units were subsequently found to contain impermissible levels of lead paint." [Emphasis added] Notably, no lead-in-paint injuries were reported from the Target sales. The agreement also indicates that Target had begun to implement a new multi-stage testing and quality assurance initiative BEFORE the recalled items were manufactured, further confirming Target's good faith and absence of presumed knowledge. Yet the company was forced to pay a $600,000 penalty for this unfortunate and regrettable incident.

I also understand that many (if not all) penalties were imposed without negotiation, exposing the violative companies to an extended, expensive, highly public and risky investigation (with possible referral to the Department of Justice) if the settlement agreements were not signed. The inherently coercive nature of such demands, with appeal a practical impossibility for all but the largest violators, makes the CPSC's penalty determination essentially final and non-negotiable. The power of the CPSC to impose penalties needs to be restricted to assure that the threat of penalties will not adversely affect the operation of markets and to eliminate abuse. In the current proposal, the ability of the CPSC to impose penalties is for all practical purposes unfettered. This is neither necessary nor desirable.

In Order to Preserve Flexibility, the Factors Fail to Discount ANY Possible Penalty Scenario. The Discussion has repeated instances where the agency declined to take a common sense position, ostensibly because circumstances exist where a penalty might *possibly* be merited. For instance, the Discussion states: "Some commenters stated that the Commission should reserve seeking penalties only for the most egregious and dangerous situations and that most violations do not involve bad intentions or ill will. . . . Since the knowledge requirements in the CPSA, FHSA, and FFA include presumed knowledge, as well as actual knowledge, the Commission declines to follow the commenters' suggestion to seek a penalty only where there is evidence of bad intentions or ill will." [Another similar formulation is found in the Discussion on Section 1119.4(a)(4).]

I interpret this verbiage to mean that under circumstances where the conduct is NOT egregious (no ill will or bad intentions) and where the hazard is NOT dire, the Commission anticipates that circumstances may exist where a penalty may still be called for. This could occur, for instance, where the company is persistently in violation of law (perhaps because of inadequate operational

controls) or had repeated recalls for the same violation. In my opinion, the right way to word the Factors would be to state that the absence of egregious conduct or substantial product hazard would be considered as a significant mitigating factor to be weighed against the presumed knowledge built into the "knowingly" definition (see below). This formulation would lend much greater clarity to the rules and Discussion set forth in the Factors. Unfortunately, if the CPSC wishes to preserve total flexibility, it will eventually act arbitrarily in setting penalties and hence unjustly.

In the same vein, the Factors do not place enough emphasis on consideration of positive factors. While the bad behavior or failures of an offending company should be considered in setting penalties, so should mitigating factors without limitation. For instance, the long term record of compliance should be considered when a violation is up for penalty. The investment in good faith safety practices and supply chain management should mitigate against evidence of non-compliance. The consideration of mitigating factors needs to be explicitly added to the process to ensure that mitigation is part of every penalty deliberation.

The Factors Fail to Recognize the Potential for Myriad Technical Violations of the CPSA, as amended. The Discussion states: "Two commenters suggested that the Commission should evaluate violations of regulatory standards by distinguishing those that do not involve actual risk of harm, but rather the potential risk of harm, differently than those that do involve real potential for significant injury. The Commission declines to accept the suggestion that it distinguish any violations of regulatory standards, rule, or bans in this manner. The promulgation of a mandatory regulation by the Commission, or by Congress when they enact statutory bans and standards, carries with it a corresponding determination that the standard is necessary to address an unreasonable risk of injury presented by the product included within its scope. Violations of such a statutory provision or Commission regulation presents a risk to consumers that has previously been determined to be addressed by compliance with the statute or regulation. If the commenters' suggestion were followed, the Commission would be classifying certain mandatory standards as more important than others. In addition, the comment does not account for the fact that the Commission can seek penalties for other prohibited act violations (in addition to knowing violations of mandatory rules, standards or bans)."

As noted above, the Factors seem to seek flexibility without acknowledging the common sense reality of the regulated community's situation. Regulated companies certainly recognize and respect that the entirety of the law must be observed. Nevertheless, because the CPSIA imposes so many tiny, hyper-technical obligations that can be the cause of (multiple) violations, penalties for repeated technical violations is a realistic possibility for almost all companies. If, for instance, a company has 50 violations of the advertising rules because of missing warning labels in catalogs or on a website (out of 10,000 relevant catalog listings), should they be subject to penalty? In my opinion, the Factors should clearly set out that some kind of violations are IN FACT different in nature and that the presumption will be AGAINST penalties in such circumstances. This preserves the ability of the agency to seek penalties for technical violations if the rare circumstances arise that merit such action. Clear statements of a presumption against penalties for technical or other low risk violations avoids terrifying the regulated community with the implicit threat that every violation could be subject to heavy penalty. [Consider the value of this change on the current trend among resale shops to refuse children's goods.] For

regulated companies, this clarification will significantly raise comfort levels and thereby strengthen the healthy operation of the marketplace.

The Definition of "Knowingly" Should Not Expand the Use of Penalties under the CPSIA.

The definition of "knowingly" under Section 20 of the CPSA introduces yet another opportunity for penalty abuse by the agency and should be restrained in the Civil Penalties Factors guidance. Under Section 20 of the CPSA, a "knowing" violation of the law by someone other than a distributor, manufacturer or private labeler will not result in a penalty unless the offender had ACTUAL knowledge. However, for distributors, manufacturers or private labelers, the definition of "knowingly" includes imputed knowledge, allowing virtually unlimited 20-20 hindsight by the CPSC.

The potential for penalty abuse is demonstrated by the penalties announced for lead-in-paint in July. In the publicly-released documents relating to the first nine cases, each offender was apparently forced to sign an agreement admitting a "knowing" violation of the law, despite the fact that the agreements do not document actual knowledge. It appears to me that the imputed reasonable man standard could be described as "woulda, coulda, shoulda" (also known as 20-20 hindsight). Under the imputed knowledge standard, virtually any presumed knowledge can be imputed, especially when determined *ex parte* as is the practice at the CPSC. In the case of lead-in-paint, all the CPSC needs to do is impute a failed test report to create the illusion of a "knowing" violation (a test that may or may not have been run, even if not legally required). Even a manufacturing error could be subject to a "knowing" violation on this basis (as in, a reasonable man would have controlled for that error). We believe that a lead-in-paint violation backed up with PASSING test reports could also be considered a "knowing" violation since a reasonable man would have (obviously) run a more careful test on the right units to reveal the problem. [Target was cited for a "[failure"] to take adequate action to ensure . . . ."] The opportunity to assess penalties based on imputed knowledge verges on a strict liability standard, which is NOT what the law imposes. If the CPSC wants to impose strict liability penalties, it should say so in plain language.

The issue of how to administer the definition of "knowingly" is especially important in light of the mind-boggling array of possible violations under the law. I would direct your attention to the Discussion section of the Factors in which the prohibited acts are described. ONE example of the new scope of the prohibited acts is set out thus: "The new amendments expand the acts prohibited under the CPSA and give the Commission the ability to enforce violations of the FHSA and FFA as prohibited acts under the CPSA. Thus, the amended CPSA now prohibits the sale, offer for sale, distribution in commerce, or importation into the United States of any consumer product, or other product or substance that is **regulated under the CPSA or any other Act enforced by the Commission, that is not in conformity with an applicable consumer product safety rule under the CPSA, or any similar rule, regulation, standard, or ban under any other Act enforced by the Commission. 15 U.S.C. 2068(a)(1).**" [Emphasis added] For perspective on the breadth of these requirements, please note that at the ICPHSO conference in February 2009, I asked in a public Q&A session for a list of these requirements and was instructed by a senior CPSC staff person (in front of an audience of several hundred people) to hire a lawyer. No list of these requirements exists to my knowledge. As a member of

the regulated community, I fear imputed knowledge of an ever-changing and evolving set of rules, regulations, standards and laws that have not been listed clearly by the regulatory agency.

The CPSC Commission has an obligation to issue clearer guidelines that sets out precisely how imputed knowledge penalties will be assessed. While the Commission may prefer to retain full authority and flexibility for all possible fact scenarios, the ultra-flexible guidelines may create new and unintended victims.

The Definition of "Defect" Needs to be Reconsidered. In the Discussion section of the Factors, the distinction between a product defect and an act of non-compliance has been extinguished. This is very unfortunate and needs to be reversed. While non-compliance can be controlled (at least in theory), product defects cannot always be anticipated, even by appropriate risk management practices. Despite the holding of the Factors on this point, the CPSC is well-aware of this problem and has admitted that it is no better than the regulated community at anticipating the unknown and the unknowable. On May 12, at the CPSC Tracking Labels panel discussion (Second Panel video, beginning at 58:40), John "Gib" Mullan, Assistant Executive Director, Office of Compliance and Field Operations, made the following statement during Q&A: "It's hard though to predict risk sometimes. I mean, we do this. We don't always see it coming. If you'd asked me a couple years ago, how safe is that drywall in your house, I would have said, you know, really safe. Man, that's all safe stuff! But right now we're dealing with drywall in a big way and that's something that's a brand new thing."

This analysis by Mr. Mullan essentially concedes that product defects cannot be equated with non-compliance since compliance can be planned for but latent product defects cannot be easily anticipated. If the CPSC cannot foresee latent safety issues in familiar products like drywall, the regulated community cannot possibly be held to a higher standard. Presumably, if the CPSC intends to impose unrealistic standards on the regulated community by allowing penalties for product defects, the agency would accept sanctions for its failure to anticipate the drywall problem in Florida and Louisiana. Of course, drywall sanctions would not be fair to the agency, and equating unanticipated product defects with non-compliance under the Factors would be no less unfair.

Given Mr. Mullan's observation of the difficulty of anticipating certain product defects or product problems, it is hard to comprehend why the agency chose to allow consideration of the complexity of identifying a particular product hazard ONLY IF the business had filed in a timely fashion under Section 15. This is a remarkably inflexible position, given that a business is required to file "immediately" under Section 15(b) (interpreted to be 24 hour notice) if it "obtains **information which reasonably supports the conclusion that** such product . . . contains a defect which could create a [a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public] . . . ." In other words, a business has only 24 hours to report information that reasonably supports the conclusion that a serious product defect exists. If the incident is a highly complex situation, it might be difficult or ill-advised to report that quickly (further research might be needed, among other things). Of course, due process reasons may underlie a failure to file in the 24-hour time window, too. For hidden or emerging hazards, this formulation of the Factors is tantamount to saying that NO extenuating circumstances will be considered to mitigate penalties for unanticipated, highly-complex

hazards. If that's the intention of the CPSC, I think the rule would state it directly so that the regulated community can familiarize itself with the policy.

Small Business Impact Guidelines Are Too Vague. The guidance provided by the Factors on the appropriateness of penalties on small businesses is in this author's opinion so vague as to permit and support any conceivable outcome. The Factors as written seem to express a view that only the size of a penalty will impact small business. I do not agree with this as penalties may have a greater indirect impact on the small business community. In my opinion, the intent of this provision is to ensure that a rational and clearly stated policy on penalties will be designed to encourage the continued investment of the small business community in children's products. These indirect or collateral impacts can also be regarded as "undue" under the statute.

Small businesses are the economy's most vulnerable participants. They are the most likely Darwinian victim of any shake-out in the marketplace. The CPSC's Civil Penalty Factors will form base expectations for small businesses and will certainly affect their decision-making. Small businesses, facing an incomprehensible blizzard of requirements under this ultra-complex law, can be anticipated to fail in substantial ways. [However, it does not follow that small businesses will fail their customers or endanger consumers in general or in greater proportion than large companies.] Small businesses recognize their disadvantage in this new highly complex legal environment and will look to the agency for clues on their likely treatment in the event of regulatory problems. The outpouring of small business protests over the CPSIA in the past two years is evidence of the real fear in this community. For this reason, the vagueness of the Factors in defining the exposure and limits on penalties will ITSELF depress the small business environment.

If a small business has exhibited good faith and its non-compliance does not lead to injury or reasonably foreseeable exposure of the public to risk of injury, the Factors should indicate that there is a presumption against penalties. If a pattern of non-compliance emerges in a series of interactions with the CPSC (e.g., a company clearly is informed of its legal obligations but persists in violating the law), then perhaps penalties can be used to bring the company into compliance. The selective use of penalties makes the issue of protecting small business much easier to administer. Thus, a clear statement of presumptions in setting penalties for small businesses would go far in limiting the impact on this fragile community.

Lack of Focus on the Purpose of Penalties Will Lead to Arbitrary Results. The Discussion in the Factors makes clear that the agency will not take into account the materiality of risk caused by violations or restrict its penalties to egregious conduct. In not restricting penalties in this way, the CPSC opens up all violations to possible assessment of penalties. By considering virtually unlimited options for penalties, the ability of the agency to administer rational, consistent and predictable imposition of penalties will greatly decline. As noted above, penalties assessed this year seem arbitrary. The consequence of arbitrariness could be quite damaging to the regulated markets. These consequences deserve deep consideration by the agency. Once doubt about the fairness, consistency or rationality of "justice" under the civil penalties provision creeps into the mindset of the marketplace, investment decisions will start to be made differently. Business people prefer stable and predictable returns on their investments. If they perceive random justice, fairly or not, in children's product markets, businesses may choose to shift their investment elsewhere to obtain more certain returns, or take other measures to protect their

limited capital (such as draining resources from the company, significantly reducing product development investment expenses or restricting other business innovations).

A useful change in the Factors would be a formalized appeal process which can independently and efficiently consider the merits of objections to penalties. While an independent appeal process may have the effect of limiting the authority of the agency to assess penalties, this process will also build confidence in the fairness of the process and in the agency itself. In the long run, a closer relationship with industry will lead to better safety outcomes, so this investment in mutual satisfaction with fair penalty administration will accrue to the benefit of the agency and consumers at large.

Business Judgment, if Properly Exercised, Should be a Factor in Civil Penalties. I want to reiterate the point I made in my December 17 comment letter that the exercise of business judgment needs to respected by the CPSC and included as a factor in the setting of penalties. The exercise of reasonable business judgment is necessary to administer any operating business. The complexity of the CPSIA and CPSA is well-known and well-documented. Thousands of business questions remain unanswered by the CPSC since passage of the CPSIA almost 14 months ago, leaving open a vast array of legal or factual ambiguities and forcing critical business decisions to be made with great uncertainty. The fact that violations of the CPSIA can create civil or even criminal liability only exacerbates the problems faced by business managers today. Given that circumstance, it would be unfortunate if the CPSC were permitted to exercise 20-20 hindsight on reasonable decision-making. Notably, the Business Judgment Rule was developed to help corporate boards deal with basically the same issue, namely that managers will not exercise judgment if all decisions are subject to liability. A reasonable safe harbor would be a constructive addition to the Factors.

The CPSC needs to recognize that only by cultivating the cooperation of the business community can safety gains be made and held. A fear-based enforcement system will lead to market dropouts and possibly bad behavior to avoid detection. Other federal agencies have long taken the approach of rewarding conscientious behavior and responsible decision-making. The Factors should take into account and respect the exercise of sound business judgment.

The Factors Should Also Take into Account the Actions and Inactions of the CPSC. The Civil Penalty Factors betray a one-sided view of violative behavior under the CPSA and related statutes. While the Factors carefully document a variety of factors in the behavior of the offending company for consideration, it omits extenuating factors such as the behavior of the regulatory agency itself. For instance, right now there are thousands of unanswered questions in the possession of the CPSC, many of which are many months old. What if those unanswered questions relate to a penalty case? What if the pendency of an unanswered question forced a company to make a business judgment that is later deemed violative – is this entirely the company's fault? There is no Factor enumerated which would introduce the behavior of the CPSC into consideration as a mitigating factor. Mitigating factors that might be relevant include (a) the investment made by the agency in education of a particular subgroup in the regulated community (Did the CPSC give seminars at trade shows or reach out to trade show participants regularly?), (b) the outreach effort made by the agency (Was a liaison office formed? Did the CPSC contact members of the regulatory community for counseling or Q&A? Did it attempt to run seminars on site for regulated companies to help broaden understanding of the complex new

laws? Did it answer reasonable questions on a timely basis?), (c) the availability of programs to reward good compliance efforts, (d) the existence of prior disclosure options to eliminate penalties, (e) the rational and consistent pattern of penalties imposed by the CPSC, (f) the ability to appeal penalties to a neutral third party on a reasonable basis (In other words, has the agency attempted to relieve the coercive nature of the current penalty process?), and so on.

Compliance is a two-way street. The idea that compliance is entirely the responsibility of the regulated community and that the regulatory agency has no influence over or any responsibility for compliance results, will not likely stand the test of time. The CPSC can anticipate and address this problem by building a fairer and more equitable penalty system upfront, something that will accrue to the benefit of the agency over time.

We Support the Factors Which Evidence Bad Faith or a Pattern of Non-compliance. The inclusion of factors which reflects the consistent bad behavior of certain companies is long overdue. It is hard to not believe that we owe the existence of the CPSIA in part to repeat offenders of the past. While the purpose of penalties and even a regulatory agency itself could be debated, there is no doubt that these cases involve unnecessary risk to the public and demonstrate an intolerable disrespect for the law.

That said, I do not believe that all infractions demonstrate disrespect for the law or operational incompetence. Careful and balanced factual inquiry is necessary to properly administer justice under the CPSA and to maintain a safe marketplace. I do not think that this factor should be over-played, however, as a market administered with an unrealistic expectation of perfect compliance with an ultra-complex law will be as self-defeating as lax treatment of repeat offenders. Some middle point will produce the best results for all concerned, including consumers.
http://www.cpsc.gov/cpsia.pdf
Thank you for considering my views on this important topic.

Sincerely,

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0007

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Civil Penalty Factors

Comment On: CPSC-2009-0068-0001
Civil Penalty Factors

Document: CPSC-2009-0068-0007
Comment from Christine Hines

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Submitter's Representative: Public Citizen
Organization: Public Citizen and other organizations

General Comment

Attached are the comments on civil penalty factors submitted by Consumers Union * Consumer Federation of America*
* Kids in Danger * National Research Center for Women & Families * Public Citizen * U.S. PIRG

Attachments

CPSC-2009-0068-0007.1: Comment from Christine Hines

Consumers Union * Consumer Federation of America
*** Kids in Danger * National Research Center for Women & Families**
*** Public Citizen * U.S. PIRG**

October 1, 2009

Office of the Secretary
Consumer Product Safety Commission
Room 502
4330 East-West Highway
Bethesda, Maryland 20814
Via: www.regulations.gov

Re: Docket No. CPSC-2009-0068

Comments of Consumers Union, Consumer Federation of America, Kids in Danger, National Research Center for Women & Families, Public Citizen, and U.S. PIRG Regarding the Interim Final Interpretative Rule on Civil Penalty Factors Under Section 217 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, National Research Center for Women & Families, and U.S. PIRG (jointly "We") appreciate the opportunity to offer comments concerning the U.S. Consumer Product Safety Commission's (Commission) interim final rule on civil penalty factors found in the Consumer Product Safety Act (CPSA), the Federal Hazardous Substances Act (FHSA), and the Flammable Fabrics Act (FFA), as amended by section 217 of the Consumer Product Safety Improvement Act of 2008 (CPSIA), Pub. L. No. 110-314.[1]

Overall, we strongly support the Commission's interpretation of the civil penalty factors as set forth in 16 e-CFR Part 1119, which became effective on September 1, 2009. These factors can potentially guide the Commission to fairly and appropriately determine penalties against violators of prohibited acts under the CPSA, FHSA and FFA. We urge the Commission to use its new authority granted in the CPSIA to apply higher penalties for violations than it has in the past. 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.

Background

CPSIA Section 217 amends the civil penalty provisions in section 20(b) of the CPSA, section 5(c)(3) of the FHSA, and section 5(e)(2) of the FFA. CPSIA Section 217(a) increases the maximum civil penalties from $8,000 to $100,000 for each violation under the CPSA, FHSA,

[1] See "Civil Penalty Factors, Interim Final Interpretative Rule," 74 Fed. Reg. 45101 (September 1, 2009).

and FFA and from $1.825 million to $15 million for a related series of violations. In November 2008, the Commission posted a notice on its web site soliciting comments on information it should use when considering the CPSIA-amended factors for determining civil penalties. The undersigned groups submitted comments on December 18, 2008 (referred to herein as "the December 18 comments") containing recommendations for the civil penalty factors. The CPSA, FHSA, and FFA require the Commission to consider certain factors in determining the amount of any civil penalty. They are 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, 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, as well as "other factors as appropriate." Below are our comments on the Commission's interpretation of the factors.

Recommendations

As we stated in the December 18 comments, civil 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 CPSIA and fail to protect consumers if they are too low to induce compliance with the law.

Nature of the Product Defect, Section 1119.4(a)(3) and (4)

We agree with the Commission's refusal to distinguish, as two commenters suggested, between violations that involve "potential risk of harm" and those that involve "real potential for significant injury." 74 Fed. Reg. 45,104. Any standard, rule, or ban inherently addresses an unreasonable risk of injury. Therefore, each failure to comply should be treated the same for purposes of civil penalties.

Occurrence or Absence of Injury, Section 1119.4(a)(5)

We agree with the Commission's decision to pursue penalties for violations even if no injury or only minor injuries occurred. As mentioned above, all the rules and standards are meant to avoid unreasonable risk of injury to consumers. Therefore, a violator should not be immune from a penalty determination merely because no injury or only minor injuries happen to have occurred at the time of the penalty assessment.

Number of Defective Products Distributed, Section 1119.4(a)(6)

The number of defective products distributed, as well as the number of consumers who could be harmed, are relevant considerations for civil penalty determinations.

Small Business, Section 1119.4(a)(7)

The Commission is charged with considering the undue adverse economic impacts on small business violators when determining civil penalties. We agree that the Commission should consider a small business' ability to pay when determining a penalty amount. This will coincide with other civil penalty factors because small businesses are likely to have smaller distribution and fewer occurrences of harm. However, as we stated in the December 18 comments, all suppliers of consumer products, including small businesses, should comply with federal law to

ensure the public's health and safety, and should reasonably be deterred from violating the Commission's laws and regulations by the possibility of incurring meaningful sanctions.

Other Factors as Appropriate, 1119.4(b)

• The Commission will consider whether a violator had a reasonable safety/compliance program or system. We appreciate the use of the term "reasonable." Regulated entities should demonstrate diligence and a commitment of resources adequate to establish programs and systems that work. The Commission should also consider a firm's failure to adopt a safety and compliance monitoring program.

• We are pleased that the Commission may consider the history of noncompliance. A repeat offender presents a serious risk of harm to consumers. We recommend that this consideration include 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.

• As we stated in the December 18 comments, "economic gain from noncompliance" is a relevant factor in assessing penalty amounts. Potential as well as actual gains are appropriate points to consider. We are pleased that the Commission will also consider the possible financial benefits of a delay in complying with its requirements. This point will assist the Commission in ensuring that penalties for violations outweigh all potential benefits of noncompliance.

• Again, we agree with the Commission's decision to weigh as a civil penalty factor a violator's failure to respond in a timely way to the Commission's requests. As a related matter, we also believe that the Commission should consider the amount of time the violator put the public at risk while continuing to benefit from the sale of the product.

Finally, we are pleased that the Commission decided to forego a formula or matrix to weigh factors. The interim final rule on the civil penalty factors will provide sufficient notice and guidance to the regulated entities of the potential consequence of unlawful actions. The lack of a specific formula will encourage product safety because regulated entities are more likely to remedy potential safety risks when they have more difficulty determining whether the benefits of inaction will outweigh the costs.

Respectfully submitted,

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Consumer and Civil Justice Counsel
Public Citizen

Donald L. Mays
Senior Director, Product Safety & Technical Policy
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Rachel Weintraub
Director of Product Safety and Senior Counsel

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0008

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Civil Penalty Factors

Comment On: CPSC-2009-0068-0001
Civil Penalty Factors

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Comments from Michael Gidding

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General Comment

See attached

Attachments

CPSC-2009-0068-0008.1: Comments from Michael Gidding

B & G
BROWN & GIDDING, P.C.

October 1, 2009

VIA E-MAIL AND
FIRST CLASS MAIL

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Comments: Civil Penalty Factors; Docket No. CPSC 2009-0068

Almost all of our clients are potentially affected by the provisions of the Consumer Product Safety Improvement Act (CPSIA) that increase the statutory cap on the amount of civil penalties that may be assessed for violations of the various laws that the Commission administers. Because of this, the Commission's September 1, 2009 interim interpretative rule stating how it will apply the factors enumerated in those laws is of substantial significance. On behalf of our clients, I submit these comments.

As the interim rule notes, in determining the amount of a civil penalty to seek under the Consumer Product Safety Act (CPSA) and Federal Hazardous Substances Act (FHSA), the CPSIA amendments to those laws now require the Commission to consider the nature, circumstances, extent, and gravity of the violation. Included as subsets of those criteria 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;
- the appropriateness of the penalty to the size of the business of the person charged, including how to mitigate undue adverse economic impacts on small businesses; and
- such other factors as appropriate.

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The CPSIA further instructed the Commission to issue a final regulation providing its interpretation of these factors by August 14, 2009.

In part, the direction from Congress appears to be designed to dispel a perception that the amounts of prior civil penalties that the staff has sought in settlement may have been arbitrary and bear little or no relationship to the merits of particular matters. Whether or not the perception is correct, the lack of clarity in the Commission's settlement agreements and press releases announcing penalties has simply fueled it.

The CPSIA requirement that the Commission publish its interpretation of the civil penalty criteria enumerated in the CPSIA provides the appropriate vehicle to bring clarity to the CPSC's penalty process and to assure the public that Commission penalty assessments are based on an objective consideration of the merits of the matters that come before it. The many disparate rulemaking requirements that the CPSIA imposed on the Commission may have adversely affected the agency's ability to provide the type of comprehensive guidance that Congress appears to have intended the Commission to provide. The interim rule, however, falls short in accomplishing this Congressional objective.

1. **The Discretion of the Commission:** While the rule recognizes that the Commission must consider the factors that were previously contained in the CPSA and FHSA, the interim rule erroneously appears to permit the Commission to treat the consideration of other factors as discretionary. It is unclear whether this is what the Commission intended in the rule or whether it is simply a matter of the use of imprecise grammar in attempting to state that the Commission will consider such factors if/when they exist. If the latter is the intent, the Commission should clarify this in the rule. If, however, the permissive construction is intentional, with all due respect, the rule appears to have this backwards.

The statute directs the Commission to consider the nature, circumstances, extent and gravity of the violation for which it seeks to impose a civil penalty. Such consideration is not discretionary. The law then gives examples of the types of factors - the ones that the rule expressly states that the Commission must consider - that are included in these four criteria. Given the construction of the statute with four primary criteria and six subordinate examples, it is clear that the law requires the Commission to consider any other factors which exist, such as those identified in the "Other Factors as appropriate" section of the rule, and which are relevant to the nature, circumstances, extent and gravity of a

violation. While the rule recognizes this in the general discussion of the four primary criteria, it departs from it in the discussion of "other factors." The rule should be revised to reflect the commitment of the agency to consider all factors relevant to the nature, circumstances, extent and gravity of the violation that exist in a particular matter.

The interim rule also points out that the factors the Commission *may* consider are not limited to those enumerated in the rule (although inclusion is the preferable vehicle), but *may* include factors unique to a particular case. These may include factors that the Commission has independently identified or that have been brought to the attention of the Commission by a proposed respondent. The rule should explicitly state that the Commission *shall,* rather than may, consider such factors when they exist.

2. **Balance in Approach:** As it is currently written, the rule emphasizes the negative. As examples, the interim rule states that the Commission may consider if a violator has a history of non-compliance and whether a higher penalty should be assessed for repeated non-compliance. However, a history of consistent compliance should also be considered favorably in arriving at the amount of a penalty. Similarly, the rule states that the Commission will consider whether a violator's failure to respond in a timely and complete fashion for requests for information or for remedial action should increase the amount of a penalty. Again, however, the timeliness and degree of cooperation should be a mitigating factor in determining the amount of a penalty, especially in complex matters involving staff requests for voluminous documents. As a general proposition, the rule should make it clear that, when the Commission considers a factor relevant to determining the amount of a penalty, it will take into account both positive and negative aspects associated with that factor.

Similarly, the rule should recognize that the various factors to be considered do not necessarily lend themselves to black and white distinctions. All factors are not equal, and within each factor are degrees of distinction that depend on the circumstances of each case. Consideration of issues such as the foreseeability of use or misuse or of the likelihood of injury in a specific case, for example, may, depending on the circumstances, result in enhancing or reducing the amount of a penalty. As an example, the fact that a product can injure people when it is used as it was designed and intended should weigh more heavily in the penalty calculus than one which only creates a risk when misused or which requires a congruence of events to create a risk of injury. This type of

recognition may well be what the rule intends to convey in its enumeration of the various factors, but it should be clarified to make the recognition explicit.

3. Relevant Criteria: The interim rule addresses generally and in a summary fashion the main criteria (the nature, circumstances, extent and gravity of the violation) that the CPSIA directs the Commission to consider in determining the amount of a penalty to seek. As is discussed above, it also includes examples of other factors that the Commission may consider. For the following reasons, the Commission should clarify certain provisions of the rule and add additional factors to the rule.

a. The Factors in the Rule: Four of the factors enumerated in the rule require clarification. First, the rule states that the Commission may consider whether a firm has benefitted economically from a delay in complying with statutory or regulatory requirements. To the extent this provision reflects a sentiment that firms should not be able to profit from violative conduct, it is a legitimate concern for the Commission. Nevertheless, as it is written, the provision, in a sense, presents a self-fulfilling prophesy, since a firm will virtually always have made a profit on a product sold before a recall. Counter balancing this reality, however, reporting and recalls themselves impose costs that may offset and often exceed any profit. Retrieval and destruction of products, sending repair kits to consumers, and private law class action law suits are examples of the consequences that result when a firm reports to the Commission and recalls a product. The rule should recognize that, if it chooses to consider economic benefit, the Commission will consider not only the profits, but also the economic losses and outlays associated with a violation for which the Commission seeks a penalty.

This is not to imply that, if a firm has losses on a product, the imposition of a penalty would necessarily be inappropriate or that those losses should offset the amount of the penalty. However, consideration of profits should also not relieve the Commission of its obligation to consider the factors enumerated in the law in arriving at an amount commensurate with the conduct that the Commission seeks to penalize. Thus, the rule should make it clear that consideration of net economic gain or loss is an ancillary matter for the Commission to consider after it has first applied the statutory factors in arriving at a penalty amount.

Second, the rule states that the Commission may consider whether a violator's failure to respond in a timely and complete fashion to requests for information or for remedial action should increase the amount of a penalty.

Again, while the sentiment behind this provision may be valid, as written, the rule fails to acknowledge that firms have due process rights. If a firm believes an information request is beyond the Commission's authority or is overly broad, it may refuse to comply voluntarily, leaving the staff with the option of requesting the Commission to subpoena the information. Similarly, a firm that disagrees with a staff request for remedial action is entitled to an administrative hearing before the Commission. To the extent that the rule suggests that firms may be penalized for exercising these rights, it contains an element of coercion that may be misapplied or misconstrued.

To the extent the Commission decides to include this type of consideration as a factor in its penalty deliberations, the Commission should revise the rule to give firms credit for adequately and voluntarily responding to the Commission staff requests in a timely manner. A firm's decision to avail itself of its rights under the law should be treated neutrally.

Third, in evaluating the number of defective products distributed, the rule cites the language of the CPSIA in declining to distinguish between products in consumers' hands and those that are distributed in commerce. However, the statute also requires the Commission to consider the severity of the risk of injury, and the rule recognizes that the likelihood of injury is a factor to consider in evaluating severity. The number of products to which consumers are actually exposed is certainly relevant to the likelihood of injury. The rule should be revised accordingly to require consideration of the number of products that have actually been distributed to consumers in evaluating the severity of the risk. It should also explicitly recognize that, because recalls often sweep widely, they may encompass products that are not defective. Thus, the rule should specifically note that the number of products recalled is not necessarily the same as the number of defective products distributed.

Fourth, the rule attempts to shoehorn into the definition of a defect, all of the prohibited acts under the statutes that the Commission administers. As is discussed earlier, the law now focuses on the nature, circumstances, extent and gravity of a violation, and includes the nature of the product defect as one factor to consider. A reasonable reading of the law shows that the absence of an identifiable defect does not foreclose the agency from seeking penalties for violations that do not involve product characteristics. Examples may be found in sections 19(a)(3), (13), and (14) of the CPSA, and sections 4(d) and (e) of the FHSA. Thus, the Commission should revise the regulation to make the term "defect" synonymous with the definition contained in 16 C.F.R. § 1115.4.

b. Additional Factors: The factors enumerated in the rule should be expanded to include other obvious factors that may be relevant to consideration of a penalty amount. Examples might include in no particular order:

- the duration of the violative conduct;
- exemplary corrective action that includes comprehensive prospective action to prevent future violations;
- consideration of the relative responsibility of the firm that will ultimately have to pay the penalty for the violations that are the basis for the penalty; and
- the complexity and difficulty in identifying possible product defects.

At a minimum, the rule should explicitly address two additional factors - voluntary reporting under section 15(b) of the CPSA and the "knowingness" of a violation.

As a general proposition the rule should recognize that the Commission will consider all of the circumstances under which a firm reported to the Commission. A voluntary report under section 15(b) of the CPSA without prompting from the Commission staff should weigh in the reporting firm's favor. Reports submitted after a Commission prompt should be reviewed in light of all of the relevant facts. For example, a report in response to a notice from the National Injury Information Clearinghouse transmitting an incident report should generally be treated as a voluntary report unless the firm had reportable information prior to receipt of the Clearinghouse notice. Similarly, the Commission staff often requests pro forma section 15(b) full report information based on a single incident. In determining how such a report should be considered in evaluating civil penalty amounts, the Commission should focus on the circumstances underlying the Commission request for a report or for the submission of information.

The rule should also recognize that, in evaluating penalty amounts, the Commission will consider the degree of knowledge that an alleged violator had or should reasonably have had, given the circumstances of the violation. The rule could articulate that violations committed with actual knowledge generally will be given more negative weight than those in which the staff imputes knowledge of

violative conduct to a firm. With respect to violations in which the staff imputes knowledge to the violator, the rule should recognize that the Commission will consider the relative difficulty in determining whether, for example, a report was required in a particular matter in deciding the weight that it give to the "knowingness" of the violation.[1]

4. Providing Notice to Firms: The interim rule requires the Commission staff to inform a potential violator that the Commission believes that it is subject to a possible civil penalty. In the past, such notifications have been summary in nature with little detail or explanation of the basis for the belief or for the amount the Commission seeks. The rule should explicitly require the staff to provide proposed respondents with a detailed explanation of all of the factors that it has considered in determining that a knowing violation has been committed and how it weighed those factors in its consideration. It should also require the staff to provide a response to the alleged violator addressing in detail any arguments or evidence that the alleged violator submits. The rule should also make it clear that, if the staff is unable to reach a negotiated settlement, it will provide the proposed respondent an opportunity to submit its position and arguments to the Commission so that the Commission will have the information necessary to make an objective judgment concerning the matter.

5. Effective Date: The increased penalty cap under the CPSIA went into effect on August 14, 2009. To avoid confusion like that which the latest phthalates guidance on testing created, the rule should include an effective date that applies to violations that occurred on or after that date.

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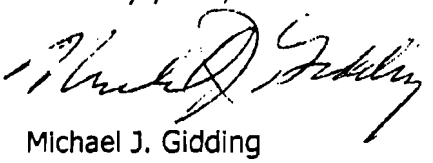
[1] The rule seems to suggest, in its discussion of the nature of the defect, that the Commission will only consider information about the complexity of identifying a defect when a firm has filed a timely report under section 15. The rationale behind this provision is unclear since, if a firm has filed a timely report; by definition it has not violated section 15(b). Moreover, information about complexity goes more to the "knowingness" of a reporting violation and not to the existence of a product defect and should be appropriately considered as part of consideration of the existence of a knowing violation.

I appreciate the opportunity to comment on behalf of my clients. Please contact me if you need additional information or if I can clarify these comments in any way.

Sincerely yours,



Michael J. Gidding

0009

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Civil Penalty Factors

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Comments from Wayne Morris

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General Comment

See attached

Attachments

CPSC-2009-0068-0009.1: Comments from Wayne Morris

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September 30, 2009

Office of the Secretary
Consumer Product Safety Commission
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Bethesda, MD 20814

Re: Docket No. CPSC-2009-0068

AHAM Comments On Civil Penalty Factors Interim Final Interpretive Rule

On September 1, 2009, the Consumer Product Safety Commission ("Commission" or "CPSC") published in the Federal Register an Interim Final Interpretive Rule interpreting the civil penalty factors as amended by the CPSIA and listing other factors that the Commission may consider in assessing civil penalties ("Interim Final Rule"). Civil Penalty Factors, 74 Fed. Reg. 45,101 (Sept. 1, 2009). The Commission invited comments on the Interim Final Rule. The Association of Home Appliance Manufacturers ("AHAM") has long been a proponent of a more fully elaborated, transparent, yet flexible civil penalty regulation, and is pleased to submit these comments.

I. Clear And Transparent Civil Penalty Criteria Are Critical.

The Commission stated that "[t]he determination of the amount of any civil penalty to seek and/or compromise should allow for maximum flexibility within an identified framework. The CPSIA requirement for the Commission to interpret the civil penalty factors gives transparency to the regulated community about the framework the Commission will use to guide its penalty calculations in the enforcement process." 74 Fed. Reg. at 45,103. AHAM agrees that the criteria and rationale for determining the amount of civil penalties must be clear, transparent, and flexible, especially now that the CPSIA greatly increased maximum civil penalties.

The Interim Final Rule provides the Commission with adequate flexibility, allowing it to take a holistic approach to assessing civil penalties. AHAM agrees that the Commission should review the facts and circumstances surrounding each violation and should assess penalties in light of the factors and framework it defines. *See* 74 Fed. Reg. 45,104. The Commission should take a 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 (and AHAM

thus commends the Commission for rejecting a formula or matrix approach to assessing civil penalties).

The Interim Final Rule also provides some of the necessary clarity and transparency, but AHAM urges the Commission to give more guidance to the regulated community regarding its interpretation of each civil penalty factor, especially those that the Commission will evaluate in addition to the statutory factors. Those who are affected by and interested in government policies must have a good sense of what the Commission considers relevant in determining whether to seek penalties and the amounts. AHAM thus urges the Commission to give increased guidance to the regulated community.

While the publication of a penalty policy is an important step toward transparency, firms should be able to evaluate how those factors are applied in particular situations. Currently, the Commission application of any factors is opaque. To the extent that there is any information on how the Commission assesses penalties is available, it is known only to a small group of frequent practitioners before the Commission. Consequently, AHAM encourages the Commission to publicize (either through recitals in settlement agreements, through its press releases or otherwise) the application of any penalty policy and the Commission analysis of relevant factors when settling or assessing penalties.

II. The Commission Should Expand Its Interpretation Of The Factors It Will Consider In Assessing Civil Penalties.

A. Statutory 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 Federal Register notice.[1/]

i. *Nature of the Product Defect*

The interim rule broadens the definition of "product defect" to include not only the statutory definition, 15 U.S.C. § 2064(a), and elaborated in Commission guidelines, 16 C.F.R. § 1115.4, but also to include any noncompliance with a prohibited act. 74 Fed. Reg. 45,104. Although noncompliance should be considered when assessing civil penalties, it should not be

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1/ Note that AHAM commented on several of these factors (and additional, non-statutory, factors) on December 18, 2008 in response to the CPSC's Request for Comments and Information on Civil Penalty Criteria ("2008 Request for Comments and Information"). AHAM directs the Commission to those comments as it continues to advocate for the positions therein.

part of the analysis of the nature of a product defect. This broadened definition dilutes the importance of this factor. Furthermore, the broadened definition goes beyond the authority provided by the Act, results in a lack of clarity and transparency, and does not provide guidance to the regulated community.

When evaluating this factor, the Commission should consider the particular product at issue. The Commission should consider the replacement and repair rates when it considers the nature of the product defect, as those rates vary for different product categories and component parts. The Commission should also consider the cause of the defect when evaluating the nature of the product defect. In particular, the Commission should consider 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.

AHAM disagrees with the Commission's position that it will only consider the "complexity of identifying a particular product hazard" if the firm "has reported in a timely fashion under section 15." 74 Fed. Reg. 45,104. Such a limit is logically and practically inconsistent—if a hazard is difficult to analyze and identify, then it is likely that any report to the Commission would be delayed. Firms should not be penalized for diligently attempting to analyze a potential hazard in order to determine whether there is a reasonable basis for a conclusion that a significant product hazard may exist. *See* 15 U.S.C. § 2064(b).

ii. *Severity of the Risk of Injury*

The Interim Final Rule states that in evaluating the severity of the risk of injury, the Commission will consider the potential for serious injury or death. AHAM agrees with that interpretation of this factor and emphasizes that higher civil penalties are appropriate where more serious injuries are likely, and lower penalties are appropriate where the risk of injury is low or the violation in question is a technical one posing no risk of injury.

In addition, the Commission should consider a product's failure rate in its analysis of the risk of injury because products with lower failure rates likely have lower risks of injury. Similarly, the Commission should consider the relative product life-span and frequency of product use to determine the risk of injury. Products with short life-spans or that are rarely used carry a lower risk of injury than products with long life-spans or that are more frequently used.

iii. *The Number of Defective Products Distributed*

The Interim Final Rule makes no distinction between the actual number of products distributed and the number of those products that remain in consumers' hands. Although the Commission recognizes that there could be a difference in those numbers, it does not find room in the statute to make a distinction. But nothing in the statute prohibits the Commission from so doing. AHAM believes that 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, as part of its analysis of the number of products distributed. The

determination should be based on reasonable considerations of product life and self-help, not just the present "recall effectiveness" calculation.

The Commission itself has previously recognized the importance of distinguishing between the number of products distributed, and the number that actually remains in consumers' hands. *See* Substantial Product Hazard Reports, 71 Fed. Reg. 42,028, 42,030 (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."). The crucial determination is whether consumers are at risk—if few products remain with consumers, or if products have been distributed to retailers, but not yet consumers, then there is a lower risk of harm to consumers, regardless of how many products were originally distributed.

B. The Additional Factors the Interim Final Rule Enumerated

The Interim Final Rule enumerates four additional factors that the Commission may consider as appropriate to an individual case: 1) a safety/compliance program and/or system; 2) history of noncompliance; 3) economic gain from noncompliance; and 4) failure of the violator to respond in a timely and complete fashion to the Commission's requests for information or remedial action. AHAM supports consideration of these factors as appropriate to individual violations.

In particular, AHAM agrees that the Commission should consider whether a violator had a "reasonable program/or system for collecting and analyzing information related to safety issues," and thanks the Commission for enumerating this as one of the factors it will consider in assessing civil penalties. It is in the public's and the CPSC's interest to encourage manufacturers to develop and use such systems 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 firms that have a documented plan for monitoring and responding to reports should be encouraged. AHAM does, however, encourage the Commission to give more guidance as to what it considers to be "reasonable." Such guidance will provide increased clarity and transparency and will allow the regulated community to more effectively develop safety compliance programs and systems.

AHAM also agrees that a firm's history of noncompliance should be evaluated. Firms that are repeat offenders should be subject to higher penalties than a firm that has committed its first offense. The Commission should recognize, however, that reporting the need to undertake recalls is not necessarily the equivalent to noncompliance. In fact, firms who timely report under section 15 and who work with the Commission on voluntary recalls often are demonstrating good faith and compliance.

II. The Commission Should Enumerate More Factors.

The Interim Final Rule states that the Commission may consider additional factors to those enumerated, and if it does so, it will discuss the other factors with the violator. AHAM supports such discussions as it is a means to increase transparency. To further enhance transparency, any additional factors considered in a particular case should be made public. AHAM also recognizes that as a consequence of adopting a holistic, fact-specific approach, the Commission needs to reserve a certain degree of flexibility as to the factors it will consider in each individual case. But clarity and transparency are increased by enumerating the factors that will cover the majority of cases. Thus, AHAM urges the Commission to enumerate more factors and to clearly state those factors in order to give the regulated industry and the public guidance as to what the Commission will consider when it examines them. In particular, AHAM proposes that the Commission also consider and enumerate: 1) the product's compliance with relevant standards; 2) cooperation and good faith; and 3) the violator's degree of culpability.

A. 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. **AHAM strongly urges the Commission to consider whether the product at issue complies with relevant mandatory or voluntary standards, particularly when the standard addresses the safety risk at issue.** The Commission itself has recently recognized the value and importance of voluntary standards. In conjunction with its recent rulemaking regarding infant walkers, the Commission published a proposed revocation of prior regulations pertaining to baby-walkers and similar products because the regulations "are outdated and do not provide the degree of safety provided by currently manufactured baby-walkers that comply with a more effective voluntary standard." 74 Fed. Reg. 45,714 (Sept. 3, 2009). 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.

B. Cooperation and Good Faith

In its 2008 Request for Comments and Information, the Commission sought comment on whether it should consider cooperation and good faith as an additional factor in assessing civil penalties. AHAM supported, and continues to support, the Commission's consideration of this factor. 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 or that drag their feet when asked by the Commission for relevant information 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.

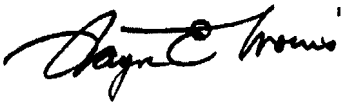
C. The Violator's Degree Of Culpability

As AHAM stated in its comments in response the Commission's 2008 Request for Comments and Information, 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 that resulted in a decision not to report even if, in hindsight, the Commission determines that decision to be incorrect.

* * *

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

Respectfully submitted,



Wayne Morris
Vice President, Division Services

Stevenson, Todd

From: Morris, Wayne [WMorris@AHAM.org]
Sent: Wednesday, September 30, 2009 1:13 PM
To: Stevenson, Todd
Subject: AHAM Filing on the Civil Penalties Proposed Regulation
Attachments: AHAM Filing Civil Penalty Rule 093009.pdf

Todd,

Please find enclosed the AHAM Comments on the Proposed Civil Penalties Rulemaking.

Thank you.

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AHAM
ASSOCIATION OF HOME APPLIANCE MANUFACTURERS

0010

PUBLIC SUBMISSION

As of: October 27, 2009
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Docket: CPSC-2009-0068
Civil Penalty Factors

Comment On: CPSC-2009-0068-0001
Civil Penalty Factors

Document: CPSC-2009-0068-0010
Comments from Carter Keithley, Toy Industry Association

Submitter Information

Name: Carter Keithley
Address:
1025 F Street, NW - 10th Floor
Washington, DC, 20004
Organization: Toy Industry Association, Inc.

General Comment

See attached

Attachments

CPSC-2009-0068-0010.1: Comments from Carter Keithley, Toy Industry Association

October 1, 2009

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

RE: INTERIM FINAL RULE INTERPRETING FACTORS TO BE CONSIDERED WHEN SEEKING CIVIL PENALTIES (Docket No. CPSC-2009-0068)

In response to the request by the Consumer Product Safety Commission ("Commission" or "CPSC"), the Toy Industry Association ("TIA"), on behalf of its 500 members, submits these comments on the Interim Final Interpretative Rule on Civil Penalty Factors ("the proposed Rule") promulgated pursuant to section 217(b)(2) of the Consumer Product Safety Improvement Act ("CPSIA"), Public Law No. 110-314. *See* 74 Fed. Reg. 45101 (Sept. 1, 2009). Civil Penalty Factors, 74 Fed. Reg. 45,101 (Sept. 1, 2009). TIA supports a balanced, comprehensive, and transparent civil penalty regulation. We appreciate the opportunity to submit these comments.

General Comments

TIA substantially agrees with a number of provisions of the proposed Interim Final Interpretative Rule, such as the decision not to employ a "matrix or formula" to compute penalty amounts and, instead, to identify factors that will be applied on a case-by-case basis, as appropriate. TIA further supports the Commission's approach to consider the totality of the circumstances surrounding a particular knowing violation to determine the amount of the civil penalty to assess. We agree that the Commission should review the totality of facts and circumstances involved in each investigated potential violation (*See* 74 Fed. Reg. 45,104). The Commission should take a comprehensive approach rather than a myopic one. Penalty determinations should not be made in a formulaic fashion and it's equally important to maintain the discretion not to assess penalties, when circumstances do not require it.

TIA, however, has reservations about some provisions of the proposed Interim Final Interpretative Rule and the accompanying discussion in the *Federal Register*. The Commission stated that "[t]he determination of the amount of any civil penalty to seek and/or compromise should allow for maximum flexibility within an identified framework. The CPSIA requires the Commission to interpret the civil penalty factors so regulated parties can easily understand the factors and criteria that are used in its penalty calculations, especially considering the significantly expanded penalty amounts now involved (See:74 Fed. Reg. at 45,103).

While the publication of a penalty policy is an important step toward clarity, affected firms should be able to evaluate how the staff applies and weights factors in particular situations.

Currently, the process is opaque and not easily discernable. Therefore the Commission analysis of relevant factors when settling, assessing or rejecting penalties requires greater clarity.

I. The Commission Should Expand Its Interpretation Of The Factors It Will Consider In Assessing Civil Penalties.

A. Statutory 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 Federal Register notice. TIA details its specific comments below in Part II. But it also generally urges the Commission to provide clearer guidance to industry. Such clarification could appropriately come by articulating general principles that will guide the Commission's application of the enumerated factors to specific cases. TIA offers two such general principles that would particularly assist in clarifying the Commission's approach without inappropriately constraining case-by-case consideration of the full nature, circumstances, extent and gravity of a violation. Instead, these principles would further such consideration.

II. Penalties Should Be Proportional To the Hazard Created By the Violation

A constellation of factors—*e.g.*, the severity of the risk of injury, the occurrence or absence of injury, and the number of defective products distributed—suggest that, as a general rule, the size of a penalty for committing a "prohibited act" should vary proportionally with the hazard that that prohibited act has caused. All else equal:

- Higher penalties should be assessed for prohibited acts that caused or are likely to cause or have caused death or grievous injury.

- Comparatively lower penalties should be assessed for prohibited acts for which there is little increased likelihood of injury or where the increased risk is for a comparatively minor injury.

- The lowest penalties should be assessed for prohibited acts that do not create or exacerbate a hazard to consumers, such as, for example, a reporting violation for a product that poses no substantial product hazard or a product that never was sold to any consumer.

Giving primacy to whether, and the extent to which, a violation caused an increased hazard would further the goal of ensuring consumer safety that underlies the statutes the Commission administers, such as the first-listed "purpose" of the CPSA "to protect the public against unreasonable risks of injury associated with consumer products." CPSA § 2(b)(1), 15 U.S.C. § 2051(b)(1). Examining this causal nexus in determining the amount of the penalty also would be sound policy and consistent with fundamental notions of due process, such as the

requirement that a plaintiff prove proximate causation or that punitive damages be assessed only for conduct that caused the compensatory damages.

For these same reasons, TIA further proposes that the Commission, where appropriate, generally make the prohibited act's effect on an individual factor the touchstone for how that factor will influence the amount of a civil penalty. For example:

- If the prohibited act increased the severity of the risk of injury from a product, that increase would certainly suggest a higher penalty for that act. If, on the other hand, the prohibited act at issue had no effect on the severity of the risk of injury from a product, then a lower penalty would be appropriate, regardless of whether the underlying and unaffected severity of the risk of injury from the product is high or low.

- Likewise, if a prohibited act increased the number of defective products in distribution, then that would argue for a higher penalty. But if the prohibited act did not affect the number of defective products in distribution, then the penalty should be lower, regardless of whether the unaffected number of defective products in distribution was high or low.

This general principle of proportionality to the hazard caused by a violation not only has a sound foundation in policy but also would provide greater clarity and assurance to regulated industries that the enumerated factors will not only apply on a case-by-case basis but also apply in a way that is principled and somewhat predictable.

III. Penalties Should Be Proportional To the Violator's Culpability

A number of factors—*e.g.*, the nature, circumstances, extent, and gravity of the violation; whether a violator contemporaneously with the violation had a reasonable safety and compliance program or system; and whether the violator had a history of noncompliance—suggest that, as a general principle, the size of a civil penalty for committing a "prohibited act" also should vary proportionally with the violator's culpability.

It is true, as discussed below in our specific comments, that a threshold to imposing any civil penalty is that the violation be "knowing." But there are varying degrees of "knowing" (including "presumed" knowledge under CPSA § 20(d), 15 U.S.C. § 2069(d)), and it is appropriate for any civil penalty to take these degrees into account. "Knowing" can under the statutes include (1) having "actual knowledge"; (2) being reckless (displaying gross negligence or outright indifference); and (3) essentially, being negligent—failing, despite a good faith effort, to consider or take an additional precautionary step that the Commission, in retrospect, believes a reasonable person would have taken in the circumstances.

TIA thus proposes that the Commission make clear that, all else equal, "knowing" violators with "actual knowledge" will face higher penalties; violators who acted without actual knowledge but recklessly will face more moderate penalties; and violators who acted in good faith but negligently will face the lowest penalties.

This approach would be just, and would extend the CPSA's explicit policy to treat more culpable violators more severely—*e.g.*, reserving more serious criminal penalties for "knowing and willful" violations and imposing less serious civil penalties for "knowing" violations. CPSA §§ 20 & 21, 15 U.S.C. §§ 2069 & 2070. From a policy perspective, such a clear enunciation by

the Commission would further encourage industries to institute measures to avoid or at least minimize "prohibited acts." Finally, such guidance would, like the first general principle, provide industry needed clarity and predictability.

Specific Comments

I. Definitions

A. "Violation"

The proposed Rule, in section 1119.3(b), defines a violation subject to a potential civil penalty as "a knowing violation, as defined in the CPSA, FHSA, or FFA of any prohibited act found in section 19 of the CPSA, section 4 of the FHSA, or section 5 of the FFA." In addition, as the Commission detailed in issuing the proposed Rule, the CPSIA has substantially expanded both the number of "prohibited acts" that—if knowing—can trigger civil penalties and the potential size of the penalties. *See* 74 Fed. Reg. at 45102, 45103. Given this definition and these expansions, TIA believes that the issuance of the proposed Rule to satisfy the requirements of CPSIA § 217 gives the Commission an occasion, which it should use, to provide industry with clearer guidance as to when it will presume "knowledge" of the commission of a prohibited act.

For example, TIA requests that the Commission advise industry that:

- There would be no presumption of "knowledge" of a violation of a consumer product safety rule or mandatory standard where, in accordance with 15 U.S.C. § 2063(a), the product was accompanied by the requisite General Conformity Certification based on a test of each product or reasonable testing program or, if applicable, a Children's Product Certification based on testing by a third-part conformity assessment body.

- There would be no presumption of "knowledge" of a product defect under 16 CFR 1115.4 where a product complies with all applicable mandatory and voluntary product standards.

- There would be no presumption of "knowledge" of noncompliance or of a product defect where the person had a reasonable safety or compliance program or system, took reasonable steps to comply of the kind described in *U.S. v. Shelton Wholesale, Inc.*, 34 F.Supp.2d 1147 (W.D. MO 1999), or where the "complexity of identifying a particular product hazard" was relatively high, as described in the *Federal Register,* Vol 74, No. 168, Tuesday, September 1, 2009 at 45104.

In connection with such clarification, the Commission also should acknowledge (as TIA indicated in its prior comments in December 2008) that in some instances "knowledge" is limited to either "actual knowledge" or "notice from the Commission," and thus by statute cannot include presumed knowledge. *E.g.*, CPSA § 20(a)(2), 15 U.S.C. § 2069(a)(2).

B. "Product Defect"

The proposed Rule defines a "product defect," in section 1119.3(a), as "a product or substance that is *associated with a prohibited act* under CPSA, FHSA, or FFA, including the meaning of defect as referenced in the CPSA and defined in Commission regulations at 16 CFR

1115.4.", which implements statutory criteria at 15 U.S.C. § 2064(a) (Emphasis added.) (*See* 74 Fed. Reg.45, 104). This definition is highly problematic.

First, it is inconsistent with the way Congress wrote the CPSA. Section 15, 15 U.S.C. § 2064, long has carefully distinguished between "a product defect" and "a failure to comply with an applicable consumer product safety rule." Congress in adopting the CPSIA retained and did not dilute this important distinction.

Second, the proposed definition significantly expands the Commission's own longstanding definition of "defect" in 16 C.F.R. § 1115.4. That definition generally includes "a fault, flaw, or irregularity that causes weakness, failure, or inadequacy in form of function," and it emphasizes the existence of "a risk of injury" arising from the manufacturing, design, operation, warnings, instructions, or labeling of a consumer product. Nor can industry even know the extent of the expansion, given the vague and broad phrase "associated with a prohibited act" in the new definition. Nowhere in the *Federal Register* did the Commission discuss why the proposed Rule adopts such a radical and wide-ranging change in definition of an established term. The use of different definitions of "product defect" in different sections of both the CPSA and the Commission's regulations is likely to cause confusion and seems ill-advised.

Third, the definition is inconsistent with the Commission's own approach to interpreting the statutory civil penalty factors. In interpreting "the number of defective products distributed," the Commission refused to distinguish between (a) products that were in the hands of retailers, distributors, wholesalers, and/or importers; and (b) products that were in consumers' hands. The Commission reasoned that "the statutory language makes no distinction" and "required" the Commission to consider all products "distributed in commerce." 74 Fed. Reg. at 45105. Similar reasoning applies here: As to "product defect," Congress long has distinguished between defective products, noncompliance with an applicable consumer product safety rule, and prohibited acts, such as reporting violations. The Commission is surely at least as "required" to abide by these congressional distinctions.

Fourth, the definition conflicts with ordinary English usage. The Commission itself acknowledges in the *Federal Register* that the "prohibited acts" include conduct that can occur even with products that, under any reasonable definition of the term, are simply not "defective." For instance, it is a prohibited act to make an untimely report under section 15(b) of the CPSA. A report may be untimely, but, upon investigation, it may turn out that a product was fully compliant with all applicable consumer product safety rules and had no defect that created a significant risk of injury to the public. Yet for purposes of determining the amount of a civil penalty for the naked reporting violation, the Commission would brand the product "defective."

Fifth, the proposed Rule's curious definition of the term "product defect" may have unintended consequences for regulated companies. Products that the Commission investigates or that are voluntarily recalled frequently are the subject of parallel products liability litigation. The Commission's labeling of a product "defective" because it was "associated with" a prohibited act, even though the Commission and its Staff might even agree that the product itself did not have a "defect" as traditionally defined and was fully compliant with consumer product safety rules, might nonetheless be used unfairly and inaccurately in media or in the courtroom.

Although noncompliance should be considered when assessing civil penalties, it should not be part of the analysis of the nature of a product defect, since such broadened definition goes

beyond the authority provided by the CPSA. Therefore, TIA respectfully suggests that in the final rule the Commission restore the longstanding, statutorily-consistent, and commonsense definition of "product defect" in 16 CFR § 1115.4.

C. Mandatory Factors

1. Nature of the Product Defect

Initially, as noted above, TIA objects to the definition of "product defect" used here and throughout the proposed Rule.

In addition, neither the proposed Rule nor the discussion elsewhere in the *Federal Register* attempts to explain what aspects of the "nature of the product defect" will be examined to assess the amount of a civil penalty.

TIA urges the Commission to make clear, consistent with our General Comments above, that the *primary* aspects of the "nature" of the "product defect" that will be examined are the effect of the prohibited act on the hazard created by the "product defect" and the degree of culpability of the "knowing" violator. Pertinent considerations would include:

- Whether the violator took steps or implemented procedures to prevent or detect the product defect, including safety and compliance measures specifically identified by the Commission in the portion of the proposed Rule that discusses "Safety/Compliance Program and/or System."

- Whether the product defect occurred despite compliance with applicable consumer product safety rules and voluntary standards or was otherwise unforeseeable.

- The severity of any injury that is likely to occur because of the "product defect."

- The magnitude of the risk that an injury will occur because of the "product defect."

TIA agrees that the "complexity of identifying" a particular hazard is a factor that may bear on the violator's culpability for a prohibited act. Its relevance, however, does not depend on whether the business has reported in a timely fashion under section 15 of the CPSA. We disagree with the stated position that the Commission should only consider the "complexity of identifying a particular product hazard" if the firm "has reported in a timely fashion under section 15." (*See* 74 Fed. Reg. 45,104). Such a limit is inconsistent with the reality that hazards are often difficult to clearly identify and may reasonably occasion filing delays. Companies should not be penalized for diligently attempting to analyze potential hazards to assess whether there is a reasonable basis for concluding that a substantial product hazard exists (*See* 15 U.S.C. § 2064(b)). TIA accordingly asks that the Commission consider the complexity of identifying a particular hazard in all appropriate cases. TIA, of course, acknowledges that companies should timely report under section 15 and that a failure to do so may be an additional prohibited act justifying a further civil penalty.

2. Severity of the Risk of Injury

TIA urges the Commission to acknowledge that the severity of the risk of injury due to a "knowing" commission of a particular prohibited act is one of the primary factors affecting the

appropriate amount of a civil penalty. The Commission should further clarify that, all else equal, the greater the severity of the risk caused by the knowing commission of a prohibited act, the greater the penalty.

We note that the severity of the risk of injury caused by a prohibited act appropriately takes into account both the likelihood and the severity of injury. Among factors pertinent to this assessment are whether generally more vulnerable consumers (children, the elderly, handicapped) are at risk. Similarly, products with short life-spans or whose use is limited present a lower risk of injury. Higher civil penalties are appropriate where more serious injuries are likely, but lower or no penalties are equally appropriate to consider where the risk of injury is low or the violation in question is one that poses no substantial risk of injury.

3. Occurrence or Absence of Injury

TIA agrees that the absence or occurrence of injury due to a knowing commission of a prohibited act is a pertinent consideration. All else equal, higher occurrences of actual injury due to the prohibited act at issue should produce a higher civil penalty, while the absence of injury due to the prohibited act should produce a lower civil penalty.

TIA agrees that the absence of an injury due to a prohibited act should not necessarily immunize a knowing violator from a civil penalty for the prohibited act at issue. But, TIA also urges the Commission to recognize that the rate and type of injury experienced by consumers who have actually used a product in their home or other environment should importantly inform any assessment of the severity of risk of injury.

4. The Number of Defective Products Distributed

As to this factor, TIA reiterates its objection to the definition of "product defect."

With that caveat, however, TIA agrees that the number of defective products distributed due to the knowing commission of the prohibited act for which a civil penalty is sought is relevant, particularly to assessing the severity of the risk. It would be helpful, however, if the Commission clarified the way in which it will use this factor.

To that end, TIA agrees with the Commission's acknowledging of the distinction between defective products "in commerce" as opposed to in "consumers' hands." We agree that this statutory factor on its face makes no such distinction; but that should not be conclusive. Instead, the number of defective products in consumers' hands may, in some circumstances, be especially pertinent to determining the size of a civil penalty. First, the statute permits the Commission to consider subsets of defective products distributed as appropriate when applying this factor to a particular case. If the Commission agrees, TIA urges that it say so. Second, to the extent that the Commission disagrees, it has authority to recognize as an "other factor" the number of defective products in consumers' hands, and the TIA requests that it do so. Finally, the Commission itself has previously recognized the importance of distinguishing between the number of products distributed, and the number that actually remains in consumers' hands (*See* Substantial Product Hazard Reports, 71 Fed. Reg. 42,028, 42,030 ;July 25, 2006). The issue is the extent to which consumers are at risk; so if products can be recaptured in distribution or at retail or recalled or outlived their expected useful life, they are not available to consumers. Thus,

there is a lower risk of harm to consumers, regardless of the number of product originally distributed in commerce.

5. 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.

TIA supports the consideration of the adverse economic impact of civil penalties on small business violators and the notion that such penalties can be mitigated to avoid undue impact to such businesses.

We also support the consideration of the deterrent effect of civil penalties when assessing the amount of civil penalties. But, for the reasons explained above in our General Comments, proportionality should be assessed principally by examining (1) the effect of the prohibited act at issue on the risk to the public's safety and (2) the violator's degree of culpability.

D. Other Factors as Appropriate

The Interim Final Rule states that the Commission may consider additional factors to those enumerated. The Commission should clearly enumerate additional factors as appropriate to the assessment process. Specifically, the Commission should consider: the history of noncompliance, the gain or lack thereof occasioned by reporting delays, the product's compliance with relevant standards, and good faith CPSC cooperation.

1. History of Noncompliance

TIA supports the principle that, all else equal, a civil penalty should be higher if a violator has a history of repeated noncompliance and lower if a violator has a history of compliance. Accordingly, TIA believes that the Commission' proposed Rule should make explicit—which it does not now do—that a history of compliance will tend to result in a lower penalty.

Moreover, a violator's history of noncompliance or compliance should be considered in relation to the violator's opportunities to comply or not. A violator that makes tens of thousands of products each year for decades and has had two past instances of noncompliance is in a different position than a violator that makes only one product and has two instances of noncompliance in the past year. The Commission should also examine actual, as opposed to imputed knowledge, the violator had prior to reporting. The fact that a firm reported a violation prior to being required to do so should be significantly considered when assessing whether a penalty should not be imposed or mitigating the amount of the penalty in the event of nonconformance to mandatory requirements. Conversely a repeat or knowing violator that seeks to hide an established violation for goods in commerce and reports only when the Commission requires it to do so might be subject to a higher penalty. Firms currently do not receive adequate credit when they have processes that involve reasonable and meaningful internal review of quality and incident data.

2. Economic Gain from Delaying Compliance

TIA supports the Commission's consideration of whether a firm benefited economically from a delay in complying with the statutory and regulatory requirements since this factor and

other potential explanations of the delay may be pertinent to the assessment of the violator's culpability for the prohibited act.

But civil penalties should not be an opportunity for the Commission to seek back door asset forfeiture, which is available only as a criminal penalty under 15 U.S.C. § 2070, or disgorgement of ill gotten gains such that the amount of the civil penalty actually becomes a criminal fine. The Commission should clarify the proposed rule accordingly.

3. Product Compliance with Safety Standards

Many children's products are subject to extensive, generally recognized mandatory and consensus safety standards, independently developed under the auspices of ANI and ASTM. Toys in particular are subject to an extensive array of CPSIA expanded mandatory toy safety standards, The Commission routinely recognizes the importance of such standards. CPSIA Section 106 mandated compliance to such standards, such as ASTM F-963, which evidenced Congressional recognition of the validity of such requirements. Toy manufacturers produce products that comply with such standards. The Commission should recognize, as Congress has, that conformance to such standards creates a presumption of safety, which cannot easily be ignored or rebuffed by Commission staff engaged in assessing whether civil penalties should ensue. The Commission should recognize this as an important factor in the assessment of such penalties. Conversely, nonconformance to such standards could create greater liability.

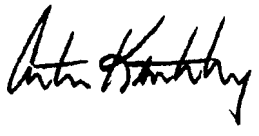
4. Good Faith Cooperation with CPSC

TIA supports consideration by CPSC of a firm's good faith cooperation with CPSC an additional factor in assessing civil penalties. The CPSC should adopt a policy that clearly and unequivocally rewards 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 or that intentionally delay agreed upon corrective action plans are more likely to be the subject of a civil penalty than those firms that cooperate and act in good faith. A policy that encourages and rewards voluntary cooperation with CPSC would enhance public safety and result in speedier reporting and corrective action. Incentives for such good faith efforts and cooperation should be created as part of a civil penalty regulation.

Conclusion

Thank you for the opportunity to comment, and we hope that our submission assists your efforts to implement the CPSIA's civil penalty provisions.

Sincerely,



Carter Keithley
President
Toy Industry Association

Stevenson, Todd

From: Desmond, Edward [edesmond@toyassociation.org]
Sent: Thursday, October 01, 2009 4:53 PM
To: CPSC-OS; Howsare, Matt
Cc: Keithley, Carter; Locker, Frederick
Subject: TIA Comments on Section 217 Civil Penalties
Attachments: TIA Section 217 Civil Penalty Comments - 10 1 09.pdf

Good afternoon,

Attached please find the comments by the Toy Industry Association regarding civil penalties. We appreciate your consideration of our views and we are happy to add further clarification if you deem it necessary.

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

Ed

Ed Desmond
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Civil Penalty Factors

Comment On: CPSC-2009-0068-0001
Civil Penalty Factors

Document: CPSC-2009-0068-0011
Comments from Kevin Burke

Submitter Information

Name: Kevin Burke
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Submitter's Representative: Kevin Burke
Organization: American Apparel and Footwear Association (AAFA)

General Comment

See attached

Attachments

CPSC-2009-0068-0011.1: Comments from Kevin Burke

October 1, 2009

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

RE: INTERIM FINAL RULE INTERPRETING FACTORS TO BE CONSIDERED WHEN SEEKING CIVIL PENALTIES

On behalf of the American Apparel & Footwear Association (AAFA) – the national trade association representing the apparel and footwear industry and its suppliers – I am writing in response to the request for comments by the Consumer Product Safety Commission (CPSC) on the Civil Penalty Factors Interim Final Interpretative Rule (Interim Final Rule).

In enacting section 15(b) of the Consumer Product Safety Act, Congress intended to encourage the widespread reporting of potential product hazards. In general, we are concerned that an undue reliance on civil penalties as an enforcement tool could have a negative effect on a company's willingness to report a potential product hazard. However, in the cases that appropriately warrant civil penalties, AAFA and its members support an approach to assessing civil penalties that is flexible, clear, comprehensive and fair. While the Interim Final Rule does allow for flexibility and rejects a matrix approach that may limit the CPSC's ability to comprehensively approach and analyze the unique circumstances surrounding a violation, we believe the CPSC should provide further guidance to limit confusion and provide transparency in the civil penalty assessment process.

Culpability

We request that the CPSC further clarify the degrees in which a person may "knowingly" engage in a prohibited act and the affect on the resulting civil penalty. The Consumer Product Safety Improvement Act (CPSIA) greatly expanded the number of prohibited acts that may result in civil penalties. Any person who "knowingly violates" these new and preexisting prohibited acts under the Consumer Product Safety Act (CPSA), Federal Hazardous Substances Act (FHSA) or the Flammable Fabrics Act (FFA) may be assessed a penalty depending on the totality of the circumstances surrounding the violation.

As the Interim Final Rule states, "knowingly" is defined by the CPSA as "having of actual knowledge or 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." Federal Register 74:168 (September 1, 2009) p. 45104, citing Section 20(d) of the CPSA. Within this definition, there exist varying degrees of "knowledge" and the CPSC should assess civil penalties proportionally. "Knowledge" can range from overtly or intentionally committing a prohibited act (and therefore warranting a relatively higher civil penalty), to negligently committing a prohibited act despite a good faith effort to ensure product compliance (therefore resulting a relatively lower civil penalty). Within this range of "knowledge," the CPSC should also distinguish between violators who have "actual knowledge" and those who have "presumed knowledge" and assess civil penalties accordingly. This guidance is especially important in the near-term as companies are still struggling to understand let alone comply with the plethora of new CPSIA requirements. Companies have often had to use their own reasonable judgment to comply with regulations without clear guidance. These companies should not be unduly penalized for good-faith efforts to comply.

Definition of a Product Defect

A knowing violation should be inclusive of but not synonymous with the definition of a product defect. The CPSC has traditionally defined "product defect" as, "a fault, flaw, or irregularity that causes weakness, failure, or inadequacy in form of function" emphasizing the "risk of injury" that results from the manufacturing, design, operation, warnings, instructions or labeling of a consumer product (16 C.F.R. § 1115.4). However, for purposes of the Final Rule, the Interim Final Rule greatly expands the definition of "product defect" to mean any "product or substance that is associated with a prohibitive act under the CPSA, FHSA, or FFA." Proposed 16 C.F.R 119.3(a) Federal Register 74:168 (September 1, 2009) p. 45106. A "prohibitive act under the CPSA, FHSA, or FFA" does not necessarily result in a "product defect" as defined by the 16 C.F.R. § 1115.4. Such prohibited acts could include failure to furnish a General Conformity Certification as required by Section 102 CPSIA, failure to comply with the new tracking label requirement (Section 103 of the CPSIA) or making an untimely report under Section 15(b) of the CPSA. These violations may inhibit the CPSC's ability to carry out its responsibilities, but do not necessarily have any impact on the safety of consumers by increasing the risk of injury from the associated product(s).

To that end, in reviewing the violation of any prohibited acts, we agree with the Interim Final Rule's determination that the CPSC should examine the violation's relation to the underlying product, the impact on the product's safety and the risk of harm to consumers.

Nature of the Product Defect

The Interim Final Rule should further clarify what aspects of the "nature of the product defect" that the CPSC will examine when determining a civil penalty." Proposed 16 C.F.R 119.4(a)(3) Federal Register 74:168 (September 1, 2009) p. 45106. The magnitude of the associated risk of injury and the severity of any actual injury should be the two primary factors that proportionally affect the civil penalty determination. Additionally, the "nature of the product defect" should include considerations of:

- Any steps the company may have taken to ensure safety of the product and compliance with all applicable consumer product safety rules,
- The relation of the product defect with the design, lifespan and the manufacturer's intended use of the product,
- How the consumer's use or misuse of the product relates to the defect and the defect's associated risk of injury,
- Frequency of the defect in relation to the total number of products distributed in commerce,
- Whether the defect happened despite compliance with applicable product safety standards and
- In the case of product defects that arise out of violations of product safety standards, when the applicable standard took affect, the complexity of the standard and the company's good faith efforts to understand and comply with the standard.

Additionally, the Final Rule should provide clarity and flexibility to the CPSA Section 15(b) reporting requirement that a company "immediately" inform the CPSC of a potential product defect or hazard. Companies who do their due diligence to assess and understand any potential problem prior to reporting the problem to the CPSC should not be unfairly penalized. In addition to assessing the timeliness of any Section15(b) report, the CPSC should take a comprehensive look at how the company approached the problem, the company's initial understanding of the nature of the problem and what corrective steps the company took before reporting the problem.

Severity of the Risk of Injury

As noted above, the magnitude of the associated risk of injury and the severity of any actual injury should be two primary factors that proportionally influence the CPSC's civil penalty assessments. Furthermore, any evaluation of risk of injury should be based solely on the product defect. Any injuries or risks of injuries that arise as a result of other factors should not be considered in the civil penalty determination provided these other factors fall outside the scope of violations that warrant civil penalties. The CPSC should also further clarify that technical violations that do not result in any potential risk of injury would result in proportionately smaller civil penalties than violations that put consumers at greater risk of injuries.

The Number of Defective Products Distributed

While the CPSIA makes no distinction between the number of defective products distributed and the number of actual products in consumers' hands, we believe that the latter consideration should be included in 16 C.F.R 1119.4(b)—"Other Factors as Appropriate." Furthermore, this distinction is significant as it relates directly to the likelihood of injury, because only consumers who own or use the products are at risk of injury as the remaining products in the distribution chain can be effectively recalled and pulled out of commerce.

History of Noncompliance

Proposed 16 CFR 119.4(b)(2) states that the CPSC "may consider if the violator has a history of noncompliance with the CPSC." A company's history of compliance or noncompliance is not a one-dimensional factor. Solely examining the company's recall record neither provides an accurate nor comprehensive picture of the company's product safety record.

The record of "noncompliance" should be taken in context. A company that sells thousands of different types of products and has had two recalls in the past is different than a company that only makes a few different types of products and has also had two recalls in the past. Additionally, whether the violation is a repeat violation of the same standard or a different standard should also be a consideration. Finally, the CPSC should take into account steps the company may have taken since the initial violation to improve its internal safety and quality control systems.

Safety/Compliance Program and/or System

Proposed 16 C.F.R. 119.4(b)(1)'s description of a Safety/Compliance Program and/or System as simply a reasonable program or system for collecting and analyzing information and data related to the product's safety is too narrow. The Interim Final Rule should go further to acknowledge other types of quality control programs that companies may have in place including supply chain control, internal education programs, tracking and traceability systems and the company's ability to respond to a product defect and implement an effective corrective action plan. Furthermore, smaller companies that have limited resources may likewise be limited in their ability to implement a comprehensive product safety management system that encompasses the entire supply chain. In these cases, the CPSC should consider a company's good faith effort to ensure product compliance throughout the entire supply chain taking into account the company's available resources.

Conclusion

AAFA and its members believe that flexible, clear and fair procedures should guide the CPSC's civil penalty determinations. Thank you for your consideration of and the opportunity to submit these comments. If you have any additional questions, please contact Rebecca Mond at rmond@apparelandfootwear.org.

Sincerely,

Kevin M. Burke

Kevin M. Burke
President and CEO

Stevenson, Todd

From: Rebecca Mond [rmond@apparelandfootwear.org]
Sent: Wednesday, October 07, 2009 8:16 PM
To: Stevenson, Todd
Cc: Steve Lamar; Nate Herman
Subject: AAFA Civil Penalty Factor Comments
Attachments: Final Comments Civil Penalty Factors Sept 09.doc

Importance: High

Todd,

Thank you again for giving us the opportunity to submit our civil penalty factor comments (attached). I truly appreciate the flexibility.

Sincerely,

Rebecca Mond
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