



U.S. CONSUMER PRODUCT SAFETY COMMISSION

4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814-4408

Record of Commission Action Commissioners Voting by Ballot*

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

ITEM:

Winter Bee, Inc. - Proposed Civil Penalty Settlement of \$200,000, to be suspended except for a payment of \$40,000 in four installments over 20 months
(Briefing package dated November 17, 2010, OS No. 5877)

DECISION:

The Commission voted (4-1) to provisionally accept with changes, the Settlement Agreement and Order, which would order Winter Bee, Inc., ("Winter Bee") to pay a civil penalty of \$200,000.00, to be suspended except for \$40,000.00, to be paid over a period of 20 months as specified in the Order. Chairman Tenenbaum and Commissioners Moore, Adler and Northup voted to accept with changes the provisional Settlement Agreement and Order. Commissioner Nord voted to reject the Settlement Agreement and Order. The provisional Settlement Agreement and Final Order will be announced in a *Federal Register* Notice. The Commission's Office of General Counsel Compliance Division staff negotiated the proposed agreement and the agreement settles the staff's allegations that Winter Bee violated the reporting requirements of section 15(b) of the Consumer Product Safety Act ("CPSA"), 15 U.S.C. § 2064(b), by manufacturing and distributing for sale sweatshirts with drawstrings that posed a risk of strangulation to children and knowingly failed to immediately inform the Commission about the sweatshirts as required by the CPSA. The failure to furnish information required by section 15(b) is a prohibited act under section 19(a)(4) of the CPSA, 15 U.S.C. § 2068(a)(4). Section 20(a)(1) of the CPSA, 15 U.S.C. § 2069(a)(1), permits the imposition of civil penalties for any person who knowingly violates section 19 of the CPSA by a company's failure to report information under section 15(b).

Commissioner Nord issued the attached statement regarding the matter.

For the Commission:

A handwritten signature in black ink, appearing to read "Todd A. Stevenson", written over a horizontal line.

Todd A. Stevenson
Secretary

*Ballot vote due November 30, 2010



U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

STATEMENT OF COMMISSIONER NANCY NORD ON
THE PROPOSED CIVIL PENALTY SETTLEMENT FOR WINTER BEE, INC.
December 1, 2010

I am voting against this proposed civil penalty settlement because I believe that the staff has misapplied the Commission's civil penalty regulations, specifically 16 CFR 1119.4 (a)(i)(E). This provision directs the staff to consider the appropriateness of the penalty in relation to the size of the business, including how to mitigate undue adverse impacts on small businesses. In addition, I want to highlight my ongoing serious concern that the agency needs to promulgate a Section 15 (j) rule with respect to drawstrings so manufacturers are better aware of this hazard and its related consequences.

The Facts:

Winter Bee is an extremely small manufacturer of children's garments. Between 2004 and 2008, it sold 81,000 children's sweatshirts with drawstrings at the neck. When Winter Bee became aware of the hazard presented by drawstrings, in December 2008, it stopped sale and undertook a recall itself to retrieve sweatshirts on the market and in consumers' hands. It did not notify the CPSC of its actions until April, 2009.

The Hazard:

The Commission has been rightly concerned about the choking hazard presented by drawstrings in children's outerwear for a number of years. However, our strategy to address this risk was to issue a guidance on this hazard in 1996 and then post a letter from staff about the dangers of drawstrings on our web site in 2006. We are taking the position that industry is on notice, based on this web posting and our ongoing penalty actions, of our view that drawstrings present a substantial product hazard.

If a product presents a substantial product hazard, the manufacturer must notify us immediately or face penalties for not doing so. Over the past several years, we have levied a number of penalties against children's clothing sellers for not informing us of this hazard. Our penalty against Winter Bee is a continuation of this enforcement strategy. Our penalty against Winter Bee is not for selling the hazardous product but for not telling us about it in a timely manner.

Application of the Penalty Factors:

The settlement agreement imposes a penalty of \$200,000. Our staff had a duty in evaluating Winter Bee's conduct, size and related factors to use those factors to get this \$200,000 penalty. Essentially, \$200,000 seems to be our initial demand of the company. It is not clear how that figure was settled upon but the company made the case it was unable to pay such a penalty. The settlement agreement shows that the penalty the staff assessed is \$200,000 but that only \$40,000 should be required to be paid because of the firm's 'inability to pay' more than \$40,000, absent some future showing of bad behavior by the company. The settlement reveals on its face that applying the penalty factors in our regulations leads us to a \$40,000 penalty, not a \$200,000 penalty. While it can be argued that the higher penalty is being mitigated, our regulations would require that any mitigation be of the appropriate penalty, that is \$40,000 paid over two years, not of the \$200,000 penalty amount initially asserted by the staff.

Obviously, as our regulations make clear, we can always set aside a settlement if we find that the information provided by the company is inaccurate, incomplete or misleading. In that case, we should look at the behavior and assess a penalty as appropriate. However, to fall back to an amount that has not been substantiated under the penalty factors is not supportable.

Regulatory Approach to Drawstrings:

I believe that we are now at a point where our enforcement strategy with respect to this hazard effectively constitutes backdoor rulemaking. The CPSIA amended the Consumer Product Safety Act to augment our rulemaking authorities giving the agency a new tool – Section 15 (j) – to better address hazards such as drawstrings. I have been advocating internally for some time that, at a minimum, we need to promulgate a Section 15 (j) rule with respect to drawstrings so that the world has better notice of this hazard and our intent to address it. While we have proposed such a rule, it has not been finalized because of the press of other business. In this respect I believe that our priorities need to be readjusted.