U. S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

Fax Message Cover Sheet

Date: May 10, 2000 **Time:** 9:35 a.m.

☐ **Fax To (Name):** Heather Howard

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From: Office of the Executive Director

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Subject: Section 15(d) CPSA

Number of Pages to Follow: 16

paragraphs of this subsection under which such person has elected to act. The Commission shall specify in the order the persons to whom refunds must be made if the person to whom the order is directed elects to take the action described in paragraph (3). If an order under this subsection is directed to more than one person, the Commission shall specify which person has the election under this subsection. An order under this subsection may prohibit the person to whom it applies from manufacturing for sale, offering for sale, distributing in commerce, or importing into the customs territory of the United States (as defined in general headnote 2 to the Tariff Schedules of the United States), [19 U.S.C. 1202] or from doing any combination of such actions, the product with respect to which the order was issued.

If the Commission determines that the action that the manufacturer, distributor or retailer has elected to take under subsection (d)(1), (2), or (3) is not in the public interest, the Commission shall order the manufacturer, distributor or retailer to take whichever other action or actions specified in subsection (d)(1), (2), or (3) that the Commission determines to be in the public interest. If the Commission determines that both of the remaining actions specified in subsection (d)(1), (2), or (3) are in the public interest, the Commission shall order the manufacturer, distributor or retailer to take whichever of those actions the manufacturer, distributor or retailer elects.

Under current law, a company with a defective product that is being recalled has the right to select the remedy to be offered to the public, even if that remedy is not in the public interest. The company can choose repair, replacement, or refund, less a reasonable allowance for use.

The proposed amendment will continue to permit the company with the defective product to select the remedy to protect the public. However, under the proposed amendment, the Commission may determine that the remedy selected by the company is not in the public interest and may order that the company carry out a remedy that is in the public interest. Companies will still be afforded the opportunity for a hearing to present their views, not only on whether their product constitutes a substantial product hazard, but also on the nature of the remedy that would be appropriate in the event that a recall is ordered.

The unconditional ability of companies to choose the remedy often does not further public safety. For example, if a manufacturer chooses to refund, "less a reasonable allowance for use," the purchase price of a product that has been on the market for a long time, the amount due consumers may be so small that there is no incentive for the consumer to take advantage of the recall. This is especially true where the hazardous product is still useful to the consumer and the cost of a replacement is substantial. The company is permitted to make this choice even thought people have been at risk for a number of years, thousands of products are still in use, and injuries are continuing to occur. In this example, as the law is currently written, allowing the manufacturer to choose a refund would do little, if anything, to stop customers from using the dangerous product and public safety would not be furthered.

SECTION 20(a) (CPSA) - CIVIL PENALTIES (AMENDED TO DELETE CIVIL PENALTY CAP)

SEC. 20(a). [15 U.S.C. 2069(a)]

(a)(1) Any person who knowingly violates section 19 of this Act shall be subject to a civil penalty not to exceed ~~$5,000~~ **$7,000** for each such violation. Subject to paragraph (2), a violation of section 19(a)(1), (2), (4), (5), (6), (7), (8), (9), (10), or (11) shall constitute a separate offense with respect to each consumer product involved~~, except that the maximum civil penalty shall not exceed $1,250,000 for any related series of violations~~. A violation of section 19(a)(3) shall constitute a separate violation with respect to each failure or refusal to allow or perform an act required thereby; and, if such violation is a continuing one, each day of such violations shall constitute a separate offense~~, except that the maximum civil penalty shall not exceed $1,250,000 for any related series of violations~~.

(2) The second sentence of paragraph (1) of this subsection shall not apply to violations of paragraph (1) or (2) of section 19(a) –

(A) if the person who violated such paragraphs is not the manufacturer or private labeler or a distributor of the products involved, and

(B) if such person did not have either (i) actual knowledge that his distribution or sale of the product violated such paragraphs or (ii) notice from the Commission that such distribution or sale would be a violation of such paragraphs.

(3)(A) The ~~maximum~~ penalty amounts authorized in paragraph (1) shall be adjusted for inflation as provided in this paragraph.

(B) Not later than December 1, ~~1994~~ **2005**, and December 1 of each fifth calendar year thereafter, the Commission shall prescribe and publish in the Federal Register ~~a schedule of maximum authorized penalties~~ **the authorized penalty amount** that shall apply for violations that occur after January 1 of the year immediately following such publication.

(C) The ~~schedule of maximum authorized penalties~~ **authorized penalty amount** shall be prescribed by increasing ~~each of~~ the amount~~s~~ referred to in paragraph (1) by the cost-of-living adjustment for the preceding five years. Any increase determined under the preceding sentence shall be rounded **up** to –

(i) in the case of ~~penalties greater than $1,000 but~~ **a penalty amount** less than or equal to $10,000, the nearest multiple of $1,000;

(ii) in the case of ~~penalties~~ **a penalty amount** greater than $10,000 ~~but less than or equal to $100,000~~, the nearest multiple of $5,000~~;~~

~~(iii) in the case of penalties greater than $100,000 but less than or equal to $200,000, the nearest multiple of $10,000.~~

~~(iv) in the case of penalties greater than $200,000, the nearest multiple of $25,000~~.

(D) For purposes of this subsection:

(i) The term "Consumer Price Index" means the Consumer Price Index for all-urban consumers published by the Department of Labor.

(ii) The term "cost-of-living adjustment for the preceding five years" means the percentage by which –

(I) the Consumer Price Index for the month of June of the calendar year preceding the adjustment; exceeds

(II) the Consumer Price Index for the month of June preceding the date on which the maximum authorized penalty was last adjusted.

Under current law, the CPSC cannot assess more than $1,650,000 in any one case against a company that knowingly violates consumer product safety laws. (Under the "Consumer Product Safety Improvement Act of 1990," this number is adjusted for inflation every five years. The next adjustment is due in 2005.) The proposed amendment eliminates the maximum civil penalty amount for multiple violations. Many of the cases in which the Commission seeks civil penalties involve very large corporations. More substantial civil penalties would provide a needed incentive for those companies to notify CPSC of defective products so that the agency can take timely action to protect consumers. Other agencies have civil penalty authority with no "cap" on the amount of the potential penalty for multiple violations, including the Federal Trade Commission (15 U.S.C. 21(l)) and the Federal Mine Safety and Health Administration (30 U.S.C. 820(a)).

The proposed amendment does not change the criteria for determining the amount of civil penalty to be sought. Under current law, the Commission must consider 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, and the appropriateness of such penalty in relation to the size of the business of the person charged. If the Commission staff cannot reach agreement with a company on a claim for civil penalty, the matter is referred to the Department of Justice for appropriate action.

The proposed amendment also codifies the current civil penalty amount of $7,000 for *each* knowing violation of section 19 of the CPSA. This amount was recently adjusted under the Consumer Product Safety Improvement Act of 1990 ("Improvement Act"), Public Law 101-608, 104 Stat. 3110 (November 16, 1990).

SECTION 21 (CPSA) – CRIMINAL PENALTIES (AMENDED TO DELETE RQUIREMEMENT FOR NOTICE OF NONCOMPLIANCE AND TO INCREASE AMOUNT OF PENALTY)

SEC. 21. [15 U.S.C. 2070]

(a) Any person who knowingly ~~and willfully~~ violates section 19 of this Act ~~after having received notice of noncompliance from the Commission~~ shall be fined not more than $50,000 or be imprisoned not more than one year, or both, **if such person is an individual, or fined not more than $100,000, if such person is an organization (as the term "organization" is defined in 18 U.S.C. 18). Any person who knowingly and willfully violates section 19 of this Act shall be fined not more than $250,000 or be imprisoned not more than three years, or both, if such person is an individual, or fined not more than $500,000 if such person is an organization.**

(b) Any individual director, officer, or agent of a corporation who ~~knowingly and willfully~~ authorizes, orders, or performs any of the acts or practices constituting in whole or in part a violation of ~~section 19, and who has knowledge of notice of noncompliance received by the corporation from the Commission,~~ **subsection (a)** shall be subject to penalties under this section without regard to any penalties to which that corporation may be subject under subsection (a).

The proposed amendment provides for two classes of CPSA violations: a "knowing" violation of the act carrying a maximum $50,000 fine and one-year prison sentence for individuals and a maximum fine of $100,000 for organizations, and a "willful" violation of the act carrying a maximum $250,000 fine and three-year prison sentence for individuals and a maximum fine of $500,000 for organizations. These heightened penalties are commensurate with the seriousness of product safety violations, which can result in death or serious injury to children and families. Other agencies have authority to seek substantial (felony) criminal penalties for knowing violations of safety requirements (e.g., the Food and Drug Administration regarding prescription drug marketing violations (21 U.S.C. 333(b)) and the Department of Transportation regarding the transportation of hazardous material (49 U.S.C. 5124)).

The proposed amendment also eliminates the requirement that the Commission give notice of noncompliance before imposing a criminal penalty for a knowing violation of product safety laws. The notice requirement makes it all but impossible to pursue a criminal penalty against companies, even in the most serious cases. The threat of a criminal felony prosecution would create an additional incentive for companies to report product defects to the Commission.

SECTION 5(a) (FHSA)– CRIMINAL PENALTIES (AMENDED TO INCREASE AMOUNT OF PENALTY)

SEC. 5(a). [15 U.S.C. 1264(a)]

Any person who violates any of the provisions of section 4 shall be guilty of a misdemeanor and shall on conviction thereof be subject to a fine of not more than ~~$500~~ **$5,000** or to imprisonment for not more than ~~ninety days~~ **one year**, or both, **if such person is an individual, or not more than $10,000 if such person is an organization (as the term "organization" is defined in 18 U.S.C. 18);** but for offenses committed ~~with intent to defraud or mislead~~ **willfully,** or for second and subsequent offenses, the penalty shall be imprisonment for not more than ~~one year~~ **three years,** or a fine of not more than ~~$3,000~~, **$250,000, or both, if such person is an individual,** ~~or both such imprisonment and fine~~ **or a fine of not more than $500,000 if such person is an organization.**.

The proposed amendment increases the potential criminal penalties to a level that will be meaningful.

SECTION 5(c) (FHSA) – CIVIL PENALTIES (AMENDED TO DELETE CIVIL PENALTY CAP)

SEC. 5(c). [15 U.S.C. 1264(c)]

(1) Any person who knowingly violates section 4 shall be subject to a civil penalty not to exceed ~~$5,000~~ **$7,000** for each such violation. Subject to paragraph (2), a violation of subsections (a), (b), (c), (d), (f), (g), (i), (j), and (k) of section 4 shall constitute a separate offense with respect to each substance involved~~, except that the maximum civil penalty shall not exceed $1,250,000 for any related series of violations~~. A violation of section 4(e) shall constitute a separate violation with respect to each failure or refusal to allow or perform an act required by section 4(e); and, if such violation is a continuing one, each day of such violation shall constitute a separate offense~~, except that the maximum civil penalty shall not exceed $1,250,000 for any related series of violations~~.

(2) The second sentence of paragraph (1) of this subsection shall not apply to violations of subsection (a) or (c) of section 4 –

(A) if the person who violated such subsection is not the manufacturer, importer, or private labeler or a distributor of the substance involved; and

(B) if such person did not have either (i) actual knowledge that such person's distribution or sale of the substance violated such subsection, or (ii) notice from the Commission that such distribution or sale would be a violation of such subsection.

(3) In determining the amount of any penalty to be sought upon commencing an action seeking to assess a penalty for a violation of section 4, the Commission shall consider the nature of the substance, the severity of the risk of injury, the occurrence or

absence of injury, the amount of the substance distributed, and the appropriateness of such penalty in relation to the size of the business of the person charged.

(4) Any civil penalty under this subsection may be compromised by the Commission. In determining the amount of such penalty or whether it should be remitted or mitigated, and in what amount, the Commission shall consider the appropriateness of such penalty to the size of the business of the persons charged, the nature of the substance involved, the severity of the risk of injury, the occurrence or absence of injury, and the amount of the substance distributed. The amount of such penalty when finally determined, or the amount agreed on compromise, may be deducted from any sums owing by the United States to the person charged.

(5) As used in the first sentence of paragraph (1), the term "knowingly" means (A) having actual knowledge, or (B) the presumed having of knowledge deemed to be possessed by a reasonable person who acts in the circumstances, including knowledge obtainable upon the exercise of due care to ascertain the truth of representations.

(6)(A) The ~~maximum~~ penalty amount authorized in paragraph (1) shall be adjusted for inflation as provided in this paragraph.

(B) Not later than December 1, ~~1994~~ **2005**, and December 1 of each fifth calendar year thereafter, the Commission shall prescribe and publish in the Federal Register ~~a schedule of maximum authorized penalties~~ **the authorized penalty amount** that shall apply for violations that occur after January 1 of the year immediately following such publication.

(C) The ~~schedule of maximum authorized penalties~~ **authorized penalty amount** shall be prescribed by increasing ~~each of~~ the amounts referred to in paragraph (1) by the cost-of-living adjustment for the preceding five years. Any increase determined under the preceding sentence shall be rounded **up** to –

(i) in the case of ~~penalties greater than $1,000 but~~ **a penalty amount** less than or equal to $10,000, the nearest multiple of $1,000;

(ii) in the case of ~~penalties~~ **a penalty amount** greater than $10,000 ~~but less than or equal to $100,000~~, the nearest multiple of $5,000~~;~~

~~(iii) in the case of penalties greater than $100,000 but less than or equal to $200,000, the nearest multiple of $10,000; and~~

~~(iv) in the case of penalties greater than $200,000, the nearest multiple of $25,000~~.

(D) For purposes of this subsection:

(i) The term "Consumer Price Index" means the Consumer Price Index for all-urban consumers published by the Department of Labor.

(ii) The term "cost-of-living adjustment for the preceding five years" means the percentage by which –

(I) the Consumer Price Index for the month of June of the calendar year preceding the adjustment; exceeds

(II) the Consumer Price Index for the month of June preceding the date on which the maximum authorized penalty was last adjusted.

See explanatory note for proposed amendment of section 20(a) of the CPSA.

SECTIONS 15(b) and 15(c)(2) (FHSA) – NOTIFICATION AND REPAIR, REPLACEMENT, OR REFUND (AN AMENDMENT TO AUTHORIZE THE COMMISSION TO ORDER ALTERNATIVE ACTION WHERE THE ACTION ELECTED IS NOT IN THE PUBLIC INTEREST)

SEC. 15(b). [15 U.S.C. 1274(b)]

~~If~~ **Subject to the last paragraph of this subsection, if** any article or substance sold in commerce is defined as a banned hazardous substance (whether or not it was such at the time of its sale) and the Commission determines (after affording interested persons, including consumers and consumer organizations, an opportunity for a hearing) that action under this subsection is in the public interest, the Consumer Product Safety Commission may order the manufacturer, distributor, or dealer to take whichever of the following actions the person to whom the order is directed elects:

(1) If repairs to or changes in the article or substance may be made so that it will not be a banned hazardous substance, to make such repairs or changes.

(2) To replace such article or substance with a like or equivalent article or substance which is not a banned hazardous substance.

(3) To refund the purchase price of the article or substance (less a reasonable allowance for use, if the article or substance has been in the possession of the consumer for one year or more –

(A) at the time of public notice under subsection (a), or

(B) at the time the consumer receives actual notice that the article or substance is a banned hazardous substance, whichever first occurs).

An order under this subsection may also require the person to whom it applies to submit a plan, satisfactory to the Commission, for taking the action which such person has elected to take. The Commission shall specify in the order the persons to whom refunds must be made if the person to whom the order is directed elects to take the action described in paragraph (3). If an order under this subsection is directed to more than one person, the Commission shall specify which person has the election under this subsection. An order under this subsection may prohibit the person to whom it applies from manufacturing for sale, offering for sale, distributing in commerce, or importing into the customs territory of the United States (as defined in general headnote 2 of the Tariff Schedules of the United States), [19 U.S.C. 1202n2; "includes only the States, the District of Columbia, and Puerto Rico"] or from doing any combination of such actions, with respect to the article or substance with respect to which the order was issued.

If the Commission determines that the action that the manufacturer, distributor or dealer has elected to take under subsection (b)(1), (2), or (3) is not in the public interest, the Commission shall order the manufacturer, distributor or dealer to take whichever other action or actions specified in subsection (b)(1), (2), or (3) that the Commission determines to be in the public interest. If the Commission determines that both of the remaining actions specified in subsection (b)(1), (2), or (3) are in the public interest, the Commission shall order the manufacturer, distributor or dealer to take whichever of those actions the manufacturer, distributor or dealer elects.

SEC. 15(c)(2). [15 U.S.C. 1274(c)(2)]

~~If~~ **Subject to the last paragraph of this subsection, if** the Commission determines (after affording interested persons, including consumers and consumer organizations, an opportunity for a hearing in accordance with subsection (e) of this section) that any toy or other article intended for use by children that is not a banned hazardous substance contains a defect which creates a substantial risk of injury to children (because of the pattern of defect, the number of defective toys or such articles distributed in commerce, the severity of the risk, or otherwise) and that action under this paragraph is in the public interest, the Commission may order the manufacturer, distributor, or dealer to take whichever of the following actions the person to whom the order is directed elects:

(A) If repairs to or changes in the toy or article can be made so that it will not contain a defect which creates a substantial risk of injury to children, to make such repairs or changes.

(B) To replace such toy or article with a like or equivalent toy or article which does not contain a defect which creates a substantial risk of injury to children.

(C) To refund the purchase price of such toy or article (less a reasonable allowance for use, if such toy or article has been in the possession of the consumer for 1 year or more (i) at the time of public notice under paragraph (1)(A), or (ii) at the time the consumer receives actual notice that the toy or article contains a defect which creates a substantial risk of injury to children, whichever first occurs).

An order under this paragraph may also require the person to whom it applies to submit a plan, satisfactory to the Commission, for taking the action which such person has elected to take. The Commission shall specify in the order the person to whom refunds must be made if the person to whom the order is directed elects to take the action described in subparagraph (C). If an order under this paragraph is directed to more than one person, the Commission shall specify which person has the election under this paragraph. An order under this paragraph may prohibit the person to whom it applies from manufacturing for sale, offering for sale, distributing in commerce, or importing into the customs territory of the United States (as defined in general headnote 2 to the Tariff Schedules of the United States), [19 U.S.C. 1202] or from doing any combination of such actions, with respect to the toy or article with respect to which the order was issued.

If the Commission determines that the action that the manufacturer, distributor or dealer has elected to take under subsection (c)(2)(A), (B) or (C) is not in the public interest, the Commission shall order the manufacturer, distributor or dealer to take whichever other action or actions specified in subsection (c)(2)(A), (B) or (C) that the Commission determines to be in the public interest. If the Commission determines that both of the remaining actions specified in subsection (c)(2)(A), (B) or (C) are in the public interest, the Commission shall order the manufacturer, distributor or dealer to take whichever of those actions the manufacturer, distributor or dealer elects.

See explanatory note for proposed amendment of section 15(i) of the CPSA.

OFFICE OF MANAGEMENT AND BUDGET

Legislative Reference Division
Labor-Welfare-Personnel Branch

URGENT

TO: Heather Howard OPD

FROM: **Robert J. Pellicci**

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Number of Pages (including cover page): 3

Date: 5/8 **Time:** 1150 am

Comments:

Departments of Labor + Commerce Comments on CPSC proposal - will send you others when received.

McCarthy Eileen <mccarthy-eileen@dol.gov>
05/05/2000 04:49:46 PM

Record Type: Record

To: Robert J. Pellicci/OMB/EOP

cc: Thomas Rosalind <thomas-rosalind@dol.gov>
Subject: DOL comments on Consumer Product Safety Commission Legislative Pr oposals (LRM RJP285)

> Bob,
>
> DOL has one substantive comment on the CPSC legislative proposals. In the
> description of the proposal to eliminate the cap on civil penalties for
> violations, the last sentence of the first paragraph says, "Other agencies
> have civil penalty authority with no 'cap' on the amount of the potential
> penalty, including...the Federal Mine Safety and Health Administration (30
> U.S.C. 820(a)." This is not a precisely accurate description of MSHA's
> authority. We request that CPSC add a sentence after this one, saying:
> "MSHA has a statutory maximum civil penalty amount, but has the authority
> to determine the civil penalty for each cited violation using the Mine
> Act's criteria."
>
> In addition, we have a couple of suggestions for CPSC's draft language:
>
> 1 The amendment to section 20(a)(3)(C) refers to rounding penalty amounts
> "up to" the nearest multiple while the amendment to section 5(c)(6)(C)
> refers to rounding penalty amounts "to" the nearest multiple. Perhaps
> this language should be made consistent (?).
>
> 2. The amendment to section 21 refers to persons who are "organizations,"
> but there does not seem to be a definition of "organization" in either the
> legislative proposal or CPSC's statute. It might be helpful to include
> such a definition in the new language.
>
> Please call me if you have any questions.
>
> Eileen McCarthy
> 219-8065 x145
>
>
>

- att1.htm

File: M 584
LRM: RJP285

May 5, 2000

TO: Bob Pellicci
OMB

FROM: Ken Clark
Commerce

SUBJECT: *Consumer Product Safety Commission Draft Bill on Improving CPSC Enforcement Powers*

This draft bill would: (1) eliminate a present statutory cap on civil penalties for violations of product safety laws: (2) increase penalties (and delete a notice provision) involving criminal violations; and (3) give the CPSC the authority to select the remedy (repair, replacement or refund) to be offered the public in the case of a product recall – a selection currently reserved for the company involved.

We have no objection to the first two actions. However, changing the present law to permit the Commission, rather than the company, to select the remedy to be offered for a defective product is a highly unusual step, and a questionable one under Administration regulatory policy as well as accepted economic theory concerning efficient regulation. Although the Commission in its explanation and analysis of this provision offers an example in which a company might make a choice of remedy that clearly would not be in the public interest, the analysis does not indicate consideration of alternative ways – short of completely shifting the business decisionmaking involved to a government agency – to ensure that the selection of remedy made by a company is not clearly contrary to the public interest.

We recommend consideration of intermediate solutions unless there is some reason why none would be workable. One approach might be to amend current law: (a) to require a company to notify the Commission of its election among the three statutorily named remedial alternatives; and (b) to authorize the Commission, upon its own motion or that of an interested party, and based on a finding that such action is necessary in the public interest under the particular circumstances presented, to require the use of another of the alternatives. (Expedited Commission fact-finding procedures could also be authorized if delayed consumer relief is of significant concern.)

OFFICE OF MANAGEMENT AND BUDGET

Legislative Reference Division
Labor-Welfare-Personnel Branch

URGENT

TO: Heather Howard OPD

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Number of Pages (including cover page): 8

Date: 5/8 **Time:** 6 30 PM

Comments:

Justice comments re:
CPSC proposal.

U.S. DEPARTMENT OF JUSTICE

OFFICE OF LEGISLATIVE AFFAIRS

FACSIMILE COVER SHEET

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NO. OF PAGES:

COMMENTS:

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

The Honorable Jacob J. Lew
Director
Office of Management and Budget
Washington, DC 20503

DRAFT

Dear Mr. Lew:

This responds to your request for the views of the Department of Justice on a draft bill of the Consumer Production Safety Commission (CPSC) that would, if enacted, enhance the Commsssion's enforcement authorities. As a general matter, we support the purposes and provisions of the draft bill. As noted below, we offer some suggestions for improvements.

1. Eliminate the cap on civil penalties for violations of product safety laws

We support this provision, lifting the cap on civil penalties. Under current law, the CPSC cannot seek more than $1.65 million in any case against a company that knowingly violates consumer product safety laws. 15 U.S.C. § 2069(a)(1). Many of the cases the CPSC handles involve large corporations which make products affecting millions of American consumers. Clearly, a civil penalty against an extensive multinational corporation which has very large operating profits should not be limited to $1.65 million. For a civil penalty to have any deterrent effect in the large scale cases, the cap must be changed. Otherwise, corporations can undertake a risky venture which might generate huge profits while at the same time being certain their regulatory liability is capped at only $1.65 million.

As correctly noted by the CPSC, removing the cap on civil penalties is consistent with other agencies' statutes, such as those enforced by the Federal Trade Commission (15 U.S.C. § 21(a)) and the Federal Mine Safety and Health Administration (30 U.S.C. § 820(a)). The provision would not change the current standard for determining the amount of civil penalty sought. Under 15 U.S.C. § 2069(b), the Commission must consider (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, and (4) the appropriateness of such penalty in relation to the size of the business or the person charged. If the CPSC staff cannot reach agreement with a company on a claim for civil penalty, the matter is referred to DOJ for appropriate action.

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We also support codifying the current civil penalty amount of $7,000 for each knowing violation of a product safety law.

2. Increase the penalty for a criminal violation of product safety laws from a misdemeanor to a felony and eliminate the requirement that the agency give notice to a person that he or she is criminally violating the law

The CPSC can request the Justice Department to seek criminal penalties against violators of the Consumer Product Safety Act ("CPSA") for engaging in any one of a number of prohibited acts outlined in 15 U.S.C. § 2068 (such as introducing into interstate commerce defective products that are subject to a CPSC regulation or order), see 15 U.S.C. § 2070. The CPSC can also seek criminal penalties for violators of the Federal Hazardous Substances Act ("FHSA") for anyone engaging in a different series of prohibited acts outlined in 15 U.S.C. § 1263 (such as introducing into interstate commerce banned or misbranded hazardous substances), see 15 U.S.C. § 1264(a).

The proposed bill essentially makes three changes to the two criminal statutes enforced by the CPSC: (1) enhance penalties, (2) alter the existing mens rea requirements for some violations, (3) remove the requirement under one of the two statutes, the CPSA, that the CPSC provide advance "notice of noncompliance" to any party it wishes to prosecute criminally under the CPSA. For the reasons outlined below, we strongly urge that the notice requirement be removed from the CPSA and support some of the penalty enhancements and some of the mens rea requirement changes, but suggest a slightly different way of amending the two statutes to accomplish the same goals.

a. The CPSA's notice requirement

We support removing the "notice of noncompliance" requirement of the CPSA, and believes it is the single greatest obstacle to the prosecution of criminal violations of the statute. In fact, because of the requirement that the CPSC provide violators of the CPSA with a "notice of noncompliance," we are aware of only one criminal prosecution under the CPSA in the Act's 28-year existence. That prosecution was for the distribution of butyl nitrite (see 15 U.S.C. § 2057a) by an individual to whom the CPSC had provided "notice of noncompliance" but who did not stop his distribution activities but simply took affirmative actions to conceal those activities which continued for several more years before he was eventually apprehended and prosecuted.

The notice requirement has provided a shield behind which bad actors who willfully violate the statute can hide comforted by the knowledge they can never be prosecuted because the CPSC has not yet detected their bad acts. We are aware of no other criminal statute that has such a prerequisite. The requirement is particularly unnecessary in light of the fact that the statute already requires the government prove beyond a reasonable doubt that a corporation or individual violated the statute knowingly. In other words, the CPSA already has a mens rea requirement that would prevent a corporation that was unaware it was violating the law from being prosecuted

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criminally.

A recent CPSC criminal case well illustrates the problematic nature of the CPSA's notice requirement. In that case, the general manager of a wholesale distributorship of various customer products, including lighters, had his employees remove the child-resistant mechanism from more than two million disposable lighters that he sold for a premium to retailers throughout the country. Because the defendant took affirmative steps to conceal his activities from the CPSC for nearly two years, the agency was not able to provide "notice of noncompliance," as is currently required by 15 U.S.C. § 2070. Thus, when the case was referred to the Justice Department, we were not able to bring any charges under the CPSA. Eventually, we were able to obtain a conviction with respect to a prosecutable false statement that the defendant had made to the CPSC. Nonetheless, because the removal of the child-resistant mechanism was itself not a crime due to his not receiving notice from the CPSC, the defendant was still able to argue successfully that his sentencing offense level under the sentencing guidelines for fraud should not be increased either for loss or for serious risk of bodily injury. This type of anomalous situation can be prevented by the removal of the notice requirement in 15 U.S.C. § 2070.

b. <u>Altering the mens rea requirements and enhancing penalties in the CPSA and the FHSA</u>

1. <u>The CPSA Criminal Sanctions</u>

Under 15 U.S.C. § 2070 of the CPSA, as currently written, defendants who "knowingly and willfully" violate the act are subject to one year in prison. The CPSC has proposed altering the <u>mens rea</u> requirement to only require the defendant "knowingly" violated the act, striking the term "and willfully" and has proposed increasing the fine and sentence provisions. The CPSC wants the maximum punishment expressly set out in the CPSA to be three years in prison and a fine of up to $250,000 for individuals and $500,000 for organizations. We support the CPSC's fine proposals which would simply make them consistent with the fines spelled out in 18 U.S.C. § 3571.[1]

Although the CPSC proposes just one type of criminal violation of the CPSA, a knowing violation of which would carry a maximum three-year sentence, we believe a modification of the CPSC proposal would lead to more equitable results and provide a sliding scale of culpability and punishment. We believe that there should be two classes of CPSA violations: a "knowing" violation of the act carrying a maximum one-year prison sentence and a "willful" violation of the act carrying a maximum three-year prison sentence.

[1]We note that the statement in the sectional analysis that the current maximum fine for an individual is $50,000 does not appear to be accurate. Under 18 U.S.C. § 3571(b)(5), the correct amount is $100,000. <u>See also</u> 18 U.S.C. § 3559(a)(6).

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The difference between the two mens rea requirements was spelled out in the Supreme Court's recent opinion, Bryan v. United States, 524 U.S. 184, 193 (1998). Although that case dealt with a gun statute, it provided the best recent explanation of the difference between the two mens rea requirements.

> [U]nless the text of the statute dictates a different result, the term "knowingly" merely requires proof of knowledge of the facts that constitute the offense.

Id.

> More is required, however, with respect to the conduct in the fourth category that is only criminal when done "willfully." The jury must find that the defendant acted with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful.

Id.

Using the above definitions as a guide, we would suggest that the statute be amended to state that any person who "knowingly" violated the CPSA, (in other words the individual knew that he or she was engaging in the prohibited act, regardless of whether the government could prove that the individual also knew the prohibited act was unlawful), would face a maximum of one year in prison. However, a second tier offense carrying a maximum punishment of up to three years in prison would be added for individuals in which the government could prove they knew they were acting in an unlawful manner. (It should be noted that, as the Court pointed out in Bryan, to prove a defendant acted "willfully" the government need not prove a defendant knew of the particular statute he or she violated, only that he was acting with the knowledge that he was violating the law.)

Our alternative statutory scheme would provide two different levels of punishment depending on the culpability of the defendant.

Although we believe that a "knowing" violation, absent a showing of "willfulness," should remain a one-year misdemeanor, rather than the three-year felony proposed by the CPSC, We believe that it is very important that the statute contain a three-year maximum for more culpable defendants, who currently can act with the worst mens rea and be certain that they will receive no more than one year in prison.

2. The FHSA Criminal Sanctions

Unlike criminal violations of the CPSA, which has always included a mens rea requirement, the FHSA has instead contained one strict-liability offense and one offense with a mens rea requirement. Under 15 U.S.C. § 1264(a) as currently written, any person who violates any provision of the FHSA, regardless of his or her mens rea, faces a maximum of 90 days in prison. If the government proves a defendant violated the act "with intent to defraud or mislead," CRAFT

or for second or subsequent offenses, the punishment is limited to one year in prison. Although the punishment is significantly less, the language for this section of the FHSA is modeled after the criminal provisions of the Federal Food, Drug and Cosmetic Act, ("FDCA") found at 21 U.S.C. § 333(a)(2). The difference is that the FDCA presently carries a one-year punishment for strict liability violations and a three-year punishment for violations "with intent to defraud or mislead." In its proposed changes, the CPSC has suggested the FHSA statute be amended to basically mirror the present FDCA, although instead of making strict liability offenses punishable by up to one year in prison as in the FDCA, the CPSC seeks an eighteen-month maximum for strict liability violations of the FHSA. The CPSC seeks a three-year maximum sentence for violations with intent to defraud and mislead.

We join the CPSC in believing the current punishment scheme in the FHSA is far too lenient. Although we support the fine proposals, we recommend that the statute be amended in a way that comes closer to tracking the mens rea requirements used in the CPSA (changes outlined above) and that the statute abandon the mens rea requirement of the FDCA model, which has proved somewhat unworkable in many FDA criminal prosecutions.

Under our revised proposal, the maximum prison sentence for any person who violates a provision of the FHSA, without proof of any mens rea requirement, would be increased from the current 90 days to only twelve months. The CPSC proposed increasing the maximum punishment for strict liability violations to eighteen months; however, we believe that this recommendation is unwise. The twelve-month limit is the dividing line between felonies and misdemeanors in the federal criminal justice system. Unless Congress is clear that it intends to impose such a severe penalty without a mens rea requirement, a court may interpret the provision to include such a requirement. See Staples v. United States, 511 U.S. 600, 618 (1994). Therefore, limiting the penalty imposed under the strict liability provision of the amended FHSA to a 12-month sentence would reduce the likelihood that a court would read in a mens rea requirement into the statute.

We suggest that this section of the FHSA be rewritten to include a second-tier punishment for individuals who "willfully" violate the FHSA. Under this proposed change, individuals who violate the FHSA knowing they are violating the law would face up to three years in prison, regardless of whether they violate the FHSA with intent to defraud or mislead anyone.

3. Giving CPSC authority to select the way defective products will be fixed in product recalls

Although this Department does not typically play an active role in advising the CPSC on its handling of recalls, we support the proposed change, as it would strengthen the agency's hand in enforcing this key aspect of its statute. We believe it to be far more effective for the CPSC to choose which is the best method to get a defective product out of the marketplace than to leave it up to the defendant organization responsible for putting the product on the market in the first place.

* * * * *

Thank you for the opportunity to comment on this matter. Please feel free to call upon us again if we may be of additional assistance.

Sincerely,

Robert Raben
Assistant Attorney General

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LEGISLATIVE PROPOSALS TO IMPROVE CPSC ENFORCEMENT POWERS

1. Eliminate the cap on civil penalties for violations of product safety laws

Under current law, the CPSC cannot assess more than $1,650,000 in any one case against a company that knowingly violates consumer product safety laws. (Under the "Consumer Product Safety Improvement Act of 1990," this number is adjusted for inflation every five years. The next adjustment is due in 2005.) The proposed amendment eliminates this maximum civil penalty amount. Many of the cases in which the Commission seeks civil penalties involve very large corporations. More substantial civil penalties would provide a needed incentive for those companies to notify CPSC of defective products so that the agency can take timely action to protect consumers. Other agencies have civil penalty authority with no "cap" on the amount of the potential penalty, including the Federal Trade Commission (15 U.S.C. 21(l)) and the Federal Mine Safety and Health Administration (30 U.S.C. 820(a)).

The proposed amendment does not change the criteria for determining the amount of civil penalty to be sought. Under current law, the Commission must consider 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, and the appropriateness of such penalty in relation to the size of the business of the person charged. If the Commission staff cannot reach agreement with a company on a claim for civil penalty, the matter is referred to the Department of Justice for appropriate action.

The proposed amendment also codifies the current civil penalty amount of $7,000 for *each* knowing violation of a product safety law. This amount was recently adjusted under the Consumer Product Safety Improvement Act of 1990 ("Improvement Act"), Public Law 101-608, 104 Stat. 3110 (November 16, 1990).

2. Increase the penalty for a criminal violation of product safety laws from a misdemeanor to a felony and eliminate the requirement that the agency give notice to the company that is criminally violating the law.

The proposed amendment increases the potential criminal penalties for a knowing violation of consumer product safety laws from a misdemeanor (up to one year in prison) to a felony (up to three years in prison). It also increases the maximum monetary criminal penalty from $50,000 to $250,000 for individuals and $500,000 for companies. These heightened penalties are commensurate with the seriousness of product safety violations, which can result in death or serious injury to children and families. Other agencies have authority to seek substantial (felony) criminal penalties for knowing violations of safety requirements (e.g., the Food and Drug Administration regarding prescription drug marketing violations (21 U.S.C. 333(b)) and the Department of Transportation regarding the transportation of hazardous material (49 U.S.C. 5124)).

The proposed amendment also eliminates the requirement that the Commission give notice of noncompliance before imposing a criminal penalty for a knowing violation of product safety laws. The notice requirement makes it all but impossible to pursue a criminal penalty against companies, even in the most serious cases. The threat of a criminal felony prosecution would create an additional strong incentive for companies to report product defects to the Commission.

3. Give CPSC the authority to select the way a defective product will be fixed in a product recall.

Under current law, a company with a defective product that is being recalled has the right to select the remedy to be offered to the public, even if that remedy does not provide the most protection to consumers. The company can choose repair, replacement, or refund, less a reasonable allowance for use.

The proposed amendment will permit the Commission, rather than the company with the defective product, to select the remedy to protect the public. Companies will still be afforded the opportunity for a hearing to present their views, not only on whether their product constitutes a substantial product hazard, but also on the nature of the remedy that would be appropriate in the event that a recall is ordered.

The ability of companies to choose the remedy often does not further public safety. For example, if a manufacturer chooses to refund, "less a reasonable allowance for use," the purchase price of a product that has been on the market for a long time, the amount due consumers may be so small that there is no incentive for the consumer to take advantage of the recall. This is especially true where the hazardous product is still useful to the consumer and the cost of a replacement is substantial. The company is permitted to make this choice even though people have been at risk for a number of years, thousands of products are still in use, and injuries are continuing to occur. In this example, as the law is currently written, allowing the manufacturer to choose a refund would do little, if anything, to stop customers from using the dangerous product and public safety would not be furthered.

NON-LEGISLATIVE PROPOSALS TO IMPROVE CPSC ENFORCEMENT POWERS

1. Provide $5 million to enhance CPSC's Special Investigations Unit (SIU)

Under CPSC's laws, any company that has information that "reasonably supports the conclusion that its product creates an unreasonable risk of serious injury or death" must file a report with the CPSC. However, fewer than 60 percent of the investigations of dangerous products conducted by CPSC every year are a result of company reports. The rest of the investigations are initiated because of information that comes from other sources, such as consumer complaints, newspaper articles, and reports from health care practitioners.

In 1995, CPSC established the SIU to develop new sources of information about potentially dangerous products in the marketplace and to review new and existing data sources to uncover potentially defective products. To date, the SIU has reached agreements with the International Association of Arson Investigators and a number of homeowners' insurance companies to receive information about products that may have caused death, serious injury and property damage. CPSC has initiated a number of recalls through the efforts of the SIU, including recalls of dive sticks that can impale children and playpens with protruding rivets that can strangle infants.

An additional $5 million would enable CPSC to expand the role of the SIU to find companies who have failed to file reports of dangerous products and to investigate and prosecute cases against those companies. The combination of this increased enforcement capability and higher civil and criminal penalties for nonreporting would provide a strong deterrent against companies failing to notify CPSC about dangerous products.

2. Allow CPSC to be eligible to receive money from the Department of Justice Asset Forfeiture Fund

The money in the Department of Justice Asset Forfeiture Fund (the Fund) comes from property that was used in, or acquired through, illegal activities. Certain foreign, federal, state and local law enforcement agencies that help contribute to the Fund are authorized to apply for money from the Fund to enhance forfeiture and strengthen law enforcement. Recently, CPSC has initiated a number of cases against people who illegally distribute fireworks and other consumer products. The assets seized as a result of these cases have been deposited into the Fund. Many of these cases are ongoing, and CPSC staff anticipates that some of the cases will result in additional contributions to the Fund. However, CPSC is not currently a member of the fund, and thus, authorized to apply for money from the Fund to further our law enforcement activities.

The Asset Forfeiture and Money Laundering Section of the Criminal Division of the Department of Justice has the authority to admit CPSC into the Fund, thereby allowing the agency to apply for money from the Fund. With the additional revenue that CPSC would obtain from the Fund, the agency could expand its efforts to pursue criminals who violate product safety laws and put children and families in danger.

LRM ID: RJP285 **SUBJECT:** Consumer Product Safety Commission Draft Bill on Improving CPSC Enforcement Powers

RESPONSE TO
LEGISLATIVE REFERRAL
MEMORANDUM

If your response to this request for views is short (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet. If the response is short and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:
(1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or
(2) sending us a memo or letter
Please include the LRM number shown above, and the subject shown below.

TO: Robert J. Pellicci Phone: 395-4871 Fax: 395-6148
Office of Management and Budget
Branch-Wide Line (to reach legislative assistant): 395-7362

FROM: ______________________ (Date)

______________________ (Name)

______________________ (Agency)

______________________ (Telephone)

The following is the response of our agency to your request for views on the above-captioned subject:

______ Concur

______ No Objection

______ No Comment

______ See proposed edits on pages __________

______ Other: ______________________

______ FAX RETURN of _____ pages, attached to this response sheet

Message Sent To: ______________________

Jeanne Lambrew/OMB/EOP@EOP
Christopher C. Jennings/OPD/EOP@EOP
Devorah R. Adler/OPD/EOP@EOP
Barry T. Clendenin/OMB/EOP@EOP
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Jennifer M. Forshey/OMB/EOP@EOP
Kirsten N. Pflomm/WHO/EOP@EOP
Heather H. Howard/OPD/EOP@EOP
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LEGISLATIVE PROPOSALS TO IMPROVE CPSC ENFORCEMENT POWERS

1. Eliminate the cap on civil penalties for violations of product safety laws

Under current law, the CPSC cannot assess more than $1,650,000 in any one case against a company that knowingly violates consumer product safety laws. (Under the "Consumer Product Safety Improvement Act of 1990," this number is adjusted for inflation every five years. The next adjustment is due in 2005.) The proposed amendment eliminates this maximum civil penalty amount. Many of the cases in which the Commission seeks civil penalties involve very large corporations. More substantial civil penalties would provide a needed incentive for those companies to notify CPSC of defective products so that the agency can take timely action to protect consumers. Other agencies have civil penalty authority with no "cap" on the amount of the potential penalty, including the Federal Trade Commission (15 U.S.C. 21(l)) and the Federal Mine Safety and Health Administration (30 U.S.C. 820(a)).

The proposed amendment does not change the criteria for determining the amount of civil penalty to be sought. Under current law, the Commission must consider 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, and the appropriateness of such penalty in relation to the size of the business of the person charged. If the Commission staff cannot reach agreement with a company on a claim for civil penalty, the matter is referred to the Department of Justice for appropriate action.

The proposed amendment also codifies the current civil penalty amount of $7,000 for *each* knowing violation of a product safety law. This amount was recently adjusted under the Consumer Product Safety Improvement Act of 1990 ("Improvement Act"), Public Law 101-608, 104 Stat. 3110 (November 16, 1990).

SECTION 20(a) (CPSA) - CIVIL PENALTIES (AMENDED TO DELETE CIVIL PENALTY CAP)

SEC. 20(a). [15 U.S.C. 2069(a)]

(a)(1) Any person who knowingly violates section 19 of this Act shall be subject to a civil penalty not to exceed ~~$5,000~~ **$7,000** for each such violation. Subject to paragraph (2), a violation of section 19(a)(1), (2), (4), (5), (6), (7), (8), (9), (10), or (11) shall constitute a separate offense with respect to each consumer product involved~~, except that the maximum civil penalty shall not exceed $1,250,000 for any related series of violations~~. A violation of section 19(a)(3) shall constitute a separate violation with respect to each failure or refusal to allow or perform an act required thereby; and, if such violation is a continuing one, each day of such violations shall constitute a separate offense~~, except that the maximum civil penalty shall not exceed $1,250,000 for any related series of violations~~.

(2) The second sentence of paragraph (1) of this subsection shall not apply to violations of paragraph (1) or (2) of section 19(a) –

(A) if the person who violated such paragraphs is not the manufacturer or private labeler or a distributor of the products involved, and

(B) if such person did not have either (i) actual knowledge that his distribution or sale of the product violated such paragraphs or (ii) notice from the Commission that such distribution or sale would be a violation of such paragraphs.

(3)(A) The ~~maximum~~ penalty amounts authorized in paragraph (1) shall be adjusted for inflation as provided in this paragraph.

(B) Not later than December 1, ~~1994~~ **2005**, and December 1 of each fifth calendar year thereafter, the Commission shall prescribe and publish in the Federal Register ~~a schedule of maximum authorized penalties~~ **the authorized penalty amount** that shall apply for violations that occur after January 1 of the year immediately following such publication.

(C) The ~~schedule of maximum authorized penalties~~ **authorized penalty amount** shall be prescribed by increasing ~~each of~~ the amounts referred to in paragraph (1) by the cost-of-living adjustment for the preceding five years. Any increase determined under the preceding sentence shall be rounded **up** to –

(i) in the case of ~~penalties greater than $1,000 but~~ **a penalty amount** less than or equal to $10,000, the nearest multiple of $1,000;

(ii) in the case of ~~penalties~~ **a penalty amount** greater than $10,000 ~~but less than or equal to $100,000~~, the nearest multiple of $5,000~~;~~

~~(iii) in the case of penalties greater than $100,000 but less than or equal to $200,000, the nearest multiple of $10,000.~~

~~(iv) in the case of penalties greater than $200,000, the nearest multiple of $25,000~~.

(D) For purposes of this subsection:

(i) The term "Consumer Price Index" means the Consumer Price Index for all-urban consumers published by the Department of Labor.

(ii) The term "cost-of-living adjustment for the preceding five years" means the percentage by which –

(I) the Consumer Price Index for the month of June of the calendar year preceding the adjustment; exceeds

(II) the Consumer Price Index for the month of June preceding the date on which the maximum authorized penalty was last adjusted.

SECTION 5(c) (FHSA) – CIVIL PENALTIES
(AMENDED TO DELETE CIVIL PENALTY CAP)

SEC. 5(c). [15 U.S.C. 1264(c)]

(1) Any person who knowingly violates section 4 shall be subject to a civil penalty not to exceed ~~$5,000~~ **$7,000** for each such violation. Subject to paragraph (2), a violation of subsections (a), (b), (c), (d), (f), (g), (i), (j), and (k) of section 4 shall constitute a separate offense with respect to each substance involved~~, except that the maximum civil penalty shall not exceed $1,250,000 for any related series of violations~~. A violation of section 4(e) shall constitute a separate violation with respect to each failure or refusal to allow or perform an act required by section 4(e); and, if such violation is a continuing one, each day of such violation shall constitute a separate offense~~, except that the maximum civil penalty shall not exceed $1,250,000 for any related series of violations~~.

(2) The second sentence of paragraph (1) of this subsection shall not apply to violations of subsection (a) or (c) of section 4 –

(A) if the person who violated such subsection is not the manufacturer, importer, or private labeler or a distributor of the substance involved; and

(B) if such person did not have either (i) actual knowledge that such person's distribution or sale of the substance violated such subsection, or (ii) notice from the Commission that such distribution or sale would be a violation of such subsection.

(3) In determining the amount of any penalty to be sought upon commencing an action seeking to assess a penalty for a violation of section 4, the Commission shall consider the nature of the substance, the severity of the risk of injury, the occurrence or

absence of injury, the amount of the substance distributed, and the appropriateness of such penalty in relation to the size of the business of the person charged.

(4) Any civil penalty under this subsection may be compromised by the Commission. In determining the amount of such penalty or whether it should be remitted or mitigated, and in what amount, the Commission shall consider the appropriateness of such penalty to the size of the business of the persons charged, the nature of the substance involved, the severity of the risk of injury, the occurrence or absence of injury, and the amount of the substance distributed. The amount of such penalty when finally determined, or the amount agreed on compromise, may be deducted from any sums owing by the United States to the person charged.

(5) As used in the first sentence of paragraph (1), the term "knowingly" means (A) having actual knowledge, or (B) the presumed having of knowledge deemed to be possessed by a reasonable person who acts in the circumstances, including knowledge obtainable upon the exercise of due care to ascertain the truth of representations.

(6)(A) The ~~maximum~~ penalty amount authorized in paragraph (1) shall be adjusted for inflation as provided in this paragraph.

(B) Not later than December 1, ~~1994~~ **2005**, and December 1 of each fifth calendar year thereafter, the Commission shall prescribe and publish in the Federal Register ~~a schedule of maximum authorized penalties~~ **the authorized penalty amount** that shall apply for violations that occur after January 1 of the year immediately following such publication.

(C) The ~~schedule of maximum authorized penalties~~ **authorized penalty amount** shall be prescribed by increasing ~~each of~~ the amount~~s~~ referred to in paragraph (1) by the cost-of-living adjustment for the preceding five years. Any increase determined under the preceding sentence shall be rounded to –

(i) in the case of ~~penalties greater than $1,000 but~~ **a penalty amount** less than or equal to $10,000, the nearest multiple of $1,000;

(ii) in the case of ~~penalties~~ **a penalty amount** greater than $10,000 ~~but less than or equal to $100,000~~, the nearest multiple of $5,000~~;~~

~~(iii) in the case of penalties greater than $100,000 but less than or equal to $200,000, the nearest multiple of $10,000; and~~

~~(iv) in the case of penalties greater than $200,000, the nearest multiple of $25,000~~.

(D) For purposes of this subsection:

(i) The term "Consumer Price Index" means the Consumer Price Index for all-urban consumers published by the Department of Labor.

(ii) The term "cost-of-living adjustment for the preceding five years" means the percentage by which –

(I) the Consumer Price Index for the month of June of the calendar year preceding the adjustment; exceeds

(II) the Consumer Price Index for the month of June preceding the date on which the maximum authorized penalty was last adjusted.

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2. Increase the penalty for a criminal violation of product safety laws from a misdemeanor to a felony and eliminate the requirement that the agency give notice to the company that is criminally violating the law.

The proposed amendment increases the potential criminal penalties for a knowing violation of consumer product safety laws from a misdemeanor (up to one year in prison) to a felony (up to three years in prison). It also increases the maximum monetary criminal penalty from $50,000 to $250,000 for individuals and $500,000 for companies. These heightened penalties are commensurate with the seriousness of product safety violations, which can result in death or serious injury to children and families. Other agencies have authority to seek substantial (felony) criminal penalties for knowing violations of safety requirements (e.g., the Food and Drug Administration regarding prescription drug marketing violations (21 U.S.C. 333(b)) and the Department of Transportation regarding the transportation of hazardous material (49 U.S.C. 5124)).

The proposed amendment also eliminates the requirement that the Commission give notice of noncompliance before imposing a criminal penalty for a knowing violation of product safety laws. The notice requirement makes it all but impossible to pursue a criminal penalty against companies, even in the most serious cases. The threat of a criminal felony prosecution would create an additional strong incentive for companies to report product defects to the Commission.

SECTION 21 (CPSA) – CRIMINAL PENALTIES (AMENDED TO DELETE REQUIREMEMENT FOR NOTICE OF NONCOMPLIANCE AND TO INCREASE AMOUNT OF PENALTY)

SEC. 21. [15 U.S.C. 2070]

(a) Any person who knowingly ~~and willfully~~ violates section 19 of this Act ~~after having received notice of noncompliance from the Commission~~ shall be fined not more than ~~$50,000~~ **$250,000 if such person is an individual, or not more than $500,000 if such person is an organization,** or be imprisoned not more than ~~one year~~ **three years**, or both.

(b) Any individual director, officer, or agent of a corporation who knowingly ~~and willfully~~ authorizes, orders, or performs any of the acts or practices constituting in whole or in part a violation of section 19, ~~and who has knowledge of notice of noncompliance received by the corporation from the Commission,~~ shall be subject to penalties under this section without regard to any penalties to which that corporation may be subject under subsection (a).

SECTION 5(a) (FHSA)- CRIMINAL PENALTIES (AMENDED TO INCREASE AMOUNT OF PENALTY)

SEC. 5(a). [15 U.S.C. 1264(a)]

Any person who violates any of the provisions of section 4 shall be guilty of a ~~misdemeanor~~ **felony** and shall on conviction thereof be subject to a fine of not more than ~~$500~~ **$5,000 if such person is an individual, or not more than $10,000 if such person is an organization**, or to imprisonment for not more than ~~ninety days~~ **eighteen months**, or both; but for offenses committed with intent to defraud or mislead, or for second and subsequent offenses, the penalty shall be imprisonment for not more than ~~one year~~ **three years**, or a fine of not more than ~~$3,000~~ **$250,000 if such person is an individual, or not more than $500,000 if such person is an organization**, or both such imprisonment and fine.

3. Give CPSC the authority to select the way a defective product will be fixed in a product recall.

Under current law, a company with a defective product that is being recalled has the right to select the remedy to be offered to the public, even if that remedy does not provide the most protection to consumers. The company can choose repair, replacement, or refund, less a reasonable allowance for use.

The proposed amendment will permit the Commission, rather than the company with the defective product, to select the remedy to protect the public. Companies will still be afforded the opportunity for a hearing to present their views, not only on whether their product constitutes a substantial product hazard, but also on the nature of the remedy that would be appropriate in the event that a recall is ordered.

The ability of companies to choose the remedy often does not further public safety. For example, if a manufacturer chooses to refund, "less a reasonable allowance for use," the purchase price of a product that has been on the market for a long time, the amount due consumers may be so small that there is no incentive for the consumer to take advantage of the recall. This is especially true where the hazardous product is still useful to the consumer and the cost of a replacement is substantial. The company is permitted to make this choice even though people have been at risk for a number of years, thousands of products are still in use, and injuries are continuing to occur. In this example, as the law is currently written, allowing the manufacturer to choose a refund would do little, if anything, to stop customers from using the dangerous product and public safety would not be furthered.

SECTIONS 15(b) and 15(c)(2) (FHSA) – NOTIFICATION AND REPAIR, REPLACEMENT, OR REFUND (AMENDED TO ELIMINATE ELECTION OF REPAIR, REPLACEMENT, OR REFUND BY PERSON SUBJECT TO SECTION 15 ACTION)

SEC. 15(b). [15 U.S.C. 1274(b)]

If any article or substance sold in commerce is defined as a banned hazardous substance (whether or not it was such at the time of its sale) and the Commission determines (after affording interested persons, including consumers and consumer organizations, an opportunity for a hearing) that action under this subsection is in the public interest, the Consumer Product Safety Commission may order the manufacturer, distributor, or dealer to take ~~whichever of the following actions the person to whom the order is directed elects~~ **one of the following actions, as specified by the Commission**:

(1) If repairs to or changes in the article or substance may be made so that it will not be a banned hazardous substance, to make such repairs or changes.

(2) To replace such article or substance with a like or equivalent article or substance which is not a banned hazardous substance.

(3) To refund the purchase price of the article or substance (less a reasonable allowance for use, if the article or substance has been in the possession of the consumer for one year or more –

(A) at the time of public notice under subsection (a), or

(B) at the time the consumer receives actual notice that the article or substance is a banned hazardous substance, whichever first occurs).

An order under this subsection may also require the person to whom it applies to submit a plan, satisfactory to the Commission, for taking ~~the action which such person has elected to take.~~ **whichever of the actions the Commission specifies under the preceding**

paragraphs of this subsection. If the Commission specifies that the action described in paragraph (3) shall be taken, the ~~The~~ Commission shall specify in the order the persons to whom refunds must be made. ~~if the person to whom the order is directed elects to take the action described in paragraph (3). If an order under this subsection is directed to more than one person, the Commission shall specify which person has the election under this subsection.~~ An order under this subsection may prohibit the person to whom it applies from manufacturing for sale, offering for sale, distributing in commerce, or importing into the customs territory of the United States (as defined in general headnote 2 of the Tariff Schedules of the United States), [19 U.S.C. 1202n2; "includes only the States, the District of Columbia, and Puerto Rico"] or from doing any combination of such actions, with respect to the article or substance with respect to which the order was issued.

SEC. 15(c)(2). [15 U.S.C. 1274(c)(2)]

If the Commission determines (after affording interested persons, including consumers and consumer organizations, an opportunity for a hearing in accordance with subsection (e) of this section) that any toy or other article intended for use by children that is not a banned hazardous substance contains a defect which creates a substantial risk of injury to children (because of the pattern of defect, the number of defective toys or such articles distributed in commerce, the severity of the risk, or otherwise) and that action under this paragraph is in the public interest, the Commission may order the manufacturer, distributor, or dealer to take ~~whichever of the following actions the person to whom the order is directed elects~~ **one of the following actions, as specified by the Commission.**:

(A) If repairs to or changes in the toy or article can be made so that it will not contain a defect which creates a substantial risk of injury to children, to make such repairs or changes.

(B) To replace such toy or article with a like or equivalent toy or article which does not contain a defect which creates a substantial risk of injury to children.

(C) To refund the purchase price of such toy or article (less a reasonable allowance for use, if such toy or article has been in the possession of the consumer for 1 year or more (i) at the time of public notice under paragraph (1)(A), or (ii) at the time the consumer receives actual notice that the toy or article contains a defect which creates a substantial risk of injury to children, whichever first occurs).

An order under this paragraph may also require the person to whom it applies to submit a plan, satisfactory to the Commission, for taking ~~the action which such person has elected to take.~~ **whichever of the actions the Commission specifies under the preceding paragraphs of this subsection. If the Commission specifies that the action described in paragraph (3) shall be taken, the** ~~The~~ Commission shall specify in the order the person to whom refunds must be made. ~~if the person to whom the order is directed elects to take the action described in subparagraph (C).~~ If an order under this paragraph is directed to more than one person, the Commission shall specify which person has the election under this paragraph. An order under this paragraph may prohibit the person to whom it applies from manufacturing for sale, offering for sale, distributing in commerce, or importing into the customs territory of the United States (as defined in general headnote 2 to the Tariff Schedules of the United States), [19 U.S.C. 1202] or from doing any combination of such actions, with respect to the toy or article with respect to which the order was issued.

April 27, 2000

Dear Heather,

Here is the package we discussed last night. Feel free to call or e-mail me if you have any questions.

Good luck on your events next week!

Tel: 301-504-0550 x 2342
Fax: 301-504-0121
e-mail: pgilbert@cpsc.gov

Pamela Gilbert
Executive Director

U. S. Consumer Product Safety Commission
4330 East-West Highway, Bethesda, MD 20814

Sincerely,

Pamela

Pamela Gilbert
Executive Director, CPSC
(301) 504-0550, ext. 2342
pgilbert@cpsc.gov

NON-LEGISLATIVE PROPOSALS TO IMPROVE CPSC ENFORCEMENT POWERS

1. Provide $5 million to enhance CPSC's Special Investigations Unit (SIU)

Under CPSC's laws, any company that has information that "reasonably supports the conclusion that its product creates an unreasonable risk of serious injury or death" must file a report with the CPSC. However, fewer than 60 percent of the investigations of dangerous products conducted by CPSC every year are a result of company reports. The rest of the investigations are initiated because of information that comes from other sources, such as consumer complaints, newspaper articles, and reports from health care practitioners.

In 1995, CPSC established the SIU to develop new sources of information about potentially dangerous products in the marketplace and to review new and existing data sources to uncover potentially defective products. To date, the SIU has reached agreements with the International Association of Arson Investigators and a number of homeowners' insurance companies to receive information about products that may have caused death, serious injury and property damage. CPSC has initiated a number of recalls through the efforts of the SIU, including recalls of dive sticks that can impale children and playpens with protruding rivets that can strangle infants.

An additional $5 million would enable CPSC to expand the role of the SIU to find companies who have failed to file reports of dangerous products and to investigate and prosecute cases against those companies. The combination of this increased enforcement capability and higher civil and criminal penalties for nonreporting would provide a strong deterrent against companies failing to notify CPSC about dangerous products.

2. Allow CPSC to be eligible to receive money from the Department of Justice Asset Forfeiture Fund

The money in the Department of Justice Asset Forfeiture Fund (the Fund) comes from property that was used in, or acquired through, illegal activities. Certain foreign, federal, state and local law enforcement agencies that help contribute to the Fund are authorized to apply for money from the Fund to enhance forfeiture and strengthen law enforcement. Recently, CPSC has initiated a number of cases against people who illegally distribute fireworks and other consumer products. The assets seized as a result of these cases have been deposited into the Fund. Many of these cases are ongoing, and CPSC staff anticipates that some of the cases will result in additional contributions to the Fund. However, CPSC is not currently a member of the fund, and thus, authorized to apply for money from the Fund to further our law enforcement activities.

The Asset Forfeiture and Money Laundering Section of the Criminal Division of the Department of Justice has the authority to admit CPSC into the Fund, thereby allowing the agency to apply for money from the Fund. With the additional revenue that CPSC would obtain from the Fund, the agency could expand its efforts to pursue criminals who violate product safety laws and put children and families in danger.

LEGISLATIVE PROPOSALS TO IMPROVE CPSC ENFORCEMENT POWERS

1. Eliminate the cap on civil penalties for violations of product safety laws

Under current law, the CPSC cannot assess more than $1,650,000 in any one case against a company that knowingly violates consumer product safety laws. (Under the "Consumer Product Safety Improvement Act of 1990," this number is adjusted for inflation every five years. The next adjustment is due in 2005.) The proposed amendment eliminates this maximum civil penalty amount. Many of the cases in which the Commission seeks civil penalties involve very large corporations. More substantial civil penalties would provide a needed incentive for those companies to notify CPSC of defective products so that the agency can take timely action to protect consumers. Other agencies have civil penalty authority with no "cap" on the amount of the potential penalty, including the Federal Trade Commission (15 U.S.C. 21(l)) and the Federal Mine Safety and Health Administration (30 U.S.C. 820(a)).

The proposed amendment does not change the criteria for determining the amount of civil penalty to be sought. Under current law, the Commission must consider 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, and the appropriateness of such penalty in relation to the size of the business of the person charged. If the Commission staff cannot reach agreement with a company on a claim for civil penalty, the matter is referred to the Department of Justice for appropriate action.

The proposed amendment also codifies the current civil penalty amount of $7,000 for *each* knowing violation of a product safety law. This amount was recently adjusted under the Consumer Product Safety Improvement Act of 1990 ("Improvement Act"), Public Law 101-608, 104 Stat. 3110 (November 16, 1990).

SECTION 20(a) (CPSA) - CIVIL PENALTIES (AMENDED TO DELETE CIVIL PENALTY CAP)

SEC. 20(a). [15 U.S.C. 2069(a)]

(a)(1) Any person who knowingly violates section 19 of this Act shall be subject to a civil penalty not to exceed ~~$5,000~~ **$7,000** for each such violation. Subject to paragraph (2), a violation of section 19(a)(1), (2), (4), (5), (6), (7), (8), (9), (10), or (11) shall constitute a separate offense with respect to each consumer product involved~~, except that the maximum civil penalty shall not exceed $1,250,000 for any related series of violations~~. A violation of section 19(a)(3) shall constitute a separate violation with respect to each failure or refusal to allow or perform an act required thereby; and, if such violation is a continuing one, each day of such violations shall constitute a separate offense~~, except that the maximum civil penalty shall not exceed $1,250,000 for any related series of violations~~.

(2) The second sentence of paragraph (1) of this subsection shall not apply to violations of paragraph (1) or (2) of section 19(a) –

(A) if the person who violated such paragraphs is not the manufacturer or private labeler or a distributor of the products involved, and

(B) if such person did not have either (i) actual knowledge that his distribution or sale of the product violated such paragraphs or (ii) notice from the Commission that such distribution or sale would be a violation of such paragraphs.

(3)(A) The ~~maximum~~ penalty amount~~s~~ authorized in paragraph (1) shall be adjusted for inflation as provided in this paragraph.

(B) Not later than December 1, ~~1994~~ **2005**, and December 1 of each fifth calendar year thereafter, the Commission shall prescribe and publish in the Federal Register ~~a schedule of maximum authorized penalties~~ **the authorized penalty amount** that shall apply for violations that occur after January 1 of the year immediately following such publication.

(C) The ~~schedule of maximum authorized penalties~~ **authorized penalty amount** shall be prescribed by increasing ~~each of~~ the amount~~s~~ referred to in paragraph (1) by the cost-of-living adjustment for the preceding five years. Any increase determined under the preceding sentence shall be rounded **up** to –

(i) in the case of ~~penalties greater than $1,000 but~~ **a penalty amount** less than or equal to $10,000, the nearest multiple of $1,000;

(ii) in the case of ~~penalties~~ **a penalty amount** greater than $10,000~~ but less than or equal to $100,000~~, the nearest multiple of $5,000~~;~~

~~(iii) in the case of penalties greater than $100,000 but less than or equal to $200,000, the nearest multiple of $10,000.~~

~~(iv) in the case of penalties greater than $200,000, the nearest multiple of $25,000~~.

(D) For purposes of this subsection:

(i) The term "Consumer Price Index" means the Consumer Price Index for all-urban consumers published by the Department of Labor.

(ii) The term "cost-of-living adjustment for the preceding five years" means the percentage by which –

(I) the Consumer Price Index for the month of June of the calendar year preceding the adjustment; exceeds

(II) the Consumer Price Index for the month of June preceding the date on which the maximum authorized penalty was last adjusted.

SECTION 5(c) (FHSA) – CIVIL PENALTIES
(AMENDED TO DELETE CIVIL PENALTY CAP)

SEC. 5(c). [15 U.S.C. 1264(c)]

(1) Any person who knowingly violates section 4 shall be subject to a civil penalty not to exceed ~~$5,000~~ **$7,000** for each such violation. Subject to paragraph (2), a violation of subsections (a), (b), (c), (d), (f), (g), (i), (j), and (k) of section 4 shall constitute a separate offense with respect to each substance involved~~, except that the maximum civil penalty shall not exceed $1,250,000 for any related series of violations~~. A violation of section 4(e) shall constitute a separate violation with respect to each failure or refusal to allow or perform an act required by section 4(e); and, if such violation is a continuing one, each day of such violation shall constitute a separate offense~~, except that the maximum civil penalty shall not exceed $1,250,000 for any related series of violations~~.

(2) The second sentence of paragraph (1) of this subsection shall not apply to violations of subsection (a) or (c) of section 4 –

(A) if the person who violated such subsection is not the manufacturer, importer, or private labeler or a distributor of the substance involved; and

(B) if such person did not have either (i) actual knowledge that such person's distribution or sale of the substance violated such subsection, or (ii) notice from the Commission that such distribution or sale would be a violation of such subsection.

(3) In determining the amount of any penalty to be sought upon commencing an action seeking to assess a penalty for a violation of section 4, the Commission shall consider the nature of the substance, the severity of the risk of injury, the occurrence or

absence of injury, the amount of the substance distributed, and the appropriateness of such penalty in relation to the size of the business of the person charged.

(4) Any civil penalty under this subsection may be compromised by the Commission. In determining the amount of such penalty or whether it should be remitted or mitigated, and in what amount, the Commission shall consider the appropriateness of such penalty to the size of the business of the persons charged, the nature of the substance involved, the severity of the risk of injury, the occurrence or absence of injury, and the amount of the substance distributed. The amount of such penalty when finally determined, or the amount agreed on compromise, may be deducted from any sums owing by the United States to the person charged.

(5) As used in the first sentence of paragraph (1), the term "knowingly" means (A) having actual knowledge, or (B) the presumed having of knowledge deemed to be possessed by a reasonable person who acts in the circumstances, including knowledge obtainable upon the exercise of due care to ascertain the truth of representations.

(6)(A) The ~~maximum~~ penalty amount authorized in paragraph (1) shall be adjusted for inflation as provided in this paragraph.

(B) Not later than December 1, ~~1994~~ **2005**, and December 1 of each fifth calendar year thereafter, the Commission shall prescribe and publish in the Federal Register ~~a schedule of maximum authorized penalties~~ **the authorized penalty amount** that shall apply for violations that occur after January 1 of the year immediately following such publication.

(C) The ~~schedule of maximum authorized penalties~~ **authorized penalty amount** shall be prescribed by increasing ~~each of~~ the amount~~s~~ referred to in paragraph (1) by the cost-of-living adjustment for the preceding five years. Any increase determined under the preceding sentence shall be rounded to –

(i) in the case of ~~penalties greater than $1,000 but~~ **a penalty amount** less than or equal to $10,000, the nearest multiple of $1,000;

(ii) in the case of ~~penalties~~ **a penalty amount** greater than $10,000 ~~but less than or equal to $100,000~~, the nearest multiple of $5,000~~;~~

~~(iii) in the case of penalties greater than $100,000 but less than or equal to $200,000, the nearest multiple of $10,000; and~~

~~(iv) in the case of penalties greater than $200,000, the nearest multiple of $25,000~~.

(D) For purposes of this subsection:

(i) The term "Consumer Price Index" means the Consumer Price Index for all-urban consumers published by the Department of Labor.

(ii) The term "cost-of-living adjustment for the preceding five years" means the percentage by which –

(I) the Consumer Price Index for the month of June of the calendar year preceding the adjustment; exceeds

(II) the Consumer Price Index for the month of June preceding the date on which the maximum authorized penalty was last adjusted.

2. Increase the penalty for a criminal violation of product safety laws from a misdemeanor to a felony and eliminate the requirement that the agency give notice to the company that is criminally violating the law.

The proposed amendment increases the potential criminal penalties for a knowing violation of consumer product safety laws from a misdemeanor (up to one year in prison) to a felony (up to three years in prison). It also increases the maximum monetary criminal penalty from $50,000 to $250,000 for individuals and $500,000 for companies. These heightened penalties are commensurate with the seriousness of product safety violations, which can result in death or serious injury to children and families. Other agencies have authority to seek substantial (felony) criminal penalties for knowing violations of safety requirements (e.g., the Food and Drug Administration regarding prescription drug marketing violations (21 U.S.C. 333(b)) and the Department of Transportation regarding the transportation of hazardous material (49 U.S.C. 5124)).

The proposed amendment also eliminates the requirement that the Commission give notice of noncompliance before imposing a criminal penalty for a knowing violation of product safety laws. The notice requirement makes it all but impossible to pursue a criminal penalty against companies, even in the most serious cases. The threat of a criminal felony prosecution would create an additional strong incentive for companies to report product defects to the Commission.

SECTION 21 (CPSA) – CRIMINAL PENALTIES (AMENDED TO DELETE REQUIREMEMENT FOR NOTICE OF NONCOMPLIANCE AND TO INCREASE AMOUNT OF PENALTY)

SEC. 21. [15 U.S.C. 2070]

(a) Any person who knowingly ~~and willfully~~ violates section 19 of this Act ~~after having received notice of noncompliance from the Commission~~ shall be fined not more than ~~$50,000~~ **$250,000 if such person is an individual, or not more than $500,000 if such person is an organization,** or be imprisoned not more than ~~one year~~ **three years**, or both.

(b) Any individual director, officer, or agent of a corporation who knowingly ~~and willfully~~ authorizes, orders, or performs any of the acts or practices constituting in whole or in part a violation of section 19, ~~and who has knowledge of notice of noncompliance received by the corporation from the Commission,~~ shall be subject to penalties under this section without regard to any penalties to which that corporation may be subject under subsection (a).

SECTION 5(a) (FHSA)– CRIMINAL PENALTIES (AMENDED TO INCREASE AMOUNT OF PENALTY)

SEC. 5(a). [15 U.S.C. 1264(a)]

Any person who violates any of the provisions of section 4 shall be guilty of a ~~misdemeanor~~ **felony** and shall on conviction thereof be subject to a fine of not more than ~~$500~~ **$5,000 if such person is an individual, or not more than $10,000 if such person is an organization,** or to imprisonment for not more than ~~ninety days~~ **eighteen months**, or both; but for offenses committed with intent to defraud or mislead, or for second and subsequent offenses, the penalty shall be imprisonment for not more than ~~one year~~ **three years**, or a fine of not more than ~~$3,000~~ **$250,000 if such person is an individual, or not more than $500,000 if such person is an organization**, or both such imprisonment and fine.

<u>3. Give CPSC the authority to select the way a defective product will be fixed in a product recall.</u>

Under current law, a company with a defective product that is being recalled has the right to select the remedy to be offered to the public, even if that remedy does not provide the most protection to consumers. The company can choose repair, replacement, or refund, less a reasonable allowance for use.

The proposed amendment will permit the Commission, rather than the company with the defective product, to select the remedy to protect the public. Companies will still be afforded the opportunity for a hearing to present their views, not only on whether their product constitutes a substantial product hazard, but also on the nature of the remedy that would be appropriate in the event that a recall is ordered.

The ability of companies to choose the remedy often does not further public safety. For example, if a manufacturer chooses to refund, "less a reasonable allowance for use," the purchase price of a product that has been on the market for a long time, the amount due consumers may be so small that there is no incentive for the consumer to take advantage of the recall. This is especially true where the hazardous product is still useful to the consumer and the cost of a replacement is substantial. The company is permitted to make this choice even though people have been at risk for a number of years, thousands of products are still in use, and injuries are continuing to occur. In this example, as the law is currently written, allowing the manufacturer to choose a refund would do little, if anything, to stop customers from using the dangerous product and public safety would not be furthered.

GE Faces Lawsuits on Dishwasher-Recall Plan

By Matt Murray
Staff Reporter of The Wall Street Journal

General Electric Co. is coming under increasing heat for a dishwasher-recall plan.

New York state's attorney general, Eliot Spitzer, said he formally notified GE he intends to file within days a lawsuit over its October recall of 3.1 million dishwashers containing a defective energy switch that could spark fires. In a statement, Mr. Spitzer said GE "deceived consumers in New York and across the country so they could sell more dishwashers."

Terry Dunn, a spokesman at GE Appliances, Louisville, Ky., called the action "grandstanding." Pointing out that the rebate program was implemented in conjunction with the federal Consumer Products Safety Commission, he said, "This has been, is and will continue to be about consumer safety and removing these hazards from the consumer marketplace. We are working very hard to communicate effectively with and to satisfy all our consumers during this recall."

Separately, a lawsuit accusing GE of attempting "to turn the CPSC procedures into a marketing program for the sale of new GE dishwashers" and seeking class-action status was filed yesterday in U.S. District Court in St. Petersburg, Fla. An earlier suit filed in Florida state court accuses GE of intentionally concealing the design defect in its dishwashers from the late 1980s until it notified the commission in November 1998.

GE has denied those allegations. But the commission said yesterday that it is investigating whether GE should have reported the problem sooner.

The recall concerns GE and Hotpoint brand dishwashers made from April 1983 to January 1989. GE and the commission said 50 fires caused by a defective energy switch on the dishwashers had been reported. Seven spread beyond the machines themselves. No injuries were reported.

The big question is how practical it is to repair the machines. GE offered individual owners rebates of \$75 to \$125 toward new GE replacements, or \$25 toward a non-GE dishwasher. But it refused to pay for repairing them, citing the costs and the age of the appliances, and warns on its Web site, "If you choose to repair it independent of GE, you do so at your own cost and risk."

Yesterday, Mr. Dunn went further, insisting that the appliance cannot be repaired, but can only be altered to deactivate the switch, thus denying users a choice between heated drying and air drying of dishes. "There is no fix," he said. "You can disable the feature, but you cannot repair it to its original condition." The cost of such an action, Mr. Dunn said, is \$75 to \$100, but "it makes no economic sense for the consumer to spend this money to make an old dishwasher that's past its useful life not do something." The average dishwasher lasts nine to 11 years.

At the same time, GE has offered some big-volume customers, such as apartment managers, instructions and tools to correct the problems on existing dishwashers "if they have a financial hardship," Mr. Dunn said. "They can do this because they have qualified service technicians to safely do this." GE also offers such customers rebates on replacements, which run from \$200 to \$500 a unit.

GE had a choice under the law to offer a recall, a rebate or repairs, said Alan Schoem, director of compliance at the CPSC. He said the agency had urged GE to offer repairs to individual consumers but "they flat out refused."

Moreover, he said: "They might be splitting hairs or playing a semantic game when they talk about a repair. The hazard can be repaired from the dishwasher by rewiring the switch." He conceded that doing so wouldn't permit users to choose between heat drying and air drying their dishes.

He also said that since the recall was announced, the commission has gotten "many more complaints than we would normally get about a recall program."

GE said it has received mostly positive responses.

NOT FOR PUBLIC DISTRIBUTION

NEW YORK ATTORNEY GENERAL'S OFFICE ACTION AGAINST GE FOR FRAUD IN CONNECTION WITH THE DISHWASHER RECALL

The Consumer Fraud Division of the New York Attorney General's Office may soon file a complaint against GE for fraud. GE has sent form letters to consumers who have asked if the dishwashers can be repaired saying that a repair is unavailable. The New York complaint will allege that this statement – that the dishwashers cannot be repaired – is fraudulent. The following Q and A provides responses to possible press inquiries:

1. Did CPSC staff approve the GE letter claiming that the dishwasher cannot be repaired?

No.

2. Would we have approved the letter?

No.

3. What are you doing about it?

The dishwasher recall is part of an open case. We are monitoring the recall and working with GE to maximize its effectiveness.

4. What can you do in this sort of situation?

In general, we work with firms conducting recalls to assure that we review and approve all materials that go out to the public.

5. Can you sue a company for fraud?

No. The CPSC is responsible for identifying and recalling unsafe products. Other agencies are responsible for taking action against firms that commit fraud. In this case, the State of New York is acting under its state laws.

6. Can the dishwashers be repaired?

We would have preferred GE to offer consumers a repair. We asked GE to do so. GE refused to offer a repair and offered a rebate instead. That is their right under the law.

It is possible to wire around the safety hazard in these dishwashers. This service must be performed by a qualified technician. It is unsafe for consumers to attempt to rewire the dishwashers themselves.

7. **Will GE wire around the safety problem?**

That is a question for GE.

8. Are there any class actions against GE because of this lawsuit?

We are a federal agency and we do not get involved in private litigation. This includes passing on information about private litigation.

9. Do you think this has been an effective recall?

We are monitoring the recall closely. It is too soon to reach conclusions about its effectiveness.

SECTION 15(d) (CPSA) – NOTIFICATION AND REPAIR, REPLACEMENT, OR REFUND (AMENDED TO ELIMINATE ELECTION OF REPAIR, REPLACEMENT, OR REFUND BY PERSON SUBJECT TO SECTION 15 ACTION)

SEC. 15(d). [15 U.S.C. 2064(d)]

If the Commission determines (after affording interested parties, including consumers and consumer organizations, an opportunity for a hearing in accordance with subsection (f) of this section) that a product distributed in commerce presents a substantial product hazard and that action under this subsection is in the public interest, it may order the manufacturer or any distributor or retailer of such product to take ~~whichever of the following actions the person to whom the order is directed elects~~ **one of the following actions, as specified by the Commission**:

(1) To bring such product into conformity with the requirements of the applicable consumer product safety rule or to repair the defect in such product.

(2) To replace such product with a like or equivalent product which complies with the applicable consumer product safety rule or which does not contain the defect.

(3) To refund the purchase price of such product (less a reasonable allowance for use, if such product has been in the possession of a consumer for one year or more (A) at the time of public notice under subsection (c), or (B) at the time the consumer receives actual notice of the defect or noncompliance, whichever first occurs).

An order under this subsection may also require the person to whom it applies to submit a plan, satisfactory to the Commission, for taking ~~action under whichever of the preceding~~

~~paragraphs of this subsection under which such person has elected to act.~~ **whichever of the actions the Commission specifies under the preceding paragraphs of this subsection. If the Commission specifies that the action described in paragraph (3) shall be taken, the** ~~The~~ Commission shall specify in the order the persons to whom refunds must be made. ~~if the person to whom the order is directed elects to take the action described in paragraph (3). If an order under this subsection is directed to more than one person, the Commission shall specify which person has the election under this subsection~~. An order under this subsection may prohibit the person to whom it applies from manufacturing for sale, offering for sale, distributing in commerce, or importing into the customs territory of the United States (as defined in general headnote 2 to the Tariff Schedules of the United States), [19 U.S.C. 1202] or from doing any combination of such actions, the product with respect to which the order was issued.

SECTIONS 15(b) and 15(c)(2) (FHSA) – NOTIFICATION AND REPAIR, REPLACEMENT, OR REFUND (AMENDED TO ELIMINATE ELECTION OF REPAIR, REPLACEMENT, OR REFUND BY PERSON SUBJECT TO SECTION 15 ACTION)

SEC. 15(b). [15 U.S.C. 1274(b)]

If any article or substance sold in commerce is defined as a banned hazardous substance (whether or not it was such at the time of its sale) and the Commission determines (after affording interested persons, including consumers and consumer organizations, an opportunity for a hearing) that action under this subsection is in the public interest, the Consumer Product Safety Commission may order the manufacturer, distributor, or dealer to take ~~whichever of the following actions the person to whom the order is directed elects~~ **one of the following actions, as specified by the Commission**:

(1) If repairs to or changes in the article or substance may be made so that it will not be a banned hazardous substance, to make such repairs or changes.

(2) To replace such article or substance with a like or equivalent article or substance which is not a banned hazardous substance.

(3) To refund the purchase price of the article or substance (less a reasonable allowance for use, if the article or substance has been in the possession of the consumer for one year or more –

(A) at the time of public notice under subsection (a), or

(B) at the time the consumer receives actual notice that the article or substance is a banned hazardous substance, whichever first occurs).

An order under this subsection may also require the person to whom it applies to submit a plan, satisfactory to the Commission, for taking ~~the action which such person has elected to take.~~ **whichever of the actions the Commission specifies under the preceding**

paragraphs of this subsection. If the Commission specifies that the action described in paragraph (3) shall be taken, the ~~The~~ Commission shall specify in the order the persons to whom refunds must be made. ~~if the person to whom the order is directed elects to take the action described in paragraph (3). If an order under this subsection is directed to more than one person, the Commission shall specify which person has the election under this subsection.~~ An order under this subsection may prohibit the person to whom it applies from manufacturing for sale, offering for sale, distributing in commerce, or importing into the customs territory of the United States (as defined in general headnote 2 of the Tariff Schedules of the United States), [19 U.S.C. 1202n2; "includes only the States, the District of Columbia, and Puerto Rico"] or from doing any combination of such actions, with respect to the article or substance with respect to which the order was issued.

SEC. 15(c)(2). [15 U.S.C. 1274(c)(2)]

If the Commission determines (after affording interested persons, including consumers and consumer organizations, an opportunity for a hearing in accordance with subsection (e) of this section) that any toy or other article intended for use by children that is not a banned hazardous substance contains a defect which creates a substantial risk of injury to children (because of the pattern of defect, the number of defective toys or such articles distributed in commerce, the severity of the risk, or otherwise) and that action under this paragraph is in the public interest, the Commission may order the manufacturer, distributor, or dealer to take ~~whichever of the following actions the person to whom the order is directed elects~~ **one of the following actions, as specified by the Commission.**:

(A) If repairs to or changes in the toy or article can be made so that it will not contain a defect which creates a substantial risk of injury to children, to make such repairs or changes.

(B) To replace such toy or article with a like or equivalent toy or article which does not contain a defect which creates a substantial risk of injury to children.

(C) To refund the purchase price of such toy or article (less a reasonable allowance for use, if such toy or article has been in the possession of the consumer for 1 year or more (i) at the time of public notice under paragraph (1)(A), or (ii) at the time the consumer receives actual notice that the toy or article contains a defect which creates a substantial risk of injury to children, whichever first occurs).

An order under this paragraph may also require the person to whom it applies to submit a plan, satisfactory to the Commission, for taking ~~the action which such person has elected to take.~~ **whichever of the actions the Commission specifies under the preceding paragraphs of this subsection. If the Commission specifies that the action described in paragraph (3) shall be taken, the** ~~The~~ Commission shall specify in the order the person to whom refunds must be made. ~~if the person to whom the order is directed elects to take the action described in subparagraph (C).~~ If an order under this paragraph is directed to more than one person, the Commission shall specify which person has the election under this paragraph. An order under this paragraph may prohibit the person to whom it applies from manufacturing for sale, offering for sale, distributing in commerce, or importing into the customs territory of the United States (as defined in general headnote 2 to the Tariff Schedules of the United States), [19 U.S.C. 1202] or from doing any combination of such actions, with respect to the toy or article with respect to which the order was issued.

To: Heather H. Howard/OPD/EOP@EOP

cc:

Subject: Re: Asset Forfeiture Fund

oops. I wasn't quite finished with this. You could probably just drop the last sentence since I'm not sure where I was going with it.

--------------------- Forwarded by Leanne A. Shimabukuro/OPD/EOP on 05/03/2000 03:34 PM ---------------------------

Leanne A. Shimabukuro 05/03/2000 03:33:56 PM

Record Type: Record

To: Heather H. Howard/OPD/EOP@EOP

cc:

bcc: Records Management@EOP

Subject: Re: Asset Forfeiture Fund

I don't know who technically receives funding from the fund, but I don't really like the idea of allowing the CPSC to use funding that is used for other law enforcement priorities (plus all of the law enforcement agencies would likely strongly oppose which would be a big problem). Is the problem that companies are not afraid of the penalties? If so, then you should try to go the increased penalty route. However, it would be a hard push to lift the cap since most efforts are trying to go in the reverse to limit damages.

Is the problem that CPSC has limited authority to get involved? (Could you lower the threshold for their involvement?) Is it that they don't have enough companies to

Heather H. Howard

Heather H. Howard
05/03/2000 02:12:49 PM

Record Type: Record

To: Leanne A. Shimabukuro/OPD/EOP@EOP, Deanne E. Benos/OPD/EOP@EOP

cc:

Subject: Asset Forfeiture Fund

We have been thinking about doing something to strengthen the Consumer Products Safety Commission's penalty authority (in response to recent press reports about companies not reporting defective toys that have resulted in serious harm and even deaths). One possibility is liftin the cap on civil damages. Another possibility, suggested by the Commission, is to allow the Commission to apply to receive money from the DOJ Asset Forfeiture Fund. The Commission currently contributes to the fund but cannot apply for money for law enforcement purposes.

Do you have any general reactions to this? (It wouldn't be giving them money - it would just allow them to apply for it). Do you know who currently does get money from the Fund?

Leanne A. Shimabukuro 05/03/2000 05:33:35 PM

Record Type: Record

To: Heather H. Howard/OPD/EOP@EOP
cc:
bcc:
Subject: Re: Asset Forfeiture Fund

1. In that case, it seems better. I can think of other areas (e.g., nursing home fraud) where we've sought increased money damages.

2. CPSC's contribution doesn't really change my assessment regarding law enforcement opposition.
Heather H. Howard

Heather H. Howard
05/03/2000 05:29:40 PM

Record Type: Record

To: Leanne A. Shimabukuro/OPD/EOP@EOP
cc:
bcc:
Subject: Re: Asset Forfeiture Fund

thanks for your comments, which are well taken.

Two thoughts I'd love your reaction to:
1) on lifting the civil penalties cap - we would only be allowing the government to seek increased remedies, not allowing private plaintiffs to sue for greater penalties. Would that address your concern?

2) Asset Forfeiture Fund - had a similar reaction about not wanting to divert funds from law enforcement. Does it help that the CPSC already contributes to the fund, but can't acces it? and that we would only be allowing them to apply for money (not guaranteeing them money)?

Thanks

Leanne A. Shimabukuro

Leanne A. Shimabukuro 05/03/2000 03:35:03 PM

Record Type: Record

LEGISLATIVE PROPOSALS TO IMPROVE CPSC ENFORCEMENT POWERS

1. Eliminate the cap on civil penalties for violations of product safety laws

Under current law, the CPSC cannot assess more than $1,650,000 in any one case against a company that knowingly violates consumer product safety laws. (Under the "Consumer Product Safety Improvement Act of 1990," this number is adjusted for inflation every five years. The next adjustment is due in 2005.) The proposed amendment eliminates this maximum civil penalty amount. Many of the cases in which the Commission seeks civil penalties involve very large corporations. More substantial civil penalties would provide a needed incentive for those companies to notify CPSC of defective products so that the agency can take timely action to protect consumers. Other agencies have civil penalty authority with no "cap" on the amount of the potential penalty, including the Federal Trade Commission (15 U.S.C. 21(l)) and the Federal Mine Safety and Health Administration (30 U.S.C. 820(a)).

The proposed amendment does not change the criteria for determining the amount of civil penalty to be sought. Under current law, the Commission must consider 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, and the appropriateness of such penalty in relation to the size of the business of the person charged. If the Commission staff cannot reach agreement with a company on a claim for civil penalty, the matter is referred to the Department of Justice for appropriate action.

The proposed amendment also codifies the current civil penalty amount of $7,000 for *each* knowing violation of a product safety law. This amount was recently adjusted under the Consumer Product Safety Improvement Act of 1990 ("Improvement Act"), Public Law 101-608, 104 Stat. 3110 (November 16, 1990).

2. Increase the penalty for a criminal violation of product safety laws from a misdemeanor to a felony and eliminate the requirement that the agency give notice to the company that is criminally violating the law.

The proposed amendment increases the potential criminal penalties for a knowing violation of consumer product safety laws from a misdemeanor (up to one year in prison) to a felony (up to three years in prison). It also increases the maximum monetary criminal penalty from $50,000 to $250,000 for individuals and $500,000 for companies. These heightened penalties are commensurate with the seriousness of product safety violations, which can result in death or serious injury to children and families. Other agencies have authority to seek substantial (felony) criminal penalties for knowing violations of safety requirements (e.g., the Food and Drug Administration regarding prescription drug marketing violations (21 U.S.C. 333(b)) and the Department of Transportation regarding the transportation of hazardous material (49 U.S.C. 5124)).

The proposed amendment also eliminates the requirement that the Commission give notice of noncompliance before imposing a criminal penalty for a knowing violation of product safety laws. The notice requirement makes it all but impossible to pursue a criminal penalty against companies, even in the most serious cases. The threat of a criminal felony prosecution would create an additional strong incentive for companies to report product defects to the Commission.

3. Give CPSC the authority to select the way a defective product will be fixed in a product recall.

Under current law, a company with a defective product that is being recalled has the right to select the remedy to be offered to the public, even if that remedy does not provide the most protection to consumers. The company can choose repair, replacement, or refund, less a reasonable allowance for use.

The proposed amendment will permit the Commission, rather than the company with the defective product, to select the remedy to protect the public. Companies will still be afforded the opportunity for a hearing to present their views, not only on whether their product constitutes a substantial product hazard, but also on the nature of the remedy that would be appropriate in the event that a recall is ordered.

The ability of companies to choose the remedy often does not further public safety. For example, if a manufacturer chooses to refund, "less a reasonable allowance for use," the purchase price of a product that has been on the market for a long time, the amount due consumers may be so small that there is no incentive for the consumer to take advantage of the recall. This is especially true where the hazardous product is still useful to the consumer and the cost of a replacement is substantial. The company is permitted to make this choice even though people have been at risk for a number of years, thousands of products are still in use, and injuries are continuing to occur. In this example, as the law is currently written, allowing the manufacturer to choose a refund would do little, if anything, to stop customers from using the dangerous product and public safety would not be furthered.

NON-LEGISLATIVE PROPOSALS TO IMPROVE CPSC ENFORCEMENT POWERS

1. Provide $5 million to enhance CPSC's Special Investigations Unit (SIU)

Under CPSC's laws, any company that has information that "reasonably supports the conclusion that its product creates an unreasonable risk of serious injury or death" must file a report with the CPSC. However, fewer than 60 percent of the investigations of dangerous products conducted by CPSC every year are a result of company reports. The rest of the investigations are initiated because of information that comes from other sources, such as consumer complaints, newspaper articles, and reports from health care practitioners.

In 1995, CPSC established the SIU to develop new sources of information about potentially dangerous products in the marketplace and to review new and existing data sources to uncover potentially defective products. To date, the SIU has reached agreements with the International Association of Arson Investigators and a number of homeowners' insurance companies to receive information about products that may have caused death, serious injury and property damage. CPSC has initiated a number of recalls through the efforts of the SIU, including recalls of dive sticks that can impale children and playpens with protruding rivets that can strangle infants.

An additional $5 million would enable CPSC to expand the role of the SIU to find companies who have failed to file reports of dangerous products and to investigate and prosecute cases against those companies. The combination of this increased enforcement capability and higher civil and criminal penalties for nonreporting would provide a strong deterrent against companies failing to notify CPSC about dangerous products.

2. Allow CPSC to be eligible to receive money from the Department of Justice Asset Forfeiture Fund

The money in the Department of Justice Asset Forfeiture Fund (the Fund) comes from property that was used in, or acquired through, illegal activities. Certain foreign, federal, state and local law enforcement agencies that help contribute to the Fund are authorized to apply for money from the Fund to enhance forfeiture and strengthen law enforcement. Recently, CPSC has initiated a number of cases against people who illegally distribute fireworks and other consumer products. The assets seized as a result of these cases have been deposited into the Fund. Many of these cases are ongoing, and CPSC staff anticipates that some of the cases will result in additional contributions to the Fund. However, CPSC is not currently a member of the fund, and thus, authorized to apply for money from the Fund to further our law enforcement activities.

The Asset Forfeiture and Money Laundering Section of the Criminal Division of the Department of Justice has the authority to admit CPSC into the Fund, thereby allowing the agency to apply for money from the Fund. With the additional revenue that CPSC would obtain from the Fund, the agency could expand its efforts to pursue criminals who violate product safety laws and put children and families in danger.