

As Civil Penalties Increase, CPSC Issues Interim Final Rule Identifying Factors to Consider for Determining Penalty Amounts

Christie Grymes Thompson

August 27, 2009

The Consumer Product Safety Commission ("CPSC" or "Commission") has approved an interim final rule setting forth the factors it will consider when calculating civil penalties for "knowing" violations of the Consumer Product Safety Act ("CPSA"), Federal Hazardous Substances Act ("FHSA"), or Flammable Fabrics Act ("FFA"). On August 14, 2009, the maximum civil penalty amounts increased from \$8,000 to \$100,000 for each "knowing"[1] violation and from \$1.825 million to \$15 million for any related series of violations. The Commission has issued this interim final rule to provide immediate guidance to industry while also providing a comment period for interested parties prior to issuance of the final rule. Although there are significantly greater penalties at stake for a company, the Commission provided only four additional factors for consideration, and those factors are generally a codification of the same factors the staff and Commission had historically considered informally. The interim final rule will be effective upon publication in the *Federal Register*, which should occur within days, and comments will be due 30 days after publication.

Statutory Factors

The Consumer Product Safety Improvement Act ("CPSIA") required the CPSC, by August 14, 2009, to issue a final rule providing its interpretation of civil penalty factors specified in section 20(b) of the CPSA, section 5(c)(3) of the FHSA, and section 5(e)(2) of the FFA. The CPSIA amended the CPSA to expand the actions subject to penalties, including prohibiting the sale, offer for sale, distribution in commerce, or importation of any consumer product, or other product or substance that is regulated under the CPSA or any other Act enforced by the Commission, that is not in conformity with an applicable consumer product safety rule under the CPSA, or any similar rule, regulation, standard, or ban under any other Act enforced by the Commission. For example, the failure to provide certifications or to use tracking labels, as required by the CPSIA, could be subject to civil penalties.

The CPSA, FHSA, and FFA specify the following factors for determining the amount of a civil penalty the CPSC will seek for "knowing" violations of the relevant statute:

- **Nature, circumstances, extent, and gravity of the violation:** The Commission will consider the totality of the circumstances surrounding a violation while recognizing that depending upon the case, the significance and importance of each factor may vary.
- **Nature of the product defect (CPSA) or the substance (FHSA):** The Commission

considers this factor broadly as applying to products or substances that may in fact contain a defect that could create a substantial product hazard, to products that present a hazard because of a violation of a rule, regulation, standard or ban under the CPSA, FHSA, and FFA, as well as any other violation of a prohibited act and how those violations relate to the underlying products or substances. The Commission could consider, as appropriate and *where the business has reported in a timely fashion under section 15*, information about the complexity of identifying a particular product hazard.

- **Severity of the risk of injury:** In assessing the severity of the risk, the Commission may also consider the intended or reasonably foreseeable use or misuse of the product and the group exposed to the risk (e.g., children, elderly, handicapped.)
- **Occurrence or absence of injury:** The Commission may seek civil penalties even in the absence of injury because a product may present a serious risk to consumers due to a failure to comply with a mandatory standard or other prohibited act even though no actual injuries have occurred.
- **Number of defective products distributed (CPSA) or amount of substance distributed (FHSA):** Although the actual number of products in consumers' hands may be fewer than the number of products distributed, the CPSC will consider only the number of products distributed.
- **Appropriateness of such penalty in relation to the size of the business, including how to mitigate undue adverse economic impacts on small businesses:** To evaluate the company's size, the Commission may consider several factors, including the number of employees, net worth, and annual sales. The Commission may be guided, where appropriate, by any relevant financial factors to help determine the ability to pay a proposed penalty, including short-term and long-term obligations and level of return on investment. In addition, to determine if a penalty will have *undue* adverse economic effects on a small business, the CPSC may also follow its Small Business Enforcement Policy set forth at 16 C.F.R. §1020.5.
- **Such other factors as appropriate:** The CPSIA clarified that the CPSC can consider factors in addition to the statutory factors in individual cases, as appropriate. The factors the CPSC has identified in the interim final rule are discussed below. Both the Commission and the company can raise any other factors they believe are relevant in determining an appropriate civil penalty amount.

Additional Factors Identified by CPSC

The CPSC opted not to provide a matrix or formula for assigning specified amounts to the various factors. Rather, the Commission will consider other factors on a case-by-case basis including, but not limited to, the following:

- **Safety or compliance program:** The Commission may consider whether the company has established a reasonable program or system for collecting and organizing information related to product safety issues, including incident reports, lawsuits, warranty claims, and safety-related issues related to repairs or returns. The Commission may also consider whether pre-market testing of the product was sufficient and relevant enough to discover safety issues.
- **Compliance history:** The CPSC may consider the company's history with the CPSC and whether a higher civil penalty should be issued for repeated noncompliance.

- **Economic gain from noncompliance:** The Commission may consider whether the company benefited economically from non- or delayed compliance.
- **Failure of the company to respond to requests:** The Commission may consider whether a company's failure to respond in a timely and complete fashion to requests for information or for remedial action should increase the amount of the penalty.

Statements from the Commissioners

CPSC Chairman Inez Tenenbaum and Commissioner Thomas Moore each voted in favor of the interim final rule and these additional factors, noting that the interpretation clarifies the Commission's well-established interpretations of the statutory factors. Commissioner Moore also stated, "Repeat violators, violators with a cavalier attitude about product safety, and violators, who by their dilatory actions in dealing with the Commission put more consumers at risk, should expect higher penalties." He also noted that "product failure rate" is not a factor to be considered because "there is no accepted product failure rate for a product that fails in a way that could create a substantial product hazard or creates an unreasonable risk of serious injury or death."

Commissioner Nancy Nord voted against the interim final rule stating, "The rule makes very clear that virtually everything associated with civil penalties is solely within the discretion and judgment of the agency and that the agency is reserving total flexibility. Civil penalties are increasing seven-fold and I believe that the CPSC has an obligation to the public to provide more concrete guidance as to how these penalties will be imposed. Transparency is not furthered by this rule and the public deserves a better effort." She identified several areas for improvement and solicited comments in those areas.

Commissioner Anne Northup abstained from voting because, given the recent start of her tenure, she did not have sufficient time to review the issues.

Withdrawal of Proposed Interpretative Rule

In July 2006, the Commission published a proposed interpretative rule identifying additional factors to be considered when determining civil penalty amounts under the CPSA. The proposed factors included the following: (1) a firm's previous record of compliance with CPSA requirements; (2) timeliness of a firm's response to relevant information; (3) safety and compliance monitoring; (4) cooperation and good faith; (5) economic gain from any delay or noncompliance with CPSC safety or reporting requirements; (6) a product's failure rate; and (7) any other pertinent factors. The CPSIA superseded the 2006 proposed rule by requiring the Commission to provide its interpretation of the existing enumerated statutory factors, so the CPSC has withdrawn the 2006 proposal.

Kelley Drye & Warren LLP

Kelley Drye & Warren's [Consumer Product Safety practice group](#) is experienced in providing advice on the difficult issues of how and when potentially hazardous consumer products must be reported to the CPSC. If product recalls are necessary, we work with our clients and CPSC staff to quickly develop and implement cost-effective communications programs that satisfy product liability concerns and minimize potential penalties. When the CPSC threatens or brings enforcement actions, we advise our clients on appropriate strategies.

For more information about this Client Advisory, please contact:

Christie Grymes Thompson
(202) 342-8633
cgthompson@kelleydrye.com

[1] The CPSA defines "knowingly" as actual knowledge or presumed knowledge based on knowledge attributed to a reasonable person acting in the circumstances, including knowledge obtainable upon the exercise of due care to ascertain the truth of representation. The knowledge requirements in the CPSA, FHSA, and FFA include presumed knowledge, as well as actual knowledge.