

CPSC Approves Final Rule on Civil Penalty Factors

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On March 31, 2010, the U.S. Consumer Product Safety Commission (CPSC) announced a Final Rule that identifies and interprets factors the CPSC will consider when seeking civil penalties for knowing violations of the Consumer Product Safety Act (CPSA), Federal Hazardous Substances Act (FHSA), and Flammable Fabrics Act (FFA). As required by section 217(b)(2) of the U.S. Consumer Product Safety Improvement Act (CPSIA), this rule “provides the Commission’s interpretation of the civil penalty factors found in” section 20(b) of the CPSA, section 5(c)(3) of the FHSA, and section 5(e)(2) of the FFA. The Commission voted 4-1 to approve the Final Rule as amended. Chairman Tenenbaum and Commissioners Nord, Adler, and Moore voted to approve the Final Rule as amended, and Commissioner Northup voted not to approve the Final Rule.

This Final Rule has particular significance because the CPSIA expanded the actions subject to civil penalties, and increased the maximum civil penalty amounts from \$8,000 to \$100,000 for each “knowing” violation and from \$1.825 million to \$15 million for any related series of violations. The statutory factors the Commission must consider include: the nature, circumstances, extent and gravity of the violation, including the nature of the product defect or of the substance; the severity of the risk of injury; the occurrence or absence of injury; the number of defective products distributed or the amount of substance distributed; the appropriateness of the penalty in relation to the size of the business, including how to mitigate undue adverse economic impacts on small businesses; and such other factors as appropriate. The Final Rule provides the Commission’s interpretation of those statutory factors and identifies four additional factors: (1) safety/compliance program and/or system relating to a violation; (2) history of noncompliance; (3) economic gain from noncompliance; and (4) failure to respond in a timely and complete fashion to the Commission’s requests for information or remedial action. The Commission declined to consider the relative complexity of identifying and confirming the presence of a defect in a product.

In light of this Final Rule and the new civil penalty cap of \$15 million, a company should take the opportunity now to review all aspects of its current product safety practices, including product development, vendor requirements, compliance with the conformity certificate and other technical requirements of the CPSIA, and how the company interfaces with the Commission. Such proactive steps now could drastically improve the company’s position in the event of a civil penalty investigation later. More information on the Final Rule and civil penalty factors can be found in Kelley Drye & Warren’s [April 1, 2010 client advisory](#).