



CONSUMER PRODUCT SAFETY COMMISSION

[CPSC Docket No. 19-C0001]

Costco Wholesale Corporation, Provisional Acceptance of a Settlement Agreement and Order

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: It is the policy of the Commission to publish settlements which it provisionally accepts under the Consumer Product Safety Act in the Federal Register in accordance with the terms of the Consumer Product Safety Commission's regulations. Published below is a provisionally-accepted Settlement Agreement with Costco Wholesale Corporation, containing a civil penalty in the amount of \$3.85 million dollars (\$3,850,000), to be paid within thirty (30) days of service of the Commission's final Order accepting the Settlement Agreement.

DATES: Any interested person may ask the Commission not to accept this agreement or otherwise comment on its contents by filing a written request with the Office of the Secretary by

[INSERT DATE 15 CALENDAR DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Persons wishing to comment on this Settlement Agreement should send written comments to the Comment 19-C0001, Office of the Secretary, Consumer Product Safety Commission, 4330 East West Highway, Room 820, Bethesda, Maryland 20814-4408.

FOR FURTHER INFORMATION CONTACT: Michele Melnick, Trial Attorney, Division of Compliance, Office of the General Counsel, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, Maryland 20814-4408; telephone (301) 504-7592.

SUPPLEMENTARY INFORMATION: The text of the Agreement and Order appears below.

Dated: October 3, 2018.

Alberta E. Mills,

Secretary.

**UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION**

_____))
In the Matter of:))
))
COSTCO WHOLESALE CORPORATION))
)) CPSC Docket No.: 19-C0001
))
_____))

SETTLEMENT AGREEMENT

1. In accordance with the Consumer Product Safety Act, 15 U.S.C. §§ 2051- 2089 (“CPSA”) and 16 C.F.R. § 1118.20, Costco Wholesale Corporation (“Costco”) and the United States Consumer Product Safety Commission (“Commission”), through its staff, hereby enter into this Settlement Agreement (“Agreement”). The Agreement and the incorporated attached Order resolve staff’s charges set forth below.

**THE
PARTIES**

2. The Commission is an independent federal regulatory agency, established pursuant to, and responsible for, the enforcement of the CPSA, 15 U.S.C. §§ 2051-2089. By executing the Agreement, staff is acting on behalf of the Commission, pursuant to 16 C.F.R. §

1118.20(b). The Commission issues the Order under the provisions of the CPSA.

3. Costco Wholesale Corporation is a corporation, organized and existing under the laws of the state of Washington, with its principal place of business in Issaquah, Washington.

STAFF CHARGES

4. Between December 2013 and May 2015, Costco imported and sold approximately 367,000 EKO Sensible Eco Living Trash Cans (“Subject Products” or “Trash Cans”) at its warehouse stores throughout the United States.
5. The Trash Cans are 80 liter stainless steel, metal-cylinder Trash Cans with a black plastic protective collar in the opening on the back of the Trash Can.
6. The Trash Cans are a “consumer product,” “distribut[ed] in commerce,” as those terms are defined or used in sections 3(a)(5) and (8) of the CPSA, 15 U.S.C. § 2052(a)(5) and (8). Costco is a “manufacturer” and “retailer” of the Trash Cans, as such terms are defined in section 3(a)(11) and (13) of the CPSA, 15 U.S.C. § 2052(a)(11) and (13).
7. The Trash Cans contain a defect which could create a substantial product hazard and create an unreasonable risk of serious injury because the black plastic protective collar in the opening on the back of the Trash Can can become dislodged and expose a sharp edge, posing a laceration hazard to consumers.
8. Between December 2013 and May 2015, Costco received 92 complaints about the Trash Cans, including 60 complaints from consumers who received injuries, including some serious injuries as defined in 16 C.F.R. § 1115.6(c).
9. Despite having information that reasonably supported the conclusion that the Trash Cans contained a defect which could create a substantial product hazard or created an unreasonable risk of serious injury, Costco did not notify the Commission immediately of such defect or risk, as required by sections 15(b)(3) and (4) of the CPSA, 15 U.S.C. §§ 2064(b)(3) and (4).
10. The Trash Cans were recalled on July 17, 2015.

11. In failing to immediately inform the Commission about the defect or unreasonable risk associated with the Trash Cans, Costco knowingly violated section 19(a)(4) of the CPSA, 15 U.S.C. § 2068(a)(4), as the term “knowingly” is defined in section 20(d) of the CPSA, 15 U.S.C. § 2069(d).
12. Pursuant to Section 20 of the CPSA, 15 U.S.C. § 2069, Costco is subject to civil penalties for its knowing violation of section 19(a)(4) of the CPSA, 15 U.S.C. § 2068(a)(4).

RESPONSE OF COSTCO

13. Costco’s Product Safety Committee reviewed reports associated with the Trash Cans that Costco received over time. The large majority of reports that Costco received about the Trash Cans were comments from Members who were returning the Trash Cans to Costco for a refund. Further, in December 2014, the Safety Committee found that the black plastic protective collar in the opening on the back of the Trash Can could not be removed easily from the exemplar sample it reviewed. Based on the available information, the Safety Committee did not believe that Costco had a duty to notify CPSC pursuant to CPSA Section 15(b) before May 2015. Costco does not believe that it knowingly violated the CPSA as that term is defined in the statute.
14. During May 2015, Costco identified additional reported incidents, and learned that the vendor had made a design change to prevent the black plastic protective collar in the opening on the back of the Trash Cans from becoming loose and exposing a sharp metal edge. The Safety Committee also learned that the exemplar sample it had previously reviewed included the modified protective collar. Based on all of the available

information, Costco voluntarily notified CPSC in May 2015 pursuant to CPSA Section 15(b). At Costco's request, the vendor also notified CPSC pursuant to CPSA Section 15(b) and then recalled the Trash Cans in cooperation with CPSC.

15. Costco's settlement of this matter does not constitute an admission of staff's charges as set forth in paragraphs 4 through 12 above.

AGREEMENT OF THE PARTIES

16. Under the CPSA, the Commission has jurisdiction over the matter involving the Trash Cans and over Costco.

17. The parties enter into the Agreement for settlement purposes only. The Agreement does not constitute an admission by Costco or a determination by the Commission that Costco violated the CPSA's reporting requirements.

18. In settlement of staff's charges, and to avoid the cost, distraction, delay, uncertainty, and inconvenience of protracted litigation, Costco shall pay a civil penalty in the amount of \$3.85 million (US \$3,850,000) within thirty (30) calendar days after receiving service of the Commission's final Order accepting the Agreement. All payments to be made under the Agreement shall constitute debts owing to the United States and shall be made by electronic wire transfer to the United States via: <http://www.pay.gov> for allocation to, and credit against, the payment obligations of Costco under this Agreement. Failure to make such payment by the date specified in the Commission's Order shall constitute Default.

19. All unpaid amounts, if any, due and owing under the Agreement shall constitute a debt due and immediately owing by Costco to the United States, and interest shall accrue and be paid by Costco at the federal legal rate of interest set forth at 28 U.S.C. § 1961(a) and (b)

from the date of Default, until all amounts due have been paid in full (hereinafter “Default Payment Amount” and “Default Interest Balance”). Costco shall consent to a Consent Judgment in the amount of the Default Payment Amount and Default Interest Balance, and the United States, at its sole option, may collect the entire Default Payment Amount and Default Interest Balance, or exercise any other rights granted by law or in equity, including, but not limited to, referring such matters for private collection; and Costco agrees not to contest, and hereby waives and discharges any defenses, to any collection action undertaken by the United States, or its agents or contractors, pursuant to this paragraph. Costco shall pay the United States all reasonable costs of collection and enforcement under this paragraph, respectively, including reasonable attorney’s fees and expenses.

20. After staff receives this Agreement executed on behalf of Costco, staff shall promptly submit the Agreement to the Commission for provisional acceptance. Promptly following provisional acceptance of the Agreement by the Commission, the Agreement shall be placed on the public record and published in the *Federal Register*, in accordance with the procedures set forth in 16 C.F.R. § 1118.20(e). If the Commission does not receive any written request not to accept the Agreement within fifteen (15) calendar days, the Agreement shall be deemed finally accepted on the 16th calendar day after the date the Agreement is published in the *Federal Register*, in accordance with 16 C.F.R. § 1118.20(f).

21. This Agreement is conditioned upon, and subject to, the Commission’s final acceptance, as set forth above, and it is subject to the provisions of 16 C.F.R. § 1118.20(h). Upon the later of: (i) the Commission’s final acceptance of this Agreement and service of the

accepted Agreement upon Costco, and (ii) the date of the issuance of the final Order, this Agreement shall be in full force and effect and shall be binding upon the parties.

22. Effective upon the later of: (i) the Commission's final acceptance of this Agreement and service of the accepted Agreement upon Costco, and (ii) the date of the issuance of the final Order, for good and valuable consideration, Costco hereby expressly and irrevocably waives and agrees not to assert any past, present or future rights to the following, in connection with the matter described in this Agreement: (i) an administrative or judicial hearing; (ii) judicial review or other challenge or contest of the Commission's actions; (iii) a determination by the Commission of whether Costco failed to comply with the CPSA and the underlying regulations; (iv) a statement of findings of fact and conclusions of law; and (v) any claims under the Equal Access to Justice Act.
23. Costco has and will maintain a compliance program designed to achieve compliance with the CPSA, and which shall contain the following elements: (i) written standards, policies and procedures, including those designed to ensure that information relevant to CPSA compliance is conveyed effectively to personnel responsible for compliance, whether or not an injury is referenced; (ii) a mechanism for confidential employee reporting of compliance-related questions or concerns to either a compliance officer or to another senior manager with authority to act as necessary; (iii) effective communication of company CPSA compliance-related policies and procedures to all appropriate employees through regular training programs or otherwise; (iv) Costco's senior management participation in a compliance committee responsible for the review and oversight of compliance matters related to the CPSA; (v) retention of CPSA compliance-related records for at least five (5) years, and availability of such records to staff upon request, provided

that retention of cumulative copies of such records shall not be required; and (vi) procedures designed to ensure that: information required to be disclosed by Costco to the Commission is recorded, processed and reported in accordance with applicable law; that all reporting made to the Commission is timely, truthful, complete, accurate and in accordance with applicable law; and that prompt disclosure is made to Costco's management of any significant deficiencies or material weaknesses in the design or operation of such internal controls that are reasonably likely to affect adversely, in any material respect, Costco's ability to record, process and report to the Commission in accordance with applicable law.

24. Upon reasonable request of staff, Costco shall provide written documentation of its internal controls and procedures, including, but not limited to, the effective dates of the procedures and improvements thereto. Costco shall cooperate fully and truthfully with staff and shall make available relevant non-privileged information and materials, and personnel deemed necessary by staff to evaluate Costco's compliance with the terms of the Agreement.

25. The parties acknowledge and agree that the Commission may publicize the terms of the Agreement and Order.

26. Costco represents that the Agreement: (i) is entered into freely and voluntarily, without any degree of duress or compulsion whatsoever; (ii) has been duly authorized; and (iii) constitutes the valid and binding obligation of Costco, enforceable against Costco in accordance with its terms. Costco will not directly or indirectly receive any reimbursement, indemnification, insurance-related payment or other payment in connection with the civil penalty to be paid by Costco pursuant to the Agreement and Order.

27. The signatories represent that they are authorized to execute this Agreement.

28. The Agreement is governed by the law of the United States.
29. The Agreement and Order shall apply to, and be binding upon, Costco and each of its successors, transferees, and assigns, and a violation of the Agreement or Order may subject Costco, and each of its successors, transferees, and assigns, to appropriate legal action.
30. The Agreement and the Order constitute the complete agreement between the parties on the subject matter contained therein. The Agreement may be used in interpreting the Order. Understandings, agreements, representations, or interpretations apart from those contained in the Agreement and the Order may not be used to vary or contradict their terms. For purposes of construction, the Agreement shall be deemed to have been drafted by both of the parties and shall not, therefore, be construed against any party, for that reason, in any subsequent dispute.
31. The Agreement may not be waived, amended, modified or otherwise altered, except as in accordance with the provisions of 16 C.F.R. § 1118.20(h). The Agreement may be executed in counterparts.
32. If any provision of the Agreement or the Order is held to be illegal, invalid, or unenforceable under present or future laws effective during the terms of the Agreement and Order, such provision shall be fully severable. The balance of the Agreement and the Order shall remain in full force and effect, unless the Commission and Costco agree in writing that severing the provision materially affects the purpose of the Agreement and the Order.

COSTCO WHOLESALE CORPORATION

Dated: _____

By: _____
John Sullivan
Senior Vice President and General Counsel
Costco Wholesale Corp.

Dated: September 18, 2018

By: _____
Eric Rubel
Arnold & Porter Kaye Scholer
601 Massachusetts Ave., N.W.
Washington, D.C. 20001-3743

Counsel to Costco Wholesale Corp.

U.S. CONSUMER PRODUCT SAFETY
COMMISSION

Patricia M. Hanz
General Counsel

Mary B. Murphy
Assistant General Counsel

Dated: September 20, 2018

By: _____
Michele Melnick
Trial Attorney
Division of Compliance
Office of the General Counsel

ORDERED that the Settlement Agreement be, and is, hereby, accepted; and it is **FURTHER ORDERED** that Costco shall comply with the terms of the Settlement Agreement and shall pay a civil penalty in the amount of \$3.85 million dollars (\$3,850,000), within thirty (30) days after service of the Commission's final Order accepting the Settlement Agreement. The payment shall be made by electronic wire transfer to the Commission via: <http://www.pay.gov>. Upon the failure of Costco to make the foregoing payment when due, interest on the unpaid amount shall accrue and be paid by Costco at the federal legal rate of interest set forth at 28 U.S.C. § 1961(a) and (b). If Costco fails to make such payment or to comply in full with any other provision of the Settlement Agreement, such conduct will be considered a violation of the Settlement Agreement and Order.

Provisionally accepted and provisional Order issued on the 3rd day of October, 2018.

BY ORDER OF THE COMMISSION:

Alberta Mills, Secretary
U.S. Consumer Product Safety Commission