Consumers Union * Consumer Federation of America
*** Kids in Danger * National Research Center for Women & Families**
*** Public Citizen * U.S. PIRG**

October 1, 2009

Office of the Secretary
Consumer Product Safety Commission
Room 502
4330 East-West Highway
Bethesda, Maryland 20814
Via: www.regulations.gov

Re: Docket No. CPSC-2009-0068

Comments of Consumers Union, Consumer Federation of America, Kids in Danger, National Research Center for Women & Families, Public Citizen, and U.S. PIRG Regarding the Interim Final Interpretative Rule on Civil Penalty Factors Under Section 217 of the Consumer Product Safety Improvement Act

Introduction

Public Citizen, joined by Consumers Union of U.S., Inc. (CU), Consumer Federation of America (CFA), Kids in Danger, National Research Center for Women & Families, and U.S. PIRG (jointly "We") appreciate the opportunity to offer comments concerning the U.S. Consumer Product Safety Commission's (Commission) interim final rule on civil penalty factors found in the Consumer Product Safety Act (CPSA), the Federal Hazardous Substances Act (FHSA), and the Flammable Fabrics Act (FFA), as amended by section 217 of the Consumer Product Safety Improvement Act of 2008 (CPSIA), Pub. L. No. 110-314.[1]

Overall, we strongly support the Commission's interpretation of the civil penalty factors as set forth in 16 e-CFR Part 1119, which became effective on September 1, 2009. These factors can potentially guide the Commission to fairly and appropriately determine penalties against violators of prohibited acts under the CPSA, FHSA and FFA. We urge the Commission to use its new authority granted in the CPSIA to apply higher penalties for violations than it has in the past. The higher fines will increase the incentive to report potential product hazards in a timely manner and encourage compliance with consumer product safety laws and regulations.

Background

CPSIA Section 217 amends the civil penalty provisions in section 20(b) of the CPSA, section 5(c)(3) of the FHSA, and section 5(e)(2) of the FFA. CPSIA Section 217(a) increases the maximum civil penalties from $8,000 to $100,000 for each violation under the CPSA, FHSA,

[1] See "Civil Penalty Factors, Interim Final Interpretative Rule," 74 Fed. Reg. 45101 (September 1, 2009).

and FFA and from $1.825 million to $15 million for a related series of violations. In November 2008, the Commission posted a notice on its web site soliciting comments on information it should use when considering the CPSIA-amended factors for determining civil penalties. The undersigned groups submitted comments on December 18, 2008 (referred to herein as "the December 18 comments") containing recommendations for the civil penalty factors. The CPSA, FHSA, and FFA require the Commission to consider certain factors in determining the amount of any civil penalty. They are the nature, circumstances, extent and gravity of the violation, including 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, the appropriateness of the penalty in relation to the size of the business of the person charged, including how to mitigate undue adverse economic impacts on small businesses, as well as "other factors as appropriate." Below are our comments on the Commission's interpretation of the factors.

Recommendations

As we stated in the December 18 comments, civil penalties should discourage manufacturers from taking risks with products that might injure or kill consumers or result in costly property damage, and encourage manufacturers to report potential product safety hazards as soon as they learn about them. Civil penalties will fail to further the purposes of the CPSIA and fail to protect consumers if they are too low to induce compliance with the law.

Nature of the Product Defect, Section 1119.4(a)(3) and (4)

We agree with the Commission's refusal to distinguish, as two commenters suggested, between violations that involve "potential risk of harm" and those that involve "real potential for significant injury." 74 Fed. Reg. 45,104. Any standard, rule, or ban inherently addresses an unreasonable risk of injury. Therefore, each failure to comply should be treated the same for purposes of civil penalties.

Occurrence or Absence of Injury, Section 1119.4(a)(5)

We agree with the Commission's decision to pursue penalties for violations even if no injury or only minor injuries occurred. As mentioned above, all the rules and standards are meant to avoid unreasonable risk of injury to consumers. Therefore, a violator should not be immune from a penalty determination merely because no injury or only minor injuries happen to have occurred at the time of the penalty assessment.

Number of Defective Products Distributed, Section 1119.4(a)(6)

The number of defective products distributed, as well as the number of consumers who could be harmed, are relevant considerations for civil penalty determinations.

Small Business, Section 1119.4(a)(7)

The Commission is charged with considering the undue adverse economic impacts on small business violators when determining civil penalties. We agree that the Commission should consider a small business' ability to pay when determining a penalty amount. This will coincide with other civil penalty factors because small businesses are likely to have smaller distribution and fewer occurrences of harm. However, as we stated in the December 18 comments, all suppliers of consumer products, including small businesses, should comply with federal law to

ensure the public's health and safety, and should reasonably be deterred from violating the Commission's laws and regulations by the possibility of incurring meaningful sanctions.

Other Factors as Appropriate, 1119.4(b)

• The Commission will consider whether a violator had a reasonable safety/compliance program or system. We appreciate the use of the term "reasonable." Regulated entities should demonstrate diligence and a commitment of resources adequate to establish programs and systems that work. The Commission should also consider a firm's failure to adopt a safety and compliance monitoring program.

• We are pleased that the Commission may consider the history of noncompliance. A repeat offender presents a serious risk of harm to consumers. We recommend that this consideration include the number of prior violations, the number of past recalls of the firm's harmful products (even if the products are unrelated to the current violating product), and the dollar amount of penalties previously imposed on the firm.

• As we stated in the December 18 comments, "economic gain from noncompliance" is a relevant factor in assessing penalty amounts. Potential as well as actual gains are appropriate points to consider. We are pleased that the Commission will also consider the possible financial benefits of a delay in complying with its requirements. This point will assist the Commission in ensuring that penalties for violations outweigh all potential benefits of noncompliance.

• Again, we agree with the Commission's decision to weigh as a civil penalty factor a violator's failure to respond in a timely way to the Commission's requests. As a related matter, we also believe that the Commission should consider the amount of time the violator put the public at risk while continuing to benefit from the sale of the product.

Finally, we are pleased that the Commission decided to forego a formula or matrix to weigh factors. The interim final rule on the civil penalty factors will provide sufficient notice and guidance to the regulated entities of the potential consequence of unlawful actions. The lack of a specific formula will encourage product safety because regulated entities are more likely to remedy potential safety risks when they have more difficulty determining whether the benefits of inaction will outweigh the costs.

Respectfully submitted,

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