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CPSC Policy Update

CPSC Issues Final Rule on Civil Penalty Factors

Recently, the Consumer Product Safety Commission (“CPSC”) issued a [final rule](#), effective March 31, 2010, which contains CPSC’s interpretation of the statutory factors it will consider in determining the amount of a civil penalty for “knowing” violations of the prohibited acts set forth in the Consumer Product Safety Act (“CPSA”), Flammable Fabrics Act (“FFA”) and Federal Hazardous Substances Act (“FHSA”). This final rule makes certain clarifications to the interim final rule, which has been in effect since September 1, 2009.

Under the Consumer Product Safety Improvement Act (“CPSIA”), the Commission now has the ability to seek higher penalty amounts under the CPSA, FFA and FHSA. Specifically, since August 14, 2009, the maximum penalty for each violation of the CPSA, FHSA and FFA increased from \$8,000 to \$100,000 for each “knowing” violation. Maximum penalty amounts for a related series of violations increased from \$1.8 million to \$15 million.

Additionally, the CPSIA introduced many new prohibited acts and expanded CPSC’s authority in the following ways:

- Importing/Selling Non-Conforming Products, etc. – prohibited the sale, importation, offer for sale, or distribution in commerce, into the United States of any non-conforming CPSC-regulated product or substance.
- Importing/Selling Recalled Products, etc. – Prohibited the sale, manufacture, distribution, or importation of products subject to a voluntary corrective action (recall) taken by the manufacturer, in consultation with CPSC, and publicly announced by CPSC, or if the seller, distributor, or manufacturer knew or should have known of such voluntary corrective action.
- Failure to Furnish Certificate or Comply with Tracking Label – the failure to furnish a certificate required by a CPSC-enforced act also became a prohibited act. In addition, failure to comply with the CPSIA “tracking label” requirement for children’s products is a prohibited act.
- Unauthorized Third-Party Mark – the sale, offer for sale, distribution in commerce, or importation into the U.S. of any consumer product containing an unauthorized third-party certification mark is also prohibited.
- Enforcement of FHSA, FFA Penalties – gave CPSC the ability to enforce violations of the FHSA, FFA and other acts enforced by CPSC as prohibited acts under the CPSA.

The CPSIA amended the CPSA, FFA and FHSA to require that the Commission now consider three additional factors: (1) the nature, circumstances, extent and gravity of the violation, including the nature of the product defect or the substance; (2) the appropriateness of the penalty in relation to the size of the business or of the person charged, including how to mitigate undue adverse economic impacts on small businesses; and (3) other factors, as appropriate.

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These factors are in addition to the factors which CPSC, prior to August 14, 2009, had been required to consider: (1) the severity of the risk of injury; (2) the occurrence or absence of injury; and (3) the number of defective products or the amount of substance distributed.

In this final rule, CPSC indicates that it will consider the following statutory factors when it reviews the nature, circumstances, extent and gravity of a violation in determining any applicable civil penalty amount:

- Nature of the product defect (CPSA) or substance (FHSA) – CPSC will consider the nature of the product hazard/substance for which a penalty is sought. This consideration will include, for example, whether the defect arises from the product’s design, composition, contents, construction, manufacture, packaging, warnings, or instructions, and will include consideration of the conditions or circumstances in which the defect arises.
- Severity of risk of injury - CPSC will consider, among other factors, the potential for serious injury, illness, or death (and whether any injury or illness required medical treatment including hospitalization or surgery); the likelihood of injury; the intended or reasonably foreseeable use or misuse of the product; and the population at risk (including vulnerable populations such as children, the elderly, or those with disabilities).
- The occurrence or absence of injury - CPSC will consider whether injuries, illnesses, or deaths have or have not occurred with respect to any product or substance associated with a violation, and, if so, the number and nature of injuries, illnesses, or deaths. Both acute illnesses and the likelihood of chronic illnesses will be considered.
- Number of defective products (CPSA), amount of substances distributed (FHSA) - CPSC will consider the number of defective products or amount of substance distributed in commerce. The statutory language makes no distinction between those defective products distributed in commerce that consumers have received and those they have not received. Therefore both could be considered in appropriate cases. This factor will not be used to penalize a person’s decision to conduct a wider-than-necessary recall out of an abundance of caution. However, this would not include situations where such a recall is conducted due to a person’s uncertainty concerning how many or which products may need to be recalled.
- Size of a business, etc. - CPSC is required to consider the size of a business in relation to the amount of the proposed penalty. In considering business size, CPSC may look to several factors including the firm's number of employees, net worth, annual sales, liquidity, solvency, and profitability. The statute requires CPSC to consider how to mitigate the adverse economic impacts on small business violators only if those impacts would be "undue." What CPSC considers in determining what is undue may include, but is not limited to, the business’s size and financial factors relating to its ability to pay.
- Other factors, as appropriate - Both CPSC and the person are free to raise any other factors they believe are relevant in determining an appropriate penalty amount. These additional factors include, but are not limited to:
 - **Adequate testing/safety system** - whether a person conducted adequate and relevant pre-market and production testing of the product(s) at issue; whether a person had at the time of the violation, a reasonable and effective program or

system for collecting and analyzing information related to safety issues such as incident reports, lawsuits, warranty claims, and safety related issues related to repairs or returns; etc.

- **History of noncompliance** - whether or not the person's history of noncompliance with the CPSA, FHSA, FFA, and CPSC regulations should increase the amount of the penalty.
- **Benefit for not complying** - whether a person benefited economically from a failure to comply, including a delay in complying, with statutory and regulatory requirements; and
- **Response to CPSC** - whether a person's failure to respond in a timely and complete fashion to CPSC requests for information or for remedial action should increase the penalty.

The final rule notes that the CPSC received ten comments on its September 2009 interim final rule. According to CPSC, actual and presumed knowledge are treated equally under the statutes, and both could have the same consequence for civil penalty liability. Any proposed civil penalty determination is based first on a violation of a prohibited act under the CPSA, FFA or FHSA. The term "knowing" is defined in Section 20(d) of the CPSA (15 U.S.C. § 2069(d), section 5(c)(5) of the FHSA (15 U.S.C. § 1264 (c)(5)) and section 5(e)(1) of the FFA (15 U.S.C. § 1194(e)(1)), as "the having of actual knowledge or the presumed having of knowledge deemed to be possessed by a reasonable man who acts in the circumstances, including knowledge obtainable upon the exercise of due care to ascertain the truth of representations."

If you have any questions or require further guidance on these penalty guidelines, please contact a Barnes/Richardson attorney.