

BILLING CODE 6355-01-P

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1119

Civil Penalty Factors

AGENCY: Consumer Product Safety Commission.

ACTION: Interim final interpretative rule.

SUMMARY: The Consumer Product Safety Improvement Act of 2008 ("CPSIA"), Public Law 110-314, 122 Stat. 3016, requires the Consumer Product Safety Commission ("Commission") to issue a final rule providing its interpretation of the civil penalty factors found in section 20(b) of the Consumer Product Safety Act ("CPSA"), 15 U.S.C. 2069(b), section 5(c)(3) of the Federal Hazardous Substances Act ("FHSA"), 15 U.S.C. 1264 (c)(3) and section 5(e)(2) of the Flammable Fabrics Act ("FFA"), 15 U.S.C. 1194(e)(2), as amended by section 217 of the CPSIA. These statutory provisions require the Commission to consider certain factors in determining the amount of any civil penalty. The Commission is issuing its interpretation of the statutory factors.

DATES: This rule is effective upon publication in *Federal Register*. Comments must be received [insert date that is 30 days after publication in the Federal Register].

ADDRESSES: You may submit comments, identified by Docket No. [insert CPSC docket number], by any of the following methods:

Electronic Submissions

Submit electronic comments in the following way:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments. To ensure timely processing of comments, the Commission is no longer accepting comments submitted by electronic mail (e-mail) except through www.regulations.gov.

Written Submissions

Submit written comments in the following way:

Mail/Hand delivery/Courier (for paper, disk, or CD-ROM submissions), preferably in five copies, to: Office of the Secretary, Consumer Product Safety Commission, Room 502, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504-7923.

Instructions: All submissions received must include the agency name and docket number for this rule. All comments received may be posted without change, including any personal identifiers, contact information, or other

personal information provided, to <http://www.regulations.gov>. Do not submit confidential business information, trade secret information, or other sensitive or protected information electronically. Such information should be submitted in writing.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Melissa V. Hampshire, Attorney, Division of Enforcement and Information, Office of the General Counsel at 301-504-7631, mhampshire@cpsc.gov

SUPPLEMENTARY INFORMATION:

A. Background

The CPSIA specifies that the Commission, by August 14, 2009, must issue a final regulation providing its interpretation of civil penalty factors in section 20(b) of the CPSA, section 5(c)(3) of the FHSA, and section 5(e)(2) of the FFA. This rule interprets the factors in section 20(b) of the CPSA, section 5(c)(3) of the FHSA and section 5(e)(2) of the FFA, and describes other factors the Commission may consider in evaluating the amount of a civil penalty to be sought for knowing violations of the prohibited acts found in section 19 of the CPSA, section 4 of the FHSA, and section 5 of the FFA. The statutory

factors the Commission is required to consider in determining the amount of a civil penalty to seek 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, and such other factors as appropriate.

The statutory factors the Commission is required to consider in determining the amount of a civil penalty to seek are the same factors identified in section 20(c) of the CPSA, section 5(c)(4) of the FHSA, and section 5(e)(3) of the FFA for determining whether a civil penalty may be compromised by the Commission. These statutory provisions instruct the Commission to consider the following factors in determining the amount of a compromised penalty and whether it should be remitted or mitigated by the Commission: the nature, circumstances, extent and gravity of the violation, including the nature of the product

defect,¹ the severity of the risk of injury, the occurrence or absence of injury, the number of defective products distributed,² the appropriateness of such penalty in relation to the size of the business of the person charged, including how to mitigate undue adverse economic impacts on small businesses and such other factors as appropriate. The Commission will apply its interpretation to these statutory terms in determining whether and in what amounts any penalties may be compromised.

As set forth in section 217(a)(4) of the CPSIA, new penalty amounts specified in section 217(a) of the CPSIA take effect on the date that is the earlier of the date on which a final rule providing the Commission's interpretation of penalty factors is issued or on August 14, 2009 (one year after the date of enactment of the CPSIA). Under the amendments, the maximum penalty amounts increase from \$8,000 to \$100,000 for each knowing violation under the CPSA, FHSA, and FFA. Maximum penalty amounts for any related series of violations increase from \$1,825,000 to \$15,000,000.

¹This factor applies only to the CPSA. The FHSA factor is "the nature of the substance." The FFA has no comparable separate factor apart from the nature, circumstances extent and gravity of the violation.

²The FHSA factor is the "amount of the substance."

B. Prior Proposal on Civil Penalty Factors

On July 12, 2006, the Commission published a proposed interpretative rule (71 FR 39248) that identified additional factors to be considered in assessing and compromising civil penalties under sections 20(b) and (c) of the CPSA. The factors identified in the proposed rule were in addition to those already required to be considered under section 20(b) and (c) of the CPSA in evaluating the appropriateness and amount of a civil penalty. The Commission invited comment on whether the Commission and staff should consider, as appropriate, one or more of the following factors in determining the appropriateness and amount of a civil penalty: (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 comment period closed August 11, 2006. The Commission received four comments.

C. CPSIA Requirements

The enactment of the CPSIA superseded the proposed rule by requiring that the Commission provide its

interpretation of the enumerated statutory factors under section 20(b) of the CPSA, section 5(c)(3) of the FHSA, and section 5(e)(2) of the FFA. The CPSIA also indicated that under the CPSA, FHSA, and FFA the Commission should consider the nature, circumstances, extent, and gravity of the violation in determining the appropriate penalty amount. The statute provides examples of elements that should go into that consideration. The CPSIA modified the factor of appropriateness of the penalty in relation to the size of the business of the person charged by requiring that this factor include a consideration of how to mitigate undue adverse economic impacts on small businesses. This small business analysis element was added to the CPSA and FHSA but not added to the FFA factor. The Commission will consider the undue adverse economic impacts on small businesses as another appropriate factor under the FFA. The CPSIA also added to the CPSA, FHSA, and FFA a new catch-all statutory factor "other factors as appropriate" for consideration. The effect of the CPSIA amendments was noted in the Fall 2008 Current Regulatory Plan and the Unified Agenda (RIN: 3041-AC40) by stating that the proposed rule would be withdrawn. By a separate notice in this issue of the *Federal Register* the Commission is

withdrawing the July 12, 2006 notice of proposed rulemaking (71 FR 39248).

On November 18, 2008 the Commission staff posted a notice on the Commission website inviting comment on information the Commission should address in considering the amended statutory factors under the CPSA, FHSA, and FFA as outlined below:

CPSA (15 U.S.C. 2069(b))	FHSA (15 U.S.C. 1264 (c)(3))	FFA (15 U.S.C. 1194 (e)(2))
The nature, circumstances, extent, and gravity of the violation, including	The nature, circumstances, extent, and gravity of the violation, including	The nature, circumstances, extent, and gravity of the violations,
the nature of the product defect,	the nature of the substance,	
the severity of the risk of injury,	the severity of the risk of injury,	the severity of the risk of injury,
the occurrence or absence of injury,	the occurrence or absence of injury,	the occurrence or absence of injury,
the number of defective products distributed,	the amount of substance distributed,	
the appropriateness of such penalty in relation to the size of the business of the person charged, including how to mitigate undue adverse economic	the appropriateness of such penalty in relation to the size of the business of the person charged, including how to mitigate undue adverse economic impacts on small	the appropriateness of such penalty in relation to the size of the business of the person charged,

impacts on small businesses,	businesses,	
and such other factors as appropriate	and such other factors as appropriate	and such other factors as appropriate

The Commission staff also invited comment on what other factors are appropriate to consider in penalty determinations including: (1) a previous record of compliance; (2) timeliness of response; (3) safety and compliance monitoring; (4) cooperation and good faith; (5) economic gain from noncompliance; (6) product failure rate; and (7) what information the Commission should consider in determining how to mitigate the adverse economic impact of a particular penalty on a small business. The Commission staff also invited comment on whether it should develop a formula or matrix for weighing any or all of the various factors and what criteria it should use in any weighting formula or matrix. The Commission received 16 comments in response to the 2008 website notice.

D. Discussion

1. What are the Requirements for Imposition of Civil Penalties?

The determination of the amount of any civil penalty to seek and/or compromise should allow for maximum

flexibility within an identified framework. The CPSIA requirement for the Commission to interpret the civil penalty factors gives transparency to the regulated community about the framework the Commission will use to guide its penalty calculations in the enforcement process and may provide incentives for greater compliance. The changes made by various CPSIA provisions to the CPSA, FHSA, and FFA, including those to the CPSA prohibited acts and the addition of new prohibited acts, present the regulated community with many new compliance challenges.

Any proposed civil penalty determination is based first on a violation of a prohibited act under the CPSA, FHSA, or FFA. Civil penalties may then be sought against any person who "knowingly violates" section 19 of the CPSA, section 4 of the FHSA or a regulation or standard under section 4 of the FFA. The term "knowingly" 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) to mean 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. Since its enactment in 1973, the CPSA

always contained a civil penalty provision; however, until 1990, the FHSA and FFA did not contain comparable provisions for civil penalties. Under the FFA, the Commission had to seek civil penalties under the Federal Trade Commission Act, using the authorities under that provision. The FHSA had no civil penalty provision. The Consumer Product Safety Improvement Act of 1990, Public Law 101-608, 104 Stat. 3110, November 16, 1990, amended section 5 of the FHSA and section 5 of the FFA giving the Commission authority to seek civil penalties for knowing violations of the prohibited acts under those Acts. If a penalty cannot be compromised by the Commission, the Commission will seek to commence an action in Federal Court to obtain a penalty. See, *Advance Machine Co. v. Consumer Product Safety Commission*, 666 F.2d 1166 (8th Cir. 1981); *Athlone Industries, Inc. v. Consumer Product Safety Commission* (D.C. Cir. 1983).

2. How do the CPSIA Amendments to the CPSA's Prohibited Acts Affect Civil Penalties?

In the past, the majority of civil penalties for prohibited acts were imposed either for a knowing failure to furnish information required by section 15(b) of the CPSA, or for regulatory violations under the CPSA, FHSA, or FFA. The CPSIA amended these three statutes to strengthen

the Commission's enforcement ability and allow for more uniform enforcement under the CPSA, where applicable.

The new amendments expand the acts prohibited under the CPSA and give the Commission the ability to enforce violations of the FHSA and FFA as prohibited acts under the CPSA. Thus, the amended CPSA now prohibits the sale, offer for sale, distribution in commerce, or importation into the United States 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. 15 U.S.C. 2068(a)(1).

The CPSA, as amended, adds a new prohibited act for the sale, manufacture, distribution, or importation of products subject to a voluntary corrective action taken by the manufacturer, in consultation with the Commission, and publicly announced by the Commission or if the seller, distributor, or manufacturer knew or should have known of such voluntary corrective action. 15 U.S.C. 2068(a)(2)(B).

The CPSA, as amended, broadens the prohibited act for the sale, offer for sale, manufacture for sale, or distribution or importation of any consumer product or other product or substance subject to a section 15

mandatory recall order to include products subject to a section 12 order. A section 15 order is imposed in an adjudicative proceeding to declare a product a "substantial product hazard" under section 15 of the CPSA, 15 U.S.C.

2064. A section 12 order, which may include a mandatory order requiring notification to purchasers and repair, replacement or refund is one imposed by a District Court after an "imminent hazard" proceeding under section 12 of the CPSA, 15 U.S.C. 2061.

The amended prohibited acts section of the statute is also broadened to include the sale, offer for sale manufacture for sale, distribution in commerce or importation into the United States of a banned hazardous substance under the FHSA as an act prohibited under the CPSA. 15 U.S.C. 2068(a)(2)(D).

The CPSA prohibited act in section 19(a)(6) of the CPSA relating to certification under section 14 of the CPSA is newly expanded to make the failure to furnish a certificate required by any other Act enforced by the Commission, a prohibited act under the CPSA. This prohibited act now also references a new tracking label requirement of section 103 of the CPSIA by specifying that the failure to comply with any requirement of section 14 includes the failure to comply with the requirement for

tracking labels or any rule or regulation promulgated under section 14.

The CPSA statutory language has also been expanded to include a new prohibited act for the sale, offer for sale, distribution in commerce or importation into the United States of any consumer product containing an unauthorized third party certification mark. 15 U.S.C. 2068(a)(12).

Misrepresentations to Commission officers or employees about the scope of consumer products subject to recall or material misrepresentations in the course of an investigation under any act enforced by the Commission also is a new prohibited act under the CPSA. 15 U.S.C. 2068(a)(13).

In addition, the CPSA adds as a new prohibited act, the exercise or attempt to exercise undue influence on a third party conformity assessment body that tests products for compliance under laws administered by the Commission. 15 U.S.C. 2068(a)(14).

The CPSIA adds to the Commission's export prohibition authority section 19(a)(15) of the CPSA that makes it illegal to export from the United States for purposes of sale any consumer product or other product or substance (other than the export of a product or substance permitted by the Secretary of the Treasury under section 17(e) of the

CPSA) that is subject to Court- or Commission-ordered recall or that is banned under the FHSA or subject to voluntary recall announced by the Commission. 15 U.S.C. 2068(a)(15).

The CPSIA also adds a new prohibited act that makes it illegal to violate a Commission order issued under new section 18(c) of the CPSA, which allows the Commission to prohibit export for sale of any consumer product not in conformity with an applicable consumer product safety rule. 15 U.S.C. 2068(a)(16).

3. Should Penalties be Sought for Violations that do not Involve Evidence of "Bad Intentions" or "Ill Will?"

Some commenters stated that the Commission should reserve seeking penalties only for the most egregious and dangerous situations and that most violations do not involve bad intentions or ill will.

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. Since the knowledge requirements in the CPSA, FHSA, and FFA include presumed knowledge, as well as actual knowledge, the Commission declines to follow the commenters' suggestion to seek a

penalty only where there is evidence of bad intentions or ill will. To follow the commenters' position to impose penalties only where there is knowing and willful conduct would read the "presumed knowledge" element out of the "knowing" definition in the statute.

4. Should the Commission Implement a Matrix or Formula for Computing Penalty Amounts?

All but two commenters rejected the concept of a penalty matrix or formula for use in the assessment of civil penalties. Commenters opposed to such a matrix or formula highlighted the difficulty of applying any formula in a particular circumstance as too rigid an approach that would not take into consideration information that might be important to consider in one instance of a penalty but not in another. One commenter suggested that if the Commission reduced its penalty formulation to a matrix it would encourage regulated parties to calculate the cost and risk of prohibited conduct and not to follow the statutory requirements.

The Commission declines to follow a formulaic or matrix approach to penalty assessment or to otherwise state in the regulation any specific circumstances that will warrant a certain penalty amount but has instead provided guidance about what factors may influence the Commission's

determination under the various statutory and other enumerated factors. Importantly, in an individual case, the Commission would review the facts and circumstances surrounding the violations and the proposed assessment of penalties in light of the factors and framework described in the rule. Therefore, the rule does not contain a matrix or formula for assigning specified amounts to the various factors in this notice. Specific considerations under each factor are discussed below.

5. How Does the New Rule Interpret the Civil Penalty Factors?

A. § 1119.1 - Purpose.

Section 1119.1 describes the purpose of new Part 1119 "Civil Penalty Factors," explaining that it is the Commission's interpretation of the statutory civil penalty factors set forth in the Consumer Product Safety Act (15 U.S.C. 2051-2089), Federal Hazardous Substances Act (15 U.S.C. 1261-1278), and the Flammable Fabrics Act (15 U.S.C. 1191-1204).

B. § 1119.2 - Applicability.

Section 1119.2 explains that the part applies to all civil penalty determinations that the Commission proposes to seek or compromise for knowing violations of the prohibited acts under the CPSA, the FHSA, or the FFA.

C. § 1119.3 - *Definitions.*

Section 1119.3 defines certain terms used in the rule. For example, the term "product defect" is broadly defined to cover a product or substance associated with a prohibited act under the CPSA, FHSA or FFA as well as to include the meaning of defect as referenced in the CPSA and the Commission definition of defect at 16 CFR 1115.4. The term "violator" would define any legally responsible party who committed a knowing violation of a prohibited act under the CPSA, FHSA or FFA. The rule explains that the definitions apply for purposes of this rule.

D. § 1119.4(a)(1) - *Nature, circumstances, extent, and gravity of the violation.*

One commenter observed that Congress amended the CPSIA adding this general factor in addition to the enumerated statutory factors to clarify its intention that the Commission adopt a holistic assessment of all relevant information for penalty determinations rather than place undue emphasis on one or more specific factors.

The Commission agrees that this language allows the Commission to 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. The Commission also believes that this

particular factor allows for the consideration of the seriousness and extent of a particular violation that may not otherwise be considered with respect to the other enumerated statutory factors. Therefore, in each case, the Commission will continue to look at the enumerated statutory factors, as well as other factors (described in paragraph J below) that the Commission may determine are appropriate, and consider all of the factors in determining the civil penalty amount.

E. § 1119.4(a)(2) - *Nature of the product defect.*

The Commission will consider, under this provision, where appropriate and applicable in each particular case, the nature of the hazard presented by the product for which a penalty is sought. The Commission considers this factor broadly as applying to products or substances that may in fact contain a defect which could create a substantial product hazard (as defined and explained in 16 CFR 1115.4), to products which 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 the nature of those violations relate to the underlying products or substances. Therefore, with respect to this factor, a proposed penalty could involve a prohibited act violation, such as a

reporting failure under section 15(b) of the CPSA or a failure to comply with any consumer product safety rule under the CPSA, or any similar rule, regulation, standard or ban under any other act enforced by the Commission. A penalty also could involve any other prohibited act, and the Commission may examine its relation to the underlying product or substance and the prohibited act. Under this factor, 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.

Two commenters suggested that the Commission should evaluate violations of regulatory standards by distinguishing those that do not involve actual risk of harm, but rather the potential risk of harm, differently than those that do involve real potential for significant injury.

The Commission declines to accept the suggestion that it distinguish any violations of regulatory standards, rule, or bans in this manner. The promulgation of a mandatory regulation by the Commission, or by Congress when they enact statutory bans and standards, carries with it a corresponding determination that the standard is necessary to address an unreasonable risk of injury presented by the

product included within its scope. Violation of such a statutory provision or Commission regulation presents a risk to consumers that has previously been determined to be addressed by compliance with the statute or regulation. If the commenters' suggestion were followed, the Commission would be classifying certain mandatory standards as more important than others. In addition, the comment does not account for the fact that the Commission can seek penalties for other prohibited act violations (in addition to knowing violations of mandatory rules, standards or bans).

F. § 1119.4(a)(3) - *Severity of the risk of injury.*

The Commission is to be guided by its discussion of the severity of the risk at 16 CFR 1115.12, as appropriate, in evaluating a particular penalty.

One commenter noted that penalties should not be assessed for risks of minor or moderate injury.

The Commission declines to follow this suggestion. However, the rule indicates that the Commission may, in addition to considering information about injury potential and the seriousness of the potential injuries, consider the likelihood of injury occurring. 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 population group exposed to the risk (e.g. children,

elderly, handicapped.)

G. § 1119.4(a)(4) - *The occurrence or absence of injury.*

The Commission received several comments suggesting that it should not seek a penalty where the information the Commission evaluates reveals that the violation involved no injury or only minor injuries have occurred.

The Commission declines to follow this suggestion 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. Therefore, the Commission states in the rule that it would consider under this factor whether injuries have or have not occurred.

H. § 1119.4(a)(5) - *The number of defective products distributed.*

Under this provision, the Commission is required to consider the actual number of defective products or amount of substances distributed in commerce. The Commission recognizes, as some commenters pointed out, that the actual number of defective products in consumers' hands may be different than the number of defective products distributed. However, the statutory language makes no distinction between those defective products that consumers

receive and those defective products distributed in commerce. Therefore, the Commission chooses not to make any such distinction in any evaluation of information under this factor. The rule reflects this consideration.

I. § 1119.4(a)(6) - The appropriateness of such penalty in relation to the size of the business of the person charged, including how to mitigate undue adverse economic impacts on small businesses.

The Commission is required to consider the size of a business in relation to the amount of the proposed penalty. This factor reflects the relationship between the size of the business of the person charged and the deterrent effect of civil penalties. In considering business "size," the Commission may look to several factors including the firm's number of employees, net worth, and annual sales. The Commission may be guided, where appropriate, by any relevant financial factors to help determine a violator's ability to pay a proposed penalty including:

- (i) liquidity factors--factors that help measure a violator's ability to pay its short-term obligations;
- (ii) solvency factors--factors that help measure a violator's ability to pay its long-term obligations; and
- (iii) profitability factors-- factors that measure a violator's level of return on investment

The Commission is aware that penalties may have adverse economic consequences on violators, including small business violators. The statute requires the Commission to consider how to mitigate the adverse economic consequences on small business violators only if those consequences would be "undue." What the Commission considers to be "undue" will vary based upon the violator's business size and financial condition as well as the nature, circumstances, extent and gravity of the violation(s). When considering how to mitigate *undue* adverse economic consequences, the Commission may also follow its Small Business Enforcement Policy set forth at 16 CFR § 1020.5. In determining a small business violator's ability to pay a proposed penalty, the Commission may be guided, where appropriate, by the financial factors set forth above in subsections (i) through (iii).

J. § 1119.4(b) -- *Other factors as appropriate.*

Congress clarified in the CPSIA that the Commission does have the ability to consider factors in addition to the ones enumerated in the Act in individual cases, as appropriate. Both the Commission and the violator are free to raise any other factors they believe are relevant in determining an appropriate civil penalty amount.

Additional factors which may be considered in an individual case include, but are not limited to, the following:

- (i) Safety/Compliance Program and/or System: The Commission may consider, for example, whether a violator had at the time of the violation, a reasonable program/or system for collecting and analyzing information related to safety issues, including incident reports, lawsuits, warranty claims, and safety-related issues related to repairs or returns; and whether a violator conducted adequate and relevant premarket and production testing of the product(s) at issue.
- (ii) History of Noncompliance: The Commission may consider if the violator has a history of noncompliance with the CPSC and whether a higher penalty should be assessed for repeated noncompliance.
- (iii) Economic Gain from Noncompliance: The Commission may consider whether a firm benefitted economically from a delay in complying with statutory and regulatory requirements.
- (iv) Failure of the violator to respond in a timely and complete fashion to the Commission's requests for information or remedial action: The

Commission may consider whether a violator'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.

Which, if any, additional factors the Commission considers in determining an appropriate penalty amount, including but not limited to those listed above, will be unique to each case. In all civil penalty matters, any additional factors beyond those enumerated in the statute that the Commission takes into consideration for purposes of determining an appropriate civil penalty amount will be made known to and discussed with the violator.

M. § 1119.5 - Notification.

Section 1119.5 of the rule sets forth a notification provision that has been informally followed by the Commission in determining the amount of a civil penalty to seek or compromise for knowing violations of the prohibited acts.

E. Immediate Effective Date

The Commission must issue a final rule, in accordance with the procedures set forth at 5 U.S.C. 553 of the Administrative Procedure Act, by August 14, 2009, providing its interpretation of the penalty factors in section 20(b)

of the CPSA, section 5(c)(3) of the FHSA, and section 5(e)(2) of the FFA. Maximum civil penalty amounts are increasing on August 14, 2009. Therefore, the Commission proposes that any final rule resulting from this rulemaking become effective upon publication. The rule is interpretative and does not impose obligations on regulated parties beyond those imposed by the CPSA, FHSA, and FFA. Therefore, there is no need to provide a delayed effective date in order to allow for regulated parties to prepare for the rule.

F. Regulatory Flexibility Certification

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601-612, directs agencies to consider the potential impact of regulations on small business and other small entities. However, the RFA does not apply to rulemaking that is not subject to the notice and comment requirement of the Administrative Procedure Act, 5 U.S.C. 553. Interpretative rules, such as the one issued by this notice, are not subject to the notice and comment requirement. Accordingly, neither an initial nor a final regulatory flexibility analysis is required for this rule.

G. Paperwork Reduction Act

The rule does not impose any information collection requirements. Rather it describes the statutory civil

penalty factors and how the Commission interprets those factors. Accordingly, it is not subject to the Paperwork Reduction Act, 44 U.S.C. 3501-3520.

H. Environmental Considerations

The Commission's regulations at 16 CFR 1021.5(a) provide that there are no CPSC actions that ordinarily produce significant environmental effects. The rule does not fall within the categories in 16 CFR 1021.5(b) of CPSC actions that have the potential for producing environmental effects. The rule does not have any potential for adversely affecting the quality of the human environment. Council of Environmental Quality regulations at 40 CFR 1508.18(a) provide that agency actions subject to environmental review "do not include bringing judicial or administrative enforcement actions." Therefore, no environmental assessment or environmental impact state is required.

List of Subjects in 16 CFR PART 1119

Administrative practice and procedure, Business and Industry, Consumer protection, Reporting and recordkeeping requirements.

Accordingly, the Commission proposes to amend title 16 of the Code of Federal Regulations by adding a new Part 1119 to read as follows:

PART 1119 CIVIL PENALTY FACTORS

§ 1119.1 Purpose.

§ 1119.2 Applicability.

§ 1119.3 Definitions.

§ 1119.4 Factors Considered In Determining
Civil Penalties.

§ 1119.5 Enforcement Notification.

AUTHORITY: 15 U.S.C. 2058, 2063, 2064, 2067(b), 2068, 2069, 2076(e), 2084, 1261, 1263, 1264, 1270, 1273, 1278, 1191, 1192, 1193, 1194, 1195, 1196.

§ 1119.1 Purpose.

This part sets forth the Consumer Product Safety Commission's (Commission) interpretation of the statutory factors considered in determining the amount of civil penalties the Commission may seek or compromise.

§ 1119.2 Applicability.

Application. This part applies to all civil penalty determinations the Commission may seek or compromise under the Consumer Product Safety Act (CPSA) (15 U.S.C. 2051-2089), the Federal Hazardous Substances Act (FHSA) (15 U.S.C. 1261-1278), and the Flammable Fabrics Act (FFA) (15 U.S.C. 1191-1204). Any person who knowingly violates a prohibited act set forth in section 19 of the CPSA, section 4 of the FHSA, or section 5(e) of the FFA is subject to a civil penalty.

§ 1119.3 Definitions.

For purposes of this rule the following definitions apply:

(a) *Product defect* means a product or substance that is associated with a prohibited act under the CPSA, FHSA, or FFA, including the meaning of defect as referenced in the CPSA and defined in Commission regulations at 16 CFR 1115.4. Where applicable and where the term "number of defective products distributed" is used it shall include "amount of substance distributed" for purposes of violations under the FHSA.

(b) *Violation* means a knowing violation, as defined in the CPSA, FHSA, or FFA of any prohibited act found in section 19 of the CPSA, section 4 of the FHSA, or section 5 of the FFA.

(c) *Violator* means any manufacturer, importer, distributor or retailer or any other legally responsible party who committed a knowing violation of a prohibited act under the CPSA, FHSA, or FFA and is thus subject to penalties.

§ 1119.4 Factors considered in determining civil penalties.

(a) *Statutory Factors.* Section 20(b) of the CPSA, section 5(c)(3) of the FHSA and section 5(e)(2) of the FFA specify factors considered by the Commission

in determining the amount of a civil penalty to be sought upon commencing an action for knowing violations of the prohibited acts section of each act. These factors are:

CPSA (15 U.S.C. 2069 (b))	FHSA (15 U.S.C. 1264 (c) (3))	FFA (15 U.S.C. 1194 (e) (2))
The nature, circumstances, extent, and gravity of the violation, including	The nature, circumstances, extent, and gravity of the violation, including	The nature, circumstances, extent, and gravity of the violations,
the nature of the product defect,	the nature of the substance,	
the severity of the risk of injury,	severity of the risk of injury,	the severity of the risk of injury,
the occurrence or absence of injury,	the occurrence or absence of injury,	the occurrence or absence of injury,
the number of defective products distributed,	the amount of substance distributed,	
the appropriateness of such penalty in relation to the size of the business of the person charged, including how to mitigate undue adverse economic impacts on small businesses,	the appropriateness of such penalty in relation to the size of the business of the person charged, including how to mitigate undue adverse economic impacts on small businesses,	the appropriateness of such penalty in relation to the size of the business of the person charged,
and such other factors as appropriate	and such other factors as appropriate	and such other factors as appropriate

(1) *The nature, circumstances, extent and gravity of the violation.* Under this factor, the Commission will consider the totality of the circumstances surrounding a violation, including how many provisions of law were violated. The Commission will continue to look at the enumerated statutory factors, as well as other factors (as described in subsection (b) below) that the Commission may determine are appropriate, and consider all of the factors in determining the civil penalty amount.

(2) *Nature of the product defect.* The Commission will consider the nature of the product hazard/substance for which a penalty is sought. A product defect under this factor includes violations for products that contain defects which could create substantial product hazards as referenced in the CPSA and defined and explained in 16 CFR 1115.4; regulatory violations of a rule, regulation, standard or ban; or product hazards presented by any other violation of the prohibited acts of section 19 of the CPSA.

(3) *Severity of the risk of injury.* Consistent with its discussion of severity of the risk at 16 CFR 1115.12, the Commission will consider, among other factors, the potential for serious injury or death (and whether any injury required actual 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).

(4) *The occurrence or absence of injury.* The Commission will consider whether injuries have or have not occurred with respect to any product associated with the violation.

(5) *The number of defective products distributed.* The Commission will consider the actual number of products or amount of substances imported or placed in the stream of commerce to distributors, retailers, and consumers.

(6) *The appropriateness of such penalty in relation to the size of the business of the person charged including how to mitigate undue adverse economic impacts on small businesses.* The Commission is required to consider the size of a business in relation to the amount of the proposed penalty. This factor reflects the relationship between the size of the business of the person charged and the deterrent effect of civil penalties. In considering business "size," the Commission may look to several factors including the firm's number of employees, net worth, and annual sales. The Commission may be guided, where appropriate, by any relevant financial factors to help

determine a violator's ability to pay a proposed penalty including: liquidity factors; solvency factors; and profitability factors.

The statute requires the Commission to consider how to mitigate the adverse economic impacts on small business violators only if those impacts would be "undue." What the Commission considers to be "undue" will vary based upon the violator's business size and financial condition as well as the nature, circumstances, extent and gravity of the violation(s). When considering how to mitigate undue adverse economic consequences, the Commission may also follow its Small Business Enforcement Policy set forth at 16 CFR §1020.5.

(b) *Other factors as appropriate.* In determining the amount of any civil penalty to be pursued when a knowing violation of the prohibited acts section of the CPSA, FHSA, or FFA has occurred, the Commission may consider, where appropriate, other factors in addition to those listed in the statutes. Both the Commission and the violator are free to raise any other factors they believe are relevant in determining an appropriate penalty amount. Additional factors which may be considered in an individual case include, but are not limited to, the following:

- (i) Safety/Compliance Program and/or System:
The Commission may consider, for example, whether a violator had at the time of the violation, a reasonable program/or system for collecting and analyzing information related to safety issues, including incident reports, lawsuits, warranty claims, and safety-related issues related to repairs or returns; and whether a violator conducted adequate and relevant premarket and production testing of the product(s) at issue.
- (ii) History of noncompliance: The Commission may consider if the violator has a history of noncompliance with the CPSC and whether a higher penalty should be assessed for repeated noncompliance.
- (iii) Economic Gain from Noncompliance: The Commission may consider whether a firm benefitted economically from a delay in complying with statutory and regulatory requirements.
- (iv) Failure of the violator to respond in a timely and complete fashion to the

Commission's requests for information or remedial action: The Commission may consider whether a violator's failure to respond in a timely and complete fashion to requests from the Commission for information or for remedial action should increase the amount of the penalty.

Which, if any, additional factors the Commission considers in determining an appropriate penalty amount, including but not limited to those listed above, will be unique to each case. In all civil penalty matters, any additional factors beyond those enumerated in the statute that the Commission takes into consideration for purposes of determining an appropriate civil penalty amount will be made known to and discussed with the violator.

§ 1119.5 Enforcement Notification.

A potential violator will be informed in writing that the Commission believes it is subject to a possible civil penalty. The violator will be able to submit evidence and arguments that it is not subject to such a penalty.

Dated: August 19, 2009



Alberta E. Mills, Acting Secretary
Consumer Product Safety Commission