

Product Regulation & Liability - USA

CPSC imposes record-high penalties in 2014

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The Consumer Product Safety Commission (CPSC) recently announced the latest penalties imposed on companies in 2014 for failure to report potential product defects. The first, announced on October 28 2014, was the largest fine that the CPSC has ever imposed – a \$4.3 million civil penalty agreed to by Baja Inc and One World Technologies Inc, involving minibikes and go-carts. The second was a \$700,000 fine against Williams-Sonoma for failure to report Roman shades sold at Pottery Barn Kids.

Allegations leading to penalties

The CPSC alleged that Baja had failed to report that certain minibikes and go-carts posed a safety hazard even after receiving complaints of fire, sudden acceleration and stuck throttles. According to the CPSC, the minibikes and go-carts "contain a defect which could create a substantial product hazard" and "create an unreasonable risk of serious injury" due to fire and burn hazards, and "because the throttle can stick due to an improperly positioned fuel line and cable".⁽¹⁾ The CPSC also stated that Baja had redesigned the fuel line to remedy the hazard, but did not inform consumers about the change.

In response, Baja stated that it had received four fire reports "out of over 250,000 units on the market" and in three of those instances the cause of the incident could not be determined. Moreover, Baja claimed that the stuck throttles had not been clearly caused by the positioning of the fuel line and cable and could have been due to other factors. The dates of the fire reports were not made publicly available. In 2010, Baja announced a voluntary recall of the minibikes and go-carts.⁽²⁾

The CPSC's allegations against Williams-Sonoma provide a more precise timeline. By August 2007, Williams-Sonoma had received five reports that children had become stuck in the inner cords of the Roman shades, but it did not report the alleged fault until September 2008.⁽³⁾ The shades were recalled in August 2009.

Steep penalties assessed in 2014

These latest two announcements bring to \$12.2 million the total civil penalties imposed by CPSC in 2014, which also include the following:

- A clothing company agreed to pay \$600,000 for failing to report drawstrings in children's tops.
- A retailer agreed to pay \$2 million for distributing 12 different recalled consumer products.
- A home appliance manufacturer agreed to pay \$750,000 for failing to report a safety hazard associated with wall ovens.
- A retailer agreed to pay \$3.1 million for failure to report potential hazards with stepladders.
- A retailer agreed to pay \$725,000 for failing to report defects in floor cleaners and misrepresenting to the CPSC the number of complaints actually received.

Compliance programmes

Notably, many of these companies were also required to implement a compliance programme designed to ensure compliance with the safety statutes and regulations enforced by CPSC.

These compliance programmes impose additional reporting and record-keeping requirements on the settling companies. The companies are also forced to make available all information, materials and personnel that the CPSC deems necessary to evaluate their compliance with the terms of the agreement.

Total penalties increasing each year

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The total penalties announced so far in 2014 are more than double the \$6 million in total penalties assessed in 2013, which was up from \$4.3 million in 2012.

The significant increase in penalties levied against companies over the past few years shows that the CPSC is intent on staking its claim as a serious enforcement agency. Not only has the number of companies facing fines increased, but the average penalty has steadily increased too, as evidenced by the \$4.3 million fine against Baja. This upward trend reflects a tough stance on enforcement that the CPSC has been seeking to build ever since Congress passed the Consumer Product Safety Improvement Act in 2008 in response to heightened consumer awareness and concerns over consumer-product safety.

How to protect against CPSC penalties

This trend of increasingly aggressive enforcement is expected to continue into 2015. Consumer product manufacturers, distributors and retailers alike need to take note and ensure they have procedures in place that will allow them to report within 24 hours of obtaining information that:

"[R]easonably supports the conclusion that its consumer product fails to comply with an applicable consumer product safety rule or voluntary consumer product safety standard, contains a defect which could create a substantial risk of injury to the public, or creates an unreasonable risk of serious injury or death."

While companies have 10 business days to investigate under 16 CFR Section 1115.14(d), the recently announced penalties make it clear that companies can be penalised for failing to report, even if the investigations are inconclusive regarding the role of the product in the reported incident.

These announcements also show that companies are not immune even if they choose to conduct a voluntary recall. In addition, companies can often be at risk of penalties for a failure to aggregate individual reports to conclude that a substantial product hazard might exist. Without appropriate procedures in place, a company may be unaware of complaints that, taken together as a whole, could indicate a potential product defect or hazard which must be reported to the CPSC. Ignorance is no defence to steep penalties, as the CPSC "shall impute to the subject firm knowledge of product safety related information received by an official or employee of a subject firm capable of appreciating the significance of the information". Therefore, information spread throughout the company could be imputed to it as a whole, exposing the company to liability for poor record keeping.

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Endnotes

(1) *World Technologies Inc vs Baja Inc*, CPSC Docket 15-C0001, available at: www.cpsc.gov/PageFiles/172144/15012CivilPenaltyAgreement.pdf.

(2) "Baja Motorsports Recalls Mini Bikes and Go-Carts Due to Fire and Burn Hazards", CPSC Press Release 10-304, available at www.cpsc.gov/en/Recalls/2010/Baja-Motorsports-Recalls-Mini-Bikes-and-Go-Carts-Due-to-Fire-and-Burn-Hazards/.

(3) *Williams-Sonoma Inc*, CPSC Docket 15-C0002, available at: www.cpsc.gov/PageFiles/172306/15019WilliamsSonomaCivilPenaltyAgreement.pdf.

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