

## CPSC Civil Penalty Trend Continues

*Law360, New York (March 27, 2015, 4:18 PM ET) --*

At the end of last year, we reported that the U.S. Consumer Product Safety Commission issued \$12.2 million in civil penalties in 2014, more than double the amount issued in 2013.[1] The number of companies fined increased as well. These trends signal the CPSC's intention to stake itself as a serious enforcement agency, which was reinforced recently by Chairman Elliot Kaye, who announced that the agency would seek to levy more penalties that approach the statutory maximum of \$15 million.

### Background

When the Consumer Product Safety Improvement Act of 2008 was passed, Congress increased the maximum penalties from \$8,000 to \$100,000 per occurrence and increased the maximum penalty amounts for a related series of violations from \$1.8 million to \$15 million. The CPSC has authority to penalize manufacturers, distributors and retailers for failure to report within 24 hours of obtaining information "which reasonably 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." 16 C.F.R. § 1115.14(e).

The CPSC views the duty to report as extremely broad. Under federal regulations, the CPSC "impute[s] 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." 16 C.F.R. § 1115.14(b). While companies have 10 days to conduct an investigation, the CPSC's pattern of charging penalties indicates that companies have a duty to report even when the investigations are inconclusive regarding the role of a product in a reported incident. Nor does conducting a fast track recall insulate companies from penalties (although it still does curry some favor).

Consumer product manufacturers, distributors and retailers may need to develop institutional procedures for collecting and investigating consumer complaints to develop a thorough record and ensure compliance with the statute because the CPSC will continue to increase penalty amounts.

### The Trend Continues



Erin M. Bosman

On Feb. 19, 2015, General Electric Co. agreed to a \$3.5 million civil penalty, one of the 10 largest fines ever levied by the CPSC. The fine was based on allegations that GE failed to report potential defects in some of its stovetop ranges and dishwashers.

According to a CPSC press release in 2004,[2] GE learned of 13 incidents of harness and wiring overheating in its stovetop ranges, some of which resulted in fire. The CPSC alleged the company did not report the possible defect until February 2009. In April 2009, GE recalled 28,000 stovetop ranges. GE also learned of several fires caused by dishwasher control panels in 2007, but did not report the issue to the CPSC until September 2010. The company announced a voluntary recall of 174,000 dishwashers in October 2010, due to the risk of short circuiting, which poses fire and burn hazards.

Consistent with other CPSC penalties reported in the last year, the fine was accompanied by an agreement that GE must participate in a compliance program that provides internal procedures for future management of complaints and reporting to the agency.

Just a week after the CPSC and GE agreed on the financial penalties and compliance program, Chairman Kaye announced his plans to fully implement the agency's authority to issue fines up to the statutory maximum \$15 million. According to Chairman Kaye, the civil penalties to date do not reflect Congress' intent to take a tougher stance on consumer product safety through increased enforcement and penalties. Chairman Kaye acknowledged that civil penalties are backward-looking, and because the CPSIA was enacted relatively recently, penalties will continue to grow since the increased penalties only apply to violations since the law was enacted.

Chairman Kaye's central concern is that companies view civil penalties as a cost of doing business, rather than a real deterrent. When a company stands to make tens of millions of dollars from the sale of a product, a penalty of \$1.5 million may be considered a wise business decision, to the detriment of consumer safety. To ensure that civil penalties are taken more seriously, Chairman Kaye instructs his staff to impose higher civil penalties when it is deserved.

### **How to Avoid or Minimize CPSC Penalties**

Companies should make sure to have internal procedures for collecting consumer complaints, quickly initiating investigations of those complaints and, if necessary, immediately reporting any potential defect to the CPSC through a Section 15(b) report. The CPSC indicates that the increase in penalties is aimed at ensuring compliance with the statute and that higher penalties will issue where warranted. The only way a company can fully insulate itself from costly penalties is to be able to clearly demonstrate compliance, a difficult standard to meet in light of the amount of information available and imputed to companies, as well as the difficulties associated with completing investigations within 10 working days of receiving notice.

—By Erin M. Bosman, Ellen N. Adler, Julie Y. Park and Dean S. Atyia, Morrison & Foerster LLP

*Erin Bosman is a partner and Ellen Adler, Julie Park and Dean Atyia are associates in Morrison & Foerster's San Diego office. Bosman is chairwoman of the firm's product liability group.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] "CPSC Imposes Record-High Penalties in 2014," Morrison & Foerster Client Alert, Nov. 11, 2014, available at <http://www.mofo.com/~media/Files/ClientAlert/2014/11/141111CPSCImposesRecordHighPenaltiesin2014.pdf>.

[2] See United States Consumer Product Safety Commission, "General Electric Agrees to \$3.5 Million Civil Penalty, Internal Compliance Program for Failure to Report Defective Ranges and Dishwashers" (Feb. 19, 2015), available at <http://www.cpsc.gov/en/Newsroom/News-Releases/2015/General-Electric-Agrees-to-35-Million-Dollar-Civil-Penalty/>.

---

All Content © 2003-2015, Portfolio Media, Inc.