

# Client Alert.

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## U.S. Consumer Product Safety Commission Issues Final Rule on Civil Penalty Factors

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The U.S. Consumer Product Safety Commission (the “CPSC”) has just issued a final rule on the civil penalty factors it and courts will apply in future enforcement actions resulting from violations of the Consumer Product Safety Act, the Federal Hazardous Substances Act and the Flammable Fabrics Act. As a practical matter, the rulemaking also establishes the framework the CPSC will use in making penalty demands associated with statutory infractions resulting in consumer product recalls and in related settlement negotiations.

### BACKGROUND

This CPSC action was required by Congress in the Consumer Product Safety Improvement Act (“CPSIA”), Pub. L. 110-314 (August 14, 2008). It offers the CPSC’s guidance about how it will interpret the CPSIA’s civil liability factors to calculate penalties, and is part of a flurry of regulatory activity that has taken place since the CPSIA was enacted. (Click [here](#) for our client alerts on the CPSC’s activities in 2009.)

The rulemaking preamble can be found at 75 *Fed. Reg.* 15993; the penalty factor rule went into effect on March 31, 2010 and will eventually be codified at 16 Code Fed. Reg. § 1119.

### ASSESSMENT OF PENALTIES UNDER THE CIVIL LIABILITY FACTORS

In general, the CPSC has stated that it prefers to reserve “maximum flexibility” within the statutory framework, and at the same time make its framework for penalty calculations transparent to the regulated community. It intends to deploy civil penalties “to promote the underlying goals of the CPSA—specifically that of protecting the public against unreasonable risks of injury associated with consumer products.”

The following is the CPSC’s interpretation of each potentially applicable civil liability statutory factor addressed by its rulemaking:

#### *Nature, Circumstances, Extent, and Gravity of the Violation (16 CFR § 1119.4(a)(2))*

The CPSC’s approach here will be to examine the “totality of the circumstances,” allowing it to weigh all of the facts involved in a violation to assess its seriousness. In evaluating this factor, the CPSC will also refer to the other “appropriate” factors described in 16 CFR § 1119.4(b), discussed below.

#### *Nature of the Product Defect (16 CFR § 1119.4(a)(3))*

Here, the CPSC focused on the nature of the hazard presented by the violation: the more “substantial” the product hazard, presumably, the greater the penalty after other factors are considered. It is important to note in this regard, however, that a violation warranting a penalty can occur *without* involving a defective product; for example, a failure to

## Client Alert.

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supply a product certification where required. In such instances, the CPSC indicated that it will turn to the other statutory factors for determining civil penalties.

### *Severity of the Risk of Injury (16 CFR § 1119.4(a)(4)) and Occurrence or Absence of Injury (16 CFR § 1119.4(a)(5))*

The CPSC will examine the likelihood of injury, illness, or death, the population group exposed, and the intended or reasonably foreseeable use or misuse of the product. In a separate but related factor, the CPSC will consider whether illness, injury, or deaths have in fact occurred associated with the violation.

### *Number of Defective Products Distributed (16 CFR § 1119.4(a)(6))*

The CPSC reserved its discretion to evaluate this factor based on the “actual” number of products placed in the stream of commerce. This could lighten penalties for entities that reduce the number of products placed into commerce through a recall, and particularly benefit those that conduct a cautionary, “wider-than-necessary,” recall.

### *Appropriateness of Penalty in Relation to the Size of the Business of the Person Charged (16 CFR § 1119.4(a)(7))*

With CPSC-imposed penalties now ranging to a high of \$100,000 for *each* knowing violation and \$15 million for a series of violations, the economic consequences of a violation for any business can be serious. In this regard, and especially for small and mid-size businesses, the CPSC’s authority to mitigate a penalty takes on particular importance. CPSC’s central concern here is a business’s ability to pay, balanced against the deterrent effects of civil penalties. To that end, a business’s liquidity, solvency, and profitability will guide CPSC’s assessment of the appropriateness of the penalty, but the burden is on the business facing a penalty to provide such evidence—and as CPSC noted, the economic consequence must be “undue,” not merely adverse.

### *Other Factors As Appropriate (16 CFR § 1119.4(b))*

Finally, the CPSC or the person charged with the violation can raise any other factors believed relevant to determining a penalty amount. For example, such factors might include a business pointing to the pre-existence of a safety or compliance program or CPSC pointing to a business’s history of noncompliance and/or dilatory tactics in response to the CPSC’s requests.

## CONCLUSION

Businesses placing consumer products on the market can expect to see the CPSC and courts apply this rule in future enforcement actions brought pursuant to a variety of consumer product safety laws, both in recall situations and even where violations do not result in a recall. Indeed, under a March 12, 2010 consent decree, Daiso Holding USA, Inc. paid a \$2.05 million civil penalty for violations of CPSC requirements and this was heralded by CPSC Chair Inez Tenenbaum as “precedential.”

Morrison & Foerster advises a variety of consumer and children’s product manufacturers, distributors, and retailers and several of their trade associations on issues relating to CPSC and similar state and local consumer protection requirements. For further information, please contact [Robert Falk](#) or [Bill Tarantino](#) in our San Francisco office or [Linda Lane](#) in our San Diego office.

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