

CPSC ACTIVELY ENFORCING CIVIL PENALTIES

On October 12, 2004, the U.S. Consumer Product Safety Commission (CPSC) issued a news release announcing that a toy manufacturer, Battat Inc., had agreed to pay a civil penalty of \$125,000 to settle allegations that it did not give the government a timely report of a safety hazard involving a children's toy. This was not the largest civil penalty secured by the Commission. In April 2003, Walmart agreed to pay \$750,000 settlement for a lawsuit filed by the Department of Justice, on behalf of the CPSC, for failing to report safety hazards associated with home exercise equipment.

<http://www.cpsc.gov/CPSCPUB/PREREL/prhtml03/03118.html>

The Battat result is noteworthy because a civil penalty was paid even though there seems to have been no reports of injury. Further, according to the news release, Battat and CPSC were not able to replicate the small parts hazard during testing, and Battat agreed to conduct a recall of 300,000 Parents Bee Bop Band drum sets in April 2003. According to the CPSC's new release, Battat's infraction was that, without first informing the CPSC, Battat modified the toy six times to try to eliminate a small parts problem.

(<http://www.cpsc.gov/CPSCPUB/PREREL/prhtml05/05007.html>)

The announcement of the Battat civil penalty serves not only as a warning to toy manufacturers but as a reminder to all manufacturers, importers, distributors and retailers of consumer products that now is the time to revisit their internal compliance policies concerning the requirements of the Consumer Product Safety Act and the CPSC's enforcement expectations.

The 24 Hour Reporting Requirement of the Consumer Product Safety Act (CPSA) and Maximum Civil Penalties

The CPSA Section 15 (b) and supporting regulations require that manufacturers, importers, distributors, and retailers report to the CPSC within 24 hours of obtaining information which reasonably supports the conclusion that a product does not comply with a safety rule issued under the CPSA, or contains a defect which could create a substantial risk of injury to the public or presents an unreasonable risk of serious injury or death. 15 U.S.C. § 2064(b). In 1990, Congress enacted statutory amendments that provided for periodic adjustments to the maximum civil penalty amounts authorized under the Consumer Product Safety Act (as well as the Federal Hazardous Substances Act, and the Flammable Fabrics Act). The current maximum civil penalty amounts are \$7,000 for each violation and \$1,650,000 for any related series of violations.

Are Companies Really Expected to Comply with the 24 Hour Reporting Requirement?

Yes, companies will be held to the 24 hour reporting requirement under certain circumstances. The difficulty for companies is in analyzing the information before them and knowing when. In reality, the 24 hours reporting requirement is not treated by the CPSC as an absolute. The CPSC refers to this as the "general rule." It makes clear that firms should not delay reporting in order to determine with certainty whether a report is required and that reports of potential hazards and risks should be made even while a company is still investigating a matter. Yet, the CPSC acknowledges that "if a firm is uncertain whether information must be reported, it may spend a reasonable amount of time investigating the matter. A firm usually should not spend more than 10 business days on an investigation before reporting."

Yet, CPSC is empowered and can seek substantial civil penalties if it is determined that a company failed to notify the Commission within 24 hours of receiving notice that a product was defective and had seriously injured or caused a death of person. Whether the CPSC will seek the civil penalties is dependent on many factors, including what type of product is involved and the Commission's assessment of what was reasonable under the circumstances.

In some product categories, such as marbles, small balls, latex balloons and other small parts, used by children, CPSC regulations specifically state that "Firms shall not wait to determine conclusively the cause of the death, injury, cessation of breathing or necessity for treatment. An allegation that such a result followed the choking incident is sufficient to require a report." 16 CFR 1117.3 Clearly, in this product category the 24 period is likely to be enforced.

What Type of Information Could a Company Have That Would Expose It to Civil Penalties If Not Reported Within the 24 Hour Reporting Requirement?

Any time a company works with, or in response to, the CPSC concerning a product recall, the CPSC will request or demand detailed corporate records, including any that might indicate and date knowledge of a defect, a violation of a safety rule, or an unreasonable risk. This information may be in the form of quality control data, product returns, component product or design changes, warranty information, customer complaints, lawsuits, or any other information suggesting a product safety problem. The CPSC will also want to look at reports from experts, test reports, product liability lawsuits or claims, consumer or customer complaints, quality control data, scientific or epidemiological studies, reports of injury, information from other firms or governmental entities, and any other relevant information. The Commission will also look to whether the company has learned that a court or jury has determined that one of its products has caused a serious injury or death, and whether a reasonable person could conclude based on the information in, and result of, the lawsuit that the product creates an unreasonable risk of serious injury or death.

Companies will need to demonstrate that they have a system in place to make sure this kind of information is captured and channeled to responsible persons within the firm so they may evaluate it and report product safety defects or hazards in a timely manner.

The CPSC examines the records so that it may determine and judge for itself what the company actually knew about the potential hazard posed by the product and what a reasonable person or company acting in the circumstances would have known. The CPSC will deem a firm to know what it would have known if it had exercised due care in investigating the matter. Companies that the Commission considers to be irresponsible and uninformed about the safety of their products run great risk of future civil penalty liability.

Imputed Knowledge of Defects and Safety Hazards

In determining whether to pursue civil penalties, the CPSC will consider criteria concerning imputed knowledge. The Commission looks to whether reportable information was received by an official or employee who may reasonably be expected to be capable of appreciating the significance of the information. A company will be deemed to know what it would have known if it had exercised due care to ascertain the truth of complaints or other representations. This includes the knowledge a company would have if it conducted a reasonably expeditious investigation in order to ascertain whether to report to the CPSC an alleged death or grievous bodily injury or other information associated with its product.

In other words, it is essential that every manufacturer have a system in place to ensure that all reports of product defects and claims of injuries or death be expeditiously moved to a person charged with responsibility for CPSC compliance. While quality control processes contemplated by the ISO 9000 series of standards can be an important part of this system concerning defects, legal departments may also have reportable information and should reaffirm that they have appropriate compliance processes in place.