



U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814-4408

Record of Commission Action
Commissioners Voting by Ballot*

Commissioners Voting: Chairman Hal Stratton
Commissioner Nancy Nord
Commissioner Thomas H. Moore

ITEM:


Draft *Federal Register* Notice Seeking Public Comment on New Proposed Regulation on Civil Penalty Factors
(Briefing package dated June 23, 2006, OS No. 5030)

DECISION:

The Commission voted unanimously (3-0) to approve the publication of the draft *Federal Register* notice seeking public comment on a proposed regulation on civil penalty factors. The *Federal Register* notice describes a new proposed regulation identifying and explaining other civil penalty factors that the Commission and staff may consider in determining the amount of a civil penalty to be sought upon commencing an action of compromising such a penalty. Although notice is not required for an interpretative rule, the proposed regulation will be published in the *Federal Register* for notice and comment for 30 days pursuant to the Administrative Procedure Act, 5, U.S.C. § 552, *et seq.*

Commissioner Moore submitted the attached statement to accompany his vote.

For the Commission:


Todd A. Stevenson
Secretary

* Ballot vote due July 5, 2006

STATEMENT OF THE HONORABLE THOMAS H. MOORE ON THE DRAFT
FEDERAL REGISTER NOTICE SEEKING PUBLIC COMMENTS ON A NEW
PROPOSED REGULATION ON CIVIL PENALTY FACTORS

I am voting to go out for public comment on this proposal but if such a list of additional factors is to be provided to the business community, I would have preferred to see it in the form of Compliance enforcement guidance, rather than as an interpretive rule of the Commission. As with the proposal on adding new factors for consideration in section 15 reporting, I do not believe that these factors are all stated with enough clarity to prevent businesses from being misled by them. Several of the proposed factors present other problems as well.

Some of the factors should come as no surprise to any business making consumer products; for example, that repeat offenders are viewed differently than first time offenders. Businesses that repeatedly fail to report potential product hazards should expect that will weigh against them. Companies who put profit ahead of safety in deciding when or whether to report should similarly not be surprised by the Commission's reaction to that. However there are several factors listed which trouble me.

The first is "timeliness of response." Firms are required to report immediately upon obtaining information which reasonably supports the conclusion that their product contains a defect which could create a substantial product hazard, creates an unreasonable risk of serious injury or death, or fails to comply with an applicable safety standard or with a voluntary standard upon which the Commission has relied. If we are considering a civil penalty against a company, that means we believe they have already failed to report in a timely manner. If this paragraph means we view a company who waits, say five years, to report while incidents and injuries pile up differently than we view a company who waits five months, then I would say that is true. But what I do not want any company to take away from this factor is that they can wait for five months and think that because they reported *fairly* promptly that will gain them some credit with us. What this factor **should** convey to companies is the longer they wait, the worse it will be for them. They can save themselves from serious consequences by reporting as soon as they have the information that first makes them think they might have a problem.

We certainly encourage companies to adopt "safety and compliance monitoring" programs. But again, the factors in this proposal only come into play after a company has already failed to report. A bad safety and compliance monitoring program should be treated the same as not having a program at all. Companies cannot hide behind a paper program. The program has to work. That does not mean it has to be perfect, but it has to be a real program that works the vast majority of the time. Continuing failures to report by a company that has a safety and compliance monitoring program should raise other and more serious questions in our Compliance officers' minds.

The other factor that concerns me is "product failure rate." I know some companies have been trying for years to get the Commission to acknowledge that there is

a level of failures for certain types of products (often electrical products) that is normal and that only if failures go above that level (whatever it might be) should a company be held responsible for knowing that it has a reportable problem. If this is what this is intended to mean, then I cannot agree with it. There is no reasonable rate of failure for products that create or are capable of creating hazards when they fail. Consumers expect products to stop working eventually but they do not expect that the product will start a fire or otherwise present a hazard when it fails. Businesses know the difference between harmless failure and hazardous failure. We should not give them occasion to maintain that they do not.

Finally, I hope commenters will address the question of whether or not the Commission has the authority to add factors for Commission consideration in civil penalty determinations that are not enumerated in section 20 of the Consumer Product Safety Act.