



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 Issuing a Final Interpretative Rule and Responding to Public Comment on Proposed Revisions to Section 15
(Briefing package dated July 7, 2006)

DECISION:

The Commission voted (2-1) to approve the publication of the draft *Federal Register* ("FR") notice issuing a final interpretative rule on section 15(b) of the Consumer Product Safety Act, 15 U.S.C. § 2064(b). Chairman Stratton and Commissioner Nord voted to approve the publication of the draft FR notice. Commissioner Moore voted to not publish the draft FR notice. The FR notice responds to the comments received on the proposed revisions and represents the view of the Commission's Offices of Compliance and the General Counsel. The interpretative rule is final and is effective on the date of publication in the FR pursuant to the Administrative Procedure Act, 5, U.S.C. § 552, *et seq.*

Chairman Stratton and Commissioner Nord submitted the attached statements to accompany their votes.

For the Commission:

A handwritten signature in black ink, appearing to read "T. A. Stevenson", written over a horizontal line.

Todd A. Stevenson
Secretary

* Ballot vote due July 13, 2006

**STATEMENT OF HAL STRATTON, CHAIRMAN
U.S. CONSUMER PRODUCT SAFETY COMMISSION,
ON THE FINAL INTERPRETIVE RULE ON SECTION 15(B) OF THE
CONSUMER PRODUCT SAFETY ACT**

JULY 13, 2006

Our system for ensuring consumer product safety remains the best in the world. However, it needs continuous improvement in order to maximize safety without unduly impeding the free market. One of the key components of our safety system is the reporting requirement of section 15(b) of the Consumer Product Safety Act. The challenge has been to provide better guidance to stakeholders regarding how potential product hazards are analyzed by the Consumer Product Safety Commission (CPSC) without handcuffing Compliance staff, nor unintentionally creating safe harbors. Because I believe that the proposed changes to our interpretive regulations strike the right balance, I vote today to make them final.

It is my hope that the inclusion of these additional factors in the Code of Federal Regulations (CFR) will help make the CPSC's internal evaluative process more transparent. Because CPSC staff already consider these factors in determining whether a defect exists which could create a substantial product hazard, such additions to the interpretive regulations are consistent with this agency's goal of openness, and will allow better understanding of how the CPSC functions. By demystifying the process, I expect stakeholders to be more inclined to submit section 15 reports when required.

During my four years at the CPSC, I thought it essential that this agency engage regulated parties to determine how best the CPSC could accomplish its goals without creating a drag on commerce. As a result, the agency not only developed what has become the CPSC retailer reporting model, but it also set records for section 15 reports, section 15 recalls, and civil penalties.¹ Remarkably, current compliance measures remain high despite flat budgets and the loss of over 50 FTEs over the last two years.² I hope stakeholder engagement remains a high priority for my successor. Without such interaction, the CPSC could revert to a 'gotcha' mentality with regard to enforcement.

The changes we proposed include adding three factors to be considered when determining whether the risk associated with a product will render such product defective: (1) obviousness, (2) product warnings and instructions, and (3) consumer misuse.³ Because these factors are already considered by Compliance staff, these additions will shed light on the CPSC's defect evaluation process.

¹ See CPSC Office of Compliance chart attached.

² The CPSC has gone from 471 to 420 full-time equivalents (FTEs) over the past two fiscal years.

³ All of these concepts are grounded in common law and can be found in the current Restatement of Torts.

A. *Obviousness*. Though the fact that a risk of injury is obvious does not bar a finding of product defect, it is a consideration for CPSC staff. It is an accepted principle of tort law that sellers are not subject to liability for failing to warn or instruct regarding risks that should be obvious to consumers.⁴ Taking into account obviousness of a risk is consistent with the Restatement of Torts in its assessment that “the fact that a danger is open and obvious is relevant to the issue of defectiveness...”⁵ However, this consideration alone is not dispositive in determining whether a product should be deemed defective.

B. *Warnings*. Proper warnings and instructions on safe use should always be included with any potentially dangerous consumer product. This agency will continue to encourage appropriate instructions and will require warnings as necessary. Such information alerts consumers to product risks, and allows them to mitigate such risks. Though warnings alone rarely make a hazardous product safe, they remain relevant to CPSC staff defect analysis.

C. *Misuse*. Adults must bear some responsibility for their own behavior. The role of consumer misuse of a product should be considered in determining if a product is defective. This factor is already explicitly included in determining whether a product defect presents a substantial product hazard.⁶ I concur with the Restatement of Torts in its view that, “[p]roduct sellers and distributors are not required to foresee and take precautions against every conceivable mode of use and abuse to which their products might be put.”⁷ Put another way, product misuse and the foreseeability of such misuse may be relevant to any defect analysis, especially where the conduct of the consumer may be “so unreasonable, unusual, and costly” to avoid that a seller has no duty to design against them.⁸ In such instances, a defect may not exist even though injuries occur.

⁴ See *Bourne v. Gilman*, No. 05-3300, slip op. at 8 (7th Cir. June 20, 2006) (affirming no liability for goalpost manufacturer because of obviousness of danger in attempting to pull it down: “obviousness remains a relevant inquiry because ... the question of what is unreasonably dangerous depends upon the reasonable expectations of consumers and expected users”); RESTATEMENT OF TORTS, Product Liability § 2, cmt. j.

⁵ RESTATEMENT OF TORTS, Product Liability § 2, cmt. d (1998): “The fact that a danger is open and obvious is relevant to the issue of defectiveness but does not necessarily preclude a plaintiff from establishing that a reasonable alternative design should have been adopted that would have reduced or prevented injury to the plaintiff.”

⁶ See 16 C.F.R. § 1115.12(g)(1)(iii) (2004): “*Severity of the risk*. A risk is severe if the injury which might occur is serious and/or if the injury is likely to occur. In considering the likelihood of any injury the Commission and the staff will consider ... the intended or reasonably foreseeable use or misuse of the product”

⁷ RESTATEMENT OF TORTS, Product Liability § 2, cmt. m (1998).

⁸ See *id.* § 2 cmt. p:

The ABC Chair Co. manufactures and sells oak chairs. The backs of the chairs have five horizontal wooden bars shaped to the contour of the human back. John, a college student, climbed up to the top bar of an ABC chair to reach the top shelf of a bookcase. The chair tipped and John

Additionally, I voted to insert new language regarding consideration of relevant consumer product safety standards. Compliance with relevant safety standards is already a consideration when CPSC staff evaluate any potential product hazard.⁹ Adding such provisions to the CFR not only promotes transparency, but also encourages importers, retailers, and manufacturers to comply with all such standards. Both mandatory and voluntary standards play essential roles in assuring safe consumer products. Promoting such standards remains a goal of this agency. Of course, consideration of compliance or noncompliance with a standard is only relevant if the standard addresses the risk under consideration. Further, this policy statement is not intended to reduce the volume of reporting to the Office of Compliance.

Finally, because no product's utility or lifespan is infinite, this agency recognizes that the number of any type of potentially hazardous product being used by consumers decreases over time once sales cease. I believe such recognition is reasonable and appropriate to consider when evaluating the impact of the number of defective products distributed in commerce pursuant to 16 C.F.R. § 1115.12(g)(1)(ii) as part of a substantial product hazard determination.

As the preamble rightly says, “[w]hen a potential hazard first appears long after a product was sold, [] the more relevant number is not the number of products originally sold, but the number still with consumers.” If a product contains a defect, but consumer exposure is very low, the potential for injury may fall below the level of substantial product hazard. However, I also must reiterate that this acknowledgement of the finite life and utility of any consumer product in no way justifies any delay or failure to report a potential substantial product hazard. Any evidence of such intentional delay will be relevant to a penalty determination.

In closing, I wish to emphasize that nothing in these changes to the interpretive regulations, nor any single factor or consideration is intended to imply, create or have the effect of creating exceptions, exemptions or a “safe harbor” from any obligations under section 15, or to relieve any firm from fully considering its obligations to report. Firms act at their peril if they focus only on one or a few relevant section 15 considerations to

fell, suffering serious harm. John brings an action against ABC, alleging that the chair should either have had the stability to support him when standing on the top bar or have had a differently designed back so that he could not use the bars for that purpose. The ABC chair is not defectively designed. John's misuse of the product is so unreasonable that the risks it entails need not be designed against.

Id. illus. 20.

⁹ Such consideration of compliance with mandatory standards is consistent with the Restatement of Torts which states:

(b) a product's compliance with an applicable product safety statute or administrative regulation is properly considered in determining whether the product is defective with respect to the risks sought to be reduced by the statute or regulation, but such compliance does not preclude as a matter of law a finding of product defect.

Id. § 4.

the exclusion of all relevant considerations. It is my hope that these changes not only further the goal of regulatory transparency, but also promote continued CPSC engagement of stakeholders that will result in further increases in section 15 reports.

CPSC Office of Compliance Section 15 Recalls,
Section 15 Reports, and Civil Penalties
FY 1990-2005

Fiscal Year	Section 15 Recalls	Section 15(b) Reports	Civil Penalties
1990	105	162	\$782,000
1991	153	182	\$459,000
1992	156	203	\$897,500
1993	178	214	\$262,000
1994	159	212	\$715,000
1995	279	245	\$1,035,000
1996	300	239	\$915,000
1997	271	248	\$1,039,000
1998	230	225	\$1,460,000
1999	262	264	\$922,500
2000	252	295	\$2,845,000
2001	284	346	\$6,500,000
2002	343	367	\$4,215,000
2003	242	341	\$2,350,000
2004	309	450	\$4,200,000
2005	355	545	\$8,800,000



U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

**STATEMENT OF THE HONORABLE NANCY A. NORD, VICE CHAIRMAN, U.S.
CONSUMER PRODUCT SAFETY COMMISSION ON DRAFT FEDERAL REGISTER
NOTICE ISSUING A FINAL INTERPRETATIVE RULE AND RESPONDING TO
PUBLIC COMMENT ON PROPOSED
REVISIONS TO SECTION 15
July 13, 2006**

I am today voting in favor of issuing a final interpretive rule regarding the factors that may be used by the Consumer Product Safety Commission (CPSC) in determining when a report must be submitted under Section 15(b) of the Consumer Product Safety Act (CPSA). This interpretive rule is intended to give manufacturers, retailers and others covered by this law greater clarity as to what factors may be considered when determining when a Section 15(b) report must be submitted to the CPSC.

Section 15(b) does not require and was not intended by Congress to require that companies report to the CPSC every product defect associated with a consumer product. It requires reporting to the CPSC those defects that could rise to the level of a "substantial product hazard" or those that "create an unreasonable risk of serious injury or death." While the Commission has sought to explain through a previous interpretive rule those factors that the Office of Compliance will review in making these determinations, 28 years have passed since that initial guidance and several among the regulated community have expressed to the Commission during that time that they lack an adequate understanding of the factors that the Office of Compliance considers in determining both when a consumer product "defect" exists and when such a defect triggers the reporting requirement.

Thus, the additional factors set forth today represent a good faith attempt both to provide additional guidance in this regard and to explain the criteria that the Office of Compliance in fact considers in making such determinations. While some have questioned whether setting forth these additional factors may create one or more "safe harbors" for those otherwise required to report under Section 15(b), I would simply point out that any of these factors, as well as those previously issued through interpretive rule, could mitigate either for or against a reporting requirement. Indeed, the final version of the interpretive rule has been modified in response to several comments received on the proposed rule to ensure that these additional criteria do not create or appear to create any new exception or "loophole" to the Section 15(b) reporting requirement.

I believe that Section 15(b) of the CPSA is critical to our mission to protect the public from products that create unreasonable risks of injury and I fully support the vigorous enforcement of this and the other provisions of our governing statutes. However, effective and fair enforcement starts with imparting to the regulated community a reasonable understanding of what the law requires of them. That is the intent of this interpretive rule and that is what I will work to ensure that it accomplishes.