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CPSC DESK REFERENCE

SECTION 15 OF THE CONSUMER PRODUCT SAFETY ACT

Eric A. Rubel, Michelle F. Gillice, S. Michael Gentine,
Jessica L. Wang and Kelsie Sicinski

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Key Contacts



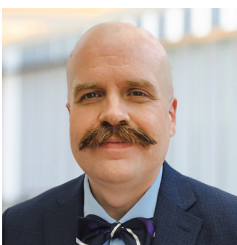
Michelle F. Gillice

Partner
Washington, D.C.
michelle.gillice@arnoldporter.com
+1 202.942.6589



Eric A. Rubel

Senior Counsel
Washington, D.C.
eric.rubel@arnoldporter.com
+1 202.942.5749



S. Michael Gentine

Counsel
Washington, D.C.
mike.gentine@arnoldporter.com
+1 202.942.5052



Jessica L. Wang

Senior Attorney
Washington, D.C.
jessica.wang@arnoldporter.com
+1 202.942.5792



Kelsie Sicinski

Associate
Washington, D.C.
kelsie.sicinski@arnoldporter.com
+1 202.942.6003

This Desk Reference is intended to be a general summary of the law and does not constitute legal advice. You should consult with counsel to determine applicable legal requirements in a specific fact situation.

*We thank our recently retired colleague, Jennifer Karmonick, for her extensive efforts over the years on this Desk Reference.

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Overview

The U.S. Consumer Product Safety Commission (CPSC or the Commission) is a small federal agency with a big job: protecting consumers from unreasonable risks of injury associated with the use of thousands of types of consumer products. With an appropriation for fiscal year 2023 of \$152.5 million and about 550 employees¹ — tiny by federal government standards — CPSC uses safety data submitted by companies pursuant to the notification requirements under Section 15 of the Consumer Product Safety Act (CPSA) to help carry out the agency’s mandate.² The Consumer Product Safety Improvement Act of 2008 (CPSIA) dramatically increased the maximum penalties for noncompliance,³ and both CPSC and the U.S. Department of Justice (DOJ) have used that authority to impose multimillion-dollar penalties against a number of companies for alleged late reporting under Section 15 and other violations.

Congress created CPSC as an independent commission, which means that it does not report to the President either directly or through any department or agency of the federal government. CPSC can have up to five Commissioners, one of whom serves as Chair, and only three of whom can be from the same political party. CPSC’s Chair and Commissioners are appointed by the President for seven-year terms with the advice and consent of the Senate.⁴

Currently, the Commission includes three Democratic Commissioners and one Republican:

- Chair Alexander Hoehn-Saric (term through October 2027) (Democrat)
- Richard Trumka, Jr. (term through October 2028) (Democrat)
- Mary Boyle (term through October 2025) (Democrat)
- Peter Feldman (term through October 2026) (Republican)

In March 2023, President Biden nominated Douglas Dziak (currently a staffer for Commissioner Feldman) to fill the vacant seat. The Senate Commerce, Science, and Transportation Committee advanced Dziak’s nomination following an October hearing, but he never received a vote on the floor in the first session of the 118th Congress. Dziak’s nomination remains pending in the second session. Notwithstanding the vacancy of the second Republican seat, the Commission has continued its trend of aggressive enforcement of the Section 15 reporting requirements.

This Desk Reference first explains the Section 15 reporting requirements, including the broad scope of CPSC’s jurisdiction, and then discusses routes to a product safety recall, reporting and recall trends, and penalties for late reporting.

Duty to Report to CPSC Under Section 15 of the CPSA

Under CPSA Section 15, a manufacturer, importer, distributor, or retailer of a product that is subject to CPSC’s jurisdiction and that is distributed in commerce must inform CPSC “immediately” upon the receipt of information that “reasonably supports the conclusion that such product —

1. fails to comply with an applicable consumer product safety rule or with a voluntary consumer product safety standard upon which the Commission has relied under section 9 [15 U.S.C. § 2058];⁵
2. fails to comply with any other rule, regulation, standard, or ban under [the CPSA] or any other Act enforced by the Commission;⁶
3. contains a defect which could create a substantial product hazard...; or
4. creates an unreasonable risk of serious injury or death.”⁷

The only exception to the reporting requirement is if the “firm”⁸ “has actual knowledge that the Commission has been adequately informed” of such defect, failure to comply, or risk,⁹ though, as discussed below, CPSC has interpreted this provision narrowly. The statute and CPSC’s interpretive regulations with respect to subparts (3) and (4) above do not provide a “bright line” as to when a duty to notify CPSC arises. The thrust of CPSC’s regulations is to encourage companies to report early and often.¹⁰

What Is a “Consumer Product”?

The CPSA defines a “consumer product” as:

any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation or otherwise....¹¹

The CPSA excludes various products from the definition of a “consumer product,” including motor vehicles and motor vehicle equipment, aircraft, boats, pesticides, tobacco, firearms, food, drugs, cosmetics, and medical devices — the safety of most of which is regulated by other agencies.¹² The CPSA also excludes “any article which is not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer.”¹³ In addition, buildings and structures are not “consumer products” under the statute.¹⁴

Companies rarely have challenged CPSC’s assertion of jurisdiction in court, and only a few decisions have addressed the meaning of the statutory term “consumer product.” In one case, an administrative law judge (ALJ) considered whether CPSC had jurisdiction over allegedly defective fire sprinkler heads.¹⁵ The ALJ in *In re Central Sprinkler Corp.* found that CPSC had jurisdiction over the sprinkler heads even though they were installed in commercial and industrial buildings, they were marketed primarily to professional contractors, and consumers did not actively use the product.¹⁶

The ALJ focused on the fact that the sprinkler heads were produced and sold as distinct articles of commerce, and found that a “consumer product” need not be available “off the shelf” at the retail level or used in consumers’ homes.¹⁷ The ALJ further found that “products which are primarily or exclusively sold to industrial or individual buyers would be included within the definition of consumer product so long as they were produced or distributed for use of the consumers.”¹⁸ Finally, the ALJ found that the “weight of judicial opinion” determined that the “focus of the Act is directed towards consumers’ exposure to hazards associated with products.”¹⁹ Similarly, courts have focused on the exposure of consumers to harm in finding that CPSC has jurisdiction over aluminum branch circuit wiring systems,²⁰ aerial tramways at state fairs,²¹ refuse bins,²² and amusement park rides.²³

The *Central Sprinkler* decision is consistent with CPSC’s historically broad interpretation of the term “consumer product” to include articles used by or for the enjoyment of consumers or having an effect on consumer safety. For example, CPSC has asserted jurisdiction over escalators and elevators, reasoning that consumers could be exposed to risks associated with those products. CPSC explained in a 1978 Advisory Opinion, “Congress’ overriding concern in enacting the CPSA was to provide one agency with jurisdiction over products which could expose consumers to unreasonable risks of injury, regardless of where that exposure occurred.”²⁴ Consistent with that logic, CPSC has asserted jurisdiction to reach many seemingly “commercial” products, such as:

- vending machines;²⁵
- cement-asbestos wallboard used in construction;²⁶
- blown-in fiberglass insulation;²⁷

- fire alarm equipment;²⁸
- supermarket freezer cases;²⁹
- child-resistant packaging of drug products distributed for institutional use;³⁰ and
- stadium light poles at schools and municipal fields.³¹

In practice, however, it can be difficult in some cases to predict where CPSC will draw the jurisdictional line, as CPSC has not articulated a bright-line test to rule out products that CPSC likely would agree are outside its jurisdiction but yet arguably are for the use or enjoyment of consumers or could affect their safety. Further, the scope of products that can expose consumers to potential harm is so broad that this fails to be a viable test for determining what is a consumer product. For example, defective equipment used in a chemical plant could explode, exposing consumers in the vicinity of the plant to harm. Yet such industrial equipment could not reasonably be viewed as a “consumer product” under the CPSA.

Reporting a Failure to Comply with a Rule, Regulation, Ban, or Standard Under Any Act Enforced by CPSC

The Section 15 reporting requirement is triggered upon the receipt of information that “reasonably supports the conclusion” that any product over which CPSC has jurisdiction and that is distributed in commerce fails to comply with “any ... rule, regulation, standard, or ban” under any Act enforced by the Commission, e.g., the CPSA, Federal Hazardous Substances Act (FHSA), Flammable Fabrics Act (FFA), Poison Protection Packaging Act (PPPA), and Refrigerator Safety Act.³² Thus, CPSC has pursued late-reporting penalties not only for consumer products, but also for drugs that lacked child-resistant packaging, as required under the PPPA.³³

Reporting a Defect That “Could Create” a “Substantial Product Hazard”

Due to the lack of objective criteria to determine when information “*reasonably supports the conclusion*” that a product “contains a defect which *could* create a substantial product hazard,”³⁴ this reporting requirement, along with the duty to notify concerning “unreasonable risks” of serious injury or death (discussed in the next section), can present significant challenges for companies seeking to comply with the law. Thus, it is not surprising that most CPSC late-reporting penalty cases include allegations that the company should have reported earlier under either or both of those two provisions. Accordingly, as a company evaluates whether it has obtained reportable information, it may be helpful to consider the expression that hindsight is 20/20, which may come to mind when a company finds itself defending a late-reporting penalty investigation after conducting a recall, despite the company’s belief that it exercised good-faith judgment in real time.

Factors to Consider: The CPSA defines a “substantial product hazard,” in relevant part, as “a product defect” that “creates a substantial risk of injury to the public.”³⁵ The Act, as amplified by CPSC’s interpretive regulation on Section 15 reporting, identifies the following factors that the Commission and staff will consider in assessing whether a product defect (or noncompliance) “present[s] a substantial risk of injury”:³⁶

- pattern of defect;³⁷
- number of defective products distributed in commerce;³⁸
- severity of the risk;³⁹ or
- other considerations.⁴⁰

These factors are “set forth in the disjunctive,” and CPSC has asserted that any one of them alone can result in a finding that a product defect (or noncompliance) creates a substantial product hazard.⁴¹

CPSC's regulations provide that, as in the product liability context, a product can be defective with respect to its design, manufacture, or warnings.⁴² Factors to be considered in assessing whether a product is defective include, "as appropriate":

- the utility of the product involved;
- the nature of the risk of injury that the product presents;
- the necessity for the product;
- the population exposed to the product and its risk of injury;
- the obviousness of such risk;
- the adequacy of warnings and instructions to mitigate such risk;
- the role of consumer misuse of the product and the foreseeability of such misuse;
- the Commission's own experience and expertise;
- the case law in the area of products liability; and
- other factors relevant to the determination.⁴³

The Commission has cautioned companies that "[r]eliance on one factor alone cannot negate a reporting obligation if other factors, as applied, reasonably support the conclusion that a defect exists."⁴⁴

CPSC instructs companies to consider all reasonably available information to determine "whether it suggests the existence" of a product defect or unreasonable risk.⁴⁵ Examples of such information include engineering, quality control, or production data; information about safety-related production or design changes; information from an independent testing laboratory; product liability suits and claims for personal injury or property damage; consumer complaints; information received from CPSC; and information received from other firms.⁴⁶

In addition, when considering whether information "reasonably supports the conclusion" that a product contains a defect that "could create" a substantial product hazard, a company may not be able to rely on past experience with CPSC as a predictor of whether CPSC will claim there is a duty to notify under Section 15. In the *Spectrum Brands* litigation, the government sought civil penalties, in part, for alleged late reporting that certain coffeemakers contained a defect that presented a risk of burns and lacerations.⁴⁷ The court found that the threshold for reporting is "a lower standard than whether a substantial product hazard *actually* exists."⁴⁸ Therefore, the court reasoned, the fact that CPSC had closed two prior investigations into other models of Spectrum's coffeemakers without seeking recalls did not preclude a late-reporting penalty. According to the court, "even if multiple cases involve products of similar type or design or present similar risks of injury, a number of factors, including the nature of the defect, as well as the number and severity of injuries, could reasonably lead to different results in analogous cases."⁴⁹ The court also found that the defendant could not point to an "established CPSC policy regarding a threshold for substantial product hazard involving defective coffeemakers" that would relieve the defendant from its reporting obligation concerning possible defects in the handles of the coffeemakers' carafes.⁵⁰

Relevance of Voluntary and Mandatory Standards: CPSC has addressed the relevance of voluntary and mandatory standards in determining whether a product presents a substantial product hazard. CPSC may consider compliance or noncompliance with such standards as relevant factors in determining whether a substantial product hazard exists. However, the Commission does not view compliance with such standards as necessarily obviating the need to notify CPSC under Section 15.⁵¹ Further, according to the Commission, "[c]ompliance with a voluntary standard does not preclude a determination that a substantial product hazard exists."⁵² With respect to hazards addressed by mandatory standards, the Commission strikes a somewhat softer tone, stating that, while compliance

does not “provide [a] safe harbor for the failure to report, ... the Commission appreciates that it is generally inappropriate to hold firms to a higher standard for products retroactively.”⁵³

Non-U.S. Information: Neither Section 15 nor CPSC’s interpretive regulations specify the geographic scope of the information to be considered in determining whether there is a duty to notify. However, CPSC has asserted in a policy statement that firms should evaluate not only information about products sold in the United States, but also information about the same or substantially similar products sold outside of the United States “that may be relevant to defects and hazards associated with products distributed within the United States.”⁵⁴

Substantial Product Hazard List: CPSA Section 15(j) authorizes CPSC to “specify, by rule, for any consumer product or class of consumer products, characteristics whose existence or absence shall be deemed a substantial product hazard,” if CPSC determines that:

- “such characteristics are readily observable and have been addressed by voluntary standards”; and
- “such standards have been effective in reducing the risk of injury from consumer products and that there is substantial compliance with such standards.”⁵⁵

CPSC has issued rules establishing that certain hairdryers, children’s upper outerwear with drawstrings at the hood or neck, seasonal and decorative lighting products, and extension cords are deemed to be substantial product hazards.⁵⁶ Most recently, CPSC has added stock and custom window coverings that fail to have certain “readily observable characteristics” to the 15(j) substantial product hazard list.⁵⁷ CPSC has explained its view of the impact of a 15(j) rule: “Although a 15(j) rule does not establish a consumer product safety standard, placing a consumer product on this substantial product hazard list has certain consequences. A product on the ‘substantial product hazard’ list is subject to the reporting requirements of Section 15(b) of the CPSA”⁵⁸ and “shall be refused entry into the United States.”⁵⁹

Reporting an “Unreasonable Risk of Serious Injury or Death”

With respect to reporting information that “reasonably supports the conclusion” that a product creates an “unreasonable risk of serious injury or death,” CPSC considers the term “serious injury” to include “grievous” injuries (e.g., mutilation, amputation, severe burns and/or electrical shock, loss of important bodily functions, and debilitating internal disorders),⁶⁰ as well as injuries requiring hospitalization for medical or surgical treatment, “fractures, lacerations requiring sutures, concussions, injuries to the eye, ear, or internal organs requiring medical treatment, and injuries necessitating absence from school or work of more than one day.”⁶¹ In addition, CPSC advises that chronic or long-term health effects, as well as immediate injuries, should be considered.⁶²

CPSC’s regulations provide that the duty to notify is triggered by information that reasonably supports the conclusion that such a “risk” is presented, even if “no final determination of the risk is possible.”⁶³ Thus, “[t]he Commission expects firms to report if a reasonable person could conclude given the information available that a product creates an unreasonable risk of serious injury or death.”⁶⁴ Moreover, CPSC has stated that companies “should not wait for such serious injury or death to actually occur before reporting.”⁶⁵

The issue of whether a risk is “unreasonable” involves a balancing of factors, including the product’s utility, the nature and extent of the risk, and the availability of alternative designs or products that could eliminate the risk.⁶⁶ Information that may indicate the presence of an unreasonable risk includes “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 other relevant information.”⁶⁷

Timing of the Reporting Obligation

Companies are required to notify CPSC “immediately” upon receiving information that triggers a reporting obligation. CPSC interprets “immediately” to be within 24 hours after a company obtains the requisite information.⁶⁸ If a company is uncertain about whether information is reportable, it may investigate the matter. CPSC presumes that 10 working days are sufficient to conduct “a reasonably expeditious investigation,” unless the company “can demonstrate that a longer period is reasonable.”⁶⁹ Moreover, according to the Commission, companies may not wait until a defect is established scientifically before reporting under Section 15. Rather, CPSC “urge[s]” companies to “report if in doubt as to whether a defect could present a substantial product hazard” or as to “whether a defect exists.”⁷⁰

A company need not report if it has “actual knowledge that” CPSC “has been adequately informed” of a potential hazard.⁷¹ However, CPSC has interpreted this exception narrowly.⁷²

Who Must Report to CPSC Under Section 15 and What to Report

The duty to notify CPSC under Section 15 applies to manufacturers, importers (which are included within the definition of “manufacturer” under the CPSA), distributors, and retailers⁷³ — in CPSC’s view, this covers essentially all persons in the chain of distribution.

CPSC’s interpretive regulation identifies information that should be included in an “Initial Report” under Section 15(b) — identification of the product; the name and address of the manufacturer, if known; the nature and extent of the possible defect; the nature and extent of the risk of injury; and the name and address of the person notifying the Commission.⁷⁴ A more extensive list of information is then specified for a “Full Report” — e.g., how and when the company learned of the issue; the total number of units at issue; the number of units in possession of the manufacturer, distributors, retailers, and consumers; when the product was manufactured, imported, distributed, and sold at retail; any pertinent changes that have been or will be made to the product; details of any corrective action plan; and a description of how the product was marketed and distributed.⁷⁵ Further, CPSC staff typically asks reporting companies for additional information, such as copies of all consumer complaints, claims, and lawsuits related to the reported issue; test reports, analyses and evaluations of the reported issue; relevant engineering drawings and change notices; product samples in their retail packaging; and samples of returned products that demonstrate the reported issue.⁷⁶ If a company does not propose to conduct a recall, the Full Report should explain why the company believes no corrective action is warranted.

Retailers and distributors may provide less information in Section 15 reports than is required of manufacturers and importers. A retailer or distributor that is not also the manufacturer or importer of a product may satisfy its Section 15 notification obligation by submitting to CPSC only the Initial Report information.⁷⁷ The Commission staff may then request additional information from the product’s manufacturer or importer, and in some cases may also request a Full Report from the retailer/distributor. However, as discussed further below, recent actions and statements by CPSC indicate an increased focus on enforcing Section 15 against large e-commerce platforms that facilitate distribution of consumer products by third-party sellers to consumers.⁷⁸

In practice, CPSC typically pursues recalls through a U.S. manufacturer or importer, rather than through a retailer or distributor that did not also import the product. However, retailers and distributors have recalled products when, for example, the manufacturer or importer was insolvent, had ceased operations, or was not located in the United States.⁷⁹ Further, civil penalties have been assessed against retailers as well as manufacturers for alleged late reporting under Section 15.⁸⁰

Confidentiality

Under CPSA Section 6(b)(5), information submitted to the Commission under Section 15 is exempt from public disclosure by the agency under the Freedom of Information Act or otherwise, absent one of the following exceptions:

1. CPSC files an administrative complaint seeking to require a recall;
2. CPSC accepts “a remedial settlement” (i.e., a voluntary recall) in writing;
3. the person who submits the information agrees that the information may be disclosed; or
4. CPSC “publishes a finding that the public health and safety requires public disclosure” with less than 15 days’ notice.⁸¹

In addition, CPSA Section 6(b)(5) excludes from protection information pertaining to a product about which CPSC either (a) files a complaint in federal district court alleging that a consumer product presents an “imminent hazard” under Section 12 of the CPSA or (b) has “reasonable cause to believe” violates a “consumer product safety rule or provision under [the CPSA] or similar rule or provision of any other Act enforced by the Commission.”⁸²

Thus, absent one of these exceptions or exclusions, a Section 15 report that does not result in a recall remains confidential. In addition, even if a recall is conducted, confidential trade secret, commercial, or financial information is exempt from disclosure under Section 6(a).⁸³

CPSC regularly applies the exclusion from Section 6(b)(5) protection for information about products that CPSC has “reasonable cause to believe” violate a mandatory standard. In particular, CPSC posts on its website information about products for which CPSC has sent Notices of Violation to such products’ importers or manufacturers, including identifying the firm, product, violation, and requested remedial action.⁸⁴

Objective Reporting Criteria: CPSC’s “Working Model” (Retailer Reporting Program)

In early 2005, CPSC staff announced a “working model” (also referred to as the Retailer Reporting Program) through which companies seek to satisfy the Section 15 reporting requirements by reaching agreement with the staff on objective reporting criteria. By reporting specified information on an ongoing basis, participating companies have sought protection from late-reporting penalties for alleged failure to timely notify CPSC based upon information submitted under this program. A key objective of the program is to help CPSC, as a data-driven agency, to identify emerging product hazards sooner than would otherwise be possible.

Participating companies reached agreement with CPSC on the reporting triggers, the data to be submitted, the reporting format, and the frequency of reporting. Upon receiving information from retailers, CPSC may follow up through either the Office of Epidemiology, which tracks data for trends, and/or the Office of Compliance. Thus, for example, the Office of Compliance may investigate the reported issue, ask either the retailer or the manufacturer to submit a Full Report, and potentially seek a corrective action.

Currently, a handful of companies are in the program. It has been many years since CPSC admitted any additional companies into the program, notwithstanding requests by companies to participate. CPSC’s Fiscal Year 2022 Operating Plan included as a priority activity “continuing to implement agency approach to advanced analytics, including application to retailer reporting data” but did not otherwise indicate activity with this program.⁸⁵ This language does not appear in CPSC’s Fiscal Year 2024 Operating Plan. Thus, there is no indication that CPSC will reopen the program in the near future to additional companies.

Routes to a Recall

Nearly all consumer product recalls are conducted “voluntarily” by companies in cooperation with CPSC. The two most common routes to a voluntary recall are through (a) CPSC’s preliminary determination process, and (b) the agency’s Fast Track Recall Program, both of which are described below. In addition, while exercised infrequently, CPSC has the authority to seek to compel recalls through administrative litigation and imminent hazard litigation, also discussed below.

Preliminary Determination Process

When a company notifies CPSC under Section 15, either at the company’s initiative or in response to a request for information from the CPSC staff, the company may assert that a recall is not warranted. In such cases, the staff, acting under authority delegated by the Commission, conducts an investigation to assess the hazard and the need for a corrective action. CPSC classifies risks as follows:

Class A Hazard: Exists when a risk of death or grievous injury or illness is likely or very likely, or serious injury or illness is very likely.

Class B Hazard: Exists when a risk of death or grievous injury or illness is not likely to occur, but is possible, or when serious injury or illness is likely, or moderate injury or illness is very likely.

Class C Hazard: Exists when a risk of serious injury or illness is not likely, but is possible, or when moderate injury or illness is not necessarily likely, but is possible.⁸⁶

If the CPSC staff determines that the risk is a Class A, B, or C hazard, the staff then sends the company a letter stating the agency’s “preliminary determination” that the product presents a substantial product hazard and requesting that the company conduct a recall.⁸⁷ The company may then agree “voluntarily” to do so, as occurs in most cases upon receipt of a preliminary determination letter, or may continue to oppose the need for a recall. If the staff concludes instead that no further action is required — because the staff concludes either that the product contains a defect that does not rise to the level of a substantial product hazard or that there is insufficient information to conclude a defect exists — the staff’s practice is to send the company a letter, which typically states that, based on the available information, the staff is not taking action under Section 15 and will assess any new information to determine if further action should be taken to protect the public.

If the company agrees to conduct a voluntary recall, the company negotiates the terms of the corrective action plan with CPSC staff. The CPSC staff, acting under authority delegated to the Executive Director by the Commission in 1981, may accept corrective action plans concerning Class B or C hazards, while the Commission retained its authority to accept corrective action plans for Class A hazards.⁸⁸ According to then-Commissioner Marietta Robinson, between 2000 and 2016, the staff did not determine that any hazards were Class A hazards.⁸⁹ Effective April 2016, the Commission further limited the delegation of authority to the staff, requiring any corrective action plan concerning a product that has been associated with a death to be voted on by the Commission, regardless of the hazard classification and even if the death is unrelated to the hazard for which the recall is being conducted.⁹⁰

Other Measures

The staff may try to persuade a company to conduct a “voluntary” recall by notifying the company that, absent agreement to do so, CPSC plans to issue a press release to warn the public of the alleged

hazard, through what is commonly referred to as a “unilateral” press release. While the authority to issue such unilateral warnings is not new, CPSC’s use of these announcements has increased significantly in recent years.

There is no single defining characteristic that has resulted in CPSC issuing unilateral warnings about a product. However, some themes seen among CPSC’s unilateral warnings include:

- Alleged defects associated with one or more reported fatalities;⁹¹
- Alleged defects related to the agency’s 2023 priorities (as identified in its FY 2023 Operating Plan), such as high-energy density batteries, micromobility devices, smoke and carbon monoxide alarms, and hazards to children;⁹² and
- Alleged hazards presented by products that CPSC claimed violate federal safety standards (e.g., the federal Infant Sleep Products and Toy Safety regulations).⁹³

In some cases, companies voluntarily recall products after CPSC issues a public warning.⁹⁴ In other cases, however, particularly those involving smaller, less-conspicuous companies or non-U.S. manufacturers selling products on third-party internet platforms, CPSC’s unilateral warnings have not resulted in recalls.⁹⁵ In the case of Leachco infant loungers, shortly after issuing the unilateral release, CPSC filed an administrative complaint to compel Leachco to recall the infant loungers, as discussed further below.⁹⁶ In addition to unilateral press releases, the staff has on occasion, over the manufacturer’s objection, notified retailers of an alleged product hazard and requested that they stop selling the product.⁹⁷

Before issuing a unilateral warning about a company’s product, CPSC must take “reasonable steps” to ensure that the information it discloses about a company’s product is “accurate,” “fair in the circumstances,” and “reasonably related to effectuating the purposes of [the CPSA].”⁹⁸ CPSC must also provide advance notice to the company before issuing the statement and provide an opportunity to comment or object.⁹⁹ CPSC can reduce the statutory 15-day notice period if CPSC “publishes a finding that the public health and safety requires a lesser period of notice.”¹⁰⁰ A company can file a lawsuit to seek to block CPSC’s disclosure on grounds that CPSC has not taken the required “reasonable steps.”¹⁰¹

Administrative Litigation to Require a Recall

Absent an agreement by a company to conduct a recall that is acceptable to the CPSC staff, the staff may seek Commission approval to initiate an administrative proceeding under Section 15 of the CPSA to seek to require a manufacturer, importer, distributor, or retailer to provide public notice that a product presents a substantial product hazard, and to require a company to repair, replace, or refund the purchase price of the item at issue — i.e., conduct a recall.¹⁰² Such cases are initiated by the filing of an administrative complaint against the company. Notably, the confidentiality provisions of Section 6(b) do not apply to such complaints,¹⁰³ which thus are publicly available and typically announced by CPSC through issuance of a press release.¹⁰⁴ Once such an action has been filed, CPSC may also seek a preliminary injunction in federal district court to restrain the distribution of the product pending completion of the administrative proceeding to require a recall.¹⁰⁵ The administrative proceeding is held before an ALJ, who serves as the Presiding Officer.¹⁰⁶ Following discovery and the opportunity for a hearing in accordance with 5 U.S.C. § 554, the ALJ files an Initial Decision with the Commission.¹⁰⁷

The Initial Decision becomes final 40 days after issuance absent either (a) an appeal to the Commission (which can be filed by either the company or CPSC Complaint Counsel), or (b) issuance of an order by the Commission to review the Initial Decision.¹⁰⁸ If the Commission then reviews the Initial Decision and orders a recall, the company can seek judicial review of the Commission’s order by a federal district court, pursuant to the Administrative Procedure Act.¹⁰⁹

During the agency’s history, CPSC staff has infrequently resorted to filing an administrative complaint to seek a recall, and litigation to judgment of such proceedings has been rarer still.¹¹⁰ Two actively pending administrative litigation matters are discussed below.¹¹¹

Leachco: In February 2022, the CPSC filed a complaint against Leachco, alleging that the company’s “Podster” infant lounging pillows present a substantial product hazard, claiming that it is foreseeable that caregivers would allow infants to sleep unattended on the pillows and that their design can allow an infant to move into a position in which the infant’s breathing is obstructed, potentially leading to suffocation.¹¹² The Complaint alleged the Podsters had been associated with two fatalities.¹¹³ Leachco’s Answer denied the Complaint’s allegations of defect and substantial product hazard.¹¹⁴ The ALJ held a hearing August 7-10, 2023,¹¹⁵ and the parties submitted their post-hearing briefs September 29, 2023.¹¹⁶ As of the time of this writing, the ALJ had not issued an Initial Order.

Amazon: In its July 2021 Complaint against Amazon, CPSC staff alleged that certain products sold through Amazon’s “Fulfilled by Amazon” (FBA) program are defective and pose a risk of serious injury or death to consumers and that, because Amazon “acts as a distributor” of its FBA products, Amazon is legally responsible to recall them.¹¹⁷ The Complaint alleged that Amazon acts as a “distributor” of its FBA products by:

(a) receiving delivery of FBA consumer products from a merchant with the intent to further distribute the product; (b) holding, storing, sorting, and preparing for shipment FBA products in its warehouses and fulfillment centers; and (c) distributing FBA consumer products into commerce by delivering FBA products directly to consumers or to common carriers for delivery to consumers.¹¹⁸

In response, Amazon argued that it is a “third-party logistics provider” and not a “distributor” of FBA products, as those terms are defined in the CPSA, because it does not take title to, manufacture, or sell such products.¹¹⁹ The CPSA defines “third-party logistics provider” as an entity that “solely receives, holds, or otherwise transports a consumer product in the ordinary course of business but who does not take title to the product,” and expressly excludes third-party logistics providers from the definition of “distributor.”¹²⁰ The CPSC argued, however, that “[b]y controlling and directing the entire customer relationship from the sale of an FBA product through its potential return, Amazon does far more than ‘solely’ transport products.”¹²¹

The Complaint further alleged that although Amazon took a number of unilateral actions after CPSC staff notified Amazon of the hazards presented by the specified products — including stopping the sale of certain products, and notifying and offering refunds to consumers who purchased certain of the specified products — those actions “are insufficient to remediate the hazards posed by the Subject Products and do not constitute a fully effectuated Section 15 mandatory corrective action ordered by” CPSC.¹²² The Complaint alleged that “[a] Section 15 order requiring Amazon to take additional actions in conjunction with the CPSC as a distributor is necessary for public safety,” and asked the Commission to order Amazon to take specific actions pursuant to Section 15(c)(1) and 15(d)(1), including, among others: to provide public notice in consultation with CPSC and offer adequate remedies to consumers, facilitate the return and destruction of recalled products from consumers, and submit monthly progress reports.¹²³

Amazon, in turn, argued that the Complaint is moot based on the actions Amazon has already taken to stop sales of the products in question and provide direct notice and full refunds to all affected purchasers.¹²⁴ Amazon maintained that those remedial actions were sufficient, and that the CPSA does not require that all corrective actions or consumer notifications be pre-approved by the CPSC, because the Commission has the power to issue mandatory remedial orders only under certain conditions — i.e., if the Commission determines that a product “presents a substantial product hazard and ... notification is required in order to adequately protect the public,” or that ordering a specific remedy would be “in the public interest.”¹²⁵

On January 19, 2022, in an order granting CPSC staff's partial motion for summary decision, the ALJ found that the "undisputed facts" show that Amazon meets the statutory definition of the term "distributor" for products sold through the Amazon's FBA program.¹²⁶ This ruling is an important issue for other "platform marketplaces," which is a sales and distribution channel created decades after the CPSA was enacted in 1972.

On July 10, 2023, the ALJ issued an Initial Decision and Order on Remedies,¹²⁷ ordering Amazon (in pertinent part) to:

- Immediately cease distribution of the subject products, including products that were not expressly the subject of the prior manufacturer or importer recalls but differing "only ... in size, color, and print pattern, yet presenting the same hazard;"¹²⁸
- Issue notifications of the products' alleged hazards pursuant to the CPSA and CPSC's interpretive regulations,¹²⁹ including direct, internet, and social media notifications;
- Instruct consumers to verify destruction of the products to receive a refund; and
- Submit monthly progress reports to CPSC.¹³⁰

Both parties appealed this decision to the Commission. Amazon appealed the ALJ's rulings that Amazon is a distributor of products sold through its FBA program, that CPSC has the authority to order refunds even where Amazon had already provided refunds, that CPSC has the authority to order a recall for the products that were not the previously recalled products but "present[ed] the same hazard," and that further notification was necessary, also raising Due Process and Separation of Powers arguments.¹³¹ Complaint Counsel appealed rulings regarding the scope of the recall and specific internet and social media notification issues.¹³² The Commission held oral argument on the appeals on December 14, 2023.¹³³ As of this writing, the Commission had not issued its decision on the appeals.

If, following the appeals, CPSC issues an order adverse to Amazon, the company will have a right to challenge the order in federal court.¹³⁴

Prior to 2021, the CPSC staff had filed only a single administrative complaint between 2013 and 2020. In addition, although the staff filed four administrative complaints in 2012 — concerning certain infant recliners and high-powered magnets — those 2012 actions were preceded by a gap of nearly 11 years since CPSC had filed another administrative complaint.

Zen Magnets: Spanning more than nine years, the most recent administrative case that was fully litigated before an ALJ to judgment (and subsequently in a U.S. District Court and Court of Appeals), *Zen Magnets* illustrates the potentially years-long process of CPSC staff seeking to require a recall through administrative litigation. In 2012, CPSC staff filed administrative complaints against Zen Magnets LLC (Zen) and other companies, alleging that small, rare-earth magnet sets (SREMs) present a substantial product hazard, and seeking orders directing the respondents to stop sales and distribution of the SREMs, notify consumers of the hazard and provide refunds, and destroy all remaining recalled magnets.¹³⁵ In 2014, the other companies settled and entered into consent agreements with CPSC, while Zen continued to litigate.¹³⁶

In a March 2016 Decision and Order, the ALJ denied in substantial part CPSC's demand for a recall.¹³⁷ On appeal, the Commission voted 3-1 in October 2017 to issue a Final Decision and Order (FDO) that all of the SREMs imported and distributed by Zen present a substantial product hazard, and ordered Zen to recall the product.¹³⁸ Zen then filed an action in federal court seeking to set aside the Commission's decision.¹³⁹ In June 2018, the District Court vacated the Commission's FDO, finding that Zen's due process rights had been violated, and remanded the appeal of the Initial Decision for the Commission to "conduct the appellate review without the participation of Commissioner Adler."¹⁴⁰ The court found Zen had been "deprived of a fair and impartial tribunal" in

the appeal of the ALJ’s Initial Decision and Order due to Commissioner Adler’s prior public statements during a meeting on SREM rulemaking.¹⁴¹

On appeal by CPSC, in August 2020, the Court of Appeals for the Tenth Circuit reversed the District Court, concluding that Commissioner Adler’s statements did not show prejudgment or the appearance of prejudgment and his participation in the Commission’s adjudication did not violate due process.¹⁴² Shortly after Zen’s petition for rehearing *en banc* was denied in November 2020,¹⁴³ Zen announced that it intended to suspend sales of SREMs and close its business.¹⁴⁴

In August 2021 — more than nine years after CPSC staff filed an administrative complaint against Zen — a mandatory recall of Zen SREMs was announced by CPSC.¹⁴⁵

Imminent Hazard Litigation to Require a Recall

In lieu of filing an administrative complaint, CPSC also has authority to proceed directly to a federal district court under Section 12 of the CPSA to seek such “temporary or permanent relief as may be necessary to protect the public” with respect to a product that the court determines presents an “imminent and unreasonable risk of death, serious illness, or severe personal injury.”¹⁴⁶ In addition, through the CPSIA, Congress expanded CPSC’s power to address imminent hazards: if CPSC determines that a product presents an imminent hazard and files an action under Section 12, the Commission may order the product’s manufacturer, importer, distributor, or retailer to cease distribution and provide public notification of the hazard.¹⁴⁷

CPSC has not exercised the CPSIA’s expanded authority and indeed has not filed any Section 12 action since the 1980s.¹⁴⁸ However, in its Fiscal Year 2024 Operating Plan, CPSC unanimously adopted an amendment offered by Commissioner Feldman “[d]irecting timely assessment for actions against imminently hazardous consumer products.”¹⁴⁹ In a statement after the vote, Feldman wrote, “CPSC is authorized to bring [Section 12] enforcement actions against [imminently hazardous] products but has used its authority sparingly over the years. The Operating Plan now encourages maximum use of these powers to protect consumers. It is my hope that this amendment will continue the progress to re-prioritize the agency’s core enforcement mission.”¹⁵⁰

Fast Track Program and Reporting and Recall Trends

Under CPSC’s Fast Track program, companies agree to announce publicly a corrective action plan acceptable to the staff within 20 business days after notifying CPSC. In exchange, CPSC does not send the company a “preliminary determination” letter, as described above.¹⁵¹ Reporting companies benefit by avoiding receipt of a preliminary determination letter, which plaintiffs would seek to use in product liability or consumer protection litigation, as well as by having a means to implement recalls more quickly and efficiently. CPSC benefits by not having to devote its limited resources to conducting a more detailed investigation of a potential safety hazard. As shown in the chart below, in recent years approximately 40% or more of all Section 15 reports were made under the Fast Track program, and Fast Track recalls have outpaced recalls conducted through the preliminary determination process.

Chart: Section 15 Reporting and Recall Trends¹⁵²

Fiscal Year	Section 15 Reports			Total Recalls
	Total	Non-Fast Track	Fast Track	
2013	546	330	216	305
2014	505	293	212	301
2015	554	302	252	287
2016	569	305	264	329
2017	508	296	212	285
2018	632	393	239	264
2019	546	329	217	261
2020	375	209	166	240
2021	388	221	167	235

As of this writing, CPSC has not made similar data available for Fiscal Year 2022 or Fiscal Year 2023. However, in a November 2023 statement, Commissioner Feldman announced that there had been over 300 recalls in Fiscal Year 2023, and provided a breakdown of the recalls by category, including Fiscal Years 2022 and 2023.¹⁵³

Fiscal Year	Defect Recalls	Regulatory Recalls	Fast Track Recalls	Total Recalls
2022	36	69	155	260
2023	62	83	167	312

Penalties and Injunctive Relief for Late Reporting

Late reporting under Section 15(b) presents a risk of civil and criminal penalties as well as injunctive relief, as discussed below.

Civil Penalties

The CPSA provides for civil penalties against manufacturers (defined to include importers), distributors, and retailers who “knowingly” fail to notify CPSC under Section 15(b).¹⁵⁴ The policy and purposes behind civil penalties include: deterring violations; providing just punishment; promoting respect for the law; promoting full compliance with the law; reflecting the seriousness of the violation; and protecting the public.¹⁵⁵

What Is a “Knowing” Violation?

The CPSA defines “knowingly” as either “actual knowledge”¹⁵⁶ or “presumed ... knowledge deemed to be possessed by a reasonable man who acts in the circumstances, including knowledge obtainable upon the exercise of due care to ascertain the truth of representations.”¹⁵⁷ Particularly when this definition of “knowingly” is combined with the language in Section 15 requiring notification upon receipt of information that “*reasonably supports the conclusion*” that a product “contains a defect which *could* present a substantial product hazard,”¹⁵⁸ the government has ample opportunity to second-guess decisions about whether, and, if so, when, a duty to notify arises under Section 15. In practice, CPSC staff make such judgments after the product has been recalled for a specified

hazard, which staff can seize upon to claim with hindsight that the company should have notified CPSC sooner about the safety issue.

Maximum Civil Penalty Amount

Effective August 14, 2009, the maximum civil penalty increased dramatically from \$8,000 per violation and \$1.825 million for a related series of violations¹⁵⁹ to \$100,000 per violation and \$15 million for a related series of violations.¹⁶⁰ CPSC has since applied statutory cost-of-living adjustments, the most recent of which increased the maximum penalty to \$120,000 per violation and \$17.15 million for a related series of violations that occur after January 1, 2022.¹⁶¹ CPSC has treated each unit of a product as a separate violation, so the potential penalty for a related series of violations can easily reach the statutory maximum.

Statute of Limitations

A five-year statute of limitations applies to actions seeking a civil penalty for failure to timely report to CPSC under Section 15(b).¹⁶² The law states, in relevant part, that a government enforcement action for civil penalties “shall not be entertained unless commenced within five years from the date when the claim first accrued.”¹⁶³ The Supreme Court has interpreted this same statute of limitations provision in the context of an enforcement action by another government agency and held that “a claim accrues ‘when the plaintiff has a complete and present cause of action.’”¹⁶⁴ However, courts in two CPSC timeliness cases have ruled in favor of the government on this issue, finding that the statute of limitations begins to run only when a firm gains actual knowledge that the government is “adequately” informed of the risk.¹⁶⁵

In *United States v. Michaels Stores, Inc.*, Michaels moved to dismiss, as time-barred, the government’s claim that the defendant had failed to timely notify CPSC of a risk of cuts from a glass vase that reportedly shattered while being handled. The defendant argued that, because the government alleged that the duty to notify arose in 2008, the five-year period had expired by the time the lawsuit was filed in 2015.¹⁶⁶ Instead, the court denied the motion, finding that there was a continuing violation of Section 15(b), which “began when Michaels obtained information regarding the vases’ defect in the expert report and continued until Michaels obtained actual knowledge that the Commission was adequately informed of the defect or risk of injury.”¹⁶⁷ On February 9, 2018, the parties settled the case for \$1.5 million, thereby avoiding trial and appeal of the statute of limitations decision.¹⁶⁸

Similarly, in *United States v. Spectrum Brands*, the court found that the reporting violation accrues “not when the company fails to report, but rather when its reporting obligation ends — that is, when it eventually reports or gains actual knowledge that the government is adequately informed.”¹⁶⁹ Accordingly, the court found that the government’s claim was timely notwithstanding that it was filed more than five years after the government asserted that the duty to report first arose.¹⁷⁰ On appeal, the Court of Appeals for the Seventh Circuit affirmed the District Court’s judgment, holding that “the duty to report a potentially dangerous defect in a product so that the Commission can take appropriate action to protect consumers is necessarily an ongoing duty which, by the terms of Section 15(b), does not end until such time as the product’s maker, distributor, or seller either makes a report or actually knows the Commission has been properly informed.”¹⁷¹

Factors in Size of Penalty

The CPSA requires the Commission to consider the following factors in determining the amount of a civil penalty to seek:

the nature, circumstances, extent, and gravity of the violation, including the nature of the product defect, the severity of the risk of injury, the occurrence or absence of injury, the number of defective products distributed, the appropriateness of such penalty in relation to the size of the business of the person charged, including how to mitigate undue adverse economic impacts on small businesses, and such other factors as appropriate.¹⁷²

On March 31, 2010, CPSC published a Final Rule, effective on publication, interpreting the civil penalty factors.¹⁷³ CPSC explained the factors relevant to late reporting penalties as follows:

Nature, circumstances, extent, and gravity of the violation: CPSC will consider “the totality of the circumstances surrounding a violation while recognizing that depending upon the case, the significance and importance of each factor may vary.”¹⁷⁴ Further, CPSC found that, unlike other factors discussed below, this factor permits consideration of “the seriousness and extent of a particular violation.”¹⁷⁵

Nature of the product defect: CPSC will consider “the nature of the product defect associated with a CPSA violation ... [including] conditions or circumstances in which the defect arises” or the “nature of the substance associated with an FHSA violation.”¹⁷⁶ In addition, the Final Rule acknowledges that a “product defect” may not be relevant for certain violations of the CPSA (for example, failing to supply a required certificate that a product complies with an applicable product safety rule), and that other factors would be considered in that circumstance.¹⁷⁷

Severity of the risk of injury: CPSC will consider “the potential for serious injury, illness or death (and whether any injury or illness required medical treatment including hospitalization or surgery),”¹⁷⁸ but rejected a proposal to forgo penalties where a risk is limited to a minor or moderate injury.¹⁷⁹ CPSC will also consider “the likelihood of injury; the intended or reasonably foreseeable use or misuse of the product; and the population at risk (including vulnerable populations such as children, the elderly, or those with disabilities).”¹⁸⁰

The occurrence or absence of injury: CPSC “will consider whether injuries, illnesses, or death have or have not occurred with respect to any product or substance associated with a violation, and if so,” their number and nature.¹⁸¹ CPSC declined to adopt a proposal to forgo penalties where there have been only minor injuries or no injuries at all. CPSC reasoned that a product could present a serious risk to consumers even if injuries have not occurred.¹⁸²

The number of defective products distributed: CPSC will consider “the number of defective products or amount of substance distributed in commerce.”¹⁸³ CPSC declined to draw a distinction under this factor based on whether consumers received such defective products, reasoning that this distinction is not set forth in the statute.¹⁸⁴ However, while not addressed in the regulations or preamble, the extent to which products at issue were distributed to consumers or were identified and segregated before they could pose any risk could arguably be relevant to the “totality of the circumstances” or the “severity of the risk” in a given case. The Final Rule clarifies that this factor “will not be used to penalize a person’s decision to conduct a wider-than-necessary recall out of an abundance of caution,” including “situations where such a recall is conducted due to a person’s uncertainty concerning how many or which products may need to be recalled.”¹⁸⁵

The appropriateness of such penalty in relation to the size of the business of the person charged, including how to mitigate undue adverse economic impacts on small businesses: In evaluating a company’s size, CPSC will consider the “firm’s number of employees, net worth, and annual sales.”¹⁸⁶ In determining whether a small business can pay a proposed penalty, CPSC may consider any “relevant financial factors,” including liquidity factors (ability to pay short-term obligations); solvency factors (ability to pay long-term obligations); and profitability factors (return on investment).¹⁸⁷ CPSC also noted that it is required to mitigate only “undue” impacts on small businesses, and the factors CPSC considers in determining whether impacts are undue “may include ... the business’s size and financial factors relating to its ability to pay.”¹⁸⁸

In addition to discussing the statutory factors, CPSC identified the following nonexclusive list of factors that it may consider on a case-by-case basis:

Safety and compliance program or system: CPSC may consider whether, “at the time of the violation,” the company had in place “a reasonable and effective program or system for collecting and analyzing information related to safety issues,” including, for example, “incident reports, lawsuits,

warranty claims, and safety-related issues related to repairs or returns.”¹⁸⁹ CPSC also may consider whether the company “conducted adequate and relevant premarket and production testing of the product at issue; had a program in place for continued compliance with all relevant mandatory and voluntary safety standards”; and other appropriate factors.¹⁹⁰ This emphasis on the internal controls in place at the time of an alleged violation is consistent with the staff’s position in the past that a company’s actions in enhancing internal controls in response to an alleged violation are less important in assessing a civil penalty than the adequacy of internal controls that were in place at the time of the alleged violation.

History of noncompliance: CPSC “may consider whether or not a person’s history of noncompliance with” the laws or regulations enforced by CPSC “should increase the amount of the penalty.”¹⁹¹

Economic gain from noncompliance: CPSC “may consider whether a person benefitted economically from a failure to comply, including a delay in complying” with statutory and regulatory requirements.¹⁹²

Failure to respond in a timely and complete fashion to the Commission’s requests for information or remedial action: CPSC “may consider whether a person’s failure to respond in a timely and complete fashion to requests from the Commission for information or for remedial action should increase a penalty.”¹⁹³ The Final Rule clarifies that this factor “is intended to address a person’s dilatory and egregious conduct in responding to requests for information or remedial action sought by the Commission, but not to impede any person’s lawful rights.”¹⁹⁴ Again, this is consistent with the staff’s position in prior civil penalty negotiations that a company’s alleged failure to supply complete information to the staff in connection with a product safety investigation is relevant to the size of any penalty for late reporting. Moreover, there are separate enumerated offenses for misrepresenting the scope of products subject to an action required under Section 15 of the CPSA or making a material misrepresentation in the course of a CPSC investigation.¹⁹⁵ CPSC leaves open which of these factors it may consider in a given case, and whether it may also consider other factors that are not listed in the regulation.

Just as important as the civil penalty factors that CPSC cites in the 2010 final regulations are the proposals that CPSC explicitly rejected. First, CPSC declined to adopt a proposal to seek civil penalties only in cases of “actual knowledge.” The Commission noted that while civil penalties are available under the CPSA only for violations committed “knowingly,” the statute defines “knowingly” to include both actual knowledge and “presumed” knowledge based on “knowledge deemed to be possessed by a reasonable man who acts in the circumstances, including knowledge obtainable upon the exercise of due care to ascertain the truth of representations.”¹⁹⁶ Thus, in CPSC’s view, civil penalties may be appropriate even absent actual knowledge.

Second, CPSC declined to adopt a matrix or formula to set fines for various offenses and instead adopted a non-exhaustive list of factors that it will consider on a case-by-case basis in calculating civil penalties.¹⁹⁷

CPSC commissioners long have debated whether the Commission’s decision-making process on penalties should be enhanced. Commissioners Adler and Kaye, for their part, disputed criticisms that the civil penalty process lacks transparency or is indifferent to due process.¹⁹⁸ In particular, they rejected assertions that CPSC should “share more information about the facts and factors that enter into our valuations of civil penalties in order to permit the regulated community to understand the agency’s rationale in penalty cases,” arguing that the CPSA Section 6(b) protection against disclosure of certain information submitted pursuant to Section 15(b) makes it too onerous for CPSC to do so.¹⁹⁹ In addition, Commissioners Adler and Kaye argued against criticisms that firms in “cases in which products associated with few injuries or relatively minor injuries have paid penalties substantially similar to those assessed against firms with products that have caused numerous

injuries or relatively serious injuries.”²⁰⁰ Commissioners Adler and Kaye noted that CPSC considers other factors in addition to the injury pattern, and that they were disinclined to consider the absence of injuries in penalty decisions:

“We often see firms vigorously contesting timeliness claims by arguing that, notwithstanding the serious risks posed by a product’s defect, hindsight reveals that few injuries resulted from the defect, thereby removing any reason for a civil penalty. While we rejoice at the lack of injuries or fatalities in these cases, we find it hard to see why a civil penalty should be reduced simply because good fortune smiled on a company’s dangerous product.”²⁰¹

Instead, Commissioners Adler and Kaye would have given greater weight to the severity of the risk of injury, regardless of whether that risk has materialized.²⁰²

Civil Penalty Settlement Data and Trends

Historically, alleged failure to timely report under Section 15 of the CPSA has been the violation most frequently penalized by CPSC. As discussed below, recent negotiated settlements have included requirements for companies to review and report on compliance programs and internal controls, including internal audit requirements. Further, monetary penalties have increased substantially in recent years, including multiple settlements exceeding \$10 million and/or approaching the statutory maximum. The escalation reflects both increased maximum penalties authorized by the CPSIA and a push by CPSC leadership.²⁰³ Chair Alexander Hoehn-Saric stated in October 2021, in connection with resolution of criminal charges of willful failure to timely report to CPSC as required by Section 15, that “CPSC will use its authority to the fullest to keep American families safe,” and that “[f]ailing to report dangerous products puts consumers at an unnecessary risk and will not be tolerated.”²⁰⁴

Between fiscal year 2021 and January 2024, the median civil penalty settlement for allegations of late reporting was \$10.25 million. In contrast, during fiscal years 2014-2019, the median such penalty settlement was \$3.5 million. Indeed, while fewer than 20% of settlements announced by CPSC in fiscal years 2014-2019 exceeded \$5 million, four of the five most recent settlements surpassed \$10 million. Further, the vast majority of all settlements since 2015 well-exceed the penalties for late reporting in the litigated Spectrum case (\$821,675; litigated verdict) and Michaels case (\$1.5 million; settled with DOJ during litigation) in 2018.²⁰⁵

Fiscal Year	Late-Reporting Settlements in FY	FY Total	FY Median Settlement	FY Average Settlement
2024 (partial year)	1	\$16,000,000	\$16,000,000	\$16,000,000
2023	4	\$52,325,000	\$13,650,000	\$13,081,250
2022	3	\$20,000,000	\$6,500,000	\$6,666,667
2021	2	\$19,950,000	\$9,975,000	\$9,975,000
2020	0	0	—	—
2019	2	\$4,850,000	\$2,425,000	\$2,425,000
2018	1	\$27,250,000	\$27,250,000	\$27,250,000
2017	4	\$19,900,000	\$4,925,000	\$4,975,000
2016	5	\$31,250,000	\$4,500,000	\$6,250,000
2015	9	\$24,400,000	\$3,000,000	\$2,711,111
2014	4	\$5,175,000	\$737,500	\$1,293,750

As discussed below, late-reporting settlement agreements are not limited to monetary penalties. CPSC has long required companies put in place compliance programs and internal controls to ensure compliance with the CPSA. In addition, starting in mid-2022, a new trend emerged: an annual reporting requirement.²⁰⁶ CPSC's previous practice was to only require that a company provide staff with written documentation of its CPSA compliance upon request.

Litigated Section 15 Penalties

Historically, virtually all CPSC civil penalty assessments for alleged reporting violations have been resolved through settlement rather than litigation. Prior to the CPSIA, only one late-reporting case was decided by a court on the merits. In that case, *United States v. Mirama Enterprises, Inc.*, the court granted the government's motion for summary judgment, holding that, as a matter of law, the defendant manufacturer had a duty to notify CPSC after receiving the first three (of 23 total) reports that a juice extractor's filter basket had "exploded" while in use, posing a risk to consumers of being cut by sharp pieces of plastic and metal.²⁰⁷ The court imposed a civil penalty of \$300,000 at a time when the maximum civil penalty was \$1.5 million. The Court of Appeals for the Ninth Circuit affirmed, finding that a penalty for late reporting may be assessed even if the product ultimately is determined not to be defective and that each unit of a product (rather than each model or product line) constitutes a separate violation.²⁰⁸

Since *Mirama*, only three Section 15 late-reporting civil penalty lawsuits have been filed without a contemporaneous settlement, and only one case — *United States v. Spectrum Brands* — has been litigated to judgment.²⁰⁹ In *United States v. Spectrum Brands*, the court granted the government's motion for summary judgment, finding that, by May 2009, the defendant had information "supporting the conclusion that a defect in coffeemaker carafe handles constituted a substantial product hazard" upon the receipt of 60 reports of broken handles, including four reported burns, and had implemented design changes to remedy the issue.²¹⁰ According to the court, if that information did not suffice, "no reasonable jury" would conclude that a reporting obligation had not arisen by June 30, 2010, upon the defendant's receipt of 714 reports of coffeemaker carafe handle failures and 35 reported injuries, including one that required medical attention.²¹¹

The government contended that the maximum penalty for the two series of violations in *Spectrum Brands* was a total of \$30.3 million (\$15.15 million each for late reporting and post-recall sales), and sought a penalty of \$12 to \$15 million.²¹² Following an evidentiary hearing to determine the appropriate amount of civil penalties and injunctive relief, the court assessed civil penalties of \$821,675 for late reporting and \$1,115,000 for the "inadvertent" sale of 641 recalled carafes after the recall was announced, in violation of the CPSA, for a total civil penalty of \$1,936,675.²¹³ The court stated that "the fact that there were few reports of severe injuries ... does weigh in defendant's favor with respect to determining an appropriate civil penalty" for late reporting,²¹⁴ but that the defendant's failure to notify CPSC was "increasingly" "egregious as time went on and complaints mounted."²¹⁵ The court calculated the late-reporting penalty on a per-complaint basis, with the penalty per complaint increasing in each six-month period, ranging from \$10 to \$2,400 per complaint, for a total of \$821,675.²¹⁶ The court noted that this penalty "is well below the ballpark of *Mirama*, ... the only other CPSA failure-to-report case litigated to this point. *Mirama* involved a much more serious defect—'exploding' juicers."²¹⁷ The penalty in *Mirama* was "20% of the \$1.5 million penalty cap that was in place at the time," and the *Spectrum* court imposed a penalty "approximately 5.4% of [the] \$15.15m maximum," which "having considered all of the [civil penalty] factors," the court found to be "an appropriate civil penalty for defendant's failure to report timely."²¹⁸ The *Spectrum* court also imposed penalties for post-recall sales, assessing \$1,000 per unit sold from the first of two shipments and \$2,000 per unit sold from the second shipment.²¹⁹

Other Section 15 Enforcers

Courts generally have rejected efforts by private litigants to pursue actions for late reporting under Section 15. The only Circuit Courts of Appeal that have addressed the issue have held that there is no private right of action to enforce Section 15 reporting violations.²²⁰ In addition, although the CPSIA granted state attorneys general authority to enforce certain provisions of the CPSA, that authority does not include enforcement of the Section 15 reporting obligation.²²¹

Injunctive Relief

As noted above, nonmonetary provisions of CPSC settlements have grown more frequent. Since March 2013, each settlement agreement and consent decree to resolve a late-reporting claim has included provisions through which the company agreed (a) to implement and maintain a compliance program designed to ensure compliance with the safety statutes and regulations enforced by CPSC, (b) to maintain and enforce internal controls and procedures to help record and identify information required to be disclosed to CPSC and ensure timely and accurate reporting to CPSC, and (c) to cooperate and provide information and documents to the CPSC staff.²²²

On April 9, 2018, the District Court in *United States v. Spectrum Brands* issued an amended order and final judgment and entered a permanent injunction against Spectrum requiring it to “(A) ... maintain sufficient systems, programs, and internal controls to ensure compliance with the CPSA and the regulations enforced by the CPSC including, without limitation, the Section 15(b) reporting requirement ... and the prohibition of the sale of recalled products ..., (B) ... disseminate copies of both the civil penalty and the summary judgment opinions and orders ... to each of its directors, officers, management-level employees, and in-house attorneys involved in the sale, offering for sale, manufacture, distribution in commerce, or importation into the United States of ‘consumer products,’ [and] (C) ... implement improvements to its compliance programs as required under subsection A ...”²²³ The permanent injunction sets forth various improvements that *Spectrum* was required to implement to its compliance program, most of which the court noted *Spectrum* had represented were already in place.

On April 12, 2018, Spectrum filed a notice of appeal of the final and amended judgments (and preceding orders, opinions, or rulings that merged into the judgments) to the U.S. Court of Appeals for the Seventh Circuit.²²⁴ Spectrum challenged the District Court’s holding that the government’s claims were not barred by the statute of limitations and the award of injunctive relief, particularly with respect to the requirement that Spectrum retain an independent expert.²²⁵ On May 9, 2019, the Seventh Circuit affirmed the District Court’s judgment against Spectrum.²²⁶

Liquidated Damages

The Consent Decree entered against Kidde, discussed above, subjects the company to liquidated damages of \$5,000 “per violation for each day that Kidde fails to comply with the Decree.”²²⁷ Liquidated damages have not been a feature of settlements by CPSC or of all DOJ settlements for late reporting. However, in 2015, two DOJ Consent Decrees for late reporting included liquidated damage provisions, requiring the companies to pay \$1,000 “for each day that [the company] fails to comply with the Decree.”²²⁸

Criminal Penalties

Prior to the 2008 amendments to the CPSA, criminal penalties were available under the Act only if a person willfully violated the statute after having received notice of noncompliance from CPSC.²²⁹ Thus, for all practical purposes, the failure to timely notify CPSC of potential safety hazards carried only civil penalties. However, the CPSIA removed the prior notice requirement as a prerequisite for criminal penalties and allowed for felony prosecutions.²³⁰ Accordingly, if DOJ concludes that the facts of a case are particularly egregious, the government could seek criminal sanctions against companies for

late-reporting violations, or against any director, officer, or agent of a corporation who “knowingly and willfully authorizes, orders, or performs” such violations of Section 15.²³¹

Criminal penalties available under the CPSA include imprisonment for not more than five years (a felony) and a fine to be determined in accordance with 18 U.S.C. § 3571.²³² Further, the penalties available for a “criminal violation” of the CPSA (or other Acts enforced by the Commission) include the “forfeiture of assets associated with the violation.”²³³ And, for these purposes, a “criminal violation” means a violation “for which the violator is sentenced to pay a fine, be imprisoned, or both.”²³⁴ To date, and as discussed below, there has been only one corporate criminal enforcement action brought for knowing and willful violations of Section 15 reporting requirements, and that case also involved criminal convictions of two executives.

Gree Appliance Companies

On October 29, 2021, DOJ announced the resolution of criminal charges against Gree Zhuhai, Gree Hong Kong, and Gree USA, Inc. (Gree USA) (collectively, the Gree Appliance Companies) in the first ever corporate criminal enforcement action brought under the CPSA, which resulted in a plea agreement from Gree USA, a deferred prosecution agreement (DPA) for Gree Zhuhai and Gree Hong Kong, and \$91 million in monetary penalties and forfeitures.²³⁵ DOJ charged in a criminal information that the Gree Appliance Companies had information by September 2012 that their dehumidifiers were defective, creating a substantial product hazard, and created an unreasonable risk of serious injury and death to consumers, but that the companies “knowingly and willfully failed to inform” CPSC until June 2013.²³⁶

In connection with the DPA and plea agreement, the Gree Appliance Companies admitted the existence of internal communications about reports of fire hazards as early as July 2012, as well as subsequent internal communications about concerns over the costs of addressing the overheating defect and reporting it to the CPSC.²³⁷ The companies also admitted that their initial reports to the CPSC in early 2013 failed to disclose the extent of the safety issues, and that consumers have reported more than 2,000 incidents involving the dehumidifiers, including 450 fires and more than \$19 million in property damage.²³⁸

The DPA and plea agreement require the Gree Appliance Companies to pay more than \$91 million (\$52.2 million monetary penalty and \$39 million forfeiture representing the assets associated with their violation — from the distribution of both defective and non-defective Gree dehumidifiers) and to provide restitution to any uncompensated consumers whose Gree dehumidifier subject to recall caused physical injury or financial loss through a fire or overheating.²³⁹ The prior \$15.45 million civil penalty the Gree Appliance Companies paid was credited against the new amount owed.²⁴⁰

The DPA and plea agreement also impose compliance-related audit and review obligations, including:

- establishing (or updating) a compliance program with standards, policies, and procedures for investigating and documenting allegations of potential product hazards and CPSA violations;
- creating (or updating) a confidential non-retaliation employee reporting program for product safety concerns;
- requiring compliance program training for directors, officers, and employees;
- retaining an outside compliance expert for a three-year term to advise the companies on product safety and regulatory compliance issues; and
- submitting annual reports and certifications to the government regarding remediation and implementation of the compliance program.²⁴¹

Gree: Corporate Executive Convictions

On November 16, 2023, a Los Angeles jury found Gree corporate executives Simon Chu and Charley Loh guilty of conspiracy to defraud the CPSC and failure to furnish information as required by the CPSA. A sentencing hearing is scheduled for March 2024. The convictions follow the first ever criminal indictments and trial of corporate executives for such alleged violations related to the Section 15 reporting requirement.²⁴² The indictment identified Chu and Loh as the part owners and executives of two then-unnamed unindicted co-conspirator companies that imported and sold Chinese dehumidifiers in the United States.²⁴³ According to the indictment, Chu and Loh “knowingly and willfully failed, and willfully caused others to fail, to immediately report” to CPSC upon obtaining information that reasonably supported the conclusion that the dehumidifiers contained a defect that could create a substantial product hazard or an unreasonable risk of injury, as required by Section 15 of the CPSA.

Chu and Loh, the charged executives, pled not guilty. The indictment provided insight into the activities Chu and Loh allegedly engaged in and, according to the government, supported findings that they knowingly and willfully failed to notify CPSC. For example, the indictment alleged that (1) Chu tested the plastic used in the dehumidifiers and found it was able to burn, (2) Loh sent an email that stated the dehumidifiers caught fire during testing and the material used in the products apparently did not meet UL safety standards, and (3) Loh and Chu discussed with other Gree employees delaying a recall to avoid losing dehumidifier sales and to reduce the costs and effect of a recall.²⁴⁴

Conclusion

Helping to protect consumers and guarding a company’s brand reputation remain powerful incentives for companies to identify and address potential safety issues quickly and effectively. Further, particularly given the risk of substantial civil and even criminal penalties for late reporting, and CPSC’s ongoing trend of aggressive enforcement, it is more important than ever for companies to ensure that they understand the scope of Section 15; have internal controls in place to capture, track, and analyze complaints and other information that may trigger a duty to notify CPSC; and timely and accurately notify CPSC when the need arises.

1 CPSC, Fiscal Year 2023 Operating Plan (Sept. 28, 2022), https://www.cpsc.gov/s3fs-public/CPSCs-Fiscal-Year-2023-Operating-Plan.pdf?VersionId=9vdumkfeKFU45nEiM14vUwk6Xy7_0j2 (anticipating increasing from 539 to 672 based on a \$195.5 million appropriation that did not materialize). As of this writing, for Fiscal Year 2024, no full appropriations bill had been enacted, and the federal government, including CPSC, was operating on a Continuing Resolution, and the agency anticipated between \$151.0 and \$162.6 million in total appropriations. See CPSC, Fiscal Year 2024 Operating Plan (Nov. 6, 2023), https://www.cpsc.gov/s3fs-public/FY2024OperatingPlan.pdf?VersionId=N46Kg9oFJtn_Slys4cdzuQYza29oFynS.

2 Pub. L. No. 92-573, 86 Stat. 1207 (1972), codified at 15 U.S.C. §§ 2051-2089.

3 Pub. L. No. 110-314, § 217, 122 Stat. 3016, 3058.

4 15 U.S.C. § 2053.

5 The only voluntary standards upon which CPSC has so relied are provisions of (i) ANSI B175.1 (gasoline-powered chainsaws), and (ii) ANSI Z21.11.2 (gas-fired room heaters). See 16 C.F.R. Part 1115, App.

6 This provision was added by the CPSIA. Pub. L. No. 110-314, § 214(a)(2), 122 Stat. 3016, 3054.

7 15 U.S.C. § 2064(b). The “unreasonable risk” clause was added to the CPSA in 1990. Consumer Product Safety Improvement Act of 1990, Pub. L. No. 101-608, § 112(a)(2), (3), 104 Stat. 3110, 3115.

8 CPSC uses the term “firm” or “subject firm” to mean any manufacturer, importer, distributor, or retailer of a consumer product. See 16 C.F.R. § 1115.3(f).

9 15 U.S.C. § 2064(b).

10 Two other notification requirements are beyond the scope of this desk reference but should not be ignored: (i) manufacturers of consumer products must notify CPSC upon settling or receiving adverse judgments in three or more lawsuits in state or federal court alleging “death or grievous bodily injury” from the same model of a consumer product during designated 24-month periods (e.g., 1/1/2021 through 12/31/2022), see 15 U.S.C. § 2084; 16 C.F.R. §§ 1116.3(b)-(c); and (ii) manufacturers, importers, distributors, and retailers must notify CPSC within 24 hours of receiving a report that a child (a) choked on a marble, small ball, latex balloon, or small part contained in a toy or game, and (b) died, suffered serious injury, ceased breathing for any length of time, or was treated by a medical professional. See Child Safety Protection Act, Pub. L. No. 103-267, 108 Stat. 722 (1994); 16 C.F.R. Part 1117.

11 15 U.S.C. § 2052(a)(5).

12 *Id.* While “motor vehicles,” as defined in Section 102(3) of the National Traffic and Motor Vehicle Safety Act of 1966 (49 U.S.C. § 30102(a)(7)), are outside CPSC’s jurisdiction, CPSC has jurisdiction over off-road vehicles. See, e.g., 15 U.S.C. § 2089; 16 C.F.R. Part 1420; Press Release, CPSC, Recreational Off-Highway Vehicles Recalled by American Honda Due to Crash and Injury Hazards (Recall Alert) (Dec. 3, 2020), <https://cpsc.gov/Recalls/2021/Recreational-Off-Highway-Vehicles-Recalled-by-American-Honda-Due-to-Crash-and-Injury-Hazards-Recall-Alert>; Press Release, CPSC, John Deere Recalls Crossover Gator Utility Vehicles Due to Crash Hazard (Dec. 21, 2017), <https://www.cpsc.gov/Recalls/2018/John-Deere-Recalls-Crossover-Gator-Utility-Vehicles-Due-to-Crash-Hazard-Recall-Alert>. In addition, although “motor vehicle equipment,” as defined in 49 U.S.C. § 30102(a)(8), is also excluded from the definition of “consumer product,” CPSC has exercised jurisdiction over products that can be used in both motor vehicles and the home, to the extent that the hazard presented does not arise from use in the motor vehicle, such as infant seats that can be used in an automobile or in a stroller frame. See, e.g., Press Release, CPSC, Combi USA Recalls Stroller and Car Seat Combos Due to Fall Hazard (May 4, 2017), <https://www.cpsc.gov/node/35271>.

13 15 U.S.C. § 2052(a)(5).

14 See *CPSC v. Anaconda Co.*, 593 F.2d 1314, 1320 n.19 (D.C. Cir. 1979) (CPSC concedes that it lacks jurisdiction over housing).

15 *In re Central Sprinkler Corp.*, CPSC Docket No. 98-2 (June 4, 1998).

16 *Id.* at 11-12.

17 *Id.* at 10-12, discussing *Anaconda*, 593 F.2d at 1319, and *Kaiser Aluminum & Chem. Corp. v. CPSC*, 574 F.2d 178 (3d Cir. 1978).

18 *Id.* at 14 (quoting *Anaconda*, 593 F.2d at 1322).

19 *Id.* at 14.

20 *Kaiser Aluminum*, 574 F.2d at 181-82 (finding that CPSC has jurisdiction over aluminum branch circuit wiring systems). *But see Anaconda*, 593 F.2d at 1320 (explaining that the term “consumer product” was designed to include the various ways “through which consumers acquire products and are exposed to the risks of injury associated with those products,” but remanding for a determination of whether CPSC has jurisdiction over aluminum branch circuit wiring systems).

21 See *State Fair of Tex. v. CPSC*, 650 F.2d 1324, 1329 (5th Cir. 1981) (holding that aerial tramway was a “consumer product” within the meaning of the CPSA, and CPSC was authorized to enter state fairgrounds to inspect aerial tramway and relevant documents), *vacated as moot*, 454 U.S. 1026 (1981).

22 See *United States v. One Hazardous Prod. Consisting of a Refuse Bin*, 487 F. Supp. 581, 584 (D.N.J. 1980).

23 See *CPSC v. Chance Mfg. Co.*, 441 F. Supp. 228, 231, 233 (D.D.C. 1977) (jurisdiction depends upon the extent to which consumers were exposed to the risks associated with the product). *But see Robert K. Bell Enters. v. CPSC*, 645 F.2d 26 (10th Cir. 1981). Following these decisions, Congress expressly provided that CPSC’s jurisdiction does not include fixed-

site amusement rides. Pub. L. No. 97-35, § 1213, 95 Stat. 703, 724 (Aug. 13, 1981).

24 See Adv. Op. No. 262 (Feb. 27, 1978), https://www.cpsc.gov/s3fs-public/pdfs/blk_media_Elevators.pdf.

25 See Adv. Op. No. 125 (Oct. 23, 1973), https://www.cpsc.gov/s3fs-public/pdfs/blk_media_125.pdf.

26 See Adv. Op. No. 55 (Dec. 21, 1973), https://www.cpsc.gov/s3fs-public/pdfs/blk_media_55.pdf.

27 See Adv. Op. No. 205 (May 21, 1975), https://www.cpsc.gov/s3fs-public/pdfs/blk_media_205.pdf. See also 16 C.F.R. § 1209 (interim standard for cellulose insulation).

28 See Adv. Op. No. 181 (Feb. 12, 1975), https://www.cpsc.gov/s3fs-public/pdfs/blk_media_181.pdf.

29 See Press Release, CPSC, Commercial Frozen Food Merchandisers Recalled by Tyler Refrigeration Due to Fire Hazard (Dec. 11, 2008), <https://www.cpsc.gov/Recalls/2008/commercial-frozen-food-merchandisers-recalled-by-tyler-refrigeration-due-to-fire-hazard>.

30 See CPSC Guidance (Feb. 18, 2002), https://www.cpsc.gov/s3fs-public/PPPA-Updated-Guidance-on-Substances-Not-Intended-for-Household-Use.pdf?VersionId=kw_4n0prUwI6BX2JxQG0vMIRdW47cKHh.

31 See CPSC Alert: Whitco Co. LP Stadium Light Poles Can Fall Over, Posing Risk of Serious Injury and Death (Aug. 24, 2009), <https://www.cpsc.gov/id/node/20821>.

32 15 U.S.C. § 2064(b)(2); see Pub. L. No. 110-314, § 214(a)(2), 122 Stat. 3016, 3054 (2008). See, e.g., Consent Decree of Civil Penalty, *United States v. LM Import-Export, Inc.*, No. 11-cv-20765 (S.D. Fla. Apr. 30, 2012) (agreeing to a \$287,500 civil penalty for allegedly knowingly (1) importing, offering for sale, selling, and distributing in commerce toys and other children’s articles in violation of CPSA and FHSA standards; (2) failing to timely notify CPSC under Section 15; and (3) violating requirements under CPSA Section 14 (15 U.S.C. § 2063(a)) to certify the compliance of products and provide tracking labels on products); Schylling Assocs., Inc., Provisional Acceptance of a Settlement Agreement and Order, 75 Fed. Reg. 30784 (June 2, 2010) (agreeing to a \$400,000 civil penalty for allegedly knowingly (1) importing, offering for sale, selling, and distributing in commerce toys that do not comply with lead paint limits, and (2) failing to timely notify CPSC under Section 15).

33 See Consent Decree of Civil Penalty and Permanent Injunction, *United States v. Dr. Reddy’s Labs., Inc.*, No. 17-cv-13219 (D.N.J. Jan. 18, 2018) (agreeing to a \$5 million civil penalty and permanent injunction requiring compliance program for the alleged knowing (1) importation and distribution of household oral prescription drugs packaged in non-child-resistant blister packs that failed to comply with the PPPA; (2) failure to timely notify CPSC under Section 15; and (3) failure to certify compliance with applicable standards under CPSA Section 14).

34 15 U.S.C. § 2064(b)(3) (emphasis added).

35 15 U.S.C. § 2064(a).

36 16 C.F.R. § 1115.12(g).

37 See 16 C.F.R. § 1115.12(g)(1)(i) (“The Commission and the staff will consider whether the defect arises from the design, composition, contents, construction, finish, packaging, warnings, or instructions of the product or from some other cause and will consider the conditions under which the defect manifests itself.”).

38 See 16 C.F.R. § 1115.12(g)(1)(ii) (“Even one defective product can present a substantial risk of injury and provide a basis for a substantial product hazard determination ... if the injury which might occur is serious and/ or if the injury is likely to occur. However, a few defective products with no potential for causing serious injury and little likelihood of injuring even in a minor way will not ordinarily provide a proper basis for a substantial product hazard determination. The Commission also recognizes that the number of products remaining with consumers is a relevant consideration.”). CPSC’s July 2006 amendments to the interpretive regulations sought to clarify that it is the number of units “remaining with consumers,” rather than the number initially distributed, that may be relevant to determining the severity of the risk. See 71 Fed. Reg. 42,028, at 42,030 (July 25, 2006). However, the Commission cautioned that in its view a company “may still have a reporting obligation” even if “the number of products being used by consumers decreases” over time. *Id.* According to the Commission, firms that delay reporting “in anticipation of, or because of, a decrease in the number of products in use ... will be subject to civil penalties.” *Id.*

39 See 16 C.F.R. § 1115.12(g)(1)(iii) (“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 number of injuries reported to have occurred, the intended or reasonably foreseeable use or misuse of the product, and the population group exposed to the product (e.g., children, elderly, handicapped).”); see also *United States v. Spectrum Brands, Inc.*, 218 F. Supp. 3d 794, 820-21 (W.D. Wis. 2016) (rejecting defendant’s argument that no duty to report arose because “none of the reported injuries rose to any particular level of seriousness”), *aff’d*, 924 F.3d 337 (7th Cir. 2019).

40 16 C.F.R. § 1115.12(g)(iv) (“The Commission and the staff will consider all other relevant factors.”).

41 16 C.F.R. § 1115.12(g)(1); see also *Spectrum Brands*, 218 F. Supp. 3d at 821 (“CPSC’s interpretive regulations explain that a significant degree of exposure of the possibly defective product to the public, or the likelihood that it will cause injury, can give rise to a substantial product hazard regardless of whether there is a risk of a serious injury.”).

42 See 16 C.F.R. § 1115.4; see also, e.g., *Restatement (Third) of Torts: Prod. Liab.* § 2 (1998).

43 16 C.F.R. § 1115.4; see also Final Decision and Order at 46-47, *In re Zen Magnets, LLC*, CPSC Docket No. 12-2 (Oct. 26, 2017), https://www.cpsc.gov/s3fs-public/recall/lawsuits/abc/163--2017-10-26%20.Final%20Decision%20and%20Order.pdf?Tme8u5fRF2.29_B.i4lx7pPwb_whKng2 (holding that, under 16 C.F.R. § 1115.4, a design defect can arise solely as a result of product misuse).

44 71 Fed. Reg. at 42,030.
45 16 C.F.R. § 1115.12(f).
46 *Id.*
47 *Spectrum Brands*, 218 F. Supp. 3d 794.
48 *Id.* at 812 (emphasis in original).
49 *Id.* at 813.
50 *Id.* at 814.
51 16 C.F.R. § 1115.8.
52 71 Fed. Reg. at 42,030.
53 *Id.* CPSC has not uniformly treated compliance with a mandatory standard as a bar to late-reporting penalties. For example, in 2004, Battat, Inc. agreed to pay a civil penalty to settle allegations that it failed timely to notify CPSC about a choking risk associated with a toy drum set. Provisional Acceptance of a Settlement Agreement and Order, *Battat Inc.*, 69 Fed. Reg. 56,202, 56,202-03 (Sept. 20, 2004). CPSC acknowledged that the product complied with the small parts standard in testing, but alleged that Battat failed to timely notify the agency that the product could produce small parts in actual use. *Id.*
54 66 Fed. Reg. 30,715, 30,717 (June 7, 2001); *see also* Provisional Acceptance of a Settlement Agreement and Order, *The West Bend Company, a Subsidiary of Illinois Tool Works, Inc.*, 66 Fed. Reg. 11565 (Feb. 26, 2001) (alleging late reporting under Section 15 where West Bend received incident reports in Taiwan concerning its water distiller (two fires, one melting), recalled the product in Taiwan, and then notified CPSC approximately four months later after receiving six additional reports in the United States); Provisional Acceptance of a Settlement Agreement and Order, *phil&teds USA, Inc.*, 80 Fed. Reg. 54,769, 57,771 (Sept. 11, 2015) (agreeing to implement and maintain a compliance program that includes “procedures for collecting information from phil&teds USA’s affiliates on incidents and injuries occurring outside the United States”). And, as a practical matter, CPSC’s online Section 15 reporting portal instructs that reported incidents and injuries “should include those that occurred outside the United States.” *See* <https://www.saferproducts.gov/section15/>.
55 This provision was added by the CPSIA. Pub. L. No. 110-314, § 223, 122 Stat. 3016, 3068 (2008).
56 16 C.F.R. part 1120.
57 *See* 87 Fed. Reg. 72873 (Nov. 28, 2022).
58 *See* CPSC, Seasonal Lighting (Holiday Lights and Decorative Outfits), Business Guidance, <https://www.cpsc.gov/Business--Manufacturing/Business-Education/Business-Guidance/Household-Electrical-Products/Seasonal-and-Decorative-Lighting-Products>.
59 16 C.F.R. § 1120.1.
60 *See* 16 C.F.R. § 1115.12(d).
61 *Id.* § 1115.6(c).
62 *See id.*
63 *Id.* § 1115.6(a).
64 *Id.* § 1115.6(b); *see also United States v. Mirama Enters., Inc.*, 185 F. Supp. 2d 1148, 1158-59 (S.D. Cal. 2002) (stating that “[t]he standard is a ‘reasonable person’ standard, not a ‘reasonable expert’ standard” and finding that, based on the evidence Aroma had received, “a reasonable person could conclude that the juicer contained a defect which created a substantial risk to the public ... and ... ‘an unreasonable risk of serious injury or death’”), *aff’d*, 387 F.3d 983 (9th Cir. 2004).
65 16 C.F.R. § 1115.6(a); *see also Spectrum Brands*, 218 F. Supp. 3d at 820-21 (rejecting the defendant’s argument that no duty to report arose where “none of the reported injuries rose to any particular level of seriousness”).
66 16 C.F.R. § 1115.6(b).
67 *Id.* § 1115.6(a).
68 *Id.* § 1115.14(e).
69 *Id.* §§ 1115.14(c), (d). CPSC’s regulations also provide that 5 working days is “the maximum reasonable time for information” to go from an employee “capable of appreciating the significance of the information” to “the official or employee responsible for complying with the reporting requirements of section 15(b) of the CPSA.” *Id.* § 1115.14(b).
70 *Id.* § 1115.4; *see also Mirama Enters.*, 387 F.3d at 988 (“[i]nformation about a possible defect triggers the duty to report, which in turn allows the Commission either to conclude that no defect exists or to require appropriate corrective action”).
71 16 C.F.R. § 1115.10(f).
72 *See id.* §§ 1115.3(a), 1115.10(f); *see also Spectrum Brands*, 218 F. Supp. 3d at 818 (CPSC is adequately informed if “the company and CPSC have the same material information”); *Mirama Enters.*, 185 F. Supp. 2d at 1163 (finding that CPSC was not adequately informed under Section 15 when the agency knew of seven of 23 incidents of which the company had knowledge and the company had actual knowledge that CPSC was informed of only seven of the 23 incidents).
73 15 U.S.C. § 2064(b).
74 *See* 16 C.F.R. § 1115.13(c).
75 *See id.* § 1115.13(d).
76 Further, as discussed below, Commission approval is required for any corrective action plan involving a consumer

product that has been associated with a fatality to meet this requirement, CPSC staff includes in every Full Report request a question seeking information regarding any fatality involving the product regardless of whether the death is related to the reported issue.

77 See *id.* § 1115.13(b).

78 See *In re Amazon.com, Inc.*, CPSC Docket No. 21-2 (July 21, 2021) (seeking a determination that Amazon is a distributor of consumer products in commerce, as those terms are defined in the CPSA, and to compel Amazon to recall specified productions that allegedly create substantial product hazards); see also Press Release, CPSC, CPSC Sues Amazon to Force Recall of Hazardous Products Sold on Amazon.com (July 14, 2021), <https://www.cpsc.gov/Newsroom/News-Releases/2021/CPSC-Sues-Amazon-to-Force-Recall-of-Hazardous-Products-Sold-on-Amazon-com> (Acting Chairman Robert Adler stating, “We must grapple with how to deal with these massive third-party platforms more efficiently, and how best to protect the American consumers who rely on them.”); CPSC, Statement of Commissioner Peter Feldman, New Penalty Caps May Provide Insufficient Deterrence Against the Largest E-Commerce Platforms (Nov. 23, 2021), <https://cpsc-d8-media-prod.s3.amazonaws.com/s3fs-public/Civil%20Penalties%20Adjustment%20Nov%2023%202021.pdf?VersionId=QHEBFJV4Hn7.m0o.5QWG5eCaJ16zov2>.

79 See, e.g., Press Release, CPSC, Four Retailers Agree to Stop Sale and Voluntarily Recall Nap Nanny Recliners Due to Five Infant Deaths (Dec. 27, 2012), <https://www.cpsc.gov/Recalls/2012/four-retailers-agree-to-stop-sale-and-voluntarily-recall-nap-nanny-recliners-due-to> (manufacturer unable or unwilling to participate in the recall); Provisional Acceptance of a Settlement Agreement and Order, *Consolidated Electrical Distributors, Inc.*, 64 Fed. Reg. 43,990 (Aug. 12, 1999) (distributor of a recalled heater paid \$1.5 million under a Consent Agreement with CPSC to help fund a recall where the manufacturer had declared bankruptcy after negotiating a corrective action plan with CPSC).

80 See, e.g., Provisional Acceptance of a Settlement Agreement and Order, B.J’s Wholesale Club, Inc., 888 Fed. Reg. 68,589 (October 4, 2023) (\$9 million civil penalty settlements for alleged late reporting under Section 15 concerning certain portable air conditioners for which B.J’s was not an exclusive retailer); Provisional Acceptance of a Settlement Agreement and Order, *Office Depot, Inc.*, 80 Fed. Reg. 31,576 (June 3, 2015) (\$3.4 million civil penalty settlement for alleged late reporting under Section 15 concerning two office chair models for which Office Depot was the exclusive retailer, one of which it also imported); Stipulated Judgment and Order, *United States v. Wal-Mart Stores, Inc.*, No. PJM 01-1521 (D. Md. Apr. 23, 2003) (\$750,000 civil penalty settlement for alleged late reporting under Section 15 concerning exercise equipment for which Wal-Mart was neither the importer nor the private labeler), https://www.cpsc.gov/s3fs-public/CivilPenalty03118.pdf?F2CjR6rUvKHtBla1mXUagbJ6ti9_FTb.

81 15 U.S.C. § 2055(b)(5). The fourth of these exceptions was added by the CPSIA, thereby expanding CPSC’s ability to disclose publicly information about a potential safety hazard that a company reports under Section 15(b). See Pub. L. No. 110-314, § 21, 122 Stat. 3018, 3048 (2008).

82 *Id.* The CPSIA expanded this exception to cover acts other than the CPSA.

83 See 15 U.S.C. § 2055(a)(2); 16 C.F.R. § 1015.18(d); see also *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019) (protecting from disclosure as “confidential” financial or commercial information that “is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy”); *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871 (D.C. Cir. 1992) (*en banc*) (protecting from disclosure information submitted voluntarily to the government). Further, before disclosing information through which the product’s manufacturer or private labeler “may be readily ascertained,” CPSC must take reasonable steps to ensure that the information “is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of this Act.” See 15 U.S.C. § 2055(b)(1); 16 C.F.R. §§ 1101.31-1101.34.

84 See CPSC, Violations, <https://www.cpsc.gov/Recalls/violations>.

85 CPSC, Fiscal Year 2022 Operating Plan at 55 (Sept. 24, 2021), <https://www.cpsc.gov/content/FY-2022-Operating-Plan>.

86 See Product Safety Planning, Reporting, and Recall Handbook at 13-14 (Sept. 2021), <https://www.cpsc.gov/s3fs-public/CPSCRecallHandbookSeptember2021.pdf>.

87 The determination is “preliminary” because the Commissioners will not yet have made a formal, “final” determination, through the administrative litigation process described below, that the product presents a substantial product hazard. See 15 U.S.C. §§ 2064(c), (d).

88 See Marietta Robinson, The Robinson Report #17: ICPHSO & Changing the CPSC’s Delegation for a Safer Tomorrow! (Mar. 1, 2016), <https://leadership.cpsc.gov/robinson/2016/03/01/the-robinson-report-17-icphso-changing-the-cpsc-delegation-for-a-safer-tomorrow/> (discussing CPSC Order No. 0310.14).

89 See *id.*

90 See CPSC, Record of Commission Action: Revised Delegation of Authority: Authority to Accept Certain Voluntary Corrective Action Plans (Feb. 23, 2016), <https://www.cpsc.gov/content/rca-revised-delegation-of-authority-authority-to-accept-certain-voluntary-corrective-action>; CPSC, Revised Draft Delegation of Authority (approved by the Commission), <https://cpsc.gov/s3fs-public/DelegationsOfAuthorityRegulatory.pdf>. The delegation of authority was revised at the impetus of Commissioner Marietta Robinson and approved 4-1 by the Commission, with Commissioner Ann Marie Buerkle opposing. Commissioner Robinson explained that she had analyzed five years of recall press releases and had become “concerned that some voluntary CAPs, many of which involved the deaths of small children, were simply

inadequate [and] these CAPs would have been stronger had they been submitted to the Commission for approval.” The Robinson Report #17. She further explained that the “Commission would review and ultimately approve, reject, or take other action on those voluntary CAPs for cases where a death has occurred,” and that the “goal of this change is not to directly affect the preliminary determination of a hazard classification or the negotiation of the voluntary CAP,” but the revision would “lead to more appropriate and comprehensive voluntary CAPs and an overall safer marketplace for tomorrow’s consumer.” *Id.* Commissioner Buerkle argued against the more restrictive delegation as “violat[ing] the principle of risk-based decisionmaking.” CPSC, Statement of Commissioner Ann Marie Buerkle on the Commission’s Withdrawal of Authority to Approve Corrective Action Plans in Cases Where a Death Has Occurred (Mar. 31, 2016), <https://www.cpsc.gov/about-cpsc/commissioner/ann-marie-buerkle/statements/statement-of-commissioner-ann-marie-buerkle-on>. She also questioned the assertion that the change was not intended to affect the negotiation of the voluntary CAP, indicating that only through negotiating the terms could “CAPs become ‘more appropriate and comprehensive.’” *Id.* Further, she reasoned that requiring Commission approval would “delay voluntary recalls in these cases,” including potentially extended delays for renegotiation or litigation of CAPs. *Id.*

⁹¹ See, e.g., Press Release, CPSC, CPSC Warns Consumers: Stop Using the Leachco Podster, Podster Plush, Bummzie and Podster Playtime Infant Loungers Due to Suffocation Hazard; Two Infant Deaths Investigated (Jan. 20, 2022), <https://www.cpsc.gov/Newsroom/News-Releases/2022/CPSC-Warns-Consumers-Stop-Using-the-Leachco-Podster-Podster-Plush-Bummzie-and-Podster-Playtime-Infant-Loungers-Due-to-Suffocation-Hazard-Two-Infant-Deaths-Investigated>; <https://www.cpsc.gov/Newsroom/News-Releases/2021/CPSC-Warns-Consumers-Stop-Using-the-Peloton-Tread>; Press Release, CPSC, CPSC Warning: Stop Using Otteroo LUMI and MINI Infant Flotation Rings Due to Drowning Hazard; One Infant Death Reported (Nov. 22, 2022), <https://www.cpsc.gov/Newsroom/News-Releases/2023/CPSC-Warning-Stop-Using-Otteroo-LUMI-and-MINI-Infant-Flotation-Rings-Due-to-Drowning-Hazard-One-Infant-Death-Reported>; Press Release, CPSC, CPSC Warns Consumers to Immediately Stop Using “My Bouncer Little Castle” Bounce Houses Due to Strangulation Risk; Death of 4-Year-Old Boy Reported (Nov. 16, 2022), <https://www.cpsc.gov/Newsroom/News-Releases/2023/CPSC-Warns-Consumers-to-Immediately-Stop-Using-My-Bouncer-Little-Castle-Bounce-Houses-Due-to-Strangulation-Risk-Death-of-4-Year-Old-Boy-Reported>.

⁹² See, e.g., Press Release, CPSC, CPSC Warns Consumers to Stop Using Toos Elite Electric Scooters Due to Fire Hazard; Two Deaths Reported (Oct. 23, 2023), <https://www.cpsc.gov/Newsroom/News-Releases/2024/CPSC-Warns-Consumers-to-Stop-Using-Toos-Elite-Electric-Scooters-Due-to-Fire-Hazard-Two-Deaths-Reported>; Press Release, CPSC, CPSC Warns Consumers to Stop Using Onewheel Self-Balancing Electric Skateboards Due to Ejection Hazard; At Least Four Deaths and Multiple Injuries Reported (Nov. 16, 2022), <https://www.cpsc.gov/Newsroom/News-Releases/2023/CPSC-Warns-Consumers-to-Stop-Using-Onewheel-Self-Balancing-Electric-Skateboards-Due-to-Ejection-Hazard-At-Least-Four-Deaths-and-Multiple-Injuries-Reported>; CPSC Warns Consumers to Immediately Stop Using ZAUTNKN.INC Lithium-Ion Replacement Battery Packs for Dyson Vacuums Due to Fire Hazard; Sold on Amazon.com (Jan. 4, 2024), <https://www.cpsc.gov/Newsroom/News-Releases/2024/CPSC-Warns-Consumers-to-Immediately-Stop-Using-ZAUTNKN-INC-Lithium-Ion-Replacement-Battery-Packs-for-Dyson-Vacuums-Due-to-Fire-Hazard-Sold-on-Amazon-com>; Press Release, CPSC, CPSC Warns Consumers to Immediately Stop Using BQQZHZ Combination Smoke and Carbon Monoxide Detectors Due to Failure to Alert Consumers to Deadly Smoke and Fire; Sold on Amazon.com (May 18, 2023), <https://www.cpsc.gov/Newsroom/News-Releases/2023/CPSC-Warns-Consumers-to-Immediately-Stop-Using-BQQZHZ-Combination-Smoke-and-Carbon-Monoxide-Detectors-Due-to-Failure-to-Alert-Consumers-to-Deadly-Smoke-and-Fire-Sold-on-Amazon-com>; Press Release, CPSC, CPSC Warns Consumers to Immediately Stop Using “My Bouncer Little Castle” Bounce Houses Due to Strangulation Risk; Death of 4-Year-Old Boy Reported (Nov. 16, 2022), <https://www.cpsc.gov/Newsroom/News-Releases/2023/CPSC-Warns-Consumers-to-Immediately-Stop-Using-My-Bouncer-Little-Castle-Bounce-Houses-Due-to-Strangulation-Risk-Death-of-4-Year-Old-Boy-Reported>.

⁹³ See, e.g., Press Release, CPSC, CPSC Warns Consumers to Immediately Stop Using SplishSplashFun’s SplishSplash Balls Reusable Water Balloons with High-Powered Magnets Due to Ingestion Hazard; Violation of Federal Safety Regulation for Toys (Dec. 7, 2023), <https://www.cpsc.gov/Newsroom/News-Releases/2024/CPSC-Warns-Consumers-to-Immediately-Stop-Using-SplishSplashFuns-SplishSplash-Balls-Reusable-Water-Balloons-with-High-Powered-Magnets-Due-to-Ingestion-Hazard-Violation-of-Federal-Safety-Regulation-for-Toys>; Press Release, CPSC (Sept. 28, 2023), CPSC Warns Consumers to Immediately Stop Using 5in1 Rocker Bassinets Due to Suffocation, Strangulation, and Fall Hazards; Failure to Meet Federal Safety Requirements, <https://www.cpsc.gov/Newsroom/News-Releases/2023/CPSC-Warns-Consumers-to-Immediately-Stop-Using-5in1-Rocker-Bassinets-Due-to-Suffocation-Strangulation-and-Fall-Hazards-Failure-to-Meet-Federal-Safety-Requirements>; Press Release, CPSC, CPSC Warns Consumers to Immediately Stop Using Girasol Rainbow Love Woven Wrap Sling Carriers Due to Failure to Meet Federal Safety Standard; Fall Hazard (June 15, 2023), <https://www.cpsc.gov/Newsroom/News-Releases/2023/CPSC-Warns-Consumers-to-Immediately-Stop-Using-Girasol-Rainbow-Love-Woven-Wrap-Sling-Carriers-Due-to-Failure-to-Meet-Federal-Safety-Standard-Fall-Hazard>; Press Release, CPSC, CPSC Warns Consumers to Immediately Stop Using TureClos Bicycle Helmets Due to Risk of Head Injury; Sold at Walmart.com (Mar. 9, 2023), <https://www.cpsc.gov/Newsroom/News-Releases/2023/CPSC-Warns-Consumers-to-Immediately-Stop-Using-TureClos-Bicycle-Helmets-Due-to-Risk-of-Head-Injury-Sold-at-Walmart-com>.

- ⁹⁴ See, e.g., Press Release, CPSC, CPSC and Peloton Announce: Recall of Tread+ Treadmills After One Child Death and 70 Incidents; Recall of Tread Treadmills Due to Risk of Injury (May 5, 2021), <https://www.cpsc.gov/Newsroom/News-Releases/2021/CPSC-and-Peloton-Announce-Recall-of-Tread-Plus-Treadmills-After-One-Child-Death-and-70-Incidents-Recall-of-Tread-Treadmills-Due-to-Risk-of-Injury>; Press Release, CPSC, CPSC Warns Consumers of Serious Tip-Over Hazard Posed by Hodedah HI4DR 4-Drawer Dressers (Jan. 8, 2020), <https://www.cpsc.gov/Newsroom/News-Releases/2020/CPSC-Warns-Consumers-of-Serious-Tip-Over-Hazard-Posed-by-Hodedah-HI4DR-4-Drawer-Dressers>, followed by Press Release, CPSC, Hodedah Recalls HI4DR 4-Drawer Chests Due to Tip-Over and Entrapment Hazards; Remedies May Be Delayed Due to COVID-19 Restrictions; Keep Product Away from Children (May 13, 2020), <https://www.cpsc.gov/Recalls/2020/hodedah-recalls-hi4dr-4-drawer-chests-due-to-tip-over-and-entrapment-hazards-remedies>; and Press Release, CPSC, CPSC Warns Consumers to Stop Using Summer Infant (USA), Inc.'s SwaddleMe By Your Bed Sleeper (Jan. 16, 2020), <https://www.cpsc.gov/content/cpsc-warns-consumers-to-stop-using-summer-infant-usa-inc%E2%80%99s-swaddleme-by-your-bed-sleeper>, followed by Press Release, CPSC, Summer Infant Recalls SwaddleMe By Your Bed Inclined Sleepers to Prevent Risk of Suffocation (Jan. 29, 2020), <https://www.cpsc.gov/Recalls/2020/Summer-Infant-Recalls-SwaddleMe-By-Your-Bed-Inclined-Sleepers-to-Prevent-Risk-of-Suffocation>; Press Release, CPSC, CPSC Warns Consumers to Stop Using Onewheel Self-Balancing Electric Skateboards Due to Ejection Hazard; At Least Four Deaths and Multiple Injuries Reported (Nov. 16, 2022), <https://www.cpsc.gov/Newsroom/News-Releases/2023/CPSC-Warns-Consumers-to-Stop-Using-Onewheel-Self-Balancing-Electric-Skateboards-Due-to-Ejection-Hazard-At-Least-Four-Deaths-and-Multiple-Injuries-Reported> and Press Release, CPSC, Future Motion Recalls Onewheel Self-Balancing Electric Skateboards Due to Crash Hazard; Four Deaths Reported (Sept. 29, 2023), <https://www.cpsc.gov/Recalls/2023/Future-Motion-Recalls-Onewheel-Self-Balancing-Electric-Skateboards-Due-to-Crash-Hazard-Four-Deaths-Reported>.
- ⁹⁵ See, e.g., Press Release, CPSC, CPSC Warning: Stop Using Otteroo LUMI and MINI Infant Flotation Rings Due to Drowning Hazard; One Infant Death Reported (Nov. 22, 2022), <https://www.cpsc.gov/Newsroom/News-Releases/2023/CPSC-Warning-Stop-Using-Otteroo-LUMI-and-MINI-Infant-Flotation-Rings-Due-to-Drowning-Hazard-One-Infant-Death-Reported>, and CBS News, *Otteroo baby neck floats still on sale despite reports of injury and one infant death* (Aug. 2, 2023), <https://www.cbsnews.com/news/otteroo-baby-neck-pillow-warning-cpsc-fda/>; Press Release, CPSC, CPSC Warns Consumers to Immediately Stop Using King Song Electric Unicycles Due to Fire Hazard; Fire and Injuries Reported (July 12, 2022), <https://www.cpsc.gov/Newsroom/News-Releases/2022/CPSC-Warns-Consumers-to-Immediately-Stop-Using-King-Song-Electric-Unicycles-Due-to-Fire-Hazard-Fire-and-Injuries-Reported>; Press Release, CPSC, CPSC Warns Consumers to Stop Using Toos Elite Electric Scooters Due to Fire Hazard; Two Deaths Reported (Oct. 23, 2023), <https://www.cpsc.gov/Newsroom/News-Releases/2024/CPSC-Warns-Consumers-to-Stop-Using-Toos-Elite-Electric-Scooters-Due-to-Fire-Hazard-Two-Deaths-Reported>.
- ⁹⁶ See *In re Leachco, Inc.*, CPSC Docket No. 22-1, 87 Fed. Reg. 8,804 (Feb. 16, 2022), https://www.cpsc.gov/s3fs-public/pdfs/recall/lawsuits/abc/001-Complaint-In-the-Matter-of-Leachco-Inc-CPSC-Docket-No-22-1.pdf?VersionId=3WKMODTUGoNJPXYzM_VpsS8a.mtPRT5x.
- ⁹⁷ See, e.g., Answer of Respondent Maxfield and Oberton Holdings, LLC ¶ 52, *In re Maxfield & Oberton Holdings, LLC*, CPSC Docket No. 12-1 (Aug. 14, 2012), https://www.cpsc.gov/s3fs-public/pdfs/lawsuit_maxfield2.pdf (alleging that, without prior notice to Maxfield, the staff notified retailers identified through confidential information Maxfield had provided and requested that they stop selling the product, in violation of Section 6(b)(5)). This practice has not been without criticism. See generally, e.g., Jerry Brito, “Agency Threats’ and the Rule of Law: An Offer You Can’t Refuse,” 37 Harv. J. L. and Pub. Pol. 553 (2014) (arguing that agencies’ use of such tactics is coercive).
- ⁹⁸ 15 U.S.C. § 2055(b)(1).
- ⁹⁹ 15 U.S.C. § 2055(b)(1).
- ¹⁰⁰ 15 U.S.C. § 2055(b)(1).
- ¹⁰¹ 15 U.S.C. § 2055(b)(1).
- ¹⁰² See 15 U.S.C. §§ 2064(c), (d).
- ¹⁰³ See 15 U.S.C. § 2055(b)(5)(A).
- ¹⁰⁴ See, e.g., Press Release, CPSC, CPSC Sues Zen Magnets Over Hazardous, High-Powered Magnetic Balls Action Prompted by Ongoing Harm to Children from Ingested Magnets (Aug. 7, 2012), <https://www.cpsc.gov/Newsroom/News-Releases/2012/cpsc-sues-zen-magnets-over-hazardous-high-powered-magnetic-balls-action-prompted-by-ongoing>.
- ¹⁰⁵ 15 U.S.C. § 2064(g).
- ¹⁰⁶ See 16 C.F.R. § 1025 (CPSC rules of practice for adjudicative proceedings).
- ¹⁰⁷ See *id.* § 1025.51(a).
- ¹⁰⁸ See *id.* §§ 1025.51-1025.54.
- ¹⁰⁹ 5 U.S.C. §§ 701-706.
- ¹¹⁰ Including the *Central Sprinkler* case, discussed *supra* at nn.15-19 and accompanying text, the CPSC staff filed four administrative complaints from 1998 through 2001. See *In re Daisy Mfg. Co.*, CPSC Docket No. 02-2, 66 Fed. Reg. 56,082 (Nov. 6, 2001) (air rifles); *In re Chemetron Corp.*, CPSC Docket No. 02-1 (Oct. 9, 2001) (sprinkler systems); *In re Cadet Mfg. Co.*, CPSC Docket No. 99-1, 64 Fed. Reg. 3,932 (Jan. 26, 1999) (heaters). After a gap of nearly 11 years, the CPSC staff filed four administrative complaints in 2012 — one concerning

- certain Nap Nanny[®] infant recliners (see *In re Baby Matters, LLC*, CPSC Docket No. 13-1, 77 Fed. Reg. 73,621 (Dec. 11, 2012)), and three concerning high-powered magnets. See *In re Star Networks USA, LLC*, CPSC Docket No. 13-2, 77 Fed. Reg. 76,006 (Dec. 26, 2012); *In re Zen Magnets, LLC*, CPSC Docket No. 12-2, 77 Fed. Reg. 47,823 (Aug. 10, 2012); *In re Maxfield & Oberton Holdings, LLC*, CPSC Docket No. 12-1, 77 Fed. Reg. 45,342 (July 31, 2012). After another litigation gap spanning more than five years, on February 16, 2018, CPSC filed an administrative complaint against Britax Child Safety, Inc. See Press Release, CPSC, CPSC Sues Britax Over Hazardous Jogging Strollers; Action Prompted by Ongoing Harm to Children and Adults from Stroller Wheel Detachment (Feb. 16, 2018), <https://www.cpsc.gov/Newsroom/News-Releases/2018/cpsc-sues-britax-over-hazardous-jogging-strollers-action-prompted-by-ongoing-harm-to>.
- 111 See *In re Leachco, Inc.*, CPSC Docket No. 22-1, 87 Fed. Reg. 8,804 (Feb. 16, 2022), https://www.cpsc.gov/s3fs-public/pdfs/recall/lawsuits/abc/001-Complaint--In-the-Matter-of-Leachco-Inc-CPSC-Docket-No-22-1.pdf?VersionId=3WKMODTUGoNJPXYzM_VpsS8a.mtPRT5x.
- 112 See *In re Leachco, Inc.*, CPSC Docket No. 22-2, *supra* n.111, ¶¶ 50-52.
- 113 See *In re Leachco, Inc.*, CPSC Docket No. 22-1, *supra* n.111, ¶¶ 35-37.
- 114 See Respondent Leachco, Inc.'s Answer to Complaint, *In re Leachco, Inc.*, CPSC Docket No. 22-1, ¶¶ 47-51 (Mar. 2, 2022), <https://www.cpsc.gov/s3fs-public/pdfs/recall/lawsuits/abc/002-Respondent-Leachco-Incs-Answer-To-Complaint.pdf?VersionId=saWRLT8wowxdIY6q6CN9upUky6LR.Lv>.
- 115 See Order Granting Joint Motion to Correct Hearing Transcript, *In re Leachco, Inc.*, CPSC Docket No. 22-1 (Oct. 4, 2023), https://www.cpsc.gov/s3fs-public/pdfs/recall/lawsuits/abc/146OrderGrantingJointMottoCorrectHrgTrCPSC22_1.pdf?VersionId=SC7jiMiBkrQiSlkEaSbtXxEleA21kGyu.
- 116 See Complaint Counsel's Post-Hearing Brief, *In re Leachco, Inc.*, CPSC Docket No. 22-1, https://www.cpsc.gov/s3fs-public/pdfs/recall/lawsuits/abc/143-CCs-Post-Hearing-Brief-9-29-23-PUBLIC.pdf?VersionId=rqB37gmO_Q0fYAA_V3GEP1PFK_IUfnAB; see also Leachco, Inc.'s Post-Hearing Brief, CPSC Docket No. 22-1, <https://www.cpsc.gov/s3fs-public/pdfs/recall/lawsuits/abc/144-Leachco-Post-Hearing-Brief-DRAFT-FINAL-PUBLIC.pdf?VersionId=pNv1QjrmVCyWRAnaNiDf6nVdhKUj636j>.
- 117 Complaint, *In re Amazon.com, Inc.*, CPSC Docket No. 21-2, 86 Fed. Reg. 38,450 (July 21, 2021), ¶¶ 19, 52-74.
- 118 *Id.*
- 119 Amazon's Opposition to Complaint Counsel's Motion for Partial Summary Decision and Memorandum in Support of Motion to Dismiss or, in the Alternative, Cross-Motion for Summary Decision at 9-11, *In re Amazon.com, Inc.*, CPSC Docket No. 21-2 (Nov. 2, 2021), https://www.cpsc.gov/s3fs-public/pdfs/recall/lawsuits/abc/015-Respondent-Amazons-Opposition-to-Complaint-Counsels-Motion-for-Partial-Summary-Decision-and-Memo-in-Support-of-Motion-to-Dismiss-or-in-the-Alternative-Cross-Motion-for-Summary.pdf?VersionId=Vi.KrbSnb0hjSd_i007UOUeBc3kU7nHI.
- 120 15 U.S.C. § 2052(a)(16), (b).
- 121 Complaint Counsel's Motion for Partial Summary Decision and Memorandum of Points and Authorities in Support of Motion for Partial Summary Decision at 3, *In re Amazon.com, Inc.*, CPSC Docket No. 21-2 (Oct. 13, 2021), <https://www.cpsc.gov/s3fs-public/pdfs/recall/lawsuits/abc/009-Motion-for-Partial-Summary-Decision-In-the-Matter-of-Amazon.pdf?VersionId=jn.bObBol5YBSoEZHK8xRLW83MEWeT1>.
- 122 Complaint, *In re Amazon.com, Inc.*, CPSC Docket No. 21-2, *supra* n.117, ¶¶ 47-51.
- 123 Complaint, *In re Amazon.com, Inc.*, CPSC Docket No. 21-2, *supra* n.117, ¶¶ XI.3, XI.4.
- 124 Amazon's Opposition to Complaint Counsel's Motion for Partial Summary Decision and Memorandum in Support of Motion to Dismiss or, in the Alternative, Cross-Motion for Summary Decision, *supra* n.119, at 35.
- 125 Amazon's Reply in Support of Motion to Dismiss at 20, *In re Amazon.com, Inc.*, CPSC Docket No. 21-2 (Dec. 7, 2021) (citing 15 U.S.C. § 2064(c)-(d)), https://www.cpsc.gov/s3fs-public/pdfs/recall/lawsuits/abc/025-In-the-Matter-of-Amazon-com-CPSC-Docket-21-2-Amazons-Reply-in-Support-of-Motion-to-Dismiss.pdf?VersionId=92LhgPa6WW_ic6xhpug07ms0BO0qgMNY.
- 126 See Order on Motion to Dismiss and Motion for Summary Decision at ¶ 27, *In re Amazon.com Inc.*, CPSC Docket No. 21-2 (Jan. 19, 2022), <https://www.cpsc.gov/s3fs-public/pdfs/recall/lawsuits/abc/027-Order-on-Motion-to-Dismiss-and-Motion-for-Summary-Judgement.pdf?VersionId=fqW05hge.c7FvPZZOjVWVapvJBQKudZ>.
- 127 See Initial Decision and Order on Remedies, *In re Amazon.com, Inc.*, CPSC Docket No. 21-2 (July 10, 2023), https://www.cpsc.gov/s3fs-public/pdfs/recall/lawsuits/abc/119-Initial-Decision-and-Order-on-Remedies.pdf?VersionId=VCX.J7PqooaChMDhINQ6dKYJzc_K7nuP.
- 128 See Initial Decision and Order on Remedies, at ¶ 13.
- 129 See 16 C.F.R. §§ 1115.23-29.
- 130 See Initial Decision and Order on Remedies, at ¶¶ 13-17.
- 131 See Respondent Amazon.com, Inc.'s Appeal Brief, CPSC Docket 21-2 (Aug. 21, 2023), <https://www.cpsc.gov/s3fs-public/pdfs/recall/lawsuits/abc/127-20230821-Amazons-Appeal-Brief-and-Proposed-Order>

[PUBLIC.pdf?VersionId=bDFe.Hsz4fGBS_dLJCa2_Cxj2VNvSity.](#)

132 See Complaint Counsel’s Appeal Brief, CPSC Docket 21-2 (Aug. 21, 2023), https://www.cpsc.gov/s3fs-public/pdfs/recall/lawsuits/abc/125-2023-08-21-CCs-Appeal-Brief-In-re-Amazon-PUBLIC.pdf?VersionId=oH_jnG4WRLeWb_PeqQqMqx_gedOiKXS_.

133 Video of the oral argument is available at <https://www.youtube.com/watch?v=0Yq0KKZDHSI>.

134 5 U.S.C. § 702.

135 *In re Zen Magnets*, 77 Fed. Reg. 47,823; see also *In re Star Networks*, 77 Fed. Reg. 76,006; *In re Maxfield & Oberton*, 77 Fed. Reg. 45,342.

136 Consent Agreement and Order, *In re Star Networks*, CPSC Docket No. 13-2 (July 27, 2014), https://www.cpsc.gov/s3fs-public/pdfs/recall/lawsuits/abc/lawsuit_ConsentAgreementandOrder072814-19801.pdf; Consent Agreement and Order, *In re Maxfield & Oberton*, CPSC Docket No. 12-1 (May 9, 2014), https://www.cpsc.gov/s3fs-public/pdfs/lawsuit_ConsentAgreementOrder050914.pdf.

137 Decision and Order, *In re Zen Magnets, LLC*, CPSC Docket No. 12-2 (Mar. 25, 2016), https://www.cpsc.gov/s3fs-public/pdfs/lawsuit_ZenMagnetsDecisionandOrder.pdf. While the administrative case was pending, the Commission promulgated a magnet set safety standard that established requirements with which Zen’s SREMs would not comply. Final Rule: Safety Standard for Magnet Sets, 79 Fed. Reg. 59,962 (Oct. 3, 2014) (*codified at* 16 C.F.R. §§ 1240.1-1240.5). Zen then successfully challenged the regulation before the Tenth Circuit Court of Appeals, which held “the Commission failed to meet the [CPSC’s] requirements for issuing a safety standard,” because CPSC’s “prerequisite factual findings, which are compulsory under the [CPSC], are incomplete and inadequately explained.” *Zen Magnets, LLC v. CPSC*, 841 F.3d 1141, 1144, 1147 (10th Cir. 2016). Three of the four commissioners who had voted to issue the Safety Standard then heard the appeal of the ALJ’s decision in the administrative proceedings, along with Commissioner Buerkle, who had abstained from the rulemaking vote. See Opinion and Order Denying Respondent’s Motion to Disqualify the Commission or Some of Its Members, *In re Zen Magnets, LLC*, CPSC Docket No. 12-2 (Sept. 1, 2016), <https://www.cpsc.gov/s3fs-public/pdfs/recall/lawsuits/abc/155--2016-09-01OpinionandOrderDenyingRespondentsMotiontoDisqualifytheCommissionorSomeofitsMembers.pdf>.

138 Final Decision and Order at 46-47, *In re Zen Magnets, LLC*, CPSC Docket No. 12-2 (Oct. 26, 2017), https://www.cpsc.gov/s3fs-public/pdfs/recall/lawsuits/abc/163--2017-10-26%20Final%20Decision%20and%20Order.pdf?Tme8u5fRF2.29_B.i4lx7pPwb_whKng2.

139 Complaint for Injunctive Relief and Declaratory Relief, *Zen Magnets, LLC v. CPSC*, 17-cv-02645 (D. Colo. Nov. 6, 2017).

140 Order on Cross-Motions for Summary Judgment, *Zen Magnets, LLC vs. CPSC*, No. 17-cv-02645, 2018 WL 2938326, at *15 (D. Colo. June 12, 2018).

141 *Id.* at *13. In particular, the court referred to the public statement by Commissioner Adler “that the risks associated with SREMs would persist ‘irrespective of how strong the warnings on the boxes in which they’re sold or how narrowly they are marketed to adults.’”

142 *Zen Magnets, LLC v. Consumer Prod. Safety Comm’n*, 968 F.3d 1156, 1173 (10th Cir. 2020).

143 Order Denying Petition For Rehearing And Rehearing En Banc, *Zen Magnets, LLC v. CPSC*, 19-1168, 19-1186 (10th Cir. Nov. 9, 2020).

144 Alan Prendergast, *Zen Magnets Calls It Quits After New Ruling in Eight-Year Fight*, Westword (Dec. 14, 2020), <https://www.westword.com/news/zen-magnets-gives-up-after-eight-year-government-fight-11861289>.

145 See Press Release, CPSC, *Zen Magnets and Neoballs Magnets Recalled Due to Ingestion Hazard* (Aug. 17, 2021), <https://www.cpsc.gov/Recalls/2021/Zen-Magnets-and-Neoballs-Magnets-Recalled-Due-to-Ingestion-Hazard>.

146 See 15 U.S.C. § 2061(b)(1).

147 See 15 U.S.C. §§ 2064(c), (d).

148 See, e.g., Memorandum and Order, *U.S. v. Polaris Indus., L.P.*, No. 87-3525 (D.D.C. Apr. 27, 1988) (consent decree under Section 12, including a ban of three-wheel ATVs) (*reproduced in U.S. v. Am. Honda Motor Co., Inc.*, 143 F.R.D. 1, App. A (D.D.C. 1992)); Order, *CPSC v. A.K. Electric Corp.*, No. 74-1206 (D.D.C. Sept. 9, 1974) (granting injunction under Section 12 barring manufacture, distribution, and sale, and ordering recall, of a “mechanic’s light” that was found to pose an imminent danger of serious or fatal electric shock).

149 See Minutes of Commission Meeting, Decisional Matter: Fiscal Year 2024 Operating Plan, 4 (Nov. 8, 2023), <https://www.cpsc.gov/s3fs-public/Comm-Mtg-Min-FY-2024-Operating-Plan-Decisional.pdf?VersionId=GDwWSUy29P7SN9MpqVWdX5Nn9xe36Vm#page=8>.

150 Peter A. Feldman, Statement of Commissioner Peter A. Feldman on the FY 2024 Operating Plan, ¶ 4 (Nov. 8, 2023), <https://www.cpsc.gov/About-CPSC/Commissioner/Peter-A-Feldman/Statement/Statement-of-Commissioner-Peter-A-Feldman-on-the-FY-2024-Operating-Plan>.

151 See 62 Fed. Reg. 39,827, 39,828 (July 24, 1997).

152 Email from CPSC staff to Eric Rubel Nov. 19, 2021 (data for fiscal years 2013-2021).

153 Statement of Commissioner Peter A. Feldman: Record Recall Numbers Reflect Return on Investment for American Consumers (Nov. 1, 2023), <https://www.cpsc.gov/s3fs-public/COPF-Statement-on-Record-Recall-Numbers.pdf>.

154 See 15 U.S.C. §§ 2068(a)(4), 2069(a)(1).
155 16 C.F.R. § 1119.1.
156 15 U.S.C. § 2069(d); see also *Spectrum Brands*, 218 F. Supp. 3d at 822 (“Since defendant had actual knowledge of the information that required a report, it ‘knowingly’ failed to do so, and no reasonable jury could find otherwise.”).
157 *Id.*
158 15 U.S.C. § 2064(b) (emphases added).
159 See 69 Fed. Reg. 68,884 (Nov. 26, 2004).
160 See Pub. L. No. 110-314, §§ 217(a)(1), (4), 122 Stat. 3016, 3058 (2008); see also Civil Penalty Factors, Interim Final Interpretive Rule, 74 Fed. Reg. 45,101, 45,102 (Sept. 1, 2009) (“new penalty amounts specified in [the CPSIA] take effect on the date that is the earlier of the date on which a final rule providing the Commission’s interpretation of penalty factors is issued or on August 14, 2009 (one year after the date of enactment of the CPSIA)”).
161 See 86 Fed. Reg. 68,244 (Dec. 1, 2021).
162 See 28 U.S.C. §2462; see also *Mirama Enters.*, 387 F.3d at 987 (interpreting the provision of 15 U.S.C. § 2069(a)(1) that “violations ‘shall constitute a separate offense with respect to each consumer product involved’” as meaning that “a company commits a separate offense for every potentially dangerous unit it fails to report”); see also *United States v. Spectrum Brands*, No. 15-cv-00371-wmc, 2017 WL 4339677, at *1 (W.D. Wis. Sept. 29, 2017) (quoting *Mirama*).
163 28 U.S.C. § 2462.
164 *Gabelli v. SEC*, 568 U.S. 442, 448 (2013).
165 See *United States v. Michaels Stores, Inc.*, No. 3:15-cv-1203, 2016 WL 1090666, at *2 (N.D. Tex. Mar. 21, 2016); *Spectrum Brands*, 218 F. Supp. 3d at 817, *aff’d*, 924 F.3d 337 (7th Cir. 2019).
166 *Michaels Stores*, 2016 WL 1090666, at *2.
167 *Id.*
168 Consent Decree and Permanent Injunction, *Michaels Stores*, No. 3:15-cv-1203 (N.D. Tex. Feb. 9, 2018).
169 *Spectrum Brands*, 218 F. Supp. 3d at 817.
170 *Id.*
171 Order at 34, *United States v. Spectrum Brands, Inc.*, No. 18-1785 (7th Cir. May. 9, 2019).
172 15 U.S.C. § 2069(b).
173 16 C.F.R. Part 1119, *published in* 75 Fed. Reg. 15,993 (Mar. 31, 2010).
174 75 Fed. Reg. at 15,996.
175 *Id.*; see also 16 C.F.R. § 1119.4(a)(2).
176 16 C.F.R. § 1119.4(a)(3).
177 *Id.*
178 *Id.* § 1119.4(a)(4).
179 75 Fed. Reg. at 15,996-97.
180 16 C.F.R. § 1119.4(a)(4).
181 *Id.* § 1119.4(a)(5).
182 75 Fed. Reg. at 15,997.
183 16 C.F.R. § 1119.4(a)(6).
184 75 Fed. Reg. at 15,997.
185 *Id.*
186 *Id.* § 1119.4(a)(7)(i).
187 *Id.*; see 75 Fed. Reg. at 15,997.
188 16 C.F.R. § 1119.4(a)(7)(ii).
189 *Id.* at § 1119.4(b)(1).
190 *Id.*
191 *Id.* at § 1119.4(b)(2).
192 *Id.* at § 1119.4(b)(3).
193 *Id.* at § 1119.4(b)(4).
194 *Id.*
195 See 15 U.S.C. § 2068(a)(13).
196 75 Fed. Reg. at 15,995-96.
197 CPSC summarized the comments that it received against a penalty matrix: Commenters opposed to such a matrix or formula highlighted the difficulty of applying any formula in a particular circumstance as too rigid an approach that would not take into consideration information that might be important to consider in one instance of a penalty but not in another. One commenter suggested that if the Commission reduced its penalty formulation to a matrix, it would encourage regulated parties to calculate the cost and risk of prohibited conduct and not to follow the statutory requirements. 74 Fed. Reg. 45,101, 45,104 (Sept. 1, 2009).
198 See CPSC, Joint Statement of Chairman Elliot F. Kaye and Commissioner Robert S. Adler On Civil Penalties (July 20, 2016), <https://www.cpsc.gov/about-cpsc/commissioner/robert-bob-adler/statements/joint-statement-of-chairman-elliott-f-kaye-and>.

199 *Id.*
200 *Id.*
201 *Id.*
202 *Id.* at n.31.
203 Effective January 1, 2022, for most violations of the CPSA, the maximum civil penalty allowed by law is \$120,000 for each violation and \$17.15 million for any related series of violations. *Civil Penalties; Notice of Adjusted Maximum Amounts*, 86 C.F.R. 68244 (Dec. 1, 2021).
204 Press Release, Department of Justice, Gree Appliance Companies Charged with Failure to Report Dangerous Dehumidifiers and Agree to \$91 Million Resolution (Oct. 29, 2021), <https://www.justice.gov/opa/pr/gree-appliance-companies-charged-failure-report-dangerous-dehumidifiers-and-agree-91-million>.
205 *United States v. Spectrum Brands, Inc.*, No. 15-cv-371-wmc, 2017 WL 4339677, at *6 (W.D. Wis. Sept. 29, 2017); Press Release, Department of Justice, Michaels Stores Agrees to Pay \$1.5 Million to Settle CPSC Delayed Reporting Claim (Feb. 13, 2018), [https://www.justice.gov/opa/pr/michaels-stores-agrees-pay-15-million-settle-cpsc-delayed-reporting-claim#:~:text=\(Michaels\)%20agreed%20to%20enter%20into,consumers%20between%202007%20and%202009](https://www.justice.gov/opa/pr/michaels-stores-agrees-pay-15-million-settle-cpsc-delayed-reporting-claim#:~:text=(Michaels)%20agreed%20to%20enter%20into,consumers%20between%202007%20and%202009).
206 See, e.g., Settlement Agreement and Order, *In re Peloton Interactive, Inc.*, CPSC Docket No.: 23-C0001, ¶ 35 (Dec. 28, 2022) (requiring an annual report on Peloton’s compliance program for each of the first five years following acceptance of the settlement), <https://www.cpsc.gov/s3fs-public/PelotonInteractiveIncProvSettlementAgreementandOrder23C0001p.pdf>; Settlement Agreement and Order, *In re Generac Power Systems, Inc.*, CPSC Docket No.: 23-C00002, ¶ 27 (May 3, 2023) (requiring an annual report on Generac’s compliance program for each of the first three years following acceptance of the settlement and annual internal audits), <https://www.cpsc.gov/s3fs-public/23-C0002-Generac-Order-and-Settlement-Agreement.pdf>.
207 *Mirama Enters.*, *supra* n.64.
208 *Mirama Enters.*, 387 F.3d at 986-89.
209 *United States v. Michaels Stores* was settled in February 2018 after nearly three years of litigation for a civil penalty of \$1.5 million. See Press Release, Department of Justice, Michaels Stores Agrees to Pay \$1.5 Million to Settle CPSC Delayed Reporting Claim (Feb. 13, 2018), [https://www.justice.gov/opa/pr/michaels-stores-agrees-pay-15-million-settle-cpsc-delayed-reporting-claim#:~:text=\(Michaels\)%20agreed%20to%20enter%20into,consumers%20between%202007%20and%202009](https://www.justice.gov/opa/pr/michaels-stores-agrees-pay-15-million-settle-cpsc-delayed-reporting-claim#:~:text=(Michaels)%20agreed%20to%20enter%20into,consumers%20between%202007%20and%202009).
United States v. SunSetter Products LP, No. 1:23-cv-10744-ADB (D. Mass.) was filed in April 2023 and litigation is ongoing.
210 218 F. Supp. 3d at 8.
211 218 F. Supp. 3d at 822.
212 Memorandum of Law in Support of Proposed Order of Civil Penalties and Permanent Injunction, *United States v. Spectrum Brands, Inc.*, No. 15-cv-00371-wmc (W.D. Wis. Jan. 17, 2017).
213 *Spectrum Brands*, *supra* n.162, at *6-7.
214 *Id.* at *4.
215 *Id.* at *6 & n.14.
216 See *id.* at *6. The court used a “starting point of \$10 per complaint received on or before June 30, 2009, representing the rough profit on the sale of those defective products; then \$75, representing the product’s purchase price; and doubling the penalty for each 6-month period thereafter” until Spectrum notified CPSC. *Id.*
217 *Id.*
218 *Id.*
219 See *id.* at *7.
220 See *Daniels v. Am. Honda Motor Co.*, 980 F.2d 729, 1992 WL 361271, at *4 (6th Cir. 1992); *In re All Terrain Vehicle Litig.*, 979 F.2d 755, 757-58 (9th Cir. 1992); *Kloepfer v. Honda Motor Co., Ltd.*, 898 F.2d 1452, 1457 (10th Cir. 1990); *Benitez-Allende v. Alcan Aluminio do Brasil, S.A.*, 857 F.2d 26, 34-35 (1st Cir. 1988), *cert. denied*, 489 U.S. 1018 (1989); *Zepik v. Tidewater Midwest, Inc.*, 856 F.2d 936, 942 (7th Cir. 1988); *Copley v. Heil Quaker Corp.*, 818 F.2d 866, 1987 WL 37429, at *2 (6th Cir. 1987); *Drake v. Honeywell, Inc.*, 797 F.2d 603, 609-10 (8th Cir. 1986). Some trial courts have held that a private right of action may exist. See *Berry v. Mega Brands, Inc.*, No. 08-1750, 2009 WL 233508, at *6 (D.N.J. Jan. 30, 2009) (allowing a private right of action for violation of Section 15); *Butcher v. Robertshaw Controls Co.*, 550 F. Supp. 692, 694, 700 (D. Md. 1981) (same); *Young v. Robertshaw Controls Co.*, 560 F. Supp. 288 (N.D.N.Y. 1983) (same); *Swenson v. Emerson Elec. Co.*, 374 N.W.2d 690, 698-99 (Minn. 1985) (same). Further, the Second Circuit has found that even if there is a private right of action, plaintiff would have to establish causation between non-disclosure and the alleged injury. *Kelsey v. Muskin Inc.*, 848 F.2d 39, 42 (2d Cir. 1988). The speculative nature of establishing such a causal link was key to the Seventh Circuit’s holding that there is no private right of action for alleged violations of Section 15. *Zepik*, 856 F.2d at 942.
221 See Pub. L. No. 110-314, § 218, 122 Stat. 3016, 3060 (2008).
222 See Provisional Acceptance of a Settlement Agreement and Order, Kolcraft Enterprises, Inc., 78 Fed. Reg. 14,080 (Mar. 4, 2013); see also, e.g., Consent Decree, *United States v. Walter Kidde Portable Equipment, Inc.*, No. 20-cv-1172 (M.D.N.C. Jan. 4, 2021); Consent Decree, *U.S. v. Dr. Reddy’s Labs.*, *supra* n.33; Provisional Acceptance of a Settlement

Agreement and Order, *Kawasaki Heavy Industries*, 82 Fed. Reg. 25,779 (June 5, 2017).

223 Opinion and Order at 4, *United States v. Spectrum Brands, Inc.*, No. 3:15-cv-00371 (W.D. Wis. Apr. 9, 2018).

224 Notice of Appeal, *United States v. Spectrum Brands, Inc.*, No. 3:15-cv-00371 (W.D. Wis. Apr. 12, 2018).

225 Opening Brief and Circuit Rule 30(a) Appendix of Appellant Spectrum Brands, Inc., *United States v. Spectrum Brands, Inc.*, No. 18-1785 (7th Cir. June 22, 2018).

226 *United States v. Spectrum Brands, Inc.*, No. 18-1785 (7th Cir. May 9, 2019).

227 See Consent Decree, *United States v. Walter Kidde Portable Equipment, Inc.*, *supra* n.222.

228 See Consent Decree of Civil Penalty and Permanent Injunction, *U.S. v. Gerber Legendary Blades, a division of Fiskars Brands Inc.*, No. 3:14-cv-2061 (D. Or. Jan. 6, 2015), <https://www.cpsc.gov/s3fs-public/FiskarsConsentDecreeUpdate.pdf>; Consent Decree of Civil Penalty and Permanent Injunction, *United States v. Black & Decker (U.S.) Inc.*, No. GLR-15-1239 (D. Md. Apr. 29, 2015), <https://www.justice.gov/media/465041/dl>. DOJ also sought liquidated damages in *Michaels* and *Spectrum*, but such damages ultimately were not included in the Consent Decree in *Michaels* or ordered by the court in *Spectrum*. See Amended Complaint for Civil Penalties and Permanent Injunctive Relief, *Michaels Stores*, No. 3:15-cv-1203 (N.D. Tex. Apr. 3, 2017); Consent Decree, *Michaels Stores*, No. 3:15-cv-1203 (N.D. Tex. Feb. 9, 2018); *Spectrum Brands*, No. 3:15-cv-00371 (W.D. Wis. Apr. 9, 2018).

229 15 U.S.C. § 2070 (2008).

230 See Pub. L. No. 110-314, § 217(c), 122 Stat. 3016, 3060.

231 15 U.S.C. § 2070(b).

232 See 15 U.S.C. § 2070(a) (providing criminal penalties for violations of Section 19 of the CPSA); 15 U.S.C. § 2068(a)(4) (failure to furnish information required by Section 15(b) is a violation of Section 19).

233 15 U.S.C. § 2070(c)(1); see, e.g., Judgment in a Criminal Case, *United States v. Hung Lam*, No. 12-cr-20048-KMW (S.D. Fla. June 11, 2013). Lam and three companies he owned and operated pled guilty to one count of conspiracy to traffic and smuggle in banned children's products that contained lead and small parts in violation of the CPSA and FHSA and one count of trafficking in counterfeit goods, and Lam agreed to a criminal forfeiture of \$862,500, 22 months incarceration in federal prison, three years of supervised release, and a \$10,000 fine. The government alleged that Customs and Border Protection seized 35 importation shipments by Lam's company LM Import-Export, Inc. (LM) for violations, including 16 shipments for CPSC violations during 2010, and LM received at least six notices of noncompliance from CPSC advising of excess lead content or a choking hazard found during CPSC lab testing. See Criminal Complaint, *United States v. Hung Lam*, No. 12-cr-20048-KMW (S.D. Fla. Feb. 11, 2011).

234 15 U.S.C. § 2070(c)(2).

235 Press Release, Department of Justice, Gree Appliance Companies Charged with Failure to Report Dangerous Dehumidifiers and Agree to \$91 Million Resolution (Oct. 29, 2021), <https://www.justice.gov/opa/pr/gree-appliance-companies-charged-failure-report-dangerous-dehumidifiers-and-agree-91-million>.

236 Information, *United States v. Gree Electric Appliances, Inc. of Zhuhai*, No. 2:21-cr-00498 MCS (C.D. Cal. Oct. 26, 2021).

237 Plea Agreement for Defendant Gree USA, Inc., Exhibit B: Statement of Facts, *United States v. Gree USA, Inc.*, No. 2:21-cr-00498 MCS (C.D. Cal. Oct. 28, 2021); Deferred Prosecution Agreement for Defendants Gree Electric Appliances, Inc. of Zhuhai, and Hong Kong Gree Electric Appliances Sales Co., Ltd., Exhibit B: Statement of Facts, *United States v. Gree Electric Appliances, Inc. of Zhuhai*, No. 2:21-cr-00498 MCS (C.D. Cal. Oct. 28, 2021).

238 See *id.*

239 See *id.*

240 See *id.*

241 See *id.*

242 Press Release, Department of Justice, Two Corporate Executives Indicted in First-Ever Criminal Prosecution for Failure to Report Under Consumer Product Safety Act (Mar. 29, 2019), <https://www.justice.gov/opa/pr/two-corporate-executives-indicted-first-ever-criminal-prosecution-failure-report-under>.

243 See *id.* DOJ subsequently identified Loh and Chu as the Chief Executive Officer and Chief Administrative Officer, respectively, of Gree USA, Inc. See Press Release, Department of Justice, Gree Appliance Companies Charged with Failure to Report Dangerous Dehumidifiers and Agree to \$91 Million Resolution (Oct. 29, 2021), <https://www.justice.gov/opa/pr/gree-appliance-companies-charged-failure-report-dangerous-dehumidifiers-and-agree-91-million>.

244 Indictment, *United States v. Chu*, No. 2:19-cv-00193-DSF (C.D. Cal. Mar. 28, 2019).

AMSTERDAM

Amsterdam, Spaces Zuidas I, 4th Floor
Barbara Strozziilaan 201
Amsterdam, Netherlands 1083 HN

BOSTON

200 Clarendon Street - The Hancock building
53rd Floor
Boston, MA 02116

BRUSSELS

1, Rue du Marquis -
Markiesstraat, 1
Brussels
BELGIUM

CHICAGO

70 West Madison Street
Suite 4200
Chicago, IL 60602-4231

DENVER

Suite 3100
1144 Fifteenth Street
Denver, CO 80202-1370

HOUSTON

700 Louisiana Street
Suite 4000
Houston, TX 77002-2755

LONDON

Tower 42
25 Old Broad Street
EC2N 1HQ
UNITED KINGDOM

LOS ANGELES

44th Floor
777 South Figueroa Street
Los Angeles, CA 90017-5844

NEWARK

One Gateway Center
Suite 1025
Newark, NJ 07102

NEW YORK

250 West 55th Street
New York, NY 10019-9710

SAN FRANCISCO

10th Floor
Three Embarcadero Center
San Francisco, CA 94111-4024

SEOUL

20F, Concordian
76 Saemunan-ro, Jongro-gu
Seoul, Korea (03185)

SHANGHAI

Plaza 66 Building 2, #4306-4313
1266 Nanjing Xi Rd
Shanghai 200041
People's Republic of China

SILICON VALLEY

3000 El Camino Real
Five Palo Alto Square, Suite 500
Palo Alto, CA 94306-3807

WASHINGTON, D.C.

601 Massachusetts Ave, NW
Washington, D.C. 20001