CPSC DESK REFERENCE: SECTION 15 OF THE CONSUMER PRODUCT SAFETY ACT

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

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Key Contacts

Michelle F. Gillice
Partner
Washington, DC
michelle.gillice@arnoldporter.com
+1 202.942.6589

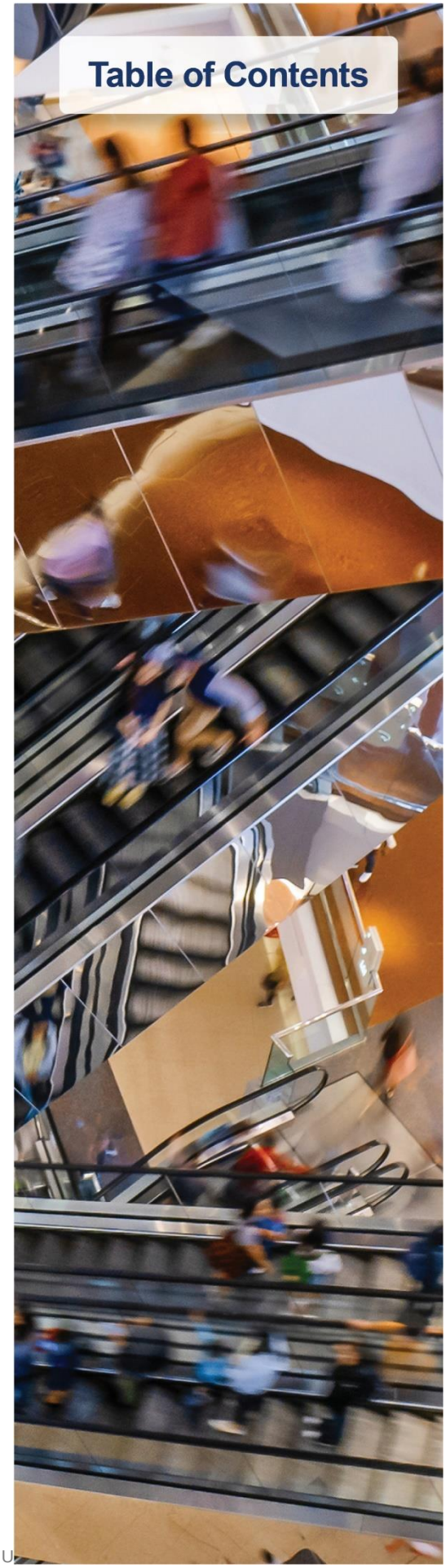
Eric A. Rubel
Senior Counsel
Washington, DC
eric.rubel@arnoldporter.com
+1 202.942.5749

S. Michael Gentine
Counsel
Washington, DC
mike.gentine@arnoldporter.com
+1 202.942.5052

Jessica L. Wang
Senior Attorney
Washington, DC
jessica.wang@arnoldporter.com
+1 202.942.5792

Jennifer A. Karmonick
Counsel
Washington, DC
jennifer.karmonick@arnoldporter.com
+1 202.942.6605

Kelsie Sicinski
Associate
Washington, DC
kelsie.sicinski@arnoldporter.com
+1 202.942.6003



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Overview

The US 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 employees[1]—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 US Department of Justice (DOJ) have used that authority to impose multi-million-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]

After years of open seats on the Commission, in 2021-22 President Biden nominated and the Senate confirmed three Democratic Commissioners: Alexander Hoehn-Saric (as Chair) through 2027, Richard Trumka Jr. through 2028, and Mary Boyle through 2025. These appointments brought the Commission to full strength and a 3-to-2 partisan makeup. However, Republican Dana Baiocco left her seat in October 2022 with two years remaining on her term, leaving Peter Feldman as the lone Republican. As of this writing, President Biden had not nominated anyone to fill the rest of Commissioner Baiocco's term (through 2024) or to succeed her. 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 subject to CPSC's jurisdiction 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] 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 historic 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] and
- stadium light poles at schools and municipal fields.[30]

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, Poison Protection Packaging Act (PPPA), and Refrigerator Safety Act.[31] 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.[32]

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,"[33] 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."[34] 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":[35]

- pattern of defect;[36]
- number of defective products distributed in commerce;[37]

- severity of the risk;[38] or
- other considerations.[39]

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.[40]

CPSC's regulations provide that, as in the product liability context, a product can be defective with respect to its design, manufacture, or warnings.[41] 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.[42]

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."[43]

CPSC instructs companies to consider all reasonably available information to determine "whether it suggests the existence" of a product defect or unreasonable risk.[44] 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.[45]

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.[46] The court found that the threshold for reporting is "a lower standard than whether a substantial product hazard *actually* exists."[47] 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."[48] 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 carafes' handles.[49]

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.[50] Further, according to the Commission, "[c]ompliance with a voluntary standard does not preclude a determination that a substantial product hazard exists."[51] 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."[52]

Non-U.S. Information: Neither Section 15 nor the 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."[53]

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."[54]

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.[55] Most recently, CPSC has issued a notice of proposed rulemaking to add stock and custom window coverings that fail to have certain "readily observable characteristics" to the 15(j) substantial product hazards list.[56] 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."[57]

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),[58] 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."[59] In addition, CPSC advises that chronic or long-term health effects, as well as immediate injuries, should be considered.[60]

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."[61] 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."[62] Moreover, CPSC has stated that companies "should not wait for such serious injury or death to actually occur before reporting."[63]

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.[64] 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."[65]

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.[66] If a company is uncertain about whether information is reportable, it may investigate the matter. CPSC presumes that 10 days are sufficient to conduct "a reasonably expeditious investigation" (which in practice is rarely the case), unless the company "can demonstrate that a longer period is reasonable."[67] 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."[68]

A company need not report if it has "actual knowledge that" CPSC "has been adequately informed" of a potential hazard.[69] However, CPSC has interpreted this exception narrowly.[70]

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 retailers—essentially, all persons in the chain of distribution.[71]

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.[72] A more extensive list of information is then specified for the "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.[73] 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. If a company does not propose to conduct a recall, the Full Report should explain why 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.[74] 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.[75]

In practice, CPSC typically pursues recalls through a US manufacturer or importer, rather than through a retailer or distributor that did not also import the product. In addition, retailers and distributors have recalled products when, for example, the manufacturer was insolvent or was not located in the United States.[76] Further, civil penalties have been assessed against retailers as well as manufacturers for alleged late reporting under Section 15.[77]

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 it may be disclosed; or
4. CPSC "publishes a finding that the public health and safety requires public disclosure" with less than 15 days' notice.[78]

In addition, CPSA Section 6(b)(5) excludes from protection information about 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."[79]

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.[80]

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.[81]

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 reach 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.[82] This language does not appear in CPSC's Fiscal Year 2023 Operating Plan. Thus, there is no indication that CPSC will re-open 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.[83]

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.[84] 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 typically sends the company a letter stating that, based on the available information, the staff has concluded that action under Section 15 is not required. According to CPSC staff, excluding recalls conducted under the Fast Track program (discussed below), between fiscal years 2016 and 2018 only 16% of all firm-reported cases resulted in a recall.[85]

If the company agrees to conduct a voluntary recall after receiving a preliminary determination letter, 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.[86] According to Commissioner Marietta Robinson, between 2000 and 2016, the staff did not determine that any hazards were Class A hazards.[87] 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.[88]

Other Measures

The staff may try to persuade a company to conduct a "voluntary" recall by notifying the company that 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. This is a measure CPSC has shown an increasing willingness to use. For example, in January 2022, CPSC issued two such warnings to consumers concerning infant loungers and residential elevators.

On January 11, 2022, CPSC issued an "urgent warning" regarding entrapment and serious fall hazards posed by residential elevators distributed by Waupaca Elevator Company, Inc. (Waupaca).[89] The warning included a statement from Waupaca that it does not have the financial resources required to satisfy a recall to address the hazard.[90] In a separate CPSC press release issued the same day announcing the urgent warning and three recalls of residential elevators,

CPSC stated that it issued the warning to stop using residential elevators manufactured by Waupaca after the company "refused to cooperate with the recall." [91]

Then, in a January 20, 2022 press release, CPSC warned consumers to immediately stop using several models of "Podster" infant loungers manufactured by Leachco, Inc., stating that the Commission "found that the public health and safety requires this notice to warn the public quickly of the hazard," and noting that two reported infant fatalities are associated with the products.[92] Shortly thereafter, on February 9, CPSC filed an administrative complaint to compel Leachco to recall the infant loungers, as discussed further below.[93]

CPSC continued its flurry of unilateral (or quasi-unilateral) statements throughout 2022, issuing 14 in the ensuing 11 months, including statements about alleged hazards presented by products ranging from infant rockers to electric unicycles, including statements that certain companies were refusing to conduct a recall.[94]

As one example, in April 2021, CPSC issued an "urgent warning" to consumers to stop using "the popular Peloton Tread+ exercise machine" after finding that the public health and safety required such notice.[95] CPSC's warning came after finding "one death and dozens of incidents of children being sucked beneath the Tread +."[96] About three weeks later, Peloton voluntarily recalled the Tread+ as well as the Tread treadmills.[97] This is consistent with other matters in which companies have voluntarily recalled products after CPSC issued a public warning about the product.[98] Further, as discussed below, Peloton subsequently paid a late reporting penalty in connection with this matter.

In addition to issuing 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.[99]

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.[100] 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,[101] which thus are publicly available and typically announced by CPSC through issuance of a press release.[102] 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.[103] The administrative proceeding is held before an ALJ, who serves as the Presiding Officer.[104] 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.[105]

The Initial Decision becomes final 40 days after issuance absent either (a) an appeal to the Commission, or (b) issuance of an order by the Commission to review the Initial Decision.[106] 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.[107]

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.[108] In July 2021—more than three years since CPSC staff last sought to require a recall

through an administrative proceeding—CPSC filed two administrative complaints to compel recalls by Amazon and TK Access Solutions Corp. (formerly thyssenkrupp Access Corp.).[109] A third complaint, against Leachco, followed in February 2022,[110] potentially signaling a more aggressive approach to enforcement.

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.[111] 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.[112]

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.[113] 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."[114] 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."[115]

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.[116] 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.[117]

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.[118] 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."[119]

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."[120]

The ALJ's January 19 order addressed what for outsiders is likely the most critical question the case presents, as how Amazon's FBA program (and other operations in which Amazon is not an importer, private labeler, or retailer for CPSA purposes) is treated under the CPSA will have implications for other "platform marketplaces," a concept that did not exist when the statute was enacted in 1972. However, the ALJ stage of the litigation is ongoing, currently centering largely on questions pertaining to the remedies Amazon provided for the recalled products—full, automatic refunds—and CPSC's authority to order additional remedies, such as a new round of notifications to consumers.[121] Finally, even the core question of whether Amazon is a "distributor" of products under the FBA program, and thereby is subject to the CPSA, has not yet been finally settled, as Amazon may appeal the issue to the Commission or to federal district court.

TK Access Solutions Corp.*:* In its July 2021 complaint against TK Access Solutions Corp. (TKASC) (then identified as thyssenkrupp Access Corp.), CPSC Complaint Counsel alleged that the residential elevators the company manufactured and distributed—through dealers who were generally third parties and installed by contractors who were also generally third parties—presented a Substantial Product Hazard.[122] Namely, the Complaint alleged:

- If an installed elevator contained too large a space between the elevator car's gate (generally an accordion gate that could flex inward or outward if a force were applied to it) and the adjoining door to the elevator shaft or hoistway (generally an ordinary residential door), a child who was in this space at the time the elevator was called to another floor could suffer serious injury or death.
- The elevators, as manufactured and distributed to dealers by TKASC, were defective in that they did not adequately warn dealers, installers, or consumers about the importance of minimizing gap space and the hazards associated with excessive gap spaces.[123]

The Complaint further alleged three incidents involving TKASC-manufactured elevators, with one fatality and one catastrophic brain injury.

The Complaint sought an order requiring, in pertinent part, that TKASC notify consumers about the gap space hazard and repair the installed elevators by inspecting installations' gap spaces and by providing and installing free devices (known as space guards) to fill gap spaces determined to be excessively large.[124]

In its Answer,[125] TKASC advanced a number of arguments, including arguing that:

- the Complaint was moot because CPSC, in 2014, had closed a prior investigation into the matter and approved a program in which TKASC notified consumers about the gap space hazard and offered discounted space guards;[126]
- the Complaint was also moot in that TKASC was already engaged in a program that notified consumers about the gap space hazard and offered free inspections and, as needed, free installation of free space guards;[127]
- the alleged gap-space hazard arises not from the elevators' manufacture but from their installation, which is performed by third-party professionals who, as they were reminded in TKASC's design specifications and instructions, are bound by law to adhere to local building codes where those have provisions for residential elevator gap spaces (where local codes did not address gap spaces, TKASC directed installers to adhere to the applicable consensus safety standard);[128] and

- the installed elevators are improvements to realty that are governed by state building codes and that are outside CPSC's jurisdiction.[129]

The matter was ultimately settled,[130] with TKASC agreeing to provide free inspections and, as needed, free installation of free space guards.[131] One wrinkle in the settlement, however, is that the Commission's vote to approve it was 4-1, with Commissioner Feldman in opposition.[132] Commissioner Feldman opposed[133] the settlement's provision that TKASC—which has been out of the residential elevator business since 2012—only committed to provide the full inspection/installation remedy through 2026,[134] after which TKASC is obligated only to send free space guards to consumers upon request (forgoing the inspection and installation provisions),[135] although this DIY remedy aligns with the similar DIY remedies offered in recalls by other residential elevator companies.[136]

Leachco*:* In February 2022, the CPSC filed a complaint against Leachco, alleging that the company's "Podster" infant lounging pillows presented a substantial product hazard in that it is foreseeable that caregivers would allow infants to sleep unattended on the pillows and their design can allow an infant to move into a position in which the infant's breathing is obstructed, potentially leading to suffocation.[137] The Complaint alleged the Podsters had been associated with two fatal incidents.[138] Leachco's Answer denied the Complaint's allegations of defect and substantial product hazard.[139] As of the time of this publication, this matter was ongoing.

Prior to the 2021 and 2022 actions, 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 sale and distribution of the SREMs, notify consumers of the hazard and provide refunds, and destroy all remaining recalled magnets.[140] In 2014, the other companies settled and entered into consent agreements with CPSC, while Zen continued to litigate.[141]

In a March 2016 Decision and Order, the ALJ denied in substantial part CPSC's demand for a recall.[142] 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.[143] Zen then filed an action in federal court seeking to set aside the Commission's decision.[144] 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."[145] 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.[146]

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.[147] Shortly after Zen's petition for rehearing en banc was denied in November 2020,[148] Zen announced that it intended to suspend sales of SREMs and close its business.[149]

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.[150]

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."[151] 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.[152]

However, CPSC has not exercised this expanded authority, and indeed has not filed a Section 12 action since the 1980s.[153]

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.[154] 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 Trends[155]

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

The data also reflect a decreasing trend in the number of Section 15 reports and recalls announced by CPSC during the past several years. The extent to which the further decline during FY 2020 and FY2021 is related to the COVID-19 pandemic is unclear.

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).[156] 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.[157]

What Is a "Knowing" Violation?

The CPSA defines "knowingly" as either "actual knowledge"[158] 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."[159] 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,"[160] 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 violations[161] to $100,000 per violation and $15 million for a related series of violations.[162] 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.[163] 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).[164] 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."[165] 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.'"[166] 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.[167]

In *United States v. Michaels Stores, Inc.*, the court denied the defendant Michaels' motion 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.[168] Instead, the court found 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."[169] On February 9, 2018, the parties settled the case for $1.5 million, thereby avoiding trial and appeal of the statute of limitations decision.[170]

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."[171] 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.[172] 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."[173]

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.[174]

On March 31, 2010, CPSC published a Final Rule, effective on publication, interpreting the civil penalty factors.[175] 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."[176] Further, CPSC found that, unlike other factors discussed below, this factor permits consideration of "the seriousness and extent of a particular violation."[177]

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."[178] 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.[179]

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),"[180] but rejected a proposal to forgo penalties where a risk is limited to a minor or moderate injury.[181] 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)."[182]

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.[183] 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.[184]

The number of defective products distributed: CPSC will consider "the number of defective products or amount of substance distributed in commerce."[185] 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.[186] 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."[187]

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."[188] 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).[189] 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."[190]

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."[191] 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.[192] 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."[193]

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.[194]

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."[195] 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."[196] 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.[197] 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."[198] 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.[199]

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.[200] 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.[201] 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."[202] 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.[203]

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.[204]

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 shown in the chart below, over the past 10+ years civil penalty settlements obtained by CPSC and DOJ have increased in amount, including four late-reporting settlements exceeding $10 million. The increases reflect both the increased maximum penalties authorized by the CPSIA and a push by CPSC leadership. 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. 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."[205]

During the period from fiscal year 2021 through January 2023, the median civil penalty settlement in matters in which the primary allegation was late reporting was $9.33 million. In contrast, for the period of fiscal years 2013-2020, the median such civil penalty settlement was $5.03 million. Indeed, only one of the 24 penalty settlements announced by CPSC from fiscal year 2015 to date (January 2023) was less than $1 million, and more than 80% were $2 million or higher. Further, the vast majority of these settlements 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.

Fiscal Year	Late-Reporting Settlements in FY	FY Total	FY Median Settlement	FY Average Settlement
2023 (partial year)	1	$16,025,000	$16,025,000	$16,025,000
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
2013	6	$7,112,500	$687,500	$1,185,417

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. CPSC's previous practice was to only require that a company provide staff with written documentation of its CPSA compliance upon request.

Recent Civil Penalty Settlements

On January 5, 2023, CPSC announced a $19.065 million civil penalty settlement with Peloton Interactive, Inc., arising out of Peloton's 2021 recall of its Tread+ treadmill to address entrapment injury hazards to users associated with the treadmill's slatted belt.[206] That figure comprised a $16.025 million penalty (the maximum under the CPSA at the time of the alleged violation) for the alleged failure to report and a $3.04 million penalty for the alleged distribution of recalled goods. The vote to provisionally accept the settlement was unanimous, 4-0, but Commissioner Feldman wrote separately, calling for CPSC to "always consider injunctive relief [such as demanding a company accept a third-party monitor] to deter future violations, especially in sale-of-recalled-goods cases." [207]

In general, the current commissioners have both pushed for the agency to fully utilize the penalty authorities it has, both monetary and non-monetary, and called on Congress to increase that authority.

Additional Noteworthy Civil Penalty Settlements

Gree Electric Appliances, Inc. of Zhuhai et. al.*:* In March 2016, CPSC announced a $15.45 million civil penalty settlement agreement with Gree Electrical Appliances, Inc. of Zhuhai (Gree Zhuhai), Hong Kong Gree Electric Appliances Sales Co., Ltd. (Gree Hong Kong), and Gree USA Sales, Ltd. (Gree USA Sales) (collectively, Gree) arising out of an expanded and re-announced recall of dehumidifiers. This settlement remains the largest Section 15 penalty in CPSC's history arising out of a single recall or expanded recall, and was the maximum amount then permitted under the law.[208] The agreement "resolve[d] staff's charges that Gree [was] subject to civil penalties" for Gree's "knowing violations" for (1) failing to timely report "information reasonably supporting the conclusion of a defect or the creation of an unreasonable risk of serious injury or death associated with the Dehumidifiers;" (2) using the Underwriters Laboratories, Inc. (UL) registered safety certification mark without authorization; and (3) making material misrepresentations to CPSC staff during its investigation.[209] With respect to late reporting, CPSC staff alleged:

> Between January 2005 and August 2013, Gree manufactured, imported and sold approximately 2.5 million dehumidifiers manufactured before December 2012 (Dehumidifiers) in the United States. …The Dehumidifiers are defective and create an unreasonable risk of serious injury or death because they can overheat, smoke and catch fire, posing smoke and burn hazards to consumers. … In July 2012, Gree began receiving reports of smoking, sparking and fires involving the Dehumidifiers. Gree received reports of property damage due to these fires. … In response to reports of smoking, sparking and fires, Gree implemented design changes to remedy the defect and unreasonable risk of injury or death associated with the Dehumidifiers.[210]

As discussed below in the Criminal Penalties section, DOJ subsequently brought criminal charges arising from the same matter against certain Gree executives and entities for "knowingly and willfully" violating the Section 15 reporting requirements, including a multi-count indictment of two Gree USA, Inc. corporate executives and a single-count criminal information charging Gree USA, Inc., Gree Zhuhai, and Gree Hong Kong with willfully failing to report.

U.S. v. Walter Kidde Portable Equipment, Inc.: On December 30, 2020, DOJ filed a Complaint and a proposed $12 million civil penalty consent judgment against Walter Kidde Portable Equipment, Inc. (Kidde) arising out of the recall of certain fire extinguishers.[211] The Complaint alleged Kidde failed to timely inform CPSC about problems with the fire extinguishers and included three counts of material misrepresentations and one count of counterfeit marking.[212] The District Court entered the Consent Decree on January 4, 2021, which includes a $12 million civil penalty, injunctive relief related to future compliance, and liquidated damages if the company violates the consent decree.[213] Commissioner Feldman stated that "this $12 million settlement still falls short of the maximum civil penalty that would have been appropriate in this case."[214]

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.[215] 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.[216]

Likely in part due to CPSC's demands for higher civil penalties, since 2014 two late reporting cases have been litigated after CPSC referred them to the DOJ,[217] and several (like the Kidde penalty discussed above) have been settled with the filing of a Complaint and contemporaneous entry of a consent judgment after CPSC referred the cases to DOJ.[218] The government won one of the two litigated cases on summary judgment, and the second settled after almost three years of pre-trial proceedings. However, the late reporting penalties in these two cases were far below average settlements for such alleged violations in recent years (see data above).

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 coffee maker 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.[219] 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 coffee maker carafe handle failure and 35 reported injuries, including one with medical attention.[220]

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.[221] 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.[222] 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,[223] but that the defendant's failure to notify CPSC was "increasingly" "egregious as

time went on and complaints mounted."[224] 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.[225] 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."[226] 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."[227] 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.[228]

After nearly three years of litigation, *United States v. Michaels Stores* was settled in February 2018 for a civil penalty of $1.5 million.[229] The government alleged in its Amended Complaint that Michaels sold 203,000 glass vases; received nine reports that consumers were cut when the vases broke while being handled, four of which the government alleged were "very severe" injuries; and was about 18 months late in notifying CPSC.[230] Further, the government alleged that Michaels lacked (a) internal controls to identify potential defects and escalate issues to management, (b) a central safety database to track product incidents, (c) a system for its employees to record customers' reasons for product returns, and (d) a formal compliance program for reporting potential hazards to CPSC.[231] Notably, while the government's initial Complaint in *Michaels* also included a material misrepresentation count for the alleged failure to disclose to CPSC that Michaels was the importer of record of the vases, the government dropped that claim from its Amended Complaint. And, indeed, while the government had alleged that Michaels "avoided responsibility for the recall of the vases,"[232] it is not clear that having Michaels identified as the importer of record instead of the procurement company that conducted the recall would have had any material impact on the notice to consumers or the refund remedy that was provided to consumers. It is also notable that, in the Amended Complaint, the government reduced by approximately two years the length of time by which Michaels was allegedly "late" in reporting to CPSC. Specifically, the government alleged that Michaels had "actual knowledge that [CPSC was] adequately informed" in February 2010, when Michaels submitted an Initial Report, rather than in February 2012, when according to the government Michaels disclosed that it was the importer of the vases and other information.[233]

CPSC typically does not publicize the referral of cases to DOJ. In November 2020, however, CPSC took the "unusual step" of announcing the referral of a case "seeking a substantial civil penalty for a violation" of the CPSA.[234] Acting Chairman Robert Adler (D) announced that a bipartisan majority of the Commission voted to refer the matter to DOJ, and publicized the referral to "assure the American public that the enforcement process at CPSC—thought by some to be dormant—is continuing."[235]

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.[236] 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.[237]

Injunctive Relief

As noted above, non-monetary 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.[238]

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 …."[239] 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.[240] 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.[241] On May 9, 2019, the Seventh Circuit affirmed the District Court's judgment against Spectrum.[242]

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."[243] 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."[244]

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.[245] 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.[246] 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.[247]

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.[248] 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."[249] And, for these purposes, a "criminal violation" means a violation "for which the violator is sentenced to pay a fine, be imprisoned, or both."[250]

Gree Appliance Companies

On March 29, 2019, DOJ announced the first-ever criminal indictment of corporate executives for knowing and willful violations of the Section 15 reporting requirements, as well as conspiracy (along with four unindicted co-conspirator companies and others) to commit wire fraud, to fail to furnish information under the CPSA, and to defraud the CPSC.[251] Simon Chu and Charley Loh were identified as the part owners and executives of two then-unnamed unindicted co-conspirator companies that imported and sold Chinese dehumidifiers in the United States.[252] 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.[253] The defendants have pled not guilty and have moved to dismiss two counts of the indictments as time-barred under the CPSA.[254]

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.[255] 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.[256]

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.[257] 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.[258]

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.[259] The prior $15.45 million civil penalty the Gree Appliance Companies paid will be credited against the new amount owed.[260]

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.[261]

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=9vdumkfeKFU45nEiMI4vUwk6Xy7._0j2, (anticipating increasing from 539 to 672 based on a $195.5 million appropriation that did not materialize).
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).

[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 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.
[31] 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).
[32] *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).
[33] 15 U.S.C. § 2064(b)(3) (emphasis added).
[34] 15 U.S.C. § 2064(a).
[35] 16 C.F.R. § 1115.12(g).
[36] *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.").
[37] *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*.
[38] *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).
[39] 16 C.F.R. § 1115.12(g)(iv) ("The Commission and the staff will consider all other relevant factors.").
[40] 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.").
[41] *See* 16 C.F.R. § 1115.4; *see also, e.g.*, *Restatement (Third) of Torts: Prod. Liab.* § 2 (1998).
[42] 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/pdfs/recall/lawsuits/abc/163--2017-10-26%20.Final%20Decision%20and%20Order.pdf?Tme8u5fRF2.29_B.i4Ix7pPwb_whKng2 (holding that, under 16 C.F.R. § 1115.4, a design defect can arise solely as a result of product misuse).
[43] 71 Fed. Reg. at 42,030.

[44] 16 C.F.R. § 1115.12(f).
[45] *Id*.
[46] *Spectrum Brands,* 218 F. Supp. 3d 794.
[47] *Id*. at 812 (emphasis in original).
[48] *d*. at 813.
[49] *Id*. at 814.
[50] 16 C.F.R. § 1115.8.
[51] 71 Fed. Reg. at 42,030.
[52] *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 notify the agency timely that the product could produce small parts in actual use. *Id*.
[53] 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").
[54] This provision was added by the CPSIA. Pub. L. No. 110-314, § 223, 122 Stat. 3016, 3068 (2008).
[55] 16 C.F.R. part 1120.
[56] *See* 87 Fed. Reg. 891 (Jan. 7, 2022).
[57] *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.
[58] *See* 16 C.F.R. § 1115.12(d).
[59] *Id*. § 1115.6(c).
[60] *See id*.
[61] *Id*. § 1115.6(a).
[62] *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).
[63] 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").
[64] 16 C.F.R. § 1115.6(b).
[65] *Id*. § 1115.6(a).
[66] *Id*. § 1115.14(e).
[67] *Id*. §§ 1115.14(c), (d).
[68] *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").
[69] 16 C.F.R. § 1115.10(f).
[70] *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).
[71] 15 U.S.C. § 2064(b).
[72] *See* 16 C.F.R. § 1115.13(c).
[73] *See id*. § 1115.13(d).
[74] *See id*. § 1115.13(b).
[75] *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=QHEBFJVj4Hn7.m0o.5QWG5eCaJ16zov2.

[76] *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).

[77] *See, e.g.*, 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.

[78] 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).

[79] *Id*. The CPSIA expanded this exception to cover acts other than the CPSA.

[80] *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.

[81] *See* CPSC, Violations, https://www.cpsc.gov/Recalls/violations.

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

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

[84] The determination is "preliminary" because the Commissioners will not yet have made a formal determination, through the process described below, that the product presents a substantial product hazard. *See* 15 U.S.C. §§ 2064(c), (d).

[85] Presentation by Shelby Mathis, Beverly Kohen, Howard Tarnoff, U.S. Consumer Product Safety Comm'n, *Compliance 101*, during the Annual Meeting of the International Consumer Product Health and Safety Organization (Feb. 25, 2019).

[86] *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-cpscs-delegation-for-a-safer-tomorrow/ (discussing CPSC Order No. 0310.14).

[87] *See id*.

[88] *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*.

89 Press Release, CPSC, CPSC Urgent Warning: Stop Using Waupaca Residential Elevators Due to Fatal Entrapment and Serious Fall Hazards (Jan. 11, 2022), https://www.cpsc.gov/Newsroom/News-Releases/2022/CPSC-Urgent-Warning-Stop-Using-Waupaca-Residential-Elevators-Due-to-Fatal- Entrapment-and-Serious-Fall-Hazards.

90 *Id*.

91 Press Release, CPSC, CPSC Announces Additional Steps Towards Eliminating Child Entrapment Hazard in Residential Elevators; Three Recalls and One Warning Issued; Consumers Warned to Check Residential Elevators, including at Rental Homes (Jan. 11, 2022), https://www.cpsc.gov/Newsroom/News- Releases/2022/CPSC-Announces-Additional-Steps-Towards-Eliminating-Child-Entrapment-Hazard-in-Residential-Elevators-Three-Recalls-and-One-Warning-Issued-Consumers-Warned-to-Check-Residential-Elevators-including-at-Rental-Homes.

92 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.

93 Complaint, *In re Leachco, Inc*., CPSC Docket 22-1 (Feb 9, 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.

94 Press Release, CPSC, CPSC and Kids2 Warn Consumers About Death in a Kids2 Rocker: Advise Rockers Should Never Be Used for Sleep (June 14, 2022), https://www.cpsc.gov/Newsroom/News-Releases/2022/CPSC-and-Kids2-Warn-Consumers-About-Death-in-a-Kids2-Rocker-Advise-Rockers-Should-Never-Be-Used-for-Sleep (styled as a joint warning, but issued at the agency's urging); 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.

95 Press Release, CPSC, CPSC Warns Consumers: Stop Using the Peloton Tread+ (Apr.17, 2021), https://www.cpsc.gov/Newsroom/News-Releases/2021/CPSC-Warns-Consumers-Stop-Using-the-Peloton-Tread.

96 *Id*.

97 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.

98 *See*, *e.g.*, 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.

99 *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).

[100] *See* 15 U.S.C. §§ 2064(c), (d).
[101] *See* 15 U.S.C. § 2055(b)(5)(A).
[102] *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.
[103] 15 U.S.C. § 2064(g).
[104] *See* 16 C.F.R. § 1025 (CPSC rules of practice for adjudicative proceedings).
[105] *See id*. § 1025.51(a).
[106] *See id*. §§ 1025.51-1025.54.
[107] 5 U.S.C. §§ 701-706.
[108] 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.
[109] *See In re Amazon.com, Inc.*, CPSC Docket No. 21-2, 86 Fed. Reg. 38,450 (July 21, 2021), https://www.cpsc.gov/s3fs-public/pdfs/recall/lawsuits/abc/001-In-re-Amazon-com-Inc 0.pdf?VersionId=D_fDzMyo4QKBSwQXOtNc.fp6rasa1CEa; *In re thyssenkrupp Access Corp.*, CPSC Docket 21-1, 86 Fed. Reg. 36,711 (July 7, 2021), https://www.cpsc.gov/s3fs-public/pdfs/recall/lawsuits/abc/001- thyssenkrupp-Access-Corp-Complaint-and-List-and-Summary-of-Documentary-Evidence-7-7-21.pdf.
[110] *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.
[111] Complaint, *In re Amazon.com, Inc.*, CPSC Docket No. 21-2, *supra* n.109, ¶¶ 19, 52-74.
[112] *Id*.
[113] 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_i0O7UOUeBc3kU7nHI.
[114] 15 U.S.C. § 2052(a)(16), (b).
[115] 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.
[116] Complaint, *In re Amazon.com, Inc.*, CPSC Docket No. 21-2, supra n.109, ¶¶ 47-51.
[117] Complaint, *In re Amazon.com, Inc.*, CPSC Docket No. 21-2, supra n.109, ¶¶ XI.3, XI.4.
[118] 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.113, at 35.
[119] 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_jc6xhpug07ms0BO0qgMNY.
[120] *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=fgW05hge.c7FvPZZOijVWVapvJBQKudZ.

[121] *See generally, e.g.*, Respondent Amazon's Motion for Summary Decision and Memorandum in Support of Motion for Summary Decision, *In re Amazon.com Inc.*, CPSC Docket No. 21-2 (Sept. 23, 2022).
[122] Complaint, *In re thyssenkrupp Access Corp.*, CPSC Docket 21-1, *supra* n.109, ¶¶ 117-21.
[123] *See id*.
[124] Complaint, *In re thyssenkrupp Access Corp.*, CPSC Docket 21-1, *supra* n.109, ¶¶ A-D.
[125] *See* Respondent TK Access Solutions Corp.'s Answer to Complaint, *In re thyssenkrupp Access Corp.*, CPSC Docket 21-1 (July 27, 2021), https://www.cpsc.gov/s3fs-public/pdfs/recall/lawsuits/abc/002-Respondents-Answer-to-Complaint.pdf.
[126] *See id*. at 37.
[127] *See id*. at 37-38.
[128] *See id*. at 38-39.
[129] *See id.* at 36-37.
[130] *See* Consent Agreement, *In re TK Access Solutions Corp. f/k/a/ thyssenkrupp Access Corp.*, CPSC Docket 21-1 (Aug. 17. 2022), https://www.cpsc.gov/s3fs-public/pdfs/recall/lawsuits/abc/149ConsentAgreementTKASCDocketNo21_1.pdf?VersionId=r2.dftLxEiF4eoPw9Q1xPf1hxyBrre6t. *See also* Order, *In re TK Access Solutions Corp. f/k/a thyssenkrupp Access Corp.*, CPSC Docket 21-1 (Sept. 9, 2022), https://www.cpsc.gov/s3fs-public/pdfs/recall/lawsuits/abc/150OrderTKASCDocketNo21_1.pdf?VersionId=3nGuvXDvY7OnTzVDovAbwGnwo5.2aeli
[131] *See* Consent Agreement, *In re TK Access Solutions Corp. f/k/a/ thyssenkrupp Access Corp.*, CPSC Docket 21-1, *supra* n.130, ¶ 10.
[132] *See* Press Release, CPSC, CPSC, thyssenkrupp Access Corp. Settle Lawsuit: Firm to Conduct Recall to Inspect Home Elevators Due to Entrapment Hazard Posing Risk of Serious Injury or Death to Children; One Child Death Reported Sept. 14, 2022), https://www.cpsc.gov/Newsroom/News-Releases/2022/CPSC-thyssenkrupp-Access-Corp-Settle-Lawsuit-Firm-to-Conduct-Recall-to-Inspect-Home-Elevators-Due-to-Entrapment-Hazard-Posing-Risk-of-Serious-Injury-or-Death-to-Children-One-Child-Death-Reported.
[133] *See* Statement of Commissioner Peter A. Feldman Opposing Revised Proposed Settlement in the Matter of TK Access Solutions Corp. f/k/a thyssenkrupp Access Corp. CPSC Docket No. 21-1 (Sept. 8, 2022).
[134] *See* Consent Agreement, *In re TK Access Solutions Corp. f/k/a/ thyssenkrupp Access Corp.*, CPSC Docket 21-1, *supra* n.130, ¶ 12.
[135] *See id*.
[136] *See, e.g.*, Press Release, CPSC, Bella Elevator Recalls Residential Elevators Due to Child Entrapment Hazard; Risk of Serious Injury or Death to Young Children (Jan. 11, 2022), https://www.cpsc.gov/Recalls/2022/Bella-Elevator-Recalls-Residential-Elevators-Due-to-Child-Entrapment-Hazard-Risk-of-Serious-Injury-or-Death-to-Young-Children.
[137] *See In re Leachco, Inc.*, CPSC Docket No. 22-2, *supra* n.110, ¶¶ 50-52.
[138] *See In re Leachco, Inc.*, CPSC Docket No. 22-2, *supra* n.110 , ¶¶ 35-37.
[139] *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=saWRLT8wowxdlY6q6CN9upUky6LR.Lv
[140] *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.
[141] 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.
[142] 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 [CPSA's] requirements for issuing a safety standard," because CPSC's "prerequisite factual findings, which are compulsory under the [CPSA], 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--2016-09-01OpinionandOrderDenyingRespon

dentsMotiontoDisqualifytheCommissionorSomeofitsMembers.pdf.

[143] 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.i4Ix7pPwb_whKng2.

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

[145] 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).

[146] *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.'"

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

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

[149] 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.

[150] *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.

[151] *See* 15 U.S.C. § 2061(b)(1).

[152] *See* 15 U.S.C. §§ 2064(c), (d).

[153] *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).

[154] *See* 62 Fed. Reg. 39,827, 39,828 (July 24, 1997).

[155] Email from CPSC staff to Eric Rubel Nov.19, 2021 (data for fiscal years 2013-2021). As of this writing, CPSC has not made similar data available for Fiscal Year 2022.

[156] *See* 15 U.S.C. §§ 2068(a)(4), 2069(a)(1).

[157] 16 C.F.R. § 1119.1.

[158] 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.").

[159] *Id.*.

[160] 15 U.S.C. § 2064(b) (emphases added).

[161] *See* 69 Fed. Reg. 68,884 (Nov. 26, 2004).

[162] *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)").

[163] *See* 86 Fed. Reg. 68,244 (Dec. 1, 2021).

[164] *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*).

[165] 28 U.S.C. § 2462.

[166] *Gabelli v. SEC*, 568 U.S. 442, 448 (2013).

[167] *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).

[168] *Michaels Stores*, 2016 WL 1090666, at *2.

[169] *Id*.

[170] Consent Decree and Permanent Injunction, *Michaels Stores*, No. 3:15-cv-1203 (N.D. Tex. Feb. 9, 2018).

[171] *Spectrum Brands*, 218 F. Supp. 3d at 817.

[172] *Id*.

[173] Order at 34, *United States v. Spectrum Brands, Inc.*, No. 18-1785 (7th Cir. May. 9, 2019).

[174] 15 U.S.C. § 2069(b).

[175] 16 C.F.R. Part 1119, *published in* 75 Fed. Reg. 15,993 (Mar. 31, 2010).

[176] 75 Fed. Reg. at 15,996.

[177] *Id*.; *see also* 16 C.F.R. § 1119.4(a)(2).

[178] 16 C.F.R. § 1119.4(a)(3).

[179] *Id*.
[180] *Id*. § 1119.4(a)(4).
[181] 75 Fed. Reg. at 15,996-97.
[182] 16 C.F.R. § 1119.4(a)(4).
[183] *Id*. § 1119.4(a)(5).
[184] 75 Fed. Reg. at 15,997.
[185] 16 C.F.R. § 1119.4(a)(6).
[186] 75 Fed. Reg. at 15,997.
[187] *Id*.
[188] *Id*. § 1119.4(a)(7)(i).
[189] *Id*.; *see* 75 Fed. Reg. at 15,997.
[190] 16 C.F.R. § 1119.4(a)(7)(ii).
[191] *Id*. at § 1119.4(b)(1).
[192] *Id*.
[193] *Id*. at § 1119.4(b)(2).
[194] *Id*. at § 1119.4(b)(3).
[195] *Id*. at § 1119.4(b)(4).
[196] *Id*.
[197] *See* 15 U.S.C. § 2068(a)(13).
[198] 75 Fed. Reg. at 15,995-96.
[199] 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).
[200] *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-elliot-f-kaye-and.
[201] *Id*.
[202] *Id*.
[203] *Id*.
[204] *Id*. at n.31.
[205] 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.
[206] *See* Press Release, CPSC, Peloton Agrees to Pay $19 Million Civil Penalty for Failure to Immediately Report Tread+ Treadmill Entrapment Hazards and for Distributing Recalled Treadmills (Jan. 5, 2022), https://www.cpsc.gov/Newsroom/News-Releases/2023/Peloton-Agrees-to-Pay-19-Million-Civil-Penalty-for-Failure-to-Immediately-Report-Tread-Treadmill-Entrapment-Hazards-and-for-Distributing-Recalled-Treadmills.
[207] See Statement of Commissioner Peter A. Feldman on Peloton Settlement Agreement (Jan. 5, 2023), https://www.cpsc.gov/s3fs-public/COPF-Peloton-Statement.pdf?VersionId=llORm2bwGjLjIBkqXflmuIilGX6QYRMC.
[208] *See* Press Release, CPSC, Gree Agrees to Pay Record $15.45 Million Civil Penalty, Improve Internal Compliance for Failure to Report Defective Dehumidifiers (Mar. 25, 2016), https://www.cpsc.gov/content/ gree-agrees-to-pay-record-1545-million-civil-penalty-improve-internal-compliance-for-failure.
[209] *See Gree Electric Appliances, Inc. of Zhuhai et al.*, Provisional Acceptance of a Settlement Agreement and Order, 81 Fed. Reg. 17,683 (Mar. 30, 2016); *see also* Statement of Commissioner Marietta S. Robinson on the Gree Dehumidifiers Civil Penalty (Mar. 24, 2016), https://www.cpsc.gov/about-cpsc/commissioner/marietta-s-robinson/statements/statement-of-commissioner-marietta-s-0.
[210] 81 Fed. Reg. at 17,684.
[211] *See* Complaint for Civil Penalty and Permanent Injunctive Relief, *U.S. v. Walter Kidde Portable Equipment, Inc.*, No. 20-cv-1172 (M.D.N.C. Dec. 30, 2020), https://www.justice.gov/opa/press-release/file/1350541/download.
[212] *Id*.
[213] *See* Consent Decree of Civil Penalty and Permanent Injunction, *U.S. v. Walter Kidde Portable Equipment, Inc.*, No. 20-cv-1172 (M.D.N.C. Jan. 4, 2021), https://www.justice.gov/opa/press-release/file/1350536/download.
[214] CPSC, Statement of Commissioner Peter A. Feldman on *Kidde, Inc.*, Civil Penalty (Jan. 5, 2021), https://www.cpsc.gov/s3fs-public/COPF%20Statement%20on%20Kidde%2C%20Inc._1.pdf?_phss2U1XfZekdppzcwLVwQOq0VNsvZ5.
[215] *Mirama Enters.*, *supra* n.62.
[216] *Mirama Enters.*, 387 F.3d at 986-89.

[217] *See* Complaint for Civil Penalties and Permanent Injunctive Relief, *United States v. Spectrum Brands, Inc.*, No. 3:15- cv-00371 (W.D. Wis. June 17, 2015), https://www.justice.gov/opa/file/478731/download; Complaint for Civil Penalties and Permanent Injunctive Relief, *United States v. Michaels Stores, Inc.*, No. 3:15-cv-1203 (N.D. Tex. Apr. 21, 2015), http://www.justice.gov/file/413226/download.

[218] *See*, *e.g.*, Consent Decree, *U.S. v. Dr. Reddy's Labs.*, *supra* n.32; *United States v. Black & Decker (U.S.) Inc.*, No. GLR-15-1239 (D. Md. May 13, 2015), https://cpsc.gov/Newsroom/News-Releases/2015/Black-and-Decker-Agrees-to-1575-Million-Dollar-Civil-Penalty-Internal-Compliance-Program-for-Failure-to-Report- Defective-Lawnmowers ($1.575 million civil penalty); Consent Decree of Civil Penalty and Permanent Injunction, *United States. v. Gerber Legendary Blades*, No. 3:14-cv-2061 (D. Or. Jan. 6, 2015), https://cpsc.gov/s3fs-public/FiskarsConsentDecreeUpdate.pdf ($2.6 million civil penalty); Consent Decree of Civil Penalty and Permanent Injunction, *United States v. Electrolux Home Prods., Inc.*, No. 1:14-cv-117 (S.D. Ga. May 14, 2014), https:// cpsc.gov/Newsroom/News-Releases/2014/Electrolux-Agrees-to-Pay-750000-Civil-Penalty-for-Delay-in-Reporting ($750,000 civil penalty).

[219] Stat. 3016, 3060 (2008).

[220] 218 F. Supp. 3d at 822.

[221] 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).

[222] S*pectrum Brands, supra* n.164, at *6-7.

[223] *Id*. at *4.

[224] *Id*. at *6 & n.14.

[225] *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*.

[226] *Id*.

[227] *Id*.

[228] *See id*. at *7.

[229] Consent Decree, *United States v. Michaels Stores, Inc.*, *supra* n.167.

[230] Amended Complaint for Civil Penalties and Permanent Injunctive Relief ¶¶ 13, 16, 19, 20, and 25, *Michaels Stores*, No. 3:15-cv-1203 (N.D. Tex. Apr. 3, 2017).

[231] *Id*. ¶ 26.

[232] Complaint ¶¶ 1, 31-35, *Michaels Stores, supra* n.217.

[233] *See* Amended Complaint ¶ 23, *Michaels Stores*, *supra* n.230; Complaint ¶ 29, *Michaels Stores, supra* n.217.

[234] CPSC, Statement of Acting Chairman Robert Adler on the Referral of a Civil Penalty Case to the U.S. Department of Justice (Nov. 18, 2020), https://www.cpsc.gov/s3fs-public/Statement-of-Acting-Chairman- Robert-Adler-on-Civil-Penalty11-18.pdf?tjzMoNd7n_zn6e3tuBBph_702S7nAcJY.

[235] *Id*.

[236] *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). *But 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.

[237] *See* Pub. L. No. 110-314, § 218, 122 Stat. 3016, 3060 (2008).

[238] *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., supra* n.213; *Consent Decree, U.S. v. Dr. Reddy's Labs.*, *supra* n.35; Provisional Acceptance of a Settlement Agreement and Order, Kawasaki Heavy Industries, 82 Fed. Reg. 25,779 (June 5, 2017).

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

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

[241] 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).

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

[243] *See* Consent Decree, *United States v. Walter Kidde Portable Equipment, Inc., supra* n.213.

[244] *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.justice.gov/file/414771/download; Consent Decree of Civil Penalty and Permanent Injunction, *United States v. Black & Decker (U.S.) Inc.*, No. GLR-15-1239 (D. Md. May 13, 2015), http://www.cpsc.gov/Global/Business-and-Manufacturing/Civil%20Penalties/2015/BlackAndDeckerfiledconsentdecree.pdf. 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, *Michaels Stores*, *supra* n.230; Complaint, *Spectrum Brands, supra* n.217; Consent Decree, *Michaels Stores, Inc., supra* n.170; Opinion and Order, *Spectrum Brands, Inc., supra* n.239.

[245] 15 U.S.C. § 2070 (2008).

[246] *See* Pub. L. No. 110-314, § 217(c), 122 Stat. 3016, 3060.

[247] 15 U.S.C. § 2070(b).

[248] *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).

[249] 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).

[250] 15 U.S.C. § 2070(c)(2).

[251] 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

[252] *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.

[253] Indictment, *United States v. Chu*, No. 2:19-cr-00193 DSF (C.D. Cal. Mar. 28, 2019).

[254] Defendant's Motion to Dismiss Counts 1 and 2, *United States v. Chu*, No. 2:19-cr-00193 DSF (C.D. Cal. Jan. 30, 2023).

[255] Press Release, Department of Justice, *supra* n.205.

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

[257] 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).

[258] *See id*.

[259] *See id*.

[260] *See id*.

[261] *See id*.

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

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, DC
601 Massachusetts Ave, NW
Washington, DC 20001