

**TOMPKINS & DAVIDSON, LLP**  
**Counselors At Law**

5 Hanover Square  
15<sup>th</sup> Floor  
New York, N.Y. 10004

Phone: (212) 944-6611  
Fax: (212) 944-9779  
e-mail: [customs@tdllp.com](mailto:customs@tdllp.com)  
web: <http://www.tdllp.com>

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**RE: CPSC Solicits Comments on Consumer Product Safety Improvement Act Penalty Provisions**

The Consumer Product Safety Commission has issued a request for public comment on the application of the penalty provisions in the Consumer Product Safety Improvement Act (“CPSIA”). Section 217(b)(2) of the CPSIA requires the Commission to issue a regulation setting forth its interpretation of the factors to be considered when determining civil penalties. There are slightly different factors listed in the Consumer Product Safety Act (CPSA), Federal Hazardous Substances Act (FHSA) and Flammable Fabrics Act. The CPSIA increased the civil penalty per violation under these laws from the current maximum of \$8,000 to \$100,000, and increased the maximum penalty for a related series of violations from the current \$1,825,000 to \$15,000,000. A violation applies on a per product basis and each day of a continuing violation constitutes a separate offense. The increases will become effective no later than August 14, 2009.

Violations must occur “knowingly”, which is defined as meaning (1) having actual knowledge, or (2) the presumed having of knowledge deemed to be possessed by a reasonable person acting under the circumstances, including knowledge obtainable through the exercise of due care to ascertain the truth of representations. Under each law, knowing violations result in civil penalties that can be compromised by the Commission. Each of the three statutes includes the following as penalty factors:

- The nature, circumstances, extent and gravity of the violation;
- The severity of the risk of injury;
- The occurrence or absence of injury
- The appropriateness of the penalty in relation to the size of the business;
- Such other factors as may be appropriate.

In addition, under CPSA and FHSA, the Commission takes into account the distributed quantity and the nature of the defective item, and means for mitigating an adverse impact on small businesses.

Commission staff is soliciting comment and information concerning what the CPSC should consider under each above factor, and under other factors that should be considered as “appropriate”, including, but not limited to, the entity’s prior compliance record, timeliness of response, safety and compliance monitoring, cooperation and good faith, the economic gain from non-compliance and product failure rate, factors impacting small business and whether the Commission should establish a matrix or formula for strict weighing of the different factors.

Comments are due no later than December 18, 2008. After reviewing the comments, the Commission will publish a notice of proposed rulemaking, inviting additional comments. As always, earlier comments will have greater impact.

A copy of the notice is available on the Commission website, and can be found at [www.tdllp.com](http://www.tdllp.com). We urge that consideration be given to filing comments and, if you wish to assert your views on the penalty program that you will be operating under, please contact us.

**Firm Contacts: Robert Stack ([rstack@tdllp.com](mailto:rstack@tdllp.com)); Barbara Wierbicki ([bywierbicki@tdllp.com](mailto:bywierbicki@tdllp.com)); Louis Shoichet ([lshoichet@tdllp.com](mailto:lshoichet@tdllp.com)).**

**Note: The above comments are intended for general information only, and not as legal advice. Legal advice can only be offered after a review of a client’s specific facts and circumstances, which may affect the applicability of any general comments contained herein.**