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Consumer Protection

CPSC Chief's Recent Statements Don't Calm Companies' Concerns About Civil Penalties

Some attorneys who represent regulated consumer product companies before the Consumer Product Safety Commission (CPSC) remain concerned about the possibility of widespread, rising civil penalties for safety violations.

Agency Chairman Elliot Kaye spent several minutes addressing higher civil penalties during a March 2 keynote speech to a large group of stakeholders in Washington, D.C.

Kaye said during that speech that he would like to see million-dollar penalties in the double digits for some fact patterns currently before the commission.

"We are still not halfway" to maximum penalty amounts, he said.

The chairman said such penalties would be for "aberrant behavior" and for times "when the conduct is so outside the norm," and would depend "on some of the fact patterns that we're seeing."

Kaye's comments at the International Consumer Product Health & Safety Organization (ICPHSO) 2016 Annual Meeting & Training Symposium echoed those he made at the same symposium last year (39 DER A-27, 2/27/15).

The Consumer Product Safety Improvement Act (CPSIA), which went into effect in 2008, authorized the CPSC to obtain civil penalties of up to \$15 million for failure to report safety hazards to the agency in a timely manner, dramatically increasing the previous civil penalty cap of \$1.85 million.

Congressional Intent Disputed. Despite Kaye's use of limiting language in his March 2 talk, at least some who represent consumer product makers and others are viewing the agency chief's comments much more broadly.

"I didn't write down his exact words, but as I recall, he unequivocally said he believes—this is the second or third time, I believe, that he's said this publicly—that the congressional intent was, in raising the cap to \$15 million, he felt that reflected direct congressional intent that all civil penalties should increase," Quin Dodd, who represents regulated companies, told Bloomberg BNA in an interview March 10.

That position is wrong, said Dodd, who is based in Washington and served as CPSC chief of staff under former Chairman Nancy Nord, when the CPSIA was passed.

"I have no knowledge of any statement by any member of Congress on the committee or otherwise that indicated, or that indicates today, that the intent in increasing the cap was that all civil penalties increase," he said.

Commissioner Marietta Robinson, another one of the Democrats who, together with Kaye, hold the majority on the commission, tried to tamp down some of those industry fears during a panel discussion held later the same day at the event where Kaye made his remarks.

Congress didn't intend to raise all civil penalties for product-safety violations, Robinson said at the ICPHSO event.

Robinson also emphasized an openness to mitigating factors in assessing civil-penalty cases.

Robinson's comments seemed to allay some concerns, but spark new ones for other attorneys who represent regulated companies.

"Commissioner Robinson went out of her way, I thought, to say that the commission is looking at the factors fairly and is closing some matters and only pursuing the ones where they see egregious behavior," attorney Cheryl Falvey told Bloomberg BNA in an interview March 10.

"But I think it was equally palpable that the commission, in those instances where they do believe there's been behavior that they think doesn't match the statutory requirements, that they're going after higher penalties," Falvey, who was also at the ICPHSO event, said.

An attorney at Crowell Moring LLP and a former CPSC general counsel, she represents manufacturers, retailers and others with business before the CPSC.

A central question for companies becomes whether the commission is "going to see it the same way you do," she said.

Rachel Weintraub, legislative director and general counsel at the Consumer Federation of America, told Bloomberg BNA March 11 that she also interpreted Kaye to mean increases "not across the board, but based on specific factors of cases—based upon facts, those penalties will be applied."

"Certainly when Congress does that, it's the agency's responsibility to implement it," she said.

Robinson's words didn't quell Dodd's concerns and, he said March 10, her remarks were "in contrast with what Chairman Kaye's comments were during lunch."

Fifteen Million a 'Goal?' Commissioner Ann Marie Buerkle, a Republican, also had a different interpretation of what Kaye said, at least on some aspects of civil penalties.

Buerkle, who shared the dais at the panel discussion March 2 with Robinson, said Kaye had a "goal" of getting to a \$15 million penalty.

That approach, and the idea of publicizing cases that are referred to the Department of Justice for criminal penalties, which Kaye said he personally supports, are counterproductive, she said.

They discourage compliance and undermine trust and true collaboration between the agency and regulated industry, she said.

"I disagree with a goal of setting a specific penalty," she said, to applause.

But Robinson said that's not how she heard Kaye's speech.

"I don't think we have a goal of a high civil penalty," she said.

It was Dodd, at that time, who asked a question from the audience, perhaps channeling the concerns in the room: "Did the commissioners think Congress intended to raise *all* civil penalties?"

That was when Robinson denied that was the case.

Relationship of Penalties, Compliance. Addressing other civil penalty-related matters, the moderator, attorney Eric Rubel of Arnold & Porter LLP in Washington, D.C., asked how penalties affect compliance.

Robinson said most penalties involve a failure to report hazards to the agency as required, and are "pretty severe cases."

Penalties can't simply "be the cost of doing business," she said.

"The fact that we're punishing the bad guys" is something to be applauded, she said. And penalties improve compliance, she said.

Buerkle disagreed. "People come to us with Fast Track reporting"—a collaborative voluntary-recall process—"and we reward them with a civil penalty," she said.

"I think we drive companies away," she said.

"Fast Track doesn't mean they come to us quickly," Robinson said, indicating that some Fast Track cases may merit a penalty.

"That is one thing I tend to agree with Commissioner Robinson on," Falvey said in the March 10 interview, in response to the idea that penalties deter compliance.

"The law is the law," Falvey said. "And the law obligates companies to report. Whether the penalty threat is higher or lower, there is an engagement requirement."

Weintraub said the idea behind civil penalties "is to deter wrongful conduct and make noncompliance with CPSC rules something to avoid because of negative consequences."

Congress increased the amount because the previous cap "really was no longer meaningful for certain companies," she said.

What to Expect. Rubel asked about the predictability and flexibility of civil penalties.

"It's about as transparent a settlement process as I've ever seen," Robinson said. The company's response is

taken very seriously, she said. "We've dropped cases" and substantially lowered penalty demands after seeing a company's explanations, she said.

Buerkle said the problem "goes to the opaqueness of the statute," Section 15(b) of the Consumer Product Safety Act, which spells out the circumstances requiring reporting. Many factors go into "when a company should consider reporting," she said.

"From what I hear from companies, there's not a lot of give and take," she said. CPSC enforcement staff aren't considering mitigating factors, she said.

Dodd, in the interview, echoed this position. "It appears to me and to many of my colleagues that the single most important factor is the ability to pay."

"It's certainly one of the permissible factors in looking at civil penalties," he said. "But it is certainly not the only factor."

In his experience with the CPSC Office of General Counsel, "there is not adequate consideration of the other four statutory factors, let alone other factors that may come into play," he said.

Bad Guys, Good Guys. Robinson said some of the cases involve months of e-mails that mention delaying reports of hazards to the CPSC in order to sell more items first.

But if the problems are isolated or insignificant, or involve only a few products, the CPSC "takes all of that into consideration," she said.

At the ICPHSO event, Falvey asked a question about flexibility. "It seems there's no room for an honest mistake by a good guy," she said.

That situation would be "very much taken into consideration," Robinson said. "I would vote against a civil penalty" in those circumstances, she said.

"Sometimes a good guy makes a bad decision," she said.

But Buerkle said, "There's a feeling of angst out there."

Falvey said in the interview, "My takeaway is, I'm going to take Commissioner Robinson at face value and believe that there's room to point out that some honest mistakes were made and that not every case is going to result in a penalty."

"The takeaway for clients is you can't guarantee that they're going to see it the same way you do, that it was truly an honest mistake," she said. And the CPSC "may in hindsight look at your e-mail traffic and reach different conclusions."

A theme of the CPSC presentations at the conference was "we're going after more and higher penalties," Falvey said.

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