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December 18, 2008

Todd A. Stevenson, Secretary  
Office of the Secretary  
U.S. Consumer Product Safety Commission  
Room 502  
4330 East West Highway  
Bethesda, MD 20814

Re: Section 217(b)(2) Civil Penalty Criteria

Dear Secretary Stevenson:

Please accept the following comments from the Retail Industry Leaders Association (RILA) on behalf of its members in response to the Consumer Product Safety Commission's ("Commission" or "CPSC") Request for Comments and Information; Section 217(b)(2), Civil Penalty Criteria, of the Consumer Product Safety Improvement Act ("CPSIA" or "Act"). Section 217(b)(2) of the CPSIA directs the Commission to issue final regulations interpreting the penalty factors described in section 20(b) of the Consumer Product Safety Act (15 U.S.C. 2069(b)), section 5(c)(3) of the Federal Hazardous Substances Act (15 U.S.C. 1264(c)(3)), and section 5(e)(2) of the Flammable Fabrics Act (15 U.S.C. 1194(e)(2)), as amended.

By way of background, RILA promotes consumer choice and economic freedom through public policy and industry operational excellence. Our members include the largest and fastest growing companies in the retail industry--retailers, product manufacturers, and service suppliers--which together account for more than \$1.5 trillion in annual sales. RILA members provide millions of jobs and operate more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

RILA applauds the Commission for soliciting public comments on how it should create guidelines for determining civil penalties for product safety violations. The Commission should take care to ensure the guidelines it adopts are sufficiently flexible to respond to the specific facts of each case, and ensure that penalties are proportionate to the severity of the violation and negligence. RILA also recommends that the Commission not adopt a penalty matrix as it would tend to limit the Commission's flexibility while it examines the specifics of each case. Civil penalties should not be assessed strictly on the basis of a company's size or the number of units recalled. Most importantly, civil penalties should be proportionate to the violation at hand.

## **Clear and Transparent Civil Penalty Criteria Are Critical**

RILA welcome's the Commission's effort to implement section 217(b)(2) of the CPSIA to promulgate clear, transparent, and critical guidance to industry and the public. RILA is in full support of regulations on civil penalties to aid the regulated industry and the public in understanding the criteria and rationale behind the Commission's penalty decisions. This is particularly needed now that the CPSIA has greatly increased maximum civil penalties. The criteria and rationale should be clear to all who are affected by and interested in government policies. Whether and what level of penalty might be assessed for failure to file or late filings of safety reports under section 15 of the Consumer Product Safety Act, as amended by section 214 of the CPSIA, for example, is critical information for the regulated community, consumers, and other interested parties.

At present, only Commission staff and a small coterie of lawyers have a good sense of what the Commission considers relevant in determining whether to seek penalties and the amounts. There are no public guidelines, though other government agencies have had such policies for many years. The CPSC penalty decisions, as incorporated in press releases and Federal Register announcements, do not provide specific or useful general explanations. Even experienced company staff and counsel are left to sift through the press releases to discern patterns relating to lateness of reporting, the number of products involved, and other factors that seem to be relevant. But in discussions with Commission staff these attempts to find patterns and precedent can be easily dismissed on the ground that outsiders cannot know relevant confidential information about particular uses.

Just as important as clear and transparent civil penalty guidelines is sufficient flexibility by the Commission to assess civil penalties. RILA believes that the Commission should not develop a matrix to determine penalties as this would hinder the Commission's ability to assess each case based on the facts at hand. The Commission has sufficient expertise in the area of assessing the severity of the case, a company's compliance and monitoring records, product failure rates and previous records of compliance, which are all factors that do not lend themselves well to a matrix. For the reasons stated above, RILA urges that the Commission not adopt a penalty matrix for the purpose of assessing civil penalties.

## **Size of Business as Mitigating Factor**

Section 217(b)(2) of the CPSIA includes language directing the Commission to issue penalties based on the "appropriateness of such penalty in relation to the size of the business of the person charged."

RILA members are the largest, most successful companies in the retail industry. These companies allocate considerable amounts of time and resources toward assuring the safety and quality of the products they sell, and they take great pride in promoting best practices among the industry in product safety as well as many other areas. RILA believes it is inappropriate to interpret section 217(b)(2) to be an aggravating factor under which the largest importers and manufacturers would always be more harshly penalized than smaller companies.

Instead, RILA believes this factor should be interpreted as a mitigating factor to reduce the burden in small and medium sized enterprises. RILA recognizes it is appropriate to take into account a company's size, the unique burdens placed on smaller retailers such as mom and pop stores, and a company's ability to pay as a mitigating factor.

### **Strong Safety and Compliance Records Should be Recognized and Rewarded**

The Commission should take into consideration companies that act in good faith and have effective safety and compliance programs. Retailers dedicate significant resources that focus specifically and solely on product safety. For example, some RILA members participate in the Commission's retailer reporting model whereby companies voluntarily notify the agency of consumer contacts regarding product safety. Many retailers also have fulsome monitoring programs in place to collect and analyze safety information and to evaluate reporting issues. These programs demonstrate companies' awareness of and commitment to safety issues, and a strong program should indicate to the Commission that the company makes significant efforts to prevent safety issues and promptly report any issues that do arise. All of these efforts promote best practices in the industry and should be recognized and encouraged by the Commission.

### **Cooperation and Good Faith**

The Commission should reward companies that cooperate with Commission staff and act in good faith both in general and with regard to the matter at issue. Companies that act in bad faith or consistently fail to report in the face of reasonable information that a report is required are the violators that deserve to be penalized and should be on notice that they are more likely to be the subject of a civil penalty than those firms that cooperate and act in good faith.

Likewise, as importers begin implementing third-party testing programs, there may be some instances where a product that initially tests as being compliant with new requirements is placed onto a store shelf, yet subsequent testing reveals some abnormalities or that the product has higher levels of lead or phthalates. In such instances, importers would immediately bring the results to the attention of Commission staff and consult on how to proceed. If the importer acted in good faith and, after having received subsequent testing information contradicting earlier results which it shared it with Commission staff, the Commission should encourage information sharing between the private sector and its regulator and not unduly penalize the company if violations are found.

Finally, RILA also supports a six-month grace period for enforcement of the new penalties for violations of the new standards, if they are not intentional, and if the company cooperated and acted in good faith. Recognizing the significant difficulties industry is facing to implement provisions of the CPSIA, this proposed grace period would encourage dialogue between the Commission and good actors while alleviating some resources to focus on bad actors in the industry.

## **Conclusion**

RILA members place the highest priority on ensuring the safety of their customers and the products they sell, and RILA appreciates this opportunity to comment on the Commission's Request for Comments and Information; Section 217(b)(2), Civil Penalty Criteria. Should you have any questions about the comments as submitted, please don't hesitate to contact me by phone at (703) 600-2046 or by email at [stephanie.lester@rila.org](mailto:stephanie.lester@rila.org).

Respectfully submitted,

A handwritten signature in black ink that reads "Stephanie Lester". The signature is written in a cursive style with a long horizontal flourish at the end.

Stephanie Lester  
Vice President, International Trade