

QUESTIONS FOR THE RECORD

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In Response to the

**COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON INNOVATION, DATA, AND COMMERCE**

UNITED STATES HOUSE OF REPRESENTATIVES

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1. This question pertains to the Commission's enforcement practice, which includes pursuing civil penalties for late reporting of potential product safety hazards to the CPSC. The Committee is concerned with inconsistent enforcement against American businesses. In the past four years, the CPSC has levied 11 penalties against companies founded and operating in the United States. The CPSC recently targeted an Oklahoma family's small business that sells children's products, before an independent adjudicator dismissed the CPSC's case. You have praised CPSC's increased aggressiveness as "no small feat."

Out of concern of the cost to business, Congress has limited the maximum penalty that the Commission may impose at approximately \$17 million for a related series of violations. You support efforts to increase that limit, and a bill to raise the limit has been introduced in Congress, but it is not the law. Despite this, we have heard concerning reports that your staff is demanding sums above the statutory cap to resolve matters.

a. Commissioner Feldman, why are we seeing civil penalties that are all over the place? In *Vornado* there was a death but not a max fine but others that posed far less harm saw full penalties.

Civil penalties are an important part of CPSC's enforcement authorities to ensure compliance with the law and fairness in the marketplace. Robust enforcement helps maintain a level playing field and protects responsible firms against unfair competition from other companies, many of which are located in China. Under the Consumer Product Safety Act, CPSC's civil penalties are currently capped at \$17,150,000 for a related series of violations, and Commission staff is not permitted to demand sums above that statutory cap. While I have not endorsed any specific legislative proposal, even a maximum monetary penalty lacks serious deterrent effect for very large companies. Should Congress provide the Commission with new authorities, I will follow the law. In the meantime, I have argued for increased use of CPSC's injunctive relief in penalty cases, including third-party monitor requirements to promote full compliance with the law. These are particularly appropriate for matters involving egregious facts and recidivist firms. All firms, and recidivist firms, in particular, should bear the financial cost of third-party monitors and other compliance assurance tools, rather than American taxpayers. When companies have problems, it is their responsibility to fix them.

I have criticized CPSC's application of civil penalties for lacking coherence or consistent application of guiding principles. For example, in *Vornado*, the Commission settled charges for \$7.5 million against a recidivist firm involving aggravated failure to report a fire hazard that resulted in at least 19 fires and the death of an elderly man. This was less than half of what CPSC could have legitimately sought. Last year, in the *Generac* matter, the Commission imposed a near-maximum penalty against a first-time offender in a case that did not involve fatalities and where a reasonable reading of the evidence supported a conclusion that the reporting delay was born out of a failure to appreciate the nature of the hazard rather than a concealment of the problem from CPSC.¹ In *Vornado*, there was evidence that corporate leadership knew about the defect as early as 2014 and may have actively concealed this

¹ Generac Power Sys., Inc. CPSC Docket No.: 23-C0002 (2023) (statement of Peter A. Feldman, Comm'r), available at <https://www.cpsc.gov/About-CPSC/Commissioner/Peter-A-Feldman/Statement/Statement-of-Commissioner-Peter-A-Feldman-on-Generac-Power-Systems-Civil-Penalty-Settlement>.

information from the Commission. Nevertheless, the firm continued to sell the product for years, declining to provide notice to its regulator or to American consumers. The *Vornado* penalty is also at odds with the then-most-recent civil penalty case at the time, *Cybex*, which involved a first-time offense with no fatalities. Yet the Commission saw fit to settle that case for \$7.95 million.

As I said at the time about the *Vornado* decision:

The \$7.5 million Vornado settlement, less than half of what we could have justifiably sought, will only contribute to the incoherent manner the Commission has applied its civil penalty authority. Have a death? Face a lower penalty. Report late but within 14 months? Face a higher penalty. I cannot identify an underlying doctrine or principle.²

I remain concerned that the *Vornado* settlement has resulted in confusion about the Commission's expectations and how the Commission will deal with similar conduct going forward.

2. What is CPSC currently doing to ensure the independence of third-party testing labs abroad, including countries like China that don't always respect the rule of law and whistleblower protections of foreign jurisdictions?

a. Can CPSC guarantee the independence of these third-party labs?

No. Under the Consumer Product Safety Improvement Act, manufacturers and importers are required to test children's products for safety using either third-party laboratories or labs that are "firewalled" against the possibility of undue influence. These labs must be accredited by the agency, however, I have significant concerns about the CPSC's accreditation process for firewalled laboratories and the challenges both CPSC and in-country accrediting bodies face in verifying applicants' assertions. I am particularly concerned about laboratories in China and other countries that do not have cultures of transparency or whistleblower protections.

b. What type of due diligence is done when granting initial and renewal applications?

Little, if any, due diligence is performed by Commission staff when granting or renewing firewalled lab applications. Agency staff has admitted that the laboratory accreditation process is largely a paper exercise that relies on a firm's own attestations about independence and whistleblower protection.³ CPSC does not conduct on-site inspections or perform other

² Vornado Air, LLC (2022) (statement of Peter A. Feldman, Comm'r), *available at* https://www.cpsc.gov/s3fs-public/CommissionerFeldman_VornadoStatementFINAL.pdf?VersionId=7xFx_drLW1emiyFGAJM6ED7.u7sA.4m3.

³ CPSC Decisional Meeting, Accreditation of the Laboratory of Guangsheng M&P Manufacturing Co. Ltd. Conformity Assessment Body as a "Firewalled" Third Party Laboratory and Related Delegation of Authority (April 21, 2021) (COMMISSIONER FELDMAN: "I realize that our regulations allow for paper submissions, but in the instance of foreign laboratories that are seeking approval, how do we ensure that the test lab's independence will be maintained and that whistleblowers are able to communicate with the CPSC without fear of retaliation? We're just taking the requestor's word for it? CPSC STAFF: My short answer to that is yes"), *available at* https://youtu.be/BGNSX1KT4oo?list=PLPbI8bR243fHmCYA1a7pZ4l4wzhYjla_V&t=855.

verifications to ensure these laboratories are independent. In general, the Commission looks to factors such as whether the lab is accredited by an in-country accrediting body that is a signatory to certain mutual recognition and trade agreements. The Commission also looks to whether the lab has established procedures regarding undue influence and confidential reporting to CPSC. However, the Commission performs no independent verification.

c. Historically, application renewals were delegated to career staff, not requiring a Commission vote, and reviewed as a matter of course. Do you support automatic renewals by career staff?

No. Since joining CPSC, I have consistently voted to withhold blanket delegations of authority to agency staff to approve these reaccreditations. The Commission should consider each application on its own merits.