CONSUMER PRODUCT SAFETY COMMISSION

[CPSD Docket No. 21–C0001]

Cybex International, Inc., Provisional Acceptance of a Settlement Agreement and Order

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: It is the policy of the Commission to publish settlements that it provisionally accepts under the Consumer Product Safety Act in the Federal Register in accordance with the terms of the Consumer Product Safety Commission's regulations. Published below is a provisionally-accepted Settlement Agreement with Cybex International, Inc., containing a civil penalty in the amount of seven million, nine hundred and fifty thousand dollars ($7,950,000), subject to the terms and conditions of the Settlement Agreement.1

DATES: Any interested person may ask the Commission not to accept this agreement or otherwise comment on its contents by filing a written request with the Division of the Secretariat by March 4, 2021.

ADDRESSES: Persons wishing to comment on this Settlement Agreement should send written comments to Comment 21–C0001, Division of the Secretariat, Consumer Product Safety Commission, Room 820, 4330 East-West Highway, Bethesda, MD 20814; telephone: (301) 504–7479; email: cpsc-os@cpsc.gov.

FOR FURTHER INFORMATION CONTACT: Leah Wade Ippolito, Supervisory Attorney, Division of Enforcement and Staff Charges

1 The Commission voted 3–0–1 to provisionally accept the proposed Settlement Agreement and Order regarding Cybex International, Inc. Acting Chairman Adler, Commissioners Kaye and Baiocco voted to provisionally accept the Settlement Agreement and Order. Commissioner Feldman did not vote on this matter.

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LITIGATION, Office of Compliance and Field Operations, Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, Maryland 20814–4408; lippolito@cpsc.gov.

SUPPLEMENTARY INFORMATION: The text of the Agreement and Order appears below.


Alberta E. Mills,
Secretary.

United States of America

Consumer Product Safety Commission

In the Matter of: CYBEX INTERNATIONAL, INC., CPSC Docket No.: 21–C0001

Settlement Agreement


The Parties

2. The Commission is an independent federal regulatory agency, established pursuant to, and responsible for, the enforcement of the CPSA, 15 U.S.C. 2051–2089. By executing the Agreement, staff is acting on behalf of the Commission, pursuant to 16 CFR 1118.20(b). The Commission issues the Order under the provisions of the CPSA.

3. Cybex is a corporation, organized and existing under the laws of the state of New York, with its principal place of business in Rosemont, Illinois.

Staff Charges


5. Between 1989 and 2009, Cybex manufactured, distributed and offered for sale in the United States approximately 15,000 Model 5340 and 5341 Smith Press Machines ("Smith Press.")

6. The Arm Curl and Smith Press Machines (collectively, the "Subject Products") are "consumer products", that were "distributed in commerce," as those terms are defined or used in sections 1118.20(a)(5) and (8) of the CPSA, 15 U.S.C. 2052(a)(5) and (8). Cybex is a "manufacturer" and "distributor" of the...
Subject Products, as such terms are defined in sections 3(a)(7) and (11) of the CPSA, 15 U.S.C. 2052(a)(7) and (11).

Violation of CPSA Section 19(a)(4)

Arm Curl Machines

7. The Arm Curl Machines contain a defect which could create a substantial product hazard and create an unreasonable risk of serious injury or death because the weld that connects the swivel handle to the arm of the machine can fatigue and fail, causing the handle to separate unexpectedly from the frame of the machine. This separated handle can strike the user in the face.

8. Between mid-2002 (when Cybex was able to retrieve incident information) and June 2015, Cybex received 85 reports of broken handles, including incidents that resulted in lacerations requiring stitches and one grievous bodily injury involving a consumer who permanently lost vision in one eye when the handle separated during use and struck the consumer in the face.

9. Despite information that reasonably supported the conclusion that the Arm Curl Machine contained a defect that could create a substantial product hazard or create an unreasonable risk of serious injury or death, Cybex did not immediately report to CPSC.


11. Cybex and the Commission jointly announced a Fast Track recall of the Arm Curl Machines on August 25, 2015. The press release announcing the recall noted that the swivel handle can break off from the frame causing users to hit themselves in the face or head, posing an impact hazard.

Smith Press Machines

12. The Smith Press Machines contain a defect which could create a substantial product hazard and create an unreasonable risk of serious injury or death because the weld bar can fall, posing serious impact injury hazards to the user.

13. Between late 1991 and January 2018, Cybex received 27 reports of injuries associated with the Smith Press Machine, including grievous bodily injuries such as paralysis and spinal fracture.

14. Despite information that reasonably supported the conclusion that the Smith Press Machines contained a defect that could create a substantial product hazard or created an unreasonable risk of serious injury or death, Cybex did not immediately report to CPSC.


16. Cybex and the Commission jointly announced a Fast Track recall of Smith Press Machines on August 29, 2018. The press release announcing the recall noted that the weight bar can fall, posing serious injury hazards to the user.

Failure to Timely Report

17. Despite having information reasonably supporting the conclusion that the Subject Products contained a defect or created an unreasonable risk of serious injury or death, Cybex did not notify the Commission immediately of such defect or risk, as required by sections 15(b)(3) and (4) of the CPSA, 15 U.S.C. 2064(b)(3) and (4), in violation of section 19(a)(4) of the CPSA, 15 U.S.C. 2068(a)(4).

18. Because the information in Cybex’s possession about the Subject Products constituted actual and presumed knowledge, Cybex knowingly violated section 19(a)(4) of the CPSA, 15 U.S.C. 2068(a)(4), as the term “knowingly” is defined in section 20(d) of the CPSA, 15 U.S.C. 2069(d).


Response of Cybex

20. This Agreement does not constitute an admission by Cybex to the staff’s charges set forth in paragraphs 4 through 19 above, and Cybex specifically refutes the staff’s findings that Cybex did not timely file section 15(b) reports on the Subject Products.

21. The Arm Curl and Smith Press machines have not been sold since 2008 and 2009 respectively. The Subject Products were designed, manufactured and sold by prior ownership of the Cybex business (which was sold in 2016 and again in 2019). The original owners of Cybex recalled and retrofitted the Arm Curl in 2015 and the CPSC’s investigation was underway when the Company was sold in 2016. After assessing the legacy business and engaging in discussions with CPSC, the new owner of Cybex determined that it was required to submit a report to the CPSC regarding the Smith Press in connection with the CPSC’s ongoing investigation.

22. Due to the complexity of consumer interaction with and use of exercise equipment, and the critical role of fitness center owners in monitoring users and maintaining the equipment, consumer reports can be difficult for a manufacturer to obtain and evaluate, may not be received promptly, and may not include complete and accurate information.

23. With regard to the Smith Press, there is a risk of users failing to fully seat a weighted bar across the pins when racking the bar, thereby causing the bar to fall. Further, the equipment had extensive product safety and usage labeling and a safety stop that users frequently failed to activate while exercising. Racking systems similar to the Smith Press racking system were widely used throughout the industry during the time the Smith Press was sold and in use. Cybex believes that the number of reports of injuries associated with the weight bars was infinitesimally small in view of the millions of uses of this equipment.

24. With regard to the Arm Curl, over time the arm of certain of the machines experienced weld fatigue, despite the equipment passing rigorous and extensive product load and endurance testing. Cybex believes that the number and extent of injuries were limited.

25. At all relevant times, Cybex had a product safety compliance program, including quality control personnel and a product safety testing program. Following the sale of Cybex in 2016, new ownership implemented improvements to that compliance program to further ensure that it is consistent with industry standards.

26. Cybex enters into this Agreement solely to settle this matter without the delay and expense of litigation. Cybex does not admit to any fault, liability, violation of any law, or wrongdoing with respect to the Arm Curl or Smith Press machines, and Cybex’s willingness to enter into this Agreement and Order does not constitute, nor is it evidence of, an admission by it of any fault, liability, violation of any law, or any wrongdoing.

Agreement of the Parties

27. Under the CPSA, the Commission has jurisdiction over the matter involving the Subject Products and over Cybex.

28. The parties enter into the Agreement for settlement purposes only. The Agreement does not constitute an admission by Cybex or a determination by the Commission that Cybex violated the CPSA’s reporting requirements.

29. In settlement of staff’s charges, and to avoid the cost, distraction, delay, uncertainty, and inconvenience of protracted litigation or other proceedings, Cybex shall pay a civil penalty in the amount of seven million,
nine hundred and fifty thousand dollars ($7,950,000) within thirty (30) calendar
days after receiving service of the
Commission’s final Order accepting the
Agreement. All payments to be made
under the Agreement shall constitute
debts owing to the United States and
shall be made by electronic wire transfer
to the United States via http://
www.pay.gov, for allocation to, and
credit against, the payment obligations
of Cybex under this Agreement. Failure
to make such payment by the date
specified in the Commission’s final
Order shall constitute Default.
30. All unpaid amounts, if any, due
and owing under the Agreement, shall
constitute a debt due and immediately
owing by Cybex to the United States,
and interest shall accrue and be paid by
Cybex at the federal legal rate of interest
set forth at 28 U.S.C. 1961(a) and (b)
from the date of Default, until all
amounts due have been paid in full
(hereinafter “Default Payment Amount”
and “Default Interest Balance”). Cybex
shall consent to a Consent Judgment in
the amount of the Default Payment
Amount and Default Interest Balance,
and the United States, at its sole option,
may collect the entire Default Payment
Amount and Default Interest Balance, or
exercise any other rights granted by law
or in equity, including, but not limited
to, referring such matters for private
collection, and Cybex agrees not to
contest, and hereby waives and
discharges any defenses to, any
collection action undertaken by the
United States, or its agents or
contractors pursuant to this paragraph.
Cybex shall pay the United States all
reasonable costs of collection and
enforcement under this paragraph,
respectively, including reasonable
attorney’s fees and expenses.
31. After staff receives this Agreement
executed on behalf of Cybex, staff shall
promptly submit the Agreement to the
Commission for provisional acceptance.
Promptly following provisional
acceptance of the Agreement by the
Commission, the Agreement shall be
placed on the public record and
published in the Federal Register, in
accordance with the procedures set
forth in 16 CFR 1118.20(e). If the
Commission does not receive any
written request not to accept the
Agreement within fifteen (15) calendar
days, the Agreement shall be deemed
finally accepted on the 16th calendar
day after the date the Agreement is
published in the Federal Register, in
accordance with 16 CFR 1118.20(f).
32. This Agreement is conditioned
upon, and subject to, the Commission’s
final acceptance, as set forth above, and
it is subject to the provisions of 16 CFR
1118.20(b). Upon the later of: (i)
Commission’s final acceptance of this
Agreement and service of the accepted
Agreement upon Cybex, and (ii) the date
of issuance of the final Order, this
Agreement shall be in full force and
effect, and shall be binding upon the
parties.
33. Effective upon the later of: (i) The
Commission’s final acceptance of the
Agreement and service of the accepted
Agreement upon Cybex and (ii) and the
date of issuance of the final Order, for
good and valuable consideration, Cybex
hereby expressly and irrevocably waives
and agrees not to assert any past,
present, or future rights to the following,
connection with the matter described in
this Agreement: (i) an administrative
or judicial hearing; (ii) judicial review
or other challenge or contest of the
Commission’s actions; (iii) a
determination by the Commission of
whether Cybex failed to comply with
the CPSA and the underlying
regulations; (iv) a statement of findings
of fact and conclusions of law; and (v)
any claims under the Equal Access to
Justice Act.
34. Cybex shall maintain a
compliance program designed to ensure
compliance with the CPSA with respect
to any consumer product imported,
manufactured, distributed or sold by
Cybex, and which shall contain the
following elements:
(i) Written standards, policies and
procedures, including those designed to
ensure that information that may relate
to or impact CPSA compliance is
conveyed effectively to personnel
responsible for CPSA compliance;
whether or not an injury is referenced;
(ii) a mechanism for confidential
employee reporting of compliance-
related questions or concerns to either a
compliance officer or to another senior
manager with authority to act as
necessary;
(iii) effective communication of
company compliance-related policies
and procedures regarding the CPSA to
all applicable employees through
training programs or otherwise;
(iv) Cybex’s general board oversight, consistent with its
policies and procedures of, CPSA
compliance; and
(v) retention of all CPSA compliance-
related records for at least five (5) years,
and availability of such records to CPSC
staff upon request.
35. Cybex shall maintain and enforce
a system of internal controls and
procedures designed to ensure that,
with respect to all consumer products
imported, manufactured, distributed or
sold by Cybex:
(i) Information required to be
disclosed by Cybex to the Commission
is recorded, processed and reported in
accordance with applicable law;
(ii) all reporting made to the
Commission is timely, truthful,
complete, accurate, and in accordance
with applicable law; and
(iii) prompt disclosure is made to
Cybex’s management of any significant
deficiencies or material weaknesses in
the design or operation of such internal
controls that are reasonably likely to
affect adversely, in any material respect,
Cybex’s ability to record, process and
report to the Commission in accordance
with applicable law.
36. Upon request of staff, Cybex shall
provide written documentation of its
internal controls and procedures,
including, but not limited to, the
effective dates of the procedures and
improvements thereto. Cybex shall
cooperate fully and truthfully with staff
and shall make available all non-
privileged information and materials,
and personnel deemed necessary by
staff to evaluate Cybex’s compliance
with the terms of the Agreement.
37. The parties acknowledge and
agree that the Commission may
publish the terms of the Agreement
and the Order.
38. Cybex represents that the
Agreement: (i) Is entered into freely and
voluntarily, without any degree of
duress or compulsion whatsoever; (ii)
has been duly authorized; and (iii)
constitutes the valid and binding
obligation of Cybex, enforceable against
Cybex in accordance with its terms. The
individuals signing the Agreement on
behalf of Cybex represent and warrant
that they are duly authorized by Cybex
to execute the Agreement.
39. The signatories represent that they
are authorized to execute this
Agreement.
40. The Agreement is governed by the
laws of the United States.
41. The Agreement and the Order
shall apply, and be binding upon,
Cybex and each of its successors,
transferees, and assigns; and a violation
of the Agreement or Order may subject
Cybex, and each of its successors,
transferees, and assigns, to appropriate
legal action.
42. The Agreement and the Order
constitute the complete agreement
between the parties on the subject
matter contained therein.
43. The Agreement may be used in
interpreting the Order. Understandings,
agreements, representations, or
interpretations apart from those
contained in the Agreement and the
Order may not be used to vary or
contradict their terms. For purposes of
construction, the Agreement shall be deemed to have been drafted by both of the parties and shall not, therefore, be construed against any party, for that reason, in any subsequent dispute. The Agreement may not be waived, amended, modified, or otherwise altered, except as in accordance with the provisions of 16 CFR 1118.20(h). The Agreement may be executed in counterparts.

44. If any provision of the Agreement or the Order is held to be illegal, invalid, or unenforceable under present or future laws effective during the terms of the Agreement and the Order, such provision shall be fully severable. The balance of the Agreement and the Order shall remain in full force and effect, unless the Commission and Cybex agree in writing that severing the provision materially affects the purpose of the Agreement and the Order.

CYBEX INTERNATIONAL, INC.


By: /s/

Kathleen M. Sanzo,
Secretary, Cybex International, Inc.


By: /s/

Kelly Michelle Kaiser,
Secretary, Cybex International, Inc.


By: /s/

Albert Mills,
Secretary, U.S. Consumer Product Safety Commission.

DEPARTMENT OF EDUCATION

[Docket No.: ED–2021–SCC–0023]

Agency Information Collection Activities; Comment Request; NAEP 2021 School Survey

AGENCY: Institute for Education Sciences (IES), National Center for Education Statistics (NCES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public’s reporting burden. It also helps the public understand the Department’s information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.


Respondents/Affected Public: Individuals or Households.

Total Estimated Number of Annual Responses: 36,030.

Total Estimated Number of Annual Burden Hours: 18,016.

Agency. The payment shall be made by electronic wire transfer to the Commission via: http://www.pay.gov. Upon the failure of Cybex to make the foregoing payment when due, interest on the unpaid amount shall accrue and be paid by Cybex at the federal legal rate of interest set forth at 28 U.S.C. 1961(a) and (b). If Cybex fails to make such payment or to comply in full with any other provision of the Settlement Agreement, such conduct will be considered a violation of the Settlement Agreement and Order.

By order of the commission:

/s/

Albert Mills,
Secretary, U.S. Consumer Product Safety Commission.

BILLING CODE 6355–01–P