

INFORMATION Redacted PURSUANT TO THE FREEDOM OF  
INFORMATION ACT (FOIA), 5 U.S.C. 552(B)(6)

OCT 31 2012

Offer of compromise  
Not admissible

**CERTIFIED MAIL – RETURN RECEIPT REQUESTED**

Carlos C. Smith  
Miller & Martin PLLC  
Suite 1000 Volunteer Building  
832 Georgia Avenue  
Chattanooga, Tennessee 37402-2289

Re: Southern Honda Powersports (a/k/a Big Red Powersports LLC)/AQ12-001 – Civil  
Penalty Demand

Dear Mr. Smith:

As you are aware, the National Highway Traffic Safety Administration (NHTSA or Agency) has been investigating your client Southern Honda Powersports to determine whether it has complied with the requirements of the National Traffic and Motor Vehicle Safety Act as amended and recodified, 49 U.S.C. § 30101 *et seq.* (Safety Act). In particular, NHTSA has been investigating whether Southern Honda Powersports sold and delivered new motorcycles that were subject to a recall before the recall repairs were performed on the motorcycle.<sup>1</sup>

NHTSA is contemplating proceedings for civil penalties against Southern Honda Powersports for selling and delivering unrepaired recalled motorcycles in violation of 49 U.S.C. § 30120(i) and 49 C.F.R. § 573.11. Under the Safety Act's civil penalty provisions, each violation may result in a maximum penalty of \$6,000.<sup>2</sup> This letter sets forth the Agency's penalty demand and offers Southern Honda Powersports the opportunity to settle this matter short of litigation.

**FACTUAL BACKGROUND AND DISCUSSION OF VIOLATIONS**

**A. Prohibition on sale of new defective and noncompliant motor vehicles**

The Safety Act requires, among other things, that a dealer not sell a new vehicle subject to a recall unless the recall remedy has been performed.<sup>3</sup> The Agency's regulations similarly provide that

<sup>1</sup> See 49 U.S.C. § 30120(i) and 49 C.F.R. § 573.11.

<sup>2</sup> 49 U.S.C. §30165; 49 C.F.R. 578.6 (as amended by 75 Fed. Reg. 79978 (Dec. 21, 2010)).

<sup>3</sup> 49 U.S.C. § 30120(i).

[i]f . . . the manufacturer has provided to a dealer . . . notification about a new motor vehicle or new item of replacement equipment in the dealer's possession . . . that contains a defect related to motor vehicle safety or does not comply with an applicable motor vehicle safety standard . . . the dealer may sell or lease the motor vehicle or item of replacement equipment only if . . . [t]he defect or noncompliance is remedied as required by 49 U.S.C. 30120 before delivery under the sale or lease . . ."<sup>4</sup>

This requirement is meant to ensure that vehicles that do not comply with a Federal Motor Vehicle Safety Standard or contain a safety-related defect are not placed in the hands of consumers and driven on the roads, unless and until such noncompliances or defects are remedied.

### **B. Background**

NHTSA sent an information request (IR) to Southern Honda Powersports on May 14, 2012. The IR concerned ten recalls of motorcycles manufactured by American Honda Motor Co., Inc. (Honda). The IR sought information about which of these recalled motorcycles Southern Honda Powersports received from Honda, when such motorcycles were sold and left Southern Honda Powersports' possession, and whether and when the recall repairs were performed on the motorcycles.

### **C. Preliminary Findings**

NHTSA has reviewed the information provided by Southern Honda Powersports in response to the IR. Southern Honda Powersports had possession of and/or sold approximately 895 motorcycles that were subject to at least one of the 10 recalls included in the IR.

NHTSA has tentatively concluded that Southern Honda Powersports sold and delivered 329 motorcycles that were recalled prior to sale and delivery, but did not have the recall remedy performed before the motorcycle was delivered to the customer. One recall (08V-141) involved a fuel valve leak, which had the potential to result in a vehicle fire. NHTSA has tentatively concluded that Southern Honda Powersports sold 223 motorcycles that were subject to this recall, but were not repaired before delivery to the customer. A second recall (07V-576) was for an incorrectly welded fuel tank vent pipe, which could lead to fuel leaks, and potentially result in a vehicle fire. NHTSA has tentatively concluded that Southern Honda Powersports sold 71 unremedied motorcycles that were subject to this recall. A third recall (09V-174) involved a breaking coolant hose clamp, which could result in hot coolant spraying onto the drivers leg, resulting in not only direct injury to the driver, but also an increased crash risk from the resulting driver distraction and distress. NHTSA has tentatively concluded that Southern Honda Powersports sold 25 motorcycles that were covered by this recall, but which were not remedied prior to delivery to the customer. A fourth recall (11V-567) was for incorrect

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<sup>4</sup> 49 C.F.R. § 573.11(a).

mounting of the secondary master brake cylinder, which could lead to rear brake drag, thus increasing the risk of a crash. NHTSA has tentatively concluded that Southern Honda Powersports sold 9 motorcycles covered by this recall, but not remedied prior to delivery to the customer. A fifth recall (10V-369) was for a certification label that stated the incorrect gross axle weight rating, which increased the risk of vehicle overloading. NHTSA has tentatively concluded that Southern Honda Powersports sold 1 motorcycle that was covered by this recall but that was apparently not remedied prior to delivery to the customer. The five recalls and, by recall, the VINs for these motorcycles, are listed in Attachment A.

#### **D. Discussion of Civil Penalties**

NHTSA has tentatively concluded that Southern Honda Powersports sold and delivered the 329 recalled motorcycles identified in Attachment A that did not have the recall remedy completed at the time the motorcycle was delivered to a retail customer. Accordingly, NHTSA has tentatively concluded that Southern Honda Powersports violated 49 U.S.C. § 30120(i) and 49 C.F.R. § 573.11 and is liable for a civil penalty.

Under the Safety Act's civil penalty provisions, each violation may result in a maximum penalty of \$6,000.<sup>5</sup> The delivery of each of the 329 motorcycles identified in Attachment A constitutes a separate violation of the Safety Act for which Southern Honda Powersports is potentially liable for a maximum penalty of \$6,000. Accordingly, the maximum total civil penalty for which Southern Honda Powersports is liable is \$1,974,000. In determining the penalty or compromise amount, NHTSA must consider the appropriateness of the penalty or compromise to the size of the business and the gravity of the violation.<sup>6</sup>

NHTSA takes the Small Business Regulatory Enforcement Fairness Act (SBREFA) into account prior to setting any final penalty amount.<sup>7</sup> Upon a showing by a violator that it is a small entity, NHTSA will make appropriate adjustments to the suggested settlement amount (although certain exceptions may apply).<sup>8</sup> Under the Small Business Administration's (SBA) standards, an entity is considered "small" if it is independently owned and operated and is not dominant in its field of operation, or if its number of employees or the dollar volume of its business does not exceed specific thresholds.<sup>9</sup> These thresholds are set out at 13 C.F.R. Part 121. A motorcycle dealer is considered "small" if its annual sales do not exceed \$30 million.<sup>10</sup> According to its website, Southern Honda Powersports is "[A]merica's largest volume Honda powersports dealer since 2004. Headquartered in our huge 100,000-square-foot showroom in

<sup>5</sup> See 49 U.S.C. §30165; 49 C.F.R. 578.6 (as amended by 75 Fed. Reg. 79978 (Dec. 21, 2010)).

<sup>6</sup> 49 U.S.C. § 30165(c).

<sup>7</sup> See NHTSA, Civil Penalty Policy Under the Small Business Regulatory Enforcement Fairness Act, 62 Fed. Reg. 37115 (July 10, 1997).

<sup>8</sup> *Id.* at 37117.

<sup>9</sup> 62 Fed. Reg. 37115.

<sup>10</sup> § 121.201.

Chattanooga, TN, we keep over 2,500 motorcycles, dirt bikes, ATVs, and PWCs in stock all year 'round."<sup>11</sup> NHTSA does not have sufficient information to precisely determine Southern Honda Powersports' annual sales volume, although it is substantial.

The agency also considers the gravity of the violation in setting the compromise amount. The fact that a vehicle has been recalled indicates that the vehicle does not comply with a Federal Motor Vehicle Safety Standard or contains a defect that presents an unreasonable risk to motor vehicle safety.<sup>12</sup> The unremedied vehicles sold and delivered by Southern Honda Powersports were subject to recalls for safety-related defects and noncompliances. The gravity of the violation is substantial based on the number of recalls, numbers of motorcycles involved, and the repeated nature of the violation.

In view of the size of Southern Honda Powersports, the number of unremedied motorcycles that were sold and delivered, the nature of the defects and noncompliance at issue, and Southern Honda Powersports' pattern of selling and delivering unremedied motorcycles, NHTSA hereby demands, and is willing to accept, a compromise amount of \$800,000. This is a significant reduction from the maximum possible penalty. We believe this reduction adequately addresses the size of Southern Honda Powersports' business while taking into account the gravity of the violation. NHTSA also demands a commitment from Southern Honda Powersports to take all necessary actions to implement policies and safeguards to ensure that it does not in the future continue to sell unremedied recalled motorcycles.

If Southern Honda Powersports contends that a penalty of this magnitude would pose undue economic hardship and affect its ability to continue as a going concern, we ask that you please provide its financial statements and tax returns for the last three years. In addition, if Southern Honda Powersports has additional documentary evidence to show that any of the motorcycles identified in Attachment A were not sold and delivered before being repaired, Southern Honda Powersports should provide the Agency with such evidence.

Any penalty payments must be made payable to the U.S. Treasury and sent via overnight carrier (not U.S. Mail) to John Piazza, Office of the Chief Counsel, National Highway Traffic Safety Administration (W41-214), U.S. Department of Transportation, 1200 New Jersey Avenue, S.E., Washington, D.C. 20590.

#### **ENFORCEMENT FAIRNESS**

In considering the foregoing, please note that the Department of Transportation considers whether an entity is a small business and follows an explicit policy regarding enforcement fairness that prohibits retaliation against entities for exercising the following rights:

<sup>11</sup> See <http://www.southernhonda.com> (last visited Sept. 25, 2012).

<sup>12</sup> See 49 U.S.C. §30118.

## **Your Rights To Enforcement Fairness**

Our objective is to ensure a fair regulatory enforcement environment. If you feel you have been treated unfairly or unprofessionally, you may contact Mr. Gregory Walter, NHTSA Senior Associate Administrator of Policy and Operations, by phone at (202) 366-2330 and e-mail at Greg.Walter@dot.gov. You also have a right to contact the Small Business Administration's National Ombudsman at 1-888-REG-FAIR or [www.sba.gov/ombudsman](http://www.sba.gov/ombudsman) regarding the fairness of the compliance and enforcement activities by this agency.

## **Policy Against Retaliation**

NHTSA strictly forbids retaliatory acts by its employees. As such, you should feel confident that you will not be penalized for expressing your concerns about compliance and enforcement activities.

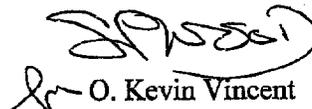
## **Small Business Policy**

NHTSA has considered small business concerns under the SBREFA. In addition, we have considered the agency's own policy regarding the treatment of small businesses.<sup>13</sup> Under the Small Business Administration regulations, Southern Honda Powersports may be a small business.<sup>14</sup>

If NHTSA and Southern Honda Powersports are unable to reach agreement, NHTSA may refer this matter to the U.S. Department of Justice to commence a civil action in Federal court against Southern Honda Powersports for civil penalties. If such litigation becomes necessary, NHTSA reserves the right to seek the maximum penalty for Southern Honda Powersports' violations.

Please respond in writing to this letter within thirty (30) calendar days of its date. The letter should be sent to O. Kevin Vincent, Chief Counsel (NCC-111), National Highway Traffic Safety Administration, Room W41-326, 1200 New Jersey Avenue, S.E., Washington, D.C. 20590. If you have any questions, you may contact John Piazza, Litigation and Enforcement Division, at (202) 366-5263.

Sincerely,

  
O. Kevin Vincent  
Chief Counsel

Enclosure

<sup>13</sup> See Civil Penalty Policy Under the Small Business Regulatory Enforcement Fairness Act, 62 Fed. Reg. 37115 (July 10, 1997).

<sup>14</sup> See generally 13 CFR 121.201.

**Attachment A**

**List of VINs of motorcycles that NHTSA has tentatively concluded were sold and delivered before the recall remedy was performed**

**Recall 07V-576**

JH2SC57027M  
JH2SC570X7M  
JH2SC57027M  
JH2SC57047M  
JH2SC570X7M  
JH2SC57057M  
JH2SC57097M  
JH2SC57007M  
JH2SC57027M  
JH2SC57047M  
JH2SC570X7M  
JH2SC57057M  
JH2SC57077M  
JH2SC57097M  
JH2SC57077M  
JH2SC57097M  
JH2SC57007M  
JH2SC57027M  
JH2SC57057M  
JH2SC57097M  
JH2SC57007M  
JH2SC570X7M  
JH2SC57087M  
JH2SC57007M

JH2SC57047M  
JH2SC57017M  
JH2SC57067M  
JH2SC57027M  
JH2SC57057M  
JH2SC57097M  
JH2SC57097M  
JH2SC57087M  
JH2SC57057M  
JH2SC57087M  
JH2SC57027M  
JH2SC57057M  
JH2SC570X7M  
JH2SC57027M  
JH2SC57067M  
JH2SC57037M  
JH2SC57047M  
JH2SC57017M  
JH2SC57037M  
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JH2SC57087M  
JH2SC57027M  
JH2SC57087M  
JH2SC57087M  
JH2SC57027M  
JH2SC57077M  
JH2SC57097M  
JH2SC57077M  
JH2SC57017M  
JH2SC57007M  
JH2SC57087M  
JH2SC57157M

**Recall 08V-141**

1HFSC55037A  
1HFSC55017A  
1HFSC550X7A  
1HFSC55057A  
1HFSC55077A  
1HFSC55097A  
1HFSC55007A  
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1HFSC55067A  
1HFSC55017A

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JH2RC50068M  
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JH2RC50438M  
JH2RC50498M  
JH2RC504X8M  
JH2RC504X8M  
JH2RC50468M  
JH2RC50478M

**Recall 09V-174**

JH2SC59078M  
JH2SC59098M  
JH2SC59008M  
JH2SC59018M  
JH2SC59018M  
JH2SC59058M  
JH2SC59078M  
JH2SC59058M  
JH2SC59068M

JH2SC59088M  
JH2SC59008M  
JH2SC59098M  
JH2SC59028M  
JH2SC59088M  
JH2SC59018M  
JH2SC59078M  
JH2SC59018M  
JH2SC59068M

JH2SC59078M  
JH2SC59098M  
JH2SC59098M  
JH2SC590X8M  
JH2SC59098M  
JH2SC59058M  
JH2SC59008M

**Recall 10V-369**

JH2SC6609AK

**Recall 11V-567**

JH2SC68H1CK  
JH2SC68H0CK  
JH2SC68L5CK

JH2SC68L0CK  
JH2SC68L4CK  
JH2SC68G7CK

JH2SC68G2CK  
JH2SC68G7CK  
JH2SC68G4CK