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NOTE

THE CONSUMER PRODUCT SAFETY ACT:
A FEDERAL COMMITMENT TO PRODUCT SAFETY

It is estimated that 20 million Americans are injured each year in and around the home. Of this number, 30,000 die, and 110,000 are permanently disabled.¹ To be sure, many of these injuries are the result of the victim's own carelessness. However, it is equally clear that an unacceptable number of injuries are caused by defective products, or products designed so as to present immediate hazards to users and bystanders. Furthermore, proper design and construction could reduce the incidence and severity of many injuries, including those caused by the user's own negligence. Recognizing this problem Congress, in 1972, enacted the Consumer Product Safety Act (CPSA).²

The Act fashions a comprehensive federal scheme for regulation of consumer product safety. The principal vehicle by which the mandate of the Act is to be accomplished is the Consumer Product Safety Commission, an independent regulatory agency created by the legislation. The Commission has authority to establish standards to which consumer products must conform, with several avenues of enforcement at its disposal. The Act, in addition to investing the Commission with fairly tough enforcement powers, contains innovative provisions to spur consumer vigilance. One of these permits a "mandamus-like" proceeding to compel the Commission to act against a particular hazard.³

Inasmuch as the problem of product hazards is universally recognized, the instant legislation received broad bipartisan support. The need for effective regulation was acknowledged by Republicans and Democrats, businessmen and consumers alike. All agreed that federal preemption of the area was essential.⁴ Hence, the debate was largely

¹ NAT'L COMM'N ON PRODUCT SAFETY, FINAL REPORT 9 (1970) [hereinafter cited as NCPS REPORT].
² Pub. L. No. 92-573 (Oct. 27, 1972) [hereinafter cited as CPSA].
³ See id. § 10(e).
⁴ See id. § 2(a):
The Congress finds that —

(4) control by State and local governments of unreasonable risks of injury associated with consumer products is inadequate and may be burdensome to manufacturers;

(6) regulation of consumer products the distribution of which affects interstate or foreign commerce is necessary to carry out this Act.
confined to specifics, such as the manner by which regulation was to be achieved—not trifling matters, but not the sort of dispute which seriously jeopardized prospects for passage. The Bill passed both houses of Congress by wide margins.5

BACKGROUND

Until enactment of the CPSA, the federal government had no comprehensive means of regulating consumer product safety. Therefore, Congress had taken a piecemeal approach, legislating with respect to specific hazards as they appeared. The Flammable Fabrics Act,6 the National Traffic and Motor Vehicle Safety Act,7 the Poison Prevention Packaging Act,8 the Child Protection and Toy Safety Act,9 the Refrigerator Door Act,10 and other statutes evidence the patchwork approach taken. Each is the result of a laudable effort to deal with a specific product hazard; however, for every hazard addressed by specific legislation, dozens have evaded regulation.

The range of potential hazards is vast. The National Commission on Product Safety (NCPS) studied only a small number of product categories, yet found each to be responsible for an extraordinary number of injuries and deaths. Every year, about 100,000 Americans are maimed walking through glass doors, 125,000 are hurt by power tools, 700,000 children are injured by toys, and approximately 10,000 television sets (predominantly color models) catch fire.11 Thus, among the myriad products found in and around the home there exist very serious dangers. Decisive action was, therefore, required.

Industry self-regulation has proven inadequate in reducing or eliminating hazards. It is not that manufacturers are so callous as to market unsafe products deliberately; rather, it is the unfortunate truth that safety is not a major factor considered in the marketing equation.12


11 NCPS REPORT, supra note 1, at 12, 13, 26, 30.
12 No manufacturer deliberately sets out to make a product to hurt or kill the
That safety does not sell products is a merchandising axiom. In the case of items like glass containers, toys, and fabrics which do not on their faces seem to present any serious danger, there is no pressing consumer demand for increased safety. Moreover, modifications to eliminate hazards often increase a product's cost, and place its manufacturer at a competitive disadvantage. Therefore, there remains little incentive for manufacturers to take the initiative in effectively dealing with product hazards.\textsuperscript{13}

Voluntary standards established by industries have also failed. The NCPS reported:

\begin{quote}
[T]hese standards are chronically inadequate, both in scope and permissible levels of risk. They do not address themselves to all significant foreseeable hazards. They give insufficient consideration to human factors such as predictable risk-taking, juvenile behavior, illiteracy, or inexperience. The levels of allowed exposure to electrical, thermal, and mechanical and other energy exchanges are frequently too high.\textsuperscript{14}
\end{quote}

Furthermore, the scope of coverage of voluntary standards leaves much to be desired. The NCPS found that 26 of the 44 product categories which ranked highest in estimated annual injuries were either not covered at all by industrywide standards, or that existing standards were grossly inadequate.\textsuperscript{15} It is fair to conclude that dependence on private initiative is no substitute for government action in this area of public concern.

Reliance on state and local regulation would be equally misplaced. As the NCPS found:

State and local governments — with only a few exceptions — offer consumers little or no protection from hazardous household products. In many instances, consumer product legislation may be worse than none; laws that provide only an illusion rather than the reality of protection destroy confidence in Government and in the legislative process.

\begin{itemize}
\item Person who buys it. Even those who heedlessly marketed the "torch" sweaters of a few years back did not intend to incinerate some of the purchasers; it was just that they did not think about safety.
\item \textsuperscript{13} Competition does not inevitably take the form of a rivalry to produce the safest product. Indeed, the competitive struggle may sometimes lead to a "shaving" of the costs of manufacture involving some sacrifice of safety. Nor does competition always reward, in the form of greater volume and higher profits, the manufacturer who tries to sell "safety" as a feature of his product.
\item \textsuperscript{14} NCPS Report, supra note 1, at 48.
\item \textsuperscript{15} Id.
\end{itemize}
narrow scope, diffuse jurisdiction, minuscule budgets, absence of enforcement, mild sanctions, and casual administration.\textsuperscript{16}

States can only regulate activities within their own borders. To require that manufacturers conform to 50 different standards would work a tremendous hardship. Federal regulation is obviously preferable for that reason alone. Additionally, state legislators are notoriously susceptible to the entreaties of lobbyists. While there may be a role for states and localities to play in product safety regulation, the major thrust must be federal.\textsuperscript{17}

The NCPS was created in 1967 and empowered to hold hearings, conduct studies to identify the extent of the product safety problem, and propose legislation to deal with it.\textsuperscript{18} After two years, the Commission transmitted to the President and Congress its final report, which included a proposed bill.\textsuperscript{19} In 1971, legislation similar in form to the Commission's proposal was introduced in both houses of Congress, and hearings were held.\textsuperscript{20} A year later, the focus was in the Senate where Senators Magnuson and Moss enthusiastically championed the legislation. The major dispute centered around structure and coverage, \textit{i.e.}, whether a new agency should be created\textsuperscript{21} or increased authority should instead be given to the Food and Drug Administration (FDA) as proposed by the Administration bill,\textsuperscript{22} and whether the legislation should apply to food, drugs, and cosmetics as well as to other household products (thereby usurping all FDA functions).\textsuperscript{23} Both houses agreed upon the independent agency concept, but while the Senate version included food and drug coverage,\textsuperscript{24} the House limited the bill's scope to consumer products then outside the realm of the FDA.\textsuperscript{25} The House prevailed in conference,\textsuperscript{26} and the CPSA was signed into law by President Nixon on October 27, 1972.
To implement the Act, Congress created the Consumer Product Safety Commission. This is an independent regulatory agency, composed of five Commissioners appointed by the President to serve seven year terms. One member is designated Chairman, with authority to exercise administrative functions.\textsuperscript{27} The Commission has the power to promulgate consumer product safety rules,\textsuperscript{28} to commence enforcement actions (although concurrence of the Attorney General is generally required for court action),\textsuperscript{29} to supervise compliance with the Act through inspection of facilities and records,\textsuperscript{30} to collect and disseminate information concerning product-related injuries and testing procedures,\textsuperscript{31} to conduct safety-oriented research,\textsuperscript{32} and to perform other miscellaneous functions necessary to the agency's operation.\textsuperscript{33}

Structure and Organization

A threshold question is whether or not the addition of another autonomous agency to the already ponderous federal bureaucracy is a viable means of confronting the problem of product hazards. Indeed, the Administration's product safety proposals would have lodged this responsibility within the Department of Health, Education, and Welfare (HEW) by adding to the duties of the FDA.\textsuperscript{34} Much of the debate preceding the passage of the Act concerned this very point.\textsuperscript{35}

Criticism of the various federal regulatory agencies is well-founded.\textsuperscript{36} All too often these agencies have either forsaken the public interest, or have been ineffective in its defense. Coziness between

\textsuperscript{27} CPSA § 4(f). On May 14, 1973, the first four appointees to the Commission took office. Richard O. Simpson, former Acting Assistant Secretary of Commerce for Science and Technology, is Chairman. The other Commissioners are Barbara Hackman Franklin, former White House Staff Assistant for Executive Manpower; Lawrence M. Kushner, former Acting Director of the National Bureau of Standards; Constance E. Newman, who had been the Director of VISTA; and Dr. R. David Pittle, formerly assistant professor of electrical engineering and public affairs at Carnegie-Mellon University and president of the Pittsburgh Alliance for Consumer Protection.

\textsuperscript{28} Id. § 7.
\textsuperscript{29} Id. §§ 12, 15, 20, 21, 22.
\textsuperscript{30} Id. § 16.
\textsuperscript{31} Id. § 5.
\textsuperscript{32} Id.
\textsuperscript{33} Id. § 27.
\textsuperscript{34} S. 1797; H.R. 8110, 92d Cong., 1st Sess. (1971).
\textsuperscript{35} See generally L. KOHLMER, THE REGULATORS (1969). The author concludes, after examining the inadequacies of regulatory agencies, that these agencies should be abolished and their powers redistributed among the three branches of government. Id. at 290.
the regulators and the regulated, insufficient funding, lack of meaningful enforcement power, and general indifference and sloth have contributed to agency impotence. The FDA has not escaped similar condemnation.\footnote{See generally J. Turner, The Chemical Feast (1970), for a scathing indictment of FDA's performance in the regulation of food and drugs. The report, a product of a Ralph Nader study group, has been criticized for its polemical tone and casual scholarship, but it nonetheless provides revealing insight into FDA's severe shortcomings.}

Government reports have severely criticized FDA's organizational structure and scientific activities.\footnote{See F. Malek, Analysis and Recommendations: The Food and Drug Administration Organizational Review (1969), reprinted in House Hearings, supra note 4, pt. 3, at 982-86. See also Report to the Commissioner of Food and Drugs from the FDA Ad Hoc Science Advisory Committee (1971), reprinted in House Hearings, supra note 4, pt. 3, at 986-1015.} The FDA's enforcement of existing product safety legislation, such as the Poison Prevention Packaging Act\footnote{15 U.S.C. § 1471 et seq. (1970).} and the Child Protection and Toy Safety Act,\footnote{Act of Nov. 6, 1969, Pub. L. No. 91-113, 83 Stat. 187.} has also come under fire.\footnote{See House Hearings, supra note 4, pt. 3, at 888-91, featuring an exchange of correspondence between Ralph Nader and Secretary of Health, Education, and Welfare Elliot Richardson; id., pt. 3, at 926, 928 (statement of David A. Swankin of Consumers Union).} Commenting on FDA's enforcement technique, one report noted:

FDA's penchant for negotiating with violators of the [Federal Hazardous Substances Act] is said to be the result of a belief that it produces compliance quickly and with the least expenditure of available resources. Such an approach, however, could also foster a cavalier attitude toward compliance by some manufacturers who may be willing to chance possible violations in the knowledge that discovery is likely to produce little more than protracted negotiations for label changes.\footnote{H. Heffron, supra note 13, at 195.}

Additionally, responsibility in the FDA is diffuse, and its product safety staff lies below several tiers of authority.\footnote{Id. at 213.} Safety of products other than food and drugs receives low priority in the agency, and only a small staff is assigned to this area.\footnote{Id. at 208. The entire Office of Product Safety numbers 169. Id. at 213.} The HEW bureaucracy itself is so cumbersome that proposals have been made to divide it into more manageable segments.\footnote{The most recent Congressional efforts were H.R. 16198, 92d Cong., 2d Sess. (1972) and S. 1485, 92d Cong., 1st Sess. (1971), both proposing the creation of a cabinet level Department of Education. Neither reached the floor.} In short, adding product safety to FDA's responsibilities would not be conducive to achievement of the Act's goals.

What are the advantages of an independent agency? According to
proponents of the idea, they are independence, enabling the agency to resist external pressures, greater public visibility, and greater leverage in obtaining funding. Opponents argue convincingly that many existing independent agencies have been ineffective despite these attributes. However, that is no argument for entrusting major responsibility to an agency such as FDA whose performance may fairly be described as lackluster. The Consumer Product Safety Commission must be sufficiently independent of both the private sector and of the White House in order to perform its tasks without interference. By functioning in a highly visible manner the Commission will help create a public awareness of product hazards and consequent demand for their elimination. Its aspirations need not be constrained by overbearing departmental policies. In addition, the Commission can make its own case for appropriations unhampered by intradepartmental competition.

Opponents of an independent agency argue that the FDA's expertise in the area should not be sacrificed, nor should the "close relationship" between product safety and HEW's other health functions be disrupted. However, since FDA's concern with general product safety is so minor, and its record so poor, this argument is not persuasive. A more telling criticism is the contention that unconscionable delay in remedial action will result during the evolution of an entirely new agency. But in view of FDA's skeletal product safety staff, it is apparent that similar delays would attend the delegation of new responsibilities to that agency.

President Nixon has set forth two prerequisites to any addition to the federal bureaucracy. First, it must be shown that responsibility for a specific area is divided among several existing agencies and is not a principal function of any of them. Neither the FDA nor the

46 See NCPS REPORT, supra note 1, at 5-6.
47 See S. REP. No. 92-749, 92d Cong., 2d Sess. 142 (1972). Senator Cotton, dissenting from the majority report, shows how the budget of the FDA has increased far more dramatically than that of the independent Federal Trade Commission. However, these figures are deceptive, since there is very little relationship between the duties of the two agencies, and it is quite possible that FDA's financial needs have grown faster than those of the FTC. The figures do not effectively refute the contention that independence may lead to more favorable budgetary treatment.
50 See H. HEFFRON, supra note 13, at 213. In fact, the Commission has geared up rather rapidly. Draft safety standards for matches and tricycles were circulated within a month after the Commission legally came into existence. See CCH CONSUMER PRODUCT SAFETY GUIDE ¶¶ 41,087-88 (1973).
Department of Commerce, the two agencies with primary federal responsibility in the product safety area, accords a high priority to such regulation. Extensive regulation of consumer products is essentially a new federal effort and should therefore warrant a new agency. Secondly, it must be shown that centralization of authority would be beneficial. Clearly, the creation of a new agency with broad jurisdiction over consumer products is preferable to parceling out fragmented duties to agencies which are otherwise occupied.

The benefits to be gained from Commission independence could, however, easily prove illusory should the Commissioners fail to approach their undertaking with dedication and impartiality. The statute cannot guarantee zeal; but it can aim to hold the interests of the public paramount to those of the Commissioners. Thus the Act bars from Commission membership anyone holding a pecuniary interest in, or business relationship with, a manufacturer or seller of consumer products. In addition, the Act goes beyond the general federal conflict-of-interest statute in prohibiting Commission officials from accepting employment or compensation from any manufacturer of consumer products within a year after leaving government service. These provisions are stringent but are intended to avert the community of interest which inevitably arises when regulatory officials are plucked from the ranks of industry only to return to private enterprise and join the very same firms with whose regulation they had previously been charged. Administration officials were critical of this across-the-board limitation. Then-Deputy Attorney General Kleindienst worried about "minimiz[ing] the attractiveness of the Agency's top positions" and thereby limiting the available talent pool. A more imaginative rationalization went as follows:

52 CPSA § 4(c).
54 CPSA § 4(g)(2). The restrictions imposed by 18 U.S.C. § 207 on post-employment activity are limited to matters with which the employee was connected while in government, or which were within the scope of his official duties.
55 The "revolving door" phenomenon is particularly evident at the Department of Agriculture. Clifford Hardin, after resigning as Secretary of Agriculture, took an executive position with Ralston Purina. Clarence D. Palmby and Clifford G. Pulvermacher, USDA officials who played a major role in negotiating the sale of $750 million worth of wheat to the Soviet Union, left the department shortly thereafter to assume high-level positions with Continental Grain Co. and Bunge Corp., major grain exporters. Palmby was replaced as Assistant Secretary of Agriculture for International Affairs by Carroll Brunthaver, who had once been with Cook Industries, Inc., another agribusiness concern.
Other examples outside the USDA include Alan Boyd, former Secretary of Transportation who became Chairman of Illinois Central Industries, Inc., parent company of the Illinois Central Railroad, and Claude Brinegar, who left the Union Oil Company to become Secretary of Transportation.
A company manufacturing consumer products may wish to employ a former [Commission] official in order to obtain the benefit of his skill and experience in reducing or eliminating the risks of injury associated with its products.\textsuperscript{57}

If only industry were so nobly motivated.

Information and Research Functions

In order to effectuate a program of product safety, it is necessary to obtain data relevant to product-related injuries and to disseminate safety information derived therefrom to the public. Accordingly, in the CPSA, Congress stressed the research and reporting duties of the Commission.\textsuperscript{58}

The Commission requires information regarding the nature and incidence of product-related injuries in order to identify hazards and establish priorities. It is, therefore, directed to establish an Injury Information Clearinghouse\textsuperscript{59} which will collect and analyze injury statistics. The National Electronic Injury Surveillance System (NEISS), a computer network set up by FDA's Bureau of Product Safety to monitor hospital emergency room admissions, will aid the information gathering process.\textsuperscript{60}

The Commission is also authorized to conduct research into causation and prevention of product-related injuries and to develop appropriate methods for design analysis and safety testing of assembled products.\textsuperscript{61} The construction of a research facility is authorized by the Act\textsuperscript{62} and funds for it may be appropriated over and above the overall authorization for the Commission.\textsuperscript{63} It may be that a substantial Commission role in research, other than statistical analysis, will be slow in

\textsuperscript{57} Id. at 97, 99 (letter from William N. Letson, General Counsel of the Department of Commerce, to the Senate Commerce Committee).

\textsuperscript{58} The purposes of this Act are —

\begin{quote}
\textsuperscript{(2) to assist consumers in evaluating the comparative safety of consumer products;}
\end{quote}

\begin{quote}
\textsuperscript{(4) to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries.}
\end{quote}

CPSA § 2(b).

\textsuperscript{59} Id. § 5(a).

\textsuperscript{60} NEISS, which became fully operational in 1972, has placed computer terminals in 119 hospital emergency rooms across the nation. Data on accident victims is now transmitted instantaneously to the Consumer Product Safety Commission, which may then send investigators to gather additional information, if required, as to the causes of the accident. These statistics may help to identify and eradicate or reduce significant product hazards.

\textsuperscript{61} CPSA § 5(b).

\textsuperscript{62} Id. § 27(b).

\textsuperscript{63} Id. § 32(b).
developing. However, after its incubation period the Commission should play a vital role in identifying product hazards and upgrading safety.

The Commission may also collect information by conducting hearings and by requiring manufacturers to submit performance and other technical data relating to their products. Also, manufacturers and distributors subject to the Act are required to keep records available for Commission scrutiny, and to permit inspection of their premises by the Commission. Furthermore, persons supplying information to the Commission are protected from any civil liability which might otherwise ensue from such disclosure.

The Injury Information Clearinghouse is directed to disseminate the information it collects. Generally, information gathered by the Commission is to be made available to the public, and in view of the Congressional intent to "assist consumers in evaluating the comparative safety of consumer products," this should be done in a highly visible manner. Effective use of the mass media will alert the public to product hazards, and exert pressure on manufacturers to take appropriate corrective action. If, however, safety information is buried in an obscure corner of the Federal Register a vital benefit of the Act will go unrealized.

Manufacturers are, however, protected against breaches of confidentiality. Any information which the Freedom of Information Act does not require to be disclosed shall remain privileged, and trade secrets are specifically protected. Thirty days prior to public dis-

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64 Id. § 27(a).
65 Id. § 27(e).
66 Id. § 16. See text accompanying notes 210-11 infra.
67 Id. § 27(d).
68 Id. § 5(a).
69 It is . . . important that the [Commission] make accessible to interested persons reports, documents, communications, studies and all other materials . . . which would enable them to monitor and participate in all proceedings in an informed manner.
S. Rep. No. 92-749, 92d Cong., 2d Sess. 8 (1972). Earlier drafts of the legislation expressly authorized the Commission to make public disclosures of information. Id. at 22. This authority can now be inferred from the language setting out exceptions to disclosure. See text accompanying notes 72-73 infra.
70 CPSA § 2(b)(2).
72 CPSA § 6(a)(1). In this context, the most important exceptions are trade secrets, internal memoranda, and investigatory files.

[A]n unpatented, secret, commercially valuable plan, appliance, formula, or
closure by the Commission of any adverse information, a manufacturer is entitled to notice and an opportunity to respond. However, the Commission is under no obligation to include the manufacturer's reply in its disclosure. Should the Commission find it has made inaccurate or misleading public statements disparaging a product, it is required to retract in a manner similar to that in which the original statement was made.

**The Consumer Product Safety Act**

*Scope of Coverage*

The Act defines consumer product as:

any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise . . . .

subject to several exceptions. The general intent is to cover a broad range of household products. Definitional problems may arise in close cases (e.g., what of an industrial product converted to home use?), but in the main the scope of the Act is clear.

One very important exception is for food, drugs, devices and cosmetics, which are regulated by the Federal Food, Drug and Cosmetic Act. The Senate version of the bill would have included food and drug regulation, shifting FDA's entire responsibility to a new agency named the Food, Drug and Consumer Product Agency. This was not contemplated by the NCPS when it first proposed the legislation, and must be seen as a reaction to the shortcomings of FDA. The proposal was dropped in conference.

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6 F.2d at 495.

74 CPSA § 6(b)(1).

76 Id. Presumably, if the Commission fails to so find, a court may order the retraction, as this would be final agency action for which no adequate remedy exists. See 5 U.S.C. § 704 (1970).

76 CPSA § 3(a)(1).

77 Id. §§ 3(a)(1)(H) & (I).


80 See text accompanying notes 37-42 supra.

81 H.R. Rep. No. 92-1593, 92d Cong., 2d Sess. (1972). In addition, the version of the bill reported by the Senate Committee on Labor and Public Welfare would have trans-
Also exempted are tobacco and tobacco products, motor vehicles and motor vehicle equipment, economic poisons, firearms, aircraft, and boats.\textsuperscript{82} Evidently, it was felt that these items did not lend themselves to control under this Act, and that their regulation was better left to other agencies under existing legislation.\textsuperscript{85} A move in the House to include firearms within the Act's coverage was readily defeated, as might be expected.\textsuperscript{84} The Commission also may not regulate with respect to any hazards covered by the Occupational Safety and Health Act of 1970,\textsuperscript{86} the Atomic Energy Act of 1954,\textsuperscript{87} the Clean Air Act,\textsuperscript{88} or the Radiation Control for Health and Safety Act.\textsuperscript{89} While the Commission will assume the functions previously delegated to HEW under the Federal Hazardous Substances Act\textsuperscript{91} and the Poison Prevention Pack-
aging Act, and to the Department of Commerce under the Flammable Fabrics Act, the procedures prescribed by those statutes still must be followed if the hazard is thereby “eliminated or reduced to a sufficient extent.” Presumably, if the CPSA procedures are more effective in reducing the danger, the Commission would not be bound by the prior legislation. If that interpretation is correct, the CPSA with its strict sanctions and comparatively swift procedures, will probably be the one applied in most instances. Although the delay-inducing procedures of these other laws are not solely to blame for failure to reduce any given hazard sufficiently, they are a contributing factor.

Apart from the specific exclusions, there is a question as to when a given product becomes a “consumer product” within the purview of the Act. The Act refers to products which are “produced or distributed (i) for sale to a consumer . . . or (ii) for the personal use . . . of a consumer.” Articles not customarily produced for sale to, or use by a consumer, i.e., industrial products, are expressly excluded. Questions of interpretation are bound to arise with respect to certain products not normally sold to consumers but which nevertheless wind up in consumers’ hands. For example, the NCPS found that 150,000 injuries per year are caused by architectural glass. Yet, glass doors, windows, etc., are customarily sold to builders who install them as part of a complete structure. While in this illustration the product is for the ultimate use of a consumer, and within the purview of the Act, similar situations posing provocative problems are likely to face the courts.

The Act applies to products affecting interstate commerce, and

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94 CPSA § 30(d).
95 See H. R. REP. No. 92-1593, 92d Cong., 2d Sess. (1972), U. S. CODE CONG. & AD. News, 92d Cong., 2d Sess. 4629 (1972). In an interesting twist, the Bicycle Manufacturers Association of America, a trade group, has petitioned the Commission for a delay in the implementation of a standard for children’s bicycles promulgated under the Federal Hazardous Substances Act, in order that the CPSA procedures be employed. See Petition by Bicycle Manufacturers Association of America, CCH CONSUMER PRODUCT SAFETY GUIDE ¶ 41,072 (June 7, 1973). The Association argues that promulgation under the CPSA will afford a standard applicable to all bicycles rather than those designed solely for children, and that a federal standard under the CPSA will preempt state standards, which would not be possible under the Hazardous Substances Act. The fact that implementation would be delayed if the CPSA procedures were employed may also have been a factor in the Association’s reasoning.
96 CPSA § 3(a)(1).
97 Id. § 3(a)(1)(A).
98 NCPS REPORT, supra note 1, at 12.
99 E.g., items such as machine tools or industrial chemicals purchased from a jobber or distributor. Such products are intended for industrial use, but on occasion can be purchased by an individual in the trade for his personal use.
100 CPSA § 3(a)(12). It is, of course, constitutional for Congress to regulate intrastate activities which “affect” interstate commerce.
its strictures extend not only to manufacturers, distributors, and retailers of consumer products, but to private labelers (owners of brands or trademarks who do not manufacture the products sold under such brand names) as well.\textsuperscript{101} However, a seller may not be held liable for violation of the Act if the manufacturer has certified compliance.\textsuperscript{102}

A product may not be imported into the United States if it fails to conform to the Act's requirements.\textsuperscript{103} However, the product may be admitted under bond so that the owner or consignee may modify the product to comply with the Act.\textsuperscript{104} On the other hand, the CPSA does not apply to products intended for export so long as they are not distributed for use in the United States.\textsuperscript{105}

The booming popularity of mobile homes led to an effort to include them within the ambit of the Act. While an amendment to that effect failed in 1972,\textsuperscript{106} a bill has been introduced in the current session to bring mobile home safety within the Commission's jurisdiction.\textsuperscript{107} Future efforts may be made to include other areas within the scope of the Act if it proves successful in its regulatory mission.

**Issuance of Consumer Product Safety Rules**

The Commission will regulate product safety by issuing consumer product safety rules. Such rules may establish requirements as to "performance, composition, contents, design, construction, finish, or packaging";\textsuperscript{108} require products to carry warnings or instructions;\textsuperscript{109} or de-
clare a product banned as hazardous. A rule will issue if the Commission finds it to be "reasonably necessary to prevent or reduce an unreasonable risk of injury associated with such product." The Act does not define "unreasonable risk of injury," but implicitly sets forth certain guidelines. A balancing test is contemplated wherein the danger posed by the product, the consumer's awareness of the danger, and his ability to protect himself are weighed against the effect of safety standards upon the product's utility, cost, and availability. The Act contemplates that, rather than take the lead in initiating standards, the Commission act upon proposals submitted to it. The standard-setting procedure is commenced by publication in the Federal Register of a notice identifying both the product and the hazard to be regulated, and inviting offers to propose standards. Offerors, including manufacturers, trade associations, independent laboratories, and consumer organizations, then have 30 days to offer to develop a standard. The Commission may, if it finds that an existing standard would serve the purpose, publish that standard and dispense with the development process. Otherwise, the Commission must accept one offer so long as it determines that the offeror is technically competent and "likely to develop an appropriate standard" within the development period. The Commission is also authorized to contribute to the offeror's cost of development, subject to certain guidelines. This should facilitate the participation of consumer organizations in the standard-setting process.

In addition, the Commission is directed to prescribe regulations governing the private development of proposed standards. These regu-

110 Id. § 8.
111 Id. §§ 7(a) & 9(c)(2).
113 See CPSA § 9(c). See also NCPS Report, supra note 1, at 11 (quoting statement of Prof. Corwin D. Edwards, University of Oregon, NCPS Hearing, Mar. 4, 1970). It is submitted that in determining the need for a product safety rule, only the risk factors associated with the product should be considered. If these factors indicate that the risk is unreasonable, then the rulemaking proceeding should commence. In adopting standards, the balancing test should come into play to help arrive at a standard which will alleviate the danger while preserving the utility of the product. If no feasible standard can be fashioned, the product could be declared a banned hazardous product.
114 CPSA § 7(b).
115 Id. § 7(c).
116 Id. § 7(d)(1). The development period is generally 150 days, but like other provisions of the Act, the limit is flexible, and the Commission may lengthen or shorten the period if it deems such action appropriate.
117 Id. § 7(d)(2). The contribution must appear to be necessary to aid the development, and the offeror must be "financially responsible."
118 "Consumer organizations would be likely recipients of such financial aid." S. Rep. No. 92-749, 92d Cong., 2d Sess. 28 (1972).
lations will require that proposed standards be accompanied by supporting data, that interested persons be provided with notice and opportunity to participate in development, that records be maintained and made available to the public, that these records contain dissenting views when such views are submitted to the developer, and that the Commission and the Comptroller General be permitted to inspect any records relevant to development or to expenditures of funds contributed by the Commission. The Act expressly includes "representatives of consumers and consumer organizations" among "interested persons." The thrust of this section is to provide maximum participation in development, and to afford the Commission the fullest possible basis upon which to evaluate a proposed standard. Absent these provisions, there would exist a possibility of Commission ratification of inadequate standards, developed without the benefit of public scrutiny.

In general, the Commission may not draft a standard during the development period. Where, however, no offer is accepted, or where the only offer accepted is that of a manufacturer, distributor, or retailer of the product to be regulated, the Commission may proceed with its own development of a standard. These restrictions are designed to preclude duplication of effort and to avoid possible bias on the part of the Commission staff towards its own proposed standards. Too great a reliance on privately developed standards may, however, be unhealthy. It may be expected that industry will be very anxious to propose standards, and unless the Commission scrutinizes these offers carefully (or consumer groups play a watchdog role), standards which do not adequately protect the public may be adopted.

The administrative procedure for the promulgation of consumer product safety rules parallels the informal rulemaking process under the Administrative Procedure Act (APA). Not more than 210 days

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119 CPSA § 7(d)(3).
120 Id. § 7(d)(3)(B).
121 Id. § 7(a)(2).
122 Id. May the Commission develop a standard when a trade association is the sole offeror whose offer is accepted? If, as is likely, this provision was included because of wariness toward standards developed by industry, the answer would be yes. However, there is support for a contrary position, based on the contention that this provision was included merely to prevent a single manufacturer from obtaining a competitive advantage by developing a standard to which only his product conforms. See Scalia & Goodman, Procedural Aspects of the Consumer Product Safety Act, 20 U.C.L.A. L. Rev. 899, 913-15 (1973).
123 Id. Fearing that the government's proposed standards would be given predominant weight, and that the efforts of the private sector would be mere window-dressing, private bodies would undoubtedly forego participation.
after publication of the notice of proceeding, the Commission shall either publish a proposed rule or withdraw the notice. The Act does not require formal hearings on the record, but unlike the APA, permits oral submissions as well as written comments. The formal rulemaking process of the APA, which requires hearings before a trial examiner, is justifiably criticized as dilatory. However, it should be recognized that the informal process does not permit an exhaustive examination on the merits, as the agency is limited to reviewing submissions of interested persons, without opportunity to probe or examine parties. Nor does informality guarantee expediency. Even under the informal procedures of the CPSA, the effective date of a rule may come as late as 15 months after the notice of proceeding, or later if extensions have been granted. But the Act does prescribe expedited procedures for dealing with imminent hazards.

The intention that the Commission exercise restraint in its regulations is evidenced by the conditions which must be met before a consumer product safety rule may be promulgated. The Commission must make findings as to the nature and severity of the particular hazard, the need of the public for the product, and the effect of the rule upon the product’s utility, cost, and availability. The Commission must act so as to “minimiz[e] adverse effects on competition or disruption . . . of manufacturing and other commercial practices . . . .” Finally, the Commission must find that the rule is reasonably necessary to deal with an unreasonable risk of injury, and that its promulgation is in the public interest. In the event that a standard is challenged, a reviewing court will look to these findings to aid its determination.

Generally, product safety rules are to become effective from 30 to 180 days after promulgation. Since compulsory safety standards apply only to products manufactured after the effective date of the proscrip-


125 CPSA § 7(f).
126 While consumers and consumer organizations are not expressly included in this section, the omission appears to have been inadvertent, and a court could reasonably conclude from the remainder of the Act that consumer comments are not to be excluded.
127 CPSA § 9(a)(2).
129 CPSA § 9(c)(1).
130 Id. § 9(c)(1)(D).
131 Id. § 9(c)(2).
132 See id. § 11(c).
133 Id. § 9(d)(1). Again, this date may be hastened or postponed for good cause.
tive rule, the Act provides a mechanism to deter stockpiling. One who manufactures or imports a product between the date of promulgation of an applicable rule and its effective date at a rate significantly greater than that for a base period is subject to penalties prescribed by the Act. The base period is to be established by rule.

The Commission may amend or revoke consumer product safety rules in accordance with the same procedures prescribed for their issuance. However, the section so providing refers only to "material" changes in the standard; "minor" changes may be made by the Commission unilaterally. Since judicial review is also limited to material changes, a "minor" change might appear unreviewable. Nevertheless, a court presumably could take jurisdiction of a challenge to the Commission's determination that an amendment was not "material" and its conclusion that adherence to statutory procedures was not required.

### Banned Hazardous Products and Imminent Hazards

The Act recognizes that there are certain product hazards which cannot, as a practical matter, be eliminated or reduced. In such situations, where no feasible standard would adequately protect the public against an unreasonable risk of injury, the Commission is empowered to declare the item a banned hazardous product. This is done by rule, following the same administrative procedure applicable to promulgation of consumer product safety rules. A banned hazardous product may not be manufactured, sold, distributed, or imported into the United States.

Often, time is of the essence in dealing with a product which presents a serious immediate hazard. Thus, the Commission has power to institute judicial action against "imminently hazardous consumer products." This action may be taken against a manufacturer, dis-

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134 *Id.*
135 *Id.*, § 9(d)(2).
136 *Id.*, § 19(a)(7). See text accompanying notes 175-79 *infra.*
137 *Id.*, § 9(e).
138 *Id.*
139 If the court found the Commission's determination that an amendment was not "material" to be arbitrary or an abuse of discretion, it could direct the Commission to follow the Act's procedures and commence an amendment proceeding. See 5 U.S.C. §§ 701-06 (1970). Although such review is not prescribed by the statute, it is neither precluded by the Act nor is the definition of materiality "committed to agency discretion." See 5 U.S.C. § 701 (1970).
140 CPSA § 8.
141 *Id.*, § 19(a)(2).
142 *Id.*, § 12(a).
tributor, or retailer of the product, or against the product itself. In the former case, the district court may grant such relief "as may be necessary to protect the public." Enjoining the sale of the product is one obvious remedy. Moreover, the Act expressly provides for mandatory orders requiring notification to known purchasers, public notice, recall, repair, replacement or refund as possible remedies, all in the court's discretion. When the Commission proceeds directly against the product, the action is one for condemnation and seizure, and is to conform as nearly as possible to in rem proceedings in admiralty. In addition to taking this emergency action, the Commission is directed to commence with due dispatch a proceeding to promulgate a consumer product safety rule with respect to the product in question, if no such rule exists.

The Act defines "imminently hazardous consumer product" as a product "which presents imminent and unreasonable risk of death, serious illness, or severe personal injury." However, there is no express standard for imminence. The Senate bill set forth, as a criterion, the finding that action prior to the completion of administrative proceedings is required to protect adequately the public health and safety. A differently worded definition was adopted in conference but "imminent" was in the end, left undefined. However, the Senate criterion appears to be a workable guideline.

In general, ultimate responsibility for enforcing the Act is situated in the Justice Department, pursuant to the policy of centralizing government litigation authority in that department. In the case of imminent hazards, since immediate action is needed and inter-agency differences of opinion might frustrate the purpose of the section, the Commission has authority to be represented by its own attorneys. To further expedite these matters, the Act contains very liberal provisions relating to venue, service of process, and service of subpoenas. Delay has been avoided to the fullest extent possible in this area.

143 Id. § 12(b)(1).
144 Id. These remedies may also be invoked by the Commission when consumer product safety rules have been violated. See text accompanying notes 182-86 infra.
145 Id. § 12(b)(2).
146 Id. § 12(c). Notwithstanding the fact that a product is subject to safety standards, if the hazard is serious and imminent, the Commission may proceed under this section. See id. § 12(a).
147 Id. § 12(a).
148 8. 3419, 92d Cong., 2d Sess. § 311(b) (1972).
149 See note 181 infra.
150 CPSA § 12(f).
151 Id. § 12(e). Venue is proper in any district in which any defendant is found, resides, or transacts business. Process and subpoenas may be served in any district.
Petition for Consumer Product Safety Rule

In the event that the Commission's action (or lack thereof) is found unsatisfactory, the Act permits the initiation of a proceeding for the issuance, amendment, or revocation of a consumer product safety rule by a person outside the Commission. Any interested person, including a consumer or consumer organization, may petition the Commission to take such action. The Commission is then given 120 days to act upon the petition. The petition procedure is generally available with respect to agency rulemaking through the APA, but the Act expands upon it by requiring that the Commission, if it denies a petition, publish its reasons for so doing.

A novel provision of the Act permits the dissatisfied petitioner to obtain an independent judicial hearing on the merits of his petition. If the Commission denies a petition, or fails to act within the prescribed period, a de novo proceeding may be commenced in the district court. If it is demonstrated by a preponderance of the evidence that the product presents an unreasonable risk of injury, and that the Commission's failure to act "unreasonably exposes the petitioner or other consumers to a risk of injury," the court shall order the Commission to take the action demanded by the petition. This has been described as a "mandamus-like" action since it expands the scope of that writ beyond mere ministerial functions of the agency.

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162 Id. § 10(a). The grant of legal standing to "a consumer" is extraordinarily broad.
163 Id. § 10(d).
164 5 U.S.C. § 553(e).
165 CPSA § 10(d). In this connection Mrs. Virginia Knauer, the President's Special Assistant for Consumer Affairs, was concerned that the Commission might have to consider even clearly frivolous petitions, to the detriment of its other duties. S. REP. No. 92-749, 92d Cong., 2d Sess. 77, 80 (1972) (letter from Virginia H. Knauer to the Senate Commerce Committee).
166 CPSA § 10(e).
167 Although the petition procedure is available to any interested person, the subsequent court action focuses on the risk of injury presented to consumers. Thus, this section does not provide an opportunity for manufacturers to circumvent the Commission in an attempt to obtain more favorable standards, but merely facilitates consumer participation in rulemaking.
168 Id. § 10(e)(2).
169 S. REP. No. 92-749, 92d Cong., 2d Sess. 9 (1972). Traditionally, the writ of mandamus was limited to situations where an officer had refused to perform a ministerial duty, and it was never available in "discretionary" situations.

Mandamus is employed to compel the performance, when refused, of a ministerial duty... Where the duty in a particular situation is so plainly described as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus...

Wilbur v. United States ex rel. Kadrie, 281 U.S. 206, 218-19 (1930). Since rulemaking is inherently discretionary, general mandatory relief would not be available, and a new, statute-created proceeding was needed to compel Commission action.
purpose of the section is to curb the discretion of the Commission, and again to provide safeguards against disregard of the public interest.

This action is also noteworthy in that it provides a standard of review different from the norm. In this case, “substantial evidence” will not suffice to sustain the agency decision. The petitioner need only prove by a preponderance of the evidence the existence of an unreasonable hazard and the threat of injury.

Agency action affecting interest in life and health should be subject to the most searching judicial examination. In our view, the importance of these interests justifies a departure from the normal standard of review. In such cases, substantial evidence in the record should not be sufficient to sustain the agency action.

Moreover, the issue is considered de novo, meaning that the petitioner and court are not limited to the record compiled before the Commission. Not only is standing to petition the Commission accorded to a very broad class, but it appears that the petitioner need not even show “injury in fact” to be properly before the court. The statute requires only that the hazard “unreasonably exposes the petitioner or other consumers to a risk of injury”; no actual damage need be shown, nor does the petitioner even have to show the threat of injury to himself. However, if this liberality leads to inundation of the courts, it is likely that judges will superimpose the “injury in fact” standard upon the Act, at least to the extent of requiring foreseeable injury to the petitioner. Finally, in order to give the Commission an opportunity to embark on its own, action-forcing suits under this section are barred for the first three years of the Act’s operation.

**Judicial Review**

The Act provides for review of consumer product safety rules in a circuit court of appeals within 60 days after promulgation. Review may be sought by “any person adversely affected by such rule, or any

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160 See note 168 infra.
162 The Committee contemplates that most [Commission] actions will withstand the scrutiny. Since this right of action gives the plaintiff no economic incentive—only costs may be recovered in the discretion of the court—it is unlikely that a large number of suits will disturb the orderly processes of [Commission] decision. Yet the possibility of suit will serve as a constant spur to action safeguarding the public.
163 Id.
165 See Note 163 infra.
167 CPSA § 10(e)(2) (emphasis added).
168 Id. § 10(g).
169 Id. § 11(a).
consumer or consumer organization."\textsuperscript{166} Again, this is a very liberal grant of standing, and insures maximum reviewability of Commission actions.

A rule is not to be sustained unless "supported by substantial evidence on the record taken as a whole."\textsuperscript{167} This is the standard normally employed in connection with formal rulemaking.\textsuperscript{168} The NCPS favored informal rulemaking partly because it felt that the substantial evidence rule would contribute to delay and interfere with the agency's performance.\textsuperscript{169} However, delay is certain to ensue merely from the existence of judicial review, irrespective of the standard employed. Since the real potential for delay inheres in the rulemaking phase and is averted by the use of the informal process which dispenses with the necessity for a formal plenary hearing, delay is not a compelling argument against the substantial evidence rule.\textsuperscript{170} Limiting the scope of review to a simple determination as to whether the rule is arbitrary, capricious, or an abuse of discretion would grant the Commission maximum discretion and guarantee that virtually all product safety rules would survive judicial scrutiny. Use of the substantial evidence standard gives courts the opportunity to inquire more searchingly into the merits of the rule. Since the Act is keyed to protecting the public against unreasonable risks of injury, this inquiry should concern itself to a greater degree with the public interest than with the potential economic harm faced by manufacturers. Adherence to this rationale,

\textsuperscript{166} Id.
\textsuperscript{167} Id. \S 11(e). The record includes any submissions of parties during the rulemaking proceeding, the Commission's published findings, and any additional material requested by the court at the petitioner's instance. Id. \S 11(b).
\textsuperscript{168} See 5 U.S.C. \S\S 556(d), 706(2)(e) (1970). Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." John W. McGrath Corp. v. Hughes, 264 F.2d 314, 316 (2d Cir.), cert. denied, 360 U.S. 931 (1959). It is less than a preponderance of the evidence, but somewhat greater than that required to show non-arbitrariness.
\textsuperscript{169} Informal proceedings are also more appropriate because rulemaking is more akin to legislation than adjudication, and the informal rulemaking procedure more closely parallels a legislative hearing than a judicial proceeding. See NCPS REPORT, supra note 1, at 93.
\textsuperscript{170} The implementation of product safety rules might also be delayed by the granting of stays pending review, but such stays are granted infrequently, and only when the petitioner can show that he faces irreparable injury should the application be denied, that he is likely to prevail on the merits, and that the public interest will not be unduly harmed by the delay. Likelihood of success will be difficult to show, although this is less important where the injury faced is great. Frequently a manufacturer will be able to show that the denial of a stay will be financially damaging as he may face changes in his manufacturing process, but this must be balanced against the unreasonable risk of injury posed to the public and the fact that these same costs will ultimately be incurred should the rule be sustained by the reviewing court. Thus, delay pending review should not be a serious problem.
coupled with the statute's broad standing provisions, will give consumers the opportunity to make certain that the Commission follows its mandate.

**Enforcement**

The Act makes unlawful the following activities:\(^{171}\) manufacture, sale, distribution, or importation of any product which does not conform to applicable safety standards, or which has been declared a banned hazardous product; failure to permit inspection, or furnish information required under the Act; failure to notify the Commission of substantial product hazards, or of non-compliance with safety standards;\(^ {172}\) failure to comply with a remedial order;\(^ {173}\) failure to certify compliance with the Act;\(^ {174}\) and violation of regulations relating to stockpiling. The Act prescribes various means by which the Commission or private parties may enforce its provisions. This flexibility of approach may be beneficial if wisely used, but it could also lead to complete abdication of responsibility by the Commission.

**Public Enforcement**

Knowing violation of the Act may subject the violator to a civil penalty of $2000 per violation.\(^ {175}\) Each product or incident involved constitutes a separate offense, up to a maximum penalty of $500,000, but the Commission has the option to compromise the penalty. The gravity of the violation and the size of the violator's business would be determinative factors in such a decision.\(^ {176}\) The term "knowing" includes both actual and constructive knowledge,\(^ {177}\) so it is unlikely that a manufacturer could escape liability by claiming ignorance, although an innocent retailer may avoid punishment by showing lack of awareness of the manufacturer's failure to comply.

Furthermore, knowing and willful violation of the Act after receipt of notice of non-compliance from the Commission may subject the violator to a fine of $50,000, or imprisonment of up to one year.\(^ {178}\) Since the Act pertains in large measure to corporations, this section provides that corporate officers, directors, or agents responsible for such violations be subject to the criminal penalties.\(^ {179}\) The specter of a

\(^{171}\) CPSA § 19(a).

\(^{172}\) See text accompanying note 182 infra.

\(^{173}\) See text accompanying notes 184-86 infra.

\(^{174}\) See text accompanying notes 199-203 infra.

\(^{175}\) CPSA § 20(a)(1).

\(^{176}\) Id. § 20(b).

\(^{177}\) Id. § 20(c).

\(^{178}\) Id. § 21(a).

\(^{179}\) Id. § 21(b).
corporate chief executive being marched off to the penitentiary should deter willful violation of the Act.

The Commission may also seek equitable relief, by obtaining from a court an injunction against any violation of the Act (including the distribution of a non-complying product), or an order to seize offending products. In any of these cases, the Commission may not enforce the Act on its own initiative. The Attorney General must concur in the decision to litigate. This raises the possibility that enforcement may be hampered by inter-agency conflict. The Justice Department may well feel that it has more pressing matters requiring its attention than the prosecution of corporate officers for failure to comply with product safety standards. However, the penalties prescribed by the Act must remain a credible deterrent against any disregard. In addition, the injunction and seizure provisions should be used when necessary to protect the public safety.

More intriguing than the conventional punitive and injunctive aspects of the Act are the remedial powers afforded the Commission. First, manufacturers, distributors, and retailers, upon learning of any failure of a product to comply with an applicable product safety rule, or of the existence of a defect "which could create a substantial product hazard" must notify the Commission. This latter requirement provides a means by which corrective action may be taken against hazards which escape the Commission's notice but which come to the attention of the manufacturer.

After having been notified, the Commission must conduct a formal hearing under the APA, and may then require that remedial action be taken. The Commission may order the manufacturer, distributor,

180 Id. § 22.
181 28 U.S.C. § 516 (1970) reserves the conduct of litigation on behalf of the United States to the Department of Justice. See 118 Cong. Rec. S9911-13 (daily ed. June 21, 1972) (summary by Department of Justice) arguing the merits of unified control of litigation, stressing the need for uniform policy positions, coordination of priorities, and, rather speciously, the excellent rapport between Department attorneys and federal judges.
182 CPSA § 15(b). There is nothing in the Act which would appear to prevent the Commission from acting under this section upon its own discovery of the defect or failure to comply, or upon a consumer complaint. A "substantial product hazard" is defined as a defect which creates a substantial risk of injury to the public due to the pattern of the defect, the number of products involved, the severity of the risk, or other factors. Id. § 15(a). Failure to comply with applicable standards creating a substantial risk is offered as an alternative definition, but this seems to be mere surplusage in view of the fact that § 15(b)(1) explicitly includes any failure to comply with product safety rules as cause for notification.
183 Id. § 15(f). Here, as opposed to the rulemaking process, formality (the procedures of 5 U.S.C. § 554 (1970)) is required, as the Commission is acting in a quasi-judicial capacity and sanctions may flow from the proceeding.
or retailer to give notice of the defect.\textsuperscript{184} Such notice may, in the discretion of the Commission, take the form of a public announcement, notice mailed to manufacturers, distributors, and retailers of the product, notice mailed to known purchasers, or any combination of the above. In many cases, however, notification will not be sufficient to protect the public against the risk of injury presented. Thus the Commission may, in addition, order a manufacturer or seller to take one of the following steps:

(1) To bring such product into conformity with the requirements of the applicable consumer product safety rule or to repair the defect in such product.

(2) To replace such product with a like or equivalent product which complies with the applicable consumer product safety rule or which does not contain the defect.

(3) To refund the purchase price of such product (less a reasonable allowance for use . . . ).\textsuperscript{185}

The person to whom the order is directed may elect the alternative remedy he will pursue. Unequivocal allowance of this choice could, however, render the statute self-defeating. For instance, if the refund option were chosen, the hazardous product still would remain in circulation. Retailers may wish to choose this option when they lack the wherewithal to repair or replace the defective product. To ensure that the election affords a satisfactory remedy, therefore, the Commission must approve the chosen plan. In addition, consumers are to be reimbursed for any costs incurred in availing themselves of defect remedies, and no charge may be made to them for so doing.\textsuperscript{186}

Private Enforcement

To ensure that the Act will not fail due to Commission apathy or impotence, Congress inserted several provisions permitting private parties to act when the Commission does not. One such provision, already noted, involves the petition for a consumer product safety rule and ensuing "mandamus-like" action.\textsuperscript{187} In addition, the Act permits "any interested person" to bring an action in a federal district court to enforce product safety rules or remedial orders.\textsuperscript{188} Significantly, this section does not expressly include consumers and consumer organizations among "interested persons," as do other provisions of the Act.

\textsuperscript{184} Id. § 15(c).
\textsuperscript{185} Id. § 15(d).
\textsuperscript{186} Id. § 15(e).
\textsuperscript{187} See text accompanying notes 152-64 supra.
\textsuperscript{188} CPSA § 24.
Nevertheless, it may be inferred from the foregoing sections that Congress intended to confer standing as broadly as possible so as to ensure that the Commission is responsive to consumer interests. At any rate, any consumer of the particular product involved could easily establish the requisite standing to enforce a safety standard or remedial order.\(^\text{189}\)

In fairness to the government, Congress provided that notice shall be given to the Commission, the Attorney General, and the prospective defendant at least 30 days before the commencement of a private enforcement action.\(^\text{190}\) Meanwhile, if the government brings an action, or has already commenced a civil or criminal suit, the putative plaintiff is barred from initiating his action. Private actions are facilitated by allowance of counsel fees when merited, but frivolous suits, on the other hand, are discouraged by the award of costs to the prevailing party.\(^\text{191}\)

The Act also creates a federal cause of action for persons injured by a knowing violation of a consumer product safety rule.\(^\text{192}\) The NCPS originally recommended that treble damages be recoverable in such suits, and that use of the class action device be encouraged.\(^\text{193}\) However, fears of a flood of lawsuits besieging the federal courts caused these provisions to be abandoned. The monetary jurisdictional requirement of more than $10,000 will apply in such suits.\(^\text{194}\) Since the

\(^{189}\) Clearly, a user of the product could claim that his safety is within the zone of interests protected by the Act, and that exposure to what the Commission has already determined to be an unreasonable risk of injury is legal injury in fact. See Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970).

\(^{190}\) CPSA § 24.

\(^{191}\) Id.

\(^{192}\) Id. § 23.

\(^{193}\) See NCPS Report, supra note 1, at 118, suggesting that the availability of the class action would help to overcome the high costs which discourage consumer litigation. But see S. Rep. No. 92-749, 92d Cong., 2d Sess. 97, 108 (1972) (letter from William N. Letson, General Counsel of the Department of Commerce, to the Senate Commerce Committee): "[T]his provision provides a windfall for injured plaintiffs. We see no justification for this windfall." On the other side of the coin, it should be noted that a provision for double or treble damages might be just retribution for knowing violation of the Act. 28 U.S.C. § 1331(a) (1970). This provision vitiates the utility of the class action, in view of the bar against aggregation of claims to reach the jurisdictional threshold. See Snyder v. Harris, 394 U.S. 882 (1969).

\(^{194}\) In addition, presently before the United States Supreme Court is an appeal from a decision which further limits the availability of the class action. See Zahn v. International Paper Co., 53 F.R.D. 430 (D. Vt. 1971), aff'd, 469 F.2d 1033 (2d Cir. 1972), cert. granted, 410 U.S. 925 (1973) (No. 888). In this case the Second Circuit held that not only must each of the representative plaintiffs have claims in excess of the jurisdictional monetary limit, but all the unnamed members of the class must also satisfy that requirement. Although Zahn was a diversity action, there is no apparent reason why the proscription should not apply equally to federal question controversies. Judicial hostility to the class action is further manifested in Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973), cert. granted, 42 U.S.L.W. 3212 (Oct. 15, 1973) (No. 208), where the Second Circuit held
quantum of proof required to prevail in the federal action will probably be no less than that needed in a state court suit based on breach of warranty or strict tort liability, the real significance of this section is its symbolic commitment of federal judicial power to the cause of product safety.

Private actions under state law for damages caused by defective products remain unhampered by the CPSA. The Act expressly declares that compliance with federal regulations will not relieve a person from liability at common law or under state statutory law, and that the Commission's failure to deal with a particular hazard is not admissible as evidence in any such action.

Compliance Supervision

In order to discover defects and potential hazards, and to evaluate compliance with safety standards, some testing of products must be undertaken. While the Commission is empowered to test products, the intent of the Act is for the Commission to play a supportive role with the emphasis on private testing. The Act requires manufacturers to certify that each product conforms to applicable safety standards. These certificates must be based upon "a test of each product or upon a reasonable testing program." While the Commission may prescribe the requirements for a reasonable testing program, the tests may be conducted privately. In fact, there is no proscription against the tests being conducted by the manufacturer. The absence here of a requirement that the Commission perform compliance tests might give rise that the named plaintiffs must bear the expense of personal notice to each member of the class who can be readily identified, irrespective of the number involved.

Thus, it can be inferred that only through legislative action can the class action be made a viable device for redressing wrongs done on a large scale to consumers. In the current session of Congress, a bill has been introduced which would permit the aggregation of claims in consumer class actions, so long as the total amount claimed exceeds $25,000. Money damages and injunctive and declaratory relief would be available, as well as costs and reasonable attorneys' fees. Defendants would be given the option of initiating corrective action within 30 days after having been notified of the impending action, in which case monetary relief would not be granted. See H.R. 1105, 93d Cong., 1st Sess. (1973). However, the bill makes the proposed action subject to the Federal Rules of Civil Procedure where those rules do not contradict the proposed statute. Therefore, the question of manageability may still plague consumer class actions. See Fed. R. Civ. P. 23(b)(3)(D).

195 See CPSA §§ 10(f), 11(e), 23(b).

196 Id. § 25(a).

197 Id. § 25(b).

198 Id. § 5(b)(2).

199 Id. § 14(a).

200 Id.

201 Id. § 14(b). See also id. §§ 5(b)(2), (3).
PRODUCT SAFETY

The Senate bill would have mandated Commission testing of products taken from production runs. See S. 3419, 92d Cong., 2d Sess. (1972).

CPSA § 19(b).

Id. § 14(c).

Id.

Id. § 7(a)(2).

At present the increasing volume of accidents suggests that the principal reliance of the regulatory system should instead be on preventing hazardous substances from reaching the market in the first instance, rather than on insuring only that labeling carries warnings which perhaps are unread or unheeded by most of the population they are designed to protect.

H. HEFFRON, supra note 13, at 192.

See text accompanying notes 142-48 supra.

CPSA § 15(a). A "new consumer product" is defined as:

a consumer product which incorporates a design, material, or form of energy exchange which (1) has not previously been used substantially in consumer products and (2) as to which there exists a lack of information adequate to determine the safety of such product in use by consumers.

Id. § 13(b).

Id. § 16(a).

to spurious testing programs. In addition, despite the good reputation enjoyed by certain independent testing organizations, the fact remains that private testing and standard-setting organizations are often reluctant to bite the hand that feeds them, and generally are sympathetic to industry's needs. The Commission should therefore maintain the capability to test all products, irrespective of third-party certification.

The major import of the certification provision is to exempt from liability under the Act a person who sells a non-conforming product in reliance upon a certificate of compliance. The Commission may also require that products bear labels certifying compliance and give the manufacturer's name, date, and place of manufacture. While this may afford some small psychological benefit to consumers, its true value is likely to be minimal. Such information may be coded, making it useless to all but the most diligent consumers. The Commission may also order, via a consumer product safety rule, that warnings or instructions be marked on the product. But, in view of the general public disregard for instructions and cautionary labels, primary reliance should not be placed upon this procedure.

The Commission may prevent dangerous new products from reaching the market if they qualify as imminent hazards, but no provision for other premarket clearance was included in the Act. The Commission may, however, prescribe procedures whereby it is apprised of the imminent appearance of a new product on the market, and hopefully test such products promptly, so as to minimize any risk of injury.

Another means by which the Commission may supervise compliance with the Act is through the inspection of product manufacturing and storage facilities. It may also require manufacturers, dis-
tributors, and retailers to maintain records relating to compliance for Commission inspection. 211

**Complementary Provisions**

In general, federal standards will preempt state regulation of product safety. 212 In certain cases, however, the Commission may permit the enforcement of a state standard if it is more stringent than its federal counterpart, "is required by compelling local conditions, and . . . does not unduly burden interstate commerce." 213 Since most products are distributed so widely that differing state standards would be extremely burdensome to interstate commerce, this exemption will have very limited application.

The Act also creates a Product Safety Advisory Council, which has no real authority but which may serve the Commission in a consultative capacity. 214 The Council shall be composed of fifteen members: five from federal, state, and local governments, five from consumer product industries (including at least one representative of small business), and five from various "consumer organizations, community organizations, and recognized consumer leaders." 215 The Council may propose product safety rules 216 and be consulted before the commencement of an action against an imminently hazardous product, 217 but its major function is to keep the Commission apprised of industry and consumer views and problems.

It is probably true that in government an agency's potential effectiveness is largely determined by its budget. This is not to say that well-financed agencies are always effective, but merely that without adequate appropriations an agency cannot fulfill its purpose. The NCPS's proposed bill 218 was relatively parsimonious, authorizing just $5 million, $7.5 million, and $10 million respectively for the first three years of the Act's operation. 219 The Senate, with characteristic largesse, increased these figures to $250 million, $300 million, and $350 million,

211 **Id.** § 16(b).
212 **Id.** § 26(a).
213 **Id.** § 26(b). This rather vague language was in the original NCPS bill, and can be traced to NCPS REPORT, supra note 1, at 87. It should be interesting to see what local conditions can be found to prompt product safety standards different from the federal standards. In the environmental area, the need for such flexibility is apparent; in product safety, while it is not harmful, it will probably remain little used.
214 CPSA § 28.
215 **Id.** § 28(a).
216 **Id.** § 28(c).
217 **Id.** § 12(d)(1).
218 See note 19 supra.
although the latter figures included amounts for food and drug regulation. The Act as passed pared these figures down to $55 million, $59 million, and $64 million for fiscal 1973-1975.220 These sums do not include amounts necessary for the construction of a research and testing facility.221

The draftsmen of the Act intended the Commission to be independent in the fullest sense of the word. Accordingly, the Act directs the Commission to transmit a copy of its budget requests to Congress concurrently with its submission to the President and the Office of Management and Budget.222 This is intended to ensure that the product safety budget is not covertly pruned before Congress has a chance to evaluate it. Predictably, the Administration was strongly opposed to this idea. In upholding the concept of a unified executive budget, officials argued that allocation of scarce resources, determination of priorities and the need for coordination demanded prior review in the Executive Branch.223 These are sound general management principles, but it is apparent Congress feared product safety would be given short shrift by the White House and therefore left itself an opportunity to evaluate independently the Commission’s financial needs.

Rejected Proposals

One of the more controversial as well as innovative provisions of the original NCPS bill which was not incorporated in the final Act called for the appointment of a Consumer Safety Advocate. This provision reflected the attitude that regulatory agencies are too solicitous of industry views, and that the public has insufficient access to these agencies.224 Under the NCPS proposal, the Advocate would have been appointed by the President, and would have had the following powers: To receive and act upon consumer complaints; to evaluate standards, orders, and hazards; to obtain information from the Commission; to appear before the Commission as a party or witness; to request that the Commission take certain actions in rulemaking and enforcement areas;

220 CPSA § 32(a). However, for fiscal 1974, the Commission requested just $30.9 million, only slightly more than half the amount authorized by the enabling legislation.
221 Id. § 32(b). See text accompanying note 63 supra.
222 Id. § 27(k).
224 Quite as private enterprise requires counsel to represent its interest in dealings with agencies of Government, the public requires an Advocate who will defend consumer safety against exploitation, excess, or neglect. NCPS Report, supra note 1, at 115.
to appeal any order, regulation or standard issued by the Commission; and, very importantly, to make public statements.\textsuperscript{225}

Obviously, there were very strong reactions to this proposal. The creation of the Advocate would have given consumers a voice in the regulatory process, and would have afforded them true representation in appearances before the Commission and legal actions against it. An industry spokesman called the Advocate "a high-level backseat driver."\textsuperscript{226} The Administration also opposed the contention that government did not adequately represent the public interest.\textsuperscript{227} Ultimately Congress succumbed, and the Advocate was dropped from the Act.

Frequently, in recent years, there has been discussion of the appointment of "ombudsmen" to represent the public in the face of burgeoning and increasingly impersonal bureaucracy. This trend will continue, and the idea of a consumer advocate is far from dead.\textsuperscript{228} It will be with us until our institutions become more responsive to human needs.

Another reason set forth for the failure of governmental regulations in various areas is the lack of accountability of individuals. The failures are perceived as institutional, but the institutions are composed of people. Thus, it was originally proposed that legal actions be permitted against individual employees of the Commission for failure to perform their statutory duties. Sanctions could run from suspension from employment to fines and imprisonment.

This approach, which was not adopted by the Act, is overly simplistic. Because of the synergistic nature of bureaucracy, it is often impossible to fix individual responsibility for a particular action or omission. The issue can rarely be framed as an outright refusal to perform a clearly mandated duty. More often than not, problems arise for misallocation of priorities, inadequate information, inadequate resources, inadequate efforts to fix problems, and institutional pressures for cost cutting.\textsuperscript{229} This problem is the subject of a recent study by the Consumer Federation of America.\textsuperscript{230} It is not surprising that this type of problem continues to occur, given the current level of governmental funding for research and development.\textsuperscript{231}

\textsuperscript{225} Proposed Bill § 4, House Hearings, supra note 4, pt. 2, at 504. (1972).
\textsuperscript{226} House Hearings, supra note 4, pt. 3, at 858, 860 (1972) (statement of J. Edward Day, Electronic Industries Association). Ralph Nader retorted: "The importance of this office can be seen in its universal denunciation by industry representatives as a 'troublemaker' and 'administrative freak.'" House Hearings, pt. 3, at 898. Nader called for strengthening the Advocate by providing an independent funding base and power to conduct field investigations.

\textsuperscript{227} See S. Rep. No. 92-749, 92d Cong., 2d Sess., 88, 91 (1972) (letter from Elliot L. Richardson, Secretary of HEW, to the Senate Commerce Committee).

\textsuperscript{228} In 1971 the House passed a bill creating a Consumer Protection Agency which included an advocate with somewhat limited power. 117 Cong. Rec. H9582-83 (daily ed. Oct. 14, 1971). The Senate had before it in 1972 a similar bill with expanded powers for the Advocate, but it was shelved after a move to cut off debate failed. Similar measures have been reintroduced in the 92d Congress. See S. 707; S. 1160; H.R. 14; H.R. 21; H.R. 1160, 93d Cong., 1st Sess. (1973).
and a lack of coordination. The imposition of severe penalties on civil servants does not present a constructive approach to these problems.

A better solution is to maximize public participation in the regulatory process. Full disclosure of information, coupled with the "mandamus-like" action,\textsuperscript{229} should be sufficient to spur Commission action. A consumer advocate would, of course, be a valuable supplement.\textsuperscript{230} Only after these measures prove deficient should the imposition of civil, criminal, or quasi-criminal liability upon civil servants be considered.\textsuperscript{231}

**CONCLUSION**

While hazardous products do not have the dramatic, highly visible impact of other societal ills, they do present a very serious concern. The CPSA represents a sincere effort to tackle this problem. To a certain extent, it also represents a departure from the conventional federal regulatory scheme which tends to accommodate those to be regulated. The Act gives the Consumer Product Safety Commission autonomy and fairly strong enforcement powers. It also makes it quite plain that consumer protection is the principal objective of the Act, as it provides numerous opportunities for consumers to participate in the regulatory process and to exercise vigilance over the Commission.

Certainly, there are changes which, if incorporated, would make for greater effectiveness. If the Commission is to have jurisdiction over products like flammable fabrics and household chemicals, it ought to be able to employ the provisions of the CPSA with regard to them, rather than having to rely upon less effective statutes. The Act's rule-making and enforcement powers are vigorous, and should be extended to as many product categories as possible. Should the Commission prove effective in regulating hazardous consumer products, serious consideration to its assumption of food and drug regulation would be warranted.

The Commission should have the power to develop safety standards on its own in addition to accepting outside offers to do so. If not,

\textsuperscript{229} See text accompanying notes 156-64 supra.

\textsuperscript{230} "The ubiquitous presence of the consumer spokesman should stiffen the spine of the most timid official." H. Heffron, supra note 15, at 3.

\textsuperscript{231} One would still encounter the problem of developing standards for courts to apply in determining what constitutes a breach of duty sufficient to incur liability. Since courts generally defer to agency expertise in discretionary matters, it is difficult to foresee a situation where the imposition of liability upon Commission employees would be appropriate, especially since other means of ensuring Commission action exist. 28 U.S.C. § 1361 (1970) makes available a mandamus action against the Commission for failure to perform any clear legal duty; imposing individual liability would only open the door to abuse, and encourage timidity.
the Commission will never develop the technical capacity to perform its regulatory task. Compliance testing by the Commission should be mandatory. If manufacturers seek to use judicial review as a delay tactic, thereby frustrating safety regulation, courts must expedite petitions for review, in recognition that rapid implementation of safety standards is essential to the public interest.

The Commission must use its enforcement power not vindictively, but productively. Remedy plans which do not reduce the threat of injury should be rejected. The Commission should supervise manufacturers to ensure that corrective action is taken.

Finally, the creation of a consumer advocate, empowered to represent the consumer interest before the Commission and the courts, should be further explored. This would accomplish conveniently the apparent intent of Congress to provide for public access, while alleviating the impact of the Act upon court calendars. If the Department of Commerce can be created to promote American industry,\(^\text{232}\) and the Department of Labor charged with serving the interests of working people,\(^\text{233}\) is it too much to ask for the creation of an office in government which unabashedly represents the interest of millions of consumers?

The Act will be something of an imposition upon businessmen, and will probably increase the cost of many products, an all-too-familiar phenomenon in the United States today. But one can be certain that the victims of exploding aerosol cans, improperly built bicycles, and incendiary appliances would willingly have paid a few cents more to be free from injury. The careless will continue to find ways to hurt themselves, but we should nevertheless make it our purpose to eliminate built-in hazards which plague the unsuspecting and the defenseless.

Richard L. Rosen


It shall be the province and duty of . . . [the Department of Commerce] to foster, promote, and develop the foreign and domestic commerce, the mining, manufacturing, shipping, and fishery industries, and the transportation facilities of the United States . . . .


The purpose of the Department of Labor shall be to foster, promote, and develop the welfare of the wage earners of the United States . . . .

Id.