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## The Child Safety Protection and Consumer Product Safety Commission Improvement Act: The Congressional Response to the Commission's Inaction

Cardiss Collins

*Congresswoman, 7th Congressional District of IL.*

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# Lead Articles

## The Child Safety Protection and Consumer Product Safety Commission Improvement Act: The Congressional Response to the Commission's Inaction

by The Honorable Cardiss Collins

### I. INTRODUCTION

In the early 1980s, the Reagan Administration moved swiftly both to terminate health and safety regulations and to reduce domestic spending. However, because Congress recognized that certain programs directed at children are similar to preventive medicine, programs including Head Start and WIC (Women, Infants, and Children Feeding Program) were less severely cut.<sup>1</sup> Indeed, as Congress realized, spending on our children's health is an investment that will save our society much more in future years than it costs us now.

One form of preventive medicine for our children that has not been satisfactorily attended to is the improvement of toy safety standards. While a discussion of toy safety may sound trivial, the statistics show otherwise. An average of 3,200 children under six require treatment in a hospital emergency room each year because of toy-related choking incidents.<sup>2</sup> Between 1980 and mid-1991, 186 children choked to death on children's products.<sup>3</sup> It is estimated that consumer product accidents cost society \$150 billion a year.<sup>4</sup> All Americans are concerned about escalating health care costs. As a society, we invest in preventive medicine and public health initiatives to reduce child mortality and future costs of health care. At the same time, we need to invest in product safety.

A reduction in injuries and deaths from consumer products would reduce the growing cost of health care to our society. The Consumer Product Safety Commission (the "Commission") would normally be expected to act to prevent

these tragic accidents. However, in the deregulatory mood of the 1980s, the Commission rarely acted, forcing Congress to assume the chief responsibility for monitoring the safety of consumer products.<sup>5</sup>

On September 10, 1992, the United States House of Representatives passed, by voice vote, H.R. 4706, the Child Safety Protection and Consumer Product Safety Commission Improvement Act ("Child & Product Safety Act").<sup>6</sup> This legislation, introduced on March 31, 1992, reauthorizes<sup>7</sup> the Commission for fiscal years 1993 and 1994 and

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includes a number of changes in the Commission's governing statutes to improve the agency's operation.<sup>8</sup> Of particular importance, the bill includes provisions directing the Commission to take action addressing hazards associated with toys, five gallon buckets, and bicycle helmets.<sup>9</sup> This legislation is necessary, for even though these products raise substantial safety issues involving children,<sup>10</sup> the Commission so far has failed or refused to take any action on its own.

Congress created the Commission in 1972, with the enactment of the Con-

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Congresswoman Cardiss Collins (D-III.) represents the Seventh Congressional District of Illinois. Mrs. Collins has served in Congress since 1973. She is currently the Chairwoman of the Subcommittee on Commerce, Consumer Protection, and Competitiveness on the Committee on Energy and Commerce and serves on that Committee's Subcommittee on Oversight and Investigations. She is also the ranking Democrat on the Government Operations Committee. She was recently reelected as Vice Chair of the Congressional Black Caucus for the 103rd Congress.

sumer Product Safety Act.<sup>11</sup> The Commission was created to address the hazards associated with consumer products. The statutory purposes of the Commission are: "to protect the public against unreasonable risks of injury associated with consumer products; to assist consumers in evaluating the comparative safety of consumer products; to develop uniform safety standards . . . and to minimize conflicting State and local regulations; and to promote research and investigation into the causes and prevention of product-related [accidents]."<sup>12</sup>

Congress set the substantive framework and the procedural rules, trusting that the Commission would address particular hazardous products. Congress also charged the Commission with the enforcement of several pre-existing statutes which applied to specific types of products: the Federal Hazardous Substances Act ("Substances Act"),<sup>13</sup> the Flammable Fabrics Act,<sup>14</sup> the Poison Prevention Packaging Act,<sup>15</sup> and the Refrigerator Safety Act.<sup>16</sup>

Unfortunately, the Commission often refuses to address particular hazards or takes excessive amounts of time in doing so, forcing Congress to intervene to protect consumers. Over the last four years, Congress has directed the Commission to take action with respect to at least four products. For example, in 1988 Congress passed legislation banning lawn darts,<sup>17</sup> requiring chronic hazard labeling on art supplies,<sup>18</sup> and directing the recall of certain water coolers containing lead.<sup>19</sup> In 1990, Congress required the Commission to establish a safety standard for automatic garage door openers.<sup>20</sup>

The Commission predictably resists such congressional efforts. Commenting on the Child & Product Safety Act, the Chairwoman of the Commission, Jacqueline Jones-Smith, complained that "product-specific legislation, especially any concerning issues already addressed by the Commission, could erode public confidence in the agency."<sup>21</sup> This is an ironic complaint, since it is the Commission's failure to

take action that has eroded public confidence in the Commission.

The following section will provide some background on toys, five-gallon buckets, and bicycle helmets, explaining why they are important matters, how the Commission has failed to act, and what the Child & Product Safety Act would require the Commission to do.

## II. THE THREE PRODUCTS

### A. Toys

As the statistics cited earlier show, our children suffer too many injuries and deaths resulting from consumer products. We can do a better job of protecting our children by providing parents with vitally important information about toys to assist them in making informed purchases.

Toys that present a choking hazard ought to be labeled. Critics contend that mandatory labels will not help children who cannot read and would present an unnecessary intrusion into the marketplace. The critics also argue that this is a parental, not governmental, responsibility. The critics fail to recognize, however, that parents, deprived of necessary information, cannot fully meet their responsibility to their children. A warning label would help parents avoid the purchase of unsafe toys for their children. Ironically, warning labels are required for all sorts of adult products, such as cigarettes, alcohol, medicines, and household cleaners, but not for toys that have the potential to choke children.

Unfortunately, the Commission, an agency that is supposed to protect children, recently voted against requiring warning labels on toys that may cause choking. It is important to understand the Commission's current regulations addressing choking hazards for toys to appreciate the magnitude of its failure to act. The Commission generally regulates toys under the provisions of the Substances Act. A regulation issued under the Substances Act effective January 1, 1980, bans toys intended for children under three, which

present a choking hazard due to the presence of small parts.<sup>22</sup> This regulation is generally referred to as the "small parts standard." A "small part" can include the toy itself or small parts which come loose during reasonably foreseeable use or abuse of the toy.<sup>23</sup>

Although the standard bans the marketing of toys with small parts to children under three, toys with small parts can legally be sold if intended for use by children three and over.<sup>24</sup> As a result, many toys which contain small parts also bear an age label to show that the toy is not intended for children under three.<sup>25</sup> In addition, a toy industry voluntary standard recommends labeling to indicate minimum age for intended use; however, the standard

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does not require specification of the hazard.<sup>26</sup> Thus, no label is required by law, and the wording of any label will vary based on the desires of the toy manufacturer. Some labels indicate that the product is recommended for children three and over. Others are slightly more explicit and indicate that the product is not recommended for children under three. Still others go further by indicating that the product is not recommended for children under three because of the presence of small parts.

The wording of a label influences its effectiveness. A label which merely states that the product is recommended for children over three may not be effective in discouraging inappropriate toy purchases. A parent may feel from the wording of the label that the label is tied to the educational development of

the child and not to safety considerations. Many parents, believing their child is brighter than average, may buy such a toy notwithstanding the label.

Empirical evidence that stronger warning labels on toys would be effective in reducing hazardous toy purchases is provided by a study published in the June 5, 1991, issue of the *Journal of the American Medical Association*.<sup>27</sup> The study, based on a survey of toy buyers, found that the voluntary labels currently used by toy manufacturers "may not be sufficiently explicit to alert buyers of toys with small parts to the potential choking hazard to children under 3 years of age."<sup>28</sup> In particular, the study found:

The wording of an age label had a strong effect on a person's willingness to buy a toy for a child between the ages of 2 and 3 years. Although 44% of the people surveyed would buy such a child a toy labeled 'Recommended for 3 and up,' only 8% would buy the toy if the label said 'Not recommended for below 3,' and only 5% would buy a toy labeled 'Not recommended for below 3 - small parts.'<sup>29</sup>

The study concluded that "a change in the small parts standard to require specific labeling . . . might substantially reduce inappropriate toy purchases without imposing any substantial cost on the consumer, the government, or the manufacturer."<sup>30</sup>

Over the last several years, the Commission expressed some concern about the effectiveness of the small parts standard and initiated several proceedings to review aspects of the standard. The result of this review, however, has been inaction. For example, as a result of a petition filed by the Consumer Federation of America and the New York State Attorney General, the Commission initially considered enlarging the size of the small parts test cylinder. On June 7, 1988, the Commission issued an advance notice of proposed rulemaking ("rulemaking notice") to consider this issue.<sup>31</sup> On March 21,

1990, the Commission voted to terminate the rulemaking proceeding and to withdraw the rulemaking notice on the basis that the small parts standard and the existing test cylinder were effective in preventing choking deaths and injuries to children under the age of three by toys intended for use by that age group.<sup>32</sup>

However, the Commission expressed concern over continuing deaths associated with toys.<sup>33</sup> The Commission also expressed concern over the effectiveness of voluntary age labels:

[T]oys intended for older children, or small pieces from such toys, often are accessible to younger siblings. Additionally, parents sometimes give a toy which is appropriate for older children to a younger child because the parents believe that the child is sufficiently advanced to be able to use the toy. A warning label to advise parents of the presence of small parts in toys or other articles intended for use by children three to six years of age could alert them to choking hazards associated with the use of such toys by children younger than three.<sup>34</sup>

Accordingly, the Commission initiated new proceedings. On June 26, 1990, to further its investigation of labeling requirements,<sup>35</sup> the Commission issued rulemaking notices to address choking hazards associated with balloons, small balls, marbles, and other articles with small parts intended for children aged three to approximately six. Given the Commission's track record on these issues, and to emphasize the importance of the Commission's developing new toy safety rules in a timely manner, the author introduced the Toy Injury Reduction Act, on November 19, 1991.<sup>36</sup> This legislation would have required the Commission to issue toy labeling regulations under the Substances Act.<sup>37</sup>

The Commission and its staff considered the public comments filed in response to the rulemaking notice. In a December 30, 1991, briefing and

options package, the Commission staff noted continuing deaths associated with toys. For example, between January 1980 and July 1991, 186 children choked to death on balloons, marbles, small balls, and other children's products.<sup>38</sup>

The Commission staff recommended that the Commission proceed with proposed rules addressing these hazards.<sup>39</sup> In the briefing package, the Commission staff concluded that:

[T]he existing information about the effectiveness of a label to change behavior is sufficient to support proposal of labeling requirements . . . Labeling combined with an information and education campaign is expected to reduce the risk of injury to children under the age of three from balloons, small balls, toys containing small parts that are intended for three and four year olds, and marbles . . . The cost of such rules appears to be small. It is the least burdensome requirement to achieve the desired result.<sup>40</sup>

While critics argue that labeling is costly, the cost of a label is minuscule. This is illustrated by the fact that many toy manufacturers already voluntarily use age labels, although often those labels are worded ineffectively. The small cost of a label simply cannot be compared with the value of a child's life.

On February 26, 1992, the Subcommittee on Commerce, Consumer Protection, and Competitiveness held a hearing on the Toy Injury Reduction Act and the reauthorization of the Commission. Unfortunately, the Consumer Product Safety Commissioners refused to address the issues raised by the Toy Injury Reduction Act.<sup>41</sup> Subsequently, on March 18, 1992, the Commission met to consider the staff recommendations for proposed toy labeling rules. Despite the views of its own experts, the Commission voted to terminate each of its pending toy safety rulemaking proceedings. The vote was unanimous with the exception of the balloon labeling issue. The

Commission's Chairwoman urged continuation of rulemaking on this issue, but was outvoted by her colleagues.<sup>42</sup> The Commission's objections centered around the difficulty of proving that labeling would save lives.<sup>43</sup> The Commission seemed to ignore its own experts, the study from the *Journal of the American Medical Association*, and its common sense.

As a result, the Toy Injury Reduction Act has been revised to minimize the Commission's discretion and to

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require specific warning labels along the lines recommended by the Commission staff. Those provisions were included in the larger Commission reauthorization bill, the Child & Product Safety Act. This legislation requires informative warning labels on balloons, marbles, small balls, and toys and games that contain small parts and are intended for use by children between the ages of three and approximately six. For example, a toy with small parts would be required to contain a label which states, "WARNING - CHOKING HAZARD - This toy has small parts. Keep away from children under three years old." In addition, the legislation requires all small balls intended for children under age three to have a diameter of over 1.75 inches and thus be choke-proof.<sup>44</sup>

### **B. Five-Gallon Buckets**

Occasionally, mundane products present unanticipated safety hazards. For example, five-gallon buckets typically are found in industrial or commercial environments and are often used as containers for paints, food, and bulk consumer goods. These buckets,

along with empty buckets purchased in hardware and other stores, often end up in homes for such household uses as cleaning.<sup>45</sup>

Five-gallon buckets are a hazard to young children. The Cook County, Illinois Medical Examiner's Office first brought this issue to public attention. From January 1984 to October 1991, the Commission received reports of young children falling head first into buckets containing liquid.<sup>46</sup> This resulted in 199 bucket-related drownings and thirteen hospitalizations. The Commission staff estimates that annually, about fifty children drown in buckets.<sup>47</sup>

These incidents typically involve five-gallon plastic buckets.<sup>48</sup> The children who have drowned in five-gallon buckets range in age from one month to twenty-eight months, but most are eight to thirteen-months-old.<sup>49</sup>

Unfortunately, parents and child caretakers are often not aware that these containers filled with even a few inches of liquid present a drowning hazard to an infant or toddler. Commission Chairwoman Jones-Smith held a news conference in August 1990 with representatives of industrial bucket users and manufacturers to raise awareness of the drowning hazard. She explained, "[O]ne of the biggest hurdles facing the Commission . . . is the very nature of the hazard. Who would suspect that infants or toddlers could pull themselves up and into a five-gallon bucket without tipping the bucket over?"<sup>50</sup>

According to a Commission staff analysis:

The buckets in question would likely be regarded as simple containers . . . commonly used around the house. The buckets have no moving parts or electrical or chemical hazards. . . . Few would expect a drowning hazard to exist with any bucket since it is logical to assume that it would tip over if pulled on. It is even more difficult to anticipate that the hazard would only be associated with a specific size of bucket. The apparent reason for the drowning hazard

is an unusual combination of factors which only exist for a specific period of time in a toddler's life. Those factors are: (1) the height of the bucket, (2) the height of the child with respect to the height of the bucket, (3) the motor development of a child of that height (and hence age), and (4) the availability or accessibility of such buckets.<sup>51</sup>

At the August 1990 press conference, the Commission, and the Coalition for Container Safety, a group of manufacturers and industrial users of five-gallon buckets, announced a campaign to encourage voluntary labeling of five-gallon buckets to warn consumers of the potential drowning hazard.<sup>52</sup> However, critics have expressed concern about the effectiveness of this voluntary effort. According to an article in the June 1992 issue of *Pediatrics*, "[t]he Gypsum Industry and Proctor and Gamble, which respectively fill about 8% and 2% of all 5-gallon industrial buckets manufactured, are the only industries presently printing permanent warning labels on new buckets before they are shipped for commercial use."<sup>53</sup> Furthermore, the Commission estimates that only about 10 percent of the five-gallon buckets have warning labels.<sup>54</sup> Despite this evidence, the Commission has taken no further action. At most, it encouraged the development of a voluntary labeling standard, but even industry did not think a voluntary standard went far enough.<sup>55</sup>

The original version of the Child & Product Safety Act, introduced in March 1992, included a provision requiring the Commission to consider both mandatory labeling and safer designs for five-gallon buckets.<sup>56</sup> Since the introduction of the bill, a consensus has developed to mandate the use of warning labels. Accordingly, Congressman Michael Bilirakis (R-Fla.) offered an amendment on the House floor to strengthen the bill by mandating labeling as an immediate step while still requiring the Commission to formally consider further safety measures. It also requires the Commission to for-

mally review the mandated labeling standard to ensure its effectiveness.<sup>57</sup>

The provision, which would become effective eight months after enactment, requires each five-gallon bucket to contain a label at least five inches high and two and three-quarter inches wide stating "WARNING" and "Child Can Fall Into Bucket and Drown - Keep Children Away From Buckets With Even a Small Amount of Liquid."<sup>58</sup> The required label would also include a picture of a child reaching into a bucket with an encircled slash.<sup>59</sup> The provision further mandates that the Commission review the size of the label sixty days after enactment and the entire labeling standard one year after enactment.<sup>60</sup> Finally, under the bill, the Commission must consider a safety performance test or other standard for buckets.<sup>61</sup>

Public health and safety groups supported the Bilirakis amendment. The National Safe Kids Campaign described the amendment as "an important first-step toward reducing the number of infants who drown each year in five-gallon buckets . . ."<sup>62</sup> The Cook County, Illinois Medical Examiner's Office urged "that a warning system be put in place as soon as possible and then let the Consumer Product Safety Commission monitor the success of that system."<sup>63</sup> Manufacturers also supported the amendment.<sup>64</sup>

### C. Bicycle Helmets

Public safety experts emphasize the importance of wearing bicycle helmets. As Commission Chairman Jones-Smith pointed out:

Each year approximately 1,200 cyclists are killed, and more than half a million bicycle-related injuries are treated in hospital emergency rooms. Most of the deaths, some 70%, are due to head trauma and about 30% of the injuries are to the head or face.<sup>65</sup>

There are currently two major voluntary standards that apply to the safety of bicycle helmets: the American Na-

tional Standards Institute ("ANSI") bicycle helmet standard Z90.4-1984 and the Snell Memorial Foundation Standard for protective headgear used in bicycling (B-90).<sup>66</sup> In addition, a third voluntary standard is being developed by the American Society For Testing and Materials ("ASTM").<sup>67</sup> While compliance with these voluntary standards is considered high, there is no legal requirement that helmets comply with either one of the standards.

These standards also have been criticized for not addressing some important issues. For example, as the May 1990 issue of *Consumer Reports* pointed out, no standard currently measures resistance to roll-off, a helmet's ability to stay on the head in a crash.<sup>68</sup> This aspect is not currently addressed in any voluntary standard.<sup>69</sup> It is expected, however, that the ASTM standard under development will deal with this issue. In addition, the House Energy and Commerce Committee Report on the Child & Product Safety Act notes, "neither standard includes specific requirements for children's helmets. However, children under age fifteen represent about two-thirds of the bicycle-related injuries and one-third of the bicycle-related deaths."<sup>70</sup>

Based on these concerns, a coalition of thirty-five medical, safety, and bicycle groups, led by the National Safe Kids Campaign and Consumer Federation of America, petitioned the Commission to establish a mandatory bicycle helmet standard.<sup>71</sup> However, in July 1991, the Commission voted two to one to deny the petition stating that the current standards were adequate.<sup>72</sup>

In response, the Child & Product Safety Act requires all bicycle helmets manufactured after sixty days from the time that the bill is enacted to conform to either the ANSI or Snell standard, or such other standard as the Commission determines is appropriate. The bill further directs the Commission to conduct a rulemaking proceeding to develop a mandatory standard, harmonizing the requirements of the existing voluntary standards and including in

the mandatory standard provisions to address roll-off resistance and the risk of injury to children.<sup>73</sup>

### III. CONCLUSION

In passing the Child & Product Safety Act, the House has sent a clear message to the Commission that it must address safety issues concerning products which present hazards to children. Unfortunately, the Senate failed to act on this legislation before Congress adjourned on October 9, 1992.<sup>74</sup> It is inexcusable that an agency entrusted with the responsibility of protecting our children from dangerous toys has ignored its mandate. ♦

### ENDNOTES

- <sup>1</sup> See Anne C. Stewart, *Head Start: Funding, Eligibility, and Participation 2-3* (July 22, 1992) (Congressional Research Service, Library of Congress). The report notes, "Head Start has generally enjoyed funding increases, even during periods of reductions in other Federal social service programs." *Id.* at 2. See also Jean Yavis Jones, *The WIC Program: Eligibility, Coverage, and Funding 11* (Jan. 10, 1992) (Congressional Research Service, Library of Congress).
- <sup>2</sup> H.R. REP. NO. 649, 102d Cong., 2d Sess. 11 (1992).
- <sup>3</sup> Memorandum from Marilyn L. Wind, Ph.D., Project Manager for Choking Hazards, Directorate for Health Sciences, CPSC, to the Commission 3 (Dec. 30, 1991) (on file with author).
- <sup>4</sup> Consumer Product Safety Commission 1993 Budget Request 4 (January 1992). Product accidents cost society in a variety of ways: increased health care costs, days lost from work, and product liability related costs such as settlements, judgments, and litigation costs.
- <sup>5</sup> Furthermore, since 1980, full time staff equivalents of the CPSC have declined from 978 to 515. H.R. REP. NO. 649, *supra* note 2, at 14. Funding for CPSC declined from \$42.14 million in fiscal year 1981 to \$37.109 million in fiscal year 1991. *Id.* at 16.
- <sup>6</sup> 138 CONG. REC. H8264-73 (daily ed. Sept. 10, 1992). Unfortunately, the Senate failed to act on the legislation before Congressional adjournment on October 9, 1992, so the bill died for this year.

- <sup>7</sup> On a periodic basis, the legislative committees of the Congress review the operations of Federal Agencies under their jurisdiction to assess how agencies are carrying out their legislative mandates, the review the need for legislative changes, and to determine what the authorized level of funding should be. This process is called "reauthorization."
- A reauthorization bill will establish an authorized level of funding for an agency for particular fiscal years and may also make legislative changes in an agency's governing statutes. The actual funding level for an agency, however, is determined on an annual basis by the Appropriations Committees, through appropriations bills. As a practical matter, the authorized level of funding for an agency in a reauthorization bill serves as a ceiling on what can be appropriated for that agency in an appropriations bill.
- <sup>8</sup> See generally H.R. 4706, 102d Cong., 2d Sess. (1992).
- <sup>9</sup> *Id.* at §§ 201 (toys) and 303 (five gallon buckets and bicycle helmets).
- <sup>10</sup> See *supra* notes 2-3.
- <sup>11</sup> 15 U.S.C. §§ 2051-83 (1988).
- <sup>12</sup> 15 U.S.C. § 2051(b) (1988).
- <sup>13</sup> 15 U.S.C. §§ 1261-77 (1988).
- <sup>14</sup> 15 U.S.C. §§ 1191-1204 (1988).
- <sup>15</sup> 15 U.S.C. §§ 1471-76 (1988).
- <sup>16</sup> 15 U.S.C. §§ 1211-14 (1988). 15 U.S.C. § 2079 (1988) provides for the CPSC to administer these statutes, which previously were administered by other agencies.
- <sup>17</sup> See Act of Nov. 5, 1988, Pub. L. No. 100-613, 1988 U.S.C.C.A.N. (102 Stat.) 3183 (providing that the CPSC amend its regulations regarding lawn darts). See also 134 CONG. REC. H10,651 (daily ed. Oct. 20, 1988) (statement of Rep. Florio) ("This legislation will require the Consumer Product Safety Commission to ban dangerous lawn darts. According to the CPSC, there have been about 6,700 lawn dart related injuries over the last 10 years and at least 3 deaths between 1970 and 1987.")
- <sup>18</sup> See Act of Nov. 18, 1988, 4568 Pub. L. No. 100-695, 1988 U.S.C.C.A.N. (102 Stat.) 4568 (amending the FHSA to require the labeling of chronically hazardous art materials). See also 134 CONG. REC. H10,109 (daily ed. Oct. 12, 1988) (statement of Rep. Dwyer) ("Unknown to many consumers, some art and craft materials contain ingredients known to cause chronic or long-term illnesses.")
- <sup>19</sup> See Lead Contamination Control Act of 1988, Pub. L. No. 100-572, 1988 U.S.C.C.A.N. (102 Stat.) 2884. See also 134 CONG. REC. H9,647 (daily ed. Oct. 5, 1988) (statement of Rep. Waxman) ("H.R. 4939 mandates that the Consumer Product Safety Commission initiate a recall of water coolers with lead or lead-lined tanks. EPA has found that such water coolers can have lead contamination levels some 400 times the level of the proposed standard.")
- <sup>20</sup> See Consumer Product Safety Improvement Act of 1990, Pub. L. No. 101-608, § 203, 1988 U.S.C.C.A.N. (104 Stat.) 3110. See also 136 CONG. REC. H11,910-11 (daily ed. Oct. 23, 1990) (statement of Rep. Sikorski) ("According to the Consumer Product Safety Commission, at least 68 kids have died, 26,959 have been injured since 1973 - from garage door openers that come down and don't reverse.")
- <sup>21</sup> Letter from the Honorable Jacqueline Jones-Smith, Chairman, CPSC, to the Honorable Cardiss Collins, Chairwoman, Subcomm. on Commerce, Consumer Protection, and Competitiveness, U.S. House of Representatives 2 (April 1, 1992) (on file with author).
- <sup>22</sup> See CPSC Hazardous Substances And Articles; Administration And Enforcement Regulations, 16 C.F.R. § 1500.18(a)(9) (1992); CPSC Method for Identifying Toys And Other Articles Intended for Use by Children Under 3 Years of Age Which Present Choking, Aspiration, or Ingestion Hazards Because of Small Parts, 16 C.F.R. § 1501 (1992). Section 1501.3 exempts certain articles from the ban, such as balloons, books, writing materials, and children's clothing. See 16 C.F.R. § 1501.3(a)-(d). Rattles and pacifiers are also exempt, because they are covered by separate standards. See 16 C.F.R. § 1501.3(i)-(j).
- <sup>23</sup> A small part is defined as a part which can fit into a hollow small parts testing cylinder having an interior diameter of 1.25 inches, a minimum interior depth of 1 inch, and a maximum interior depth of 2.25 inches. See 16 C.F.R. § 1501.4. If a toy or its parts fit into the testing cylinder, they are too small and cannot be marketed for children under three years of age. 16 C.F.R. § 1500.18(a)(9).
- <sup>24</sup> 16 C.F.R. § 1501.2(c).
- <sup>25</sup> In determining whether a toy is intended for use by a child under three, the CPSC will consider the reasonableness of a manufacturer's stated intent on a label, the advertising and marketing of the toy, and whether the toy is "commonly recognized as being intended for children under 3." 16 C.F.R. § 1501.2(b).
- <sup>26</sup> See discussion of ASTM Toy Safety Standard 963-91 in Wind memorandum, *supra* note 3, at 9-10.
- <sup>27</sup> Jean A. Langlois, et al., *The Impact of Specific Toy Warning Labels*, 265 JAMA 2848, 2849 (1991).
- <sup>28</sup> *Id.* at 2850.
- <sup>29</sup> *Id.* at 2849.
- <sup>30</sup> *Id.* at 2850.
- <sup>31</sup> See 53 Fed. Reg. 20,865, 20,867 (1988).
- <sup>32</sup> See 55 Fed. Reg. 26,076-77 (1990) (withdrawal of rulemaking notice published June 7, 1988).
- <sup>33</sup> See *id.* at 26,077 (noting that the CPSC had initiated "proposed rulemaking to begin proceedings which may result in the development of mandatory labeling and other requirements for . . . specific categories of toys and children's articles").
- <sup>34</sup> *Id.* at 26,083 (footnotes omitted).
- <sup>35</sup> See *id.* at 26,077-86.
- <sup>36</sup> H.R. 3809, 102d Cong., 1st Sess. (1991).
- <sup>37</sup> *Id.*
- <sup>38</sup> Wind memorandum, *supra* note 3, at 3.
- <sup>39</sup> See *id.* at 22-23. In particular, the staff proposed the Commission issue four notices of proposed rulemaking. These would require labels on: (1) balloon packages and bins or containers from which individual balloons are sold; (2) packages of balls or games containing accessible balls less than 1.68 inches in diameter which are intended for children three and over and on bins and containers from which small balls are sold; (3) packages, bins, or containers of toys that contain small parts and are intended for children ages three and four; and (4) on packages of marbles or bins or other containers from which individual marbles are sold. *Id.* The staff also recommended that the CPSC establish a minimum diameter of 1.68 inches for all balls intended for children under the age of three. *Id.* at 22-23.
- <sup>40</sup> *Id.* at 23. As noted above, the CPSC had earlier considered enlarging the size of the small parts test cylinder, but rejected a change because it considered the existing cylinder effective. See 55 Fed. Reg. 26,076-77, *supra* note 31, and accompanying text. At the time, the CPSC also noted that such a change could "impose widespread cost" on the toy industry. *Id.* at 26,077.
- <sup>41</sup> *Consumer Product Safety Commission Reauthorization: Hearing on H.R. 3809 Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the House Comm. on Energy and Commerce*, 102d Cong., 2d Sess. 18 (1992). In response to a question about the CPSC's views on H.R. 3809, CPSC Chairman Jones-Smith argued "the Toy Injury Reduction Act currently parallels the deliberations that the Commission is now engaged in with regard to its current rulemaking. And for those reasons, we feel that it would be inappropriate at this time to discuss the specifics of this bill." *Id.* However, it is important to emphasize that the CPSC's deliberations involved a

rulemaking proceeding and not an adjudication. Therefore the CPSC could have responded appropriately, at least in general terms, by discussing the policy considerations involved.

<sup>42</sup> See U.S. Consumer Product Safety Commission, Minutes of Commission Meeting (March 18, 1992) (on file with author).

<sup>43</sup> See Statements of Chairman Jacqueline Jones-Smith, Commissioner Carol G. Dawson, and Commissioner Mary Sheila Gall at a meeting of the CPSC (March 18, 1992) (on file with author). The Commissioners expressed concern that it would be difficult to make the findings required under the governing statute (the Substances Act) without such proof. See Statements of Commissioners Dawson and Gall, *supra*. Ironically, Chairman Jones-Smith, a supporter of the balloon labeling rulemaking, emphasized the Commission's discretion in this area. As she noted, "[t]here need not be statistical certainty as to the impact of the rule; merely that it has the 'potential' of mitigating the hazard." Statement of Chairman Jones-Smith, *supra*, at 3. She went on to note that "[t]he law instructs us that the Commission need not 'cite empirical data in support of its finding that the particular requirement [is] likely to reduce the risk of injury' and, further that 'it may exercise considerable discretion in determining an appropriate remedy.'" *Id.*

Although the CPSC, in keeping with the anti-regulatory philosophy of the Bush Administration, has been overly conservative in interpreting its authority, this article is not intended to be an analysis of the relevant case law. But the potential difficulty of making the requisite findings under current law is all the more reason for supporting a legislated solution, particularly when two of the three Commissioners recognized merit in informative labeling, the goal of the legislation. See *id.* at 6; Statement of Commissioner Dawson, *supra*, at 9.

<sup>44</sup> H.R. 4706, *supra* note 7, § 201.

<sup>45</sup> H.R. REP. No. 649, *supra* note 2, at 13.

<sup>46</sup> Memorandum from Robert P. Hartwig to George W. Rutherford Jr., Project Manager, Hazard Assessment, CPSC, 1 (November 25, 1991) (attaching a report entitled "Updated Analysis of Infant Bucket Drownings") (on file with author).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 2.

<sup>49</sup> *Id.* at 4.

<sup>50</sup> The Honorable Jacqueline Jones-Smith, Chairman, CPSC, Remarks at the News Conference on Bucket Drownings, National Press Club, Washington, D.C. 2 (August 23, 1990) (on file with author).

<sup>51</sup> Memorandum from Terry Van Houten to

George Rutherford, Project Manager, CPSC, 2 (January 27, 1992) (on file with author).

<sup>52</sup> See Remarks of CPSC Chairman Jones-Smith, *supra* note 49, at 1, 4.

<sup>53</sup> N. Clay Mann, et al., *Bucket-Related Drownings in the United States, 1984 through 1990*, 89 PEDIATRICS 1068, 1070-71 (1992).

<sup>54</sup> H.R. REP. No. 649, *supra* note 2, at 14.

<sup>55</sup> It should be noted, however, that there may be some question about the Commission's jurisdiction, absent legislation, to require labeling of all five gallon buckets. As noted above, these buckets typically are found in an industrial or commercial environment. An argument could be made that buckets manufactured for industrial or commercial use are not "consumer products" as defined in the Safety Act. See 15 U.S.C. § 2052(a)(1), *supra* note 10. According to this argument, the CPSC would lack the jurisdiction to regulate some of these buckets. However, the version of H.R. 4706 which passed in the House clarifies the Commission's jurisdiction to regulate these buckets, notwithstanding § 2052(a)(1) of the Safety Act. See H.R. 4706, *supra* note 7, § 303(a).

<sup>56</sup> See *id.* (as introduced on March 31, 1992).

<sup>57</sup> See 138 CONG. REC., *supra* note 6, at 8269-70 (amendment offered by Rep. Bilirakis).

<sup>58</sup> *Id.* at 8,269.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Letter from Herta B. Feely, Executive Director, National Safe Kids Campaign, to The Honorable Cardiss Collins, Chairwoman, Subcomm. on Commerce, Consumer Protection, and Competitiveness, U.S. House of Representatives (Sept. 8, 1992) (on file with author).

<sup>63</sup> Letter from Roy J. Dames, Executive Director, Office of the Medical Examiner, Cook County, Illinois, to The Honorable Cardiss Collins, Chairwoman, Subcomm. on Commerce, Consumer Protection, and Competitiveness, U.S. House of Representatives (June 23, 1992) (on file with author).

<sup>64</sup> See 138 CONG. REC. H8,270 (daily ed. Sept. 10, 1992) (statement of Rep. Bilirakis) ("... I have worked with both industry and consumer groups... in an effort to reach a consensus, and this amendment indeed, I think, achieves that goal").

It should be noted, though, that several consumer groups had a different view of the amendment, on the ground it did not go far enough and would have a preemptive effect on state law. See letter from Consumers Union, Consumer Federation

of America, U.S. Public Interest Research Group, and Public Citizen, to the Honorable Cardiss Collins, Chairwoman, Subcomm. on Commerce, Consumer Protection, and Competitiveness, U.S. House of Representatives (Sept. 8, 1992) (on file with author). This had no impact on the floor debate, however, as no member of the House expressed opposition to the amendment.

<sup>65</sup> Statement of The Honorable Jacqueline Jones-Smith, Chairman, CPSC, on the Bicycle Helmet Petition 1 (July 31, 1991) (on file with author).

<sup>66</sup> H.R. REP. No. 649, *supra* note 2, at 14. The two existing standards use tests of impact protection and strap system strength. The impact test is intended to determine a helmet's ability to absorb impact forces. The strap test is intended to determine whether a helmet's strap system will remain intact in a collision. *Id.*; *Bike Helmets: Unused Lifesavers*, CONSUMER REPORTS, May, 1990, at 348, 349. The Snell tests are considered more stringent and the Snell Foundation, unlike ANSI, actually tests helmet samples for compliance. *Id.* at 349.

<sup>67</sup> H.R. REP. No. 649, *supra* note 2, at 14.

<sup>68</sup> *Bike Helmets: Unused Lifesavers*, *supra* note 65, at 350.

<sup>69</sup> H.R. REP. No. 649, *supra* note 2, at 14.

<sup>70</sup> *Id.*

<sup>71</sup> See Dan Beyers, *Safety Panel Will Not Set Bicycle Helmet Standard*, WASHINGTON POST, August 1, 1991, at A20.

<sup>72</sup> See Statement of CPSC Chairman Jones-Smith, *supra* note 64; Opinion of CPSC Commissioner Carol G. Dawson Regarding Petition CP90-1: Bicycle Helmets (July 31, 1991) (on file with author); Statement of CPSC Commissioner Anne Graham on the Bicycle Helmet Petition CP90-1 (July 31, 1991) (on file with author). See also Beyers, *supra* note 70.

<sup>73</sup> H.R. 4706, *supra* note 7, § 303.

<sup>74</sup> At the end of the session, the Senate passed two bills relating to bicycle helmets. On September 25, the Senate passed, in amended form, S. 3096, 102d Cong., 2d Sess. (1992), and on October 8, the Senate passed, in amended form, S. 2952, 102d Cong., 2d Sess. (1992). Both bills, as amended, contain a provision similar to that contained in H.R. 4706 which requires the Commission to develop a mandatory standard for bicycle helmets. Both bills also established a grant program at the National Highway Traffic Safety Administration for state and local programs to promote the use of bicycle helmets by children. The House was unable to act on either bill prior to its adjournment on October 9, 1992.