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The Consumer Product Safety Act: Bold New Approaches to Regulatory Theory

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The Consumer Product Safety Act: Bold New Approaches to Regulatory Theory

Accidents, many of them involving hazardous products, take the lives of 100,000 Americans each year and injure 52 million more. Concern has been expressed that the consumer cannot adequately protect himself from dangerous products. Twenty-one years ago, in his dissenting opinion in *Dalehite v. United States*, a case under the Federal Tort Claims Act, Mr. Justice Jackson said:

This is a day of synthetic living, when to an ever-increasing extent our population is dependent upon mass producers for its food and drink, its cures and complexions, its apparel and gadgets. These no longer are natural or simple products but complex ones whose composition and qualities are often secret. Such a dependent society must exact greater care than in more simple days and must require from manufacturers or producers increased integrity and caution as the only protection of its safety and well-being. Purchasers cannot try out drugs to determine whether they kill or cure. Consumers cannot test the youngster's cowboy suit or the wife's sweater to see if they are apt to burst into fatal flames. Carriers, by land or by sea, cannot experiment with the combustibility of goods in transit. Where experiment or research is necessary to determine the presence or the degree of danger, the product must not be tried out on the public, nor must the public be expected to possess the facilities or the technical knowledge to learn for itself of inherent but latent dangers.

Private testing groups such as Underwriters' Laboratories, Good Housekeeping Guarantee Seal, Consumers Union, and United States of American Standards Institute ostensibly exist to test product safety. Yet the effectiveness of these groups is hindered by their functioning

3. *Id.* at 51-52.
as agents of industry. This precludes the private testing groups from meaningfully monitoring the safety of products and policing industry.

The characteristics of Underwriters' Laboratories are typical of the other private testing groups. Underwriters' Laboratories each year tests 20,000 new products, retests 150,000 products, and distributes 1.1 billion seals which attach to 800,000 different products. While the Underwriters' Laboratories seal enjoys public approval, this is the only true sanction that Underwriters' Laboratories is able to employ. As the President of Underwriters' Laboratories admitted on a taped television special, its contract with the companies makes it a private tester without the power to disclose test results to the public. A vivid example of the results of such an arrangement is the use of polyerthane as uncovered building insulation. When tested by Underwriters' Laboratories using the Bunsen burner test and with the polyerthane in a horizontal position, the polyerthane was self-extinguishing. Not until much later did Underwriters' Laboratories perform the test with the polyerthane in a vertical position. Placed vertically, as it is applied in building construction, the polyerthane burns fiercely.

As early as 1969 Underwriters' Laboratories warned the plastics industry of the fire hazards of polyerthane. However, Underwriters' Laboratories did not make a public disclosure nor disclose its findings to the government. The plastics industry continued until this year to advertise polyerthane as fire retardant and self-extinguishing even after home fires took the lives of occupants trapped inside by the smoke and fumes of the burning polyerthane.

Monitoring the safety of products requires the ability to evaluate the degree of safety. Underwriters' Laboratories suffers, as do the other private testing groups, from the disadvantage of not grading the degree of safety of a product. Products either pass or fail. There is no mechanism to tell the consumer by how much a product passed or how miserably a product failed the test.

Further increasing the ineffectiveness of private testing groups is the

5. ABC Special Closeup Fire aired Monday, November 26, 1973 [hereinafter cited as Fire].
6. In this test a Bunsen burner is placed in close proximity to the material to be tested and is ignited. The material is watched to see if it burns and, if so, how rapidly it burns.
7. Fire, supra note 5.
8. Id.
9. Dickerson, supra note 4, at 282.
massive power which has passed into corporate hands. James S. Turner, Consultant to the Center for Study of Responsive Law, writes:

First, massive economic power has passed into the control of major corporations which are routinely exercising \textit{de facto} government power. Second, scientific and technological expertise has been harnessed to this corporate power in a way that makes the ability to predict hazards lag behind the ability to create new products. Third, the combination of these two factors has led to the development of a major technological tragedy which is threatening the quality of human life, if not life itself.\textsuperscript{10}

With the move of enormous power to the private corporate sector and with the responsibility for the use of that power undefined, forces are released which victimize individuals as routinely as they advance corporate power. Central to the task of creating safe products are the problems of dealing with corporate forces and defining corporate responsibility. Technology and science have been harnessed to the needs of corporations rather than to the needs of individuals.\textsuperscript{11}

The Consumer Product Safety Act passed by Congress on October 27, 1972, is an attempt to fill the gap between corporate power and the unprotected consumer. This piece of legislation did not come into existence free of opposition. Pressure from interest groups almost kept the bill from emerging out of committee. Some of the conferees staged a "talkathon" with only days left before the adjournment of the Ninety-Second Congress, which seemed to spell disaster. The Nixon Administration was determinedly opposed to an independent Consumer Product Safety Commission and preferred placing the responsibilities for the Act's enforcement into the Department of Health, Education and Welfare. However, a bipartisan congressional determination that an independent regulatory commission was necessary saved the bill from being killed.\textsuperscript{12}

In finally passing the Consumer Product Safety Act, Congress found that:

(1) an unacceptable number of consumer products which present unreasonable risks of injury are distributed in commerce;

(2) complexities of consumer products and the diverse nature and abilities of consumers using them frequently result in an inability


\textsuperscript{11} Id. at 19.

of users to anticipate risks and to safeguard themselves adequately;

(3) the public should be protected against unreasonable risks of injury associated with consumer products;

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

(5) existing Federal authority to protect consumers from exposure to consumer products presenting unreasonable risks of injury is inadequate; and

(6) regulation of consumer products the distribution or use of which affects interstate or foreign commerce is necessary to carry out this Act.\textsuperscript{13}

This article will take an overview of the Act and then discuss the National Electronic Injury Surveillance System, the prerulemaking provisions, the rulemaking procedures, the enforcement provisions of the Act, and the new approaches to regulatory theory which this Act adopts.

PARAMETERS OF THE ACT

Congress declared the purposes of the Act to be: 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 for consumer products and to minimize conflicting State and local regulations; and to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries.\textsuperscript{14}

The Act defines a 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."\textsuperscript{15} However, the Act excludes from coverage tobacco and tobacco products, motor vehicles and equipment, firearms, aircraft, boats, drugs, devices or cosmetics, food, and economic poisons as defined by the Federal Insecticide, Fungicide, and Rodenticide Act.\textsuperscript{16}

\begin{itemize}
  \item \textsuperscript{15} § 3(a)(1). The Administration's definition only dealt with sales to a consumer, which would have excluded from coverage such things as synthetic turf, architectural glass and electrical house wiring. Remarks by Michael R. Lemov on November 27, 1972, Handbook, supra note 12, at 9, 12.
  \item \textsuperscript{16} Consumer Product Safety Act § 3(a)(1)(B)-(I), 15 U.S.C.A. § 2052(a)(1)
\end{itemize}
The functions of HEW under the Federal Hazardous Substances Act and the Poison Prevention Act of 1970 and the Federal Trade Commission functions under the Flammable Fabrics Act are transferred to the Commission.\textsuperscript{17} Section 31 provides that the Commission has no authority to regulate any risk if such risk could be eliminated or reduced to a sufficient extent by actions taken under the Occupational Safety and Health Act of 1970, the Atomic Energy Act of 1954, or the Clean Air Act. Nor does the Commission have authority to regulate any risk associated with electronic product radiation emitted from an electronic product if it is subject to regulation under the appropriate provisions of the Public Health Service Act. Requiring the Commission to operate under several different procedural schemes presents unnecessary problems of product classification and necessitates shifting from one procedural system to another.

\textbf{NEISS}

Section 5(a)(1) requires that the Commission maintain an Injury Information Clearinghouse to collect, investigate, analyze and disseminate injury data and information. The National Electronic Injury Surveillance System (NEISS—pronounced “nice”) daily collects and tabulates injury information gathered from one hundred nineteen hospitals across the nation. These hospitals represent a cross section of geographic areas and emergency room use.\textsuperscript{18}

NEISS became operational on July 1, 1972, under the authority of the Food and Drug Administration’s former Bureau of Product Safety. The system was transferred to the CPS Commission on May 14, 1973.\textsuperscript{19}

The NEISS data reporting system begins when an individual enters a hospital emergency room connected with NEISS. A hospital staff member identifies all cases connected with consumer products and translates those cases into numerical codes, identifying age, sex, affected body part, treatment given, disposition of the case, and what consumer product was involved.\textsuperscript{20} This information is rated and weighted for frequency, severity, and age of victim.\textsuperscript{21} The data collected at the


\textsuperscript{18} Consumer Product Hazard Index, CPSC News Briefing, Item 5 (Sept. 28, 1973) [hereinafter cited as Item 5].

\textsuperscript{19} Consumer Product Hazard Index, CPSC News Briefing, Item 1 (Sept. 28, 1973) [hereinafter cited as Item 1].

\textsuperscript{20} Item 5, supra note 18, at 1.

\textsuperscript{21} Item 1, supra note 19, at 2-4. By design, children under ten are counted...
hospital emergency rooms is transmitted by computer to Washington, D.C. where it is reviewed by the Commission staff.  

The coded data tells only that a product was associated with an injury; it does not tell how or why. Investigatory data from selected cases is obtained to show how the product was involved and the series of events which resulted in injury, and is used to determine how to begin corrective action. The surveillance data is used to assist in developing the product hazard index.  

Reports submitted through NEISS include only those injuries receiving emergency room treatment, which are estimated to be only thirty-eight per cent of all product-related injuries. Not currently reported are those injuries treated in doctors' offices (41%), at home (18%), and by direct hospital admissions (3%). The Commission may in the future add data from death certificates and doctors' office visits as a means to improve the sources of injury information.  

The Commission would also like to extend NEISS to include the following information about products on the hazard index: number of products in use, frequency of product use, medical costs of recuperation, cost of lost man-hours of work and recreation, cost of trauma and mental anguish, additional cost of a product due to meeting a safety standard or regulation, probabilities of whether a standard will successfully eliminate a hazard, and extent of loss of consumer choice when products for which risks are voluntarily assumed by users are eliminated.  

Another problem centers around the confidentiality of the patient's name on which an investigative report is done. Confidentiality may prompt people to cooperate with the in-depth investigations to help prevent similar accidents from happening to others. However, this may prove a hindrance to plaintiffs' attorneys using the information gathered by the Clearinghouse and to the Commission itself. Edwin Weid-
A review of the public disclosure sections of the Consumer Product Safety Act leads to the conclusion that the Consumer Product Safety Commission will have little difficulty in finding statutory authority to limit the information available to the plaintiffs' Bar to innocuous statistical data and technical information disconnected from real people, real products, and human events. However, the purpose of the Act is not to help plaintiffs prove their cases, but to promulgate safety standards. Even so, it was not the intent of Congress that the dissemination of information be so limited.

The confidentiality requirement is potentially troublesome to the Commission itself. The Act provides that standards may be developed if the Commission finds that they are "reasonably necessary to prevent or reduce an unreasonable risk of injury associated with such product." The injury data gathered by NEISS is of the "associated with a product" type and thus will suffice to justify proceedings to develop standards. But before the Commission can issue a standard it must find "that the rule is reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with such product." In a court challenge, the issue would become whether there is a sufficient causal link between the elements of the product modified by the standard and the injuries associated with the product. The Commission might have a difficult time proving causation with confidential evidence that cannot be checked for credibility. The solution to this problem may lie in securing as many waivers from patients as possible to allow release of statistically viable data.

PRERULEMAKING PROVISIONS—SECTIONS 7 AND 8

Sections 7 and 8 set prerulemaking requirements for product standards and bans respectively. The proceedings under section 7 are commenced by publication in the Federal Register of a notice which identi-
fies the product and the risk associated with the product, states that a safety standard is necessary, includes information on any existing standards, and invites any person to submit an existing standard as a safety standard or to offer to develop the proposed standard.36

The Commission is then directed to accept one or more offers if the offeror is technically competent, will likely develop an appropriate standard, and will comply with the Commission regulations.37 "Technically competent" and "likely develop an appropriate standard" are terms that will require further definition or interpretation by the Commission and courts. Section 7(d)(3) requires the Commission to set regulations whereby the offeror supports its recommendations with test data and other documents; provides for notice and opportunity for interested persons to participate in the development process; maintains records, available to the public, disclosing the course of development, any comments submitted by any person, and any other relevant matter; and opens its pertinent books for audit and examination.

Sections 7(a)(1) and (2) actually provide for the promulgation of three different types of product standards. Quality standards specify a particular design or kind of material to be used, e.g., building or electrical codes. Performance standards prescribe the manner in which the product must perform, thus leaving to each manufacturer the method to be used to comply, e.g., standards regarding burning characteristics of children's sleepwear. Identity standards require a manufacturer to place certain warnings and/or instructions on his products,38 e.g., baby cribs must be tagged for two years with a label stating that the crib meets applicable CPSC regulations.39

Section 7(e)(2)(B) prohibits the Commission from developing a proposed standard once an offer to develop has been accepted unless the Commission determines that no offeror is making satisfactory progress in developing such a standard. This prohibition on Commission standard development should not, however, be equated with a prohibition against acquiring the technical capabilities necessary to evaluate properly the standards recommended to the Commission.40

Some of the inadequacies of private testing groups are met by sec-

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38. Dickerson, supra note 4, at 279.
tions 7(d) and (e). The Commission is authorized to accept one or more offers to develop a proposed safety standard and, in its discretion, may contribute to the offeror's cost.\textsuperscript{41} The Commission also is to prescribe regulations governing the development process and maintenance of records. To the extent that these procedures place a buffer between the manufacturers and the laboratories doing the testing, the agency functions to prevent industry from dominating the testing laboratories. However, section 7(e)(2) may defeat these benefits. It provides that "in any case in which the sole offeror whose offer is accepted. . . is the manufacturer, distributor, or retailer of a consumer product proposed to be regulated by the consumer product safety standard, the Commission may independently proceed to develop proposals for such standard during the development period" (emphasis added). This savings clause could be defeated should a trade association or combination of manufacturers, distributors or retailers make the offer which is accepted since "manufacturer," "distributor," and "retailer" are defined terms which do not include such combinations.\textsuperscript{42}

The real issue is: What is the purpose of section 7(e)(2); was it meant to protect consumers from businessmen, or to protect businessmen from their competitors? Both versions find support in the legislative history. The House bill would have barred the Commission from developing a proposal once it had accepted a private offer.\textsuperscript{43} The Senate bill contained the Nelson amendment which precluded a manufacturer, developer or retailer (or employee of such) of a consumer product from offering to develop a standard with respect to that product.\textsuperscript{44}

The conference bill compromised by allowing industry to develop standards but allowing the Commission to proceed on its own when industry does so. One might conclude that this was a limited response to the problem of lax, self-serving industry-developed standards. In this case, section 7(e)(2) should apply to an offer from a group or association of self-interested persons no less than to an offer from a single manufacturer, distributor or retailer with an economic stake in

\textsuperscript{41} Offerors are expected to contribute at least five per cent of the project cost. However, the Commission could decide to bear the entire cost if the offeror has no source of non-federal funds. CPSC Publishes Rules For Mandatory Safety Standard Development—Encourages Consumer Participation, CPSC News Release (Jan. 4, 1974).


\textsuperscript{43} H.R. 15003, 92d Cong., 2d Sess. § 7(e)(2) (1972).

\textsuperscript{44} S. 3419, 92d Cong., 1st Sess. § 303(e)(1)(C) (1972).
the outcome.45

Representative Broyhill, a House conferee, during floor debate, offered a different explanation for the conference compromise:

The conference version retains a very limited portion of the Nelson amendment providing that in the very limited situation wherein a manufacturer of a product is the one and only offeror in a bid to create a product standard, the Commission may concurrently investigate and develop a similar standard. Such a provision is justified in that the Commission should have independent knowledge of the subject matter where only one outfit is working up a standard which will apply to its product and similar products of possible competitors. In all other cases the Commission is foreclosed from duplicating the work of offerors to avoid unnecessary double expense.46

The exception to the prohibition of Commission standard development is never applicable when two or more offers are accepted, even though the accepted offers all come from interested companies. Thus both the danger of self-serving standards, which benefit the industry as a whole, and the danger that the standards might favor the particular developers over their competitors still remain.47 At least it is within the Commission's power to avoid these dangers, since there is no compulsion to accept more than one qualified offer.

Section 7(d)(2) allows the Commission to contribute to the cost of developing a proposed standard. Congress intended this provision to enable consumer organizations and other groups without economic resources to play a role in the development process.48 There are currently several consumer groups capable of expanding their staffs to take advantage of this opportunity.49

The contribution to cost provision may mitigate the loss felt when the consumer advocate proposal was eliminated from the original bill. Unless the Commission feels a commitment to contribute to offerors' costs or separate consumer-advocate agency legislation is passed,50 it is likely that the opportunities "offered by this legislation will (like most

47. Scalia and Goodman, supra note 45, at 914.
49. See discussion of private testing groups in the introduction of this article.
50. The issue is not yet closed, since legislation to establish a federal consumer advocate to appear before other agencies is now pending in both Houses of Congress. See S. 707, S. 1160, H.R. 14, H.R. 21, H.R. 564, H.R. 762, 93d Cong., 1st Sess. (1973).
procedural opportunities) be grasped principally by those groups that are sufficiently cohesive and have enough at stake to warrant the legal costs—in a word, by commercial rather than consumer interests.”\(^{51}\)

A major issue of procedural policy that the Commission must face is the importance it wishes to assign the section 7 prerulemaking process. The Commission may choose to rely upon the selection of an appropriate developer and upon specification of regulations under section 7(d)(3) to assure proposals which could ordinarily be adopted without considerable agency work. Or the Commission may plan, instead, to devote its own resources to standard development and use section 7 to place useful outside suggestions before its staff.

Beyond the prerulemaking powers of section 7, the Commission may ban hazardous products under section 8 if it finds that a consumer product presents an unreasonable risk of injury and no feasible consumer product safety standard would adequately protect the public.\(^{52}\) Several practical differences between banning a product and promulgating a standard exist. The first difference is that a ban can kill an entire product industry, whereas a standard allows the industry to solve the problem through technological innovation. The second difference is that only a standard subjects manufacturers and private labelers to the certification, testing, and labeling requirements of the Act.\(^{53}\) “In some situations, then, businessmen might prefer a complete ban of a subproduct to a safety standard applicable to the broader product category.”\(^{54}\)

A third difference is that only a ban can be applied to products manufactured before its effective date. However, this difference is de minimis since under section 12 the Commission can in serious cases, without issuing a ban, seek a judicial declaration that previously manufactured products are imminent hazards. Also, under section 9(d)(2) the Commission may prohibit the stockpiling\(^{55}\) of any product to which a consumer product safety rule applies, so as to prevent its manufacturer from circumventing the purpose of the consumer product safety

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51. Scalia and Goodman, supra note 45, at 952.
52. The Commission may also reach the same result by completing the prerulemaking procedures of § 7. Scalia and Goodman, supra note 45, at 916.
54. Scalia and Goodman, supra note 45, at 917.
55. Stockpiling is defined as manufacturing or importing a product between the date of promulgation of such consumer product safety rule and its effective date, at a rate which is significantly greater than the rate at which such product was produced or imported during a base period ending before the date of promulgation of the consumer product safety rule. Consumer Product Safety Act § 9(d)(2), 15 U.S.C.A. § 2058(d)(2) (Supp. 1972).
rule. Finally, only a standard prevents states from adopting more stringent requirements. Section 26(a) prevents states from enacting or continuing in force any standard dealing with the same risk as the federal standard unless it is identical with the federal standard.

A question which arises is what criteria should be used to determine when a ban should be imposed and when a standard should be promulgated. One suggestion is to ban only those products within a generally recognized consumer goods category which are interchangeable for the same specific consumer use. For example, baby rattles with inedible contents would not be subject to a ban, but rather to a standard, i.e., all baby rattles must have edible contents, because the "product" is all baby rattles. That is, there is neither a generally accepted category of, nor a specific use for, rattles with poisonous contents.

RULEMAKING PROVISIONS—SECTION 9

The rulemaking process is set forth in section 9. Within sixty days after publishing a proposed standard, the Commission must either promulgate a standard, or rule that such a standard is not necessary. The product safety rule must identify the risk of injury that the rule is designed to eliminate or reduce. The more specifically the risk of injury is spelled out, the easier it will be to challenge, since the Commission must show causation. The more generally the risk is set forth in the rule, the more likely it is that it will preclude desirable state action, since the risk description controls the federal preemption provision of section 26(a).

Once a standard is passed it applies only to consumer goods manufactured after its effective date. The drafters of the Act anticipated that this might lead to stockpiling of the product before the effective date. To prevent this, section 9(d)(2) allows the Commission to prohibit such stockpiling. Basically, the Commission can forbid the manufacture or importation of the product concerned at a rate which is faster than before the standard was imminent. Unfortunately, stockpiling is allowed unless the Commission affirmatively acts to prohibit it.

57. Scalia and Goodman, supra note 45, at 920.
58. Id.
61. Scalia and Goodman, supra note 45, at 925.
62. Id. For discussion of the federal preemption provisions, see text accompanying note 56 supra.
Amendment or revocation of a standard, unless it involves an imma-
terital change, is to be handled under the same procedures used to pro-
mulgate a standard in the first instance and is subject to judicial review
under section 11 in the same manner as a standard.

**Enforcement Provisions**

Under section 12, consumer products which present an imminent
and unreasonable risk of death, serious illness or severe personal in-
jury may be seized by the Commission's filing an action in any United
States district court within the jurisdiction of which such consumer
product is found.⁶⁴

When a consumer product presents a substantial product hazard, the
Commission can, under section 15, order the manufacturer or any dis-
tributor or retailer of the product to do one or more of the following:
(1) give public notice of the defect or failure to comply; (2) mail
notice to each person who is a manufacturer, distributor or retailer
of such product; or (3) mail notice to every person to whom the per-
son required to give notice knows such product was delivered or
sold.⁶⁵ The Commission, if it finds it to be in the public interest,
may order the manufacturer or any distributor or retailer to take whichever of the following actions the person to whom the order is directed
elects: (1) bring the product into conformity with applicable stand-
ards or repair the defect of such product; (2) replace the product;
or (3) refund the purchase price.⁶⁶

A section 12 seizure has the advantage of speed, control of the judi-
cial proceeding, and broader scope of product coverage. Since a section
12 proceeding begins in the courts without a preliminary agency stage
before enforcement can be obtained, it expedites Commission ac-
don. A section 12 action does not require Justice Department approval
as does an action to enforce a section 15 order.⁶⁷ Since sections 15
and 22 can only be applied to products that are in violation of a rule
or, with respect to section 15, contain a "product defect," a product
which is neither banned nor in violation of a standard, but which is inherently unsafe rather than "defective," e.g., firecrackers, may be
reachable only through section 12.⁶⁸

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2076(b)(7) and 2061(f) (Supp. 1972).
⁶⁸. Scalia, *Imminent Hazards and Substantial Product Hazards*, HANDBOOK 51, 55
(1973).
Section 15, which provides for notification and repair, replacement or refund, has two advantages for the Commission. The first advantage is that the Commission makes the initial determination that a product presents a hazard, with only limited review in the courts. The second advantage is that the standard of "substantial product hazard" is easier to prove than is section 12's "imminent and unreasonable risk" standard.69

Prohibited acts are outlined in section 19. It is unlawful to (1) manufacture, sell, distribute or import any consumer product which does not meet applicable standards or which has been declared a banned hazardous product; (2) fail or refuse to allow access to or copying of records, make reports, or permit entry or inspection; (3) fail to furnish information regarding defective products or fail to comply with a notification or repair, replacement and refund order; (4) fail to furnish or furnish a false or misleading certificate specifying applicable safety standards and certifying compliance; and (5) fail to comply with any rule relating to stockpiling.

Formal sanctions against unlawful behavior are set forth in sections 20 through 25 of the Act. These include civil and criminal penalties, injunctive enforcement and seizure, suits for damages by persons injured, private enforcement, and continuation of common law rights and duties.

The civil penalties only apply to knowing70 violations. Each violation (each offensive consumer product constitutes a separate violation) is subject to a $2,000 penalty with a $500,000 maximum for any related series of violations.71 Each day of a continuing violation equals a separate offense. However, the Commission in determining the amount of the civil penalty will consider the size of the business and the gravity of the offense. While it may be desirable to allow the Commission to take these factors into consideration in order to afford the Commission flexibility, at the same time it dulls the real teeth of the civil penalties provision.

The criminal penalty section requires a knowing and willful violation

69. Id.
70. Knowing is defined as "knew" or "ought to have known." Consumer Product Safety Act § 20(c), 15 U.S.C.A. § 2069(c) (Supp. 1972).
71. Excepted from the "each product equals a separate violation" rule are those persons who violated § 19(a)(1) or (2) and who are not the manufacturers or private labelers or distributors of the products involved and who did not have either actual knowledge of the violation or notice from the Commission that such sale or distribution would be a violation. Consumer Product Safety Act § 20(a)(2), 15 U.S.C.A. § 2069 (a)(2) (Supp. 1972).
after having received notice of non-compliance from the Commission. This provision not only suffers because criminal intent will be difficult of proof in such cases, but this section shifts to the Commission the burden of informing the person or corporation of its violation. Thus, so long as violations remain clandestine and the Commission serves no notice, the violator faces no criminal penalties. This section provides for an individual director, officer or agent of a corporation to face criminal sanctions along with the corporation.

Injunctive enforcement and seizure is provided for by section 22. Either the Commission or the Attorney General may bring such an action in a United States district court for a district wherein the violation occurred or where the defendant is found or transacts business. Process may be served on a defendant in any other district in which the defendant resides or may be found. This section may prove to be the most effective in stopping violations and preventing harm to the consumer, since the real goal is to get the offensive products off the market. While an injunction may be of little deterrent value in keeping others from committing similar offenses, it at least removes from the market those products which are presently hazardous and in non-compliance.

Suits for damages by persons injured under the Act require a knowing and willful violation. This remedy is in addition to and not in lieu of any other remedies at common law or under federal or state law. In order to obtain jurisdiction in a federal court, the injury sustained must be $10,000 or more, but diversity of citizenship is not needed. In addition to damages the court may award suit costs, including a reasonable attorney's fee. This section may not be very significant because of the jurisdictional amount limitation. However, it does afford access to the federal courts which might not otherwise exist.

It has been argued that "as standards are adopted by the new Commission it may well prove to be extremely difficult to recover damages in those cases where the defendant can establish compliance with a standard adopted by the Consumer Product Safety Commission." Section 25 blunts this argument. Subsection (a) specifically states that: "Compliance with consumer product safety rules or other rules or

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75. Id.
76. Elking, Safety Act: For the Bar; Some Advantages, No Free Rider, 9 TRIAL (July/August 1973) 43.
orders under this Act shall not relieve any person from liability at com-
mon law or under State statutory law to any other person.” Evidence
of compliance is, however, admissible and, if experience with the Flam-
mable Fabrics Act is reliable, this will discourage personal injury suits.77
One would hope that the standards promulgated will be such that com-
pliance will drastically reduce the existence of injuries in the first place
and thus reduce the need for such suits.

Further, section 25(b) provides that the failure of the Commission
to act shall not be admissible in evidence in litigation at common law
or under state statutory law relating to the consumer product involved
in the litigation. The content of this section is unusual in that it states
a rule of evidence. Generally rules of evidence and procedure are gov-
erned by state law. It might, therefore, be possible for a state judge
to ignore section 25(b).

Several authors believe that the private suit is the most effective sanc-
tion. It has been pointed out that “[t]he deterrent power of a jury ver-
dict under our fault system is a priceless public benefit,”78 and that
“[f]aced with the possibility of high damage awards, heavy litigation
expenses, and extensive unfavorable publicity—in addition to possible
administrative action—the unscrupulous businessman may feel that a
shift to unobjectionable techniques would be more profitable.”79

Two other sections indirectly provide the Commission with sanc-
tions to be used against violators. Section 6 allows for public disclosure
of violations and section 15 allows the Commission to order manu-
facturers, distributors and retailers of substantially hazardous products
themselves to make public disclosure. Thus, the Commission has the
added tool of adverse publicity to force compliance.

NEW APPROACHES TO REGULATORY THEORY

The Consumer Product Safety Act incorporates five major innovative
ideas in regulatory theory: increased public participation; the use of
the private attorney general concept; independence from presidential
control; detailed judicial oversight; and the placing of affirmative duties
on industry.

77. Id.
Increased Public Participation

Several provisions of the Consumer Product Safety Act attempt to assure that the public will have an opportunity to influence the administrative process. It has been pointed out that:

The rulemaking process [of federal agencies in general] has frequently been criticized on the ground that the agency's real decision-making occurs in the formulation of the proposed rule, which is done without public participation, and the subsequent public proceeding to establish the final rule is often an empty show in which parties vainly try to reverse judgments already made.  

The section 7 prerulemaking process provides a means of avoiding agency precommitment to privately developed proposed rules, but precommitment is avoided only if the proposals are not intensively evaluated until the section 9 rulemaking stage. If the Commission does its major evaluation of proposed standards developed under section 7 before the rulemaking process of section 9 is substantially completed, then the pitfall of agency precommitment can hardly be avoided. On the other hand, some prior evaluation will be necessary to insure that the section 9 rulemaking procedures will not be wasted because they are addressed to a proposal substantially different from that which the Commission ultimately wishes to adopt.

The Commission must prescribe regulations governing the development of proposed standards by offerors under section 7(d)(3)(B) which will provide interested persons, including representatives of consumers and consumer organizations, with notice and opportunity to participate in the development of such standards. Thus the Act itself insures the public a chance to participate in the development process.

Further, section 9(a)(2) requires that the Commission give interested persons an opportunity for the oral presentation of data, views, or arguments as well as an opportunity to make written submissions. These presentations will of course only be effective if the agency is not already precommitted. Nevertheless, oral presentation should help consumers overcome the hindrances which arise from their lack of organization and funding.

In addition to giving the public broader participation rights in the administrative process, the Act affords the public broad access to agency information. Section 5(a)(1) says, "The Commission shall

80. Scalia and Goodman, supra note 45, at 909.
81. Id.
82. Id.
maintain an Injury Information Clearinghouse to collect, investigate, analyze, and disseminate injury data, and information, relating to the causes and prevention of death, injury and illness associated with consumer products" (emphasis added). In explaining this section, Senator Moss said, "I am hopeful that the new independent regulatory agency will take appropriate steps to assure the public access to consumer safety information so as to prevent injury and make consumer participation in agency proceedings meaningful."

Private Attorney General

Any interested person may, under section 24, bring a suit for private enforcement of a product safety rule or for enforcement of an order that notification of a substantial product hazard be given under section 15. This section thus allows a private citizen or organization to act in the role of the attorney general. The section, though, requires that notice be given not less than thirty days prior to commencement of such action to the Commission, to the Attorney General, and to the person against whom such action is directed. Section 24 also gives the plaintiff the opportunity to elect in his complaint to recover reasonable attorney's fees. If the plaintiff so elects, the court must award the costs of suit, including reasonable attorney's fees, to the prevailing party. The defendant is not afforded such an election. Since the plaintiff alone can make a demand for attorney's fees, whether the suit is brought for valid cause or merely for harassment, the plaintiff can make this section work to his advantage.

By not granting exclusive enforcement power to a governmental agency, the Act may stimulate consumer organizations to aid in protecting the public.84 On the other hand, section 24 contains the potential for consumer misuse of the private attorney general enforcement provision to harass an industry or company. Even more likely is the possibility that manufacturers or distributors will misuse section 24 to force their competitors out of business.85

Independence from Presidential Control

Several out-of-the-ordinary provisions insulate the agency from presidential control. The first such provision is section 4(a), which permits

83. Remarks by Senator Moss on October 14, 1972 in CONSUMER PRODUCT SAFETY ACT, LAW AND EXPLANATION, ¶ 142 (1972).
84. Private Remedies, supra note 79, at 418.
85. Scalia and Goodman, supra note 45, at 949.
the presidentially appointed chairman to serve in that capacity until the expiration of his term of office as commissioner. This provision is a departure from the practice in the other independent regulatory agencies, where the designee's tenure as chairman (though not as commissioner) is ordinarily at the pleasure of the President.

Another deviation is section 4(d), which reserves to the five Commission members the right to elect a vice-chairman annually. Normally for those agencies that have a statutory vice-chairman, it is provided that he also is appointed by the President.

The usual statutory grounds for removal of a commissioner from office by the President are inefficiency, neglect of duty, or malfeasance in office. However, the Consumer Product Safety Act permits removal only for neglect of duty or malfeasance in office, and for no other cause. Omission of "inefficiency" as cause is a concrete expression of the importance Congress attached to protecting the Commission's independence. This may not have an obvious effect since even under the broader standard no member of an independent regulatory commission has been removed by the President since 1935. Regardless of the removal standard, the White House may use the presidential position to gain resignations. Therefore, the stricter standard is likely to insulate the commissioners from presidential control, if at all, only in an opaque manner.

Another effort to insure the agency's independence is found in section 27(k)(2), which states: "No officer or agency of the United States shall have any authority to require the Commission to submit its legislative recommendations, or testimony, or comments on legislation . . . for approval, comments, or review." Further, section 27(k)(1) provides that whenever the agency submits any budget estimate or request to the President or the Office of Management and

86. Also noteworthy is § 4(c), which places restrictions on the commissioners as to political party affiliation, employment or ownership in concerns which are affected by the CPSA, and § 4(g)(2), which prohibits key agency employees from taking jobs in regulated industries for one year after employment with the Commission. The latter section speaks to the problem of agencies serving as corporate executive training grounds. Remarks of Congressman Bob Eckhardt, in Washington, D.C. on November 27, 1972 [hereinafter cited as Eckhardt], HANDBOOK 275, 282 (1973).


90. Scalia and Goodman, supra note 45, at 904.

Budget, it shall concurrently transmit a copy to Congress. These provisions will help the agency avoid the following problem faced by other agencies in the past:

Certain officials of the Administration have apparently attempted to control the decisions of federal agencies operating in the field of consumer protection and environmental quality through a process of preclearance of standards through the Office of Management and Budget. Certain federal agencies were required to submit an advance schedule showing estimated dates of all proposed and final regulations, standards, and guidelines, the name of the agency official responsible for the activity, and the proposed regulations, standards, and guidelines in advance of their announcement to the public.92

The Consumer Product Safety Commission is structured so as not to come within the ambit of such a requirement.

Detailed Judicial Oversight

The Consumer Product Safety Act, in section 11, allows for judicial review of any Commission rule, instigated by any person adversely affected or by any consumer or consumer organization. However, the petition must be filed in the appropriate United States court of appeals not later than sixty days after a consumer product safety rule is promulgated by the Commission. This time limitation could present obstacles to unorganized groups, which do not maintain close contact with the Commission's actions. When judicial review is sought, section 11(c) gives the court the authority to grant any appropriate relief, including interim relief.

In section 10 the Act allows any interested person, including a consumer or consumer organization, to petition the Commission to commence a proceeding for the issuance, amendment, or revocation of a consumer product safety rule. While the right to petition is not an unusual provision in administrative acts, it is unusual that the consumer is afforded judicial review if the Commission denies the petition.93

With the assurance of court review, private initiation of agency action can become a very valuable instrument for effecting public good. The only hindrance would be lack of organization on the part of consumers. It may well turn out that industry, because it is organized and funded, will be the most frequent user and principal beneficiary of reaction of section 10, since industry can use that section to secure amendment

92. Eckhardt, supra note 86, at 278-79.
93. Scalia and Goodman, supra note 45, at 928.
or revocation of standards unfavorable to it. 94

Affirmative Duties Placed on Industry

Sections 13 through 16 are significant because they place upon industry affirmative duties which are not found in other independent regulatory agency legislation. 95 Under section 13 the Commission can prescribe procedures by which a manufacturer shall furnish notice and a description of new products to the Commission. 96 This section affords the Commission the opportunity to anticipate problems and avoid the situation where a standard is proposed only after injuries and deaths have occurred.

Section 14 mandates product certification and labeling by each manufacturer that his products conform to applicable regulations. The certificate must accompany the product, specifying any standard which is applicable, stating the name of the manufacturer or private labeler issuing the certificate, and stating the date and place of manufacture. The certificate must be based upon a test of each product or upon a reasonable testing program. 97

Section 15(b) imposes upon manufacturers, distributors and retailers the duty of informing the Commission of failures to comply with standards and of defects in products, when the manufacturer, distributor or retailer obtains information which reasonably supports the conclusion that such a failure or defect exists.

Effective March 21, 1974, 98 manufacturers, importers, distributors and retailers must notify the Commission within twenty-four hours of obtaining such information. 99 The initial notification must identify the product, give the name and address of the manufacturer, if known, give the names and addresses of every distributor and retailer, if known, specify the nature and extent of the defect or failure to comply with an applicable safety standard, and provide the name and address of the person informing the Commission. 100 Within forty-eight hours

94. Id.
98. The regulations were proposed August 3, 1973, and have been informally followed since then. There have been 82 defect notices in that time, involving more than 12 million individual products. CPSC Issues Regulations For Reporting Product Defect, CPSC Press Release (Feb. 20, 1974) [hereinafter cited as Press Release].
100. Press Release, supra note 98, at 3.
the following additional information must be reported, if available: the manner in which information concerning the hazard was obtained; copies of any consumer complaints about the hazard; the number, nature and severity of any associated injuries; the number of units involved; how remaining inventory will be disposed of; and any identifying marks or numbers on the potentially hazardous units.101 Failure to notify the Commission is only excused when the manufacturer, distributor or retailer has actual knowledge that the Commission has been adequately informed of such defect or failure to comply.

Section 16 places upon manufacturers, distributors and retailers the duty to maintain records as required by the Commission and to allow reasonable inspections of any factory, warehouse or establishment in which consumer products are manufactured or held, or any conveyance being used to transport consumer products.

CONCLUSION

The Consumer Product Safety Act has strengths and weaknesses. Increased public participation in the entire administrative process, the use of the private attorney general concept, independence from presidential control, detailed judicial review, and the placing of affirmative duties on industry strengthen the Act. The success of the Act may depend on the extent to which these new approaches fulfill their intended purposes.

Certainly, one area that needs revision is the requirement that the Commission exercise those product safety functions transferred from existing agencies only in accordance with procedures established by prior legislation. This requirement presents unnecessary questions of product classification and compels a shift from one procedural scheme to another,102 without offering countervailing benefits.

Furthermore, there is reason to doubt whether the Act will be vigorously enforced. The Act itself authorized 55 million dollars for the fiscal year ending June 30, 1973.103 The Administration only asked for 30.9 million dollars to operate the Consumer Product Safety Agency; thus the Commission took a forty-four per cent cut, before it ever got started.104 Some writers believe that "the government still shows little stomach for all-out control measures to protect the Ameri-

101. Id.
102. Scalia and Goodman, supra note 45, at 952.
104. Moss, Handbook, supra note 12, at 263.
can consumer.” The Commission has only been in existence since May, 1973, and is already being criticized for not acting with enough dispatch. For instance, the ABC Closeup Fire noted that so far the non-flammability standards for children's sleepwear only apply to sizes 0 through 6x (about five years old) and, further, that two-thirds of the fires involving children occur while children are in daytime clothing. However, even if it is the case that the Commission does not act quickly or decisively, Congress has afforded the people the opportunity under this Act to require action and to enforce the regulations. Therefore, if action is not vigorous enough it will be to some extent the consumer's fault.

Yet safety always comes down to money. The human costs are set against the economic costs. The cost of product-related injuries is estimated at some 5.5 billion dollars per year. This figure includes medical expenses, loss of income, and decreased production and consuming power. On the other side of the ledger, there are at least three factors to be considered. The first is the increased price the consumer might have to pay, since safer products generally cost more to make and market. The second factor to be considered is the loss in utility that may accompany an increase in safety. For example, in the case of fabrics used in sleepwear, fire retardancy generally entails a loss of comfort and durability of the garment. The third consideration is the restriction on the freedom of consumer choice which may result from increasingly higher degrees of safety. It is of no small consequence that at last society has the means to make the choice between human and economic costs, since it was obvious that the "free market" chose to ignore the human costs.

Wendy Lee Gould

105. Turner, supra note 10, at 76.
106. Fire, supra note 5.
109. Id.