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COMPLIANCE AND ENFORCEMENT EFFORTS OF THE CONSUMER PRODUCT SAFETY COMMISSION

HEARING

BEFORE THE

SUBCOMMITTEE FOR CONSUMERS

OF THE

COMMITTEE ON COMMERCE

UNITED STATES SENATE

NINETY-FOURTH CONGRESS

SECOND SESSION

ON

S. 3755

TO AID IN THE ENFORCEMENT OF ACTS IMPLEMENTED BY THE CONSUMER PRODUCT SAFETY COMMISSION

SEPTEMBER 9, 1976

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COMPLIANCE AND ENFORCEMENT EFFORTS OF THE CONSUMER PRODUCT SAFETY COMMISSION

THURSDAY, SEPTEMBER 9, 1976

U.S. SENATE,
COMMITTEE ON COMMERCE,
SUBCOMMITTEE ON CONSUMER AFFAIRS,
Washington, D.C.

The subcommittee met at 10 a.m. in room 5110, Dirksen Senate Office Building, Hon. James B. Pearson, presiding.

OPENING STATEMENT BY SENATOR PEARSON

Senator PEARSON. We'll start a little early this morning. It is doubtful whether other members of the committee will be able to attend the hearing because of other commitments, and the long hours in the closing days of the session. I think all those who are scheduled to testify are here, however.

Today's oversight hearing on the Consumer Product Safety Commission (CPSC) was scheduled by the chairman in response to the request of several Senators on the Consumer Subcommittee. The purpose of the hearing this morning is to consider the issues raised in the recent Government Accounting Office (GAO) report which indicates there are certain deficiencies with respect to the Commission's compliance and enforcement efforts.

The Consumer Product Safety Commission has been charged by the Congress with the extremely important mission of protecting the public against unreasonable risks of injury that are associated with consumer products. If that mission is to be successfully carried out, it is vital that the Commission not only promulgate rules and regulations but see that they are successfully enforced. It does little good to promulgate these safety regulations if the standards are not enforced.

We shall be particularly interested during the course of the hearing this morning to learn what steps have been taken by the Commission in response to the shortcomings in compliance and enforcement programs that were pinpointed in the GAO report.

Further, it is our hope that we can also explore the legislative steps which may be necessary to insure an effective enforcement and compliance program by the CPSC.

As many of you know, on August 10 of this year I introduced S. 3755 with Senators Magnuson, Moss, and Weicker. That bill was designed to strengthen the Commission's compliance and enforcement activities and I understand that both the Commission and the GAO are prepared to comment this morning on the bill's provisions.

[The bill and agency comments follow:]

Staff members assigned to this hearing: Edward Cohen and H. Stephen Halloway

94TH CONGRESS
2D SESSION

S. 3755

IN THE SENATE OF THE UNITED STATES

AUGUST 10, 1976

Mr. PEARSON (for himself, Mr. MAGNUSON, Mr. MOSS, and Mr. WEICKER) introduced the following bill; which was read twice and referred to the Committee on Commerce

A BILL

To aid in the enforcement of Acts implemented by the Consumer Product Safety Commission.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That section 5 of the Federal Hazardous Substances Act (15
4 U.S.C. 1264) is amended by adding the following new
5 subsections:
6 "(c) Any person who is found by the Commission,
7 after written notice and an opportunity for a hearing, to
8 have violated any of the provisions of section 4 of this Act
9 or sections 403 (n), 502 (b), and 602 (f) of the Federal
10 Food, Drug, and Cosmetic Act (21 U.S.C. 343 (n), 352 (b),
11 and 362 (f)) shall be liable to the United States for a civil

1 penalty not to exceed $2,000 for each such violation. Each
2 distinct unit of product in violation of such provisions con-
3 stitutes a separate offense for such purpose except that the
4 maximum civil penalty shall not exceed $500,000 for any
5 related series of violations. The Commission shall maintain
6 a transcript of such hearing conducted pursuant to this sub-
7 section. The amount of such civil penalty shall be determined
8 and assessed by the Commission, by written notice. Any
9 civil penalty under this subsection may be compromised by
10 the Commission, and may be deducted from any sums owing
11 to the United States to the person charged.

12 "(d) Any person against whom a violation is found
13 under subsection (c) may obtain review in the court of
14 appeals of the United States for the circuit in which such
15 person resides or has his principal place of business, or in
16 the United States Court of Appeals for the District of
17 Columbia, by filing a notice of appeal in such court within
18 thirty days from the date of such assessment and by simul-
19 taneously sending a copy of such notice by certified mail
20 to the Commission. The Commission shall promptly file in
21 such court a certified copy of the record upon which such
22 violation was found and such penalty assessed as provided in
23 section 2112 of title 28, United States Code. The finding
24 of the Commission shall be set aside if found to be unsup-

1 ported by substantial evidence, as provided by section 706
2 (2) (E) of title 5, United States Code.
3 "(e) In determining the amount of such penalty, the
4 Commission shall take into account the nature, circum-
5 stances, extent, and gravity of the violation committed and,
6 with respect to the person found to have committed such
7 violation, the degree of culpability, and history of prior
8 offenses, ability to pay, effect on ability to continue to do
9 business, and such other matters as justice may require.
10 "(f) If any person fails to pay an assessment of a civil
11 penalty after it has become final and unappealable, or after
12 the appropriate court of appeals has entered final judgment
13 in favor of the United States, the Commission shall recover
14 the amount assessed in any court of appeals in which review
15 may be sought under subsection (d). In such action, the
16 validity and appropriateness of the final order imposing the
17 civil penalty shall not be subject to review.".
18 SEC. 2. (a) Section 11 of the Federal Hazardous Sub-
19 stances Act (15 U.S.C. 1270) is amended by adding the
20 following new subsection:
21 "(d) The Secretary is authorized to require, by special
22 or general orders, any person to submit in writing such re-
23 ports and answers to questions as the Secretary reasonably
24 may prescribe for the administration and enforcement of this

1 Act; and such submission shall be made within such reason-
2 able period and under oath or otherwise as the Secretary
3 may determine.".

4 (b) Section 4 of the Federal Hazardous Substances
5 Act (15 U.S.C. 1263) is amended by adding the following
6 new subsection:

7 "(i) The failure to submit in writing such reports and
8 answers to questions within the period as prescribed by the
9 Secretary pursuant to section 11 (d) of this Act.".

10 SEC. 3. (a) Section 2 (i) of the Flammable Fabrics Act
11 (15 U.S.C. 1191 (i)) is amended by striking "Federal
12 Trade Commission" and by inserting in lieu thereof "Con-
13 sumer Product Safety Commission".

14 (b) Section 5 of the Flammable Fabrics Act (15 U.S.C.
15 1194) is amended by adding the following new subsection:

16 "(e) The Commission is authorized to require, by
17 special or general orders, any person to submit in writing such
18 reports and answers to questions as the Commission may
19 reasonably prescribe for the administration and enforcement
20 of this Act; and such submission shall be made within such
21 reasonable period and under oath or otherwise as the Com-
22 mission may determine.".

23 (c) Section 7 of the Flammable Fabrics Act (15
24 U.S.C. 1196) is amended by adding after "section 3" the
25 words ", section 5 (e),".

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1 SEC. 4. The Act to require certain safety devices on
2 household refrigerators shipped in interstate commerce (15
3 U.S.C. 1211) is amended by—
4 (1) redesignating sections "3", "4", and "5"; as
5 sections "4", "5", and "6" respectively;
6 (2) striking the words "Secretary of Commerce"
7 in newly redesignated section 4 thereof; and
8 (3) inserting the following new section 3 after
9 section 2 thereof:
10 "SEC. 3. (a) Any person who is found by the Commis-
11 sion, after written notice and an opportunity for a hearing,
12 to have violated any of the provisions of the first section shall
13 be liable to the United States for a civil penalty not to exceed
14 $2,000 for each such violation. Each distinct unit of product
15 in violation of the first section constitutes a separate offense
16 for such purpose except that the maximum civil penalty shall
17 not exceed $500,000 for any related series of violations. The
18 Consumer Product Safety Commission shall maintain a tran-
19 script of such hearing conduct pursuant to this subsection.
20 The amount of such civil penalty shall be determined and
21 assessed by such Commission, by written notice. Any civil
22 penalty under this subsection may be compromised by such
23 Commission, and may be deducted from any sums owing by
24 the United States to the person charged.

1 "(b) Any person against whom a violation is found
2 under subsection (a) may obtain review in the court of
3 appeals of the United States for the circuit in which such
4 person resides or has his principal place of business, or in
5 the United States Court of Appeals for the District of Co-
6 lumbia, by filing a notice of appeal in such court within
7 thirty days from the date of such assessment and by simul-
8 taneously sending a copy of such notice by certified mail to
9 the Consumer Product Safety Commission. Such Commis-
10 sion shall promptly file in such court a certified copy of the
11 record upon which such violation was found and such penalty
12 assessed as provided in section 2112 of title 28, United States
13 Code. The finding of such Commission shall be set aside if
14 found to be unsupported by substantial evidence, as pro-
15 vided by section 706 (2) (E) of title 5, United States Code.
16 "(c) In determining the amount of such penalty, the
17 Consumer Product Safety Commission shall take into ac-
18 count the nature, circumstances, extent, and gravity of the
19 violation committed and, with respect to the person found
20 to have committed such violation, the degree of culpability,
21 any history of prior offenses, ability to pay, effect on ability
22 to continue to do business, and such other matters as justice
23 may require.
24 "(d) If any person fails to pay an assessment of a civil
25 penalty after it has become final and unappealable, or after

1 the appropriate court of appeals has entered final judgment
2 in favor of the United States, the Consumer Product Safety
3 Commission shall recover the amount assessed in any court
4 of appeals in which review may be sought under subsection
5 (b). In such action, the validity and appropriateness of the
6 final order imposing the civil penalty shall not be subject to
7 review.".

8 SEC. 5. Section 30 (b) of the Consumer Product Safety
9 Act (15 U.S.C. 2079 (b)) is amended by adding the words
10 "as amended," after the words "Federal Trade Commission
11 Act,".

12 SEC. 6. Section 4 (g) (1) of the Consumer Product
13 Safety Act (15 U.S.C. 2053 (g) (1)) is amended by add-
14 ing after "a Director of Epidemiology", the words "a
15 Director of Compliance".

16 SEC. 7. Section 2 (q) (1) of the Federal Hazardous
17 Substances Act (15 U.S.C. 1261 (q) (1)) is amended by
18 striking out "or" at the end of clause (A) thereof, by strik-
19 ing out the period at the end thereof, and inserting in lieu
20 thereof the following: "; (C) (i) any paint (other than
21 artists paint and related materials) or other similar surface-
22 coating material intended or packaged in a form suitable
23 for use in or around the household, (ii) any toy or other
24 article intended for use by children, or (iii) any article of
25 furniture intended or packaged in a form suitable for use in

1 or around the household, that is shipped in interstate com-
2 merce after June 22, 1977, and which contains (in the
3 case of any product enumerated in subclause (i)) or which
4 bears any paint or other similar surface-coating material
5 containing (in the case of any product enumerated in sub-
6 clause (ii) or (iii)) lead compounds of which the lead
7 content (calculated as the metal) is in excess of the level
8 expressed as a percentage to be determined 'safe' by the
9 Consumer Product Safety Commission under proceedings
10 conducted in accordance with the provisions of the Lead-
11 Based Paint Poisoning Prevention Act (42 U.S.C. 4801
12 et seq.) as amended by the National Consumer Health
13 Information and of the total weight of the contained solids
14 or dried paint film: *Provided*, That the Consumer Product
15 Safety Commission, by regulation in accordance with section
16 553 of title 5, United States Code (notwithstanding the
17 provisions of subsection 2(q)(2)), on its own initiative
18 or upon petition of any interested person, may exempt from
19 this clause any article declared a banned hazardous substance
20 thereby upon a finding that such exemption would be con-
21 sistent with protection of the public health and safety.
22 Exemptions already proposed pursuant to clause (B) of
23 this paragraph as of the date of enactment of this amend-
24 ment may be made final by regulation in accordance with
25 this clause.".

U.S. CONSUMER PRODUCT SAFETY COMMISSION,
Washington, D.C., August 30, 1976.

Hon. JAMES B. PEARSON,
Member, U.S. Senate,
Washington, D.C.

DEAR SENATOR PEARSON: As you will note in the enclosed, I will necessarily be unable to attend the September 9 oversight hearings of the Consumer Subcommittee.

Did want to let you know I am in full support of S. 3755, your bill which would amend the Consumer Product Safety Act. The legislation should go a long way toward improving the work of this agency in terms of compliance, and I am particularly pleased to note inclusion of important provisions pertaining to lead-based paint.

S. 3755 is timely and needed, and in my judgment, it merits early consideration and passage by the Congress.

Sincerely,

BARBARA HACKMAN FRANKLIN,
Commissioner.

Senator PEARSON. The first witness this morning is Mr. Gregory Ahart from the GAO.

Let me also indicate that Senator Moss, one who is vitally interested in the work of the Commission, has a statement which I would like to incorporate in the record at this time.

[The statement follows:]

STATEMENT OF HON. FRANK E. MOSS, U.S. SENATOR FROM UTAH

It is indeed important that the Subcommittee for the Consumer convene these hearings this morning on the compliance and enforcement program of the Consumer Product Safety Commission. The General Accounting Office, in preparing its report entitled "Better Enforcement of Safety Requirements Needed by the Consumer Product Safety Commission," has pin-pointed what appear to be serious deficiencies in the Commission's regulatory program. We have accomplished little if we create a federal agency to promulgate mandatory safety standards and then fail to provide an effective mechanism to insure compliance with those standards.

The GAO report concluded that the deficiencies in the Commission's compliance and enforcement program were due to management problems and in some cases, inadequate statutory authority. With respect to the internal management problems, I am pleased to note that the Commission has begun to take several important steps designed to expedite the processing of cases and to utilize Commission resources more efficiently. This hearing will help to crystalize the additional steps the Commission is taking to modify its internal procedures to facilitate a more effective compliance and enforcement program. I would urge the Commission to carefully review the specific GAO recommendations and to make whatever additional modifications as may be necessary.

With respect to the inadequate statutory authority, I am pleased to co-sponsor along with Senator Pearson, Chairman Magnuson and Senator Weicker, S. 3755, a bill to aid in the enforcement of Acts implemented by the Consumer Product Safety Commission. This legislation is a direct response to the GAO recommendations and would provide for civil sanction authority under the Federal Hazardous Substances Act, the Refrigerator Safety Act, and the Flammable Fabrics Act. Additionally, it would authorize the Commission, under the Federal Hazardous Substances Act and the Flammable Fabrics Act, to require by special or general orders, any person to submit in writing such reports and answers to questions as the Commission may reasonably prescribe.

The former amendments will provide the Commission with greater flexibility in bringing enforcement actions. The Commission's hands are tied if its only enforcement tool is criminal sanction authority. The latter provisions will, among other things, enable the Commission to identify manufacturers, distributors, importers or retailers who are engaged in the sale and distribution of consumer products which may be subject to safety standards or product recalls. It is modeled after a similar provision in the Consumer Product Safety Act.

I commend the ranking minority member of the Commerce Committee, Senator Pearson, for convening these hearings this morning, and I am hopeful that the Committee and Congress will approve S. 3755 by the end of this year.

Senator PEARSON. Mr. Ahart, would you identify for the record the lady and the gentlemen that are with you at the table? We have your statement, and I looked over it very quickly earlier this morning. Please proceed with your introductions and with your statement.

STATEMENT OF GREGORY J. AHART, DIRECTOR, HUMAN RESOURCES DIVISION, GENERAL ACCOUNTING OFFICE; ACCOMPANIED BY J. E. TOTTEN, ASSISTANT DIRECTOR; J. J. EGLIN, AUDIT MANAGER; AND DAYNA KINNARD, ATTORNEY

Mr. AHART. Thank you, Mr. Chairman.

At the table with me this morning is Mr. J. J. Eglin on my left who is the Audit Manager; Mr. J. E. Totten, the Assistant Director of the Human Resources Division; and Ms. Dayna Kinnard from the Office of the General Counsel.

I will try to summarize the statement as briefly as I can, Mr. Chairman.

Senator PEARSON. Well, you can read it if you want to, or you can summarize it. So often people who summarize statements take longer than they do when they actually read them. At least that's been my custom when I testify.

Mr. AHART. We are pleased to be here today to discuss our report on the CPSC's compliance and enforcement activities.

Our review was directed at determining whether the Commission's efforts insured that industry complied with safety requirements, products not complying with safety requirements were removed from the market, and penalties were imposed against those violating safety requirements or cases were referred to the Department of Justice for prosecution. We made our review at Commission headquarters in Washington, D.C., and Bethesda, Md., and at its field offices in Atlanta, Cleveland, and Seattle.

The Commission was created in 1972 to protect the public against unreasonable risks of injury associated with consumer products. The Commission (1) issues safety requirements under the five laws it administers to protect consumers from hazardous products and (2) inspects manufacturers, distributors, and retailers for adherence to those requirements. Each of the five laws provides the Commission several tools to enforce compliance with its safety requirements, such as seizures of products, injunctions, cease and desist orders, and civil and criminal penalties.

The largest Commission function (in terms of staff and financial resources) is compliance and enforcement, which includes inspecting manufacturers, importers, distributors, and retailers; collecting and testing product samples; and applying the administrative and legal remedies necessary to enforce compliance with safety requirements.

Compliance and enforcement is a headquarters' controlled function with considerable participation by the area offices. The Bureau of Compliance prepares compliance programs—each directing Commission compliance efforts at a specific consumer product hazard—

that contain the general operating instructions the area offices are to use to insure compliance. The Bureau also provides compliance and enforcement direction and support to the area offices; develops compliance policy, guidelines, program and enforcement strategies; and reviews area office recommendations for legal action against those who violate safety requirements.

Commission policy is to achieve compliance in a swift, vigorous manner by enforcing all safety requirements and using appropriate administrative and legal remedies against violators. This policy is to motivate manufacturers, importers, distributors, and retailers to comply with safety regulations.

The Commission has several tools to insure that products which are identified through compliance inspections and sample tests as not meeting safety requirements, are promptly removed from the market, distribution chain, and consumers, when appropriate. The Commission can use injunctions and cease and desist orders to prevent the continued manufacture, distribution, and sale of products and it can seize violative products being offered for sale. Under certain laws it administers, the Commission can require the repurchase of products violating safety requirements.

Senator PEARSON. Let me interrupt you there. If the Commission wants a cease and desist order or injunction, do they always go through the Justice Department or do they have any powers to proceed in their own right and seek injunctions or cease and desist orders?

Mr. AHART. I think I'll ask Ms. Kinnard to respond to that, Mr. Chairman.

Ms. KINNARD. To the best of my knowledge, it's done entirely through the Justice Department.

Senator PEARSON. They always have to go through the Justice Department? Is that your understanding?

Ms. KINNARD. I believe so.

Senator PEARSON. We'll ask the Commission, too, when they come forward.

Mr. AHART. The Bureau of Compliance plans most of its compliance efforts by product category (e.g., toys, mattresses, and baby cribs). It issues compliance programs to aid the area offices in inspecting manufacturers, distributors, and retailers. However, the Bureau has no written policy or guidance for preparing compliance programs.

As of June 30, 1975, the Commission had safety requirements covering about 70 products and product categories. The Commission conducted compliance activity in 8 product categories during fiscal years 1974 and 1975, and 8 compliance programs in fiscal year 1976.

We reviewed the Commission compliance activities for four product categories—aerosol sprays containing vinyl chloride, toys, aspirin products, and mattresses. We selected these categories because they (1) represented four significant categories from the standpoint of product hazards, and (2) were categories to which the Commission devoted considerable resources.

We found that the Commission has not been timely and systematic in assuring industry compliance with safety requirements. Some hazardous products remained available for consumer purchase. We found that:

Not all compliance activity was planned to insure manufacturers, importers, and packagers were identified and notified of safety requirements.

Followup inspections did not verify industry's compliance with safety requirements after hazardous products were found.

Compliance actions for toys were limited by court orders because safety requirements did not adequately define the hazards and the Commission had not issued toy test procedures.

The failure to promptly prepare an environmental impact statement required by law contributed to ineffective enforcement of the ban of aerosol products containing vinyl chloride.

Compliance actions were not evaluated to determine their effectiveness.

We recommended that the Commission formalize its compliance procedures to insure that its compliance activity is adequately planned, implemented, and evaluated. We also recommended that the Commission promptly issue toy safety requirements that adequately define the hazards associated with toys and toy test procedures.

Senator PEARSON. Let me stop you there. You have outlined about four or five omissions that the GAO found. Why did they occur? Just because they don't have a formalized procedure or because, in the case of toys, they just didn't promptly move with the safety requirements?

Mr. AHART. As I understand the situation with respect to toys, Mr. Chairman, it's a difficult definitional problem. There are so many toys on the market and they can be hazards in quite a number of ways.

Senator PEARSON. You're saying the complexity of the problem had a great deal to do with it?

Mr. AHART. The complexity of the problem had quite a bit to do with it. In our judgment, the Commission could have done more than it did and moved faster on the problem, and they are moving faster now and trying to get better definitions of the hazards and the safety requirements for the various classes of toys which are on the market.

Senator PEARSON. Now with respect to the other items, is it just the absence of a mechanism, or a policy, a procedural concept that was not implemented and enforced here?

Mr. AHART. I think the difficulty the Commission faces in many of these areas—the first one, for example—is the problem of identifying the manufacturers and getting notification to them of the safety requirements because of the large number of products over which they have jurisdiction. This is a very difficult one. The manufacturers are not required to register with the Commission so they don't have a list that's put together in that way. They must rely on such sources as Dunn and Bradstreet lists of manufacturers of various types, trade association lists, other kinds of directories to put together lists to identify manufacturers that are within the Commission's jurisdiction.

So I think it's a combination of the complexities, the practical problems involved in each of these areas, plus, in our judgment, a failure to move quite as aggressively in some of these areas as the Commission should.

Senator PEARSON. Please continue.

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Mr. AHART. The Consumer Product Safety Act provides for the Commission to initiate, prosecute, defend, or appeal any court action in the name of the Commission to enforce the laws subject to its jurisdiction, through its own legal representatives with the concurrence of the Attorney General or through the Attorney General.

The Commission's enforcement policy is to seek civil and criminal penalties against violators and to use every appropriate remedy available to insure compliance.

Whereas product seizures and injunctions are legal actions the Commission can use to remove hazardous products from the market, civil and criminal penalties are administrative and legal remedies directed at the people and firms violating safety requirements. Each of the five laws the Commission administers provides criminal penalties. These penalties vary under each law. The Commission can also impose or seek (through Justice) civil penalties under two laws it administers—the Consumer Product Safety Act and the Flammable Fabrics Act.

Although Commission policy is to seek prosecution of all violators, adequate procedures to implement this policy have not been issued. Compliance policy and procedures do not clearly define the conditions for referring a criminal case to Justice for prosecution. As a result, area offices and Bureau of Compliance staffs prepare many cases that are not approved by the Commissioners for referral or are not accepted by Justice for criminal prosecution.

During the 25-month period May 1973 through June 1975, 159 cases were forwarded to the Commissioners for referral to Justice or for other action. Of these, 28 cases were approved for referral to Justice, 52 were approved for other action (e.g., cease and desist order or notice of enforcement), 71 were closed without action, and 8 were awaiting a final Commission decision. In accordance with Commission policy, each case forwarded to the Commissioners was processed through the entire case-processing cycle, even when the area office, Bureau of Compliance, and/or Office of General Counsel believed it should have been terminated.

As of August 1976, the Commission had referred 26 of the 28 cases to Justice for criminal prosecution, and closed the other two cases after reconsidering them. Justice declined to prosecute 17 of these because (1) too much time had elapsed since the violation occurred, (2) the violations were de minimis—cases with little prosecution potential, or (3) the violations were promptly corrected. Of the remaining nine cases, four were pending at Justice and five had been filed in Federal court. In each case Justice filed, the defendant pleaded guilty.

The Commission has issued several directives to assist area officer staffs (1) perform compliance inspection, (2) collect product samples, and (3) make legal recommendations to the Commissioners when violations are identified. However, these directives do not set forth criteria for determining violations of the various laws and regulations or the legal documentation needed to support such violations. Also, there are no formal procedures (1) to guide the Bureau of Compliance and the Office of General Counsel in preparing cases for the Commission's consideration and approval, or (2) that incorporate Justice's criteria for accepting criminal cases for prosecution. The directives state the Commissioners make all decisions to prosecute or close civil and criminal cases.

Because the Commissioners have not delegated responsibility for closing cases, certain criminal cases with little or no prosecution potential were initiated in the area offices, routed through the Bureau and General Counsel for review and further development, and finally closed by the Commissioners.

Bureau officials told us that they plan to ask the Commissioners to delegate authority to close cases for de minimis violations to reduce the work on cases that are likely to be closed. As of August 1976, the Bureau had not asked for this authority.

We recommended that the Commission specify the criteria the Commissioners use to approve a case for referral to Justice and develop procedures for implementing the criteria. We also recommended that the Commission delegate authority to the staff for determining which cases should be developed and submitted to the Commissioners recommending referral to Justice or other action.

Commission procedures provided for the area offices to initiate cases and forward them to the Bureau of Compliance and Office of General Counsel for review and further development before being submitted to the Commissioners. These procedures did not provide guidelines and milestones for timely case development and review.

The Commission did not know the total number of cases the area offices forwarded to headquarters during the period May 1973 through June 1975, because it did not maintain a case log until May 1974. Therefore, we went to three area offices—Atlanta, Cleveland, and Seattle—to find out. The three offices forwarded 71 cases—22 had been sent to the Commissioners by June 30, 1975, and the remaining 49 were in process at headquarters.

The Commission has not been timely in preparing criminal cases, forwarding them to the Commissioners, and referring them to Justice for prosecution. The 49 cases were in process an average of 387 days from the date the inspector identified the violation to June 30, 1975. The processing time for the 49 cases ranged from 174 to 777 days. The 22 cases forwarded to the Commissioners averaged 413 days from the date of inspection to the date the Commissioners approved the case for referral to Justice for prosecution or closed the case.

The Commission Chairman stated that the Commission's time to process a case was excessive and that this time frame was not acceptable for efficient enforcement of safety requirements. The Commission has taken several actions to reduce its case processing time. These actions have reduced the time to process cases in the Bureau of Compliance, but the time to process a case in the area offices has increased.

We recommended that the Commission establish procedures for the staff's use in processing cases for prosecution. These procedures should contain the case characteristics, legal remedies available, case processing milestones, and case monitoring guidelines which the area offices and headquarters can use to develop cases which meet the criteria under which the Commissioners would consider referring the case to Justice.

Most of the cases which the Commissioners closed without action were the same types of cases the Department of Justice has declined to prosecute because many of them were for de minimis violations or for violations promptly corrected after they were brought to the attention of the manufacturer, distributor, or retailer.

Because of its difficulties in getting Justice to prosecute some cases—mostly Federal Hazardous Substances Act and Poison Prevention Packaging Act cases—the Commission requested the Congress to give it the authority to prosecute its own criminal cases. The Commission was not given this authority. We believe that another alternative would be the authority to assess civil money penalties for certain violations of safety requirements under these two laws.

The Commission's General Counsel agreed that civil money penalties could be a helpful enforcement tool and believes that such penalties would be beneficial.

We believe that the Commission's enforcement of safety requirements issued under the Federal Hazardous Substances Act and the Poison Prevention Packaging Act could be strengthened if it had authority to impose civil money penalties for violations against these two laws.

We recommend that the Congress amend the Federal Hazardous Substances Act to provide the Commission the authority to assess civil money penalties for violations of safety requirements under that law and the Poison Prevention Packaging Act. Poison Prevention Packaging Act violations are subject to penalties under the Federal Hazardous Substances Act.

On August 10, 1976, as you mentioned, S. 3755 was introduced in the Senate. Section 1 of this bill would amend the Federal Hazardous Substances Act along the lines we recommended and provide the Commission the authority to impose civil money penalties for certain violations to that law and the Poison Prevention Packaging Act. We believe that this authority would strengthen the Commission's enforcement of safety requirements issued under these two laws.

Mr. Chairman, this concludes our statement. We shall be happy answer any questions that you might have.

Senator PEARSON. Yes, we have several we'd like to go over with you.

First of all, it is my understanding that when the GAO conducts an agency audit the agency is given an opportunity to comment on the report when it is in the draft stage. Did the GAO give the Commission an opportunity to comment on this report?

Mr. AHART. We have had some difficulty with the Commission in this regard. I think we have resolved it now, or hopefully we have. We do follow the policy, as you stated, of offering the agency the opportunity to comment on our draft reports and did so with the Commission. However, the Commission had a policy which contradicts one of our policies. Under the Freedom of Information Act and their overall philosophy, for a time they had held a very open kind of Commission and they felt they could not accept a draft of our report without making it public. And under our criteria we do not like to see our reports go out publicly until we have had the report in final form. For some period of time now we have not made them available because the Commission could not assure us that they would remain outside the public domain.

Senator PEARSON. How have you resolved that with the Commission?

Mr. AHART. I understand under the leadership of the new chairman, that at least it's his view after his discussion with the General Counsel

that they will be able to accept our draft reports under our conditions in the future and with that assurance we will start again to give them the opportunity to comment on draft reports.

Senator PEARSON. The GAO reported that the largest Commission function in terms of staff and money committed is compliance and enforcement. Is there any reason to believe that the Commission has failed to dedicate sufficient resources to the compliance and enforcement effort?

Mr. AHART. Well, I think it's a question in our minds as to whether they have been as effectively utilized, Mr. Chairman. I think it's a matter of judgment as to how much resources should it deserve. I think the Commission needs to be selective in its enforcement and compliance activities and it certainly cannot cover the total universe on a 100-percent basis. So there has to be a lot of judgment and I'm not sure we are the people to make that judgment as to what resources, what kind of coverage the Federal Government should give to the vast universe.

Senator PEARSON. So when your report specified certain shortcomings or omissions, you didn't trace them back to manpower or money, did you?

Mr. AHART. No. We were talking about the more effective utilization of resources that are already there as opposed to any increase in resources.

Senator PEARSON. In your statement you note that the Commission's Bureau of Compliance had no written policy or guidance for preparing compliance programs to aid the area offices in inspecting the manufacturers, distributors, and retailers. Is a written policy absolutely necessary? While it promotes a sense of certainty, doesn't it take away something in the flexibility that's required?

Mr. AHART. Well, I think our comment——

Senator PEARSON. How much importance do you place on a written policy and written guidelines?

Mr. AHART. Well, our comment there, Mr. Chairman, is related not to the guidance they give to the field because the compliance program itself provides some guidance to the field on that. This is the guidance on the preparation of the compliance programs in and of themselves. It does provide guidance to the area offices with respect to coverage and what techniques they ought to use.

Senator PEARSON. You also noted the fact that the Commission had not been timely and systematic in assuring industry compliance with safety requirements. Is part of that because the Commission administers five different laws?

Mr. AHART. It might be a factor. Mr. Eglin, would you care to comment on this as to whether this might be a part of the problem?

Mr. EGLIN. I don't believe that's the problem as much as when they identify a product or category in which to verify compliance. For example, the problem is in attempting to identify which manufacturer is manufacturing the product, who the distributors and retailers are, selecting firms systematically for inspection, and then following up once they have identified a potential violation.

Senator PEARSON. Would it be your recommendation that we repeal the Flammable Fabrics Act and the Refrigerator Safety Act and bring them all under the Consumer Product Act?

Mr. AHART. I don't think we've got any particular thoughts on that, Mr. Chairman. The Consumer Product Safety Act itself is very broad and does provide quite a range of enforcement tools. I certainly haven't studied it to the extent to permit an opinion as to whether you could do just as good a job under that act as under the specific pieces of legislation. It's possible you could do so.

Senator PEARSON. With respect to the motivational concept, you agree with that, do you not?

Mr. AHART. I think probably it's a very practical approach to the problem because of the large universe which I have talked about. Unless you can motivate manufacturers to voluntarily comply with these, there's no way we could devote the resources to it to inspect them all, to do a 100-percent compliance and enforcement function. So I think the enforcement strategy and compliance strategy needs to be one which motivates people that are subject to the law.

Senator PEARSON. That requires prompt action and I think according to your report, over a 2-year period, it took the Commission more than a year, on an average, to process a case to the point where it was either referred to the Justice Department or closed out. Does the Commission disagree with that time period and how do they justify that length of time?

Mr. AHART. I think the Commission certainly agrees that that time period is excessive and it's inconsistent with the concept of the voluntary motivation to comply. Certainly if it takes that long and gets so old that Justice won't prosecute, you don't have much of a deterrent or a motivational factor. So the Commission does agree and I think they have done things to step up their case processing. I think they could do more, as I have mentioned in my statement, by being more selective at the area office level and the Bureau of Compliance level as to which cases they make a full investigation of and a full case development by delegating some authority to these levels of the organization below the Commission itself to make decisions on which ones are worthy of the investment of resources and the time it takes to do the case development.

Senator PEARSON. Summarize, if you will, what recommendations you have on the legislation, S. 3755, that was introduced in response to your report.

Mr. AHART. Well, the legislation, as I indicated at the end of my statement, is responsive to the recommendations we made to the Congress in our report.

Senator PEARSON. How about the civil penalties?

Mr. AHART. The civil penalties provisions certainly are responsive. We did not recommend civil penalties under all the acts that the bill would put them in, but we think that would be a good idea and we have no objection to it. So all in all, we favor the bill on the basis of our experience in looking at the Commission's endeavors and its range of enforcement authorities.

Senator PEARSON. Thank you very much for your contribution to this hearing and for setting the groundwork for receiving the Commission's testimony.

Mr. AHART. Thank you, Mr. Chairman.

Senator PEARSON. Thank you all very much.

Mr. Byington, I think you're accompanied this morning by your Vice Chairman and your General Counsel. Would you identify them for the record and then proceed as you see fit?

STATEMENT OF S. JOHN BYINGTON, CHAIRMAN, CONSUMER PRODUCT SAFETY COMMISSION, WASHINGTON, D.C.; ACCOMPANIED BY R. DAVID PITTLE, VICE CHAIRMAN; AND MICHAEL A. BROWN, GENERAL COUNSEL

Mr. BYINGTON. Thank you, Mr. Chairman.

On my right is Commissioner David Pittle, who is Vice Chairman of the Commission; and on my left is Michael Brown, who is General Counsel of the Commission.

I would be pleased to summarize my statement in the interest of time, and we have already submitted, as indicated by GAO, our comments that were not received by GAO prior to the publication of the report. We have submitted for the record our comments on the report in its entirety, and I think that staff has received this morning a number of copies of those comments.

Senator PEARSON. It's been received and it will be made a part of the record.[1]

Mr. BYINGTON. Thank you, Mr. Chairman.

In summary, our statement says that we are very pleased to receive GAO's report in light of its coming at a very helpful time, as we are presently reviewing and have been for the past couple months the overall operations of the Commission.

Senator PEARSON. If there are any other audits of your agency in the future, have you resolved with GAO whether you can comment on their draft report without violation of your concept of open procedures?

Mr. BYINGTON. I think it's fair to say, Mr. Chairman, that we will be able to work out the mechanisms.

Senator PEARSON. The new mode of openess brought about by the "Sunshine Acts" are all well and good, but within their implementation there are legitimate exceptions. It seems to me that this is one of them, I'm glad you resolved it, and I support you.

Mr. BYINGTON. Thank you very much. The report, we think, deals with two basic areas. One is the statutory needs and deficiencies, which you have addressed in S. 3755; and the second area is the management needs and deficiencies, which we have been addressing. Our reorganization and our fiscal year 1977 operating plan are aimed specifically at solving many of the problems that are addressed in the GAO report. In our response to the report we have attempted to point out and explain in greater detail what the agency is doing and the programs we have underway.

Specifically, in terms of some of the recommendations that GAO has made, I'd be happy to cite a couple of examples. They recommended we formalize our complaint procedures to insure that our compliance activity is adequately planned, implemented, and evaluated, and that is being done right now. We already have a number of

[1] See p. 32.

procedures in draft stage, and we have already implemented, through the development of what we call a product profile, a mechanism for involving compliance strategies in the regulatory development process. Thus, when the Commission considers its various options and the potential remedial fixes it has available to it, it also will know what some of the potential opportunities are for compliance and enforcement, and what that means in terms of strategy, allocation of resources, and so forth.

GAO also raised a very significant question in terms of time in the case processing cycle and made recommendations about delegation. We are in the process right now of developing some delegation authority to the field for early case closings. We think that we can deal with that problem in short order and thereby substantially reduce the time element involved. This would eliminate one of the problems that was raised by GAO—that only the Commission had the authority to make a decision to close or prosecute a civil or criminal case.

Early in the history of this Commission that approach had significant merit, as the agency began to develop a case history. It would therefore be reasonable for the Commission to want that kind of control. But now that we have been operational for 3 years and some case history and experience have been built up, we believe that this is a legitimate time to begin to delegate down into the organization, and such steps are currently underway.

Senator PEARSON. Do you agree that the lack of formalized procedures is one of the reasons why there hasn't been compliance?

Mr. BYINGTON. Yes and no. I think that if you are talking in terms of procedural policies, we have needed some better, more clearly defined policies for the headquarters and area office staffs to follow. But if we are talking in terms of a formal, cookbook type of thing, then no, because that would reduce all of the flexibility regarding specific details and guidelines, which should be left to the investigators and the compliance people who are building the cases.

Senator PEARSON. Another major complaint of the GAO was that you have not been able to identify the firms that are subject to your jurisdiction. Have you been able to notify them of the requirements? Have you been able to inspect on a selective basis?

Mr. BYINGTON. Again, Mr. Chairman, that is a yes and no answer. It depends upon the industry and the product category that we are talking about. That is why we are very much in favor of the registration provision under S. 3755 because there are few industries consisting of only several, easily identified firms—such as the bicycle industry, in which there are seven domestic manufacturers.

Senator PEARSON. How do you identify them now?

Mr. BYINGTON. Through the telephone book, through trade directories, through Dunn and Bradstreet, through whatever other mechanisms we have available to us. But where you have a reasonably concentrated industry, that doesn't become too significant a problem. But in many industries, and particularly the type of industries we are dealing with, that is not the case. We cover a broad spectrum of other industries, such as the toy industry under the Hazardous Substances Act, and the mattress industry under the Flammable Fabrics Act. Many of these consist of extremely small, geographically diverse firms which do not keep systematic records, and it therefore becomes very, very difficult to do a planned program in these areas.

Senator PEARSON. Although I can appreciate the complexity, I'm staggered by the idea that down there at the agency there are a lot of people thumbing through the yellow pages. But after you have identified them, how do you notify them as to their requirements?

Mr. BYINGTON. Right now, we have a program in which we use direct mail, and we use seminars. Our area offices are conducting a whole series of seminars this fall.

Senator PEARSON. What kind of attendance do you have for those seminars?

Mr. BYINGTON. Mixed.

Senator PEARSON. It would depend upon how good your enforcement is in the area, I suspect.

Mr. BYINGTON. It would depend upon how good the enforcement is and it also depends on whether or not you can get that particular businessman's attention. Some of these are very small companies. Some only do a few thousand dollars worth of business a year in a particular product, and the question is whether or not the businessman is willing to take a half an hour or an hour or 2 hours to find out about our requirements.

We have another problem in the area of retailers. I personally do not think that most retailers in the country understand that our laws and regulations apply to them, and so we have made a major effort in this area. I have met with the American Retail Association, and I went to St. Louis to speak to all the State executives of all the State retail associations. We have offered to cooperate with them in putting some written material together for them to disseminate to their members so they can understand that the CPSC affects retailers as well as manufacturers.

So we are dealing with a monumental number of small and medium sized organizations—involving manufacturing, wholesaling, custom and bulk packaging, and retailing—and CPSC is relatively new. It does become a problem of priorities because, as you know, a businessman has more than just this Commission to be concerned about. They have many other Federal agencies to deal with as well.

Senator PEARSON. What about inspections?

Mr. BYINGTON. We obviously do not have the type and amount of manpower necessary to go out and inspect every facility in all the regulated areas, but in terms of number of inspections, in fiscal year 1976 alone, we did about 5,200 inspections.

Senator PEARSON. I understand you have 126 inspectors. Is that the correct number?

Mr. BYINGTON. That is approximately correct. It depends on how we utilize our forces at any given time. Also, through a surveillance program we have used volunteer citizens to canvass the marketplace and look for problems, and our inspectors try to follow up.

Senator PEARSON. Tell me how that works.

Mr. BYINGTON. We get individual citizens through organized groups. For example, in the bicycle area, a number of the bicycle clubs volunteered to cooperate with us by taking a look at what was being sold in the bicycle shops after the regulations went into effect, and helping us identify where our problems might be.

Senator FORD. Wouldn't that be a form of harassment? You just give people the authority to go and do it, report to you and you will follow up on it?

Mr. BYINGTON. We follow up on it, but it should not involve any type of harassment. That is why we call it a surveillance rather than an inspection or investigation.

Senator PEARSON. What's the difference between surveillance and harassment?

Mr. BYINGTON. I would consider harassment to involve some kind of an imposition or impact on the people involved, whereas surveillance simply means looking at the landscape.

Senator PEARSON. Just looking at the landscape?

Mr. BYINGTON. Yes, sir.

Senator PEARSON. How many inspections have you been able to do?

Mr. BYINGTON. In 1975 we did about 6,300, and in 1976 we did 5,200. As we regulate additional categories our inspection efforts will emphasize those products. For example, we expect to finalize our matchbook standard and our architectural glazing standard shortly, and we are moving in other areas as well. Our operating plan and our 1978 budget are very much based on what we refer to as self-initiated compliance. By this, we mean firms, on their own, initiating compliance with the regulations we issue. As long as we continue to get a high degree of self-initiated compliance, then we can probably continue to operate with the forces that we presently have, or incremental increases. But if that should not continue to be the case, then that may become a major problem which we will have to address.

Senator PEARSON. The GAO recommended that in addition to following up on your rules and regulations you should issue appropriate requirements and safety procedures that come out of the court cases you have. Now has that been done? Do you have a system for that?

Mr. BYINGTON. We are doing that. They are correct that it has not been done systematically in the past.

Senator PEARSON. You say systematically. What do you mean by systematically?

Mr. BYINGTON. If you have a system, that means that if we win a series of cases and a certain amount of case law is developed, there would automatically be some people or procedure in place to issue relevant guidelines or amended regulations. In the past that has not existed—it has been done on an ad hoc basis.

Senator PEARSON. Let's go back to the question I originally asked. Under the Consumer Product Safety Act you have the right to initiate legal proceedings on your own. Is that right?

Mr. BYINGTON. Yes, sir.

Senator PEARSON. Now with all the other acts under your jurisdiction you go through the Justice Department?

Mr. BYINGTON. I would like to clarify that for a moment, because that has been discussed with GAO as well. We do have the authority to seek cease and desist orders on our own. We have to go through Justice for injunctions, except under the new amendment passed this year giving us authority to seek injunctions on our own under section 15 of the CPS Act. As far as seizures are concerned, we have to go through Justice; and for all criminal actions, we have to go through Justice. We have civil authority on our own, but only after Justice has had 45 days to determine whether or not they want to take the case; since we have had that authority, the Justice Department has been much more interested in our cases.

Senator PEARSON. You don't disagree with their report that during a 2-year period it took a year for you to process a case and decide whether it ought to be sent to Justice or dismissed or——

Mr. BYINGTON. Senator, I do not disagree with their statistics at all. In fact, in many cases it took longer than a year. One of the major things we have been attempting to do in the last couple months is to address the causes of that problem, and I think there were two or three that were partially addressed and that we have been able to deal with immediately. One of them is the delegation of authority, and we have made changes in that area. In fact, under the Hazardous Substances Act and the Poison Prevention Packaging Act, the cases are now being sent directly from the area offices to the Commission. That has eliminated a large number of the days that were previously involved in Bureau of Compliance and Office of the General Counsel.

Senator PEARSON. So you could develop criteria on how to handel these cases?

Mr. BYINGTON. Yes, sir. My goal, as I have stated at a number of senior staff meetings, has been that I would like to see our cases get to the Justice Department in six months.

Senator PEARSON. It takes a while in the Justice Department, too.

Mr. BYINGTON. Yes, sir. It is going to take a while to bring them to trial. Also there are going to be cases of such magnitude that we will be unable to get to Justice in 6 months. However, even if they are of that size and magnitude, it might be appropriate to at least begin to involve Justice at an early stage in the process. But there are an awful lot of cases in which a determination could be made in significantly less than 6 months from the date the violation was determined.

One of the areas in which we are discussing possible delegation right now is the authority, under certain provisions of the FHSA and PPPA, to close cases at the area office level. This has been needed for some time.

Senator FORD. Let me ask him one question if I may. Am I correct that of 25 cases that were sent to the Justice Department, 16 were rejected because they were too old?

Mr. BYINGTON. That is not really true, Senator. It is true that in prior years the Justice Department has declined to file some cases because of age.

Senator FORD. Or it could have been that of the 16 cases, the violation was promptly corrected by the violator it was too old, or it was *de minimis*. So those 16 cases out of the 25 that were submitted some were rejected because they were too old. What was the consumers' loss by the Commission being late with the cases?

Mr. BYINGTON. Of the 28 cases that were referred to Justice before 1976, 18 of them were declined by Justice.

Senator FORD. I was close then, wasn't I?

Mr. BYINGTON. Yes, but of those 18 cases, there were a number of reasons they were not filed. Many of them involved time limits; but I do not think it is fair to say that any one specific reason was involved in every case—whether it was only a small violation, or whether good faith had been shown by the respondent and he had come into compliance, or whether there was a delay in forwarding the case to Justice. In most instances, two or three such factors were involved in Justice not accepting it.

Senator FORD. But delay was a factor.

Mr. BYINGTON. Delay was a factor, and we are trying to eliminate that factor now. Then we will have to deal with the other factors.

Senator FORD. How much knowledge would you have of a violator who promptly corrected his violation? Wouldn't that mean that you could close without ever going to Justice? It appears that one of the reasons that these cases, 18 now you say, is that the violator promptly corrected the mistake and showed good faith and yet you sent the case on to Justice.

Mr. BYINGTON. One of the serious questions that we are faced with—and it is appropriate that a collegial body is making these kinds of decisions—is that actual knowledge of a violation beforehand is not necessarily a defense.

Senator FORD. But you define the offense.

Mr. BYINGTON. Yes, sir. That is what I am saying. If we took the position that if anybody came into compliance after they were discovered, we would not prosecute, then I think you would find yourself in a situation where industry would very likely not come into compliance until after one of our people had discovered a problem. Thus, the fact that the person immediately comes into compliance is not necessarily a defense in and of itself, justifying not requesting Justice to prosecute. It is, of course, one of the factors that has to be taken into consideration. It is also one of the reasons we are very much in favor of having civil penalties under the FFA and HSA, because Justice has been very reluctant to bring criminal action in a small case where you have subsequent compliance.

Senator FORD. I'm not a lawyer, but I have learned a new phrase since I arrived in Washington—"Everybody is entitled to one bite of the apple." I have heard all this. But it appears to me that if you find a violation and you get cooperation and the violator does everything that's necessary to eliminate that violation, it seems to me that it's adding insult to injury to continue to send that case to Justice. If that firm changed its operations and eliminated the violation, and you proceed to prosecute nevertheless somehow that doesn't to me breed business-government cooperation. Somehow or other, that doesn't tell me that you're going to get cooperation out of that fellow next time. He'll say, "If we violate it it doesn't make any difference whether we correct it or not; they're going to refer the case to Justice for prosecution and we'll probably go to court."

Mr. BYINGTON. I understand what you are saying, Senator, and I think that is one of the serious problems we are faced with. But I think there are a couple of factors we have to keep in mind, and I think Commissioner Pittle would also like to say something in this area.

First of all, we have to consider the nature of the violation and, second, we have to consider how long the violation has been in effect, and what kind of effort has been made to communicate with the industry involved. If you are talking about a very minor violation, prosecution may not be warranted.

Senator FORD. I'm talking about why the Justice Department rejects cases and one of the factors is prompt correction of the violation by the violating firm.

Mr. BYINGTON. This is particularly significant when it relates to a criminal prosecution versus a civil prosecution. In two of our acts we are left with only criminal prosecution authority, which is obviously what you are talking about, whereas if we had civil penalty authority, the situation would be different.

Senator FORD. What I'm trying to point out here I think reflects a problem with all Government regulation, and that's attitude. Sometimes I think Government inspectors sit in the motel at night and compare how many citations they give and how many dollars they get under OSHA instead of trying to bring about an attitude of cooperation. That's what I'm trying to talk to you about here and I'm trying to get through to you.

Mr. BYINGTON. We really agree in terms of trying to improve the attitude situation. It is now a matter of policy in the Commission that when these small violations have been discovered, a letter of advice goes to the violator informing them of it, and then there is a subsequent reinspection. It is only in those situations where we find a continued violation after the first one has been discovered, a letter of advice has gone to the respondent, and a subsequent violation has been discovered then our attitude changes, Senator.

Senator FORD. One quick question and then I'm going to have to go.

You stated, I believe when I came in, that your operating plan for fiscal year 1977 and the budget request for fiscal 1978 is premised on the assumption that there will be significant self-initiated compliance by regulated firms.

Mr. BYINGTON. Yes, sir.

Senator FORD. Now we're talking about attitudes. You want cooperation. You want them to volunteer. That's what you're talking about here. Yet the Commission itself—I believe it's quoted in the GAO report—estimated noncompliance with the mattresses flammability standard at as high as 40 percent. In the so-called "cottage" industries where there are so many small firms, is it realistic then to believe that there will be widespread compliance?

Mr. BYINGTON. I hope so.

Senator FORD. That's not an answer. You hope. I hope, too. I hope we balance the budget and everybody goes back to work.

Mr. BYINGTON. Senator, when you have as many people involved in the mattress industry as there are, with some of them making 20 mattresses a year and others making 20 mattresses a day, you have a different type of situation.

Senator FORD. But the fellow making 20 mattresses a year is probably more hazardous than the fellow out here making a lot of mattresses and trying to sell them and he's got a going concern.

Mr. BYINGTON. He's often the one in the least compliance.

Mr. PITTLE. Senator Ford, I'd like to make a comment about your last example because I think it would be unfair to leave anybody with the impression that a large percentage of the mattress industry is out of compliance or that there are a lot of dangerous mattresses being produced that are going to be lying around in somebody's bedframes. When you talk about mattress manufacturers being out of compliance, a lot of that is because they are not in compliance with certain rigorous testing procedures and not necessarily because

they are making highly flammable mattresses. It is my understanding that the vast majority of the manufacturers are using materials that are flame retardant. They have, unfortunately, through ignorance or design, decided not to test. But, in fact, the flammability characteristics, the safety feature that we're trying to require on that mattress is there I believe.

Senator FORD. Commissioner, I always heard ignorance of the law is no excuse.

Mr. PITTLE. I agree with that, and we do try to prosecute for recordkeeping violations as well as flammability violations when we undertake compliance activities. However, it is difficult to flatly apply that maxim to every conceivable violation of the law. Many of our regulations certainly in the Hazardous Substances Act and the Poison Prevention Packaging Act—have been on the books for several years, and yet far too often, when we go in and inspect some companies, we find that they haven't been putting their drain cleaner or whatever their product is into a child protection cap. In many cases, the company does claim ignorance of the law, and immediately brings itself into compliance. I think someone would be a fool not to come into compliance after an inspector came in and said you're out of compliance. So while I'm somewhat impressed that a company makes a fast change to bring its products into compliance, I'm not convinced that is enough. We've got a law that says when people violate that law, penalties may be assessed, and we may seek penalties not only to punish a violator but to help motivate other people to make sure they are in compliance. I think a closer look at the assessment of the FHSA cases that were rejected in Justice in the past would reveal them to be cases sometimes involving minor violations that the Commission was pursuing to set an example for the industry. I do not know how many of these were turned down because they were not considered dramatic enough by the Justice Department. I suspect that a lot were simply taken over from FDA by the Commission when it came into being. So the age of them I think may have been a major factor in a number of rejects. In future cases I think that the factor of whether somebody quickly came into compliance or was recalcitrant is going to bear on whether or not we can get a criminal prosecution but not a total reject.

Mr. BYINGTON. Senator, as you leave, I would like to make one other comment in terms of the mattress industry, as an example of our effort to try to get cooperation and educate the industry. We contacted every manufacturer of mattresses we could find, and we held seminars and publicized those seminars. We also sent materials through the trade associations, and, lastly, we went to their suppliers and gave their suppliers information and material on the law. So we are trying to inform about their legal obligations.

Senator PEARSON. Mr. Byington, you used the term in your prepared statement that always bounces off people who are concerned with safety. You say in your prepared statement that you plan to undertake construction of a cost-benefit model. I'm sure you're not going to say a certain number of children's eyes get put out to measure your cost of litigation. That's not the sort of judgment you're going to make, but I think you ought to expound on that a little

bit. We're going to get a lot of questions about that as you assess the benefits of a proposed compliance action in this safety field. I know what you're talking about, but it's just an unfortunate use of words, I think, particularly in this field.

Mr. BYINGTON. I agree that the image of cost-benefit assessment is a problem in the health and safety field, but we particularly tried to use it as it exclusively relates to the cost of litigation. In order to use it here, we attempted to construct a cost-benefit model to determine our internal cost of litigating a case as contrasted with the potential impact of the case. In looking at the agency during the past couple months, we found that we did not have any legitimate internal cost data. We did not know what it was costing us in terms of people, hours, or dollars, on a case-by-case basis, and I felt that this data was important for us to determine what kind of changes may be necessary, and especially when it may be necessary for us to request additional legislation or funding from the Congress.

Senator PEARSON. I understand what you're saying. It's a factor to be considered and it's a piece of information that you ought to have.

Mr. BYINGTON. From a management point of view.

Senator PEARSON. For budget requirements and everything else, but that's not a dominating factor in your whole development function.

Mr. BYINGTON. No; it is not. It is only significant in terms of an internal budget determination.

Senator PEARSON. Commissioner Pittle, I believe you have a statement that you want to make in relation to the legislation that was introduced.

Mr. PITTLE. Thank you, Senator. I brought a very large statement of two and a half pages this morning.

Senator PEARSON. Go ahead and read your statement.

Mr. PITTLE. I don't have any prepared comments with regard to criticisms of the GAO report beyond what the Commission has jointly submitted to the committee.

I would like to comment on several of the provisions of S. 3755.

Senator PEARSON. Excuse me. Mr. Chairman, are your statement here today and the responses you made the general consensus of opinion among all the Commission members?

Mr. BYINGTON. Yes. The actual comments that were provided in relation to the GAO report were approved by the entire Commission and my statement was the same.

Senator PEARSON. Good.

Mr. PITTLE. My comment here is an individual one.

Regarding S. 3755, I very strongly support the bill. I think it's an excellent one and I particularly applaud the proposed addition of authority to the Commission to assess civil money penalties under all acts enforced by us. As far back as March 1975, I urged in a separate statement regarding S. 100—the Consumer Product Safety Commission Improvements Act—to this committee that Congress grant us civil penalty authority under the Flammable Fabrics Act. I am delighted to see that Congress is ahead of me in suggesting this authority for all of our acts.

Second, I am delighted to see that S. 3755 would give the Commission approval over the chairman's choice for Director of the Bureau of Compliance. The Commission at present has such authority over the attorney who occupies the Office of General Counsel. Yet, the Bureau of Compliance is significantly larger than the General Counsel's office and conducts activities just as important.

Finally, I'd like to express a minor misgiving about the provision which would amend the Federal Hazardous Substances Act to provide whatever level of lead is determined "safe" under the Lead-Based Paint Poisoning Prevention Act will be considered the highest permissible level of lead in paint. We would propose any hazardous substance level of lead higher than what was deemed safe under LBPPPA could not be determined. While I support the amendment, there's a slight technical problem in it. In our proceeding under the LBPPPA, it may turn out that the Commission could not determine what a "safe" level of lead in paint should be. It's possible that we won't be able to prove what a safe level is. Now in the event that we can't prove that under the LBPPPA, then that level automatically goes to 0.06 percent under that act. That's the definition of what a lead based paint would be. In contrast, under S. 3755 that question is left unanswered. There is no resolution to that problem.

I would suggest that Congress adopt the approach that was taken in the LBPPPA and the solution—and the one I believe Congress intended in drafting S. 3755—would be to state that "lead-based paint" as determined under the LBPPPA shall automatically be a "banned hazardous substance" under the FHSA. Provision for exemptions such as artists' paints from the regulation should also be made. Should the committee wish, I would be delighted to submit specific language on this point.

Senator PEARSON. Thank you. We want you to do that. To be realistic, this piece of legislation is not going to pass in this Congress. This is September 9 and hopefully we'll adjourn in two and a half weeks or so. But, we are serious about the legislation and the issues presented to us by the GAO report's recommendations as well as your own recommendations. We'd like very much to have specific language regarding some of the points raised today. I think we will move with a greater sense of accomplishment when we consider this bill early next year. I think, at that time, you ought to be prepared to come forward with some very positive procedures and policy statements regarding the civil penalties.

Realistically, the shadow of OSHA is over the Congress. It's one of the first, and most of the questions concern whether or not this is another type of OSHA vehicle to bring about the cascade of complaints upon the Congress. The bill provides for the imposition of a civil penalty which is final unless appealed to the circuit court of appeals. That puts a great burden upon the Commission to be fair and reasonable. The civil penalties, I agree, are a necessary part of this legislation. However, I think it's going to be incumbent, if we're to be successful in moving this legislation, on the Commission to come in with some very positive statements as to what sort of system of penalties we should have and how we can insure reasonableness and fairness in the assessing of civil penalties in order to give the the necessary enforcement power.

Mr. BYINGTON. I think that is a very fair and incumbent responsibility upon the Commission, and we will be very happy to do that.

Senator PEARSON. I hope we will get into this early next year and that this will be one of the first pieces of legislation we will consider in the Consumer Subcommittee and in the Committee on Commerce.

I have nothing more unless you have something. Thank you very much.

[The statement follows:]

STATEMENT OF S. JOHN BYINGTON, CHAIRMAN, CONSUMER PRODUCT SAFETY COMMISSION

Good morning. It is a pleasure to appear before you today to discuss the issues raised by the Comptroller General's report on the Consumer Product Safety Commission's compliance and enforcement activities. This hearing also provides an opportunity to explain the Commission's recent planning initiatives in discharging all of its statutory reponsibilities, as well as enforcement activities.

At the outset I would like, on behalf of the Commission, to thank the Comptroller General and his representatives for a very detailed, thorough and helpful report. I am sorry that the agency did not make comments at the time the GAO report was in its draft stages. But I have with me today the Commission's response. At this time I would like to submit this document for the record. Since our response addresses the issues raised by the GAO report, I won't go into great detail concerning specifics. But I will be happy to answer any questions you may have on the specifics of the report at the end of my statement.

When you review the Commission's response you will note that we do not agree with every finding and conclusion of the GAO investigators. However, we do regard the report as an extremely useful document. The report was published on July 26, which was a most opportune time. Immediately after I took office as Chairman of the Commission on June 2, I established a management task force and initiated several studies to determine where the agency had been, where it was now, where it should be going, and how it should be getting there. The GAO report was an excellent adjunct to our inhouse study.

One of the problems highlighted in the GAO report which also was obvious in our internal study was the inadequate range of sanctions provided in the Federal Hazardous Substances (FHSA) and Poison Prevention Packaging Acts (PPPA) and the lack of an ability to identify the segments of an industry subject to Regulation by the CPSC under these acts and the Flammable Fabrics Act (FFA).

Even though I've been on the Commission only a relatively short time, I have seen enough to agree with the suggestion by the GAO the CPSC needs the authority to assess civil penalities. In many instances cases under the HFSA and PPPA are brought before us and we are faced with either recommending that a U.S. Attorney seek criminal penalties or closing the case. This "go—no go" situation does not allow the Commission much flexibility in tailoring a sanction to fit an offense. For example, the failure of an employee to follow an acceptable formula can result in a violative product being marketed. If the isntance is a one time offense, then a criminal sanction might well appear overly harsh. However, the danger to the public from inattention and poor quality control is as real as the danger from intentional acts. Therefore, an "in between" sanction such as civil penalties would provide the deterrent and flexibility needed to address the many gradations of violation with which the Commission must deal on a daily basis.

The same problem exists in the administration of the Flammable Fabrics Act. Our practical options under that act are to seek criminal penalties if a willful violation can be established or initiate a lengthy administrative hearing leading to the issuance of a cease and desist order. We construe the Consumer Product Safety Act as granting to us all the authority that the Federal Trade Commission had in administering the FFA. Further, we believe that the amendments to the Federal Trade Commission Act, which would have been applicable to the FFA if it were still administered by the FTC, should be available to this Commission. Unfortunately, in the sole court case testing this belief we were not successful. Therefore, it is arguable that we do not have the more efficient and stringent civil penalty authority the Congress has recently given to the Federal Trade Commission. We feel strongly this authority is a necessary addition to the possible

sanctions available in dealing with violations under the FFA. A clear statement to this effect—such as the passage of S. 3755—would, in our opinion, reflect what the Congress originally intended to do when the FFA was transferred to our Commission by the Consumer Product Safety Act.

Although the GAO did not make any legislative recommendations on this point, the GAO report also noted the difficulties which can be encountered in attempting to determine how many firms are subject to a regulation. In some product categories, such as bicycles, the domestic manufacturers are few in number and they have detailed records from which their distributors and retailers can be identified. In other product categories, such as mattresses, the manufacturers are extremely small, numerous and geographically diverse, and seldom employ sophisticated record keeping systems. Such "cottage" industries are the ones which are hardest to regulate because they are not highly structured. Rarely do their trade associations have information concerning all of the members of the industry or even, in some cases, the size of the industry. Accordingly, if firms which were subject to a specific regulation by the CPSC could be required to identify their manufacturing, distributing or retailing facilities it would make it feasible for the Commission to structure a valid, statistically based inspection program. In this manner, a sampling of the industry could be inspected and valid conclusions drawn concerning the status of compliance within that industry.

It is obvious from the exhaustive review of the activities of this Commission that the problems we face are not only statutory but also involve management functions. I have already initiated efforts aimed at resolving the management problems.

The Ad Hoc Management Task Force mentioned earlier examined the general areas of planning and budgeting; personnel and management information; agency programs and the functional organization needed to meet these programs; and communications within and without the agency.

The analysis concentrated on how to provide increased consumer protection and involvement while at the same time reducing regulatory delay. Improved socio-economic and environmental analysis have been stressed, along with an effort to stimulate voluntary action within the competitive marketplace.

From an organizational point of view the Management Task Force Report pointed out that the inherited structure was entirely too diffuse, lacked coherence or logic, and was characterized by duplication of effort, lack of accountability, and an excess of informal rules of procedure. The excessive organizational spread has nurtured additional diffusion of responsibility and fostered an inordinate number of unnecessary positions in certain areas to the detriment of other needs.

Shortly after my joining the Commission, the Commissioners and I completed formulating a policy for setting priorities. With completion of the Management Task Force Report a number of actions have already been taken to improve agency management and performance:

Product profiles have been developed for more than 100 products which represent possible candidates for Commission attention;

A new approach to translating agency mission into programmatic operating terms has been taken, and a draft FY 1977 Operating Plan and FY 1978 Budget based on that approach have been completed;

Communication between Commissioners and senior managers, both at Headquarters and in the Field, has been increased and improved; and

An improved organizational structure has been developed which includes the reallocation of personnel and financial resources to support these new management initiatives.

It is anticipated that, over the course of FY 1977, these initiatives will result in a significantly more efficient and productive agency.

As stated, part of our internal review also focused on the development of product profiles in order to identify, out of the many products within our jurisdiction, those products which present problems the Commission should address. We have already begun to profile some 100 products in seven hazard categories. These profiles analyze the safety related problems of these products and present proposed remedies including the possible use of mandatory and voluntary safety standards, information and education activities, compliance and enforcement actions, or combinations of all of these approaches. From this coordinated body of information the Commission is in a position to identify those product areas which need specific attention. This intensive study and analysis has enabled the Commission to select product specific tasks and projects that should be given priority attention during the coming fiscal year.

From these planning documents a programmatic FY 77 operating plan for the agency was drafted. It was an ambitious task as this is the first zero-base analysis of this type, from the ground up so to speak, that has been undertaken in the life of this agency. After the operating plan for the coming fiscal year was drafted, the Commission turned to the needs of the agency for FY 1978. We found that our indepth approach to planning for FY 1977 enhanced our ability to plan for FY 1978.

This week we have completed and submitted to the Congress and the Office of Management and Budget our Budget Request for FY 1978. The Commission's overall strategy for FY 1978 is based upon the management initiatives adopted during the transition quarter. Basically, our FY 1978 request for $40,152,000 and 928 positions represents a tight, hold-the-line projection of FY 1977 operating objectives, which included extensive internal reprogramming. The FY 1978 request is based on a trade-off of contract dollars for in-house expertise, and incorporates only minimal program increases.

We believe that such reprogrammed and additional in-house expertise will increase consumer representation and involvement in the agency's decision making process, as well as improve agency responsiveness to consumer requests, complaints, petitions, etc. Also, these resources will allow the agency to improve substantially its strategic planning as well as its socio-economic and environmental impact analysis capability—so essential in applying the "balancing of interests" tests inherent in consumer product safety decision making.

We have also adjusted the compliance and enforcement operations within the agency. The immediate steps I have taken include the requirement that compliance and enforcement input be obtained at the beginning of all action the agency considers. In the product profile process, compliance and enforcement comments identify the enforcement problems which may be present in the different courses of action possible with respect to identified products. In this manner, the final decision as to what approach the staff recommends and/or the Commission takes on a problem will be made with full knowledge of the enforcement resources that must be committed. Thus, regulatory or other action will be totally planned and the burden on compliance and enforcement resources will be understood before regulatory decisions are made.

Further, all regulatory efforts of the agency now include plans for educating the regulated industry, as well as consumers. The recent efforts of the agency in the bicycle regulation are illustrative of this. Prior to the effective date of the regulations, several meetings, seminars and other gatherings were instituted by the agency to notify the affected manufacturers, distributors and retailers as to their obligations under the regulation. Information and education has played a major role in our efforts to date in implementing this regulation.

It is also our current policy to develop marketplace data during the regulatory development process. In this way the universe of compliance responsibility will be identified and a cost effective surveillance planned.

Moreover, studies are now underway to determine the best means of involving state and local authorities in our compliance and enforcement efforts. In addition to the contracting work we are now doing with states, our authority to commission state and local personnel is being explored to see if this is a cost effective means of obtaining better surveillance and enforcement in the marketplace.

There are other recent initiatives which are now beginning to yield fruit. For example, the establishment of resident posts to expand our geographic presence without adding costly and time consuming travel is now being implemented.

We also plan to undertake the construction of a cost/benefit model to determine the internal cost of the litigation of a case as contrasted with the proposed impact of the case. Our pilot efforts have been encouraging and, if we are successful, this will provide us with a useful tool in making sound resource decisions.

For the future, in compliance and enforcement, our fiscal year 1978 budget request includes a very modest increase in personnel and funds to aid in the more efficient handling of field casework activities, improving liaison and response time with appropriate courts and U.S. Attorneys, and providing needed on-the-job training for our area office personnel.

However, I must stress that our operating plan for FY 1977 and the budget request for FY 1978 are premised on a very important assumption—that there will be significant self initiated compliance by the regulated firms. If that is not the case then I believe very significant increases will be necessary in our compliance and enforcement programs.

In conclusion, I would like to thank you for the opportunity to discuss the GAO report and the initiatives the Commission has recently undertaken to address the management problems facing the agency. As I have indicated, the Comptroller General's report was of great benefit to us in our delineation of the actions we must take in properly managing our compliance and enforcement responsibilities. It was also a significant aid in pinpointing deficiencies in the statutory remedies available to the Commission. Hopefully, these hearings will aid in the passage of legislation such as S. 3755, which would be an invaluable step toward curing the statutory problems identified in the GAO report.

You can be assured that our management problems will continue to be addressed and we will press our vigorous management initiatives to achieve a significantly more efficient and productive agency.

Thank you again for your attention. I am ready to answer any questions you may have on the GAO report or my statement here today.

[Whereupon, at 11:00 a.m., the hearing was adjourned.]

[The following information was referred to on p. 19:]

COMMENTARY UPON "BETTER ENFORCEMENT OF SAFETY REQUIREMENTS NEEDED BY THE CONSUMER PRODUCT SAFETY COMMISSION" BY THE COMPTROLLER GENERAL OF THE UNITED STATES (JULY 26, 1976)

Commentary Prepared by U.S. Consumer Product Safety Commission

PREFACE

The Consumer Product Safety Commission has reviewed the report of the Comptroller General entitled "Better Enforcement of Safety Requirements Needed by the Consumer Product Safety Commission". The following three sections of commentary are the observations and comments of the Commission upon the three chapters of the Comptroller General's report. The first section (pp. I–1 through I–3) is introductory comments pertaining generally to the introductory chapter of the report. The next two sections (pp. II–1 through II–7 and III–1 through III–6) pertain to Chapters 2 and 3 of the report.

INTRODUCTORY COMMENTS

Before commenting upon the substance of this report some general observations are in order. First, the Consumer Product Safety Commission appreciates the time and effort taken by the General Accounting Office (GAO) in conducting the audit which resulted in this report. Both during the conduct of the audit and in this report the GAO has aided the manaement of this agency in its continuing obligation to assess the operations of the agency.

The report identifies problems, some known before the audit and others discovered during the audit. This identification process has been invaluable in aiding the new Chairman and the Commissioners in evaluating the agency's past efforts and in setting the tone and course of new initiatives to obtain compliance with the laws and regulations the agency enforces.

It should be noted that the time frame in which GAO auditors were examining the many different aspects of enforcement activity by this agency is not consistent throughout the report. Some facets of the activities were continually examined and other aspects were examined early in the audit and not examined during the latter part of the audit. This disparity in time and attention creates the impression that some identified problems persist and that these problems have been ignored by the Commission and its staff. This is an inaccurate impression which our response will hopefully correct.

The report occurred during a time of transition of compliance philosophies. Therefore, it fails to describe some initiatives which have been undertaken to address some of the problem areas discussed. However, the report recognized the efforts to improve the time necessary to process cases and the improvements which have taken place in 1976.

The report could not address the recent initiatives taken since June by the Chairman, the Commission, the Ad Hoc Management Task Force and the staff to sift the myriad possibilities for action facing the Commission and to identify product and project specific tasks and to rank these tasks for Commission attention. This recently completed effort has provided the Commission with its first

"from the ground up" look at the problems facing it, the ordering of these problems and a determination of the resources involved. This effort goes far beyond enforcement. It has taken the many missions of the Commission concerning the identification of hazards, the analysis of these hazards, the choice of the proper approach to take to eliminate or reduce these hazards (only one of which is enforcement), and the Commission's responsibilities to inform the public concerning risks in consumer products and balanced these competing demands. The resulting plan for the operation of the agency during the coming fiscal year is, in our opinion, the best blend of our finite resources in approaching what is an almost infinite problem.

COMMENTS ON CHAPTER 2

Chapter 2 of the report discusses the need to insure that consumers are being protected from products that do not meet safety requirements. The conclusion of the GAO investigators was that not all compliance activity was planned to insure that manufacturers, importers and packagers were identified and notified of safety requirements. Before addressing current CPSC efforts in this area, it should be noted that the laws involved and the Commission's policy have never depended upon actual notice of a safety requirement before taking remedial actions. Most health and safety laws in the United States Code do not require that individuals be given actual notice before they are obligated to comply. The GAO report gives the impression that there is either no obligation or no legal sanctions possible if the individual against whom action is sought cannot be demonstrated to have received actual notice of his or her obligations under the law. This is not the case with public health and safety requirements such as those discussed in the GAO report.

However, the Commission realizes that the primary purpose of our efforts is to insure that the consuming public s protected against unreasonable risks of injury. One very important means of insuring this is to notify everyone in a regulated industry about the requirements of a regulation and then to follow that notification with actual inspections.

It is current procedure in the Commission's compliance activities to first determine the manufacturers, distributors, retailers and importers subject to a safety requirement. Identifying these firms is sometimes difficult and the degree of accuracy may be relatively low, but this is always the first step in our current compliance programs. One problem we initially encounter is that nowhere in this agency, or in other agencies to whose information we have access, is there a mechanism which requires firms subject to a particular regulation to register or notify us that they are subject to that regulation. We do have the authority under the Consumer Product Safety Act to require reports from firms indicating that they are regulated by certain safety requirements and where their manufacturing and distributing facilities are located. This authority does not exist in the acts discussed in the GAO report (*i.e.*, Flammable Fabrics Act, Federal Hazardous Substances Act and Poison Prevention Packaging Act).

Even if registration or some similar procedure is possible, this does not, in and of itself, notify affected firms of their obligations under the law. We currently use resources such as Dun and Bradstreet and the Thomas Register to identify firms. We also use questionnaires and CPSC records to supplement these outside sources. When we cannot identify firms through these national sources, we resort to local information sources such as local business directories and telephone directories.

The size of our agency's field force is such that there is no way in which every manufacturer, importer, distributor and retailer can be visited to determine compliance with every regulation we enforce. We must survey an industry to determine its compliance with our regulations. Once an initial survey is conducted, we decide from the results of the initial survey whether further CPSC efforts are needed. For example, the results of our initial survey of the mattress industry revealed that non-compliance was so high that further educational and inspectional efforts were necessary. However, despite the fact that prior to the effective date of the regulation we held seminars throughout the nation in conjunction with industry trade associations, widespread publication efforts in industry journals, using suppliers of mattress materials to spread the information and extensive mailings, we are still finding firms alleging that they are unaware

of our requirements. In an industry so diverse and conducting business in very small firms, such as the mattress industry, this informing process will probably always be a long term endeavor.

Another point that the report made was that follow-up inspections after a violation has been discovered should verify compliance with safety requirements. The current procedures of this agency require our area offices to send Letters of Advice to firms found in volation of our requirements. These letters outline the violation and require written replies concerning the corrective actions to be taken by the violative firm. These corrections are then monitored by sample collection, follow-up inspections, or both.

The report emphasizes that the agnecy's efforts in the toy field have decreased since certain court decisions. This is not the entire picture. Currently the Commission is conducting a survey of compliance with the electrical toy regulation (16 CFR 1505 *et seq.*) and the bicycle regulations (16 CFR 1512 *et seq.*).

The toy regulations at issue are those which attempt to address hazards presented by toys generically. Toys are manufactured by many different sources, and it is estimated that approximately 5,000 new toys are introduced per year. It can be seen that any attempt to regulate such toys on a toy-by-toy basis would be impracticable for any except the most dangerous toys. The hazards addressed by the challenged regulations are the hazards of puncture wounds, lacerations, and aspiration/ingestion problems in rattles, dolls and noise making toys. The Commission is now attempting to address these problems through the use of generic regulations which do not regulate individual toys but, instead, address these particular risks of injury in all toys. However, working with our major resource in this area, the National Bureau of Standards, we have been unable to produce reliable test methods or devices for measuring or determining acceptable and unacceptable sharpness of edges and points. In recognition of the problems in this area, the Commission has made these generic toy regulations one of its priority items for attention during the FY 1977.

The GAO report criticizes CPSC efforts in connection with the Commission's ban of vinyl chloride. Our first observation is that the manner in which the entire vinyl chloride enforcement program was conducted taught us many lessons. Based on these lessons we will not, in the future, conduct surveys and recalls of banned hazardous substances exactly as we did in the vinyl chloride situation.

In particular, future field surveillance programs will include checks of manufacturers who have been using banned products to determine if they are using old stocks of the banned product despite their assurances to the contrary. Of course, inspection of every establishment is never possible but a well constructed surveillance program can give us a reliable idea concerning the industry's compliance with a banning action of the Commission.

Also, the confusion in determining exactly which products contained vinyl chloride caused a holding back of surveillance efforts to locate identified products. This was in the hope that more information would become available as to other products which could be located at the same time. This attempt to be efficient and fair in surveillance was incorrect and will not occur again. One way in which we will avoid this situation in the future is the extensive survey we have conducted recently to determine the formulas of approximately 15,000 chemical products. This information is now in our files. In the event future research determnes that a particular chemical or combination of chemicals should be banned, we will be in a position to know immediately which products contain these chemicals. Any recall or information efforts will then begin immediately with hard information rather than having to be conducted after hurried surveys with incomplete data.

The GAO report also mentions that delay in obtaining an environmental assessment delayed action by this agency in dealing with vinyl chloride. There was a question whether there was a need for such an assessment. The agency initially believed that the requirement to recall hazardous products from the distribution network was exempt from the requirements of the National Environmental Policy Act because removing these goods improved individual consumer's environments. This was argued to the court and, subsequently, the court disagreed. The Commission was then required to assess the environmental impact of the disposal of recalled products. After determining volumes and concentration of the products, the Commission decided that disposal of the recalled products under various guidelines set out by the Environmental Protection Agency would not adversely affect the environment. The Commission's final assessment was submitted to the court which subsequently vacated its stay order.

This incident spurred the establishment of procedures within the agency for environmental assessments for all our activities. The agency has given top priority to the establishment of our formal regulations for such activities. These regulations, as required by law, have been reviewed by the Council on Environmental Quality and are in their final drafting.

Another point in the GAO report is the need to evaluate the effectiveness of compliance activities. It is current procedure within the agency to evaluate all compliance programs to determine the effect they have had. It is through this evaluation that we decide what the level of compliance is within the industry, the effectiveness of the regulations' procedural mechanisms in addressing the risks involved and the need for further resources to be devoted to compliance action in the area.

COMMENTS ON CHAPTER 3

Chapter 3 of the report discusses the need for more effective action against violators of safety requirements.

The GAO investigators conclude that the procedures reviewed by them are inadequate for developing and processing criminal cases. As the introductory remarks to the Commission's reply indicate, the GAO review came at a time of transition in the compliance activities of the agency and many of the initiatives taken by the Commission are not reflected in the report.

As background, early in the life of this agency two lengthy and intensive training sessions were conducted for all inspectors and investigators of the agency to train them in the legal requirements of the laws and regulations administered by the CPSC. Further follow-up training of the mid-level and upper level field managers has been conducted to refine their knowledge and answer particular questions. Additionally, weekly case review memoranda and conference telephone calls are used to answer questions of those in the field as to what the legal requirements are that they are to enforce. Accordingly, every effort has been taken to insure that everyone involved in the enforcement of CPSC laws and regulations is familiar with these laws and regulations and knows how to determine if a violation exists.

The Commission has been reviewing its past policy of requiring all cases to come to the Commission for a decision as to their disposition. This policy was initiated by the Commission to insure that administration of the law would be uniform throughout the nation. As the level of knowledge in the field force has increased, the Commission has decided to decrease the centralization of its review. Initially, as mentioned in the GAO report, delegation of case preparation and recommendations in cases under the FHSA and PPPA was made to the field. Now that the field has demonstrated the ability to implement this delegation, a further delegation is being planned, to allow certain classes and types of cases to be closed by the area offices without action by the Commission. Further, a pilot program is underway to determine if area offices can close cases even earlier in their initial stages without performing any but the most basic investigative actions. Cases which, on their face, present violations of only a *de minimis* or inconsequential nature may, under this pilot program, be recommended for closing without preparation of lengthy investigations or paperwork. If this pilot program and the pending delegation prove successful, cases which meet the criteria may be closed at the area office level without the use of further resources for investigation or paperwork, and headquarters resources formerly used to review such cases may be better employed elsewhere.

The GAO report further stated that the Commission should adapt its criteria for case referral to meet those of the Department of Justice. The report overlooks that, at the time of the audit, the Commission was well aware of some of the criteria used by the Department of Justice (although these criteria are not consistently applied, as will be discussed later) but disagreed with these criteria. For example, the Commission believes that the small size of our field force is such that for every violation found there are many more violations which will not be discovered. Accordingly, the Commission has sought to have violations punished on the theory that the punishment of the one violation will be a warning and deterrent to other violators. Also, the Department of Justice and certain U.S. Attorneys have displayed reluctance to prosecute violators who, upon being discovered, correct their activities. This reluctance has been challenged by the Commission because this concept accepts that anyone may, with apparent impunity, continue to violate the law until discovered. Further, the requirement

of knowledge of the offense (also incorrectly mentioned in the GAO summary of the requirements of the FHSA) is used by the Department of Justice and some U.S. Attorneys despite the clear provisions of the law which do not require knowledge as a prerequisite to prosecution. Therefore, the initial efforts of the Commission were not to instruct the field force to conform to Department of Justice views but, instead, to change the views of the Department of Justice.

As to establishing criteria which meet Department of Justice standards, this is very hard to do because there is no listing of any criteria by the Department. Further, each individual U.S. Attorney uses his or her own scale to evaluate potential criminal cases. As mentioned above, despite the fact that the laws involved do not require the showing of knowledge, some U.S. Attorneys reject cases in which the knowledge of the prospective defendant cannot be demonstrated. However, this is not consistent throughout the United States. Also, the Department of Justice has not been consistent in its rejection of cases. For example, some cases which have, in the past, been rejected as too old have been of a lesser age than cases which have subsequently been accepted. However, certain general standards used by the Department of Justice have been identified and our area offices are aware of them. For example, timeless of cases is of great concern, particularly in instances where there is only one violation which can be established.

The Commission itself has become more aware of the reluctance of the Department of Justice and U.S. Attorneys to proceed unless either multiple counts or actual knowledge can be demonstrated. Accordingly, the Commission is more selective in the cases it now refers. Many of the cases now closed by the Commission would have been forwarded to the Department of Justice previously.

In summary, the Commission is taking steps to delegate to the field authority to close cases as soon as criteria are identified and the field can demonstrate consistent application of these criteria. The Commission is aware of certain general standards used by the Department of Justice and U.S. Attorneys, and it is attempting to apply certain of these criteria in evaluating cases for forwarding. Local area offices aid in this process by including, where appropriate, informal estimates of case appeal to local U.S. Attorneys.

A final point in Chapter 3 of the report was the GAO recommendation that civil money penalties be allowed under the Federal Hazardous Substances Act. The Commission is in favor of this recommendation. As is evident in reading the GAO report, our reply and other discussions of this problem, the Commission is faced with a "go-no go" situation when evidence of a violation of the provisions of either the FHSA or the PPPA is brought to its attention. If the Commission decides there has been a violation and the violation should be punished, it must then seek criminal penalties. If criminal penalties are deemed unrealistic or too harsh, the Commission must content itself with a strong letter of warning and close the case. This situation does not lend itself to enforcement tailored to the offenses involved. The addition of civil penalty authority to the FHSA and the Food, Drug and Cosmetic Act provisions relating to enforcement of the PPPA would enable the Commission to address and properly deal with several types of violations which are currently either dismissed or processed as criminal actions. For example, as stated earlier in this reply, ignorance of the law, particularly in health and safety matters, is no excuse. However, when employees have been careless in following a proper formula and the reluctant product is, one time, in non-compliance with the law, it seems harsh to seek criminal penalties. At the same time, failure to take action against this sort of conduct does not protect the public against hazards which, although not intentional, are just as dangerous. Civil penalty authority would appear to fill this gap.

O