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SAFETY ACT

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HEARINGS

BEFORE THE

SUBCOMMITTEE FOR CONSUMERS

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

UNITED STATES SENATE

NINETY-FIFTH CONGRESS

SECOND SESSION

ON

S. 2796

TO AMEND THE CONSUMER PRODUCT SAFETY ACT TO EXTEND
THE AUTHORIZATION OF APPROPRIATIONS, AND FOR OTHER
PURPOSES

APRIL 4, 5, AND 6, 1978

Serial No. 95-97

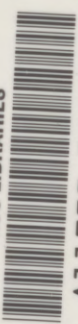
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REAUTHORIZATION OF CONSUMER PRODUCT SAFETY ACT

TUESDAY, APRIL 4, 1978

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION,
SUBCOMMITTEE FOR CONSUMER,
Washington, D.C.

The subcommittee met at 9 a.m. in room 1202, Dirksen Senate Office Building, Hon. Wendell H. Ford (chairman of the subcommittee) presiding.

OPENING STATEMENT BY SENATOR FORD

Senator Ford. Good morning, ladies and gentlemen.

This morning the Consumer Subcommittee has before it S. 2796, a bill to reauthorize the Consumer Product Safety Commission (CPSC) for fiscal years 1979 through 1981. During the next 3 days of hearings, I hope our witnesses will be able to provide us with a variety of opinions on the future role of the CPSC.

I am well aware that a number of our witnesses have been, like myself, disappointed with the CPSC's past performance. I hope we are able to reach some common agreement as to the value of this agency and its future activities in reducing product-related death and injuries.

Because of the number of witnesses we will hear from this morning, there are several areas of interest not directly related to our reauthorizing bill that will be impossible to cover today. I assure you that as chairman of the Consumer Subcommittee, vigorous oversight into the CPSC and its activities will continue in the upcoming months.

Two areas I hope to discuss today are standard development and the Commission's role in the area of chronic hazards. With respect to standard development, we frequently hear the Commission criticized for mandating only three product safety standards during the past 5 years. I understand that two of those standards were recently struck down by Federal appellate courts.

The Commission's performance in the area of standard development has been disappointing, to say the least. I am of the opinion that the Commission has a number of other regulatory tools that may be more effective in many instances than the development of mandatory standards. However, I do believe the Commission may need the flexibility to develop a standard "in-house" when the public interest would be served. Increased attention must be given to the cooperation with standard-setting groups in the development of industry voluntary standards that will adequately address the risk to consumers.

I specifically request suggestions from our witnesses on how we may implement this two-fold approach to safety standards.

With respect to chronic hazards, I believe now is an appropriate time to discuss whether a relatively small agency like the CPSC has sufficient resources and personnel to deal with the long-range health and safety hazards that exist in the marketplace, or whether the Commission should either defer to the recommendation of some other agency or have its jurisdiction over these long-range problems transferred to another agency.

I hope our witnesses will address these questions today. Although I have criticized the Commission performance in the past, it has been and remains my belief that the Consumer Product Safety Commission is capable of meeting the mandate given to it by Congress over 5 years ago. I will continue to solicit the opinions of our witnesses and other knowledgeable individuals about ways to improve the performance of this agency.

[The bill follows.]

[S. 2796, 95th Cong. 2d sess.]

A BILL To amend the Consumer Product Safety Act to extend the authorization of appropriations, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Consumer Product Safety Act Authorization Act of 1978".

SEC. 2. Section 32(a) of the Consumer Product Safety Act (15 U.S.C. 2081) is amended by (1) striking out "and" at the end of phrase (3); (2) striking out "1978." and inserting in lieu thereof "1978.;" ; and (3) inserting the following at the end thereof:

- "(5) \$55,000,000 for the fiscal year ending September 30, 1979;
- "(6) \$60,000,000 for the fiscal year ending September 30, 1980; and
- "(7) \$65,000,000 for the fiscal year ending September 30, 1981."

Senator FORD. The first witness this morning is Mr. Bernard Falk, president, National Electrical Manufacturers Association. Good morning, Mr. Falk. We are delighted to have you with us this morning. We have your statement. You may proceed. You can highlight it, submit it for the record, or read it. It's up to you.

**STATEMENT OF BERNARD H. FALK, PRESIDENT, NATIONAL
ELECTRICAL MANUFACTURERS ASSOCIATION**

Mr. FALK. Good morning, Mr. Chairman.

My statement is brief, and with your indulgence I will read it.

I appreciate this opportunity to testify and will confine my comments to standards development. Our association, NEMA, has been interested in Federal consumer product safety activities since before the formation of the CPSC. For example, in November 1969, NEMA submitted a detailed, 275-page report to the National Commission on Product Safety about the standardmaking mechanisms in the electrical industry. In 1971, I testified before the full Commerce Committee and in 1972 before the House Interstate and Foreign Commerce Committee in support of legislation that created the CPSC.

The thrust of our testimony 6 years ago, as it is today, was to define an appropriate Government role in product safety. NEMA supports the need for an agency in the area of consumer product safety, but we feel the best role for the Government is to support more research

aimed at identifying risks. As a follow-up to this identification process, the Government can also educate the consumer to possible risks and ways to avoid them. Furthermore, the Government can motivate industry—if need be, by regulations—to respond to perceived risks.

We support the offeror process embodied in section 7 of the Consumer Product Safety Act because that section appears to provide a cooperative balance between Government and nongovernment attempts to develop safety standards.

Since its formation, the Commission has often been criticized for delays and other problems encountered in the implementation of the offeror process. Critics have suggested either amendment or abolition of the process. One House bill, H.R. 10819, introduced by Congressman Eckhardt, would allow the Commission to opt for in-house development of standards rather than use of the offeror process.

We oppose changing the offeror process at this time for several reasons. First, we continue to support the concept of cooperation between the Government and the private sector in standards development. Second, change at this time, with just a few years' experience, is premature.

The biggest problem with section 7, however, may not lie in its substance but in the quality of the managerial effort of the Commission to implement it. Amending the offeror process at this time to give the Commission authority to elect to develop standards in-house is dangerous because of the agency's demonstrated lack of "hands-on" knowledge of products regulated. More generally, because of the ever-present prospect of overregulation, we must ask ourselves whether we feel that Government really has all of the answers, or at least enough answers to regulate effectively in this area.

I would like to look now at the effect of an amendment like that in the House bill. The CPSC requested about \$45 million for its activities in fiscal year 1978. Mr. Chairman, your bill to extend the authorization of the Commission would set the maximum level of funding between \$55 and \$65 million for fiscal year 1979-81. If the Commission staff were to become deeply involved in setting standards, it would be necessary to divert relatively scarce resources from other tasks to which, we feel, the Commission should devote greater effort.

We believe the Commission should improve its competence in compiling data and describing causes and effects of injury. The standards-making process requires people with "hands-on" expertise in the design and manufacture of products, people who know about tooling, quality control, et cetera. Moreover, these people must have the awareness of the state of current technology which comes from the daily experience of working toward product improvement.

I submit that, even if all of the added resources were devoted to standards activities within the Commission, the Commission would still fall short of providing an effective option to the safety standards-setting programs in the private sector. Moreover, to take the worst possible case, if the Commission decided never again to use the offeror process and to develop standards by itself, the Congress would be shocked by the funds requested by the Commission for the people necessary to do the work.

Mr. Chairman, describing this worst possible scenario may seem pointless. However, if H.R. 10819 survives the markup process and

is passed by the House of Representatives, and if your bill is passed in the Senate, then there must be resolution of the differences between the two bills. The record on the issues is scanty at this time, but we would like to be on the record as opposing any change to the offeror process without substantially more consideration on the matter.

Thank you for your attention. I shall be happy to answer any questions you may have.

Senator FORD. Thank you, Mr. Falk. I think I need to make a statement as a result of your statement. I can assure you that any amendment to the offeror process should not be taken as a directive for the CPSC to abandon the offeror process and begin to develop standards in-house. I will follow the Commission closely to see that does not occur.

Let's get down to the nuts and bolts. Does NEMA support the need for a CPSC?

Mr. FALK. Yes, sir.

Senator FORD. Does it support a 3-year authorization of the agency?

Mr. FALK. We have not taken a position on it; though I think we would support the authorization for appropriate funds and a continuation of the agency; yes, sir.

Senator FORD. Can you give the committee some specific recommendation for how the Commission might become more involved in the development of voluntary safety standards?

Mr. FALK. I think the Commission has taken some steps in the way of policy in the past year, encouraging the use of voluntary standards. I think the Commission can learn some things from the recent OMB circular which tends to set policy of the Federal Government in terms of the interaction of Federal agencies with the private sector, and begins on the premise that wherever possible, the Federal Government shall make use of appropriate private sector standards.

I think the most important thing is the standards development atmosphere. We have common objectives and common goals. I think, unfortunately, far too often in the past, either intentional or otherwise, we have seen too often what evolves is an adversary atmosphere.

I think further thought should be given, and I have no specific recommendation; but in terms of the future of the Commission, I go back to our position 6 years ago and urge that some consideration be given to centralizing the managerial efforts within, perhaps the chairman of the Commission, or, if you will, getting away from the collegial methodology of managing the Commission on a day-to-day basis. A body of five should make decisions with regard to risks of hazards. Once the decisions have been made and taken, we urge that perhaps the chairman be given the necessary authority, either through legislation or Commission procedures, to manage that Commission properly. It is difficult to have a staff reporting to five different bodies.

Senator FORD. Let me ask you a question about the OMB circular that you referred to. Was that intended for the CPSC?

Mr. FALK. I think the OMB would have to be responsive to that. We have not gotten a direct answer from the OMB. The OMB, as I understand it, can only use that circular for the term of force of effectiveness within the executive agencies.

I do not have the circular in front of me, but there is language that urges the independent agencies to consider the use of this policy.

Senator FORD. What is your opinion of the recent Commission decision to participate in the development of a voluntary standard for chain saws?

Mr. FALK. It is a pleasant development. The Commission has also gone ahead and decided to go ahead on voluntary standards on extension cords.

Senator FORD. In your statement, you indicated that the best safety role for Government is to support more research aimed at identifying risks. Should this be the first priority of the Commission?

Mr. FALK. I think it is one of the top priorities. Let's look ahead at what the Commission objective is in designing standards: It is to curtail and cut down the unreasonable risk, cut down the injury rate that is product-related in this country.

It seems the first place to start is to identify where are these accidents occurring, why are they occurring, the epidemiological reasons for the occurrence. You need that type of input and data, which I think best comes from the Federal agency, despite the efforts of the private sector.

We can't reach out for hospital data the same way a Government agency such as the Commission can. We can't supply data.

Sometimes we get into an injury situation and the manufacturer wants to find out something about the cause of injury, finds himself in the midst of a lawsuit where the plaintiff is withholding data.

The Commission is in an ideal role to obtain such information. That ought to be encouraged. There is nothing that hits home better than the Commission coming in, or any Government agency coming in, with some constructive data that says: look, here are the risks we have uncovered, and here are the causes for the risk. We would like you fellows to do something about them.

Senator FORD. Do you think the Commission's failure to support such research as you refer to has had an effect on standard development?

Mr. FALK. It may have had an effect in the sense that I am not sure the priorities have been well chosen. I think the Commission has reacted too often to public clamor or outside complaint—and I am not criticizing the validity of the complaint; but it seems the best way to set priorities on standards and activities of that sort is to start out with a reasonable data base.

I don't believe such a reasonable data base of the type that some of us visualized some years ago is in being as yet.

Senator FORD. You mentioned Congressman Eckhardt's proposed amendment to section 7. Does that legislation, in your opinion, give the Commission a blanket mandate to develop in-house standards?

Mr. FALK. No; it doesn't give them a blanket mandate, but it gives them the authority to interpret it as they see fit. If they consider it a mandate they can go ahead on that process.

Senator FORD. Don't we as a committee help them interpret that by oversight?

Mr. FALK. I was going to say, sometimes after the fact.

Senator FORD. Maybe we can act instead of reacting. Can you suggest any safeguards which would provide flexibility without getting the offeror process?

Mr. FALK. You mean safeguards with regard to the Eckhardt amendment?

Senator FORD. Yes.

Mr. FALK. I find little in the Eckhardt amendment that is acceptable to us, and let me explain why. What we are concerned about here is not only the language of the amendment, but the direction and, if you will, interpretation of the mandate that that amendment might offer. It might be interpreted as a signal by the Commission or key people in the Commission that they can now ignore the private sector.

I think all we are talking about here is basically a saving of 30 days, as I read the amendment, saying you can decide, without going through the offeror process, to go right ahead. I think that 30-day saving is not worth the—what I would call the attitudinal relationship between the private sector and the Government; and more importantly, the opportunity for the Commission to find out what is out there, that offeror process has some attractive points. It gives a Government agency an opportunity to hear from 218 million Americans what ideas they have about developing a standard to resolve a problem.

Senator FORD. Mr. Falk, the development of standards have averaged 834 days thus far. That seems like an awful long time. Can you cite specific examples where the development of a standard under section 7 has worked reasonably well?

Mr. FALK. No, sir, but I am not certain. I agree with your concern about the problem. I don't know that I am wise enough to offer solutions.

I have some reservations about the solutions being offered. I don't know that 834 days—

Senator FORD. The statute says 330. It has taken almost three times that, and that makes 3 years instead of 1.

Mr. FALK. Yes, and I would say with regard to the statute, a more serious look should have been taken as to what the reasonableness was in terms of time.

Standards take time, Mr. Chairman. It is not a one-man operation. You are dealing with many works, many segments representing many different sectors. I have been personally involved in standards work for 21 years. I have seen standards written in anywhere from 1 month to ad infinitum. Sometimes they are never resolved.

Senator FORD. Take the cellulose problem. I think that accepting a modified version of the industry standard, going in, so that we can have some protection for the consumer, and then directing the Commission to set its own standard in a definite period of time has advantages. You have to go back and see how long it is taking the Commission to get to the cellulose issue after they have been warned by their own field office that a problem exists.

Mr. FALK. As well as by us, sir.

Senator FORD. Industry has begged them to do a standard on this one. It concerns them greatly. I think it concerns you, too.

Mr. FALK. My point is—

Senator FORD. Under the law as presently written, do they have the flexibility? Under the bill that has been introduced, has there been

enough flexibility for the Commission to go ahead and move in appropriate circumstances?

Mr. FALK. As I understand the law at the present time, the Commission, after appropriate findings, can determine a section 7 proceeding in order. After making that determination, they then give the public 30 days to offer proposed solutions in the way of an offeror process. At the end of the 30-day period, if the Commission is dissatisfied, it moves ahead on its own volition.

It can develop standards in-house, or hire some outside agency, which I suspect would be the course the Commission would go if the legislation is enacted, because I think the Commission is realistic enough to say it does not have the expertise in-house for the broad range and variety of products covered by the Commission scope.

I think all we are talking about here is a 30-day situation. It is hard for me to perceive suddenly, overnight, somebody wakes up bright one morning and says: Hey, we need a standard this morning. What happens overnight is you get a section 15 or section 12 proceeding. Standards are not something that takes place overnight.

Unless I read the legislation incorrectly, I think we are talking about a difference of 30 days, but a whale of a difference in Commission philosophy.

Senator FORD. Let me put my thoughts down here. I am encouraged with the philosophy of voluntary standards, but I am also concerned about the inability to have flexibility when it is needed. I hope that in the philosophy as it relates to voluntary standards, flexibility will be used and exercised with good judgment.

We can only trust those who are put in the position of responsibility until such time as they get out and start going in a wrong direction. We have the ability to bring a halt to it. We have to take into consideration that one of the things we wanted for the Commission before I arrived on the scene was independence. We are trying to give them direction, even though they are an independent agency. So I think we are both trying to get to the same place. One is more concerned than the other here.

Mr. FALK. Perhaps I haven't stressed it strongly enough. I think with the proper leadership and with the regulatory clout that exists in this law, you have got that expertise out there in the private sector. I don't mean just in the industrial sector. It is there in the consumers, there in the users, there at the academic levels.

I think you can harness that try to reinvent the wheel by saying we are going to develop in-house expertise. It would not only be redundant, but it would be a waste and nonproductive.

Senator FORD. I go back to the cellulose problem. They should have had the ability to move quickly; 600 new companies have sprung up in the last 24 months. There are real problems, no standards. I think the ability to move is very important, and they should have had that flexibility.

Mr. FALK. I talked about 30 days being the difference in the two approaches. I would like the opportunity to offer written suggestions on how to deal with something like this.

Senator FORD. That would please me very much. It is an area in which we can do a better job. If we give them the proper direction,

and their philosophy is correct, I think we have an opportunity to get the agency to perform in a manner that we would both applaud.

I get from your testimony, primarily, you would like to see the Commission extended. You are pleased with the voluntary approach. You have concerns about amending the offeror process, and we will leave the record open. Hopefully you will come forward with your recommendations at an early date. This has to be on the floor and passed by May 15. We are running into a deadline.

Mr. FALK. We will have something to you in a week or two, sir.

Senator FORD. How about 10 days?

Mr. FALK. It's a deal.

Senator FORD. It's a deal. Thank you very much. We are glad to have you with us this morning.

[The following information was subsequently received for the record:]

NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION,
Washington, D.C., April 6, 1978.

HON. WENDELL H. FORD,
Chairman, Subcommittee on Consumer, Senate Committee on Commerce, Science, and Transportation, Dirksen Senate Office Building, Washington, D.C.

DEAR SENATOR FORD: You will recall that on April 4, 1978, I testified before the Senate Commerce Subcommittee on Consumer to discuss the CPSC and, particularly, the matter of the "offeror" process in standards development.

Toward the conclusion of our colloquy, you requested specific recommendations, using the cellulose problem as an example, as to how the Commission could deal effectively and promptly in terms of establishing a standard where early action is necessary. I requested the opportunity to submit my comments to you in writing, and that is the purpose of this letter.

First, I understand that there is an existing standard (GSA Purchasing Standard HH-I-515C) which, if adhered to, could presumably go a long way toward reducing unreasonable risks of injury. (See your bill S. 2401.) We believe that the Commission has the authority under section 7(c) of the existing act (Public Law 92-573) to publish such standard as a proposed consumer product safety rule without going through the offeror process as described in section 7(b). If this is not the correct interpretation of the law, perhaps consideration should be given to such an amendment which I think will be responsive to the flexibility that you seek.

Even if the GSA Standard were not the ideal solution, it could still serve as an adequate interim standard until an improved standard could be developed under normal section 7 procedures.

In those instances where an adequate standard does not exist, we would urge that the Commission continue to use the section 7(b) process as we stated in our testimony to you.

Let me stress again my thought that the need for establishment of a standard does not suddenly arise overnight. Proper responsiveness to "early-warning signals"—and in the instance of home insulation this has been evident for a year or two—should have resulted in proper leadership and early communication with all concerned parties as to the need for responsive action by the private sector without the necessity of "regulatory clout."

I hope you find these comments responsive and helpful. I would be happy to discuss this further with your staff, if so desired.

Sincerely yours,

BERNARD H. FALK, *President.*

Senator FORD. The next witness this morning will be Anita Johnson, with the Environmental Defense Fund.

We want to move along and get into questions with you. You have a statement which we have read. If you want to outline that statement so we can ask questions, we would appreciate it.

STATEMENT OF ANITA JOHNSON, ENVIRONMENTAL DEFENSE
FUND; ACCOMPANIED BY ROBERT RAUCH

Ms. JOHNSON. I think you are well aware that the CPSC has not set the standards we all expected it to give years ago. In 1976, the chairman was then predicting that the Commission would set 100 product safety standards by 1982 and thereafter would self-destruct, in the words of one Commissioner.

Two years after that testimony, we have three promulgated standards. At that rate, as my testimony points out, we can expect the Commission to achieve the 100 standards goal in 155 years. Obviously, that's a snail's pace compared to what we expected.

Senator FORD. That proves you ought to be careful about what you say for the record.

Ms. JOHNSON. We believe to some extent the failure of the Commission is due to labyrinthine procedure aspects for setting standards. The GAO determined that the three standards set took 834 days on the average. Standards now underway are not a whole lot better. The National Commission on Product Safety, which was the origin of this new agency, and whose report was issued in 1970, did an extensive study of safety standards developed by industry. They studied 48 voluntary standard-setting organizations. Their conclusion was that standards set by industry at that time were chronically inadequate, both in scope and permissible levels of risk.

Their solution, to the chronically inadequate voluntary standards set by industry, was the CPSC. Unfortunately, the Congress built into the Consumer Product Safety Act a provision, the practical rule of which the industry is still developing its own standards. The intention behind the offeror provision was public participation in the standard-setting process. As an intellectual matter, it's hard to disagree with that.

What it has meant for the CPSC is that the public that's participating in the development of standards is by and large the industry itself. Industry, as a practical matter, is developing the first draft of its standards. Then this draft has to be examined in great detail and at great cost by the Commission before they are promulgated. Commissioner Pittle, in the statement to Chairman Magnuson, has put it well. He says, "In my view of all the standards that we have seen so far submitted by industry organizations are simply warmed-over versions of the voluntary standards that had been set before the Commission was enacted."

We do not think that industry should be developing its own standards. We do not think the Commission needs industry development of standards in order to get the expertise.

Obviously, these standards are highly technical. Obviously, the Commission will not have all of the experts that it needs. But it can solicit outside experts on an individual basis, outside experts not employed by industry or industry standard-setting organizations, and it can solicit this expertise early in the process.

Mr. Pittle points out again in his excellent letter to Chairman Magnuson, really I guess he was writing to you, that the ordinary rule-

making provisions of the APA require the agency to propose a rule and then open it up for public comment. He points out, when you're working with technical standards you need to have outside comment earlier than the APA provides for. This can easily be done without extensive provision.

In summary on that point, we believe the offeror provisions are unwieldy, costly, involve industry setting its own standard and in general have not produced very good safety standards. We think that the CPSC should utilize its current powers to set substantive rules on the regulation of toxic chemicals. CPSC has regulated asbestos and Tris. We think there are other toxic chemicals in consumer products which they should attack immediately.

CPSC is fully aware that it needs a policy on cancer-causing chemicals. There are drafts circulating now in the agency on what to do. On page 3 of our testimony, I note that it's extremely important for rules on cancer-causing chemicals to be substantive in nature so that each principle of carcinogenesis does not need to be litigated in the agency or court proceedings every time the agency regulates a carcinogen.

Our third point is that the agency should promulgate general rules to require generation of safety data by manufacturers. Frequently, the problem in the marketplace is not that there are no hazards in consumers' products. The problem is we know nothing about the safety or harmfulness of a product. There is simply no information. The agency should go quickly to require manufacturers to generate safety data about their products.

The section 27(e) of the act does give the agency this authority. It has had this authority from the very beginning and had utilized it only one time, when it required aerosol manufacturers to inform the agency of the contents of its products.

We think that the agency, once it has information that an ingredient of a consumer product causes mutation in bacterial studies, should immediately require long-term animal studies.

We noted that many consumer products contain chemicals which are chemical cousins of known toxins. They should be assertively investigated by the agency.

The agency has not instituted a program of premarketing scrutiny. It has the ability to require manufacturers to notify the agency prior to marketing of new ingredients and has not taken the opportunity to use this excellent power.

We think that some of the projects taken on by the agency are outright silly and ineffectual. We think those projects should be abandoned because they are a waste of money.

February 20, the agency announced publication of a pamphlet called *Supersitter*. This pamphlet instructs babysitters on what precautions to take on their job. The suggestions include getting the phone number of the doctor, the poison control center, a hospital and the number where the parents of the child can be reached.

These suggestions obviously have some merit. In fact, they are indisputable. We cannot understand why a technical, high-powered agency would waste its time on such obviousness.

Last Thursday the Commission voted to allocate \$330,000 to the Chain Saw Manufacturers Association to develop voluntary standards,

that are the same voluntary standards that the National Commission concluded were ineffectual and useless, the same old voluntary standards that industry was developing before there ever was an act, to develop voluntary standards for chain saws.

The Commission Chairman was quoted in an Associated Press story as saying they chose voluntary standards because they were cheaper to develop than mandatory ones. They would be because industry won't contest them all the way along and because they could be developed in a shorter period of time. The industry would not cause trouble on those, obviously.

Senator FORD. Let me ask you something here. The decision to which you refer is recent, and I have some knowledge of what was done. I don't want to get into a conflict, but I would like to get some answers. Is there any reason why the Commission cannot accept the voluntary standards and let that be the minimum, and then go ahead with a higher mandatory standards?

Ms. JOHNSON. Ultimately, we may get a very strong mandatory safety standard out of there. We are talking about 10 years down the pike if it's done this way. They have asked the trade association to regulate itself in this case. You can't ask any human being to set up stringent rules for his own conduct.

Senator FORD. I understand the Commission will be setting the rules on this one, not the industry itself, and that they have appropriated funds so they might be in a position to help direct the development of the standards even though when they come forward the Commission will have to approve these.

Ms. JOHNSON. You're right that the Commission staff looks at any standards approved by the Commission. The problem is as a practical matter, the form of the standard, general thrust of the standard, most of the substance of the standard is determined by the industry. They have the first chance and it's that chance according to Commissioner Pittle which is the most powerful one.

If you want a strong standard, why ask chain saw manufacturers to develop the standard? You want people who are disinterested, people who do not have important financial disincentives to develop a stringent standard.

Senator FORD. I understand this is a special case where the commissioners were attempting to try this and where the consumer will have input. It's a cooperative venture. I thought it was an innovative idea which should be attempted.

Ms. JOHNSON. This is an idea which coincides with the offeror provision of the act. It says, let the public develop the standards. The public is not the Consumers Union. It's not the NBS. The public is the chain saw trade association. It's the lobbying group for the manufacturers of chain saws. Why are we asking them to take the first step in development of the standard? They may come up with something valuable. But that is 10 years down the pike.

Senator FORD. I thought that this procedure and the allocation of funds allowed, one, the industry to come forward with their voluntary standards and, two, you would have consumer input and the Commission would make a decision.

Now, in the cellulose problem we have an offeror process. Intellectually you said it was good but in the real world it hasn't been working

out, so why not try something else? In my legislation concerning cellulose we set a minimum standard which was based on the industry standard. Then we directed the Commission to go forward with setting their own mandatory standard within a 12-month period.

I think we are at a point in time where we have to try something different.

Ms. JOHNSON. This is the same old thing.

Senator FORD. I disagree with you. Mr. Pittle is one of four and he might be right. I like him and I was tickled he was reappointed. He's concerned about mandatory standards for cellulose. If you don't set a deadline and tell the Commission to do it, I doubt that the 834-day average will be better in the future than it has been in the past.

That's the point I am making.

Mr. RAUCH. May I add one comment? I think our concern is that although the procedures which are being tried here may involve the public at some point, and there is no question about—

Senator FORD. The public will get in at some point.

Mr. RAUCH. The real difficulty is the major decisions are made early in the standard-setting process. When you allow an industry organization to begin that process and carry it a long way without involving the public at an early stage, it actually almost throws the burden of proof to the Commission and public later in reality to dispute what the industry has come up with.

The industry will claim it has the knowledge and expertise. What is needed, it seems to us, is a system where all parties have equal access to expertise at the same time as the development of the standard. It does no good for Anita or myself or another public witness to say, "I'm sort of worried about that standard." That comment is of little value, other than to show concern.

We need the ability to tap experts who will say, "I know about chain saws, and I happen to know that the standard being proposed is far from what could be done, because of my technical knowledge of chain saws."

What is needed to change the process, in my view, is the ability to give the public the access not only to the standard-setting process at an early stage, but give them access to technical expertise, so they can effectively challenge industry proposals.

This is at the real root of our problem.

Senator FORD. Do you violently object to trying this procedure?

Mr. RAUCH. I don't think we violently object, no.

Senator FORD. Mildly?

Mr. RAUCH. The difficulty is, it seems to be a throwback to earlier procedures in a violently different form. As a practical matter, industry will always get in early on the standard-setting process. When I was with EPA, they had the ability before the first draft was off the press to get in comment. They will always be there. The real concern should be how to get the public involved at the early stages where many of the decisions are in reality made.

I'm not sure this proposal is going to do that. In fact, it may be a step backward.

Senator FORD. I will assure both of you one thing. I hope I have indicated by my past performance that I carefully look at this agency, and we will continue to have oversight. I assure you through this

procedure we will have oversight, open hearings and, if it isn't working, I will be the first to say we will go to mandatory standards completely. I would like to do a better job. With anything innovative, industry should have the input and expertise.

I'm not sure that we can rest too much on the laurels.

Mr. RAUCH. Frankly, your involvement in oversight of the Commission has been helpful. Frankly, it has been one of the few forces that has had impact on the Commission.

We welcome that and hope you do continue.

Senator FORD. You can bet we are going to look at it. Go ahead and proceed with your testimony. I'm sorry I interrupted. That was important to me, and I didn't want to leave it hanging.

Ms. JOHNSON. One summary statement on the chain saw situation. We think it is going to be ineffectual, because it is developed by an outside party which has been costly and time consuming, the outside party is not a disinterested party, but a group of manufacturers and not only that, but it involves Commission funding of the trade association which the Commission has not done in the past.

We have two further suggestions for making the life of the Commission somewhat easier. The first is we are very disturbed by the technical and rather elaborate findings which the Consumer Product Safety Act requires the Commission to make before they set safety standards. The findings include the need of the public for the consumer product, subject to such rule, the probable effect of the rule upon the utility cost and ability of such products to meet such needs and any means of achieving the objective of the order while minimizing the adverse effects of competition, disruption, dislocation, and other commercial practices consistent with public health and safety.

The problem is the necessity for making these technical economic findings will be and has been used by manufacturers' groups to divert the thrust of the standards.

Moreover, it has had an inhibiting effect on the Commission. As former Chairman Simpson has stated, you can drift into a situation of paralysis. Last Friday, the First Circuit Court of Appeals, in *D.D. Bean and Sons v. CPSC*, invalidated the matchbook standard in regard to testing requirements for matchbooks. The court said the findings required by the act had not met detailed and elaborate standards set by the CPSC. This imposes duties on the Commission to collect injury data of the most specific kind. The Commission needs protection from the findings part of the standards section, and we hope you will consider rewriting that section.

Our last suggestion, in general, we think the Hazardous Substances Act is an old act used for a long time, and it has excellent safety-minded provisions in it.

However, it is burdened by extensive trial-type hearings that must be conducted before regulations can occur.

In our testimony, we gave examples of what trial-type hearings do to agencies. The FDA, which is also burdened with trial-type hearings has had several long hearings. Their hearings on peanut butter ran 4½ months and included 7,736 pages of transcript. The debate in that peanut butter proceeding centered on whether peanut butter should contain 87 percent peanuts or 90 percent peanuts, a relatively trivial matter, not involving sophisticated factual determination.

Senator FORD. That proves the point: "Man cannot live by bread alone." He must have his peanut butter.

Ms. JOHNSON. The transcript on carbon tetrachloride consumed 32,000 pages. This hearing ran 2 years. Mind you, the taxpayer is paying not only for the transcript pages, which accounts for a considerable amount of money, but for the agency personnel and time. The Administrative Conference of the United States has repeatedly recommended that the trial-type hearings required by the FDA be taken away.

We are hopeful the CPSC will plunk into the hard work and decisions of the mandatory standard setting. CPSC would be substantially aided by simpler, cheaper and more rational standard setting provisions by elimination of the elaborate economic and other findings proceeding to action required by the act. By the elimination of a tedious wasteful trial-type hearing required by the otherwise healthy Hazardous Substances Act and by development under current powers of clear systems for regulating products and acquiring scientific data.

We look forward to a new era of leadership from the Agency and strong encouragement, we hope, from the White House.

Thank you.

Senator FORD. Thank you very much.

You have endorsed the reauthorization of the Commission.

Ms. JOHNSON. We have, sir.

Senator FORD. For 2 years.

Ms. JOHNSON. Yes, sir.

Mr. RAUCH. We are endorsing it. Let me make one suggestion to you which we made to the House committee on this matter. We are in a strange position here this morning. I don't think there is any question that EDF has been one of the groups most critical of the Commission's performance. We have been heavily involved in its activities as you know, asbestos and every chronic hazardous material standard setting in which they have involved themselves. We have been unhappy with the way it has been done.

However, we don't think that the Commission should be abolished. We don't think it should be thrown to the four winds throughout the Government. We feel it should be reauthorized.

We make one request of this committee before you proceed with reauthorization. That request is that you ask the Commissioners to provide you with either a draft or the final version of a strong policy concerning chronic hazards in consumer products. This is something you know the Commission has been struggling with for over a year now.

The need for it became obvious after Tris and even before them. To be candid the program has less than what we had hoped. The drafts which are circulating in the Commission now, while certainly a step forward, still, in our judgment, are not terribly adequate.

And, we now are seeing the slippage of dates by which the Commission had hoped to have a policy. Admittedly, two new Commissioners have come on. They should be given the opportunity to get into this area. We think if your committee, you in particular, would tell the Commission in no uncertain terms that before you intend to reauthorize them you expect to see a strong cancer policy in published

form we think this would be helpful. We think the House committee is considering a similar approach. We don't know whether, in fact, they will accept it. We think it is pressure from you and the House committee that the commission understands. Frankly, EDF does its best but we are not in the position of holding the sword over their head as you are.

Senator FORD. Let me ask this question.

You understand the circumstances under which the legislation has been introduced. Would a 3-year reauthorization give the Commission a greater opportunity to turn itself around than just 2 years? I say this because if you know it is going to be just for a year or two, it is hard for them to get quality people on board to come in and preside over the dismantling of an agency.

Would you prefer the 2 year or 3 year, since you have endorsed reauthorization subject to its turn-around and giving CPSC the opportunity to make an effort to do what it was intended to do?

Ms. JOHNSON. Three years is a good suggestion. We were concerned about the 1-year authorization because we thought the staff would leave with a 1-year authorization. We feel that many of the big programs that we were proposing could not be finished in 1 year. Three years would be fine. It would keep an attractive staff. It is a last chance authorization.

Senator FORD. Everybody understands that.

Ms. JOHNSON. Ralph Nader uses the term creative insecurity. I think that is needed.

Senator FORD. I don't know what creative insecurity is, but if insecurity initiates creativity maybe we can do that.

Let me pose this question to either of you: Because of the relatively small size in comparison with other Federal agencies, it has been suggested that the Commission's responsibility for regulation of chronic hazards be placed with an agency of greater size and resource.

Do you have an opinion concerning this suggestion?

Mr. RAUCH. We do, Mr. Chairman. This is again one of the difficult issues for us. We at this point have a great deal more confidence in the EPA than we do in the Commission. I think we have said this before. I don't think it would come as a surprise to the commissioners.

EPA has a lot more manpower, much more money, and some would feel better expertise to deal with these questions. Congressman Eckhardt made exactly that proposal at the House hearings. I think our feeling at this stage is that from a logical standpoint, transfer of these chronic hazard functions of EPA probably is a good idea.

However, along the same lines Anita suggested we think the Commission should be given one last opportunity to do some of this itself. It has gone through the bitter experience of Tris. It has gone through an almost equally difficult experience with asbestos. It is just now beginning to understand, I think, and to appreciate some of the issues. To yank this away at this stage just as they are beginning to get their act together, would probably not be wise.

If the Commission fails and if the Commission fails within the next year or two we would be the first to come forward to you and suggest that those functions be transferred because it has been very frustrating, Mr. Chairman.

In dealing with this agency it is not particularly pleasant. We think they are coming along and deserved a last chance. We oppose an immediate transfer of those functions for that reason.

Senator FORD. I'm talking about this with the Commission now. To say you want to transfer chronic hazards out of that sounds simple. It really isn't a simple procedure.

Mr. RAUCH. It would require legislative change.

Senator FORD. There would be other problems. To transfer chronic hazards out sounds easy, but it is not that easy.

Mr. RAUCH. I think you should keep it under study, ask your staff to peruse what is necessary so you could move if the Commission fails.

Senator FORD. If we do that it might develop creative insecurity.

I don't believe I have other questions of you this morning.

I appreciate both of you being here. We will proceed working together.

Mr. RAUCH. Thank you, Mr. Chairman.

[The statement follows:]

STATEMENT OF ANITA JOHNSON, ENVIRONMENTAL DEFENSE FUND

In 1976, the then-Chairman of the Consumer Product Safety Commission testified that 100 product safety standards could be set by 1982. He said that these standards would prevent 75 percent of standard-preventable injuries. The Chairman suggested that having accomplished that goal, the Commission could thereafter self-destruct.

Two years later, 5 years after creation of the CPSC, only 3 out of the 100 standards have been promulgated.¹ At this rate, the Chairman's goal will be reached in 155 years rather than 4. Performance has fallen far short of the expectations created by the Congress, the Chairman, and the \$205 million in appropriations. The CPSC may self-destruct, not because it has completed its task, but because the appropriating bodies have lost patience with its snail's pace.

We believe that CPSC should be re-authorized for two more years, because there are important projects in the works, because the two new commissioners are known activists and because the market place remains crowded with hazardous consumer products.²

Our suggestions for the last-chance authorization for the Committee and the Commission are as follows:

(1) CPSC should be given authority to set safety standards in-house. Under the offeror provisions of the Consumer Product Safety Act, which require standards to be set by outside groups, standard-setting is a time-consuming and expensive process. The standard for power lawn mowers has required 11,000 man hours and \$1 million, to develop and the standard is not promulgated yet.³ The average length of time for the standards promulgated, according to the GAO, was 834 days. For standards underway, the average time prior to initial Federal Register publication has been about 500 days.

A long time and a lot of money, moreover, does not ensure a good standard. All but one of the standards at CPSC have been developed by industry organizations. Standard-setting by industry organizations is fraught with danger. Standards set by 48 industry standard-setting organizations were studied by the National Commission on Product Safety which concluded: "These standards are chronically inadequate, both in scope and permissible levels of risk."⁴ That Commission concluded that safety itself was a secondary consideration in the private development of standards. Traditionally, decisions in these organizations are

¹ Report of the U.S. General Accounting Office, "The Consumer Product Safety Commission Needs to Issue Safety Standards Faster," Dec. 12, 1977.

² Unreasonably dangerous products identified by the National Commission on Product Safety include some types of color television sets, floor furnaces, glass bottles, high-rise bicycles, hot water vaporizers, household chemicals, infant furniture, ladders, power tools, protective head gear, toys, unvented gas heaters, and wringer washers.

³ Report on Federal regulation and regulatory reform by the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce (1976), p. 209.

⁴ Final report (1970), p. 48.

reached by consensus, and tend to reflect the lowest common denominator among possible standards. The consumer representation in these groups is minimal. Thus, standards developed by industry organizations must be examined with great care within the CPSC. This entails development within the agency of much the same expertise which the outside group has, and a great deal of additional time. CPSC must determine not only that the design or performance specified by the outside organization demands adequate safety, but that the standard will not create unfair monopolies for the large manufacturers who often control standard-setting groups.

CPSC Commissioner David Pittle has pointed out that when the bulk of offerors are industry groups, the CPSC results in "industry . . . provid[ing] the] first draft of standards for the Commission to evaluate and modify." As pointed out by Federal Regulation and Regulatory Reform, "he who develops the standard has the strongest hand in shaping the final standard." According to Commissioner Pittle, standards submitted by past industry offerors were "nothing more than 'warmed-over' versions of voluntary standards initially determined to be inadequate by the Commission."⁵ "Such a result is not in keeping with Congress clear intent that consumers be actively involved in all phases of standard development, and that the Commission be independent of the industries it regulates."⁶

In order to reduce the time involved in developing standards, in order to end wasteful duplication of effort, and in order to assure adequately safe standards, the CPSC should have the authority to develop standards in-house, utilizing, where necessary, the services of individual outside consultants.

(2) The CPSC should develop general, binding rules on the regulation of cancer-causing chemicals. A number of consumer products contain benzene or acrylonitrile, carcinogens for which the Occupational Health and Safety Administration has proposed workplace standards. Cleaning agents, paint strippers, and aerosol products contain suspect carcinogens such as methylene chloride. Other cleaning agents contain proven carcinogens such as perchlorethylene. While CPSC has regulated two carcinogens, asbestos-containing fireplace ashes and logs and asbestos-containing spackling compounds, and the flame-retardant Tris (regulation of Tris has been overturned in Court), both actions were preceded by months of indecision and delay, and occurred only after petitions by environmental groups.

CPSC has no policy on cancer-causing chemicals. There is no system for timely response to new information on chemical hazards. Years can and do go by between the knowledge that a product is a hazard and CPSC action to limit public exposure. There is no policy delineating what type of scientific information the CPSC deems adequate for regulatory action, and the kind of regulatory action that should follow given certain information.

The CPSC should not re-invent the wheel for each new chemical hazard. Procedures should be routinized so that regulation is quick and economical. The CPSC has recognized that a coherent policy is needed for cancer-causing chemicals and policy drafts are being circulated internally. So far, these drafts fail to provide the swiftness, certainty, and protection required. Because of past somnolence, strict timetables are necessary to ensure quick regulation. General rules should specify that consumer products shall be banned if they expose consumers to proven carcinogens. Suspect carcinogens should be labelled. Manufacturers should be required to conduct tests on suspect carcinogens within a definite time period.

These rules and other rules already included in the internal drafts, such as rules stating that animal evidence shall be used as a basis of regulation, should be promulgated as substantive rules rather than mere policy guidelines. Otherwise, CPSC is inviting repeated re-litigation of the cancer policy every time a different product is banned. This is wasteful of agency resources.

In EPA proceedings on the ban of the carcinogens Aldrin-Dieldrin, an estimated 25 percent of the time was spent contesting cancer policies as opposed to the facts of the specific product. In a hearing which lasted about 13 months, this was an expenditure of 3 months. Some OSHA proceedings have involved an even higher proportion of time, although others have involved 10 to 20 percent. Substantive rulemaking will prevent wasteful duplication on this score.

⁵ Letter to Senator Warren G. Magnuson, Jan. 25, 1977.

⁶ Report, supra, note 3, p. 221.

CPSC cannot assume a more active regulatory role unless it routinizes its procedures, setting a definite policy and permitting the work to be conducted on the staff level without the attention of the Commissioners themselves.

(3) The CPSC should promulgate general rules to require generation of safety data by manufacturers under certain circumstances. Under § 27(e) of the Act, 21 U.S.C. 2076, the CPSC has the authority, by rulemaking, to require "performance and technical data related to performance and safety as may be required to carry out the purposes of this chapter . . ." This authority has been utilized only once, to require contents of aerosols. Broad use would aid the CPSC immensely in assuring safety. For example, the CPSC should require manufacturers to conduct well-designed animal studies on chemicals which mutate genes in bacterial tests. The CPSC should require testing of products which contain chemical cousins of known carcinogens such as mothballs and spray paint. The CPSC should require manufacturers of household products which contain dangerous substances such as asbestos to test whether or not those substances leach out for consumer intake.

(4) The CPSC should institute a program of premarket scrutiny. Under § 13 of the Act, 21 U.S.C. 2062, the CPSC may require manufacturers to submit premarket notification of new products. This important provision has never been utilized, in part because CPSC has felt that it would cost too much money to define. Premarket notification may prevent consumer exposure to toxic chemicals, such as cleaners, to highly flammable products such as insulation materials, or to mechanically-defective products such as vent dampers, and may be used to trigger safety testing under § 27(e).

(5) The Commission should be given explicit, general rulemaking authority under the Consumer Product Safety Act. The Act now confers explicit authority to promulgate rules for supplying the Commission with technical data, rules for pre-market notification to the Commission for certain products, rules for the form and content of certain labels, rules for the maintenance of records and reports, etc. The Commission has explicit rulemaking authority under the Hazardous Substances Act and may well have implicit authority under the Administrative Procedure Act, or constitutional authority. General rulemaking authority is, of course, important for consumers. Rulemaking encourages thoughtful systematic development of policy, consistency of actions, and economy of proceedings. When agencies are required to articulate their standards for decision-making, they are more inclined to be wise and less inclined to be arbitrary. Moreover, rulemaking permits development of policy under essentially legislative procedures rather than adjudication on individual cases, and prevents agency policy from being relitigated every time it is applied to a specific product. Increasingly, the courts are requiring governmental bodies to promulgate rules for their conduct, most recently in *Sherrill v. Knight* (U.S. Court of Appeals for the District of Columbia, Case no. 76-1945, December 15, 1977), where the Court required the White House to issue standards for granting or refusing press passes to journalists, so that press passes would not be arbitrarily refused.

(6) The CPSC should abandon silly and ineffectual projects. February 20, 1978, it announced publication of a pamphlet called "Supersitter," which instructs babysitters on what precautions to take, such as getting the phone number of the doctor, the poison control center, a hospital, and the number where the parents can be reached. While the merit of these obvious suggestions is indisputable, they are inappropriate for a technical agency.

Last Thursday, CPSC voted to allocate \$330,000 to the Chain Saw Manufacturers Association to develop "voluntary standards" for chains saws. The Commission Chairman was quoted in an Associated Press story (N.Y. Times, March 31, 1978) as saying that voluntary standards were cheaper to develop than mandatory ones, and could be developed in a shorter period of time. If chain-saw injuries are a substantial problem (the CPSC staff said there were 76,800 injuries in 1976, and 30 deaths), the Commission should be developing mandatory standards. Commission time and money should not be spent on standards which not only are developed by the manufacturers' trade association but also bear no compliance requirements.

(7) Findings required for issuance of consumer safety rules should be simplified. Under current law, the Commission must make findings as to the degree and nature of the risk of injury the rule is designed to eliminate or reduce. But it must also make findings as to "the need of the public for the consumer products subject to such rule, and the probable effect of such rule upon the utility, cost, or availability of such products to meet such need; and any means of achieving the objective of the order while minimizing adverse

effects on competition or disruption or dislocation of manufacturing and other commercial practices consistent with the public health and safety." 15 U.S.C. 2058 (c). The necessity for these elaborate findings impedes issuance of consumer product safety rules because the findings force the Commission to make judgments beyond its expertise, and involve an enormous amount of fact-gathering not directly related to health and safety. As stated by former Chairman Simpson, "You can drift into a situation of paralysis by analysis." The requirements of these findings, technical as they are, will be used by manufacturers to challenge consumer product safety rules in court.

Last Friday, the First Circuit Court of Appeals in *D.D. Bean and Sons Co. v. CPSC*⁷ invalidated the Commission matchbook standard with regard to testing requirements for matchbooks to ensure that matches do not have an afterglow, delayed ignition or re-ignition, and that matchheads do not fragment in use. The Court said that the finding required by the Act that standards be "reasonably necessary to eliminate or reduce the risk" must be backed up by detailed data proving that the specified defects occur and cause injuries to an appreciable extent. This interpretation of the findings section imposes onerous duties upon the CPSC to collect injury data of the most specific kind before it can move to enact the most common sense prevention measures. Clearly, the Commission needs protection from this reading of the standards section, which could incapacitate the injury prevention programs of the most vigilant agency.

(8) Procedures under the Hazardous Substances Act and the recall provision of the CPSA should be simplified. Regulation of hazardous substances and remedies under 15 U.S.C. 2046 now requires a formal, trial-type hearing, which consumes a great deal of time and money. 21 U.S.C. 701(e) of the Food, Drug and Cosmetic Act is the formal hearing section mandated for hazardous substances. Of the 16 formal hearings held under that section, "In not one instance did the Agency complete a rulemaking proceeding involving a hearing in less than two years, and in two instances more than ten years elapsed between the first proposal and the final order. The average time lapse was roughly four years."⁸

Formal hearings on peanut butter ran four and a half months. The hearing transcript was 7,736 pages. Much of the debate centered on whether peanut butter should contain 87 percent or 90 percent peanuts. Formal hearings on vitamin pill limitations an intermittently for over two years. The transcript consumed over 32,000 pages. Hearings on carbon tetrachloride, a substance known to be lethal, ran for two years, during which time the product was on the market. The danger of this product had been common knowledge in the scientific community for years. The Heffron Report commissioned by the National Commission on Product Safety comments:

Administrators apparently fear that a major conflict in rulemaking or enforcement would tie up so much of the agency's resources that its ability to press its program would be hamstrung.⁹

Formal evidentiary hearings are the perfect instrument for those who would obfuscate and delay agency action. The mere availability of formal hearings has put FDA in the position of having to compromise its actions to avoid holding formal hearings.

The formal hearing system allows industry to blackmail FDA in this way: either compromise your position or we'll request a formal hearing.

Last, formal hearings held under § 701 in the past, have been poor vehicles for substantive input into decisions, because the issues at stake are really policy issues rather than factual ones. A formal evidentiary hearing, conducted orally by lawyers and presided over by an administrative law judge, with full cross-examination of witness, and formal findings of fact and law on the record introduced at the hearing, is an awkward way to consider whether it is wise policy to ban a drug acknowledged to cause cancer in animals or to set up an emergency permit system for the canning of tomatoes. As Kenneth Culp Davis, perhaps the outstanding expert in administrative law, has stated: A trial is designed for resolving issues of fact, not for determining issues of law, policy or discretion. In rulemaking, the method of the trial has no place except where specific facts are at issue, and even then it should seldom be used when the dis-

⁷ Case No. 77-1265, Mar. 31, 1978.

⁸ Hamilton, 60 Cal. L. Rev. 1276, 1287 (1972).

⁹ From Laden. "FDA Rule-Making Hearings," George Washington L. Rev., 40, 4 (May 1972) 726, 733.

puted facts are legislative.”¹⁰ The standards and remedies of the Hazardous Substances Act should be combined with the less formal procedure of the CPSC.

We are hopeful that the CPSC will now plunge into the hard work and hard decisions of mandatory standard-setting. CPSC will be substantially aided by simplified, cheaper and more rational standard-setting provisions, by elimination of the elaborate economic and other findings precedent to action required by the Act, by the elimination of the tedious, wasteful trial-type hearings required by the otherwise healthy Hazardous Substances Act, and by development of clear systems for regulating products and acquiring test data. We look forward to a new era, with safety-minded leadership from the agency and strong encouragement from the White House.

Senator FORD. The next two witnesses this morning will be John Hayward, Lexington, Mass., and Robert Goldstone, M.D., from Paterson, N.J.

Mr. Hayward, would you care to proceed?

**STATEMENTS OF JOHN O. HAYWARD AND
DR. ROBERT A. GOLDSTONE**

Mr. HAYWARD. Good morning, Mr. Chairman. My name is John Hayward. I am a lawyer who acts as a consultant in the area of product safety and liability.

I appear this morning on behalf of the J. A. Masterson Co., a licensor of a safety device for power lawnmowers.

I have been a consumer participant in two section 7 proceedings—the development of the lawnmower standard in 1975 where Consumers Union was the offeror, and the development last year of a miniature Christmas tree light standard with the National Consumers League as offeror.

I submit that consumers want and need the Consumer Product Safety Commission. The recent Harris poll, “Consumerism at the Crossroads,” commissioned by the Sentry Insurance Co., found that out of 1,510 people who were considered to be representative of the adult American population:

Sixty percent believed the safety of products had improved during the past 10 years.

Fifty-six percent believed the main reason companies recall more products nowadays is because they are more closely watched and controlled than they used to be.

Fifty-two percent believed that although improvements in product safety and quality brought about by consumer activists often raise prices, generally these improvements are worth the extra cost.

More importantly, consumers are still being injured and killed by hazardous products. A recent CPSC staff study states that injuries associated with consumer products may be increasing. To quote:

Aggregate NEISS data show that the reported number of product related injuries treated in emergency rooms has increased 44 percent from fiscal year 1973 to fiscal year 1974. However, it is known that more people are using emergency rooms and that the quality of NEISS reporting has been continually improving.

The study estimates that CPSC actions may have prevented 172,000 child poisonings, 19,500 toy-related injuries, 9,200 burn injuries, and 4,500 crib injuries.

¹⁰ “The Requirement of a Trial-Type Hearing,” 70 Harv. L. Rev. 193, 1977 (1956), as quoted in Laden, 736.

I submit further that the very existence of the agency serves important societal goals. First, it furnishes a powerful incentive for the development of safety technology. The most dramatic examples are matches and lawnmower safety devices. In response to the agency's development of a mandatory standard for matchbooks, the Diamond Match Co. announced in 1976 the first safety development in matches in 60 years—a match with a lower burning temperature and shorter burning time. In 1974, the Commission began a proceeding to develop a mandatory standard for power lawnmowers, a product which the agency estimates is involved in 178,289 injuries annually.

From 1973 to 1975, only two patent applications for lawnmower safety devices were filed with the Patent Office. But in 1976, as the Commission intensified its efforts on the mower standard, no less than seven patent applications were filed in the first 7 months. I enclose a list of these applications for the committee's convenience. These are concrete examples of how the agency can accelerate innovation in safety technology through the flexing of its regulatory muscles. Furthermore, witness the proliferation of all types of safety devices in recent years—stopples for electric outlets, protective envelopes for carbonated beverage bottles, flip-top caps on drain cleaners, vented aerosol spray cans, flash arresters, and chain brakes on power saws.

Although many of these devices can be attributed indirectly to product liability lawsuits, the existence of the Commission no doubt played some part in hastening their development and use in the marketplace.

Second, the very existence of the agency compels manufacturers to consider safety when marketing a product. Design review panels, intensive safety audits, stringent quality assurance and control programs, and improved sampling plans have been instituted by many manufacturers in an effort to design in safety and incorporate reliable safety devices wherever possible. The incentive for these safety measures comes primarily from manufacturers' concern over probable agency action should a product line prove defective. Furthermore, the specter of Commission action can be used by manufacturers' own safety engineers to argue for increased safety.

Third, the Commission can remove dangerous products from the marketplace under the imminent hazards provision of section 12, or the banned hazardous products provisos of section 8.

Finally, the agency could be a great force in raising the level of public awareness of product hazards. But industry opposition to informing people how products can injure them is fierce. For example, during the 1976 Christmas season, the agency sought to publicize toy safety by providing guidelines for buying safe toys. But the Toy Manufacturers Association strenuously objected to the Commission's program named "Better Watch Out" calling it a scare tactic. So the agency played down the program instead of facing up to the industry. Later Senator Magnuson charged the agency with abandoning toy safety.

Recently, the Commission has come under heavy criticism for excessive delays in issuing standards. Although I deplore these seemingly endless delays, in all fairness to the agency, part of the blame lies with its mandate which requires that, whenever feasible, standards be expressed in performance rather than design language.

A performance requirement describes only an end result whereas a design requirement specifies exactly how that result is to be achieved. Writing performance standards for complex products is therefore a long and difficult task, made even more burdensome by industry's insistence that all lab tests strike a perfect balance between being repeatable in the lab and approximating the real world. Let me illustrate this point.

An example of design requirements are Noah's instructions on how to build the ark. He is told to make it of gopher wood, 300 cubits long, 50 cubits wide, and 30 cubits high. If this had been expressed in performance language, it would have required a battery of tests for structural integrity, weathering, buoyancy, weight, volume, density, et cetera, and the testing would no doubt still have been going on when the rains came.

So, if the agency seeks to issue standards more expeditiously, it need only find that a performance standard is not feasible, and proceed to develop a design standard. A lawnmower standard could have been issued more than 2 years ago if the agency had been willing to simply limit blade tip speed, and require a stringent blade stopping time. Instead, under pressure from the lawnmower trade association, it is still exploring performance tests for thrown objects, and is about to reopen the comment period for tests developed last year.

Given the length of time necessary to write performance standards, I submit that it is unfair to measure the effectiveness of the agency only by the number of standards it issues. Its recent long-range planning paper lists seven alternative measures of effectiveness, including reducing the severity of injuries and exposure to risk, increasing consumer awareness about safety, and improving industry safety performance by monitoring, among other things, the number of personnel assigned to consumer product safety, the fraction of each firm's defective products reaching consumers, the amount of advertising highlighting safety features of products, and most changes related to product safety.

But I submit that the true measure of the Commission's effectiveness is the amount of safety technology innovation in the marketplace as measured by the number of consumer products redesigned to eliminate hazards, and incorporating safety devices. The most efficacious incentive to foster safety innovation that the Commission has at its disposal is the threat of mandatory standards. This will also accelerate the development of stringent voluntary standards which could make mandatory action unnecessary.

As regards the offeror process, it has been criticized as too cumbersome and some have suggested it should be abolished. In my opinion, the process is most useful because it provides for consumer and small business participation in standards writing. Such participation is lacking or extremely limited in the present voluntary standards system. Rather than discontinue the process, the Commission should be given more flexibility in its use. At present, the only alternative is for the Commission to issue an offer, decide that no one is competent to write a standard, and then proceed to write the standard themselves. What is needed is a system where if the agency determines that a product is hazardous but does not want to take the great length of time necessary to develop an offer, it can quickly issue an

NBS standard or a more stringent version of a voluntary standard. I understand a bill providing such flexibility has been filed. I would support such a bill.

Let's consider what would happen if the offeror process is abolished. This means that NBS would write all standards with only industry participation. At least now consumers can participate in the standards-writing process, and the Commission has made some progress in that it realizes that it must fund consumer participation in order for it to be effective. The Christmas tree light standard was the first time the agency paid consumers for their time, and effective consumer participation resulted.

I believe that critical to the success of the offeror process is the choice of the right offeror; right meaning not only technically competent, but dedicated to making the process work.

For example, Underwriters Lab was chosen as the offeror for the TV standard. They agreed they would not question the agency's judgment that TV's presented certain unreasonable risks of injury. But once they started to work on the standard they decided that TV's did not present any unreasonable risks of injury.

As a result, the proceeding was a fiasco. On the other hand, the National Consumers League never questioned the Commission's judgment that Christmas tree lights presented certain unreasonable risks of injury. Consequently, their proceeding produced a reasonable standard on schedule.

The Christmas tree light standard, in my opinion, demonstrates what is needed to make the offeror process work. First, the agency chose an offeror dedicated to making the process work. Then the agency did the following right things:

1. Provided potential offerors long lead time to gear up to prepare an offer;
2. Furnished potential offerors with information describing the hazards of the product, the injury modes, and the number of injuries;
3. Narrowed the focus of the offer to only two major hazards;
4. Paid technical and use-oriented consumers for their time, and also provided money for consumers to hire an independent technical consultant to evaluate the standard. This meant the industry did not become the sole source of technical expertise.
5. CPSC staff were participants, not observers in the proceeding. They worked closely with the offeror's technical staff; and
6. Chose a product which, if subject to a stringent standard, will increase the profits of a certain segment of the industry. This meant that for the first time, some industry people actually had an incentive for safety (bigger share of the market) and consequently consumers had a powerful countervailing force to the technical arguments of the majority of the industry.

Therefore, if these conditions are met, the chances of a successful offeror proceeding are improved.

In my opinion, the agency has several serious shortcomings.

First, it is more solicitous of industry welfare than consumer safety. It is more concerned with the economic impact on industry than with the number of consumers who are injured by dangerous products.

Second, the Commission has no vision. It fails to realize that its function is

to eliminate dangerous design and shoddy manufacturing as ways to compete in the marketplace.

Third, it lacks courage. It has no backbone, and seems timid when it faces industry. Its mandate gives it vast power to protect consumers from hazardous products, but it has not yet seen fit to exercise this power. Consequently, it is not respected by industry and never will be unless it takes a stern no-nonsense approach and shows that it is not afraid to have its decisions tested in court, which is the crucible of any agency's authority.

For the committee's convenience, I have provided a chart showing the terms of office of the commissioners who have served the agency.

In conclusion, for the reasons I have mentioned, I believe the Commission has an important mandate to carry out, and a valuable service to perform for consumers. Its past failings should not obscure the significance of this service. The agency should be given an opportunity to demonstrate that it can fulfill the hopes of its founders and become a potent force for safety in the marketplace.

[The attachment referred to follows:]

APPENDIX A—PATENT APPLICATIONS FOR LAWNMOWER SAFETY DEVICES

<i>Patent and description</i>	<i>Date filed</i>
1. 3,871,159—"Safety Device for Lawnmowers"-----	Aug. 17, 1973.
2. 4,035,994—"Lawnmower Blade Control Apparatus"-----	May 27, 1975.
3. 4,055,935—"Clutch Brake Mechanism for Lawnmowers"-----	Feb. 6, 1976.
4. 4,037,389—"Brake Safety System for a Power Driven Rotary Mower"-----	Mar. 17, 1976.
5. 4,044,533—"Lawnmower Blade Clutch and Brake"-----	May 27, 1976.
6. 4,048,787—"Combination Clutch and Brake for Rotary Power Mower"-----	July 1, 1976.
7. 4,048,788—"Rotary Power Mower with Improved Clutch and Brake Mechanism"-----	July 9, 1976.
8. 4,054,022—"Lawnmower Planetary Gear Blade and Brake"-----	July 12, 1976.
9. 4,058,957—"Deadman Control and Blade Clutch for Power Rotary Lawn Mowers"-----	July 28, 1976.

APPENDIX B—CONSUMER PRODUCT SAFETY COMMISSION

TERMS OF OFFICE OF COMMISSIONERS BEGINNING OCTOBER 27, 1972

Five Commissioners serve 7-year staggered terms of office after initial shorter terms, and may be removed only for neglect of duty or malfeasance.

Commissioner 1

Chairman Richard O. Simpson [3-year term] 1972-75.

Succeeded by Thaddeus Garrett, November 18, 1976 through October 14, 1977 [recess appointment].

Succeeded by R. David Pittle [reappointed to serve through 1982].

Commissioner 2

Lawrence Kushner [4-year term] 1972-76.

Resigned October 21, 1977 [term expires October 1983].

Succeeded by Edith B. Sloan (March, 1978).

Commissioner 3

R. David Pittle [5-year term] 1972-77.

[Reappointed to fill unexpired term of Simpson.] [Term expires October 1984.]

Succeeded by Susan B. King (March 1978).

Commissioner 4

Constance Newman [6-year term] 1972-78.

Resigned February, 1976.

Succeeded by S. John Byington [term expires October, 1978]. Designated Chairman by President Ford in May 1976.

Commissioner 5

Barbara H. Franklin [7-year term] 1972-79.

Mr. HAYWARD. Thank you, and I would be happy to answer questions.

Senator FORD. Before we get to Dr. Goldstone, Mr. Hayward, do you endorse a 3-year authorization?

Mr. HAYWARD. Yes.

Senator FORD. Doctor, I am glad to see you this morning. We corresponded recently. You said you would be pleased to eliminate this area from your practice.

Dr. GOLDSTONE. That's correct.

[The letter follows:]

ROBERT A. GOLDSTONE, M.D., FAAOS,
Paterson, N.J., January 31, 1978.

Senator WENDALL H. FORD,
Senate Office Building,
Washington, D.C.

DEAR SENATOR FORD: I understand that you will be holding hearings to evaluate the efficiency of the CPSC.

I am concerned because I welcomed the Consumer Product Safety Act. As a physician, with a special interest in hand injuries, I am constantly exposed to the results of unfortunate and preventable accidents arising from unsafe products. Because of my concern in this area, I was a consumer representative on the panel which prepared power lawn mower safety standards under the guidance of Consumers Union, and with the assistance of industry representatives. Considerable time, effort, and thought by a number of talented and concerned people went into this proposal. Since that time industry has embarked upon a series of delaying tactics, and the Commission has responded with a failure to promulgate a standard.

Although the patients I have seen and the work which I have done have made me particularly familiar with the power lawn mower injuries, I regard the entire mission of CPSC as vital and important, and hope that your hearings will lead to a reaffirmation of the noble purpose for which this agency was originally conceived.

To the critics of the increased costs of safer products, and to those who do not wish to have safety legislated, I would point out that the cost to society as a whole of death and injury from accident, is greater than the increased costs which could be anticipated if reasonable safety measures were followed. The individual who cries the loudest for his right to injure himself without the protection of government, is often among the first to seek governmental assistance when injured, be it direct financial aid or hospital support, or indirect benefits resulting from his disability status, early retirement, aid to dependent children, tax benefits, social security disability, and so on.

Unfortunately, the average consumer does not have at his disposal the information which he needs to make a reasonable choice of product based upon its safety. Furthermore, by setting minimum standards, the agency will remove the economic advantage which accrues to those unscrupulous manufacturers who deliberately sacrifice safety in order to gain a competitive price advantage.

As one who profits financially from injuries to others, I would be happy to see this part of my practice diminished by Federal action in the field of product safety.

Very truly yours,

ROBERT A. GOLDSTONE, M.D.

Senator FORD. I am delighted to see you today and I hope we can do something to put you out of work in this area.

You may proceed with your testimony.

Dr. GOLDSTONE. Thank you, Senator, and members of the staff. It is a privilege and an honor to be able to express my views before a committee of the Congress of the United States, appearing as a private, but concerned, citizen, neither representing nor reimbursed by any

special interest group or lobby. I am awed by the opportunity to participate in the working of our democracy.

It is, therefore, with some sense of apprehension that I propose to speak in favor of measures and actions which could be interpreted as taking away the freedom of the marketplace, both with respect to the manufacturer to produce, and the consumer to purchase.

As a physician, I am well aware of the effects of growing governmental involvement in the practice of medicine, and I am deeply sensitive to the problems inherent in Federal involvement in matters which affect our daily lives and livelihood.

But compelling reasons to advocate areas of control can exist even in a free society, and I believe that these hearings are concerned with one such area.

I am a physician, in the private practice of orthopedic surgery, with hospital privileges at an inner city medical center, receiving patients from the city and surrounding suburbs. I participate in the teaching of medical students, and in the training of orthopedic surgeons.

In my work I am called upon to treat patients who are injured by consumer products.

At my hospital I have established a hand surgical service to help coordinate and, therefore, improve the care rendered to patients who have injured their hands and upper extremities.

I have been made aware of and am concerned by the hazards of many products available to consumers, and have in the past made these concerns known.

As a result, I was asked by Consumers Union to serve as a consumer representative when they became the offeror for the CPSC's proposed power mower safety standard.

From October of 1974 until May of 1975 a significant portion of my time, and the time of numerous representatives of academia, industry, and the public at large, was spent in travel, meeting, argument and debate, observation, study, and hard work, in drawing up a standard which has been presented to the CPSC, and although it has been weakened, if not emasculated, by subsequent industry opposition, it remains to be promulgated 3 years later.

From this experience, I feel qualified to share some thoughts and ideas with you.

First, product safety is a legitimate concern of this Government.

The consumer requires protection from products which can kill or maim.

I hear the arguments that, "I am not sure that I want to be protected from myself" and that all consumers should not have to pay more to protect themselves or other people from their own carelessness.

These arguments suffer from tunnel vision, perceiving only a part of the entire problem, and ignoring the wider realities.

Among the most important of these ignored realities is the fact that those injured are frequently not the individual who purchased the product.

We control explosives for this reason, and no one—I hope—complains.

Many of the people injured by power mowers, for example, are passers-by who are struck by thrown objects such as rocks, which can blind, and nails or wires which can penetrate the chest, heart, and lungs, and cause death; or children who become innocent victims of a machine which has been badly designed from a safety standpoint and then perhaps, but not necessarily, misused by the purchaser.

In 1975 at least 60,000 Americans required hospital treatment for injuries received from power mowers, and about 30 fatalities resulted from their use.

This product is not designed to be used by a sophisticated machine operator. It is in fact a sophisticated product sold and promoted to the unsophisticated consumer.

It is marketed to the average citizen, who does not understand the lethal potential of a blade tip moving at 19,000 feet per minute, and who need not demonstrate his proficiency before commencing operation.

He puts his faith in the manufacturer, and assumes that he has purchased something he can safely use, and which will give his life more leisure time. He does not expect or anticipate the possibility of loss of life or limb.

He does not have the knowledge, experience, or training to be able to make an informed and responsible decision regarding the safety aspects of the product, just as a baby cannot judge its safety from the threat of strangulation by the crib his mother has purchased, or as the consumer is unable to tell which book of pocket matches might explode into a ball of fire when he strikes one.

When safety is left to the manufacturer, there can be an economic advantage in producing a cheaper item, unencumbered by safety features which might add to cost. He could decide that his exposure to loss from a liability lawsuit might be less than the projected profit from the increase in sales anticipated.

Similarly, I feel that it is not reasonable to expect that negligence and product liability suits will be adequate deterrents against unsafe products. The procedure is too slow and inefficient; not all victims gain access to the system; insurance covers the manufacturer; and no amount of money can bring back a life or a limb.

This is an important point.

As opposed to many of the matters which Congress addresses, where another approach can be tried if the first doesn't produce the desired effect, we are dealing here with irreversible changes—death, amputation, and mutilation.

The freedom of the consumer to purchase what he pleases and the freedom of the manufacturer to produce what he pleases for general consumption can no more be interpreted in such a way as to deny the innocent child or bystander the freedom to enjoy life and limb than can the freedom of speech be abused to cry "Fire" in a crowded auditorium.

The battle cry of "freedom of choice" is a false issue when the information upon which to base that choice is not available to all who might be harmed by the incorrect choice.

The injuries resulting from unsafe products rarely result from studied and deliberate negligence on the part of the individual injured.

While it is certainly stupid to put one's hand into the exhaust chute of a power mower to clear it of wet grass which has clogged the exit, that is a sudden and thoughtless response to a problem which at rapid glance appears to exist outside the machine.

Yet this thoughtless act continues to result in thousands of hand and finger amputations and injuries a year.

These people did not deliberately mutilate themselves but, instead, made a sudden impulsive move which resulted in deformity and loss of function that will remain with them for the rest of their lives.

A recent editorial in the *New England Journal of Medicine* put it well when it stated that "An injury is no accident," since by definition an accident is unforeseen and unexpected, while most injuries can be foreseen and expected.

This same editorial pointed out that according to data from the National Center for Health Statistics, injuries are perhaps the second most common cause of visits to hospitals and doctors, yet funds for injury research constitute a miniscule fraction, less than 150th of the amount allotted by Congress to cancer and heart disease, problems which are less amenable to cure, and which exact far less of a toll in man-years from our society.

The cost to society and to the Government is great. Beyond the moneys which go into hospitals and emergency rooms, beyond the doctors' fees, and beyond the shock and hurt involved.

A workingman can be rendered unable to use his machine or his tools while still in his early twenties. If not trainable for other employment, he becomes permanently disabled, eligible for social security at an early age.

Unemployment benefits, public welfare, and aid to dependent children are some of the direct costs which can follow.

Social services, rehabilitation programs, and other forms of public aid and assistance are also among those areas where expenditures of public funds can go on for years after an injury.

These slides¹ are not intended to shock—although these lawnmower and machine injuries can be horrible—but to demonstrate that severe injuries can result and that, even with the best of care, it is not always possible to restore useful functions.

Senator Ford. Please proceed, Doctor.

Dr. Goldstone. This is a foot of a 1½-year-old child. After the best of surgery—this is the initial injury and the result afterward. The child was 1½ years old at the time of the accident.

A 7-year-old-boy and the end result.

These are power mower injuries only.

A 58-year-old man who used a standard rotary mower and had been using it for years. Obviously experienced with the machine. This was his job.

Senator Ford. I can understand why you want to eliminate this from your practice.

Dr. Goldstone. There is, therefore, no support for the point of view that product safety is not a legitimate measure of legislative

¹ The slides are available for inspection in the Committee files.

concern but, rather, compelling evidence that such legislation is not only legitimate, but necessary.

Second, voluntary industry standards are not the answer. While better than nothing, they tend not to go far enough.

The existing voluntary standards with respect to power mowers were a case in point. Blade stopping to prevent operator injury was not considered in spite of the prevalence of this type of injury.

Such voluntary standards are good for the image of industry, but appear to be designed more to protect the industry than the consumer.

We do not ask the fox to design the lock on the chicken coop door, but we can learn a great deal from his efforts to foil it.

Participation by industry does seem desirable, but I do not feel that industry should dominate the standards process, a point of view which I gained from my participation in the power mower project where a great deal of technical expertise was available from the industry representatives, but where a great deal of expertise and information was also held back, and where that expertise is now being used to delay implementation of the standard.

Voluntary standards and voluntary participation also run into the problem of the freeloader who either lets others do the work without R. & D. expenditures, or who fails to conform with the voluntary standard, again at a possible economic advantage.

Third, the present offeror process can work, but procedures for its implementation should be streamlined.

Consumer representation is vital, but there are some problems. One is in locating interested, knowledgeable, and effective consumers. I believe that Consumers Union was fortunate in this respect.

Next in importance is perhaps the need to fund the participants. While the mower and engine companies were able to send salaried representatives to provide articulate technical reasons for and against proposals made during the offering process, the consumers had to take leave of household job, and professional activities, with possible loss of salary or income, babysitter expenses, and so on, which they cheerfully did, but which in the long run might be expected to interfere with the available consumer pool and continue to tip the scales toward an imbalanced industry-heavy representation.

Additional funding for testing by the offeror is necessary, but here again the tendency is otherwise to rely on industry-supplied data, and while I do not suggest that it is falsified, I do suggest that it can be carefully selected and edited beforehand.

Fourth, I believe that in certain instances the CPSC should be empowered to promulgate its own standard or interim standard. These would include those situations where an impasse has been reached in the offering process and/or where a clearly identifiable hazard exists.

To do so might require the utilization of internal or hired consultants, and I recommend that necessary funding be made available.

Thank you very much.

Senator FORD. You have attached to your statement a resolution of the New Jersey Orthopedic Society. Is that something you have worked on?

Dr. GOLDSTONE. Yes. When I informed the executive committee last night of my appearance here today, I asked for an expression of their support, and they passed a resolution which I will read.

Recognizing the severity of injuries and noting the cost to the individual and society, the Executive Committee of the New Jersey Orthopedic Society expresses its support of effective protection for the consumer from products which represent an unnecessary hazard.

Senator FORD. I want to ask you some questions first, and then I will move to Mr. Hayward.

You appear to view the power mower with a great deal of alarm. Do you feel a reasonable level—and I underscore “reasonable,”—level of safety can be obtained through standard of development?

Dr. GOLDSTONE. Yes; I do. I am afraid I disagree with Mr. Hayward, in the sense that I do feel the performance standard, at least from my experience on this project, is a reasonable one. I do not think anybody says you can eliminate all risk from life. That is not our goal. We are talking about unnecessary risk. The key thing is that when the state of the art of the technology permits a reduction in risk, then I think that that should be utilized. I think that there is no question that, for example, with the power mower, the implementation of the standard put forth by the Consumers Union at the end of the offering process would significantly reduce injury and death.

Senator FORD. You indicated a cost in your statement. How should the cost of safety be taken into consideration?

Dr. GOLDSTONE. I would like to say it should not. It is not on a direct dollar-for-dollar basis. If we put \$500 million into lawnmowers, we cannot expect \$500 million of hospital cost. I think there has to be some kind of reasonable balance or insurance aspect to your thinking: Is it worth \$25 extra per lawnmower to insure against a reasonable risk of injury? You have to work up this data for what it would cost per mower. I understand there are 5 million mowers sold every year. The manufacturers say it would cost \$25 to adopt the standard. That is \$125 million.

If we figure there are 60,000 injuries and each person runs into hospital expenses on the average of \$200 after that type of injury—it might be low—it is worth the \$25, I think. It does not balance, but it is worth it.

Senator FORD. We find cost in the arguments pro or con, as it relates to new additional standards. You have related that the industry says it will cost \$25 more per lawnmower to the consumer if you went to the standards recommended. That cost is always something you know is going to come. I wondered how you would factor that in. I do not believe that anybody can put a real dollar figure on pain, suffering, injury, death. It is hard to put a dollar figure on it, even though juries do arrive at decisions. I am not sure it is always adequate. It has different degrees to different people. It is a hidden cost, hard to put your finger on.

Dr. GOLDSTONE. You can work up the dollar figure, other than pain or suffering. It is not a 1-to-1 thing. We have a moral value that we have to put a dollar value on.

Senator FORD. You seem to be alarmed about the power mower industry. Are there other products besides lawnmowers that cause you particular concern as a physician?

Dr. GOLDSTONE. I think snowblowers are similar to the lawnmower injury. They become clogged with wet snow and the person does the same silly act he does with a lawnmower. Snowblowers are not used as widely over the country as are lawnmowers, so it is not that widely known. Perhaps we in the Northeast and central part of the country see more of these. However, I think, since I mentioned it, at least to start I would accept using the NEISS data as a basis for identifying those areas of significant injury. I have no particular axe to grind with power mowers, except this is an area I have worked with.

Senator FORD. You see that every day.

Dr. GOLDSTONE. Not every day. They are starting again with warm weather coming.

Senator FORD. Do you believe the function of the CPSC could be carried out by any other agency?

Dr. GOLDSTONE. I am sure some other agency could be trained to do it. I think there is a uniqueness to the area of consumer product safety which to just take it out and plunk it on the FDA, for example, would not achieve the desired effect, because the existing agencies have a different orientation, different mandate, different charge, and they are dealing with a different type of product, not something that is for everyone. We have this emphasis on consumer input into the standardmaking process. I think that the CPSC properly functioning is the best agency at the present time to handle these matters.

Senator FORD. Then despite your concern about the activity of the Commission as it relates to lawnmowers, do you believe that the agency should be reauthorized for 3 years?

Dr. GOLDSTONE. I would like to see it not only reauthorized but strengthened.

Senator FORD. You endorse the suggestion that the Commission be given the flexibility to develop standards in specific narrow instances; is that correct?

Dr. GOLDSTONE. Yes.

Senator FORD. Thank you, Doctor.

Mr. Hayward, I am interested in your statement on design standards. Some critics of designed standards claim they stifle innovation. How would you respond to that?

Mr. HAYWARD. That is the classic argument against designed standards. The question you should ask when you receive that response is, "What is that innovation that you have done in the last 5 years? How many innovations have been brought about in the last 5 or 7 years?"

Generally, the argument that designed standards stifle innovation is made by industries who have had the least innovation. They cannot substantiate any innovation at all. That is in terms of past innovation.

In terms of future innovation, you ask, "What is being planned now for the future?" They say, "We have a few ideas." There is nothing concrete or that we can point to that will be brought up in the next 4 or 5 years. At the same time, they ask the CPSC to delay mandatory action until we gear up our innovation to meet future standards.

Stifling innovation is an unsubstantiated argument, generally. Few innovations are brought about. That is why the Commission was formed. There is little innovation in many of the consumer products that the agency deals with.

Senator FORD. In your opinion, what should be the Commission's policy with respect to voluntary standards?

Mr. HAYWARD. I think a stringent voluntary standard that is complied with by, say, 90, 95 percent of the industry is probably preferable to mandatory standards, mainly because the Commission does not have all of the resources at its disposal to continue to write standards for all of the consumer products. But what the Commission should do in my opinion is act as a catalyst for the development of stringent voluntary standards. It can do this by having industry know that they are considering mandatory standards. It can hold the club of mandatory standards over the industry and say:

If you do not tighten up your voluntary standard or if you do not produce a strong voluntary standard, we will write a mandatory standard.

I think the agency's action last Thursday, going voluntary on chain saws, is a good sign of their flexibility. It is, as far as I can understand it, a completely innovative procedure. Generally, there have been voluntary standards, on the one hand, written by industries alone, and then later consumers or small business people comment on them. This is what ANSI has now. Then there has been the mandatory standard. The chain saw association suggested blending some aspects of the offeror process with the voluntary-standard approach. No doubt their motive is to keep a mandatory standard at bay. If the Commission retains strict control of this procedure, if consumers and small business people are participating in the actual writing of the standard, as opposed to comments—you should understand this carefully; commenting after the standard has been completed is different than if the comments are made before or at the same time the standard is formed—only if the Commission in the chain saw matter now asks participation at the writing stage, retains control and provides for any revision in the voluntary standard be given their approval, the standard cannot be changed at the whim of the industry, I think it is a hopeful sign.

Senator FORD. I am glad to see someone who has been on the participant side of the offeror process, and approves of the procedure taken by the Commission last week.

Mr. HAYWARD. I think it is a step forward if the chain saw people act in good faith. There is a great burden—

Senator FORD. The Commission can see to it that the chain saw people act in good faith. The flexing of the bureaucratic muscle is important.

Mr. HAYWARD. Exactly. The Commission must retain control, put good consumers, small business people on the writing of the standard, must make it clear that at any time, if it feels the chain saw manufacturers association are not producing a standard which incorporates the state of the art—this has been the big defect with the standards in the past, they are usually 5 or 10 years behind the state of the art—then you will have a very fine blending of the offeror process with voluntary standards.

This will be an encouragement for other industries to seek to work in a cooperative manner with the Commission. But if this proceeding fails, I think it is only evidence that the only way one can go is with mandatory standards. I hope it will not fail. Properly handled it should not fail.

Senator FORD. Would you agree that voluntary standards can be adequate to protect the consumer in a great many areas where products pose a low hazard level?

Mr. HAYWARD. Yes. There is no question about that.

Senator FORD. Since you have been on the offeror side—

Mr. HAYWARD. I have been involved in two proceedings, been through it twice.

Senator FORD. I may want to pick your brain a little later. Item No. 5 on page 8. The staff in the processes that you recommended were participants and not observers. They worked closely with the offeror's technical staff, as I understand it; otherwise they have just been there as observers of whatever comes out. In some instances there has been no input from the Commission at all, and when the Commission receives the recommendation, they go through the procedure again, which delays it further.

Mr. HAYWARD. That is correct. What happened in the lawnmower standard, in all fairness to the Commission, this was early in the offeror process. The idea was the offeror would go aside in his corner and develop the standard. The Commission or its staff at this point would provide advice, friendly advice. What would happen at the meetings would be an important issue would come up, technical issue or issue of policy—there were always two CPSC staff people present—and the industry and the offeror consumers' unit would want an opinion from the CPSC staff person. They said "We are really not supposed to actively participate. Our job is overseers; we are here as observers. We cannot really say what the policy should be or what number you should pick.

At that time it seemed like a good idea, because that was how the idea was supposed to work. It became clear after the proceeding was finished that that was not a good idea at all. In the Christmas-tree-light standard, just the opposite happened. The CPSC technical and Office of Program Management staff people were intimately involved with the standard. I used to sit next to them and if I had a question I would say, "What do you think of this?" And they would say, "There is a problem with this."

I would ask that question and have everything brought out on the table at that time. If there was a question as to how to proceed, the staff of the CPSC would answer the question then. It is important that the staff people be active participants.

This is not a failing of the Commission. At that time it seemed to be a good idea, in 1975, to have the staff advise the Commission. Hind-sight is always better.

Senator FORD. Doctor, do you want to comment?

Dr. GOLDSTONE. I want to second that. There were times when we would spend hours debating something and need guidance as to whether this was what the CPSC wanted. We would ask them, and they would say, "We cannot tell you. Give it to us. We will let you know later." So much time could have been saved through a direct response. This improvement that John has described would be worthwhile.

Senator FORD. They still have not told you what they want?

Dr. GOLDSTONE. Not as far as the lawnmowers are concerned.

Senator FORD. Mr. Hayward, I take it from your statement and testimony that you think the agency should be reauthorized for 3 years.

Mr. HAYWARD. Perhaps 3 years is not long enough. If you want to keep their feet to the fire, 3 years will do it nicely.

Senator FORD. You would prefer 4 years?

Mr. HAYWARD. I would prefer 4 years. What they do requires a minimum time. My feeling is with the new Commissioners on board it will take 1 year to get familiar with the job.

Senator FORD. You endorse the suggestion that the Commission be given flexibility to develop standards in specific narrow instances?

Mr. HAYWARD. Yes. That is a good idea.

Senator FORD. I appreciate the time you gentlemen have spent here. I know, Doctor, you got up before milking time to get here. I appreciate that very much.

Thank you very much for taking the time to come to Washington and testify on this reauthorization legislation.

Our next witness is Mr. Silbergeld of the Consumers Union, accompanied by Sharon Nelson, legislative counsel.

STATEMENT OF MARK SILBERGELD, DIRECTOR, CONSUMERS UNION; ACCOMPANIED BY SHARON NELSON, LEGISLATIVE COUNSEL, WASHINGTON OFFICE

Mr. SILBERGELD. Thank you very much. We appreciate the opportunity to testify before the subcommittee.

Senator FORD. Your appearance here is improved by the presence of your associate.

Mr. SILBERGELD. Coming from one who knows her professional work, I appreciate the comment.

We would like to introduce our prepared testimony into the record and summarize.

Senator FORD. I appreciate that.

Mr. SILBERGELD. We support reauthorization of the Commission. We have specific comments to make about the offeror process. Ms. Nelson will address the question of reauthorization, and I will address the question of the offeror process, particularly with respect to the lawn-mower problem. The Chair will note we do not address in our prepared testimony the question of chronic hazards. In part that is simply because we have not had the time to prepare a careful assessment of that. But we do have some concern about a piecemeal treatment of chronic hazards problem with regard to CPSC, taken apart from a review of Federal chronic hazards policy generally. I urge that, when and if anything is done in that area, it be viewed in context of the overall pattern of Federal chronic hazards policy.

Ms. Nelson will begin by addressing the question of reauthorization.

Senator FORD. You may proceed.

Ms. NELSON. Consumers Union endorses the reauthorization bill you introduced 2 weeks ago. We think the consumers have a right to expect protection from unreasonable risk of injury in the marketplace. We think the CPSC should remain the agency charged with protecting the health and safety of the public in that respect.

In our written testimony we mentioned that OMB may be considering abolition of an independent commission and transferring certain of CPSC's existing functions elsewhere.

Given our knowledge of this proposal, which admittedly is sketchy, we oppose it as premature and unwise at this point. It is our belief that CPSC has suffered from ineffective management; it is not the

concept of an independent Product Safety Commission which is to blame.

At this point we would urge the President to appoint as a new chairman, a person dedicated to the goals of the Consumer Product Safety Commission, who would be an effective manager and who, given the chance to turn the agency around, could prove that the agency can function as consumers have a right to expect it should and as Congress intended it should. If the new Chairman, after 3 years cannot turn the organization around, we would then entertain plans for reorganization of product safety protection at the Federal Government level.

Although we think CPSC has been a whipping boy up to this point, its performance record has been disappointing indeed. We believe that record will prove with effective management. We hope this belief doesn't represent the triumph of hope over experience.

For example, the petitions backlog, and this subcommittee has been urging the Commission to improve that record, has been improved. There is virtually no petitions backlog. One shouldn't applaud an agency for complying with the law, but on the other hand, it does represent that it has taken a significant step to improve its performances.

As the chairman noted, when he introduced the reauthorization bill, CPSC is on the verge of fulfilling the Congressional intent. Perhaps it finally has hit the top of the learning curve and will begin to perform adequately in the near future. We are encouraged by reports of the recent improvements in the offeror process and Mark will discuss our experience with the offeror process and offer suggestions on how it might be improved.

In summary, we do believe that the 3-year authorization is appropriate, because it would give the Agency the time it needs to turn its record around and allow a new chairman, the time to institute the necessary management reforms. At the same time we urge the subcommittee to continue its vigorous, effective oversight of the Agency. Hopefully, future hearings records will demonstrate substantial improvement.

Senator FORD. Thank you, Sharon.

With respect to your recommendation that the subcommittee continue its vigorous oversight, I can assure you we will continue to look closely at the commission. I think you have some comments that you can go over before I ask questions.

Mr. SILBERGELD. In the offeror process, we believe that mandatory standard setting is the key process at CPSC. The other responsibilities of the Commissioners should not be overlooked. But mandatory standards "design in" safety, rather than react to a product after it has caused injury or death.

The process must be improved. A good deal of what must be done about the shortcomings has to do with the management performance deficit that Sharon mentioned. That can only come after a new Chair is appointed for that Commission.

Senator FORD. Person.

Mr. SILBERGELD. I believe in the shorter form. That person cannot take office until the middle of this summer. And, probably, even a Commissioner with experience probably will have to take a few months

to get his or her feet solidly on the ground. But we believe that managing the Agency effectively and having the Agency do what it is supposed to do will improve this process. We would like to mention the proposal in Mr. Eckhardt's bill on the House side which would permit the Commission in certain situations to delete the offeror process. We think safeguards are important, and we suggest the following:

No. 1, instead of the four disjunctive criteria offered in the House bill, there need be only two. Two of them refer to the Commission expertise with regard to the risk of injury involved. Those can be made into a single criterion which deals with the Commission's expertise in regard to the risk of injury.

The third provision of the House bill's disjunctive criteria has to do with need for expedited development of the standard. We believe that that also is a very appropriate, perhaps the most appropriate, criterion, because expertise really comes back to the question of whether they can do it faster or if somebody else can do it as well.

We disagree with the provision in the House bill that says the Commission should be permitted to opt out of the offeror process and develop its proposed standard, simply based on its expertise at developing its own standards.

To begin with, it doesn't have expertise. Once they gain the expertise, it is an automatic out, regardless of whether the Commission says it can do it faster or better.

We recommend getting rid of that and adding a provision that the Commission needs to give at least 15 days notice in the Federal Register that they intend to develop a standard. That would give anybody who would be an appropriate offeror or who can identify an appropriate offeror time to inform the Commission by written comment.

The second provision would be that the Commission make a specific finding not only that there is a need either for expedited treatment or for the use of their developed expertise with regard to particular risks, but also that—whichever of those criteria they relied on—that the Commission is likely to perform the standard developing process faster, or that it is likely to perform it better because it has developed expertise with regard to a particular risk of injury involved.

We believe that process will provide the better part of the best of both worlds. It will permit the Commission to opt out of the offeror process when that is appropriate, based on specific requirements.

I have heard the criticism, "Who will offer a better standard?" One suggestion has been that the Consumers Union won't ever do it again. We are not prepared to say that. We won't know whether we will until we look at the final lawnmower standard to determine whether the final result made our participation worth the effort.

There are other groups which may have expertise. I remember that a few years ago we were involved in a lawsuit involving toy safety. We were aware that there was a group of voluntary engineers and scientists who were themselves working on toy safety and knew quite a bit about it.

If there is going to be an amendment to the offeror process, it should leave the door open for the possibility that somebody has developed expertise in a particular area which will, in fact, expedite

the process over what we might expect the Commission to perform in standards development.

We believe these safeguards will assure it is an open process.

We also believe that the provision in the House bill should be retained providing that where the Commission decides to develop its own proposed standard it must follow the provision in section 7 regarding public participation.

With regard to our experience in the lawnmower standard, we believe that the delay in the offeror process has to do, not with the offeror, but with what the Commission does once it gets a proposed standard.

Consumer Union submitted its proposed standard in less than a year. That was in June 1975. The Commission has no prospect for issuing a final standard based upon that proposed standard until at least June 1978, which is 3 years after they got the offeror's product.

As you have indicated, there is a probability that they are going to reopen portions of the standard, especially with regard to thrown objects, for a further period. That means it will be over 3 years, perhaps 4 or more, since they got the offeror's product.

The problem is not necessarily—the delay problem is not necessarily—based upon the fact that there was an offeror, but it is based on the problems that the Commission has had since then in dealing with the standard.

We don't believe it is due to what they have got. In fact, if anything, they are not finding what they got is inadequate in the sense it doesn't give them enough options. They are finding what they got may be more than what they wanted.

We believe that much of the delay is not due to the use of a private party offeror. We believe, and Dr. Goldstone touched on this, that better management would speed up the offeror process itself.

Our technical department tells us that they believe that there could have been better contribution of injury data. They believe that they could receive much better assistance from the CPSC monitors in terms of getting information and communications back from the Commission side as to what the Commission expected.

They also feel that if the Commission had set a more realistic time for the development of an offered or proposed standard submitted by the offeror, we could have avoided delaying work on the actual proposed standard in the middle of the process in order to develop an application for an extension of time.

All of those things—maybe they are part of the learning process, and power mowers was one of the early standards development processes—but maybe simply the passage of time and the learning process plus better management can solve the problems and cut down on the time involved in the offeror process.

Senator FORD. Let me make a statement after your testimony. It is my hope that standards development can become the cornerstone of the Commission's activities rather than a millstone around the Commission's neck. The offeror process should be the preferred route. I think flexibility of the type that you have mentioned should be carefully considered as we move forward, and that your recommendations ought to be considered carefully.

With respect to Consumer Union's experience as an offeror, you state that the Commission should have provided greater wealth of supportive injury information. Earlier in your testimony and in your statement you indicated NEISS, while flawed, provides the best available product related to injury data. Has the Commission increased the quality of its data gathering to the point where future offerors will have the greater supportive information that you urge?

Ms. NELSON. We can't respond to that since we haven't been an offeror since that time. Chairman Byington has said that the Commission has been more cooperative in giving "front-end analysis" to the offeror at the outset. Apparently this was so in the miniature Christmas tree light standard.

Apparently, though, the NEISS system has not changed much over time. The numerical product injury correlations are still only of academic interest. What we found needed improvement was the indepth reports; that is, the verbal description of how the product caused the injury, and it was that data that we felt needed improvement, but, apparently that indepth reporting has remained constant. If the chairman is correct, the front-end analysis given to the offeror has improved and the package given to offerors is better than it used to be.

Senator FORD. The chairman tells me he is redesignating that system. Are you aware of that?

Ms NELSON. Only insofar as we read a statement of his from February 1978. We are not aware of how that impacts on the offerors.

Senator FORD. We will talk to him about that on Thursday. Has the Commission indicated when it will decide whether it will develop individual standards for different types of mowers?

Ms. NELSON. Yes; and we found out about that through hearsay. One of the problems has been that once our product was given to the Commission, there has been no further communication.

Senator FORD. When you say your product, that is the recommendation on standards?

Ms. NELSON. Right. Our technical people observing their professional responsibilities see Commission staff at professional group meetings, and they hear about what is going on at the Commission, and what is being proposed at the staff level.

But there is no formal communication. We heard the Commission might want to break down the power mower standard into component parts. It seemed to us that that may be a good idea if the most prevalent cause of injuries—the components that cause the most injuries are dealt with first, and there is opportunity for the offeror and other parties to participate in discussing these standards. Again, we have not been told this in any formal way by the Commission.

Senator FORD. In the statement for the union, you indicate that if the offeror process is amended to provide the Commission with greater flexibility, outside participation should be maximized. In your opinion, has outside participation created any significant impediment to the development of safety standards under section 7, as currently written?

Mr. SILBERGELD. Not in the one in which we have participated. There are some problems with that. Dr. Goldstone touched on some of those. We believe that outside consultation is necessary to insure that it is

not simply the public or the technically expert consumers representing the public, who develop the final proposal, and that there are some ordinary consumers who have some sense of what it is like at the using end of the product, who have input into it.

Senator FORD. I am concerned about outside input into the development of the standards. I don't want us to overdo that involvement. But we ought to have sufficient information. I don't want it criticized that the process has been impeded by outside interest.

Mr. SILBERGELD. With the lawnmower process, for instance, the whole offeror process, including the outside participation by the public members who consulted on this, took less than a year. It is now 3 years from that date and still we have no standard.

Ms. NELSON. Senator, if I might add, our technical director was asked if he thought the public participation slowed down our part of the process. His answer was emphatic. He said, "Heck, no."

The public participation was not cause for delay in our production as offeror, of the standard.

Senator FORD. Mr. Hayward, in his testimony, indicated some points that he thought would improve things. Would you give us your comments on those four or five points after looking at his statement?

Ms. NELSON. Certainly.

Senator FORD. Would you see if you agree or disagree?

Ms. NELSON. By written comments?

Senator FORD. Yes.

Ms. NELSON. We would be happy to do that.

Senator FORD. Ten days, if you can.

[The following information was subsequently received for the record:]

CONSUMER UNION,
Washington, D.C., April 14, 1978.

HON. WENDELL H. FORD,
Chairman, Subcommittee on Consumer Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request of April 4 for Consumers Union's views on the problem of chronic hazards regulation at the Consumer Product Safety Commission and our comments on portions of testimony of Mr. John Hayward. In view of the fact that a number of major federal chronic hazards regulatory programs are relatively new, this is a difficult task. However, we offer for your consideration the following views and recommendations.

First, we believe that any new statutory provisions which would affect CPSC's chronic hazards authority or responsibility would be best considered in the context of a comprehensive review of federal chronic hazards policy. Piecemeal attempts to fine tune various parts of the federal regulatory scheme without consideration of the whole may complicate, rather than simplify, existing problems. A recent study by the Senate Governmental Affairs Committee charges that federal regulation for health and safety suffers generally because historically, Congress has approached problem areas on a piecemeal basis, product-by-product.¹

If the mode of delegating Federal regulatory jurisdiction is to be changed from a product-by-product approach to one based upon the nature of the hazard, such a change should be based on a comprehensive review and analysis of existing federal chronic hazards regulation programs. This caution should be applied especially to the suggested option of removing consumer products chronic hazards jurisdiction from CPSC and placing it with some other agency. Such a change could result in duplicative costs to government, industry and public participants and potentially overlapping proceedings to regulate the various risks of the same consumer products—and would not necessarily produce a better, or even as good, result.

¹ See Senate Committee on Governmental Affairs, Study on Federal Regulation: Regulatory Organization, vol. 5, 95th Cong. 1st sess. (1977), at XII, and 308.

Therefore, we would recommend that the Committee seriously consider obtaining a comprehensive review and analysis of the existing Federal agencies mandates and capabilities with regard to chronic hazards regulation. Based upon the results of this survey, the Committee could then hold informational hearings to obtain recommendations as to what charges, if any, should be made in federal chronic hazards regulation. Either GAO or OMB (given the latter's apparent interest in chronic hazards policy) could conduct the study.

Clearly, CPSC has not been well-equipped to deal with chronic hazards. Chairman Byington indicated this view to the Subcommittee in oversight hearings last October. This view accords with our own experience in CPSC proceedings to determine permissible levels of lead in residential paints and other paints and coatings.

However, CPSC did produce an entirely satisfactory final result in its decision on lead levels in paint, in its proceedings under the Lead Based Paint Poisoning Prevention Act and the Consumer Product Safety Act, although the decision under the former Act required a second effort because of Congressional dissatisfaction with the process of Chairman Simpson's original decision. And, even though—in our view—the staff work in the proceedings under the two Acts was less than satisfactory, the CPSC's final decision was to permit no more lead in these paints and coatings than trace amounts of lead which occur naturally in the materials used to manufacture paints. The final decision will provide maximum possible protection to children exposed to new paint as a potential source of lead ingestion.

One question which the Subcommittee must consider in evaluating the problems of chronic hazards regulation by CPSC is how CPSC can perform the technical work necessary to deal with chronic hazards effectively. Our view is that the general process used by CPSC in the lead paint proceedings is a good model for the development and evaluation of the technical information needed to reach a final decision on chronic hazards issues.

In the lead paint proceedings,² CPSC contracted with outside institutions for primary research which was intended to provide evidence relating levels of lead ingestion to degrees of risk. In addition, recommendations were obtained from the National Academy of Sciences regarding both the appropriate framework for arriving at the final decision and the merits of the issue. NAS undertook a comprehensive review and evaluation of the lead toxicology literature, as well as a recommendation as to whether the available evidence on low level lead poisoning supported a finding that a particular level of lead in paint is "safe". The views of the Department of HEW were obtained, including a scathing critique by the Center for Disease Control of the primary research for which CPSC had contracted. CPSC also obtained the views of interested members of the public, as well as of the paint and coatings industry.

We feel that this process was, in itself, adequate to have provided the information and evaluations needed to reach appropriate final decisions regarding the chronic hazards of lead. What was inadequate was the management of the process and the decisionmaking based upon its results.

For example, the protocols for the primary research conducted by outside institutions under contract were inadequate to produce results sufficient to make the necessary chronic hazards evaluations. One example of the deficiencies is sufficient to illustrate the magnitude of the problem. The methodology of the outside research contractors included the measurement of body lead levels in laboratory animals by measurement of levels of lead in the animals' blood. In order to prevent iron-deficiency anemia in the animals due to frequent withdrawal of blood samples, one of the research products supplemented the animals' diets with iron dextran. However, this procedure actually may have interfered with the very iron absorption which the study intended to measure. To compound the error, while the laboratory animals were fed iron supplements, many of the children particularly at risk of lead poisoning have iron-deficient diets, so that the animals' diets were altered in a manner which prevented them from being analogs of those of the human population at risk.³ If CPSC had managed competently its chronic hazards scientific work, the research protocols would have been reviewed in a manner to identify and avoid this problem.

² Two decisions were made under the Lead Based Paint Poisoning Prevention Act—one by Chairman Simpson and one by the full Commission—and one decision was made under the Consumer Product Safety Act in response to Consumers Union's petition for a product safety rule.

³ A detailed discussion of the deficiencies of the protocols can be found in Hearings on S. 1664 Before the Subcommittee on Health, Senate Committee on Labor and Public Welfare, 94th Cong., 2d sess. at 197-200 (June 16, 1975).

To compound the error, CDC informed Chairman Simpson of this deficiency in the contracted research, but Chairman Simpson simply noted such deficiency in passing, without assessing the implications of the deficiencies with regard to the basic validity of the studies or their sufficiency as evidence to support his findings. This result probably would not have occurred, if CPSC had a competent chronic hazards capability.

These shortcomings illustrate the same lack of good agency management which our April 4 testimony before the Subcommittee highlighted. Improved management should make it possible for CPSC, through the process described above, to obtain the needed chronic hazards evidence and evaluations. Even so, it may be difficult to define chronic hazards because of their possibly insidious nature. The effects may not manifest themselves until a long period of time after exposure, while early effects may go unrecognized.

You also asked us to comment on Mr. Hayward's suggestion that the power mower standard could have been made final much faster if the CPSC were willing to adopt a design, rather than a performance standard. It is difficult to confirm or to deny Mr. Hayward's contention. But, even if true, speed might have an adverse effect, in that design standards generally inhibit innovation and may have anticompetitive effects. Both innovation and competition affect the price, as well as the quality, of goods. The price effect of the final rule is one of the concerns which will have to be addressed by the Commission, and one on which Consumers Union, as offeror, provided CPSC with substantial information. While more expeditious adoption of a final standard is a desirable goal, we do not believe that it should overcome other legitimate goals of preserving long-term innovation and price competition.

In closing, Mr. Chairman, we wish to reiterate our support for a three year reauthorization for CPSC. We feel that this term of reauthorization is especially important in light of current news reports that the White House does not expect to nominate a new CPSC Chairperson with sufficient promptness to fill the vacancy by July 1, the date on which the seat will become vacant. It seems clear that if there is any substantial hiatus in the leadership of the agency, a one year reauthorization will be inadequate for the new CPSC Chair to establish critically needed management reform essential to the agency's proper functioning.

Sincerely,

SHARON NELSON,
Legislative Counsel.

MARK SILBERGELD,
Director, Washington Office.

Senator FORD. I appreciate your being here. Mark, it has been indicated that we appreciate your bringing Sharon with you. Thank you for your testimony and for being witnesses today.

[The statement follows:]

STATEMENT OF MARK SILBERGELD, DIRECTOR, CONSUMERS UNION AND SHARON NELSON, LEGISLATIVE COUNSEL WASHINGTON OFFICE

Mr. Chairman, Consumers Union¹ thanks the Subcommittee for its invitation to testify at these hearings on S. 2796, a bill to reauthorize appropriations for the Consumer Product Safety Commission.

Consumers Union long has been interested in and concerned with the work of the Consumer Product Safety Commission, and we support this Subcommittee's continuing scrutiny of the agency through the oversight and authorization process as important efforts to bring about improvements in CPSC's performance on behalf of consumer product safety. As the Subcommittee knows, Consumers Union was the offeror in the development of CPSC's proposed power mower mandatory consumer product safety standard. Therefore, we believe that we are

¹ Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide information, educate, and counsel about consumer goods and services and the management of the family income. Consumers Union's income is derived solely from the sale of Consumer Reports, its other publications and films. Expenses of occasional public service efforts may be met, in part, by nonrestrictive, noncommercial grants and fees. In addition to reports on Consumers Union's own product testing, Consumer Reports, with more than 1.8 million circulation, regularly carries articles on health, product safety, marketplace economics, and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

highly qualified to address a number of questions which the Chairman has indicated he intends to raise in these hearings. In these comments, we will address (1) reauthorization, and (2) the standards setting process.

We endorse reauthorization of CPSC appropriations for FYs 1979-81. At the same time, we believe that Congress and, especially, this Subcommittee must continue to put CPSC and the new Chairperson who will take office this year on notice that the Commission's performance in protecting the public by carrying out its duties under the Consumer Product Safety Act must improve substantially and promptly.

Consumers have a right to expect that products which they purchase in the marketplace do not present an unreasonable risk of death or injury. Neither this proposition nor the government's role in furthering that right is disputed. Apparently, however, continuation of the CPSC as the agency through which the government performs its role is in dispute. The Office of Management and Budget reportedly is considering seriously the phasing out of CPSC and the transfer of its function elsewhere.² Such an idea is, at best, premature and unwise. While CPSC's performance most clearly has been less than optimal, the function which it is charged by law with performing is greatly needed because of the number and variety of unsafe products which continue to be offered for sale in the marketplace. The public is entitled to effective government protection in the area of health and safety. Poor performance by the responsible agency should not be dispositive of whether the government continues to perform this function.

An examination of the agency's performance record demonstrates that the problem is not inherent in the concept of a consumer product safety commission. Rather, the record demonstrates that there is ample room for improvement both in the management of the agency and in curing certain defects in the existing statute.³ Also, the record shows that CPSC's performance has been improving in some respects, although there still is a long way to go to reach optimal performance.

We strongly believe that the agency should be permitted to demonstrate that it is capable of fulfilling its statutory responsibilities in an effective and efficient manner. If, after a reasonable period, a new Chairperson appointed by this administration has not demonstrated satisfactory progress toward rectifying the problems which abound at CPSC, then a fresh look can be taken at where else in the government the responsibility for consumer product safety might be placed. Until a chairperson of the CPSC dedicated to its statutory mission has had reasonable opportunity to make such a showing, however, any dismantling of the agency would be premature.

I

REAUTHORIZATION OF APPROPRIATIONS

The hearings of Committees of both Houses of the Congress document almost universal agreement that the CPSC's performance to date has been unacceptable, and the record supports the conclusion that much of CPSC's problem has been lack of effective management. It reveals areas in which CPSC might perform much better than it has, if properly managed.

The first Chairman of the Commission served from May, 1973 to June, 1976, a period of more than three years, without complying with the requirement of Section 4(g)(1) of the Act to appoint an Executive Director of the Commission. It is difficult to imagine any federal agency being able to function properly without an Executive Director to oversee the day-to-day functions.

² See Jack Anderson's column, *The Washington Post*, March 23, 1978.

³ Hearings on S. 644 and S. 1000 before the Subcommittee for Consumers of the Committee on Commerce, United States Senate, 94th Cong, 1st Sess, Serial No. 94-12 (1975). Oversight Hearings on the Implementation of the Consumer Product Safety Act Before the Subcommittee for Consumers of the Committee on Commerce, Science and Transportation, United States Senate, 95th Cong, 1st Sess., Serial No. 95-19 (April, 1977). Hearing on Implementation of the Consumer Product Safety Act before the Subcommittee for Consumers, Committee on Commerce, Science and Transportation, United States Senate, 95th Cong, 1st Sess, Serial No. 95-48 (October, 1977). Hearings before the Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce, United States House of Representatives, on the Consumer Product Safety Commission, 94th Cong, 2d Sess, Serial No. 94-83, 1976. Hearings before the Subcommittee on Oversight and Investigations and the Subcommittee on Consumer Protection and Finance of the Committee on Interstate and Foreign Commerce, House of Representatives, on the Degree to which the Consumer Product Safety Commission is Fulfilling its Mandate to Protect Consumers From Unreasonable Risks of Death, Injury, or Serious or Frequent Illness Associated with the Use or Exposure to Consumer Products, 95th Cong, 2d Sess, Serial No. 95-42.

The second, and current, Chairman, while espousing a commitment to management and while having appointed an Executive Director and effected some reorganization within the agency, has raised other doubts about his own ability to lead the agency, doubts so serious that the mounting criticism of his conduct has resulted in his early resignation.

Under these two Chairmen, CPSC has, in a period of almost five years, developed only three final consumer product safety standards under Section 7 of the Act, one of which recently has been overturned by the Courts. The three standards required an average of 834 days to develop and become final. The issuance of these standards—for swimming pool slides, architectural glazing, and matchbooks—took two and one half times the time schedule provided for by Congress in Sections 7 and 9 of the Act.⁴

The General Accounting Office has documented weaknesses in the Commission's management of standards development which create delay in the development process. Among those weaknesses are lack of adequate guidance to offeror,⁵ lack of an established process for evaluation of the offeror's recommendations,⁶ and insufficiency of the product-related injury data maintained by CPSC.⁷

Consumers Union's own experience as the offeror in development of the pending proposed standard on outdoor power equipment (lawnmowers) corroborates GAO's findings. A more detailed discussion of our experience is provided in Part II, *infra*.

CPSC Chairman Byington, has candidly admitted that ineffective management of the offeror process, rather than poor performance of offerors or the offeror process itself, has been to blame for past poor performance in product safety standards development.⁸ Mr. Byington cites CPSC's experience with development of the proposed miniature Christmas tree light safety standard as the harbinger of improved Section 7 management. While this statement may not be based upon as yet demonstrable achievement, it may be one indication that the offeror process can become an effective regulatory tool.

The mandatory consumer product safety standard, of course, is but one mechanism in CPSC's regulatory arsenal. Its authority under the Acts previously enforced by predecessor agencies and its authority under Section 8 (product banning) Section 15 (timeliness and recall cases), Section 12 (imminent hazard cases), and Section 27 (labelling and information campaigns) of the CPSA should not be overlooked. While it is up to the Commission to establish that it has been effective in these areas, we believe that inquiries into its performance in the offeror process should not detract from investigation of its performance of these other responsibilities.

Over the past year, some improvements have been made in the management of the agency. For example, petitions now are being dealt with in a timely manner, as required by the Act. Whereas in October, 1977, 80 percent of all product safety standard petitions filed with CPSC had not been disposed of in the 120 days required by Section 10 of the Act, today the Commission is dealing with such petitions on a daily basis and there is virtually no backlog. Of course, many of the petitions have been disposed of by means of denial. Whether the basis for denial has been adequate is a question which has not been addressed. However, the mere response to petitions within the time required by law is at least an indication that some improvement has been made in the management of the petitions workload. (Because this Subcommittee has raised the question of timely response to citizen petitions in the past, this fact may also indicate increased CPSC responsiveness to its legislative authorization Committees.)

The Commission also has been responsive in its approval of final regulations to establish an Office of Public Participation, based upon Consumers Union's petition to create a mechanism to increase public participation in CPSC proceedings. And, after Civil Service Commission denial of a requested Schedule C position to run this Office, CPSC has proceeded to determine that the Office nonetheless should be established utilizing already existing staff positions to run the Office. We believe that the decision to implement this Office, and to do so despite CSC obstacles, represents a management decision which will improve the Commission's performance in some respects.

Additionally, the very existence of CPSC representing a high visibility fed-

⁴ GAO Report to the Congress, *The Consumer Product Safety Commission Needs to Issue Safety Standards Faster*, December 12, 1977.

⁵ GAO Report, p. 9.

⁶ GAO Report, p. 11.

⁷ GAO Report, pp. 23-25.

⁸ S. John Byington, written statement dated February 17, 1978.

eral commitment to consumer product safety has an indirect, but important, effect on improving product safety in the market place. The National Electronic Injury Surveillance System (NEISS), while flawed, provides the best available product-related injury data. Industry and the various standards setting organizations, aware of this data and its potential for triggering CPSC action regarding product-related injuries, are attempting to improve their own product safety records by improving design and performance standards. Consumers Union personnel who sit on various standards setting organization's advisory committees have noted just such effects on the attitudes and efforts of industry representatives. Without an independent Consumer Product Safety Commission, the incentives for improved industry vigilance with respect to product safety could well be substantially reduced.

Abolishing CPSC and transferring its functions back to the agencies which originally exercised its transferred powers would roll the clock back on product safety six years without significantly improving the government's role in regulating product safety. As the National Commission on Product Safety stated in recommending establishment of a Consumer Product Safety Commission:

Consumers assume that the Federal Government exercises broad regulatory authority in the interest of their safety. And yet the short answer * * * is that Federal authority to curb hazards in consumer products is virtually non-existent.

Federal product safety legislation consists of a series of isolated acts treating specific hazards and narrow product categories. No government agency possesses general authority to ban products which harbor unreasonable risks or to require that consumer products conform to the minimum safety standards.

Such limited Federal authority as does exist is scattered among many agencies. Jurisdiction over a single category of products may be shared by as many as four different departments of agencies. Moreover, where it exists, Federal product safety regulation is burdened by unnecessary procedural obstacles, circumscribed investigative powers, inadequate and ill-fitting sanctions, bureaucratic lassitude, timid administration, bargain-basement budgets, distorted priorities, and misdirected technical resources.⁹

Proposals to disperse CPSC's existing authority among other federal agencies would recreate the same situation which existed eight years ago. It is difficult to understand how such action would be progressive or improve management of a federal consumer product safety effort.

What is necessary now is for President Carter to appoint a new Chairperson to succeed Mr. Byington on July 1, 1978, who is dedicated to accomplishment of the goals of the Consumer Product Safety Act through effective management of the agency.

Therefore, we recommend that the Committee favorably consider and report the authorization of appropriations for the Consumer Product Safety Commission. At the same time, we urge that the Subcommittee continue its vigorous oversight of CPSC, so that the new Chairperson and all of the Commissioners are put on notice that significantly improved performance is required of the Commission. The authorization levels for FYs 1979-1981, as proposed in S. 2769, represent substantial reductions from prior fiscal years. However, since actual appropriations to CPSC generally have been substantially lower than the amounts authorized, the reduction should not hamper efforts to breathe new life into the agency.

II

THE PRODUCT SAFETY STANDARD SETTING PROCESS

Consumers Union generally agrees with many of the GAO's criticisms of CPSC's management of the offeror process. At the same time, we believe that the agency's administrative procedures have improved somewhat since the time when CU participated as an offeror in the development of the power mower standard. These revisions in the agency's project management should contribute to more efficient production of technically adequate standards and for that reason, we believe that the offeror process should be retained.

Consumers Union believes that efficient, effective and open standard-making is the cornerstone of the Consumer Product Safety Act. Although the current Chairman states that bans and recall are important consumer protection enforcement tools. Consumers Union believes that the central purpose of the CPSA is to

⁹ National Commission on Product Safety, *Final Report*, at 2 (1970).

improve the inherent (designed-in) safety of consumer products. The purpose of a mandatory product safety standard is to minimize product injury and, thereby, to significantly reduce the number and severity of injuries caused by such products. Bans and recalls are necessarily reactive and not preventative enforcement tools. Thus, the agency should continue to develop product safety standards as its priority activity.

Despite our belief that the offeror process, if properly managed, can efficiently produce technically adequate standards. Consumers Union recognizes that there are situations in which it may be desirable for CPSC to act as its own offeror. The House is considering a bill which would allow the Commission to act as its own offeror in certain limited circumstances. We have endorsed the concept of the House bill and discussed certain of its provisions in further detail below.

Consumers Union Experience with the Section 7 Offeror Process of the CPSA

Although Chairman Byington has indicated that there have been substantial changes in the administrative procedures employed in the offeror process, we believe, nonetheless, that in evaluating these changes it would be useful for the Subcommittee to consider the administrative problems which Consumers Union has encountered in developing the power mower proposed standard.

The hazards associated with power mowers are significant. Power lawn mowers, including walk-behind and riding types, account annually for 160,000 to 200,000 injuries and deaths. The statistical data of the National Electronic Surveillance System sets the estimated mean severity of power lawn mowers at 142. This severity level is exceeded in the data only by injuries from a few other sources. However, these other sources of injury account annually for much smaller numbers of injuries than do power lawn mowers. We estimate the total annual costs assessed to power lawn mower related injuries are in the range of \$111 to \$775 million including estimates for pain and suffering.

In June, 1975, Consumers Union delivered to CPSC a proposed standard, after a development period of 285 days, which was complete with rationale, economic impact analysis and an estimate of environmental impact along with copies of referenced standards.

Our proposed standard represented the composite input of engineering personnel of the power lawn mower industry, of consumers (technical and non-technical) and of other interested parties. In some areas its requirements are similar to requirements that appear in current voluntary standards of Underwriters Laboratories and of the American National Standards Institute. In some other areas the CU standard did go beyond the voluntary standards but, in our opinion, and in the opinion of many others, only insofar as was deemed necessary to insure the reduction or elimination of unreasonable risks of injury.

It is very likely that our development time could have been shortened significantly if CPSC had been of greater assistance in the following ways:

1. CPSC should have provided a greater wealth of supportive injury information. Further, that which was provided should have been arranged in a more directly useful fashion, i.e., codified according to injury and mower type. The offeror and subcommittees had to devote considerable time to searching for that which was pertinent and to looking for additional material. Chairman Byington since has indicated that there was "inadequate front end analysis of the product hazard(s)" before the Commission published its notice requesting offers. The CPSC has taken steps intended to deal more effectively with these problems.

2. The CPSC monitors, apparently fearing the appearance of partiality, refused to cooperate with the offeror and subcommittees by providing them with guidance on considerations and positions the CPSC could be expected to take in its own evaluation of the offeror's standard. Chairman Byington indicates that CPSC monitors now are participating actively in the standards development process.

3. The CPSC, at the beginning, should have established a realistic time period for submission of the proposed standard. The set period of 90 days for a standard of this magnitude was totally unrealistic and required the offeror to take time out at a critical period to prepare a request for an extension and a new budget.

It is now approaching three years since CU submitted its proposed safety standard to CPSC. Power mowers have, since the CPSC's inception, ranked very high in the Agency's Adjusted Frequency/Severity Index. They continue to rank high and are presently in the No. 2 position in the CPSC's High Priority Products Rating List.

We are very concerned that it has taken CPSC this long to evaluate our proposed standard. A final standard is not yet even in sight.

We are also very concerned regarding certain actions CPSC has taken with respect to CU's standard.

1. In our opinion, the most effective way to reduce lawn mower injuries is through promulgation of a mandatory standard that includes all the necessary safety requirements that must be observed by all manufacturers of the covered products. A number of CU's requirements (e.g., those which addressed the shock hazard associated with electric power mowers structural strength tests, and safety instructions) have been omitted from the CPSC standard because they were features of a voluntary standard that the Commission believes most manufacturers generally follow.

Such a rationale, we submit, is arbitrary and unfair to manufacturers and consumers alike.

In fairness, compliance with the necessary safety requirements should not be left to voluntary action. Not all manufacturers comply with voluntary standards, and not all who claim to comply, do so at all times. We do not believe it sufficient basis for deferral to argue that if the incidence of noncompliance increases, CPSC will act. Such action may take far too long. (CPSC has been demonstrably deficient in this respect in far simpler matters.)

2. Several requirements of the CU standard (concerned with dynamic testing of riding mowers for stability and for control of motion on a slope) were omitted from CPSC's standard ostensibly because performance of the tests was deemed too hazardous for *test operators* and the results depended too much on operator skill.

Granted that there may be a certain degree of hazard in conducting these tests, we maintain that a skilled tester will be much better able to deal with the hazard than an unskilled consumer.

Various industries regularly employ testing laboratories to test hazardous products, including the crash testing of automobiles.

3. Certain of CU's requirements have been modified by CPSC so that they no longer represent the intent of the committees that developed them. Changes were made without the benefit of consultation with the offeror and in some instances are strongly opposed by the offeror. (Chairman Byington indicates later, offerors have not experienced this lack of communication with CPSC staff during the evaluation phase.)

Examples of changes we oppose are:

(A) CU's standard required that when mower's deadman control was released the blade must stop but the mower's engine, if it was manually started, must continue to run. It was written in this manner to avoid having an operator defeat the deadman control as well he might if he had to manually restart the engine each time he wished to mop his brow or pick up some object from the path of the mower.

CPSC has changed this requirement to permit stopping a manual start engine if it will restart in no more than three trials in which a 50 lb. weight attached to the mower's pull cord is allowed to fall through a vertical height of 24 inches.

In CU's judgment, the Commission's "easy restart" test may pass mowers that many users will not consider easy to restart. And, mowers that seem easy to restart when new may become more difficult to restart as they age. Actually, many users are likely to want to by-pass any deadman control if restarting the engine requires more than the slightest effort, e.g., more than pushing a button. CU strongly opposes the "easy restart" exception.

As indicated, we understand that CPSC has made changes in its offeror process procedure since our exposure to it. We hope these changes will accelerate the production of new mandatory standards in areas where injury statistics indicate they are needed.

As for the power lawn mower standard, we certainly want to see this activity brought to a fruitful conclusion just as soon as possible. The CPSC's proposed standard has been strenuously opposed both by industry and consumers though, of course, usually for different—often opposite—reasons. We realize the standard is a very complex one addressing many mower types and hazard areas. Certain types of mowers, i.e., walk-behind, are in much greater prevalence than others and certain types of hazards, i.e., blade contact and thrown object, account for the largest numbers and/or most serious injuries and deaths. Therefore, a course of action that might accelerate publication of a mandatory standard and reduction of injuries could be to consider covering the entire power mower spectrum with more than one standard—the first standard's scope could be the

more prevalent mowers and the hazards that have resulted in the more numerous and/or more serious injuries and deaths. Additional standards could be published later to cover the remaining mower and hazard types. We understand the Commission is considering such action. Hopefully, the omitted mower types and hazard areas will not be delayed long. They are estimated to represent 40,000 to 50,000 injuries and deaths annually.

We think that any decision to divide the standard into "mini-standards" should only be made after consultation with the offeror and industry representatives, and after seeking comments from other interested parties.

It may be, as the current Chairman believes, that CPSC has finally hit the top of the learning curve with respect to management of the offeror process. Although we reserve the right to disagree with Chairman Byington's enthusiastic remarks about the results of the miniature Christmas tree lights standard, his discussion of the changes which have been effected in the offeror process indicates the CPSC's intention to implement substantial improvement in the agency's administrative procedures. These procedures should be further tested in additional product safety standards development.

Amending Section 7 to Authorize CPSC to Act As Its Own Offeror

In introducing S. 2796, the Chairman of the Subcommittee has indicated that the CPSC perhaps ought to have greater flexibility to develop its own mandatory standards when the public interest would be served.

We agree. We have examined the proposed provision of H.R. 10819, authorizing CPSC to develop consumer product safety standards under certain limited conditions, without resorting to an outside offeror. We commend H.R. 10819 to this subcommittee for analysis and evaluation. Although, CU has endorsed generally the offeror process provisions of H.R. 10819, we also have suggested certain changes in language to ensure that the offeror process is not entirely abandoned and replaced by a new procedure authorizing the CPSC automatically to act as its own offeror.

The provisions of the House bill are intended to permit expedited development of product standards where there is a need for greater speed in developing a particular standard, as well as where there is no particular benefit to development of the standard by an outside offeror. However, we believe that, in order to prevent routine use of this provision in place of the offeror process, certain safeguards should be included. The intent of the Congress in establishing an offeror process in the original Act was to assure maximum participation in safety standards development. Revision of the offeror process should not diminish public participation in the standard development process except in those limited circumstances where some need is shown. Even when the Commission serves as its own offeror, public participation should be maximized.

Consumers Union would recommend a requirement that before the CPSC actually invokes the proposal to act as its own offeror, it publish in the Federal Register notice of its intent to develop a standard for the specific product involved, and that it provide *no less than fifteen days within which interested persons may comment as to whether it is appropriate for the Commission to proceed under the circumstances involved.* This will assure that any party which believes it or another party would be a likely and appropriate offeror with respect to development of a standard for the product involved will have the opportunity to inform the CPSC of the basis for its belief. Thus, the Commission would, where such was the case, have specific relevant information which it would be required to consider in making the final determination to act as its own offeror.

The CPSC should not be allowed arbitrarily to proceed to develop standards "in-house". As we have recommended to the House subcommittee, the CPSC should be allowed to act as its own offeror only in a situation where it is in the public interest to do so. One such situation is when the CPSC has *existing expertise with respect to the risk of injury involved*, which makes it likely to be the most qualified party to develop the standard. The language of any bill amending the statute should so provide, and should include the additional requirement of a finding that the Commission is likely to be more qualified to develop the standard, based upon this expertise, than any other likely offeror. The Commission can utilize the public comment period, which we have recommended, as a means of determining whether there are likely offerors with greater expertise than the Commission with respect to the specific risks of injury involved.

The argument for CPSC development of a proposed standard based upon its expertise in the standards development process is really one of expeditiousness. A bill allowing CPSC to act as its own offeror should permit CPSC to develop

the proposed standard upon a showing of exceptional circumstances. Thus, a bill, amending Section 7 should require not only the proposed finding that it is necessary to expedite development of the proposed standard but, also, that it is likely that the Commission can do so more expeditiously than any other offeror. This requirement, also, can be met in part by use of the suggested brief notice and public comment period to determine which outside parties would be likely offerors. The Commission could then assess whether any likely offerors were likely to develop the proposed standard as rapidly or more so than the Commission itself.

Given the Commission's resources—and assuming better management than it has had to date—it may well be that in most cases the Commission could perform more quickly than an outside offeror, given the commitment to do so. However, it is not possible to foresee all circumstances. It is entirely conceivable that in some instance in the future an outside party may, at the crucial time, be substantially further along than the CPSC in developing a proposed standard and able to complete a proposed standard more rapidly than the Commission. The provision we propose should not foreclose that possibility, and the addition of a requirement to find that such is not the case should not prove so burdensome as to forego the option to preserve such an opportunity.

With these suggested revisions, we believe that the standards development process can be substantially improved in situations where CPSC is better qualified than likely outside offerors to develop a proposed standard expeditiously or to apply its greater expertise to a specific risk of injury.

CONCLUSION

In conclusion, Consumers Union endorses S. 2796 and urges the Subcommittee to consider carefully our recommendations for amending the Section 7 offeror process.

Senator FORD. The next witness is Kathleen Sheekey, colegislative director, Consumer Federation of America.

Your statement will be included in the record in total.

STATEMENT OF KATHLEEN D. SHEEKEY, COLEGISLATIVE DIRECTOR, CONSUMER FEDERATION OF AMERICA

Ms. SHEEKEY. I am replacing Kathleen O'Reilly, executive director of Consumer Federation of America. She was unavoidably detained in the Midwest last night.

It was brought to my attention that the price she has to pay for that is a listing in the Washington Post this morning in regard to the congressional hearings as the ex-director of Consumer Federation of America instead of executive director.

Senator FORD. That will teach her to leave town.

Ms. SHEEKEY. I assure you, as I would her, that I am not here as her successor.

As a stand-in, I have a brief statement I will read.

As you are well aware, CFA has been an outspoken critic of the CPSC. However, as our past statements to this committee have consistently indicated, the major failings of the CPSC have largely been the result of the Commission's undistinguished and overly politicized leadership.

In our opinion, this situation is now well on its way to being satisfactorily resolved.

We are optimistic that with the recent addition of Commissioners Sloan and King and the continued proconsumer performance of Commissioner Pittle, the CPSC will be able to dramatically expand on its successes of the past—successes which have been largely possible despite the Simpson/Byington era, not because of it.

We feel that it both appropriate and important at this time to recap

some of the successes. Much has been made of the fact that the CPSC has issued only three mandatory product safety standards under the Consumer Product Safety Act in the last 5 years.

As true as that is, we must not forget that the mandatory standard approach is but one avenue available to the CPSC. In fact, the Commission has issued another 20 mandatory safety rules using other powers.

Among the more significant of these rules are those which dealt with dangers associated with easy-to-open containers such as aspirin bottles, full-sized and portable infant cribs, sharp points and edges of toys, the flame-retardant Tris, paint containing lead, unstable refuse bins and numerous others.

Consider the following two examples of the effectiveness of such rules. The ingestion by children of products subject to safety closures has decreased by approximately 47 percent since CPSC issued the rule covering these products 4 years ago. This represents a total of 286 fewer poisoning deaths—146 aspirin related, and 140 nonaspirin related.

Regarding the crib standard, CPSC estimates that since its issuance in 1974 a total of 4,500 fewer injuries and 171 fewer deaths may have been avoided.

Additionally, since 1973 the CPSC has recalled 573 products involving a total of 7.5 million specific units which it considered to be unduly dangerous. They covered a wide range of products from smoke detectors to riding lawnmowers.

These accomplishments have been achieved by the Commission in spite of serious budgetary constraints.

Consider the enormity of its charge—to promote products safety—and then compare its \$40 million annual budget with the following Federal budget outlays for 1977: \$61 million to the Domestic and International Business Administration of the Department of Commerce—its charge is to promote commerce and industry; \$14 million to the U.S. Travel Service of the Department of Commerce—its charge is to promote travel; \$55 million to USDA's Agricultural Research Service to promote animal production; \$106 million to the USDA's Agricultural Research Service to promote plant production.

The general public's concern for the existence of Federal agencies which protect consumers, such as the CPSC, is evidenced in a recent national survey conducted by Lou Harris for the Sentry Insurance Co. It shows that 61 percent of the public want at least as much, if not more, Government regulation than we now have.

The same poll shows 75 percent of the public are concerned that too many products are dangerous.

With an aggressive new leadership at the Commission, a strong likelihood of a voting majority of the consumer viewpoint, the promise of an improved offeror process, and, hopefully, an expanded budget, the CPSC should have the chance and the congressional encouragement to follow through on its recently developed priority list.

It should also have the opportunity to benefit from the inclusion of the public participation program which CFA so vigorously advocated and which will soon be implemented.

For these reasons CFA feels strongly that a 3-year reauthorization of the CPSC is imperative.

We would further urge you to work for the defeat of a 1-year reauthorization period. Reauthorization for a period of less than 3 years would seriously undermine the Commission's efforts at a moment when the future looks hopeful and a measure of public and congressional confidence is sorely needed.

Senator FORD. Thank you very much.

You made a point in your statement that I have been pushing for some time. In the standards that are developed, we can estimate the injuries and deaths that have been prevented.

You gave the estimates in your statement.

Ms. SHEEKEY. CPSC has not completed that estimate. That is its rough analysis as of right now.

Senator FORD. If we can get the Commission into the posture of showing that it has prevented x number of injuries and death, they will capture the imagination of the consumer and the country by proving that they are doing the job they were organized to do. They may make a few more friends around here as well.

Ms. SHEEKEY. That's right.

Senator FORD. You mentioned the serious budgetary constraints that the Commission has faced. In light of those constraints, do you believe the Commission can effectively deal with chronic hazards?

Ms. SHEEKEY. I think, Senator, if the role of the CPSC in that regard is specifically defined, it could.

I would agree with the representatives of the Environmental Defense Fund that they should at least be given the chance to have that kind of involvement.

Obviously, given the fact that it is a relatively small agency, with limited resources, we would have to look closely at avoiding unnecessary duplication with other agencies.

I feel that its involvement in the Interagency Liaison Group with FDA, EPA, and OSHA, regarding the regulating of the nonessential uses of chlorofluorocarbons has been an enormously successful experiment and probably the best example we have of the kind of informal cooperative arrangement in which CPSC could be involved.

Senator FORD. With the Commission's limited resources, in your opinion, could they better be utilized by concentrating on the key acute product hazards?

Ms. SHEEKEY. I think so.

Senator FORD. What factors do you believe should be considered if this committee decides to amend the offeror process to allow the Commission to develop so-called "in-house" standards under limited circumstances?

Ms. SHEEKEY. As you know, we testified on February 24 on this subject. At that time we said we fully supported changes that would increase the frequency of the mandatory standards being issued. At that time we said that we felt almost any change would do so.

I will reiterate the concerns that we had at that time, though. That is, that although the Eckhardt bill appears and is a supportive response to allow this greater flexibility, we would stress that the rights of consumers to participate at an early stage be preserved in order to retain the magnitude of clout that it would otherwise have if it was acting in a full offeror role.

We feel the present language of the Eckhardt bill does not exactly do this and we would like to work with the committee to develop language that would.

Second, the circumstances which would authorize the Commission to develop a Consumer Product Safety Standard without making an invitation to prospective offerors are not delineated clearly enough in the Eckhardt bill. We feel that more definitive prerequisites must be drafted before the Commission would be afforded that latitude.

Although we believe there would be instances when the Commission would be more effective and efficient than an outside offeror, we feel that sufficient consumer input should always be the rule rather than the exception.

We want that factor to be foremost in the minds of the committee members when considering revision of the offeror process.

I think Mark Silbergeld's comments on having two provisions rather than four in the Eckhardt bill is an alternative which Consumer Federation will consider closely.

Senator FORD. Your statement points out that setting of mandatory standards is only one tool available to the Commission. It is unfair to assume that the Commission's mandatory standard activity should be the only barometer of the Commission's success. What factors should we look to in determining whether the Commission is meeting its mandate?

Ms. SHEEKEY. We have to look at whether or not it is aggressively pursuing all of those other avenues open to it. Although I have highlighted their successes, I think I would back off a little bit to say they could be more aggressive, and truly serve as a real consumer advocate. Bans, recalls, labeling, public warnings, research and testing, recordkeeping, and more aggressive collection of data on the part of the Commission—rather than waiting for industry to voluntarily submit it—are all areas where this aggressiveness could emerge.

We advise a close look at all of these aspects in determining whether CPSC is following its mandate.

We sorely need the consumer advocate that CPSC could be, especially at a time when we don't have the Consumer Protection Agency we so hoped for.

Senator FORD. I am hopeful the new Commissioners will look at these areas.

Ms. SHEEKEY. So are we.

Senator FORD. In closing let me see if I have your position. You believe that reauthorization of CPSC for less than 3 years would seriously undermine the Commission's efforts?

Ms. SHEEKEY. We think it would undermine its efforts and demoralize those good people left at the Commission. So we would fully support a 3-year reauthorization period.

Senator FORD. Thank you very much. You have been a fine substitute this morning.

Ms. SHEEKEY. Thank you, Senator.

Senator FORD. Our final witness this morning is Theodora Sweeney, child safety advocate from Cleveland Heights, Ohio.

I appreciate your willingness to come to Washington to deliver your testimony on such short notice. I want you to know we are grateful. If you will proceed, we will be delighted to listen to your testimony.

STATEMENT OF THEODORA BRIGGS SWEENEY, CONSUMERS LEAGUE
OF OHIO

Ms. SWEENEY. Thank you.

As an individual who has had extensive dealings with the Consumer Product Safety Commission over the past several years, and as a member of the executive board of Consumers League of Ohio, I have been invited to present testimony to this committee relative to my perceptions of the strengths and shortcomings of this Commission. With apologies to G. K. Chesterton, I would like to say at the outset that consumer product safety "has not been tried and found wanting; it has been found difficult, and left untried."

In my opinion, the two main acts which the Commission was established to administer, namely, the Consumer Product Safety Act and the Hazardous Substances Act, are basically sound, although the Hazardous Substances Act is weakened by its lack of a timetable for action. (Since most children's products are to be regulated under this act, prompt action would seem to be imperative.) It is particularly clear that the intention of the Consumer Product Safety Act is to protect the consumer, and that those who framed it wanted those who administer it to take this task seriously.

Unfortunately, those who have directed the Commission up until now have had a different philosophy from that which inspired the drafting of the Consumer Product Safety Act. I have to say that what I personally feel, having spent the last 4 years in an attempt to get a simple label put on public playground equipment, is nothing short of outrage. It is a personal outrage, at having had my time and efforts so grossly wasted by the Commission, but more than that it is an outrage in the name of those children who are now handicapped, brain-damaged or dead because a few people lacked the will to act incisively to solve an obvious problem with an inexpensive solution.

To back up: In May, 1974, I submitted a petition requesting that the CPSC issue a set of mandatory safety standards for public playground equipment and surfacing. Notwithstanding the 120-day time limit within which it is supposed to grant or deny such petitions, I received no reply to my request until the publication of the Federal Register notice on March 7, 1975, announcing the approval of the petition, and the invitation to submit offers to develop such standards. With the subsequent selection of the National Recreation and Park Association as the successful offeror the die was already cast for the defeat of the consumer interest, since those whose industry leanings were transparent outnumbered the consumer representatives on the development panel 8 to 4. As a result, the proposed standard as submitted to the Commission on May 1, 1976, had serious weaknesses, chief among which was its omission of the negative labeling requirement, which the industry representatives opposed more vigorously than any other issue.

The proposed standard for public playground equipment was then evaluated by the National Bureau of Standards, which did a very peculiar thing. It not only ignored the consumer objections to the standard, it ignored the scientific data upon which these objections were based. As a result, I requested a hearing before the five members of the Commission on May 11, 1977, and presented the statement

attached to this testimony (item I). At that point, despite intervening letters urging prompt Commission action, 3 years had elapsed since my initial petition had been filed.

Apparently in response to arguments presented at this hearing, the Commission directed its general counsel to study the labeling problem in some depth. Its resultant memorandum, dated July 12, 1977, stated as follows:

In addition to asphalt and cement, there may be other equally dangerous surfaces which the staff may want to investigate. However, it is not necessary that we know about all dangerous surfaces before we can propose a negative labeling rule. If we have sufficient information establishing injuries from falls onto asphalt or cement, then we may proceed to require labels regarding those surfaces and add other surfaces as we learn about them.

I assure this committee that since May 1, 1976, the Commission has indeed had "sufficient information" relative to the dangers of falls onto asphalt or cement. It has known that if a child falls directly onto his head from a 1-foot height onto asphalt he can be killed, and that concrete is even worse. It has also known that since falls constitute 75 percent of all playground injuries, the surfacing issue is, by far, the most crucial one relative to the reduction of the appalling incidence of playground equipment injuries.

My paramount concern is the protection of children. They can't vote, and they tend to believe that the adults around them are looking out for their best interests. I assure this committee that with regard to most of this country's playgrounds, that trust is misplaced. Asphalt and concrete are used to pave playgrounds not because they are the safest materials for children to fall onto, but because they're easiest for the custodians to maintain and because they can then double as parking lots.

Just for the record, before I offer my suggestions for this committee's course of action relative to the reauthorization of the Consumer Product Safety Commission, I would like it known that on May 23, 1976, I submitted another petition to the Commission, requesting that safety standards be developed for home playground equipment. Since there are actually more fatalities in connection with these backyard sets than with the public equipment, action in this area seemed imperative. After 2 years, I am still awaiting a decision on this second petition.

Despite this long tale of personal frustration and Commission ineptitude, I do not think that the Consumer Product Safety Commission should be scuttled. Although it has its flaws, at present it's the only agency designed for the specific purpose of insuring the safety of the products which Americans buy. Its failure to do so lies not so much with its design as with its implementation. Even a Rolls Royce has to be put into gear before it will go anywhere. I would suggest that all the Commission needs in order to be put into gear is a tough-minded group of people at the helm who place consumers protection above industry pressure, and who are willing to fight for this principle without apology.

In order to give this new leadership "equal time" with the old, I would suggest that the commission be reauthorized for an additional 3 year, but that it perhaps be monitored more closely than in the past. If this committee is concerned with protection of consumer interests I think it has the right to know the specific reasons why the Commis-

sion rejects consumer input, as it so often has relative to the playground standard.

I would further suggest that this committee require that a roster be kept of all those consumers who have in any way been involved with the Commission, and that this group of persons be polled for its comments, suggestions and criticisms at the time of the next reauthorization hearings. A simple questionnaire could provide data which might be enormously useful in fine-tuning the Commission's efficiency.

As an example of the current under utilization of consumer interest, energy and talent on the part of the Commission, this committee might be interested in knowing that in a letter to Chairman Byington, dated August 13, 1977 (item II), I volunteered to administer a labeling program if the agency's 900 employees were too busy to do so. I never received a reply to that letter, nor has any labeling program as yet been inaugurated. It is worth noting, however, that in May of 1976 a \$75,000 contract for the development of educational materials relative to playground safety was awarded to Bermulti National, despite the fact that the Commission had not yet finalized the safety standard, and also despite the well-known ineffectiveness of safety literature in general. Since this educational materials program, which is essentially a "scattershot" technique, cost five times the estimate for the materials needed in a direct-approach labeling program, one is inevitably left wondering if the Commission is serious about informing consumers of dangerous products.

I appreciate the opportunity to offer these comments, and would be happy to answer any questions or provide whatever additional information this committee might deem useful.

Senator FORD. Thank you, very much. I hope you will supply the committee with the recommended questions for a questionnaire to consumers involved with the CPSC. I just may ask the next chairman to do something like that for us. It might be interesting.

You stated that we haven't been looking after the Commission and their activities. Since I became chairman of the subcommittee, we have had so many oversight hearings, they claim if we have any more they will give us two chairs at the Commission. Some say it is not enough and some say it is too much.

In your testimony, you indicated that recreational equipment manufacturers opposed a labeling requirement. To your knowledge, what is the basis for their opposition?

Ms. SWEENEY. I have in my possession 10 months of tapes from these meetings. I repeatedly asked them: "Why are you opposing this?" They refused to answer the question. I said, "Inform me; why don't you want to place labels?" They said they would be dangerous. I said, how can a 3- by 5-inch vinyl label be dangerous. They said it can't be done technically. They had no substantial reason. They got extremely exercised. I can give you my interpretation. I am not sure you are interested.

Senator FORD. You are here, a witness, and if you want to give me an interpretation, it will become part of the record.

Ms. SWEENEY. My opinion is, they don't want the public to know.

Senator FORD. I have seen advertisements on TV that you can put a band aid on a scratch or skinned place and take it off without hurting.

It seems to me every commercial I see, that the child has fallen on concrete or asphalt. I don't think it takes a great deal of intelligence to know if you fall on asphalt or concrete, it is going to hurt.

Ms. SWEENEY. Most parents really think when a child gets hurt, it is the child's fault. "You shouldn't have been doing that in the first place," is what they will say when the child goes up a slide backwards. I lecture frequently to PTA groups.

Senator FORD. I have been a member of PTA groups.

Ms. SWEENEY. This seems to be the universal reaction.

Senator FORD. Maybe we need to ask the parents to educate their children, tell them not to fall down.

Ms. SWEENEY. I assume you are being facetious, Senator.

Senator FORD. On what you base your belief that the playground educational safety program would cost five times that of the labeling program?

Ms. SWEENEY. A retrofit labeling program would have been \$15,000. My initial request was that they put a 4-cent vinyl label on every new unit before it leaves the manufacturer. But the retrofit cost would have been \$15,000, to retrofit a label on every piece of school playground equipment in the country. \$75,000 was the contract awarded to Bermulti National for an educational program. I haven't seen the results of that program, but it was to have been finalized a year ago.

Senator FORD. What type of suggested information have you given for the labeling of the equipment?

Ms. SWEENEY. "Warning: Hazardous if installed over asphalt or concrete." I have gotten cost estimates on the labels from a supplier. They couldn't be cheaper. They have rejected and refused and fought this simple label with all their might.

Senator FORD. How successful in your opinion has the Commission's NEISS system been in collecting statistics on playground injuries to children?

Ms. SWEENEY. It shows playground equipment as being No. 8 out of a list of 105 consumer products. That is successful because it pinpoints the fact that it is a dangerous product if not properly installed. Primarily—75 percent of the injuries are due to falls.

Senator FORD. Do you believe after your experience with the Commission that the Commission should be allowed to bypass the offeror process in some circumstances?

Ms. SWEENEY. If adequate safeguards are built into this for abundant consumer input. As it stands consumers are the underdog at CPSC. We are ignored and passed by. We do not have lobbies in Washington.

As you are aware, I had to pay my own plane fare to get here today. It is difficult for someone like me to feel effective with the Commission. I don't happen to have a nice lobby address here in Washington.

As I say, there was an eight to four split all the time in the development of this playground standard. The industry people were plugged into that. We had no control over this issue. Every feasible safety standard proposed was immediately voted down by the industry bloc. For things done inhouse, I think that some safeguard has to be there, so that the consumers are in a position where they would have clout.

We did not have it with the playground equipment.

Senator FORD. The situation you are describing now indicates that it is an area in which the Commission ought to take a long hard look to be sure that adequate representation is assured.

Ms. SWEENEY. They have been told. They put my letters in file 9.

Senator FORD. I thought it was 13.

Ms. SWEENEY. Wherever.

Senator FORD. Maybe we are getting a new look at the Commission. Do you believe the Commission's proposed Office of Public Participation can effectively deal with the underutilization of consumer interest that you have cited in your testimony today, and in your answers to previous questions?

Ms. SWEENEY. I have to know more about the particulars of the office, Senator. I would have to read up on it.

Senator FORD. They will be in here Thursday, and we will discuss that with them at that time.

I am appreciative of your being here today. I think having consumer people come to meetings and participate will improve consumer awareness. There are a lot of things that can be done to improve the ability of the Commission to do its job.

I am primarily interested in quality rather than quantity and hopefully that we can develop an image of the Commission that will keep it in business.

I appreciate your coming on your own on such short notice. Thank you for your testimony.

Ms. SWEENEY. If I may make one closing comment.

There is a difference in quality between standards written for an adult population and those written for children. I mentioned in my testimony, children cannot vote.

Senator FORD. Some of them cannot read yet either.

Ms. SWEENEY. Those labels would inform the parents. You cannot put the burden for product safety on children. You have to prioritize. Supposedly, up to now the Commission has said children are its priority.

It is a mockery because they don't have the timeframe under the Hazardous Substances Act.

Senator FORD. We saw the hands and feet of children in Dr. Goldstone's slides.

Ms. SWEENEY. I know a child who was pushed off the top of the slide who is in a vegetable state.

Senator FORD. Thank you for being here.

[The attachments referred to follow:]

STATEMENT OF THEODORA BRIGGS SWEENEY, CHILD ADVOCATE, BEFORE THE U.S. CONSUMER PRODUCT SAFETY COMMISSION, MAY 11, 1977

First, I want to thank the Commissioners for taking the time to meet with me today. I hope that at the end of our meeting the consensus will be that the time has been well spent.

At the present time, the task before the Commission is to synthesize the volumes of data which have accumulated on the subject of public playground equipment and surfacing, and to issue a set of regulations which will effectively reduce the unreasonable risk of injury presently associated with these products. My purpose in requesting this meeting is not to add to the Commissioners' paperwork, but rather to simplify it, by calling attention to those aspects of the proposed standard which, to my mind, fail to eliminate such unreasonable risks.

The first four items I will discuss pertain to crucial aspects of the standard in which the National Bureau of Standards' evaluation has failed to note either inconsistencies, lack of technical rationale, or both. The fifth topic addressed will be the problem of surfacing data. Finally, I will focus on some possible solutions

to the legal and logistical problems posed by existing playground equipment and surfacing, where unreasonable risk of injury will continue to exist unless remedial action is taken.

(1) The National Bureau of Standards' evaluation of the proposed standard, dated July 22, 1976, states that items (a), (b) and (c) of section 1514.9, "falls from equipment," are "adequate," adding that the technical rationale is "debatable," and the standard itself is "subjective." NBS has apparently failed to note the discrepancy which exists between the proposed allowable unenclosed height of 12 feet and the fact that no surfacing was tested beyond a drop height of 10½ feet. Whatever the merits or shortcomings of the surface testing itself may be, since it provides no data beyond the 10½-foot height it is difficult to comprehend how NBS can term the use of the 12-foot figure "adequate."

(2) Section 1514.9(e) deals with side protection on sliding surfaces, and would require that slides have 2½-inch sides raised above the chutes. NBS has evaluated both standard and technical rationale for this section as "debatable." Again, no notice is taken that no justification is offered for this 2½-inch figure, which is clearly unrelated to center of gravity measures for children. In this matter, I would like to call the Commission's attention to a memorandum from Donald MacKay, SCAV director, dated February 6, 1975, pertaining to this same issue as related to home playground equipment. As Mr. MacKay puts it, "Data available to the Commission from the FAA indicates that a child's center of gravity is at least 6 inches above the sitting surface." Since a 2½-inch chute side cannot adequately protect a child whose seated center of gravity is at least 3½ inches above it, it would seem that the more appropriate evaluation for this section would be "inadequate."

(3) Part (g) of section 1514.9 pertains to the angle of inclination of stairways and ladders, specifying that ladders with rungs shall have an incline between 75 and 90 degrees from the horizontal, and ladders with steps shall have an incline no greater than 75 degrees from the horizontal. While the technical rationale is considered "debatable," NBS evaluates this section of the standard itself "adequate," apparently failing to note that the recommended angles are based on studies of angles for ladders without railings. Since virtually all playground equipment ladders are equipped with railings, the use of which greatly alters the angle of inclination of the user's body, it would seem that the adoption of an industrial standard for a child's play ladder is "inadequate." The effect of such steep inclinations on ladders with railings makes it virtually inevitable that a child who loses his grip will fall helplessly backwards, rather than being able to catch himself in a forward fall onto rungs or steps.

(4) In view of the obvious fact that using playground equipment without protective surfacing beneath it may be harmful to one's health, it is surprising that NBS has judged section 1514.11, "maintenance, installation and identification," to be adequate. As written, the only label which this section would require is one which identifies the manufacturer. Nowhere would the truth of the matter be stated, namely, that most playground equipment is simply dangerous without the proper surfacing underneath it. If everything from cigarettes to aerosols can be labeled, informing the public of its potential hazards, it would seem irresponsible, and hardly "adequate," to omit this fact from a label on playground equipment. While it may not be within the jurisdiction of the Commission to require protective surfacing as such, legal opinion and precedent would seem to support the use of such an informational label as to the hazards which exist without such surfacing.

(5) Of the 118,000 estimated public playground equipment injuries which occur annually, over three-quarters, or almost 90,000, are due to falls onto hard surfaces. Slightly less than half of these children who fall injure their heads; the majority of the victims are between the ages of five and nine.

According to medical experts, any interruption of normal neurological functioning while the brain is still developing can have lasting, detrimental effects, symptoms of which are not always immediately evident. In other words, as the University of Iowa report states, "The risk is real and the potential for the most severe injury is imminent with every fall."¹ Clearly, there is an urgent need to reduce the impact potential of the surfacing over which most public playground equipment is installed.

Unfortunately, although surfacing might be described as one of the biggest single problems associated with public playground equipment, it is also an area

¹ "Public Playground Equipment," University of Iowa Product Investigation Report No. FDA 73-6, Oct. 15, 1973, p. 1.

in which definitive data are extremely difficult to obtain. Although tests for skull fracture can be conducted on cadavers, there is no way to test for the level at which brain damage is caused in a living child, short of actually risking it.

Partly as the result of this difficulty, NBS has adjudged section 1514.10, "Surfaces under the equipment," to be "inadequate." On the basis of available head impact data, an average force of 50g's was used as the cutoff figure for maximum allowable impact level, and it was on this basis that the surfaces tested were evaluated. Dr. Fred Wendt of Franklin Institute, who supplied this figure, acknowledged that it tended to oversimplify the problem, but defended its use as the best general guideline presently available.

Dr. Bal Mahajan of NBS, who has evaluated the standard, and who has himself done considerable work in the area of head injury, also acknowledges the problems inherent in obtaining statistically valid data in the area of head injury. As Dr. Mahajan expresses it, "Vital information, such as threshold values for sub-fatal head injuries, is hard to obtain because humans are complex and variable, and techniques for testing live humans are limited. . . . An interim standard will have to suffice until the essential information becomes available."² I would only add that unless such an interim standard is quickly arrived at and effectively enforced, we are, in effect, conducting uncontrolled experiments with human subjects on our public playgrounds every day of the year.

(6) Normally, when the Commission is faced with regulating a product known to be causing injury and even death, recall and repurchase are possible solutions to the problem. Public playground equipment, however, poses a unique situation. To begin with, much of it was purchased from companies which cannot be identified, some of which are no longer in business, and at such distant points in history that those presently responsible for its maintenance and supervision cannot recall its origins. Although repurchase may be required of manufacturers of substandard equipment at some future date, it would appear to be an impractical solution to the problem of what to do about existing, installed equipment, of documented, injury-causing potential. Additionally, in many cases it is the surfacing and not the equipment itself which is the actual injury agent.

Although the Commissioners have undoubtedly examined this issue already from a variety of perspectives, I would like to suggest two possible solutions to the problem. The first alternative would be a congressionally-funded "seed-money" program which would allot \$200. For every school and park playground in the country to help defray expenses involved in removing undesirable surfaces beneath public playground equipment and in replacing them with sand, wood chips or other inexpensive, energy-absorbing material. The cost of a program of this nature, based on an estimated figure of 113,311 public playgrounds in the United States, would be approximately \$22,500,000.³

A second, less costly but less adequate alternative, would be to take the "direct-information-plus-feedback" approach. Under this system, the Commission would send a letter to each superintendent of schools and park director in the country, providing them with criteria for evaluating playground equipment under their jurisdiction and guidelines for the selection of proper surfacing. Contained in this letter would be a return postcard indicating the number of basically sound pieces remaining on the playgrounds for which labels would be required indicating that they are nonetheless hazardous to the user without protective surfacing underneath. The estimated cost of this label distribution program would be \$34,000, based on an average of three pieces of equipment on every park and playground, and a wholesale cost of 10 cents per label.

Although this second proposal would place the expense of the surfacing itself upon the individual agency's budget, it should be noted that in many municipalities wood chips are available free to anyone who will haul them away: in addition, sand is literally, "dirt cheap." If funds for the necessary labor were lacking, volunteer programs could be set up locally using civic-minded groups, many of which are often in search of a cause.

Although some have suggested a general information and education program as the solution to the problem of existing public playground equipment, I personally doubt that such a program would be effective. Not only is safety literature the least often requested at consumer information centers, I have personally found great resistance among both school administrators and park officials even

² Mahajan, Bal M., "Standard for Athletic Helmets—State-of-the-Art and Recommendations." NBS Report No. NBSIR73-276, April 1974, p. 16.

³ U.S. Department of Commerce, Bureau of the Census, Statistical Abstract of the United States, 1976 ed., and The Condition of Education: a Statistical Report on the Condition of American Education, United States, National Center for Educational Statistics, 1976 ed.

to discussing the possibility that their playgrounds may be hazardous. Unfortunately, the most prevalent attitudes seems to be that if a child is injured on playground equipment, it's probably his own fault.

At the present time, I find the public playground situation analogous legally to that which existed prior to the enactment of child labor legislation: because there is no law or regulation against it does not mean that there is no problem, and that children are not being exploited. I find it ironic that at the present time, factory workers in this country enjoy greater protection in their places of work than children do in their places of play. I respectfully urge the Commissioners to take decisive action to remedy this situation, and to ensure that the challenges which public playgrounds offer will be to a child's ability, not to his very survival.

ITEM II

CLEVELAND HEIGHTS, OHIO, August 13, 1977.

Mr. S. JOHN BYINGTON,
Chairman, Consumer Product Safety Commission,
Washington, D.C.

DEAR CHAIRMAN BYINGTON: For a variety of reasons, two issues have recently emerged as pivotal in the matter of public playground equipment regulation, namely, surfaces and labels. With regard to surfacing, the key question seems to be "Is there enough data upon which to base a regulation?" Regarding labels, the issues are: 1) will they help; 2) can they pose a new hazard; and 3) what will they cost? Having studied the playground problem for thirteen years (longer, I suspect, than anyone else now involved), I would like to make the following observations.

While additional, more refined data are valuable in virtually any scientific investigation, including an exploration of the relative absorbency characteristics of playground surfacing materials, we already know that the most commonly used surface, asphalt, cannot absorb impacts which occur in falls from relatively low heights. To quote Dr. Mahajan's memo on June 2, 'Existing data shows that a high percentage of injuries occur in falling, making surfacing a major contributory factor to injury.' Dr. Mahajan's opinion is that "A definite action is recommended in this matter." In short, although we may presently lack data on some potentially desirable surfacing materials, we do know what is undesirable. I believe that it is incumbent upon the Commission to share its knowledge in this area with the public in the most direct way possible, namely, labels on the equipment itself.

Those who question the efficacy of labels with the target audience apparently have not understood that the real "target audience" is not the children, but their parents. The rationale for requiring labels is that, in general, an informed public will act when an issue concerns the welfare of its children. Typically, a child's introduction to playground equipment takes place when his or her parent takes the child to play at the local school or park, long before he or she is old enough to go alone. As a frequent speaker to PTA and other civic groups, I can assure the Commission that at the present time, parents simply do not know how hazardous playground surfaces are—until their child is injured.

In answer to the question, then, "will labels help?", I believe that they will help not only to educate the public in the most direct way possible as to the dangers posed by hard playground surfaces, they will also benefit the Commission by placing the responsibility for action on the citizens. As the Commission is well aware, there is no way it can legally mandate the removal of undesirable surfacing on properties owned by the private sector; having jurisdiction over consumer products, however, it can require that such products be labelled, wherever they are installed, if such labelling is in the public interest.

Opponents of labels have suggested that placing them on playground equipment might pose an additional hazard to children. Inquiries made of label manufacturers indicate that a two-by-four inch pressure-sensitive vinyl label would be easily applied, and have a life expectancy of five to ten years. It is difficult to imagine how a vinyl label—with rounded corners—can possibly pose a hazard even approaching the severity of that posed by an asphalt surface!

With regard to the question of labelling costs, I am happy to report that more research on the subject indicates that the costs would be far lower than the earlier quotations. Two Cleveland manufacturers have indicated that the vinyl labels described above can be obtained at a cost of \$25.00 per thousand. What this means is that labels for the estimated 240,000 pieces of equipment on the country's elementary school playgrounds would cost only \$6,000.

With regard to retrofit labelling, a point needs to be raised which has not previously been discussed, to my knowledge. It is understandable that the Commission would be reluctant to undertake the labelling of all presently installed public playground equipment in the country, if for no other reason than the difficulty of determining how much is out there and where it all is. While I might consider such labelling to be the ideal solution to the problem of informing the public of surfacing hazards, I can well appreciate its logistical problems.

The initial impetus for my own involvement with this issue, however, and the one which sustains my efforts to find a solution to the playground problem, is the situation of the primary grade child, between the ages of five and nine, who is required to play on the school playground, whatever its condition and whatever surfacing it may have. If this seems over-stated, I would merely point out that parents are required by law to send their children to school, and that these same children are given no choice when it comes to recess periods; unless they are ill, they automatically are taken out to play on the playground. Between first and third grades, recess periods are often held twice a day. Since most parents do not recognize the hazards, and most school administrators I have dealt with do not want to recognize them (harsh, but true), the present situation puts the school child squarely in the role of victim.

I would suggest, then, that as a compromise solution to the problem of retrofit labelling, the Commission undertake to require labels only on elementary school playgrounds, for the reasons cited above. Location of the superintendents of school districts, through whom the labels would be issued, would be a simple matter to determine. Two mailings would be required; the first would contain the request for the equipment count, and the second would be the actual issuance of the required number of labels. As I assess it, the costs would be:

Labels for 240,000 (estimate) pieces of equipment.....	\$6,000
Cost of two mailings.....	4,420
Printing, paper, collating (estimate).....	5,000
Total	15,420

If the Commission were lacking in sufficient staff to administer this Playground Area Labelling (PAL) program, I would be happy to conduct it on a volunteer basis, asking that the Commission meet expenses.

Since nearly three and one-half years have elapsed since I petitioned the Commission to regulate public playground equipment and surfacing, I respectfully urge that decisive and effective action be delayed no longer.

Sincerely,

THEODORA SWEENEY.

RELATIONSHIP OF SURFACES, DROP HEIGHTS AND G-FORCES

Surface material	Drop height in feet							
	0.25	0.5	1	2	3.5	4	8	10.5
Concrete.....	150-200	250-300	475-525					
Thin mat.....	60-80	125-150	275-300					
Asphalt.....	40-45	60-65	140-160					
Packed earth.....						175-225		
Gym mat No. 1.....				8-12		55-70		
Gym mat No. 2.....			1-2	4-5		170-190		
Rubber mat (11/8-in thick).....			3-5	6-15		40-55		
Double rubber mat.....			1	2-15	24-28		50-58	70-80
Sand (10-in deep) ¹							10-13	15-20
Pea gravel No. 1 (8-in deep) ²				10-15	10-20		15-40	20-50
Pea gravel No. 5 (8-in deep) ³				10-15	10-20		15-30	25-40
Wood chips (12-in deep).....					15-20		30-35	42-48

¹ Corrugated rubber mat, 1/8-in thick, with 1/16-in vinyl cover.

² Wet, firmly packed sand.

³ Rounded, river washed, up to 3/8-in diameter.

Note: Figures given indicate range of G-force in repeated drop tests. Serious injury is likely to occur in impacts in excess of 50 G's.

Source: Franklin Institute Research Laboratories, Philadelphia, Pa.

Senator FORD. The subcommittee will stand in recess until 9:00 a.m. tomorrow. We will reconvene in 5110 of this building.

[Whereupon, at 11:45 a.m., the hearing was adjourned, to reconvene at 9:00 a.m. on Wednesday, April 5, 1978.]

REAUTHORIZATION OF CONSUMER PRODUCT SAFETY ACT

WEDNESDAY, APRIL 5, 1978

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE FOR CONSUMERS,
Washington, D.C.

The subcommittee met at 9:07 a.m. in room 5110, Dirksen Senate Office Building, Hon. Wendell H. Ford (chairman of the subcommittee) presiding.

OPENING STATEMENT BY SENATOR FORD

Senator Ford. Good morning, ladies and gentlemen.

This morning we continue our consideration of S. 2796, a bill to reauthorize the CPSC for fiscal years 1979 through 1981. Yesterday we heard a number of witnesses who provided us with a range of suggestions on how we might further improve the performance of this agency. I hope today's witnesses will be able to provide us with a variety of opinions on that same subject.

Because of the number of witnesses we will hear from this morning, and the fact that an important vote on the second Panama Canal Treaty is scheduled for later this morning, I believe at 11:00 a.m., there are several areas of interest not directly related to our reauthorization bill that will be impossible to discuss today. Some of these subjects may well become the topic of future oversight of the Commission later in this session.

Two areas I hope to discuss today are standard development and the Commission's role in the area of chronic hazards. The Commission's performance in these two areas has led some critics to conclude that the offeror process should be abolished and chronic hazards should be transferred to another Federal agency.

With respect to mandatory standards, I believe the Commission has a number of other regulatory tools that may be more effective in many instances. In light of the Commission's most recent standard development under the offeror process, I believe that any move to abolish section 7 at this time would be premature. However, I do believe that the Commission might need the flexibility to develop a standard, bypassing the offeror process, under very specific and narrow circumstances. I specifically solicit the suggestions of our witnesses on how this might be accomplished.

At the same time, I am convinced that increased attention must be given to cooperation with standard-setting groups and industry in the

development of suitable voluntary standards. The Commission's decision last week concerning the development of a chain saw standard makes me hopeful that the agency is taking a closer look at this approach.

The primary focus of our hearing today is reauthorization. That is: Should the Consumer Product Safety Commission be reauthorized for an additional 3 years? Although the Commission's past performance leaves a great deal to be desired, I am optimistic that this agency can function and meet its primary purpose of reducing the number of product-related injuries and deaths that occur each year.

Our first witness this morning is Mr. Edward R. Garvey, executive director, National Football League Players Association, accompanied by Mr. Brig Owens of the Washington Redskins professional football club.

If you two gentlemen will come forward, we shall proceed.

**STATEMENT OF EDWARD R. GARVEY, EXECUTIVE DIRECTOR,
NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION; ACCOMPANIED BY BEN ZELENKO, SPECIAL COUNSEL; AND BRIG OWENS**

Mr. GARVEY. Good morning, Mr. Chairman.

Senator FORD. Good morning. You have a fairly lengthy statement with a lot of addendum to it. If you want to highlight your statement this morning, we will put the entire text in the record.

Mr. GARVEY. We appreciate that, Mr. Chairman.

On my left is Ben Zelenko, special counsel. As you indicated, Brig Owens is with us. He's also a staff member of the Players Association.

In light of the time we will be brief. We appreciate your taking the entire statement.

Frankly, our story with respect to the CPSC is one of total frustration and I guess our appearance here today is a monument to perseverance. We testified when the bill was being considered to create the Commission in the first place. It was made clear through an amendment to the bill then that synthetic turf would be covered by the Consumer Product Safety Act.

We were one of the first to petition the Commission. In fact, I think we were second or third to actually get our petition before the CPSC. Our petition was denied because we did not have enough information, to support our claim according to the Consumer Product Safety Commission.

When we did produce that information through a study paid for by the National Football League as a result of our pressures as the union, then the Commission said, well now, you haven't shown us enough and we should first have an overall study of football injuries rather than focus on synthetic turf.

When we came up with another year's study from the Stanford Research Institute indicating that synthetic turf substantially increased injuries to the knee, ankle, head and shoulder, the Commission turned down our second petition, saying we hadn't given them anything new.

So it seems to us every time we have tried to turn to the CPSC, they have either said, well, the problem is too specific and we should generalize it, or you don't have enough information. When we give them

the information, they say, it's not anything new. Then they say we should also give them information about high school and college injuries, and we have now seen at least a preliminary study by NAIRS which we have included in our statement, which shows that, at the college level, foot injuries, ankle injuries, knee injuries are all increased on synthetic turf.

It seems to me we are sort of in a classic Catch-22 situation. What the CPSC has said, you must gather all the data, come to us, show us conclusively there are more serious injuries on synthetic turf, then we are not going to do anything anyway.

So while we have spent time and effort during this 5-year period, before the Commission, hundreds of careers have been ended as a result of this dangerous surface. We would encourage the Congress to extend the life of the CPSC, but also to give some direction to the Commission that it not unduly burden the citizen. If a citizen comes to the Commission and says, look, we have proof this is a dangerous product the Commission should investigate. We can't help but wonder why the Commission seems to have followed the advice of Monsanto throughout the 5-year effort, to not set standards for synthetic turf.

We can't speak for college and high school athletes, but they don't have a voice, they are the ones who also have to play on this surface. If someone decides to put it in.

We now have a new turf which we have shown you a sample of, called Superturf.

Senator FORD. This is what you're talking about?

Mr. GARVEY. That's right. They say it's a little softer. As you see, it's put on asphalt. We don't think it's very soft. At any rate, there are no standards set by the Commission to govern how much shock absorbency the surface should have. Nor are there any standards regulating the conditions of the turf, given varying weather conditions and so on.

We think the CPSC has been a total failure and we hope its record would be rectified by guidance of the Congress. I think Brig Owens who played on the surface is probably a more persuasive witness and I would like to ask Brig if he can make a few comments on the turf itself.

Mr. OWENS. Thank you, Mr. Chairman. I thank you for your time.

When artificial turf first came out, it was supposed to offer a better playing surface. It was supposed to be easier to maintain, supposed to cut down on the number of injuries of the athletes playing on the field. It failed in all three categories.

Whenever we have gone into a game with artificial turf, our strategy from a defensive point of view is to bounce the ball carrier, because of the hardness of the surface. Something has to give. I don't have any facts in terms of studies, but you will find a few more fumbles on artificial turf than on natural grass.

They talk about how it's supposed to cut down the number of injuries. They still have not perfected a shoe to play on artificial turf. It's been a number of years. For instance, in Buffalo, we played in Buffalo the past season on artificial turf. It was quite cold up there and the ground was frozen. They used a chemical on the field to try and thaw out the ice. The chemical was so strong that it blistered the skin. The same thing happened in St. Louis this year. The year before

that, it rained in St. Louis and the chemical they use on the field to wash out some of the white chalk lines and put new chalk lines in, the chemical burned the skin as well as the eyes.

It seems as though the accepted view is that the artificial turf is put in to make for a better game for the player to play on, and all the facts prove that it has not.

Now, they say it makes it easier for the TV fans to look at. It looks better on TV, without any regard for the player. But there are a number of serious hazards involved.

Senator FORD. I might suggest Kentucky bluegrass. It looks awfully good on TV.

Mr. OWENS. One more thing about artificial turf, they say it calls for perfection of the game. They are supposed to be trying to develop a perfect shoe, one that speeds up the game because of the rubber surface you have, which means you are going to have to stop more suddenly.

The body isn't built for that kind of perfection. As a result of the twisting of the ankles and twisting of the knees because of sudden stopping serious knee and foot injuries occur.

Players are getting much bigger, stronger, and faster every day and you have speeding up of the game and bodies colliding; as a result, you have injuries.

Mr. GARVEY. Just to support this—the Stanford research study showed that the five stadiums with the highest injury rates all have artificial turf. The fields with lowest injury rates have natural grass. Of the 12 most dangerous fields, 10 have artificial surfaces.

We are somewhat encouraged because we think stadium officials also are beginning to realize that artificial turf has been a bad joke. In Miami they did replace it and we hope in San Francisco, at Candlestick Park they will replace it. Maybe commonsense will spread faster than Federal regulations.

Senator FORD. It usually does.

Mr. GARVEY. In the meantime, there are thousands of people who have to play on this surface. Some say, well, why don't you as the union negotiate this? But if it's in a municipal stadium we are not engaged in collective bargaining with them. The NFL owners say they can't negotiate the subject. To the extent we can negotiate we will do what we can do get it removed, but they don't seem to be quite as interested in safety as we are. Of course, college and high school players do not have such negotiating representatives.

That, in essence, is our story. It's been a story of frustration. We would be happy to answer any questions.

Senator FORD. The frustration your group has experienced in dealing with the Commission is certainly not unique. Hopefully, through these hearings and some future oversight hearings by the committee, we will be able to improve the Commission's losing record.

In your statement you indicated that football has moved from seventh to third in the Commission's list of hazard product categories. Has there been a significant increase in the number of stadiums using artificial turf over the same period of time?

Mr. GARVEY. I am not absolutely certain. We are somewhat without complete information with respect to the colleges. We have information on all the NFL stadiums and we have actually reversed the

trend a little bit as I mentioned. Where they have tried to install artificial turf we have been somewhat successful in getting them to put in natural surfaces. But we keep seeing the colleges putting in synthetic turf and that may be one of the reasons for an overall increase in injuries.

Senator FORD. To your knowledge, has the Commission done any in-depth analysis of its injury data to determine what part artificial turf may have played in specific injuries?

Mr. ZELENKO. The answer is "no," Mr. Chairman. Despite the fact that in the last Congress a House Select Committee on Professional Sports recommended that the CPSC do just that. More than a year has gone by since the Select Committee's report. When the present chairman of the CPSC testified to the Pro Sports Committee, as your statement suggests, he indicated that he would be undertaking such studies. To our knowledge, none have been undertaken. As Mr. Garvey pointed out also, Mr. Chairman, approximately, 15 out of 175 or 200 synthetic surface fields are in the NFL, so the vast majority are elsewhere.

The preliminary data that we supply today, which has not been published before, was furnished to the Commission. It covers some 800-odd colleges. It shows there are more knee, ankle, and foot injuries on artificial surfaces than on natural grass.

So that is why we suspect the football category ranks third today, on the Product Hazard Index and continues to be a highly dangerous product category. In the 5 years of the Commission's existence it has done nothing about football safety.

Senator FORD. Well, in light of the recent data concerning nonprofessional injuries which you have cited this morning, Ed, is your association considering re-petitioning the Commission?

Mr. GARVEY. Absolutely. We are going to keep at them until hopefully someday they will take a look. All we have had are so-called "helpful tips,"—for example, make sure the playing surface is free of rocks, holes, or debris. I would hope that if the Commission takes a serious look at the problem they can come up with better than that. So we are going to re-petition, yes.

Senator FORD. I think, Brig, you know from experience, that sometimes a change in lineup and a few new players make a big difference. I mention that to you because the CPSC has two new commissioners and will have a few changes at the end of this year.

In your statement, you also indicated that the Commission issued a release entitled "Football Safety Tips, October of 1974."

Did the Commission request any help from the NFL players concerning the content of that release?

Mr. GARVEY. None whatsoever. It's been one of these situations where we submit the petition and it's as if we dropped it in a well. We never hear from them. We asked for public hearings. We finally had one meeting then they turned down our petition.

They have not tried to work with us and to the best of our knowledge, they have not worked with the college coaches or any of the other people in football, to see what kind of guidelines should be established. I think their performance is kind of absurd.

Senator FORD. Well, it's typical that if you need some information you don't go to the people that know and understand. You go to some-

body else who is a Monday morning quarterback. I think in the language here, it is called a consultant.

In your testimony you mentioned the North American Soccer League Players Association.

Mr. GARVEY. Yes.

Senator FORD. I know that soccer is becoming increasingly popular in this country. Are a significant number of soccer fields equipped with artificial turf?

Mr. GARVEY. Yes. In fact, we are also the union for the North American Soccer League Players Association. If you like to get into the problems we have in the National Labor Relations Board perhaps we can handle that this morning, too.

Senator FORD. We handle a lot of things here, but I believe I will yield that responsibility to somebody else.

Mr. GARVEY. The soccer players have the same attitudes toward synthetic turf the football players do. Obviously, it's a less violent game, but running on that hard surface, because it's covered over asphalt is very difficult. Because they play soccer in this country in the summer months, where in most countries they don't; summer temperatures are an important safety factor. The heat of the artificial surface is very, very dangerous for players. One day in Philadelphia last summer I think it was 120 degrees in the outfield when the Chicago Cubs were playing a baseball game there. If you are running at full speed in a soccer match on that kind of surface, with that kind of heat, it's very dangerous to the athlete. We have seen it in football, we have seen it in soccer and of course the baseball players have the same attitude we do as well.

Mr. OWENS. Another important point, I don't think a study has been done in terms of the number of infections that result from the artificial surface. On the artificial surface, the blood, and sweat, sets right there on the surface. When you get a small scab, you get a staph infection, the joints stiffen and you will note a large number of players have injuries as a result of this. The same thing occurs in baseball.

In many situations the coach will try only to practice on that field maybe once a week.

Senator FORD. Is there any reason to believe that the higher the level of athletic competition, the higher the exposure to potential injury?

Mr. GARVEY. I don't know. I think that in professional football, you will have the more talented players available, the best equipment, best trainers and doctors. I would guess that probably there are fewer injuries at the professional level than, let's say, at the college or high school level, where oftentimes a high school team will not have a trainer present and equipment not always as good. I would guess that the level of injuries would be higher on the high school and college level.

Brig might have a different view. He played at all three levels.

Senator FORD. I would like to see some valuable tips go out to these younger people, that would be helpful to them, rather than something from a consultant from behind a desk who doesn't know anything about it.

Mr. OWENS. Talking about the infections I mentioned earlier, you have a piece of that artificial turf, Mr. Chairman. If you pick it up, just scrape your hand across the top of it. You can imagine—

Senator FORD. We could also scour the skillet with this, couldn't we?
Mr. GARVEY. You ought to try Astroturf. This is a little softer.

Mr. OWENS. But on natural grass, you don't have that and you don't have the high rate of infections.

Senator FORD. I am not going to keep you any longer, Ed, but I would encourage you and your players association, to pursue this with the Commission. I will commit to you today that we will look into it from the committee standpoint, and at a future date we will have an oversight to find out what is going on at the Commission, and how far they are moving along. I can see some light at the end of the tunnel as it relates to the Commission's performance.

I know that there has been a lot of controversy and I have been one of their worst critics, but I also know that it is a Commission that has the authority and the ability to make some improvements, and they do have the muscle of law behind them.

Hopefully, we can do some things that are obvious. I think your substantiating documents and the testimony you have given today should be considered. I would watch the football game whether you play on Astroturf or grass or mud, as you have on some occasions.

We thank you for being with us and, Brig, we are delighted you were with us today.

Mr. GARVEY. We would be more than happy to volunteer the expertise we have.

We are simply trying to assure for the safest playing conditions not only for the professional athlete but for high school and collegiate players as well.

Senator FORD. I would appreciate your working with them to get some real safety tips. Thank you all very much.

[The statement follows:]

STATEMENT OF EDWARD R. GARVEY, EXECUTIVE DIRECTOR, NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION

Mr. Chairman and members of the subcommittee, I am Edward R. Garvey, Executive Director of the NFL Players Association, a post I have held since May 1971. I am accompanied by Brig Owens, Defensive Back with the Washington Redskins and NFLPA staff member. We appear today at the Committee's invitation on behalf of more than 1400 active professional football players in the NFL.

Our message is straight forward. After five years experience with the Consumer Product Safety Commission in which we attempted to encourage federal regulation of artificial turf when used as a cover for athletic fields, we are profoundly disappointed in the performance of the agency and the effectiveness of product safety regulation.

We believe the CPSC has defaulted in its responsibility to the public to assure sports and recreational product safety. Its failure is particularly distressing because its own Product Hazard Index has ranked sports products, especially football, consistently among the 10 most dangerous product categories.

We believe that the CPSC has an affirmative duty to act in a preventive manner. It should require recordkeeping and technical data from manufacturers when a prima facie case of unreasonable risk of injury has been established.

It has a statutory duty to gather, analyze and evaluate injury data independently and not rely solely on the submissions of interested parties.

We believe that the CPSC is fully empowered under the law to have tests conducted to determine the safety of products and to inform consumers of the results.

This agency has not discharged its responsibilities under the law. It has failed to undertake bold initiatives or meaningful action with respect to sports safety. For example, only now is it considering to let a contract for an impact study of football helmets, but the contract has not been awarded (the offeror has not

yet been published in the Federal Register), so meaningful regulation, if it occurs at all, is still years away.

In light of the past 5 years experience, one may seriously question whether the CPSC has advanced the goal of consumer product safety at all.

When the Consumer Product Safety Act was first being considered, members of our Association testified before House and Senate Committees as to the serious risk of injury from playing on artificial turf. Testimony also was received from 3 artificial turf manufacturers. As a compromise, the legislation was amended to make clear that artificial turf, among other recreational products, was covered by the law. (See H. Rept. No. 92-1153, at 27).

We were among the first to petition the CPSC to issue a product safety rule. Within 10 days of the Commission's establishment, we cited a number of serious hazards presented by artificial turf. These included aggravated knee, ankle and foot injuries; serious burns; cartilage and ligament tears, among other injuries. We also recommended that public hearings be held by the CPSC to gather additional information from athletes, manufacturers, trainers, sports medical experts and others informed in the use of the product.

Our petition was denied in November 1973. Our request for hearings, made before the Commission announced its decision, was denied ultimately on June 12, 1975, over 19 months after the initial request was made.

In its decision, the Commission noted that since the category of "Football-Related Activity, Equipment and Apparel" ranked 7th on its Product Hazard Index, any regulatory action it might take should not be related solely to playing surfaces. Artificial surfaces it said, was only one element. Proper regulation should consider football overall. Similarly, the Commission noted that artificial turf has consumer uses other than for athletic fields and its regulatory action should not be confined to football use. This was a classic "Catch-22".

Emanuel Celler, NFLPA Special Counsel, prophetically warned the Commission:

"By the time an overall inquiry is completed, thousands of our youth and young adults will have been maimed or crippled by playing on synthetic turf." Letter to CPSC Chairman Simpson dated November 14, 1973.

Almost 5 years have passed, Mr. Chairman, and no overall regulation or study of football-related injuries or artificial turf injuries has been completed or even begun. Meanwhile, the product category of "Football" has moved from 7th to 3rd on the Commission's list of 100 Most Hazardous Product Categories.

During this period the Commission did issue a Public Release entitled "Football Safety Tips", Oct-Nov 1974. Among the 7 tips offered were the following:

"1. Choose equipment carefully.

"4. Make sure that the playing surface is free of debris, rocks, holes, uneven surfaces and equipment.

"7. Always check with a physician after injury to make sure it is safe to resume playing".

I offer a copy of this Public Release in its entirety for the record.

Such "safety tips" are a far cry from the type of meaningful product safety regulation we, other supporters of product safety and the Congress envisioned.

In 1976, the NFLPA again petitioned the CPSC for product safety regulations to govern artificial turf. (CP 76-12) Our petition relied on a study by the Stanford Research Institute commissioned by the National Football League which surveyed NFL injuries for the 1972, 1973 and 1974 seasons. It cited increased injuries to arms, elbows, hand/fingers, ankles, foot/toes, knees and the lower leg on artificial turf. Also, the data related the hazards of artificial turf to specific NFL stadiums. It reveals that the 5 stadiums with the highest major injury rate each have an artificial turf field; whereas the 4 stadiums with the lowest injury rate each have natural grass fields. The SRI study defines a "major injury" as one which results in 2 or more missed games. Whether or not this definition of "major injury" is applicable to nonprofessional athletes who are not as well trained and experienced as professional NFL players is questionable. Suffice it to say the Product Safety Commission has never made any independent evaluation of what constitutes a "major" injury. When major and minor injury rates are combined, the data indicates that of the 12 most dangerous fields, 10 have artificial turf surfaces; whereas of the 11 least dangerous fields, 10 are covered with natural grass.

But, on September 10, 1976, the CPSC denied the NFLPA petition. It gave two reasons: first, that the latest NFL injury data was not sufficiently different from earlier information; and, second, that the NFLPA had not submitted injury data for nonprofessionals. This was a new "Catch-22"!

The Act and its legislative history make clear that artificial turf is a covered product. The statute does not require that unreasonable risk of injury be shown to all classes of users. Nevertheless, the CPSC insisted on imposing an additional and unwarranted burden to establish risk of injury.

Recently, I obtained a copy of a preliminary report of the National Athletic Injury/Illness Reporting System (NAIRS). It deals with injuries associated with artificial turf and natural grass in college football for the 1975, 1976 and 1977 seasons. With respect to severity, the report defines two types of injuries: "Significant"—injuries which restrict an athlete from participation for more than 7 days; and "All-Reported"—which includes all injuries reported to the NAIRS system. The preliminary report focused on knee injuries; foot and ankle injuries and concussions.

Findings

1. 59 percent of the exposure (practice and games) is on natural grass and 41 percent is on artificial turf.

2. The injury rates for artificial surfaces are higher than natural grass for knee injuries for all 3 years of the study. Knee injury rates are higher for practices and for games. There are more "significant" knee injuries on artificial turf and the data show an increasing rate of such injuries during the period surveyed.

3. Rates for foot injuries and for ankle injuries on artificial surfaces exhibit a similar relationship to that for knee injuries.

4. Generally, the data collected by NAIRS show a higher overall rate of injury for artificial turf than for natural grass.

The final report has not yet been submitted and there may be an effort to relate these findings to type of shoe worn. Nevertheless, these preliminary data overwhelmingly give further support to the NFLPA assertion that artificial turf is a dangerous product.

Must the NFLPA submit another petition? Quite frankly, Mr. Chairman, we question what burden a citizen must meet when it seeks product safety regulation from the CPSC. Do we have the burden now of gathering, collating and analyzing high school injuries? Must we establish that deaths have been caused by artificial turf? Will the Commission finally act on its own initiative and examine the hazards of synthetic turf? Will it convene public hearings and hear from experts? We look to this Committee and to the Congress to give policy guidance to the agency.

In the 94th Congress, the House Select Committee on Professional Sports reviewed the history of the NFLPA efforts to improve player safety by regulating artificial turf. In its final report, it recommended that the CPSC take a number of actions:

"The Committee recommends that the Consumer Product Safety Commission gather injury information associated with professional and amateur football teams' use of artificial turf and that the Commission control the collection and analysis of the data. The Consumer Product Safety Commission should develop definitions of "major" and "minor" injuries which more accurately reflect the seriousness of the injuries incurred rather than to rely on definitions based on lost time or some other criteria of questionable validity." (Final Report, Select Committee on Professional Sports, U.S. House of Representatives, 94th Cong, 2d Sess. (1977) at 154).

Despite assurances by CPSC Chairman Byington to the Select Committee, it is our understanding that the agency has done nothing with respect to these recommendations. We urge you to interrogate the Commission as to its present and future programs in light of the recommendations of the House Select Committee and the latest data on college football injuries on artificial turf.

Today 15 of the 28 NFL playing fields have artificial turf surfaces. A chart identifying those fields is attached to my statement. I understand that the artificial turf of Candlestick Park, the home of the San Francisco 49'ers, will be removed and replaced with a natural turf field. Apparently, the Supervisors of San Francisco were more impressed than the CPSC with our injury data. Their analysis noted that the second highest number of major injuries in the NFL occurred at Candlestick Park. Even the alleged "land economics: advantage of artificial turf was disputed by a San Francisco Bureau of the Budget analysis. According to their estimate "natural grass is the least costly of the two playing surfaces by an estimated \$40,458 per year." A final decision is still pending. But if a change does occur, it will be in spite of, not because of, federal product safety regulation. The Orange Bowl, home of the Miami Dolphins recently removed

artificial turf and replaced it was natural surface. The University of Minnesota did likewise. Maybe common sense will spread faster than federal regulations.

Now a new brand of artificial turf has entered the marketplace. This new product known as SuperTurf has been installed in Shaefer Stadium, Foxboro, Massachusetts. In addition, SuperTurf has been installed in several high school athletic fields in Texas and at a university in Oklahoma. Its manufacturer claims that the product's shock absorbing properties are superior to those of AstroTurf. Since the federal government has failed to regulate the product this is the only characteristic the manufacturer needs to test for safety. But is SuperTurf less hazardous? Is it safer to play on than natural grass? What are its properties in hot/humid or hot/dry conditions; or at temperatures below freezing; or when the surface has been used for 2, 3 or 4 years? What reports, what information, what technical data has the Product Safety Commission requested of the manufacturer? None that we know of.

The Congress has recognized, rightly we believe, that consumer product safety must be a federal responsibility. The agency it established to protect the public was given a broad charter and powers. But in the area of organized team sports, after 5 years experience, the record of this agency is a disaster. The members of the NFL Players Association and of the newly formed North American Soccer League Players Association are vitally interested in sports and player safety. Our interest is shared by athletes in the nonprofessional ranks, as well as by the public-at-large. We urge this Committee and the Congress to insure that the agency it charges with product safety regulation fully performs its responsibilities. We stand ready to cooperate in that effort.

Thank you.

CPSA OFFERS FOOTBALL SAFETY TIPS

WASHINGTON, D.C. (Oct. 23, 1974).—Football, the favorite fall pastime of many Americans, is also the most hazardous sport to play, according to the U.S. Consumer Product Safety Commission.

An estimated 300,000 children and adults are treated in hospital emergency rooms, and about 20 people die annually as a result of football-related injuries.

Staff analysis on nonprofessional football player injury records in Commission files shows that 40 percent of all injuries occurred among 15 to 19 year old boys. Most injuries took place at school or at other public playing facilities.

Sprains and strains accounted for about 30 percent of the injuries, as did severe bruises and scrapes. Broken bones followed with 22 percent and serious cuts were next with 10 percent. While only one percent of the injuries were concussions, this type of injury may be quite serious.

Repeat injuries, particularly to the head, are the most serious threat to life, according to one researcher.

A football hazard analysis by the Commission has isolated several problem areas. One problem appears to be the inadequacy of some protective equipment. While only a small percentage of injuries were directly attributable to defective, ill-fitting or broken equipment, injuries did occur beneath the equipment, indicating that it may not be providing adequate protection.

In other cases, players sustained injuries because they had neglected to wear all their equipment during practice and play. For example, a 21-year-old boy cracked the third cervical vertebra (neck) after being hit from the side. He was wearing his helmet, but not a protective collar.

A study of North Carolina High School football players, funded by the Commission, revealed that nearly 25 percent of the injuries studied came as a result of a player receiving a hard blow from the helmet, shoulder pad or shoes of another player. The statistic led to the study recommendation that consumers, coaches and others responsible for athletic activities, demand safer equipment for manufacturers. In particular, the study said, manufacturers should be encouraged to design helmets and shoulder pads with soft, external padding to better cushion a player against blows from another player's equipment.

Soccer shoes were recommended over conventional shoes with long cleats to reduce ankle and knee injuries. Soccer shoes were also found to be less injurious to other players.

The Commission is supporting additional research on football and sports injuries at the University of Washington.

Based on existing injury and research data, the Commission offers the following tips for players and officials to reduce football-related injuries:

1. Choose equipment carefully. The North Carolina study pointed out there are marked differences between the effectiveness of different brands.

2. Soccer shoes are preferable to conventional football shoes.
3. Wear all equipment, even when practicing.
4. Make sure that the playing surface is free of debris, rocks, holes, uneven surfaces and equipment.
5. Follow the rules of the game to eliminate a vast number of injuries from such illegal activities as "spearing" and "clipping".
6. Limit blocking and tackling drills during practice sessions. A significant number of injuries result from these drills.
7. Always check with a physician after an injury to make sure it is safe to resume play.

WEISMAN, CELLER, MODLIN & WERTHEIMER,
Washington, D.C., February 26, 1976.

HON. RICHARD O. SIMPSON,
*Chairman, Consumer Product Safety Commission,
Washington, D.C.*

DEAR MR. CHAIRMAN: The National Football League Players Association respectfully urges the Commission to reexamine the unreasonable risk of injury presented by synthetic turf when used as a surface cover for athletic fields. We ask that the Commission take appropriate action pursuant to its statutory authority on the basis of injury data that was unavailable when it last considered this matter. (On June 25, 1975 the Commission denied the NFL Players Association's request of October and November 1973 that public hearings be convened to receive testimony on the safety hazards of synthetic turf). The new injury data were compiled by the Stanford Research Institute under contract with the National Football League and only recently were disclosed to the NFLPA. "National Football League 1974 Injury Study," (Stanford Research Institute, June 1975.) A copy of the Injury Study is attached hereto and made a part hereof.

The latest study surveys 1974 NFL injuries and contains comparisons of the three regular seasons in which injury surveys were conducted, 1972, 1973 and 1974. The study demonstrates that a significantly higher incidence of major and minor game injuries are sustained while playing on synthetic rather than on natural surfaces. For example, all three types of synthetic turf¹ demonstrate more fractures, sprains, abrasions and strains than natural surfaces. More injuries to arms, elbows, hands/fingers, abdomen and groin, ankles and foot/toes occur on all three types of synthetic surfaces. Two types of synthetic turf display higher rates of injuries for knees, the lower leg and the head. (1974 Injury Study at 12-13, 115-177.) The statistical incidence in all these cases is significant.

The data contain a number of revealing displays, but one table in particular (Table 15, [sic] at 142) relates the hazards of synthetic turf to specific stadiums. The table lists 26 NFL stadiums and ranks each on the basis of major injuries per game and on the basis of major and minor injuries per game for the period 1972-74. (A "major injury" is defined as one which causes two or more missed games.) The data reveal that the 5 stadiums with the highest major injury rate each have synthetic turf surfaces; whereas the 4 stadiums with the lowest injury rate each have fields covered with natural grass. Moreover, when major and minor injury rates are combined, the latest Stanford Research Institute data indicate that of the 12 most dangerous NFL fields, 10 have synthetic turf surfaces; whereas of the 11 least dangerous fields, 10 are covered with natural grass.

The latest Injury Study also discloses that when "punishment" from playing on various types of turf was analyzed (e.g., injuries resulting from contact with the turf alone and so-called "playable injuries", i.e., those requiring medical services but not resulting in lost time), all three types of synthetic turf displayed significantly greater numbers of injuries than natural turf. (Injury Study at 12, 126-137.) Finally the study also contains a number of recommendations with respect to the use of synthetic turf surfaces. On the basis of its three year study, the Stanford Research Institute has concluded—

"The significantly higher injury rates consistently obtained in the NFL over the past three years from playing on synthetic surfaces in such categories as 'lost time injuries', 'punishment' beyond the reported injuries, and even 'playable injuries' all point to the conclusion that synthetic surfaces for football use cannot be justified on an injury prevention basis; in general, natural turf fields are safer."

¹ The three principal brands of synthetic turf include: AstroTurf, Tartan Turf and Poly-Turf.

"Even the alleged advantage that synthetic turf can be justified on the basis of 'better land economics' (i.e., multipurpose use) seems to be a poor trade-off for NFL football in view of the higher injury rates obtained for the converted baseball fields on which its teams play" (at 171).

"The top or surface layer does not react consistently to hot, cold or ambient air conditions; to different humidity or precipitation; or even to physical wear. Moreover, surface inconsistencies are not only apparent from season-to-season and from field-to-field but, in some cases, within the same field; the hard shock pad or undersurface causes an undue amount of 'punishment' to players when compared to natural turf."

The Stanford Research Institute recommends that the significance of synthetic turf problems "should result in a movement toward the new natural turf systems . . . whenever the [NFL] League is in a position to influence" the decision (at 172, emphasis supplied). Moreover, in the 1975 regular NFL season which has now concluded, a number of quarterbacks who suffered season-ending injuries claimed that synthetic turf was responsible, e.g., Billy Kilmer (Washington Redskins), Jim Plunkett (New England Patriots) and Bob Griese and Earl Morrall (Miami Dolphins).

In light of this most recent NFL injury data, we believe it intolerable to permit the continued use of synthetic turf in collegiate and scholastic athletics as well as professional athletic contests without appropriate product safety regulations. Accordingly, the NFL Players Association respectfully requests that the Commission convene public hearings to receive testimony and other evidence from professional athletes, manufacturers, trainers and others most knowledgeable in the safety hazards of the product. On the basis of such a record, we urge the Commission to take appropriate action in developing product safety rules to govern the manufacture and use of synthetic turf.

Sincerely yours,

NFL PLAYERS ASSOCIATION,
EMANUEL CELLER, *Special Counsel*.

NFL STADIUMS WITH NATURAL GRASS OR SYNTHETIC TURF

City	Multi-use (baseball and football)	Single purpose	Playing surface	
			Natural	Synthetic
Atlanta		X	X	
Baltimore		X	X	
Bloomington, Minn.		X	X	
Buffalo		Football		X
Chicago				X
Cincinnati	X			X
Cleveland			X	
Dallas		Football		X
Denver	X		X	
Detroit ¹		Football		X
Foxboro, Mass.		do.		X
Green Bay, Wis.		do.	X	
Houston ¹	X			X
Kansas City				X
Los Angeles		Football	X	
Rutherford, N.J. (Giants)		do.		X
Miami		do.	X	
New Orleans ¹				X
New York (Shea)	X		X	
Oakland	X		X	
Pittsburgh	X		X	
Philadelphia	X			X
San Diego	X			X
San Francisco	X		X	
St. Louis	X			X
Seattle ¹	X			X
Tampa Bay			X	
Washington, D.C.		Football	X	
Total (28)			13	15

¹ Domed stadiums.

Source: National Football League Players Association.

The NAIRS office has been deeply involved in the preparation of 1977 fall football data since the conclusion of the post season play in January. The doubling of records from previous years has brought to the surface several minor problems which heretofore did not exist. The effort required to contact recorders in order to verify input and complete their records was considerably more time consuming than anticipated. In addition, a couple of bugs isolated in the program format for 1977-1978 had to be located and corrected. Several programmed computer outages due to University imposed restrictions on energy during our recent term break have placed unforeseen obstacles in the path of data production. We have hurdled each barrier and will be continually supplying the Commission with product related data for 1977 football.

Enclosed in this document are tables which capture summary information regarding surface related injury occurring in college football for the 1975, 1976, and 1977 fall seasons. The data included should be considered as preliminary since we have not completed our analysis of the overall relationship of surface to shoes, surface condition, and relative age. In addition minor changes sometimes occur due to recorder initiated modification which arrive during the spring. The final report to be submitted to the Commission will include all such modifications and analysis.

This report considers football exposure which occurs to the college population. We have chosen not to include high school data since the data would be overloaded with natural surface exposure because very few of our high schools play on artificial surface. Data have been analyzed by surface for both practice and games and excludes from the practice session category those surfaces which appear due to special practice conditions: such as moving into the gym due to weather conditions. Also in this report the age of the artificial surface is not considered but will be examined in the final report. Each of these considerations require more time for sharing and evaluation of the relationship before definitive ideas can be expressed. Because the exposure to polyturf is so small, we have not included it as a separate surface in this report.

It is appropriate here to include statements regarding specific definitions to be used in this report. As always, NAIRS can provide injury data in a variety of ways. Specifically used in this report are the following:

Severity

All-reported.—All injuries reported to the system (includes significant).

Significant.—Injuries which require the athlete to be restricted from participation for more than seven days.

Occasion related categories

Significant sport related (Sig-Sp).—Injury occurred in either practice or game (and restricted participation for more than seven days).

All reported sport related (All-Sp).—All injuries from practice and games include significant).

Significant game related (Sig-Ga).—Injuries occurring in a varsity game only (and restricting play for more than seven days).

All reported game related (All-Ga).—All injuries occurring in a varsity game.

With respect to the analysis of injuries the following type of injuries are included in the general heading:

Knee injuries.—General trauma, sprains (ligament and menisci) and patellar injuries.

Foot and ankle injuries.—General trauma, sprains, fracture.

Concussion.—Neurotrauma.

Table 1 represents a summary of the three year exposure. It treats the data both in actual frequency and relative percentage. The exposure for polyturf is included yet as noted earlier will not be analyzed separately from artificial surface since it represents only about 1 percent of the total artificial surface exposure. For perspective, the data include injuries for approximately 1.09 million athlete exposure for natural and artificial surface combined.

From Table 1 which indicated that 59 percent of the exposure is on natural surface and 41 percent on artificial, if no difference existed between the two surface categories a similar percentage ratio would be expected for the injury

frequency by surface. Table 2 portrays the injury frequencies for occasion related categories by surfaces for 1975-1977. It can be seen from this table that the artificial surface categories have a higher percentage of injury than would be expected from their exposure. This is particularly noticeable in the foot group for both sport and game related. The only exceptions are in the significant sport and game section for concussion where the injury frequency is less than expected. The determination of the relative importance of the deviation from the expected percentage is to be considered in the complete analysis of the above stated multiple relationship.

Table 3 1975-77 rates show an increasing rate of knee injury for: (a) significant sport related injuries, (b) all reported sport related, (c) significant game related, and (d) all reported game related.

For each occasion category during each of the 3 years the rates for artificial surface are higher than natural surface for the knee injury category.

TABLE 1.—TOTAL EXPOSURES BY SURFACE FOR COLLEGE FOOTBALL, 1975-77

	Practice (Percent)	Game (Percent)	Sport total (Percent)
Natural surface.....	566,347 (92.75)	46,626 (7.25)	642,973 (100)
Artificial surface.....	413,156 (92.38)	34,073 (7.62)	447,229 (100)
Astroturf.....	308,529 (92.58)	24,761 (7.42)	333,290 (100)
Tartanturf.....	96,567 (91.95)	8,461 (8.05)	105,028 (100)
Polyturf.....	4,142 (78.59)	1,156 (21.41)	5,298 (100)

PERCENT EXPOSURE BY OCCASION RELATED CATEGORIES AND SURFACE

	Natural	Artificial	Astroturf	Tartan	Polyturf
Practice related.....	59	41	30.5	9.5	0.4
Game related.....	58	42	20.6	10.4	1.4
Sport related.....	59	41	30.5	9.6	.4

TABLE 2.—OBSERVED INJURY FREQUENCY FOR KNEE, FOOT, ANKLE AND CONCUSSION INJURIES BY OCCASION RELATED CATEGORIES FOR NATURAL AND ARTIFICIAL SURFACE, 1975-77

	Significant sport related		All reported sport related		Significant game related		All reported game related	
	Natural surface	Artificial surface	Natural surface	Artificial surface	Natural surface	Artificial surface	Natural surface	Artificial surface
Knee:								
Number.....	584	553	1,305	1,179	245	226	494	433
Percent.....	51.4	48.6	52.5	47.5	52.0	48.0	55.1	44.9
Foot:								
Number.....	34	68	160	253	9	23	47	123
Percent.....	33.3	66.7	38.7	61.3	29.0	71.0	27.5	82.4
Ankle:								
Number.....	258	269	927	912	116	126	359	371
Percent.....	49.0	51.0	49.6	50.4	47.9	52.1	49.2	50.8
Concussion:								
Number.....	47	32	432	367	18	11	192	181
Percent.....	59.5	40.5	54.1	45.9	62.1	37.9	51.5	48.5

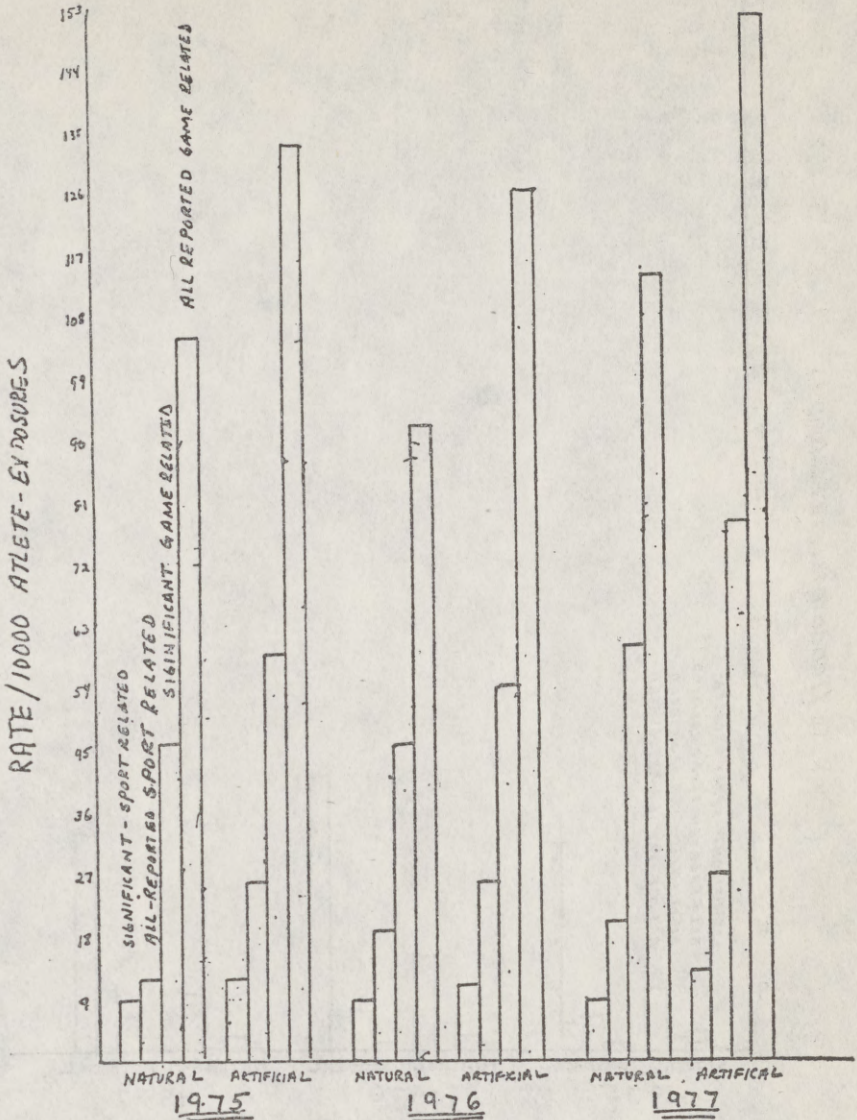


Table 3. Knee injuries.

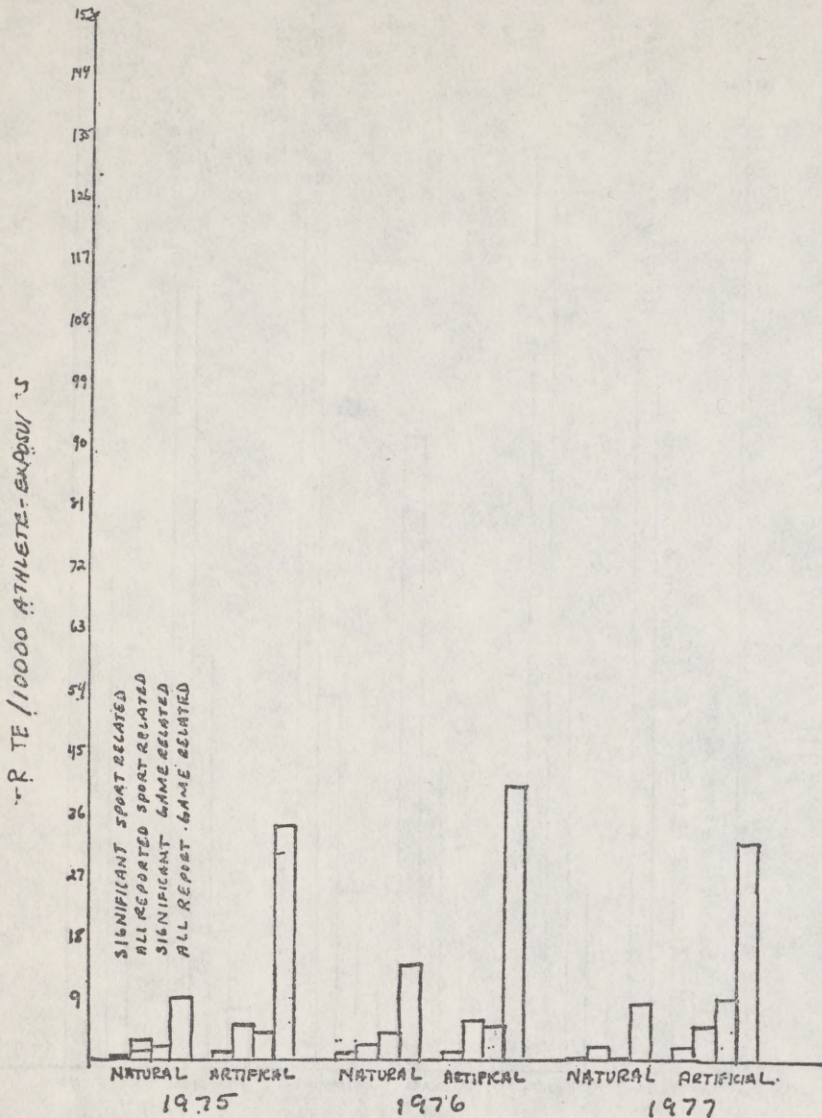


Table 4. Foot injuries.

Table 4 demonstrates the same general pattern, however the rate for foot injury appears to be substantially greater for artificial surface only in the all reported game related category. The other three categories reveal higher rates for artificial surface during the three year period but the magnitude of the difference is less. Rates for both surfaces are higher for knee injuries than foot injuries.

Table 5 The rates for ankle injuries on natural artificial surfaces exhibit a similar relationship to that of the rates for knee injuries.

Table 6 The all reported game related concussion rates are higher than the rates for other occasion categories during each of the three years. Rates for artificial surfaces are higher than the rates for natural surface for each category, and again, most notably in the all reported game related category. Overall con-

cussion rates for both natural and artificial surfaces are lower than the rates for ankle and knee.

Tables 7-10 demonstrates the highest rates for knee, foot, ankle, and concussion injuries are in the all reported game related category for both artificial and natural surfaces. Similarly, the lowest rates are observed in the significant sport related category. For each occasion category and injury the artificial surface rates are higher than the rates for natural surface exposure. The only exception to this is noticed in the significant game related concussion rates, where artificial and natural surfaces produce virtually the same rate. Generally, the tables portray a higher rate of injury for artificial than for natural surfaces. However this interval has not been completely analyzed as to its relative importance.

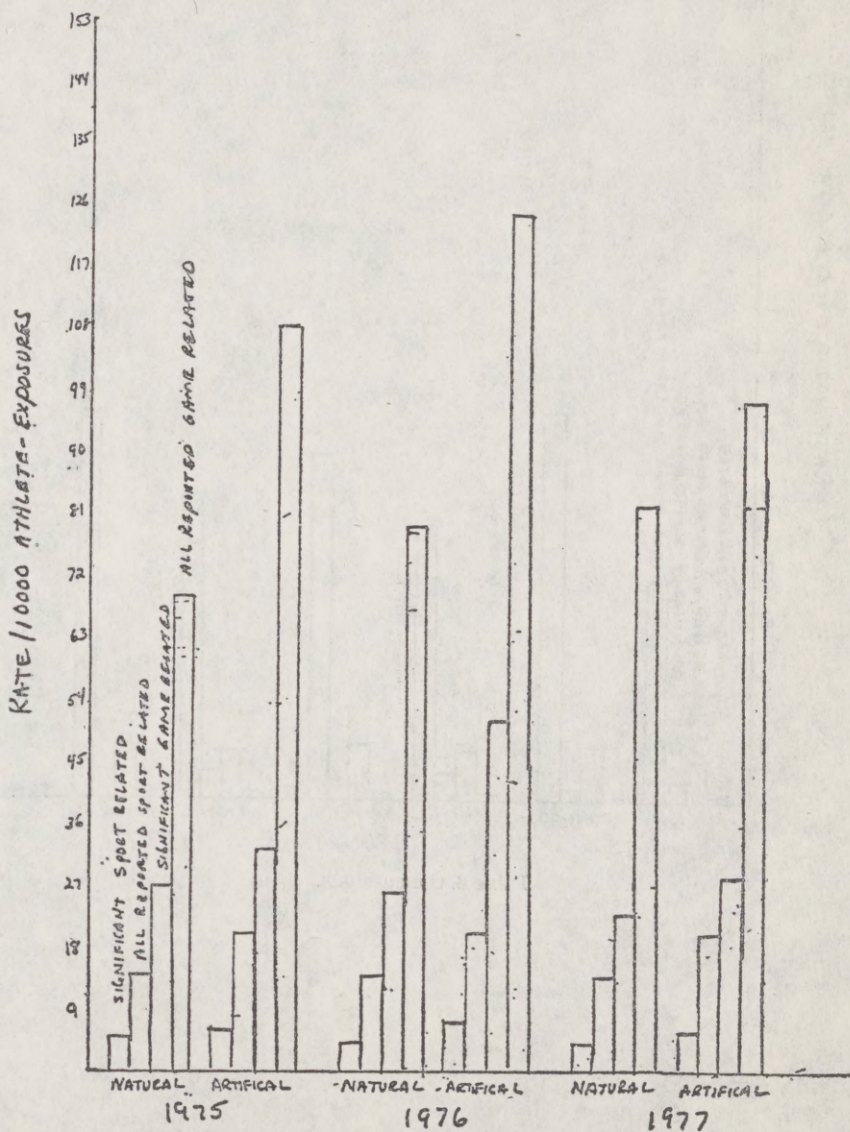


Table 5. Ankle injuries.

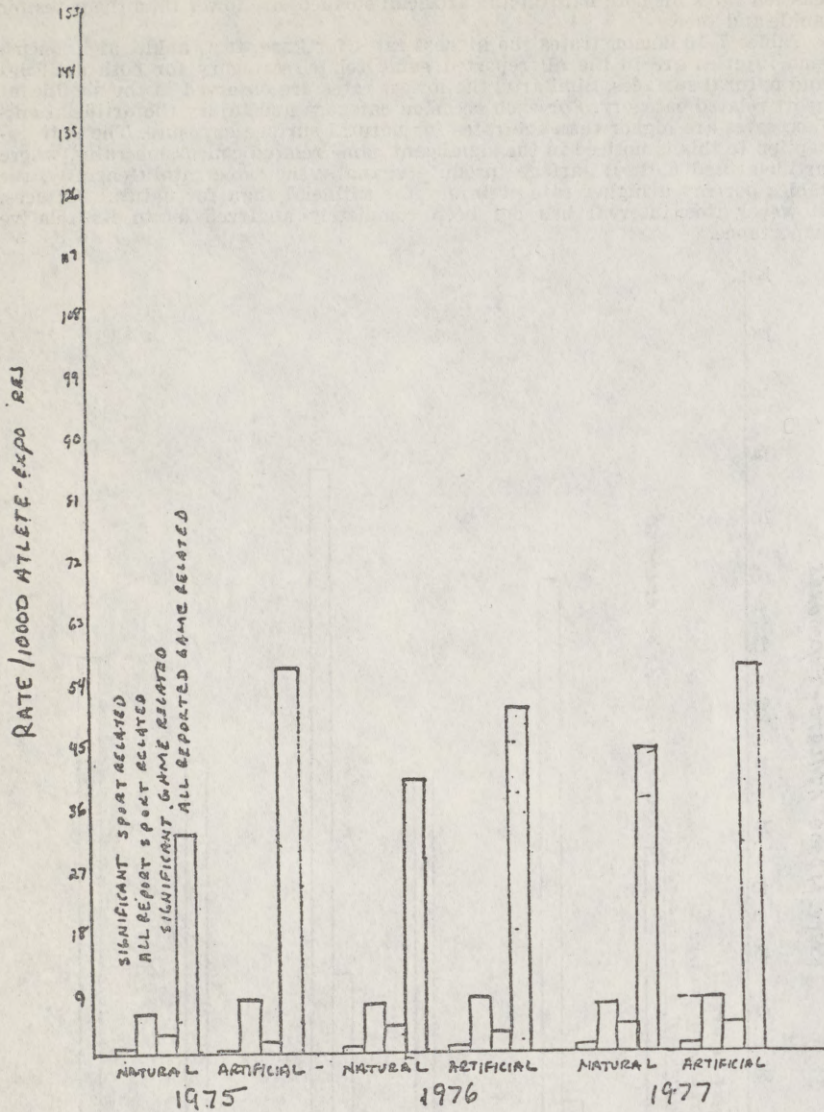


Table 6. Concussions.

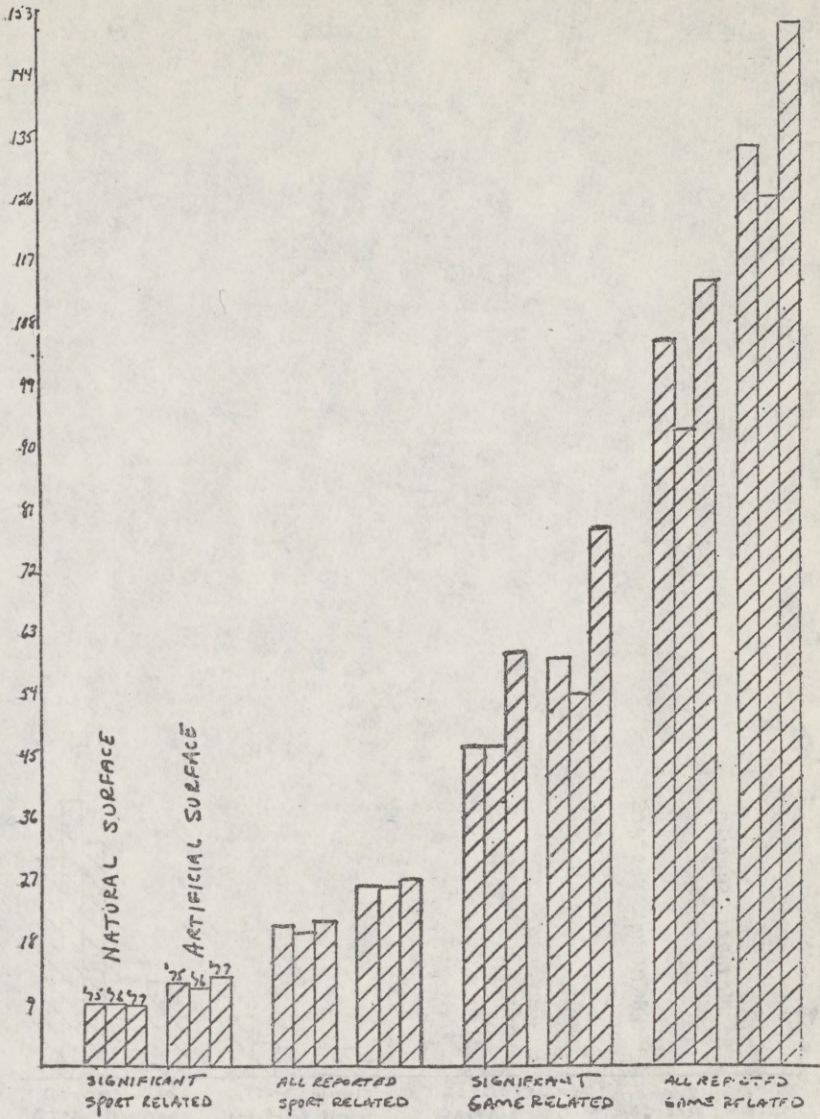


Table 7. Knee injuries.

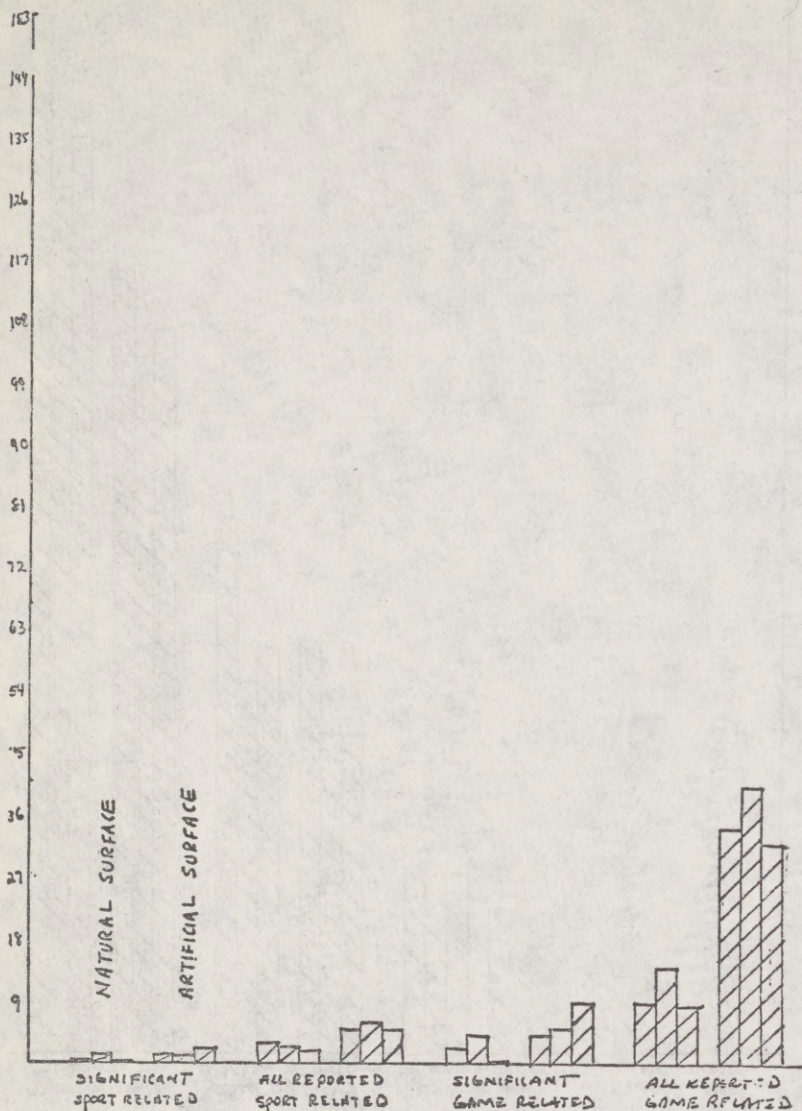


Table 8. Foot injuries.

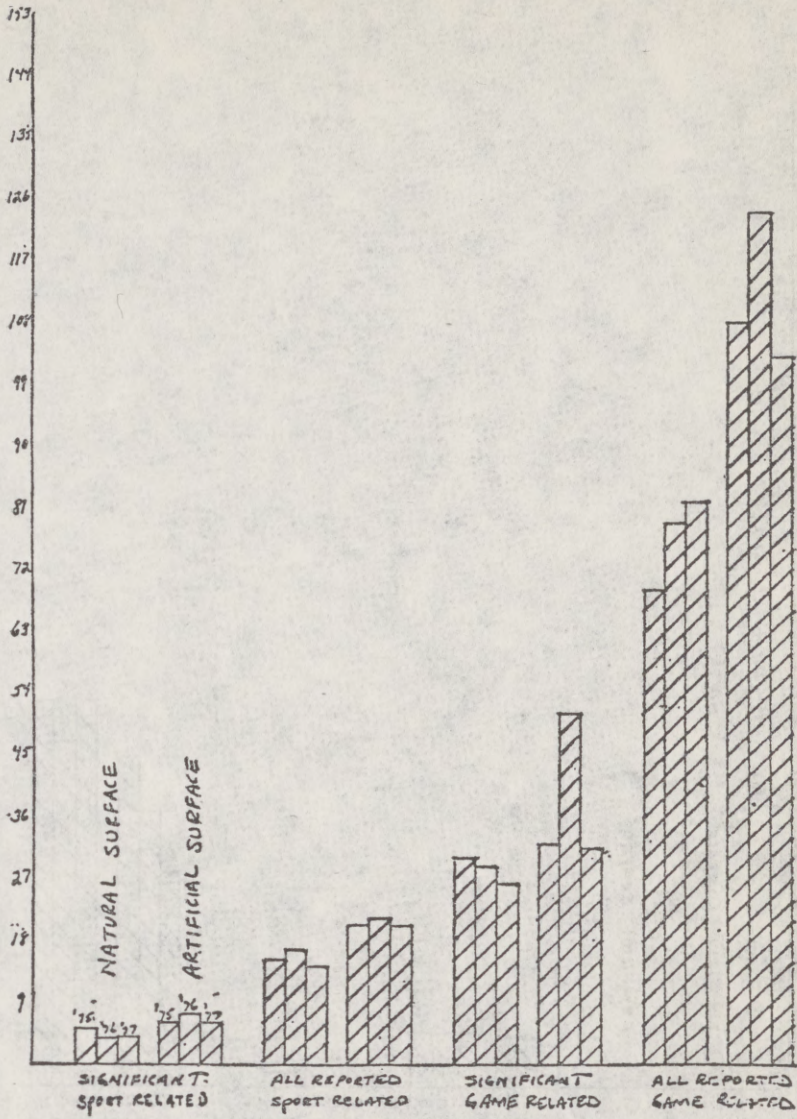


Table 9. Ankle injuries.

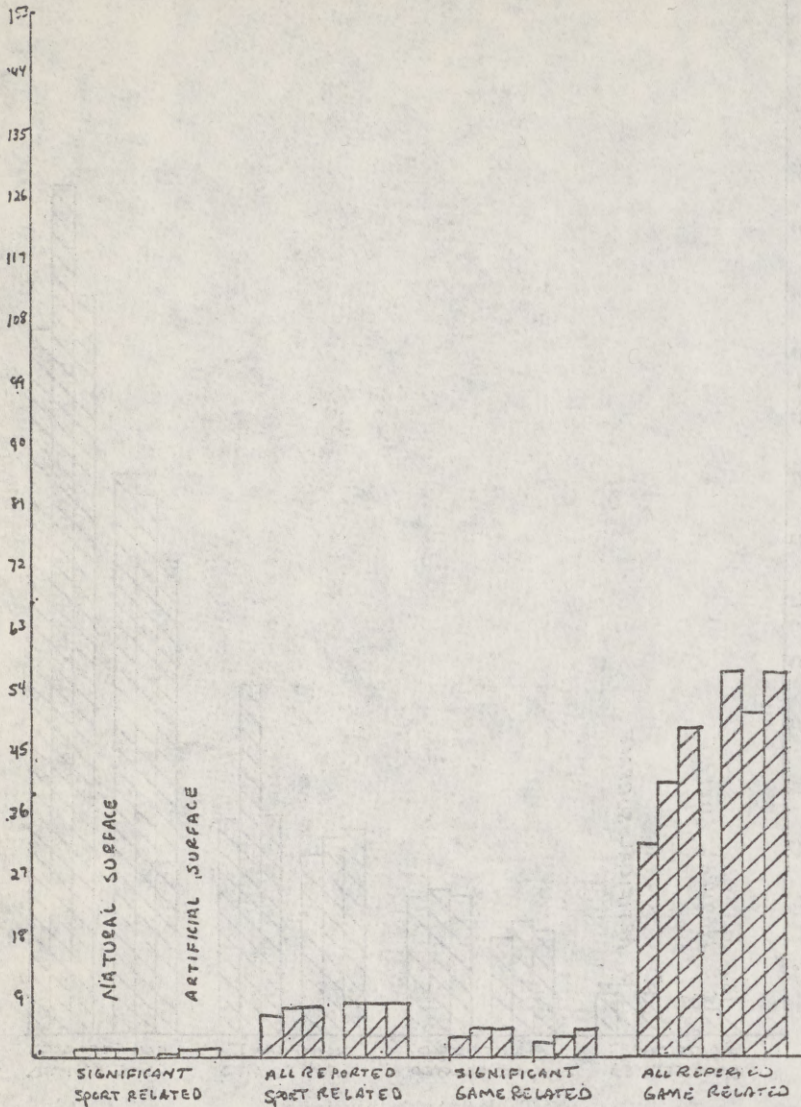


Table 10. Concussions.

Tables 11-14¹ display the actual frequency, exposure and case rate/10000 athlete exposure. As indicated above the number may change as incoming modifications are implemented in the data. The magnitude of this change should not exceed plus or minus 1% for any particular year.

In conclusion it should be reemphasized that complete analysis of the injuries involved with artificial and natural surface is based on the multiple association of surface, surface condition, and shoe type. We are currently examining these parameters and will be sharing the work with the Commission as this project continues into the final contract report. The overall process of analysis is slow

¹ Tables 11-14 were not reproducible.

due to the large number of records and the numerous verifications that are made before we feel the data are complete. We hope this pace does not inconvenience the Commission in any way. As in the past, please feel free to communicate any concerns by telephone.

Senator FORD. The next witness is Sandra L. Willett, executive vice president of the National Consumers League.

**STATEMENT OF SANDRA L. WILLETT, EXECUTIVE VICE PRESIDENT,
NATIONAL CONSUMERS LEAGUE; ACCOMPANIED BY DAVID
SWANKIN, COUNSEL**

Ms. WILLETT. Good morning, Mr. Ford.

With me today is David Swankin, who serves, on a nonpaid basis, as the league's general counsel and also chairs NCL's safety committee. We are here today to support your bill, S. 2796, and to applaud both the direction you have given the Commission during the past 15 months and your determination to make the CPSC live up to its primary congressional mandate, that of reducing product deaths and injuries in the marketplace.

May I ask our written statement be submitted for the record, because I would like to summarize my comments, then turn to David Swankin.

Senator FORD. Your complete statement will be included in the record.

Ms. WILLETT. The issue of product safety is not new to the National Consumers League nor are we new to your committee nor to the Commission itself with which we have worked since it opened its doors in 1973.

As you know, NCL was the first consumer group to be selected under the offeror process. We submitted an offer in 1974 as a "guinea pig" effort on architectural glass.

Although our submission was accepted by the Commission we could not convince the Commission at that point to provide sufficient funding for consumer representation. Therefore, we could not participate.

We have also been involved in the offeror process on matchbooks and held many meetings with the Commission. Last November, NCL submitted its offer to the Commission on Christmas tree lights.

So you can see that we have a special interest in assuring that the CPSC works and works well for public safety. The Commission in some areas deserves very high marks. CPSC initiated openness well before the sunshine legislation.

They deserve credit also for trying to institutionalize paid public participation. They have also made improvements and progress in administering section 7 and enforcing section 15.

However, when we examine the Commission accomplishments over the last 5 years, we have to agree with the saying "too little, too late."

We believe the Commission has a societal role as well as a safety role. It should be a catalyst for safety. It should be constantly concerned with raising the minimum standards. It should, in fact, err on the side of safety until real and potential harm to consumers and to the public interest from hazardous products is substantially reduced.

As a governmental body carrying out the mandate of Congress, the

Commission should lead the fight for safety, not follow behind the public's uninformed behavior or industry's self-centered actions.

The leadership is both a preventive and curative role. With your committee's oversight and with a 3-year lease on life, CPSC will, we believe, be able to get down to business.

Therefore, we actively support your bill, S. 2796, which would reauthorize the Commission for another 3 years. We would oppose any effort to kill the agency, or to dismember the agency or to vitiate in any way its mandates.

NCL would like to offer three brief points regarding CPSC management.

First, the Senate has reconfirmed or confirmed three highly qualified persons as Commissioners. Now that the Commission is operating with a full team we expect to see the five Commissioners operate as a team. That is not to say we expect consensus, but we do hope the Commissioners as a Commission will devote their energies to researching, debating, and deciding safety policies and standards.

Second, the Commission has made progress during the past year to establish priorities, and has published selective criteria and a system of "high" priority and "medium." The Commission identified over 40 products to be considered for Commission action. We would urge that the Commission go several steps further and follow the lead recently established by the Food and Drug Administration.

More than using their own advisory councils, FDA asks the public to grant a wide range of priorities identified by the agencies and suggest others. We believe the Commission, consumers, Congress and all will be helped better if consumer opinion is institutionalized at the point of deciding priorities and selecting candidates for mandatory standards.

Third, the Commission has voted to establish an Office of Public Participation. Their request, however, was denied by the Civil Service Commission. We are frankly quite appalled by this rejection.

Here, after all, is an agency which desires to pay those which are affected by their decisions and cannot otherwise participate and yesterday the CSC has rejected the request.

We plan to support the Commission's appeal. Perhaps, Senator Ford, you also would be interested in contacting the Civil Service Commission.

On the crucial subject of substantial product hazards, section 15, we believe that CPSC needs an enhanced self-image. Depoliticized, non-sense management will help, but the CPSC needs to build a solid track record of solid public interest action.

Reporting and compliance will remain the factors which determine the success and effectiveness of the CPSC. Congress has provided, after all, the Commission with a variety of remedies to protect the public against substantial product hazards, but the most important provision is one that directs manufacturers, retailers and distributors to report products containing defects which could create substantial product hazards.

This provision was meant to be self-enforcing. Industry must be made to recognize the seriousness of failing to report. We believe the most egregious error a company can commit under section 15 is not to report. That is an error, if committed on a repeated basis, we don't think can ever be forgiven.

Likewise, the most egregious error the Commission can make under section 15 is not to monitor these provisions. What does the record show for notification and compliance under section 15? It indicates that of the 10,000 consumer product categories sold in the marketplace today, notification for only 350 single products, a drop in the bucket, we believe, was submitted to the Commission during the entire first 2½ years of its life.

Between May 1973, and June 1977, according to the recent GAO report, only 495 substantial product hazards were reported. This figure represents approximately 36.4 million products containing defects. The travesty is that through June 1977, only 18 percent of these defects had been corrected.

Fortunately, within the past 6 months the Commission has made great strides to correct problems of reporting and compliance under section 15.

NCL commends the Commission for its (1) definition of "defect"; (2) increased efforts to inform manufacturers, retailers, and distributors about their reporting responsibilities; (3) identification of specific time constraints; and (4) clarification that a firm is responsible once its employees have knowledge about a hazardous product.

We believe that section 15 is so important that we wrote to the Commission requesting that public hearings be held on section 15, in addition to the written comments. We are happy to report that the Commission has responded and plans to hold public hearings on April 26.

With regard to home insulation made of cellulose, NCL would like to commend you for pushing the Commission toward a response to the flammability problem that consumers can understand. Consumers, who are beleaguered now with overly aggressive marketing practices and with new insulation products on the market, need protection.

Therefore, we think a minimum standard on cellulose for the time being is better than no standard at all. Consumers need protection, even at a minimum level. Until standard D or some other equivalent is perfected we would support making the current standard C mandatory, with the explicit proviso that the standard be constantly upgraded. We also feel because industry is familiar with the standard C that the time frame between passing a mandatory standard and compliance ought to be reduced to 30 days, rather than 120.

I would like to conclude my portion of the comments right now. If you have further comments on other issues we have discussed, consumer education or our report to the Department of Commerce, I would be delighted to answer them after Dave Swankin provides his remarks.

Senator FORD. Before you go any further I think the House standards, talk about 45 days instead of 120.

Ms. WILLETT. I am glad to see they have reduced this original time frame. Thank you; 45 days seems acceptable.

Senator FORD. It's a start.

Mr. SWANKIN. Senator, before I make a few comments about the offeror process—which is what I want to spend my time talking about—I would like to reinforce what Ms. Willett said about supporting the idea of a 3-year authorization for the Commission.

If it weren't for the fact that the rumors were coming from such high sources, stating that it is time to abolish this agency or throw

it in with another one, we could just dismiss it and pass it off; but I don't think we ought to.

It is only 10 years ago since this very committee took it away from the FDA because it wasn't getting the proper attention. That agency has enough to do to keep on top of the drug, food, and cosmetic problems we have.

There are a lot of problems, we all agree, but transferring is the only remedy that doesn't make any sense. There is an analogy there with regard to the offeror process. Because that process hasn't worked as well as it should—in fact, it's worked very poorly in our opinion, in most cases—a quick remedy is to throw it away.

But I wish and I hope that this committee will look very carefully at all these suggestions—it hasn't worked, so let's do something else.

We have been involved in three offers; monitored the rest of them; and are now generally credited with having monitored and directed the only successful process under the offeror process. It worked.

It is an oversimplification to say it worked because Christmas tree lights are a simple product. It is a relatively simple product; but the reasons it worked had nothing to do with the fact that Christmas tree lights are a simple product. We believe it would work again with a difficult product.

That is not to say some things don't have to be done to the process. We supported the idea of giving the Commission more flexibility. There are a number of times when 150 days isn't enough time to write the proper standard.

What happens in fact now, if 150 days isn't enough, you simply get extension after extension. The Commission is going to end up taking the time it needs anyway, and I think we all would be better off to get that figure correctly stated, and then hold people to it, rather than just go along with Federal Register notices postponing it a month or 6 months at a time.

I think there are many situations where there are relatively minor changes that have to be made to existing standards. In such cases, it just doesn't make any sense from a time or cost point of view to have to go through the offeror process to do relatively minor things to existing standards.

I think the idea now built into the cellulose piece of legislation, that you don't have to take this voluntary standard or the GSA standard, with every word and every comma, if there are relatively minor changes that have to be made, go ahead and make them. I think that principle would apply here.

But some of the other suggestions—I like your term this morning very much, Senator Ford. If we make it more flexible, let's do it in the most narrow sense. I would support that notion strongly, because the idea that the Commission has no options is just nonsense.

The Commission today under the law, when it puts out an offer, receives either none or some from the public at large. The Commission then, under the current law, is required to make a determination whether or not any of those offerors are qualified to carry on the responsibilities of performing a successful offer.

I have not yet seen the situation when the Commission used that authority to say: No offeror in this situation is qualified. I don't think

the Commission has done nearly a good enough job in monitoring the kind of questions they ought to be asked in advance.

That includes the NCL. I don't think we were asked tough enough questions when we got the Christmas tree light standard. I don't think there is anything in the process that we went through with the Commission that would guarantee the success of the Christmas tree light standard, even though it was successful.

I think the Commission ought to be obliged to be tougher on potential offerors, because there are ways to determine whether an offer is successful in advance.

Another argument that is not correct is that the offeror process per se is the thing that makes the process take so long. I have just sketched out what I think are approximately eight different time periods that are involved from the beginning of setting a standard until it becomes a final standard.

I would describe them as these:

First of all there is the examination of the statistics to determine if there is an unreasonable risk of injury; and then there is the up-front analysis to determine the state of the art, to determine whether or not the existing standards are any good.

Then there is the period when the Commission develops hopeful approaches.

Let me stop right there for a moment. Those first three things take almost a year. If the offeror process were abolished and the Commission were to write its own standard, the staff would have to go through exactly the same steps for those first three phases to write its own standard: It still would have to determine what the injury data showed; it still would have to analyze the existing standards to determine whether or not they could just be picked up or modified; and they still would have to develop what it was they were going to spend their time looking at during the development period.

Let me skip over the next step, and then go to the actual time it takes to develop a standard. That should be the same, if it is adequately done, no matter who is developing the standard.

Next comes the evaluation of the standard. That is a place in the past where lots and lots of time was spent; and that is the time where the criticism correctly has said the offeror has done such a lousy job, the Commission has wasted all that time and had to go back to square one. But that is because up until Christmas tree lights, the Commission took no effort upon itself to participate in that standard. Now they do.

So the evaluation process in Christmas tree lights went from November of 1978 to approximately April 1. That is not an unreasonable time. It isn't the 2 years that it has taken before.

Finally, after the evaluation—were we are now in Christmas tree lights—the public hearing, evaluation of the hearing record, then the final promulgation of the standard, which will move along at the same pace as if the standard had been developed by the staff.

So now we go back to what I skipped, which is that 60-day period—30 days for the offerors to put in their offers, and 30 days to evaluate the offer. Those 60 days, it is true, would not exist if there were no offeror process, because you wouldn't have to publish, wouldn't have to wait 30 days, and you wouldn't have to take 30 days to evaluate.

That is only 60 days that can be tied directly to the offeror process. If all we were talking about at this hearing were 60-day delays, we would be talking about something very different than I think what you are talking about: Why does it take 3 and 4 years to get a standard out.

Senator FORD. Average 834 days.

Mr. SWANKIN. And it is just not too correct to attribute that to the offeror process.

Finally let me say another thing that has been totally overlooked in the evaluation of why the offeror process is a superior process if it works directly.

In Christmas tree lights, with all the wonderful things done by the staff, where we have been lauded, too, for having managed it correctly, we have a major disagreement with the staff on what that standard ought to look like. The staff is supporting—we agree on many things—but we have a major disagreement that is not yet resolved on a major issue, as to what the final Christmas tree standard ought to look like.

The staff of the CPSC, from the beginning of the process and all during the development process, was calling for, and is still calling for, materials control of the lamp holder. We disagree.

I don't want to get into the exact specifics, but I want you to understand the debate. They believe the standard ought to contain materials control, certain materials ought to be allowed, and others not allowed, and they have developed a test they would like to see put in.

As the offeror, we rejected the notion, because we think there is a better way to control whether the Christmas tree light is safe. If you pass the end-product test, we don't care what materials you use in developing the standard.

Both of these things will be debated before the CPSC at the public hearing. Whichever way the CPSC goes, I can guarantee—sitting here—they will have a substantial record, because the staff will make its case, and the offeror would make its case.

I would like to state to you, Senator, if there wasn't the offeror process, what the Commission would have before it to vote on would be the staff proposal, subject to a public hearing to vote up or to vote down. They would have one option in front of them.

Standard setting is not usually so simple that there is only one way to go. If I were a commissioner, I would much rather have two options, two legitimate options, to be argued out, the cost consequences of each to be determined, the marketplace consequences of each to be determined. That has been totally overlooked in the debate over the offeror process.

I will finish now by stating—I guess the way I would conclude this would be this: Other than that 60 days that I talked about, the offeror process, if given some flexibility along the lines that I had suggested earlier, is either good or bad, depending upon the way it is administered by the Commission.

In the Christmas tree light standard, the Commission overruled itself on six areas where it had heretofore had different policies; and those six areas, plus the efforts made by the offeror, made it work this time.

It would work again in a complicated situation, and it would work again in as fast a time as the staff itself could develop the standard;

and the end result will be in all cases, if it is done right, options before the Commission.

Senator FORD. I might say, in your statement where the Commission would have two options, it would be hard for the four of them to be able to make a decision. I think we can go back to the swimming pool slide standard. The court indicated that it had very little in front of it. They have, of course, thrown that standard out. I think it supports the position you have taken this morning.

In your testimony you indicated that some criticism of the offeror process is no longer valid. Of course, you have cited your work in developing the miniature Christmas tree light standards.

Do I understand by your testimony that it is now ready to go before the Commission for the offerors' argument for their proposal and the staff's proposal? It is in that position now?

Mr. SWANKIN. It is about a month away. The staff took our standard and suggested to the Commission those changes that I mentioned, plus some others for publication in the Register. I think that is correct.

I think the staff should monitor, and the staff has the obligation to say to the committee: we don't like that, we don't like A, B, C, and D, what the offeror did; and the Federal Register publication for a public hearing ought to be the offeror's product as worked over by the staff.

But because the offeror had built the record the way we built the record, the public hearing ought to focus on those differences. That is what the public hearing ought to be all about.

In this case, what we are talking about is a Federal Register publication, probably at the beginning of May, and a public hearing in the beginning of June, that will clearly put on the record both sides of this dispute.

Senator FORD. Did the Commission have staff there to work with you on the input?

Mr. SWANKIN. There couldn't have been closer relations. There is no surprise at this point at what the staff is doing.

Senator FORD. The problem I have seen in the offeror process is that the staff would sit there monitoring, not saying anything, and not having any input. Therefore, once the offeror developed his proposal, he came to the Commission, and they had to look at it all over again.

Mr. SWANKIN. That is right. That is what they did for the first 5 years, and it never worked.

Senator FORD. That's right. I have been a critic of that position and now the Commission is getting in the position where it can be helpful.

Let's look at miniature Christmas tree lights for a minute. I'm trying to get a point. I believe we can be very helpful to each other's area. Christmas tree lights accounted for, I think, no deaths, and a small number of injuries compared to other products, say 700 or 800, as I recall.

Is it safe to assume that future offerors working with more hazardous products will have the same success using the procedure you used in arriving at a standard?

Do you think that you set the groundwork, even though the Christmas tree lighting, as far as deaths and injuries were concerned, doesn't compare with some of the other products we need to get at with standards?

Mr. SWANKIN. Absolutely, Senator. The procedures are identical. While you bring up that point as an oversight committee, is very important to the Commission. They don't have all the resources in the world and the products on which they decide to set standards ought to be those products that are the greatest hazards.

I think all of us that are concerned with that agency want to be sure that the agency does have a priority list that makes sense. But I think you would agree with me that the only measure of where standards are needed is certainly measured by other than body counts.

Christmas tree lights—as against some of the other products for which we have criticized the Commission for wasting its jurisdiction in setting standards—Christmas tree lights can be deceptive. Looking at the NEISS system as the place for the injury data doesn't work here, because what usually happens when a Christmas tree light goes bad, you get a fire. You get a fire in the livingroom at Christmastime.

The injury that occurs or the economic loss when the house burned down, won't be reported through the NEISS system. If it was a death, it wouldn't be reported because the deceased wouldn't be taken to the emergency room.

So we have a situation here, this isn't the hearing to get into how hazardous they are. But miniature Christmas tree lights have many features that are inherently dangerous without a standard.

If it ever gets to court, this case might be a case to show that the Commission doesn't have to wait for the body count in order to take action.

Senator FORD. Now, I want to talk a little about flexibility here.

What is NCL's opinion of the Commission's recent vote to cooperate with the chainsaw industry in the development of voluntary standards for this product?

Do you have a position on that?

Mr. SWANKIN. Senator, that was a tough case. Four years ago, I might have sided with Commissioner Pittle in saying when a product is so hazardous, the Commission ought to set mandatory standards.

But if we have learned one thing in the past 4 years, it's that the Commission can't do it all itself and the Commission's obligation is to encourage voluntary standards activities.

We will never solve the product safety problem unless we have a vigorous Commission and an industry that is doing its part voluntarily. And the Commission has a terrible record in having encouraged voluntary standards.

So given that record, it seems to me that the Commission was correct in the case of the chainsaw in allowing the voluntary standard test to go on.

They were obliged to monitor. It's a serious problem.

Senator FORD. I will monitor, too.

Mr. SWANKIN. That's better than every 6 months saying, how's it going? The staff should be reporting at least monthly, a positive report, stating that things are going OK.

If the Commission watches it and it's not going well, they can always move in. But I think the voluntary system needs encouragement and that's one of the major efforts that has to be done.

I know you fought for that, to interrelate voluntary standards and mandatory standards.

So we support it.

Senator FORD. I think we can go to low hazard level products and get voluntary standards that need very little effort by the Commission. We can begin to build a record.

I have an answer to those who say, well, the chainsaw manufacturers came in at the 11th hour. I think there is some significance that they came at the 11th hour, because there was some muscle and it could be flexed as related to that industry.

So I think the cooperation, and the saving of money are factors. The ability to get a voluntary standard showed cooperation between the industry and the Commission. Ultimately, it will be an expedited procedure through which we can protect the consumer.

Sandra, you made a statement related to the chronic hazard problem, I think.

Ms. WILLETT. We find the problem of chronic hazards to be a very substantial problem. It's certainly easier to say it's a problem, however, than it is to speed up the solution.

We focused our remarks on section 15 and the offeror proposition, because we find that the Commission must look toward both voluntary standards and mandatory standards.

The Commission has an inherent obligation to monitor and assure compliance with what it has promulgated.

So that's why I spent my time looking at section 15.

Senator FORD. Let me ask you this question. Considering the relatively small size of the CPSC, do you believe, speaking for your association, that there may be some merit to the suggestion that the Commission defer to some larger agency in the area of chronic hazards?

Ms. WILLETT. At this point, no. I think because of the legislation that the Commission must carry out, it does have responsibility for products that have possible carcinogenic and other related chronic hazard problems.

However, we must watch how far that responsibility extends because the Commission is small and has limited resources. It would be wasteful, of course, to duplicate any efforts their agencies are undertaking.

What we would perhaps like to see is a much better coordinated effort which can take place on an interagency basis, so that what happens in one agency is shared by others. The Food and Drug Administration can perhaps stimulate the Commission in its development of a carcinogenic policy.

Senator FORD. Your statement mentioned rumors about dismantling of the agency. I assure you, they are not just rumors, and I'm caught in the middle crossfire again. It seems like I always get in the hotseat. It wouldn't be fun in this place if you weren't in a warm seat, and this seems to be hotter than normal.

In your statement, you indicated your belief that the Commission should be reauthorized for an additional three years.

Ms. WILLETT. Yes, sir.

Senator FORD. Could you tell the committee why you believe a reauthorization for less than 3 years would be inappropriate?

Ms. WILLETT. Yes. First of all, I think David pointed out that standard setting takes a good long time, at least a year for the commission to get fired up.

There are no standards in the pipeline right now. Therefore, 3 years is a reasonable time, under your direction, for the CPSC to identify, with help from the public, what products need standards.

The standards process needs monitoring. That takes time.

But most importantly, we believe 3 years is a minimum for the new leadership of the Commission to get down to business and produce results.

Safety problems exist that haven't been addressed. When you reorganize an agency, you lose time, you lose direction, and most importantly, you lose the continuity that the commission is now in the position to build up for compliance. One year reauthorization is not enough. Two years are not either. We support 3 years, with careful and continuous oversight.

So we strongly support your legislation. I did read the Washington Post this morning. I think it's wrong to think of dismantling the agency, and we are glad to tell you and we would be glad to tell OMB as well.

Mr. SWANKIN. As you well know, the morale of that agency over the past 3 or 4 years has been awful. It's been a major problem. It's one not to look at lightly.

I venture to say if there were a 1-year extension, you would have nothing but a holding operation in that agency for another year and it wouldn't get better. It would even get worse than it's been, no matter how good the new leadership.

There's no way that agency, if the people that work there thought of spending this time thinking what was going to happen to them 11 months from now, that they would be able to carry out the task. It would just be devastating.

Senator FORD. I think the morale problem has been very severe. I doubt seriously if you could bring new people on to oversee dismantling of the agency—so therefore, your ability to improve the staff would be nil.

I'm not sure that the three recent appointees would have accepted if they felt they would be there just for a year to dismantle the agency and send it back to other agencies from whence it came.

Thank you both this morning. We appreciate your coming and appreciate your cooperation. We look forward to working with you in the next 3 years.

Ms. WILLETT. So do we. Thank you.

[The statement follows:]

STATEMENT OF SANDRA L. WILLETT, EXECUTIVE VICE PRESIDENT, NATIONAL CONSUMERS LEAGUE

Thank you Mr. Chairman for your invitation to participate in this oversight hearing on the Consumer Product Safety Commission. My name is Sandra Willett, and I am Executive Vice President of the National Consumers League. With me is David Swankin, who serves on a non-paid basis as NCL's Counsel and Chair of our Safety Standard Committee.

May I ask that our written statement be submitted in full for the record. I would like to summarize NCL's position on CPSC's priorities, Section 15 and cellulose standards; and then turn to Mr. Swankin for NCL's comments on the offeror process and overall mission of the Commission.

NCL is here today to support your bill S. 2796 and to applaud both the direction you have given the Commission during the past 15 months, and your determination to make the CPSC live up to its primary Congressional mandate: that of reducing product-related deaths and injuries in the marketplace.

The issue of product safety is certainly not new to NCL. Nor is the National Consumers League new to the Committee or to the CPSC with which it has worked extensively since CPSC first "opened its doors" in May 1973.

Founded in 1899 to defend and promote the safety, health and economic well-being of workers and consumers, the National Consumers League is the country's oldest consumer organization. Under the leadership of such giants as Louis Brandeis and Eleanor Roosevelt, NCL has fought against unsafe drug testing, unclean food processing and unscrupulous business practices. Under the current leadership of our Board which included international economist Robert R. Nathan, Esther Peterson, Presidential Assistant for Consumer Affairs, and Erma Angevine, founding Executive Director of the Consumer Federation of America, NCL believes the need for consumer and worker protection is more important today than ever before. Faced with increasingly complex technologies, citizens are subjected to safety hazards both at work and in the marketplace. Confronted with a burgeoning, unresponsive bureaucracy, consumers are at a loss as how to participate in their own government. The National Consumers League's current work therefore, focuses on (1) identifying and promoting the consumer interest on issues of public concern, (2) recommending legislation, policies and programs which promote the consumer interest and protect the citizen where the means of determining health, safety and economic well-being are beyond the powers of the individual, and (3) establishing mechanisms to assure consumer representation and participation in governmental actions affecting the consumer interest.

As you know, NCL was the first consumer group to be selected as an "offeror" under the CPSC "offeror" process as legislated under Section 7 of the Consumer Product Safety Act. The "offer" we submitted in 1974 as a "guinea pig" effort was on architectural glass; and although it was accepted by the Commission, NCL could not perform the work because we simply could not convince the CPSC of the need to adequately finance consumer participation in standard setting. Since that time NCL has participated with the American Society for Testing and Materials (ASTM) in developing the proposed safety standards for bookmatches, which is still before the Commission. In January 1977 NCL requested the Commission to establish mandatory standards for aerosol spray on the grounds that the aerosol industry had failed to set voluntary standards but in August that petition was denied. Instead, the Commission urged industry to set voluntary standards and absorb the cost of the work which has dragged over several years. Last February 1977 the National Consumers League met with all five Commissioners for a useful, informal discussion. We have also testified several times before the Commission and the Congress. On November 16 NCL submitted, under the offeror process, recommendations for a safety standards for Christmas light decorations. Thus, you can understand for special interest in assuring that the CPSC works, and works well for public safety.

GENERAL ASSESSMENT

The Congress is to be lauded for its sensitivity, foresight and wisdom in legislating the innovative features of the CPSC which pioneer areas of regulatory reform, agency independence, industry responsibility and citizen participation.

In spite of its limited appropriations and extensive regulatory domain (which includes more than 10,000 product categories maintained by 2.5 million firms—approximately 50% of all firms in the United States), the Commission in some areas deserves very high marks. CPSC initiated "openness" well before the Sunshine legislation took effect. The public has encouraged to attend meetings between Commission personnel and private parties. These meetings have been published in advance in a Public Calendar, or they are the regular "brown bag" weekly lunch time Q and A session. CPSC also deserves credit for its efforts to institutionalize public participation in its procedures. The Commission has voted to establish an Office of Public Participation to compensate participants who have "viewpoints and interests that will contribute in a positive way to the Commission rulemaking decisions" and who otherwise could not afford to participate. This is a commendable step although unfortunately stalemated at the moment. CPSC has also made some progress in administering Section 7 and enforcing Section 15.

However, when we examine the Commission's record of accomplishments since 1973, we have to agree that the saying "to little, too late" applies at the present time to the Consumer Product Safety Commission. The National Consumers

League finds that the CPSC is not yet meeting its Congressionally-mandated responsibility, that of vigorous protector of the public health and safety.

President Kennedy identified the right to safe products as one of the principle consumer rights when he delivered the first Consumer Bill of Rights over 15 years ago. The National Commission on Product Safety in its final report stated, "Safety standards, effectively enforced, are one of the important means for reducing unreasonable hazards in consumer products." Combining these two findings the Congress empowered the Consumer Product Safety Commission "to protect the public against unreasonable risks of injury associated with consumer products" and "to develop uniform safety standards for consumer products . . ." (Section 2 Public Law 92-573).

Congress intended government agencies to protect and advance the public interest. Particularly in those technically complex areas, such as safety where consumers are dependent on governmental and marketplace forces to develop, test and market products which at a minimum do not injure or kill people, the government agency has a serious societal role to play.

We believe that the Commission has a societal role to play. It should act as a catalyst for safety. It should constantly be concerned with raising the minimum standards for safety. It should, in fact, err on the side of safety until real and potential harm to consumers and to the public interest from hazardous products is substantially reduced. As a governmental body carrying out the mandate of Congress, the Commission should lead the fight for safety, not follow behind the public's uninformed behavior or industry's self-interested actions. The leadership role is both a preventive and curative role. We expect nothing less from CPSC.

In our view, the Commission rates a grade of C+. But it is moving toward a B-. In fact, your continuing concern for safety and recent developments at the CPSC lead us to believe it could rate a solid B by the time of your 1979 oversight hearings.

The National Consumers League, therefore, actively supports S. 2796, your bill which will reauthorize the Consumer Product Safety Commission for three more years. We would oppose any efforts to kill the agency, to dismember the agency, or to vitiate in any way its crucial mandate. We suggest that Members of Congress and the Administration, who might look longingly at the modest CPSC budget to redirect it toward some regulatory reform projects, reread the recent and lengthy CPSC options paper carefully. Instead of recommending abolition as some people think it does, the paper poses many controversial questions which demand answers before any precipitous action is taken.

NCL believes therefore, that you have shown the proper sense of urgency—that the Commission settle down immediately to conduct its business—as well as the proper understanding of real public safety problems which must not get buried by bureaucratic turf battles. We agree with Senator Ford, that the Commission should have a three-year lease on life.

MANAGEMENT ISSUES

NCL would like to offer three brief points regarding CPSC management.

1. We are very pleased that the Senate has reconfirmed or confirmed three highly qualified persons as Commissioners. NCL is assured these three will do their very best to promote safety in the public interest.

Now that the Commission is operating with a "full deck", we expect to see the team of five Commissioners act like a team. That is not to say that we expect consensus; but we hope the Commissioners as a Commission will devote their energies to researching, debating and deciding safety policies and issues.

We would like to thank Chairman Byington for his consistent and sincere support for the offeror process and institutionalized public participation, and we wish him well.

We anticipate an expeditious appointment this summer of an experienced, safety-minded leader to chair the CPSC.

2. The Commission has moved during the past year to establish priorities. Having established selective criteria and a ranking system of "high priority" or "medium", the CPSC identified over 40 products to be considered for Commission action. We would urge the Commissioner to go several steps further and follow the lead recently set by the Food and Drug Administration.

FDA asks the public to rank a wide range of priorities identified by the agency, and to suggest others. FDA uses two basic criteria: (1) remaining risks, and (2)

public concern. Following the public response, FDA meets with public interest groups and conducts open discussions which Commissioner Kennedy frequently attends. In this manner, FDA makes efficient use of its scientific data and staff recommendations, as well as recommendations from consumers and affected groups. NCL believes the CPSC, industry and the public would benefit if the Commission institutionalized consumer opinion regarding Commission priorities and in the selection of candidates for mandatory standards.

3. I mentioned earlier that the Commission had voted to establish an Office of Public Participation. From our experience as intervenor in FTC hearings and as organizer of consumer meetings with the Department of Commerce, NCL knows that public participation is needed, feasible to obtain, and cost effective in government decision-making.

The CPSC's request to establish such an office was rejected by the Civil Service Commission. We are quite frankly appalled by this action. Here is an agency which desires to pay those who are affected by its decisions and cannot otherwise participate and the CSC turns the request down. We plan to support the Commission's appeal to the CSC. Perhaps Senator Ford would also be interested in approaching the CSC.

SUBSTANTIAL PRODUCT HAZARDS (SECTION 15)

The CPSC needs an enhanced self-image. Depoliticized, no-nonsense management will help, but the CPSC needs to build a solid track record of positive, public-interest action. Its authorizing legislation is aggressive and socially sensitive, but the Commission itself appears not to accept its role as vigorous protector of the public health and safety. The role Congress gave to the CPSC to carry out—that of the catalyst for and defender of public health and safety—will be fulfilled when the Commission itself leads the way to safety.

Although we could spend time usefully discussing other problem areas, Section 7 which Mr. Swanker will address and Section 15 deserve appraisal because they really are the cornerstones of the agency as Congress legislated it.

Regarding Section 15, NCL believes that compliance and enforcement will remain the factor determining the success and effectiveness of the CPSC. We stated this opinion at our February 1977 meeting with all five Commissioners.

When we testified we said that our criticisms are directed not at the mandate from Congress but at how Section 15 has been administered.

Congress has provided the CPSC with a variety of remedies to protect the public against substantial product hazards. But the most important provision is the one that directs manufacturers, distributors and retailers to report to the Commission, immediately and with supporting data, that a product contains a defect which could create a substantial product hazard.

This provision was meant to be self-enforcing. Industry must be made to recognize the seriousness of failing to report. The entire scheme of enforcement is based upon timely reporting. The most egregious error a company can commit under Section 15 is not to report—failure to report, on a repeated basis, can never be forgiven.

The most egregious error the Commission can make is not to monitor these provisions.

What does the record show for notification and compliance under Section 15? It indicates that of the 10,000 consumer products categories sold in the marketplace today, notification for only 350 single products—a drop in the bucket—was submitted to CPSC during the entire first 2½ years of CPSC operation. Between May 1973 and June 1977, according to the February 1978 General Accounting Report, 495 substantial product hazards were reported to, or identified by, the Commission. This figure represents approximately 36.4 million products containing defects. The travesty is that through June 1977, only 18 percent of these defects (6.6 million defective products) had been corrected.

This less-than-honorable record is an affront to the Commission's authorizing legislation and poses a safety hazard to consumers who expect a considerably higher return on their tax dollars.

Fortunately within the past six months, the Commission has made substantial studies to correct problems with reporting and compliance under Section 15, substantial product hazards. Regulations published in the September 16, 1977, Federal Register go a long way toward meeting the consumer's need for an effective self-enforcing reporting system. NCL commends the Commission for its:

1. definition of "defect" and the production and marketing aspects which could result in faulty quality control or other manufacturing error;

2. increased efforts to inform manufacturers, distributors and retailers about their reporting responsibilities;
3. identification of specific time constraints for reporting and investigating;
4. clarification that a firm is responsible once its employees have knowledge about a hazardous product; and
5. requirements for reporting any product involved with a death or "grievous bodily injury."

NCL is also very interested in the remedies which CPSC proposed under its corrective action process. What is acceptable as voluntary corrective actions? What action should be binding? When are criminal, as opposed to civil, penalties in order?

As we stated earlier, NCL considers Section 15 to be an instrumental part of the Commission's foundation. In fact, we believe Section 15 is so important that we petitioned the CPSC to hold hearings rather than simply request written comments. We were informed unofficially that, as a result, the Commission will hold public hearings on April 26. These hearings will provide the interested parties the opportunity to convey in person their feelings, as well as the facts from their perspective. It will also encourage public debate, with opposing viewpoints well represented, a process which we believe will be of greatest assistance as the Commission makes its decision. NCL plans to participate.

If the committee is interested NCL would be very glad to submit the detailed comments on Section 15 which we will present to the Commission. We intend not only to comment on the proposed regulations, but to urge the Commission to tighten the regulations.

More, not less, work needs to be done by the Commission. What, for example, is "unnecessary risk?" How does CPSC plan to improve its system for monitoring compliance? for correcting defects? When does the Commission plan to issue more recalls? to penalize repeat offenders? Of the nine Section 15 actions which CPSC brought (as of September 1977), five involved acceptance of corrective action. Others involved deferrals or referrals. What is CPSC's evidence for accepting the corrective action plans developed by industry? Why has the Commission not cited more companies for failure to report a potential hazard? How does such a situation correlate with injury data with Section 15 cases?

Although NCL believes the proposed regulations are on the right track, we feel they must be tightened and the questions answered.

HOME INSULATION (CELLULOSE) STANDARDS

Knowing of your interest in safer home insulation materials, NCL would like to commend you for pushing the CPSC to act in the face of consumer confusion and potential risk. Although we do not want to go into the details at this point, we believe that a minimum for the time being is far better than no standard at all.

NCL therefore supports making the currently acceptable "C" standard mandatory with the explicit proviso that the standard be constantly upgraded.

Without the technical testing capabilities, we are not prepared at this time to judge the new GSA "D" standard. It seems promising, but rather than wait until it, or some other standard, is perfected we think the "C" standard should be adopted as the minimum.

Since industry has tested the "C" standard we think a 30-60 day period between passage and enactment is preferable to 120 days.

Let me conclude my portion of the presentations, Senator by saying that if you would like to discuss other aspects of the Commission's work, such as the Consumer Education and Information activities, I would be delighted to respond after NCL's Counsel presents our statements on Section 7 and on the overall mission or abolition of the CPSC.

SECTION 7 (OFFEROR PROCESS)

With the possible exception of TRIS, no activity of the Commission has been more subject to criticism than the manner in which it has administered the Section 7 "offeror" process.

NCL has, as you know, been one of the harshest critics of the CPSC on this issue. At the time, we think that much of the criticism one hears is no longer valid now. The Commission has recently made some major policy changes that have reversed what were heretofore unworkable policies. Let us expand on this a little.

In September of 1977, NCL, in testimony before the House Subcommittee on Consumer Protection, listed six reasons that the offeror process had not been working well. These were:

1. No Up-front analysis

Given the fact that offerors are expected to produce mandatory safety standards in a very short period of time, and given the fact that many participants in the development process are not experts in standards-setting, it is essential that much up-front work be done by the CPSC staff by way of analyzing the hazards, analyzing the deficiencies in existing private standards, and informing the public about these hazards and deficiencies. In the past this up front analysis was not done before the publication of a request for offerors. Thus offerors were forced to spend too much of their time in discovering for themselves what was wrong with existing standards, rather than focusing their attention on developing adequate ones. It is not the same thing to criticize an existing standard's inadequacies as it is to develop a better way to deal with a hazard.

2. Failure to Insist on Adequate Consumer Representation

We want to underscore the word adequate. In the past, the CPSC seemed more concerned that there were a sufficient number of persons involved in the offer who could be designated as consumers, than with whether or not there was indeed a genuine capacity to represent the consumer interest.

The NCL has been pleading with the CPSC—and with other regulatory agencies as well—to move away from quantitative measures of consumer representation, and concern itself instead with the quality of such representation. As we have stated many times, there has been an unfortunate tendency on the part of some observers of the standards-setting process to confuse representation of the consumer interest with participation by individual consumers. In our opinion, it is a mistake to think of consumer input as one or the other.

No responsible consumer advocate that I know of pretends to speak for 215 million citizens. What the responsible consumer advocate can do, however, is gather and analyze a body of data, and construct from that a position that represents the economic and/or social interest of the consuming public.

Moreover, the consumer interest cannot be properly represented only by non-technical persons. Either technical back-up is available, or consumer representatives can only play a limited role.

For example, in developing the bookmatch standard, the issue arose concerning the technological feasibility of treating certain paperboard with flame-retardant chemicals. Certain interests claimed, among other things, that certain chemicals would create a serious toxicity problem. I submit that without technical backup, the consumer interest could only stand by and listen to the allegations, instead of being able to independently confirm or challenge them.

To limit technical backup is to limit consumer input to a mere expression of value judgments. While these are essential, they are not enough.

3. Lack of financial support for adequate consumer representation

At long last the Commission has reversed itself on this issue, and nothing further need be said about it at this time.

4. Failure to insist on an offeror using a procedure that assures consideration of all points of view

It is insufficient for consumers to be brought into the standards-development process only in the beginning (to assert what they would like to see in the standard) and at the end (to review it). They must have input throughout. Yet recently much has been made of the so-called consumer sounding boards. These are intended to be groups of citizens who are supposedly represented on a "jury" to tell the technicians what they like, don't like, how they use products, their views on cost increases, etc. Over and above the question of whether or not these groups, as they exist today, are balanced at all (which they are not), they perform only a limited function. For an offeror to tell the Commission that their consumer input will consist primarily or exclusively of a sounding board approach should never be satisfactory. But in the past this could and did happen.

Secondly, in the past, even when consumer representatives provided valid technical data, the rules of procedure under which some offerors operated never required that these issues be dealt with. It is not sufficient to dismiss a question or a proposition with a simple "non-meritorious" label, as has happened.

The best way to assure this doesn't happen is to insist that the offeror specifically include in the rationale that accompanies the standard all substantive

consumer positions, and reasons why all rejected positions were in fact rejected. In the past this has not happened.

5. Improper second-guessing of the CPSC determination that a safety standard is needed

In the past, most if not all offeror processes have been transformed from technical committees to quasi-judicial bodies. Interests that do not want a standard, or a tough standard, have used the process to argue the legal question, is the standard necessary?

The offeror process is not the place to address that question. Yet the CPSC has not in the past put a stop to such digressions.

6. Inadequate relations between staff and offeror

It is clear that Congress, in adopting Section 7, specifically rejected the notion of the staff of CPSC developing safety standards in the first instance.

On the other hand, we can find nothing in the legislative history of the act that directed CPSC to treat offerors as adversaries. Yet the role of CPSC staff, to date, has been what I would characterize as either laissez-faire or adversary—but certainly not cooperative.

Once an offeror is selected, we would produce better standards if there were full, frank and frequent exchanges between offeror and staff. Staff should suggest, question, raise issues, and offer criticism. This will lead to better standards, with better justifications, fewer policy disagreements, and more rapid promulgation. In the past, this cooperative approach has never worked out. Thus, we have had some processes where the staff said nothing until it got the standard—then it proceeded to pick it apart, without there ever being an opportunity for the offeror to interact with the staff.

As you know, the NCL has recently completed work as the designated offeror in the development of a miniature Christmas tree light standard. The process worked beautifully. Much of the reason why it worked beautifully is that the Commission, in the case of Christmas tree lights, reversed itself concerning the six above listed policy issues. If these new procedures are eventually codified and become policy for all section 7 offers, then we believe the offeror process will work the way Congress designed it to work.

Just last week, the Commission indicated that it will soon publish in the Federal Register our recommended CTL standard, with some changes as recommended by its staff. At the public hearing that will take place about two months from now, there will be every opportunity to focus on the differences between what NCL, the offeror, recommended and what the CPSC staff has recommended.

In our opinion, at the end of the public hearing, the CPSC will be in the position it should be in; namely, it will have before it a complete record, adequately documented, allowing the five Commissioner's to make an informed choice between alternative standards as to what the final standard should be.

Thus the offeror process must be looked at in terms of these new policy directions implemented by the Commission in its most recent effort. Criticism that is based on past policies may no longer be valid.

In a recent statement to a House Committee in support of the offeror process, Chairman Byington, commenting on the relationship between the offeror and the CPSC staff, said:

"Only under the offeror process are government staffers required or even able to defend these regulatory stances to peers in industry and the public, on a day-by-day basis over a standard's development period. Only in these circumstances are they required to state their positions and to defend their strengths and weaknesses in the open, as other interest groups must do in order to affect a regulatory proceeding. It recognized that federal personnel often develop their own set of biases about what a standard should say. In this instance, CPSC's staff—rather than deciding the standard's contents within the privacy of their offices, with self-bestowed responsibility for conflict resolution—argued the merits of their position with all other participants. NCL's review panel was the third party decision-maker—the caretaker of the final standard—committed to presenting a record of all parties' stances."

NCL has been among Chairman Byington's harshest critics. But on this issue, we agree completely with his position. As we have stated on numerous occasions, it is the essence of why the offeror process, administered properly, is a superior way to develop a standard.

We note with some dismay that Commissioner Pittle (who is the Commission's leading critic of the offeror process) has used the term "spoon-feeding" of the offeror by the Commission in characterizing the reasons the miniature Christmas tree light standard was a success.

Nothing could be further from the truth in that case.

The facts are that the CPSC staff, from the beginning, disagreed with the offeror on a major aspect of the standard. Because of this disagreement, both we (the offeror) and they (the staff) were challenged to validate our positions. This is the stuff that good standards are made of!

We may not have time today to go into all the substantive merits of the issue, but let us just say that without the offeror process, the CPSC would be in the position of approving or disapproving its staff's proposed standard. Instead, the five Commissioner's will be in the position of being able to choose between at least two different approaches. That is the very reason the offeror process, properly administered, remains a viable one.

Now we are not against giving the CPSC some flexibility to bypass the offeror process in some situations. NCL is an appalled as you are at the Commission's track record on standard-setting, and we want good standards developed expeditiously. However, we find that the Eckhardt bill goes too far in allowing the Commission to bypass the offeror process. We urge your committee to tighten up considerably the findings that must be made by the Commission before the offeror process can be bypassed. We would be glad to work with your committee in developing better language, if you so desire.

Finally, we believe that the 150 days development period is oftentimes unrealistic. While we do believe that "traditional" methods of setting standards often take far too much time, we do recognize that there are situations where a better standard can be produced if, for example, adequate time for verifying new tests procedures is allowed. We believe that an amendment to the Consumer Product Safety Act might be in order whereby offerors were allowed more leeway in suggesting that more than 150 days was necessary, provided, of course, they justified the additional time.

SHOULD THE CPSC BE ABOLISHED OR TRANSFERRED

The CPSC has not done as good a job as many of us hoped it would. Much of the criticism that has been aired here and elsewhere is valid.

What is totally invalid, however, is the currently fashionable proposal offered by some: get rid of the agency, or transfer it elsewhere.

Nothing could be more foolish. In so far as the idea of abolishing the agency, that would only make sense if the underlying problem, namely, unnecessary deaths and injuries, were no longer the facts of life. But unnecessary deaths and injuries caused by consumer products have not been eliminated. We don't need to abolish the agency—we need to make it work, as you have so aptly stated.

As far as transferring the agency to EPA, FDA, or anyplace else, we are skeptical that such a transfer would improve the situation, and in fact think it would probably make it worse. This Committee need not be reminded that less than a decade ago the responsibility to regulate product safety was in the FDA. The Congress established the National Commission on Product Safety to look at the problem. It is timely to recall what that Commission said:

"Statutory regulatory programs buried in agencies with broad and diverse missions have, with few exceptions, rarely fulfilled their mission. The specific experience of safety programs relating to hazardous substances, pesticides, and flammable fabrics is discussed in some detail.

"The reasons for their weaknesses include lack of adequate funding and staffing because of competition with other deserving programs within an agency; lack of vigor in enforcing the law caused by the absence of authority and independence in some Federal administrators; and a low priority, assigned to program of low visibility."

That statement was correct in 1970 when it was made. It is just as correct today. It seems to us to be utter nonsense to play with this agency as if it were a yo-yo. Moving it out of another agency, and then back into it, simply for movement's sake, cannot possibly lead to a safe marketplace.

Policies and programs need to be changed, not mailing addresses.

We welcome this oversight hearing, as we welcome all efforts to make the CPSC a better agency. We are among the agency's harshest critics, but we will stand first in line to protect its independence and its very existence. It is a cop-

out to suggest that the agency need only be moved elsewhere to straighten it out.

In the last 10 years, OSHA, FDA, and FTC have all been subject to severe criticism of the kind now being directed to CPSC. In each case, the cry was heard, abolish or transfer the agency.

New Commissioners and new policies allowed each of these agencies to turn themselves around, and the same can be true of CPSC. Let's develop real solutions, and reject simplistic remedies such as extinction or transfer.

In conclusion, we want to point back to CPSC's successful undertakings. We trust that CPSC knows how appreciative NCL is of the complex problems facing the Commission which, we maintain, can be efficiently addressed with guidance from Congress' mandate and participation by consumers.

We believe, however, that the Commission can and should assume the role of leader, and of catalyst for public safety. We believe that consumers would be more willing to pay in safety dollars than in injury dollars. National Consumers League, therefore, hopes for a more aggressive Commission in the near future, one that combines preventative with vigorous curative action on behalf of the public interest, now and in the decades ahead.

Senator Ford. Next is the representative from Sears, Roebuck & Co., Phil Knox, from Washington, D.C.

**STATEMENT OF PHILIP M. KNOX, JR., SEARS, ROEBUCK AND CO.;
ACCOMPANIED BY JOANNE E. MATTIACE; AND THOMAS A. CAMP**

Mr. KNOX. My associate on my right is Joanne E. Mattiace, a lawyer in our Washington office, who spends the great bulk of her time on product-safety-related matters. On my left is Thomas A. Camp, director of the hard line product engineering section within the Sears Merchandise Development & Testing Laboratories in Chicago.

With your permission, Senator, I would like to offer the full text of both my comments and Tom's for the record, and then we would like to highlight them very briefly.

Senator Ford. Both statements will be included in the record, and you may highlight them. I appreciate that.

Mr. KNOX. I simply have three points that I would like to make, Senator. First, we support a 3-year extension of the authorization for the Commission. I share views that have been stated already here today, that if you in the Congress are going to hold the Commission responsible for its work, and we in the private sector who would like to know what the Commission's rules and policies are so we can try to follow the law, we need continuity, the ability to look further down the road than 1 year. We feel strongly that authorization of less than 3 years would be a disservice to the Commission, a disservice to the consumers who have a right to look to it for protection, and a disservice to those of us in the business community who would want to work with the Commission to achieve its purposes.

You mentioned earlier that rumors about dismantling the Commission were something more than rumors. I read in a newspaper column a week or so ago that one source of that suggestion was the business community, and I would simply like to say for this part of the business community, that is totally incorrect. I do not know anybody else in the business community who associates themselves with that point of view.

The second point, Senator—

Senator Ford. I might just say, there are a few people down at OMB who think they are doing the business community a favor. We will let them have a copy of the record.

Mr. KNOX. Thank you. We have told them what we think. Senator FORD. Knowing you like I do, I am sure that they understood it.

Mr. KNOX. Well, I wish I thought so.

Second, Senator, I would like to mention something we have discussed before: The problem of the transferred acts. Those are acts that were adopted by the Congress to deal with certain specific areas, prior to the creation of the Commission, and which the Commission now administers. It was our view when the act was originally adopted, and the view of the Senate at that time, although that view did not prevail in conference, that it would be better to consolidate the administration of all kinds of products under a single law so that those of us who want to comply with the law and understand the procedures so as to work with the Commission would not have to guess at what law to follow.

I think if you are asked, without any background, to determine what kind of a product a bicycle was, it would seem to be a "consumer product," rather than a "hazardous substance." Yet the latter is what it has been treated as!

We have suggested that it is time to take a look at the entire package of laws and put them together with a single orderly procedure.

I do not want to belabor the Tris problem any more than necessary. I know another witness intends to go into it in detail, but worth noting is the particular problem of those of us in the retail business: The Consumer Product Safety Commission, created by the Consumer Product Safety Act, was administering a standard adopted by the Department of Commerce under the Flammable Fabrics Act, and then made a decision that some characteristics of those products offended the Hazardous Substance Act, but in the *Spring Mills* case the court struck down the Commission because it had not followed procedures set out in the Drug and Cosmetics Act.

If those responsible for administering the law on a day-to-day basis, have a problem following its procedures, it is fair to say that those of us who want to live within the law and want to comply with it have the same difficulty.

We would encourage your committee and its staff to give every consideration to pulling this together so we will have one set of ground rules without regard to the type of product.

My third comment, Senator, relates to the offeror process, and I can be even briefer than I intended, because Mr. Swankin made such a very clear and persuasive case for maintaining the offeror process.

We thought, when the act was adopted, that section 7 was an innovative, creative provision to bring the expertise of the private sector, those who knew something about a subject, into the process of developing Government standards. You mentioned the value of that sort of thing in your conversation with Brig Owens earlier today. We think it is valuable on other contexts, too.

Criticism of delay in the offeror process should be directed at the administration of it, and not at the statute itself. An essential element in the development of a standard is what might be called the "front-end work."

Before any standard can be put out for an offeror, before the standard-developing process begins, whether within the Government or

within a private institution, preliminary research must be done to determine exactly the number and the kinds of injuries sought to be prevented, and then a determination of the product characteristics that have a causal relationship to those injuries. Unless that work is done carefully and completely, the standard-making process simply cannot go forward. That has been one of the reasons for difficulties and delays in standard-making procedures.

The 150-day period, I quite agree, is too short. The Commission ought to have the authority and the responsibility to determine what time period is necessary for each individual proposed standard.

Whether it was 90 days, as the act originally provided, or 150 days, in either case, an offeror had to set up a program to get the job done within the statutory period, even though he knew that it could not work. Then he had to begin the early stages of the process by going too rapidly, in order to show that it was not possible to get the job done earlier.

It is necessary to allow an adequate time period, and an offeror should testify why he needs a particular extension of time. The Commission should satisfy itself that it is reasonable and not be limited by an artificial restraint imbedded in the statute.

Senator, with those comments I would like to conclude and ask you to hear a few words from Mr. Camp about a problem that is very important to us, with respect to a pending proposal at the Commission for some regulations in connection with section 15 (b).

Mr. CAMP. Last September the Commission proposed new regulations under section 15 of the Consumer Product Safety Act. Our written statement covers the problems we believe will occur if the regulations are finalized.

I want to cover three or four of our major concerns. We believe parts of the proposed regulations are ambiguous or unreasonable and serve to undermine the integrity of section 15, which is a very powerful tool for the Commission. Also, in our opinion the Commission has no authority to issue substantive rules under section 15 of the Consumer Product Safety Act, especially when the violation of such rules would be considered a prohibited act.

In contrast, the present regulation provides the Commission may under the authority of sections 20 and 21 seek penalties for violations of section 15, but not the regulations under section 15.

Moreover, the proposed definition of the term "defect" is vague and imprecise. It does little to aid a manufacturer, or distributor, or retailer in making a determination of whether or not his product contains a defect. What it does is to open the door to many value judgments on which agreement would be difficult to achieve.

Further, it could have an adverse effect on product innovation, since manufacturers would be uncertain of how the Commission would apply its balancing test; that is, whether the risks outweigh the benefits.

The proposed regulation would allow up to 5 days for the report of an alleged product defect to reach the person in the company responsible for receiving such reports, then up to 10 days for an analysis of the hazard and risk, and add an additional 1 day to report, when appropriate.

Based on our experience in handling many such reports in the past several years, Sears believes these time periods to be unreasonably short. With regard to the 10-day limitation on the investigatory process, our experience indicates that only the most clear-cut cases can be handled in that time. In many cases our investigation will include an examination of the item that triggered the complaint. Just obtaining that item from the customer or from the store to which it was returned may consume most or all of the 10-day period. We frequently conduct tests on a returned item or identical items taken from our stock. In addition, we need and obtain information from the manufacturer regarding, for example, the number of suspected products produced, predicted production dates, whether or not substitute components were used or whether other changes were made.

In some investigations we ask our quality control staff to inspect stock in our warehouses to establish the percentage of suspected products. We frequently check with our service department to learn of their experience with a product.

In a few cases we have sought medical advice regarding possible health or safety hazards. We believe that the 10-day period will not permit enough time for adequate investigation and result in many unwarranted reports to the Commission, thereby hindering its ability to handle those cases truly deserving attention.

We do not believe it is possible for the Commission to process and evaluate the flood of reports which certainly will be made if the 10-day limitation becomes effective.

The Commission has also proposed a 5-day time period for the routing of product safety information within the company. We believe that this time period is similarly unreasonable. While we agree that the handling of such information should be done as expeditiously as possible, it is unrealistic to assume that such information will be routinely received and subsequently handled by responsible managerial persons within 5 days.

In short, the Commission's proposed 5-day initial time period would not only be burdensome, but would clearly be beyond the utmost ability of almost any company to comply. The most rigorously enforced internal company policy cannot assure full compliance with such an arbitrary time period.

The Commission has additionally proposed stringent reporting requirements when information has been received alleging that a product has been involved in either a death or grievous bodily injury. The proposed exemptive effect of the receipt of such information is wholly unwarranted.

Over and above the absence of showing of reasonable basis for such a presumption, there is a serious question concerning the Commission's statutory authority to mandate such a presumption.

Section 15 is explicit as to the factors to be considered when evaluating a possible product defect. Namely, the pattern of defects, number of defective products produced commercially, the severity of the risk or otherwise are to be considered. Therefore, to mandate a presumptive effect of information involving a death or grievous bodily injury is clearly beyond the scope of the statute itself. Again, the Commission has endeavored to rewrite section 15.

In summary, section 15 is an important tool for the Commission. However, by endeavoring to rewrite the section the Commission inevitably risks a chance of substantially undermining its effectiveness. A flood of premature, inconclusive reports would serve no purpose and would detract from those reports that truly do involve possible safety hazards.

Because Sears believed in the concept of the Consumer Product Safety Commission, we supported the creation of the Commission. We still believe in the concept. We want to support a Commission which functions both effectively and sensibly.

Thank you, Senator.

Senator FORD. Thank you, Mr. Camp.

Mr. KNOX. That concludes our comments, Senator, unless you have any questions.

Senator FORD. Mr. Camp, in your testimony you touched upon the fact that I wrote Chairman Byington in December of last year inquiring about the Commission's section 15 proposal. I do not believe that the Chairman's response adequately addressed the issues raised in my letter, nor did he address the issues that you have raised before the committee today. I understand that the Commission will hold a public hearing on section 15 in the near future. Even though I currently have my hands full, I assure you I intend to carefully monitor the Commission's activity in this area with an eye toward future oversight hearings.

Mr. Knox, in your statement, as it relates to the consolidation of the statutes, I have raised this issue with them before. I intend to take a good hard look at that but my problem now is to see that the agency is reauthorized and is heading in the right direction. Then we can get on with the other things that we see need to be changed as a result of the past and what we hope for the future.

Mr. KNOX. Senator, I am conscious of the fact that the consolidation of those transfer acts would be a complex job and requires some policy decisions. I appreciate that you may have to put this matter on the "back burner." My concern is that nobody turns out the burner completely.

Senator FORD. We will see if we can't find a match, too, and keep it burning.

In your opinion, Is the Commission improving its ability to collect relevant injury data?

Mr. KNOX. No. We testified before at your last oversight hearing that, in our judgment, the data collection system is not worth the time and resources the Commission has put into it. Its reliability is not sufficient for it to be a proper guide.

Mr. Swankin gave a good illustration of a problem with it. There are types of injuries that could be directly caused by a particular product but never reported at all.

An additional problem is that hospital personnel have many other duties besides completing those reports. There is no reason to think that they will be done in a manner that gives solid data.

Senator, I am sure that in campaigns for office you have taken advantage of polling and opinion research techniques, in which good data can be taken. There are valid techniques there that would be well adapted to getting reliable injury data from a validated cross-section

of the public. Techniques could be developed that would give the Commission much better information and much more information than it now has and probably at a good deal less cost.

Senator FORD. Do you have any comments on the efforts to redesign the NEISS procedure?

Mr. KNOX. I am not familiar with any proposals to redesign it. It has been discussed among people in our company who monitor injuries and their constant recommendation is, don't redesign it, throw it away and start from scratch.

Senator FORD. The only thing I can say at the moment is that the chairman has assured me it is in the process of being redesigned, and we will talk to him about it tomorrow.

I will have him here.

Mr. KNOX. I will be interested. If proposals have been made public, they haven't come to my attention.

Senator FORD. Usually the vice president in charge of Government relations and his staff usually find out about it before the Senators do. I am surprised you don't know about it.

Mr. KNOX. My staff does. Miss Mattiace tells me they are relatively minor variations.

Senator FORD. OK. In your statement you indicate the Commission should not be given broad authority to develop standards, "in-house," and I agree with that.

But I also believe that there may be some instances when greater flexibility is needed. Do you believe there are any circumstances under which the Commission should be allowed to proceed with a standard without using the offeror process?

Mr. KNOX. Yes, I suppose so, but I haven't thought about it enough to be able to list them. I wouldn't exclude it.

My real concern is that there would be a shift to total in-house development of standards, abandoning the opportunity to bring into the process the private sector and representatives of consumers and testing laboratories.

Senator FORD. There will not be a substantial shift away from the offeror process. I assure you of that. But I believe there is some flexibility in a narrow way, that ought to be given to the Commission to give it some ability to make some decisions.

For instance, in cellulose—

Mr. KNOX. I don't quarrel with that as a matter of principle. My concern is one of emphasis and taking advantage of the best information and the best facilities available to get the job done right.

Senator FORD. The difficulty that I encountered and the difficulties encountered by the cellulose industry, I think, indicate to me that some flexibility is needed. For instance, this is something that has been before the Commission for better than 2 years. We held a hearing here and watched flammable products being burned right in this room, and we listened to those endeavoring to insulate and improve the homes of the elderly and poor, particularly from Pennsylvania, and the problems they were facing.

Some 600 new industries sprung up around the country in this one area alone in the last 2 years, and it seems to me that something has to be done. But we had to go to the legislative process. We were a little faster on this side and we have run into a little slowdown in the House.

That particular problem indicated to me that in some areas, in certain instances, a degree of flexibility was desirable, without throwing the baby out with the bath water.

Mr. KNOX. I don't quarrel with that statement at all. I am only concerned about it in the context of possible predisposition within the Commission and within the staff, to avoid using the public process and obtaining public input if they possibly could.

Senator FORD. If I understand your testimony, basically, you want guidelines, and for them to be permanent. Something that you know that you will be working under today, and it won't be changed on you tomorrow. Industry will have some direction to follow, so that you feel comfortable when you are working in a certain direction, that it will not be changed on you, and all your work will be for naught.

Mr. KNOX. It takes a long time to change a product from the development stage to the time it is on the shelves.

We need continuity, we need to know the sense of direction, so that we can plan.

We would hope that we can plan within a framework that still lets us be innovative, creative, and competitive.

Senator FORD. There are many areas of industry that we move into and don't really understand. It sounds simple to make a move, but if the dominos start falling, it gets into a lot of areas. For instance, on the appliance standards. You have to get out a catalog. No one ever thought about trying to help industry, I think at the beginning, in trying to develop a standard for appliances. There has to be some lead time for you to advertise to your customers that would not disrupt your business, so we have to be very careful.

Mr. KNOX. A catalog that has 6 to 8 months of life begins a printing process 6 or more months before it is published, which means final decisions on what is to be printed have to be made well ahead of that.

Senator FORD. We have to be very careful, because sometimes it can be very costly to industry.

Mr. KNOX. If the Congress thinks of those problems ahead of time, then we don't have to come in here and ask for exemptions.

Senator FORD. I have one final question I want to ask you. Do you think the Commission's existence has had a positive effect on voluntary standards?

Mr. KNOX. Yes, Senator. I think it has had a positive effect on the entire safety process. The very existence of the Commission has increased the awareness of those of us who make and sell things. We, in retailing, who buy products and have a necessity for developing our own standards as well as for following Government standards, have become more conscious of the entire safety problem.

Senator FORD. I don't have any other questions.

Thank all three of you for being here this morning and for your testimony.

[The statements follow:]

STATEMENT OF PHILIP M. KNOX, JR., VICE PRESIDENT, GOVERNMENTAL AFFAIRS, SEARS, ROEBUCK AND CO.

My name is Philip M. Knox, Jr., Vice-President of Governmental Affairs, Sears, Roebuck and Co., and I am here today on behalf of Sears. Accompanying me is Joanne E. Mattiace, an attorney in Sears Washington Governmental Affairs office, whose prime responsibility is in the area of product safety.

These comments represent the views of Sears, Roebuck and Co. on improvements needed in the Consumer Product Safety Act as well as the Federal Hazardous Substances Act, the Flammable Fabrics Act, the Poison Prevention Packaging Act, and the Refrigerator Safety Act (commonly referred to as the "transfer acts") and the administration of these acts by the Commission.

Prior to making such comments, I would like to repeat the main thrust of past Sears testimony concerning the Consumer Product Safety Commission before this Subcommittee and elsewhere. It has been, and continues to be, the position of Sears that the basic concept of the Commission—to aid in the national effort to provide maximum safety of consumer products—is sound. Sears accordingly supported the enactment of the Consumer Product Safety Act of 1972 and the amendments to that act in 1976.

Since it is clear that the efforts of the Consumer Product Safety Commission have already produced benefits for the consumer we would oppose any move to abolish it or even strip it of any of its powers. Because we continue to believe in the basic concept of the Commission, we believe it essential, before considering any radical restructuring or total abolition, that the Commission be given a fair chance to achieve its Congressionally mandated goals. For that reason, we support S. 2796 and its reauthorization provisions for the Commission.

That said, I find myself presenting once again to this Subcommittee serious criticism of Commission policies and procedures. Though Sears has expressed essentially these same comments before to both this subcommittee and others, the result to date, however, has been that little has been done to correct the situation prevailing over at the Consumer Product Safety Commission.

Nevertheless, we are optimistic that appropriate changes and improvements resulting from the oversight activities of this Subcommittee can improve the effectiveness of the Commission.

CONSOLIDATION OF THE "TRANSFER ACTS"

In past Sears testimony we have urged Congress to consolidate the associated "transfer acts" with the Consumer Product Safety Act. It is now even more abundantly clear, in the context of all the legal challenges to the Product Safety Commission's April 8, 1977, purported ban of Tris-treated children's apparel, that consolidation of all the "transfer acts" (and their respective regulations) under the Commission's jurisdiction is an absolute necessity. What is needed now is an in-depth analysis and subsequent redrafting of the legislation in this area. This task can wait no longer.

As this Subcommittee is aware, these miscellaneous laws, now within the jurisdiction of the Consumer Product Safety Commission, dealt with problems which Congress had considered too urgent to wait for omnibus legislation. Unfortunately, the confusion, complexity and illogic of vastly different procedures for similar safety problems have not been easy to deal with, either by the Commission or the business community subject to the Commission's regulatory action. If there were ever a valid case for not repealing these separate acts, it has long since disappeared.

Sears encourages, therefore, and would support, any proposal to consolidate these transfer acts.

The Tris situation is an excellent case in point. For far too long the Commissioners argued over which specific statute should be used in dealing with the Environmental Defense Fund's petition concerning the chemical flame retardant Tris. So much time was actually wasted in arguing over the differing statutes that it was evidently decided that there was insufficient time in which to solicit public comment on the Commission's anticipated action regarding Tris! As a result, no public hearings concerning the possible toxicity of Tris were ever held and no written comments were solicited. In short, there was no opportunity for those of us who were affected to be heard!

This Subcommittee is well aware of what ultimately ensued: The Tris ban was declared illegal last June by a Federal district court in South Carolina.¹ The court, holding that there were too many procedural irregularities to sustain the Commission's action, declared the April ban null and void and the repurchase provisions of the Federal Hazardous Substances Act (contained within Section 15) unenforceable. On December 6, 1977, (an incredible 6 months later!), the Commission "withdrew" its earlier ban, sought to explain then what it had "meant" back in April, and announced its intention to prove the toxicity if Tris

¹ *Spring Mills v. Consumer Product Safety Commission*, 434 F. Supp. 416 (D.S.C. 1977).

in the courtroom at, essentially, "anytime, anyplace". Since then, injunctions against retailers have been sought, and, in one case, even an ex parte seizure of garments was attempted.

The end result of all this has been nothing less than utter confusion in the marketplace. Without a doubt, the Commission's actions of last April will keep retailers, distributors, and manufacturers in the courts for years.

No less important, consumers have similarly been adversely affected by the Commission's actions: they do not know if Tris-treated goods, since the Tris ban has been declared illegal, can be sold; they do not know if such garments do indeed pose any threat to the well-being of their children; indeed, they do not know if any flame resistant garments—Tris-treated or not—pose a possible chronic health hazard to their children. Consequently, a good number of parents are either having their children sleep in just their underwear (who are, therefore, being deprived of the benefits of the flammability standards) or are simply allowing their children to continue to use the suspect garments. Sadly, it might be months longer before just the procedural issues in this particular lawsuit are finally adjudicated!

Had the law been clear as to what procedures the Commission was obligated to follow in order to promulgate a valid ban of Tris-treated childrens' sleepwear, under either the Consumer Product Safety Act or the Federal Hazardous Substances Act, all this confusion and apprehension in everyone's part would surely have been averted. The substantive issue concerning the possible toxicity of Tris would have been publicly considered and duly ruled upon by the Commission (subject to appellate review). Both the public at large and business would have been apprised of any potential dangers with the chemical flame retardant Tris and could have acted accordingly. There would have been no time or money (including, significantly, taxpayers' money) lost in court over purely procedural issues.

As I stated before, the Tris fiasco aptly underscores the deficiencies in a multi-statute regulatory scheme. There is no flexibility in retaining all the transfer acts—there is only immobility. Sears submits that repeal of the Federal Hazardous Substances Act and all the other transfer acts and appropriate amendment to the Consumer Product Safety Act is clearly warranted so that cases such as this might not continually reoccur.

THE "OFFEROR PROCESS"

Section 7 of the Consumer Product Safety Act, 15 U.S.C. 2056, provides for the Commission, subsequent to the determination that a need for a consumer product safety standard exists, to extend an invitation for offers from other governmental agencies (Federal, State, or Local) or private individuals to develop such a standard. Under section 7 the Commission may agree to contribute to the cost of developing the standard. The Commission, meanwhile, is to closely monitor the progress of the development of the proposal.

The "offeror process" was clearly an innovative approach taken by Congress. It was designed to utilize the skill, knowledge, and experience of the private sector as well as accommodate the wants and needs of consumers while drawing upon only a minimum amount of Commission resources. Unfortunately, after nearly five years and precious few standards² later, the general consensus is that section 7 simply has not been used effectively.

As this subcommittee is aware, the General Accounting Office issued late last year a critical report, entitled "The Consumer Product Safety Commission Needs To Issue Safety Standards Faster". This report received widespread coverage and has contributed, in part, to a move within Congress to significantly amend section 7. While we have, in the past, criticized the Commission's activities under Section 7, we cannot join in the current criticism.

The success of the Commission simply cannot be measured by the number (or the lack thereof) of mandatory standards developed and issued by the Commission. Reference to Section 1 of the Consumer Product Safety Act, 15 U.S.C. § 2051(b), discloses that Congress declared there to be multi-purposes of the act:

² Indeed, in early March of this year, the United States Court of Appeals, Fifth Circuit, overturned major portions of the swimming pool slide standard, developed under Section 7. The court held that substantial evidence did not support the Commission's finding that the standard was reasonably necessary to eliminate or reduce an unreasonable risk of injury. *Aqua Slide 'N' Dive Corporation v. Consumer Product Safety Commission*, Docket No. 76-1713 (5th Cir. 1978).

1. to protect the public against unreasonable risk of injury associated with consumer products;
2. to assist consumers in evaluating the comparative safety of consumer products;
3. to develop uniform safety standards for consumer products and to minimize conflicting state and local regulations; and
4. to promote research and investigation into the causes and prevention of product-related deaths, illnesses and injuries.

Thus development of safety standards, while important, is but one task of the Commission and but one factor to be considered in judging the overall effectiveness of the agency. As Senator Ford stated in introducing S. 2796, the Commission's primary Congressional mandate is to reduce the incidents of product related deaths in injuries in the marketplace.

Furthermore, it is completely unrealistic to judge either the effectiveness of a particular consumer product standard or of the Commission itself by the number of days expended in the development of that standard. Consumer product standards simply are not easy to write. Proper risk analysis must first be made in order to determine if a mandatory standard is needed and, if so, what types of injuries (and the frequency of such) are sought to be prevented. Even after this initial step is taken, compilation of additional injury data is essential. Obviously, each particular product and the peculiar types of potential injuries associated with it and sought to be addressed will determine the length of time and the amount of effort necessary for the proper development of an appropriate standards.

Moreover, in light of the Commission's poor implementation of the offeror process, any move to give the Commission the power under section 7 to develop a standard on its own—i.e., by entirely bypassing the offeror process—would be patently unwise. First, there is no evidence that the Commission can be reasonably expected to develop a standard in shorter time, or, even more importantly, in better fashion. Second, were the Commission to be given the broad authority to develop standards in house, there might well be a significant decrease in outside consumer participation. Issues such as aesthetics and cost, which are so very important to consumers, could well be entirely overlooked.

As I stated before, the fundamental problem with the offeror process has been the Commission's inept implementation of it, not section 7 itself. The recent *Aqua Slide 'N' Dive* case aptly illustrates the crucial need for adequate risk analysis in the consideration of any mandatory standard. Such analysis can only be accomplished after sufficient, statistically reliable, data is compiled.

The Commission needs to carefully examine its past practices with the offeror process. It must accept the fact that before it turns to the offeror process it must first gather good data, examine the data carefully, and, only after determining that a mandatory standard is necessary, should it select a competent offeror. Subsequent to the selection of an offeror, the Commission must monitor the offeror's work conscientiously.

In summary, Sears continues to support the offeror process as it presently exists for we continue to believe that, with proper implementation of this innovative process, there can be beneficial results.

STATEMENT OF THOMAS A. CAMP, DIRECTOR, HARD LINE PRODUCT ENGINEERING, MERCHANDISE DEVELOPMENT AND TESTING LABORATORIES, SEARS, ROEBUCK AND CO.

My name is Thomas A. Camp and I am director of Hard Line Product Engineering in the Sears Merchandise Development and Testing Laboratory, Chicago, and I am here today on behalf of Sears, Roebuck and Co. Accompanying me is Joanne E. Mattiace, an attorney in the Sears Washington Governmental Affairs office, whose prime responsibility is in the area of product safety.

I participate in the Sears safety analysis system which receives and evaluates information concerning potential safety hazards with our products. In the course of this work I have come into contact with the Consumer Product Safety Commission and, as a result, I have become somewhat familiar with the various statutes which the Commission administers.

Last September the Commission proposed new regulations under Section 15 of the Consumer Product Safety Act, commonly referred to as a "tattle tale" provision since it requires that every manufacturer (including importer), dis-

tributor, or retailer of a consumer product inform the Commission when it "... obtains information which reasonably supports the conclusion that such product either fails to comply with an applicable consumer product safety rule, or contains a defect which could create a substantial product hazard ..."

I would like to briefly describe to this Subcommittee the problems that I envision will inevitably occur if the proposed regulations under Section 15 concerning substantial product hazard notification are finalized.

GUIDELINES OR REQUIREMENTS?

At the outset, it needs to be noted that there is a serious question concerning the effect of these proposed reporting requirements: The Commission has labeled the proposed regulation "interpretative rules", i.e., mere statements of policy and procedure intended as clarification of the reporting requirement and remedial process under Section 15. Examination, however, of the proposal (particularly Section 1115.22) reveals that violation of the rules would be a prohibited act under Section 19(a)(4) of the Consumer Product Safety Act subject to severe penalties.¹

Moreover, in recent months it has become publicly known that within the Commission² itself, primarily within the Office of General Counsel and the Product Defect Correction Division, there is sharp disagreement over whether the proposed rules are truly a statement of policy at all or whether they actually mandate certain requirements. The issue is an important one. Whereas violation of interpretative rules are punishable only upon judicial determination of their reasonableness, violation of substantive rules is a per se prohibited act subject to severe penalties. (See, e.g., Davis, "Administrative Law Text" (1972 ed), § 5.03, pp 126-131.)

We are vitally concerned with this issue because, as will be discussed further in these comments, the proposed rules are extremely vague and, moreover, contain numerous arbitrary presumptions. If the proposed rules are truly only "interpretative" ones, i.e., guidelines for future action, then perhaps a certain amount of ambiguity and unreasonableness can be overlooked. If, however, the rules are substantive ones, which carry the force of law, then such ambiguity and unreasonableness simply cannot be condoned.

Furthermore, close examination of Section 15 reveals that the Commission simply has no authority to issue any substantive rules under the section at all.³ Thus, regardless of any "label" on these proposed rules, it is likely that there will be a court challenge to them. The Commission simply does not have the authority to legislate new law.

DEFINITION OF THE TERM "DEFECT"

While Sears commends the Commission and its staff upon their diligent efforts to adequately define the term "defect" as used in Section 15, we believe this term cannot be defined in a relatively concise manner.

The Commission has proposed that the term "defect" be defined as:

A "defect" within the meaning of Section 15 of the CPSA is any aspect of a product which creates an *unnecessary* risk of injury. Such aspects include, but are not limited to the following: performance, composition, contents, design, construction, finish, packaging, warnings, and instructions. A product presents an *unnecessary* risk if the aspect which creates the risk is not *necessary* for

¹ In contrast, the present regulation under § 15, 16 CFR 1116.10(a), simply provides that "The Commission may seek appropriate penalties under the authority of Sections 20 and 21 for violations of provisions of Section 15 [not regulations issued under Section 15] of the CPSA." (Emphasis supplied.)

² Indeed even Chairman Byington has added to the confusion: in his letter of December 16, 1977, page two, to Senator Ford, Chairman of the Consumer Subcommittee of the Committee on Commerce, Science and Transportation, he wrote, "The proposed regulation indicates how the Commission will *interpret* and *implement* this [i.e., Section 15] Congressional mandate. The Commission's proposed rules do not *change* the presently existing legal obligation of manufacturers, importers, distributors, and retailers to report information to the Commission under Section 15 of the CPSA. The obligation of these groups exists by statute, whether there are regulations or not. However, the proposal does set forth *guidelines* for persons subject to Section 15(b) of the Act to assist them in meeting the requirement to report all defects that *could create* a substantial product hazard." (Emphasis supplied.)

³ Unlike other sections of the Consumer Product Safety Act which expressly provide, *inter alia*, that the Commission may "... by rule ..." act, Section 15 is devoid of any reference to the ability of the Commission to engage in substantive rulemaking.

the product to perform its functional purpose. A risk is also *unnecessary* if the benefits (including recreational and aesthetic benefits) to be gained from use of the product do not justify the risk of injury. A product defect within the meaning of Section 15 includes both unintended manufacturing errors and/or imperfections and intended product aspects. (Emphasis supplied.)

As has been underscored above, the word "unnecessary"—itself as vague and amorphous a term as the term "defect"—has been employed in the definition. But exactly what is an "unnecessary risk"? Surely, it cannot suffice to imply assert that a product presents an "unnecessary risk if the aspect which creates the risk is not necessary for the product to perform its functional purpose!" (Section 1115.3(b)(3); emphasis supplied). How can the term "defect" be adequately defined by employing another vague, amorphous term ("unnecessary risk") in its place and then redefining that term by using virtually the very same phrase ("not necessary") over again?

In short, the Commission has equated the phrase "unnecessary risk" with the term "defect". Yet, both terms are vague and will not clarify Section 15. In fact, adoption of such a definition and the use of a balancing test is only an invitation to value judgments and could conceivably severely hamper the Commission, with its collegial body, in its regulatory action.

Moreover, the balancing test employed by the Commission will stifle, if not cripple, business. It is all too conceivable that a direct result of the threat of such a subjective balancing test will be veritable stagnation of product innovation, particularly in light of the Commission's reference in the preamble of the proposal to the "state of the manufacturing art". Business simply will not know with any reasonable certainty whether a particular product would pass the Commission's "balancing test".

We believe Congress was expressly cognizant of the dangers in defining the word "defect" and deliberately chose not to define it. Sears accordingly suggests that any regulation, whether "interpretative" or "substantive", not include any definition of the term "defect". It would be useful if the report of these hearings touched upon this subject.

ARBITRARY TIME PERIODS

The Commission has further proposed in these regulations under Section 15 a maximum time structure of "five days plus ten days plus one day" in the investigation of possible product hazards. As noted before, if these rules are only to serve as guidelines to industry for the reporting of potential safety hazards, then there is not much of a problem. But a close reading of the proposal as well as attention to intra-Commission remarks suggests that these rules are to be construed as substantive ones, in which case there is a real problem.

These time periods are arbitrary and capricious. Significantly, the Commission has cited absolutely no evidence whatsoever in support of the appropriateness of any of the mandated time periods! This in itself is enough to challenge the reasonableness of the regulation.

First of all, the proposed limit of 10 days in which to investigate a report will simply be insufficient in all but the most clear cut and serious cases. It is imperative to note that in a substantial number of cases the allegedly defective product must be located and field examination and/or laboratory testing accordingly arranged. This alone might well take ten days! In addition, there is always the distinct possibility that such analysis will be prevented because of pending, or threatened, product liability legislation. Of what use would it be to notify the Commission when in such a situation little or nothing is known?

The Commission has repeatedly countered the above with the assertion that a company, faced with the possibility of not meeting the enunciated investigatory time period, should thereupon proceed to file a Section 15 report with the Commission. But even assuming *arguendo* that the Commission would be able to effectively cope with the extraordinarily high number of reports which would then inevitably be made, Section 15 requires that a manufacturer, distributor, or retailer of a product report upon the receipt of "information which *reasonably* supports the *conclusion* that such product . . . contains a defect which *could* create a substantial product hazard . . ." (Emphasis supplied.) Hence, it cannot be overlooked that:

1. Congress clearly intended reasonableness to be an integral, basic element of reporting;

2. The term "conclusion" unquestionably indicates a thinking process; and
 3. The statute uses the phrase "could create" rather than, e.g., the phrase "might conceivably be", clearly indicating, therefore, that the reporting requirement is triggered in only some, not all, circumstances.

It is clear that the Commission has plainly exceeded its statutory authority by establishing an arbitrary time period within which reports must be investigated. In short, the Commission has chosen to rewrite Section 15—not merely interpret it!

Moreover, as a practical matter, adoption of the time periods as presently incorporated in the Section 15 proposals would result in the Commission being deluged with reports. The reporting system would clearly be choked, to the detriment of those reports that are important and deserving of prompt and full attention. The Commission itself has recognized (in the preamble to the proposal, 42 Federal Register at 46772) that numerous reports will result with the adoption of these Section 15 proposals. Chairman Byington conceded such to Senator Ford in his letter of December 16, 1977. We submit that such a proliferation of reports would actually undermine the integrity of Section 15 reporting!

Furthermore, for business to endeavor to comply with these arbitrary time constraints would result in having to have constantly available enormous manpower, thereby inevitably resulting in higher costs (and, ultimately, higher consumer prices) but with no corresponding increase in protection to the consumer. Yet, the Commission has not done any economic analysis of the impact of the proposed regulations.⁴

Sears has formally suggested to the Commission that in order to provide for those circumstances in which the ten day investigatory period is insufficient, the following language be employed in Section 1115.11(c): "In either event, the time allowed for investigation or evaluation, shall not exceed ten (10) working days or such additional time as is necessary for reasonable continuous diligent efforts for a particular investigation." The Commission could make it abundantly clear, in either the preamble or in the text of the regulation itself, that the burden would be upon the person going beyond the ten day period to explain the particular circumstances. Or, as we have also formally recommended, the Commission could, in the alternative, choose to refrain from establishing any investigatory time period at all and continue to employ the Congressionally mandated standard of reasonableness.

The initial five day time period (Section 1115.10(d)) allotted for the transmission of product safety complaints will similarly be oftentimes insufficient. It is simply unrealistic to assume that in a large commercial enterprise information "regarding a potential hazard or nonconformity" will be routinely received by responsible, managerial persons.

Sears employs more than four hundred thousand persons, the great majority of whom are on the sales floor and responsible for the carrying out of many varied tasks. To assume that all employees, including, for example, salespersons or warehouse personnel will, even under strict management directive, routinely and quickly pass along information—including that of only an oral nature—that "might possibly indicate" a product safety problem is clearly assuming a utopian environment.

In short, the Commissions' proposed five day initial time period would not simply be burdensome but would clearly be beyond the utmost ability of almost any company to comply. The most rigorously enforced internal company policy could not ensure full compliance with such an arbitrary time period.

Sears suggests that the Commission be urged to reconsider this initial five day time period and its irrebuttable presumptive effects on the receipt of such information. We urge that the Commission continue to apply instead a standard of reasonableness for the initial time period consumed in the routing of information.

In summary, it is imperative to note that Section 15 is too important a provision in the Consumer Product Safety Act for the Commission to recklessly undermine. Section 15 has already been demonstrated to be one of the most effective—if not the most effective—tool the Commission has. Therefore, any regulation, whether construed as substantive or merely a "statement of policy", which diminishes the integrity of Section 15 is patently unwise.

⁴This inaction, of course, is at odds with recently issued Executive Order 12044, "Improving Government Regulations", which the Commission, though not obligated to obey, would be wise in following.

PRESUMPTIVE EFFECT OF DEATH OR GRIEVOUS BODILY INJURY

The Commission has proposed that there be, essentially, automatic reporting of any product involved in a death or grievous bodily injury. The proposed presumptive effect of the receipt of such information is wholly unwarranted.

There are times at which a company receives only the barest of information concerning a product—perhaps by formal service of a complaint⁵ only to learn that further information simply will not be disseminated. Of what good would such a premature report be to the Commission? Moreover, can the Commission possibly handle the flood of reports which could, most assuredly, be expected to be made?

Rather than adopt a specialize rule for reports involving either a death or serious bodily injury, the Commission should enforce its more general reporting requirements. Section 15 itself is explicit as to the factors which are to be considered when evaluating a possible product defect: “. . . the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise . . .”. In addition, reference to the legislative history of the Consumer Product Safety Act, Section 15 discloses that:

“Section 15(a) defines the term ‘substantial product hazard’ to mean a defect which because of the pattern of the defect, the number of defective products distributed in commerce and the severity of the risk or otherwise, can be determined to pose a substantial hazard to the public. This definition looks to the extent of the public exposure to the hazard. *A few defective products will not normally provide a Proper basis for compelling notification under this section.*” House Report 92-1153, 92nd Congress, 2nd Session. 42(1972). (Emphasis supplied.)

Therefore, to mandate a presumptive effect of information involving a death or grievous bodily injury is clearly beyond the scope of the statute itself. Again the Commission has endeavored to rewrite section 15.

We believe that good business practices will, in themselves, necessarily require in-depth investigation of reports of a serious nature. Such good corporate practices, coupled with the general reporting requirements of section 15, will serve both the spirit and the letter of the law.

Sears has formally urged the Commission to reexamine its stance on the presumptive effect language contained in section 1115.11(a) of its proposal. We additionally implore this Committee to similarly urge such to the Commission.

In summary, section 15 is an important tool for the Commission. However, by endeavoring to rewrite this section, the Commission inevitably risks the chance of substantially undermining the very effectiveness of section 15. A flood of premature, inconclusive reports would serve absolutely no purpose and would actually detract from those reports that truly do involve possible safety hazards.

Because Sears believed in the concept of the Consumer Product Safety Commission, we supported the creation of the Commission. We still believe in the concept. We want to support a Commission which functions both effectively and sensibly.

Senator FORD. Next is Charlie Donaldson with the Center for Study of Responsive Law.

**STATEMENT OF CHARLIE DONALDSON, ATTORNEY, CENTER FOR
THE STUDY OF RESPONSIVE LAW**

Mr. DONALDSON. I prefer that my written statement be entered in the record.

Senator FORD. We have a vote at 11 o'clock this morning. That will disrupt us for about a half hour. I am trying to get everybody in, so we can give the Commission some time tomorrow.

If you will proceed, your statement will be included in the record, and we will be glad to listen to your highlights.

Mr. DONALDSON. Yes, sir. I have about five points to make.

⁵ It must be recognized that a complaint, by its very nature, contains only *allegations*, not proven facts. Moreover, such allegations are often vastly exaggerated and it might well take months of formal discovery to uncover the actual facts.

I am Charlie Donaldson, a staff attorney with the Center for Study of Responsive Law, one of the Ralph Nader organizations.

You have seen myself and other persons from the center up here quite often in the recent past saying some relatively critical things about the Commission.

I don't think that anything we said about them has changed significantly but thanks to the oversight of your subcommittee, the efforts from the House and also the consumer community, I think there may be some changes coming along, especially beginning June 30.

The first point I would like to make is that we support wholeheartedly the concept of extending the authorization of the CPSC for 3 years. Sandra Willett pointed out several reasons why extending for 3 years is a good idea.

I would like to see Congress enact the 3-year reauthorization as a reaffirmation of the commitment of the Congress to protect consumers from dangerous products in the marketplace. I think S. 2796 goes a long way toward reaffirming that commitment.

I would like to deal next with the rumors, which I guess are more than rumors, about effort at OMB to scuttle the CPSC.

In addition to what has already been said, there is a very disturbing paragraph in the April 1, 1978, National Journal. It makes reference to reconsideration at the White House of the routine 1-year extension of CPSC, and the designation of someone to take the place of Chairman Byington come June 30.

The paragraph is ambiguous. I am not sure what the reporter meant. But if he is referring to not designating any person to replace Chairman Byington, which would leave the Commission totally without leadership, I think that would be a total abdication of the President's responsibility to the American consumer.

I would urge you personally, your subcommittee, and other interested persons to contact the White House and ask the administration to designate a new Chairman at the earliest possible moment.

There should be a smooth transition.

Senator FORD. Let me interrupt to say, I am giving serious consideration to proposing an amendment to provide for advice and consent as to the chairmanship of this Commission. I am also going to be very inquisitive as to any stipulations that might be made between the White House or the administration and the new chairman. I promise you I will be asking some questions and trying to get some answers as it relates to this situation.

Mr. DONALDSON. Yes, sir. We are wholeheartedly behind that.

We support the concept of allowing the new President to designate one of the sitting members as his Chairman, but with the advice and consent of Congress. Another portion of the Product Safety Act I would urge you to take a look at is the provision that deals with conflict of interest, section 4(g)(2).

As written there is no prohibition against persons leaving the CPSC and going to work the next day with private consulting groups working with the Commission to develop a standard.

I think that loophole should be closed.

But at the same time 4(g)(2) as written, would prohibit persons from going to work for, say, Allis-Chalmers in their tractor division,

an area not under the CPSC, simply because the company makes power lawnmowers or chain saws. That is an unwarranted restriction on the right of folks to go out and look for jobs.

We would, therefore, urge that 4(g)(2) be changed to focus on conflict of interest based on the product being produced, rather than the fact the manufacturer may have some dealings with the Commission.

Also in connection with the staff of the CPSC, we would urge that senior staff members be removed from CSC so that they can be made responsive. Good work should be rewarded, but how can you reward somebody with a promotion if there is dead wood in the way. Under the present civil service rules it is almost impossible to remove any body, at least in any relatively short period of time.

Senator FORD. That flies in the face of the argument that you have to give the employee some protection so he will come in and work and not be in fear of being fired tomorrow for political purposes.

Mr. DONALDSON. Yes, sir. I understand that, but I would say that a competent person would not worry too much about whether he will keep his job if he is doing the job. Your subcommittee has an oversight capability. I would assume that you would exercise that vigorously if it came to your attention that someone was playing politics at the CPSC.

Senator FORD. The present Chairman did it and I raised all kinds of Cain. I am not sure I accomplished a whole lot.

Mr. DONALDSON. Well, sir, he is leaving before the end of his term. Not much. Nowhere near as soon as he should have, but at least he will be leaving. I would say that your vigorous oversight had a great deal to do with that.

One further point on the Product Safety Act. At present the CPSC cannot prohibit the export of products which were ruled unsafe in the United States. A specific instance has to do with the proposal to sell Tris-treated sleepwear to foreign countries.

We urge that this prohibition be removed from the Product Safety Act. One reason is that the nationality of an injured person is irrelevant. For humanitarian reasons we should not be allowed to dump our unsafe products on other nations. Also allowing manufacturers to export dangerous products will reduce the deterrent ability of financial loss. If a man knows that even if he cuts a few corners and is caught he will still be able to sell his defective merchandise to Mexico or some other foreign nation, he will not be quite as assiduous in trying to prevent dangerous products from leaving his factory.

I have no further remarks. I will be happy to respond to questions.

Senator FORD. Mr. Donaldson, you indicated in your statement that section 7 should be amended and replaced with rulemaking under the Administrative Procedures Act.

Mr. DONALDSON. That is correct, sir.

Senator FORD. I would like to see some happy medium between these two points.

Do you believe providing the Commission with limited authority to bypass the offeror process in certain circumstances would be appropriate?

Mr. DONALDSON. Yes, sir, I would. As an example, if the Commission were given the authority to take an existing voluntary standard but modify it to fit the scheme of the Product Safety Act. I think this would be an instance where the Commission would not necessarily have to go through the offeror process.

Your bill related to cellulose insulation is an example of that. It is written in such a way that the Commission can take standard 515(c), modify it, issue it, then look to further improvements in the General Services Administration Standard and make each compatible with the requirements of the Product Safety Act. This would be one possible mechanism.

Senator FORD. I am trying to find some way to write that into the law, as we have in the cellulose, so every time something comes up that we won't have to write legislation. The Commission would have that authority. I think the word right here is "fragile," and it is a fragile position to be in, and you have to walk a very thin line.

What is your opinion of the Commission's recent decision to cooperate with the chain saw manufacturers to develop a voluntary standard for those products?

Mr. DONALDSON. I think that we are in favor of that. Obviously, we are going to wait and see how it turns out, but I would say the decision to work with the chain saw manufacturers is an example of a little innovation and flexibility on the part of the Commission, which has not been noted for those characteristics in the past.

Obviously, we would urge that there be significant consumer participation in the development of the standard, either by having a representative of the consumer community sit in with the chain saw manufacturers or such other arrangement the manufacturer and Commission can work out.

We urge this subcommittee exercise vigorous oversight over the development of the chain saw standard. The CPSC has not had victories and we would like to see a few more.

Senator FORD. In your opinion does the Commission have sufficient personnel resources to adequate deal with the problem of chronic hazards?

Mr. DONALDSON. No, sir, they don't; but that gets into the whole question of whether a chronic hazard should be dealt with by one agency or whether the problem is so complex that it has to be split among various federal agencies.

For instance, I don't think the CPSC should duplicate the capabilities of the National Institutes of Health for cancer research. When you say chronic hazard I assume you mean primarily carcinogens.

Senator FORD. If this authority is removed from the CPSC what agency of the Federal Government, I say "agency" rather than several, do you believe should have authority in that area?

Mr. DONALDSON. Senator, I don't think we can support the removal of chronic hazard authority from the CPSC. If you take that responsibility as it relates to consumer products, put it under another agency which has a totally different focus, for example, the EPA, it will wind up being an orphan.

Hazards relating to consumer products must remain with the Commission if there is going to be any effective protection of the consumer.

Senator FORD. You raised a very interesting point, concerning the export of products that would not meet our standards, that developed into a hazard.

I can see that to continue to manufacture that product and ship it without any restraint whatsoever, would have some ability to dilute the authority of the Commission as it relates to standards.

I have no further questions of you but I would like to ask you to give me an outline of recommendations as to exports of hazardous products, or at least those that have been so identified by the Commission.

Give me a feel for that in your opinion, and the direction we ought to try to go. Would you see if you could get that to me in the next week or 10 days?

Mr. DONALDSON. Yes, sir. I would be happy to do so.

Senator FORD. Fine.

[The following information was subsequently received for the record:]

APRIL 24, 1978.

To: Subcommittee on Consumer Protection of the Senate Commerce Committee.
From: Charlie Donaldson, Center For Study of Responsive Law.
Subject: Consumer Product Safety Commission Control of Export of Dangerous Consumer Products.

EXISTING LEGISLATION

The Consumer Product Safety Commission (CPSC) administers the Federal Hazardous Substances Act (15 U.S.C. §§ 1261 *et seq.*), the Poison Prevention Packaging Act of 1970 (15 U.S.C. §§ 1471 *et seq.*) and the Flammable Fabrics Act (15 U.S.C. §§ 1191 *et seq.*) in addition to the Consumer Product Safety Act (15 U.S.C. §§ 2051 *et seq.*). For enforcement purposes the Poison Prevention Packaging Act is incorporated in the Federal Hazardous Substances Act. The CPSC therefore has three potential sources of authority to regulate the export of dangerous consumer products.

The Federal Hazardous Substances Act (15 U.S.C. §§ 1264(b) (3), 1265(a)) exempts exported hazardous substances so long as the exported products are labeled in accordance with the laws of the importing country and are not intended for distribution within the jurisdiction of the United States or an overseas American installation. Similarly, the Flammable Fabrics Act (15 U.S.C. § 2067) and the Consumer Product Safety Act (15 U.S.C. § 2067) both specifically exclude exports from the jurisdiction of the CPSC unless the product is intended for ultimate distribution in the United States, a territory under U.S. jurisdiction or an overseas American installation. Since no other Federal agency is given the specific duty of determining whether exported consumer products are safe, the safety of American exports depends on the ethics and technical skills of the exporter and the laws and vigilance of the importing nation. Advanced industrial nations may be able to recognize and exclude dangerous consumer products but less sophisticated governments lack the necessary knowledge and administrative capability to protect their citizens. Excluding exports from the jurisdiction of the CPSC places millions at the mercy of those American manufacturers and exporters indifferent to the health and safety of their ultimate customers.

EFFECT ON DOMESTIC REGULATION

Prohibiting CPSC regulation of dangerous consumer product exports reduces the ability of the Commission to protect U.S. citizens. Conscientious manufacturers will test and inspect their products for potential dangers before selling them, but unfortunately not all businessmen are concerned with the safety of their products. The irresponsible few will avoid the testing costs and market unsafe products until caught by the CPSC. The deterrent effect of a CPSC ban

is weakened if the manufacturer knows that any products excluded from domestic commerce can be disposed of on the export market. This also gives the unscrupulous an unfair price advantage over responsible businessmen willing to pay for premarket testing and quality control.

The export of consumer products banned in the United States may well be taking place. The March 1, 1978 Jack Anderson column (copy attached) reported that several American firms were willing to purchase Tris-treated sleepwear for export. Apparently some American exporters are unconcerned about giving children cancer so long as the overseas sales are legal.

The situation reported by Mr. Anderson is the result of the April 7, 1977 CPSC ban on the sale of Tris-treated sleepwear in domestic commerce and the Commission's October 20, 1977 opinion that the CPSC had no authority to regulate export of Tris even though the garments were originally intended for sale in the United States. The relevant statutory language is ambiguous at best and a CPSC ban on export of Tris might not be upheld in the courts. If previous CPSC experience is any indication, the resulting Tris export litigation would be time consuming and expensive with no certain outcome. Witness the injunction against the general ban on Tris. The efficacious way to resolve the dispute is by legislative amendment to prohibit the export of dangerous consumer products. This conclusion is supported by the findings of Representatives Rosenthal and Waxman set forth in their February 9, 1978 letter to President Carter. A copy of the letter is attached.

PROPOSED AMENDMENTS

Extension of CPSC jurisdiction to encompass all consumer products may not be politically feasible. The arguments are that each nation should decide what protection its citizens require and that to impose CPSC standards on exports would unduly burden American businesses competing in the international market. The problem then is to find some middle ground that would protect domestic consumers without hampering American exports.

A possible solution is to prohibit the export of dangerous products originally intended for domestic sale. This could be accomplished by adding to the Federal Hazardous Substances Act a new Section 4(i) as follows:

Notwithstanding any other provision of this Act no hazardous substance or misbranded hazardous substance may be shipped or delivered for shipment for export to any foreign country if the product was ever introduced or delivered for introduction into interstate commerce or was intended for introduction into interstate commerce. Before removing the shipment from the jurisdiction of the United States, the exporter of any product determined under this Act to be a hazardous substance shall file with the Consumer Product Safety Commission an affidavit stating that the products intended for export have not been introduced or delivered for introduction into domestic interstate commerce or intended for introduction into domestic interstate commerce.

Similar language with appropriate references to "nonconforming product, fabric or related material" and "unconforming or banned hazardous products" should be added to the Flammable Fabrics Act as 15 U.S.C. § 1202(c) and to the Consumer Product Safety Act as 15 U.S.C. § 2067.

ENFORCEMENT

Enforcement of the proposed amendments should be relatively simple. The burden is placed on the exporter to determine whether the proposed shipment was ever involved in or intended for domestic interstate commerce. To assist in enforcement CPSC can adopt record keeping rules pursuant to 15 U.S.C. § 2065. The regulations should require that every manufacturer, wholesaler or exporter maintain records on all export transactions in products for which the CPSC has established standards or bans. The minimum information should include the names and addresses of all parties, the dates and nature of all significant transactions, the type and quantity of the products involved, the specific standard or ban applicable, whether the product conforms to CPSC standards, any identification marks used and, if applicable, the dates on which production of the relevant lot of the product began and ended. The recordkeeping should not be burdensome on business but would allow the CPSC to substantiate exporter(s) affidavits easily.

CONGRESS OF THE UNITED STATES,
 HOUSE OF REPRESENTATIVES,
 COMMERCE, CONSUMER, AND MONETARY AFFAIRS SUBCOMMITTEE,
 OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
 Washington, D.C., February 9, 1978.

The PRESIDENT,
 The White House,
 Washington, D.C.

DEAR MR. PRESIDENT: In recent months, there has been considerable controversy surrounding the Consumer Product Safety Commission's decision to ban the chemical flame retardant—Tris. One aspect of the problem, which has been particularly troublesome, has been the inability of the Consumer Product Safety Commission to stop the export of Tris-treated children's sleepwear. It appears that the Commission has determined that it does not have the statutory authority to prevent the export of a product which it has found to cause cancer in children. When CPSC Chairman Byington attempted to enlist the aid of the Department of Commerce, he was told by the Secretary that since the Export Administration Act does not specifically authorize the Department to stop the export of items banned in this country, the State Department would have to determine whether or not such exports significantly affected the foreign policy objectives of the United States. The Commerce Department was informed by the State Department that it did not.

The Commerce, Consumer and Monetary Affairs Subcommittee of which we are members has been conducting a study of the problem of the export of banned substances to determine whether items banned by other government agencies in addition to the CPSC were being routinely exported. In response to a letter from the subcommittee, Secretary Kreps indicated that the Commerce Department was unable to act without direct policy guidance from the Department of State regarding the relationship between the export of banned substances and U.S. foreign policy.

We are writing to ask your help in addressing this serious problem. Tomorrow the CPSC may vote to affirm its position that it cannot prevent the export of Tris-treated sleepwear, paving the way for the export of garments that will cause cancer in the foreign children who wear them. It is inconceivable to us that the United States could condone such action in this case and in other cases where the export of an item banned here would result in serious harm to the users abroad. We would be happy to work with the Administration to develop legislation which would define U.S. policy regarding the export of banned items. This situation as it current exists is unacceptable. Neither the agency which bans an item nor the Department of Commerce have the ability to stop the export of those products whose export cannot be justified on any reasonable grounds.

The subcommittee will be holding hearings this spring with the various agencies involved in this problem. We hope that the State Department can be convinced of the foreign policy merits of an export policy which takes into consideration the harmful nature of what is being sent abroad by this country. In the meantime, however, large quantities of Tris-treated sleepwear will begin leaving the United States soon unless its manufacturers know that such action will not be allowed in the future.

We urgently request that all efforts be made to identify potential exporters and recipient countries and that all means be exhausted to discourage those who would exploit foreign markets at the expense of innocent children. We strongly believe that Tris should not be exported. We need your help to stop it.

Sincerely,

HENRY A. WAXMAN,
 BENJAMIN S. ROSENTHAL,
 Chairman.

Senator FORD. Thank you very much for being here today and I appreciate it very much.
 [The statement follows:]

STATEMENT OF CHARLIE DONALDSON, CENTER FOR STUDY OF RESPONSIVE LAW

Mr. Chairman, members of the subcommittee, thank you for the invitation to testify today on the Consumer Product Safety Commission.

I am Charlie Donaldson, a staff attorney with the Center for Study of Responsive Law, one of the Ralph Nader organizations. The Center has followed the performance of the CPSC closely since the organization of the Commission. It is a matter of public record that the Center has been extremely unimpressed by the CPSC's performance.

We have been especially critical of the ineffective leadership of the present Chairman of the CPSC and his predecessor. Thanks in large part to the vigorous oversight of your Subcommittee, the present Chairman will depart on June 30, 1978. The CPSC will then have the opportunity to redeem itself under a new Chairman and Commissioners dedicated to the purpose for which the CPSC was created—the protection of consumers from dangerous products.

THREE-YEAR AUTHORIZATION

The Center supports reauthorization of the CPSC for three years. This will indicate Congress's continued commitment to protecting consumers and will allow the CPSC to concentrate on repairing the damage done by the incompetence of the present and past Chairman. Authorization for a shorter period would damage morale at the CPSC at the very time that maximum effort must be expended to improve the effectiveness of the agency. The CPSC deserves a fair chance to prove that it can make the Nation a safer place to live. It would be a supreme irony if the failure of leadership indifferent to the interest of consumers was used as an excuse to strip consumers of the protection of the only Federal agency explicitly charged with the duty to protect the public from dangerous products.

The criticism of the Center and other consumer organizations has made it appear that the CPSC has been an utter failure. This is not the case. Although the agency's accomplishments are minuscule compared with its potential, the very existence of the CPSC has been some deterrent to the introduction of dangerous products into the market place. In addition, the Commission has had a few concrete successes. Their development and enforcement of packaging standards for drugs and household cleaners has reduced the danger that young children will poison themselves. The standard for architectural glazing may, in time, reduce the thousands of injuries caused by broken glass walls and doors. The enforcement of the standard for mattress flammability makes our homes safer from fire. However, the CPSC should not rest on its limited achievements but rather should seek to reach its full potential.

CONTINUING NEED FOR THE CPSC

In June 1970, the National Commission on Product Safety (NCPS) reported that an estimated 20 million consumers were injured each year in the use of consumer products, of which 110,000 were permanently disabled and 30,000 killed. The NCPS found that the then extant programs to protect consumers were "marked by too much timidity and inordinate delay." Congress concluded from the NCPS report that the nation could best be served by a single agency responsible for protecting the public from dangerous consumer products. Nothing has happened in the intervening years to reduce the force of Congress' original finding. It is this time that the operation of the CPSC has been marked by the same timidity and delay the NCPS noted, but there is no indication that fragmenting the CPSC and squirreling away the Commission's responsibilities in the interstices of other Federal agencies would do anything except make Congressional oversight more difficult. Any change in the CPSC, or any of the legislation administered by the CPSC should clearly improve the protection afforded consumers.

THE OFFEROR PROCESS SHOULD BE ABOLISHED OR AMENDED TO REMOVE UNNECESSARY DELAY

Reform of the offeror process under Section 7 of the Consumer Product Safety that is the most pressing legislative change needed to improve the performance of the CPSC. Only the standard for miniature Christmas tree lights, a very simple product, has been issued even close to the statutory deadline. The offeror process has been repeatedly criticized by the Center and even the CPSC as the cause for delay in the development of product safety standards. The theory behind the offeror process, to open up standards development to groups other than the affected industry, is commendable but has worked poorly in practice. Section 7 should be amended to replace the offeror process with a rule making

process similar to that in the Administrative Procedure Act or to make the offeror process discretionary with the Commission. The provision to provide funding for public interest groups to participate in standards development should be retained and made applicable to any method of standards development used by the CPSC.

One improvement adopted by the CPSC in the development of the Christmas tree light standard is the provision of CPSC guidance to the standard developer. The CPSA does not prohibit the CPSC from effective supervision of standards development but was so interpreted until the miniature Christmas tree light standard development process. The CPSC should continue to provide effective guidance to any private organization developing standards for the Commission. Congress should indicate either in legislative language or the accompanying report that the Commission should work closely with standards developers to reduce delay and to produce the standard in a form usable by the Commission. In the past, the final product of offerors has had to be completely reworked by the CPSC before proposed regulations could be published.

The authority of the CPSC to use existing product standards as a point of departure in development of Commission regulations should also be clearly spelled out. The CPSA does not specify the degree to which the Commission can modify an existing standard and is therefore subject to varying interpretation. Congress should make clear the authority of the CPSC to economize the Commission's resources by using existing standards as a base and the responsibility of the Commission to insure that the final regulations so developed in the public interest.

THE CPSC SHOULD BE ALLOWED DISCRETION IN ACCEPTING PETITIONS UNDER
SECTION 10 OF THE CPSA

One point in dispute is the discretion of the CPSC to reject petitions filed under Section 10 of the CPSA. The Commission should be allowed wide discretion in deciding what petitions to accept. Otherwise, the CPSC's limited resources might be frittered away on products that offered only a limited threat to the public. The classic example is the maligned standard on home swimming pool slides. This standard began with a petition and absorbed CPSC effort that should have been directed toward such basic tools as a priority list of product hazards and a policy on chronic hazards.

To insure that the CPSC does not abuse its discretion, the time allowed a petitioner to appeal the CPSC's denial of a petition (or failure to act within 120 days) should be extended beyond the present 60 days allowed by Section 10(e) of the CPSA. Sixty days may be too short a time for a petition to evaluate the Commission's reasons for denying the petition. And a petitioner whose petition has not been acted upon within the statutory 120 days may be reluctant to sue and antagonize the Commission when waiting may produce CPSC acceptance of the petition. The interest of petitioners should be balanced against the need of the Commission for rapid and final resolution of petitions so that CPSC resources can be allocated effectively. A large number of petitions that may be litigated would require the Commission to hold resources in reserve.

EXPORT OF PRODUCTS THAT VIOLATE THE CPSA SHOULD BE BANNED

The CPSC has ruled that Section 18 of the CPSA prevents the CPSC from interfering with the export of Tris treated sleepware. Unfortunately the Commission's interpretation of the CPSA appears to be correct. This exemption should be removed on humanitarian and practical grounds. Children should be protected from cancer-causing garments and other potential hazards regardless of nationality. And manufacturers should not be allowed to operate with the assurance that they can export to less sophisticated countries any products found to be dangerous. This encourages corner-cutting and reduces the deterrent effect of financial loss caused by disregard for public safety.

A NEW PRESIDENT SHOULD BE ALLOWED TO DESIGNATE ANY MEMBER OF THE COMMISSION TO BE CHAIRMAN

Independent regulatory agencies like the CPSC should be just that—*independent*. But the agencies should not be totally immune to the democratic process. Every new Administration has a responsibility to improve the effectiveness of Federal regulation, including the protection of consumer from dangerous products. And each Administration has a different approach and set of prior-

ities. It is possible to balance the CPSC's need for independence and the mandate of a new Administration by allowing each new President to designate the Chairman of the CPSC from among the Commissioners. Such designation should be subject to the advice and consent of the Senate, in keeping with the role of the regulatory agencies as an arm of Congress. Once confirmed the Chairman would serve until the end of his or her term or the election of a new President, whichever occurred first. Any Chairman not renominated by a new President would continue to sit on the CPSC until the end of his or her term.

SENIOR CPSC EMPLOYEE SHOULD BE PROHIBITED FROM EMPLOYMENT IN THE PRODUCT STANDARD SETTING PROCESS FOR ONE YEAR AFTER LEAVING THE CPSC

Federal employees should not be allowed to turn their positions to their private benefit. Otherwise the employee will be tempted to make public decisions based on his own private interest. To avoid this conflict of interest, Section 4(g)(2) of the CPSC prohibits any CPSC employee at the GS-14 level or above from accepting employment with any manufacturer subject to the CPSA. The prohibition continues for one year after the employee leaves the CPSC. This restriction is both too narrow and to broad.

The restriction is too narrow because it allows a former employee to go immediately from the CPSC to an organization that sets standards, even though the standards organization is the creature of manufacturers or a trade association. In fact, the natural progress of a senior CPSC employee would be from the Commission to private standards organizations rather than to industry, since the CPSC employee's experience would be in standards setting rather than manufacture. In this way, the ex-CPSC employee makes his inside contacts available to several manufacturers rather than one.

Section 4(g)(2) is too broad because it prohibits ex-CPSC employees from accepting employment with any manufacturer subject to the CPSA even if the employment had nothing to do with a product or function under the jurisdiction of the CPSC. For example, a CPSC employee would be prohibited by the CPSA from accepting a job in the automotive division (not subject to the CPSA) of a company that also built power lawn mowers (subject to the CPSA). This restricts the right of the CPSC employee to seek work of his or her choosing without a compensating benefit for the public. Section 4(g)(2) should be amended to prohibit a CPSC employee from engaging in any activity related to a product covered by the CPSA, rather than with a manufacture subject to the Act. This would prevent an employee from going to a private standards organization and at the same time opens to former CPSC staff jobs that are unrelated to the jurisdiction of the CPSC.

SENIOR CPSC STAFF MEMBERS SHOULD BE REMOVED FROM THE CIVIL SERVICE

The present Chairman of the CPSC and consumer groups agree on little except the difficulty of removing or transferring ineffectual CPSC employees. This is a problem, compounded by the poor selections made by the present Chairman and his predecessor and the attrition of competent staff who leave, discouraged, for other jobs. The CPSC staff must therefore be made responsive if the CPSC is to be made effective. Competent work should be rewarded. This is difficult to do if promotion is blocked by deadwood. Conversely, poor performance should lead to transfer, demotion or, ultimately, removal. This is virtually impossible under present Civil Service rules. The President has proposed Civil Service reform to make bureaucracy more efficient. Perhaps the CPSC should be a test vehicle for those reforms.

Thank you.

Senator FORD. Next witness is Nancy Buc, National Retail Merchants Association. Good morning.

STATEMENT OF NANCY L. BUC, NATIONAL RETAIL MERCHANTS ASSOCIATION, WASHINGTON, D.C.

Ms. Buc. Good morning.

Senator FORD. If you want to submit your statement for the record, we will be glad to take it in toto, or you may highlight it, whichever you prefer.

Ms. Buc. That will be fine.

Senator FORD. Your statement will be included in the record.

Ms. BUC. Thank you very much. Senator, I must say, in light of your expressed concern about the lifespan of the CPSC, I was startled when I walked in this morning to see a sign in the back that had the word "sunset" in it. I looked again and it turns out those are the sunrise and sunset times for eight major American cities.

I have no idea what it is doing here but I guess that is not the kind of sunset OMB has for the Commission.

Senator FORD. They tell me that when you get your utility bill and you go down to the bottom, that is a sunset surprise.

Ms. BUC. Senator, I would like to describe briefly who the National Retail Merchants Association are, what the association is. It is a non-profit, voluntary trade association whose 3,500 corporate members operate more than 35,000 department and specialty stores throughout the country.

Most of these companies are small businesses; about 75 percent of them do less than \$1 million a year.

Senator FORD. How many employees do they have?

Ms. BUC. I'm sorry. I don't know. It is a large number since the retailing business is extremely labor intensive, perhaps more so than any other industry in the country. Virtually every NRMA member is subject to the statutes the CPSC enforces, especially in the area of flammable fabrics and Tris, all of them are subject to the act.

For that reason, we are very concerned about what happens to the CPSC, and how it carries out its statutory missions.

At this point, with two new Commissioners, with the prospect of a new Chairman, we are hopeful, and I am sure everybody else in the room is as well, this is the time when we can talk about things that the Commission ought to be doing, interject some constructive criticism into the public record, and hope that the Commission will listen. This has not always been an agency that listens to anybody.

One can hope that this is a time when the Commission will listen, as it starts to chart its course for the next several years. With that hope in mind, I want to talk about one important aspect of the Commission's enforcement policy, that is, the way it has behaved or treated retailers.

The retailing community sells hundreds and thousands of different products. There is no way a retailer can be an expert on the safety of every product in its store. As a rule, the retailer is at the mercy of its supplier, doesn't always know what it is getting, and it really is not in a position to please the entire marketplace for the CPSC.

That is not to say that the retail community thinks it ought to have some form of license to violate the law. That is not the case at all. Retailers are extraordinarily conscious of their only gages to comply with the law and, indeed, as my prepared remarks illustrate, there have been a number of circumstances, including the Tris situation, where the retail community has been virtually the only segment of an industry that has been trying to cooperate or comply with the law, if you can tell what the law is and nonetheless, has, in effect, been punished for it.

I submit that is not only unfair to the retailers but it is very poor public policy. I would like to talk a little about it, about what happened in the Amelia Sinclair situation.

In the Tris situation, the Commission issued its ban last April. That ban immediately ran into some flak in the Federal District Court here, and not very long after that, into some flak in the Federal District Court in North Carolina.

I think it is accurate to say, into spring and summer, the situation was extremely confused. It was very difficult to know what the courts were going to do. The Commission reversed its course three or four times. I think they may have won the "Elroy Hirsch Zigzag Award" for reversing the public policy last summer.

There was no way to tell what the law was except the Commission wanted Tris-treated goods off the market. The manufacturing community generally was not as cooperative as perhaps they might have been. I don't intend to be critical of them because it is unclear what the Commission's legal authority was to do what they did.

What is clear is that the retail community did cooperate. By and large, every retailer with which I am familiar made extraordinary effort to clear their shelves of Tris-treated goods. You will recall, in most situations, they could not send them back, although the statute seems to say they could, because the manufacturers weren't taking them, but the retailers nonetheless made what I would consider in some cases superhuman efforts to get Tris-treated goods off their shelves and, by and large, they succeeded.

Nonetheless, when the Commission decided it looked bad, which is a fair enough statement of their status last August, what this did was bring a series of cases against retailers.

Now, I don't think anybody in the retail community would have been terribly upset if the Commission had looked for and found one or two retailers who were just plain defiant who had hundreds of dozens of Tris-treated goods on their shelves by August after they had time to clean their shelves.

That is not what happened. They assiduously investigated, looked and looked, and in the case I am familiar with, they found 7 garments in a total of 10 stores; they brought a lawsuit, and declared this retailer was a terrible law violator.

I think that is unfair. It is fair to say when you have cleared yourself of all but seven garments, you have done everything the law ought to require, everything an agency should respect, there was no evidence that the retailer wouldn't have removed them if they were asked. But they weren't given that opportunity for voluntary compliance, and instead, that retailer and six or seven others were sued, accompanied by the usual fanfare of press releases from the Commission, making it sound as though they were protecting the American public from horrible dangers.

I am not arguing about whether Tris should have been banned. That is not the point. The point is, that kind of enforcement policy where the retailer is picked on for doing things almost impossible for a human being to avoid, 7 garments in 70 stores, is simply not the kind of law enforcement that this committee ought to be seeking or approving from the CPSC.

Now that you are in the process of considering the agency's reauthorization, I am sure that one of the things you will want to consider is whether the Commission is spending the money allotted to it wisely and effectively and fairly.

Now, apart from the unfairness to the retailers, in being picked on in the manner I described, that is simply poor public policy. It does not make sense to spend investigative resources, law resources, Commission resources generally to prosecute six or seven retailers for trivial violations.

That money and those people, money could be spent more wisely, the people could surely spend their time more productively, so not only from the point of view of a misuse of the power of the Federal agency, but also from the point of view of a wise expenditure of the public money, I consider the events of last summer to be extremely unfortunate.

Now, the Commission has occasionally taken the view they have to do this, somehow there is some magical requirement that tells that because they may view a retailer, they must sue a retailer.

I think that the error of that position is obvious on its face. Nothing in the statute requires them to go out and pick on retailers. So I would hope when the commissioners appear before you, and you conduct your legislative oversight activities throughout the year, you will look very closely to see whether the retailers are being harassed and whether the Commission is appropriately spending the authorization and appropriations that are allotted to it.

That is the burden of my remarks. If you have any questions, I would be happy to answer them.

Senator FORD. You were very fluent with your burden, so you must be doing an excellent job in your position. Nancy, your suggestion, in your prepared remarks, that the Commission should have a retail merchant on its advisory council, I think is well taken. You have made that suggestion to the Commission?

Ms. BUC. We have. The Commission has chosen for whatever reason to put on its advisory committee, very often, people with technical expertise. That is certainly understandable.

Much of the work the Commission does is technically oriented, but for the kind of problems I have talked about today and for other kinds of problems that are sure to arise, I think the Commission would be well advised to put on its advisory council, both the Product Safety Advisory Council and Flammable Fabrics Advisory Council, merchants who know how stores operate, and how the things the Commission is going to do will really work in real life.

While the technical people are, of course, invaluable on certain issues, they don't have the broad experience senior executives do have. We are hoping the Commission will see fit to put those kinds of retail senior executives on their advisory council this year.

Senator FORD. I guess we could call this practical expertise rather than technical expertise.

Ms. BUC. I think that is right. Seat of the pants expertise.

Senator FORD. Well, I'm not sure I want that kind. Does the National Retail Merchants Association support the reauthorization of the Commission for 3 more years?

Ms. BUC. The association takes positions by vote of the members, and while the Tris-related information I gave yesterday was voted on by the association, but they haven't had a chance to do so on the question of the Commission. If asked so, they would, but I don't have any authorization to say one way or the other.

Senator FORD. Your judgment would be that they would approve it?

Ms. BUC. I would think so, as opposed to having the agency fragmented so they would have to deal with four or five different agencies. I think the point Mr. Knox made earlier, one of the things that the business community needs to comply with laws is consistency and constancy, instead of the constant—like the zigzag on Tris I described.

I think it would be much more difficult for a retailer who has so many different kinds of consumer products to deal with FTC here; I would guess that the retail community would prefer to deal with a single agency if possible.

Senator FORD. I thought the representative from Sears made an eloquent statement on where you could start your procedure and know you are following through.

Ms. BUC. It is very important to be able to plan ahead.

Senator FORD. Nancy, with the benefit of so-called 20-20 hindsight, what do you believe would have been the proper regulatory strategy for the Commission to follow in the area of Tris?

Ms. BUC. First it is very clear that by waiting for almost a year after the Tris problem was first called to their attention, and then having to hurry up, that the Commission made a really fatal mistake. If you think back to what happened last April, the pressure started to build and build and all of a sudden the Commission was compelled to move so quickly no one had time to think through what was being done. I think it is very difficult to anticipate exactly which problem is going to turn into a Tris.

On the other hand, there have been considerable pressures from various environmental and consumer groups, so that I think some planning on the Commission's part and better use of the year that was allowed to lapse between the problem being called to their attention and taking action, would have helped.

Second, the Commission has refused to face up to the fact that the laws make requirements of them that they have to meet. I find, my own view, simply as a lawyer, is that the Commission has chosen to take chances on important public policy questions instead of complying with the law.

Now, there has been a lot of criticism of Food, Drug, and Cosmetic rulemaking. It is complicated, but it strikes me the Commission would be far better advised to jump through the necessary hoops and stop getting reversed. If it doesn't like the hoops it has to jump through, it ought to come up here and ask the committee and the Congress to amend the laws, so they suit the Commission's purposes.

But all too often, they have decided to ignore the laws they don't like, get slapped down by the courts, then we are right back where we were before with no action being taken. I suggest to you that agency needs a little better decent regard for the law.

If that means listening to their lawyers on occasion, and sometimes doing things a little more slowly, so when they get finished they get done and done right. I think that would be a good step in the right direction.

Senator FORD. Talking about quality instead of quantity.

Ms. BUC. That agency is characterized by a distaste for law and lawyers. That is not uncommon in our society. Time magazine looks at this this week.

But if the Commission wants its actions to stick, it has to take account of the fact that its actions will be reviewed by courts in light of the applicable law and taking into account the advice of its lawyers, getting more lawyers, if it needs them, so it can concentrate on the legality of its actions that is just as important in the long run as what the standards do.

If it gets overturned by the court, it won't work.

I think the Commission would be well advised to start paying more attention to their lawyers.

Senator FORD. I think the Commission's record in court substantiates your statement. With respect to the Tris ban, do you have any estimates of the financial loss of retailers as a result of this situation?

Ms. BUC. The situation is very difficult to assess, because the manufacturing community has behaved differently with different retailers and differently with different products, and so forth.

I think it is accurate to say that retailers lost an enormous amount of money in administrative cost, just trying to monitor what they were doing in getting those things off the shelf.

It took a considerable amount of manpower.

In addition, there are retailers, probably not too many, but there are certainly retailers that still have warehouses with Tris-treated goods in them, because they can't send them back. It is very difficult to quantify how many dollars we lost, but it is a cinch that the dollars lost by retailers are higher than they needed to have been, if the Commission had more evenhandedly enforced the law.

Senator FORD. Mr. Donaldson made a very interesting comment a moment ago. To your knowledge, are there any members of your association currently exporting Tris-treated garments?

Ms. BUC. Not to my knowledge. Most retailers would prefer to return those goods to their suppliers and try to get their money back. I would, if I might, like to comment on the question of what the economic incentives are with respect to exporting. I don't know of any NRMA member or any of my other clients in other areas of endeavor who sit and plan whether or not they can export goods when they think about the safety of their products. I think that most people try to comply with the law because it is right, because they know the law is there, and because any cost in being caught with noncomplying goods is too high.

It is disruptive. You don't have goods to sell.

Nobody sits and thinks, "Or well, maybe I can export it."

I just don't know of business people who behave like that.

So that when you are giving some consideration to what the statute ought to read, I don't think that you need to concern yourself half as much as Mr. Donaldson suggested with the idea there are a lot of people out there relying on the money they can recapture from exporting, taking a chance on violating the law.

Senator FORD. I didn't take it from him that people were violating the law. He indicated in his statement that it would take out the romance of looking in that direction, in case they did flunk the standard here, there would be that market.

Ms. BUC. I would venture to guess if you did a poll of business people who had been manufacturing Tris-treated products, remember it was lawful until last April, that if you could find three who even

knew that the Federal Hazardous Substances Act had an export provision, you would be amazed. Of those three, I venture none would interpret—I must say I found it extremely difficult to tell whether the statute permits exporting or not. I don't believe people make decisions on the basis of that kind of logic.

Senator Ford. Well, circumstances might cause them to look for another outlet.

Ms. Buc. After it happens, sure.

Senator Ford. In your testimony you indicate CPSC officials claim that the statutes they administer required the Commission to follow the strategy undertaken in the examples you cited. Did the Commission indicate what statutory language led to that conclusion?

Ms. Buc. Well, they seemed to have this theory of motivational compliance that somehow, if you sue enough retailers, you will draw the attention of other retailers to the problems and keep them from carrying unsafe products.

The problem with that is that the retailer is very rarely in a position to know whether the particular product which is being sold to him by his suppliers is unsafe or not. The retailer ordinarily tries to get guarantees under the Flammable Fabrics Act, under the Hazardous Substances Act that certify the products are in compliance with the law.

There is no deterrent to be had. The retailer is not trying to sell unsafe products. The idea of suing a bunch of retailers who aren't trying to engage in the things you are trying to deter doesn't make any sense.

You are not going to find the NRMA objecting to the kind of law sought where some retailer buys something to sell, an unsafe product. When they go around and pick on a few retailers, like Milea Sinclair Co., like they did, it doesn't make any sense to me.

Senator Ford. Does the NRMA have any comment on section 7, the offeror process.

Ms. Buc. We haven't been involved in that process. The retailers by and large are recipients of products which come from those who have much more active day-to-day involvement with product safety standards.

Individual NRMA members who are importers or private labelers are sometimes involved, but as a rule, we are less involved, largely because retailers buy goods which manufacturers are much more familiar with.

Senator Ford. Wouldn't it make sense, Nancy, that those who are at the end be interested in what they are receiving? It seems to me, we talked earlier about practical expertise, and you suggested that retailers and retail merchants be on the advisory commission.

Wouldn't it make sense that they get into the offeror process and have some input?

Ms. Buc. Let me respond to that in two ways. I don't mean to suggest that retailers are uninterested in the quality or safety of the products they receive.

Obviously, the whole merchandizing process requires decisionmaking about whether the products that you are buying and intend to sell to consumers are good products, the kind you like to have associated with your store.

But on the other hand, it is very difficult for retailers to be fully cognizant of the details of the safety of all the products they sell.

Most of the products with which the Commission has been involved in standards making thus far are not products which would ordinarily retail, product swimming pool slides; matchbooks are, but they are not the kind of thing you think of in the mainstream.

I think where retailers might be involved, and have been is the standardmaking under the Flammable Fabrics Act, where they do have intimate knowledge of the characteristics of the product and have been very much involved in that kind of standardmaking.

If the Commission turns its attention under section 7 to those kinds of products, I think it is quite likely NRMA will be more involved for just the reasons you suggest.

[The statement follows:]

STATEMENT OF NANCY L. BUC, NATIONAL RETAIL MERCHANTS ASSOCIATION

Mr. Chairman, Members of the Committee, my name is Nancy L. Buc. I am a member of the law firm of Weil, Gotshal and Manges, and I appreciate the opportunity to appear before you today on behalf of the National Retail Merchants Association.

NRMA is a non-profit voluntary trade association whose approximately 3,500 corporate members operate more than 35,000 department and specialty stores throughout the country. About 75 percent of NRMA's members have annual sales of less than one million dollars. NRMA members sell a wide variety of products regulated by the Consumer Product Safety Commission under the Consumer Product Safety Act, the Flammable Fabrics Act, and the Federal Hazardous Substances Act. For that reason, NRMA and its members are vitally interested in the future of the Consumer Product Safety Commission, the subject of this series of hearings.

With two new Commissioners and the prospect of a new Chairman, we hope that this is a time when the Commission will listen carefully to constructive criticism, and will begin to formulate new policies which will allow it to go forward in carrying out its important mission of protecting American consumers from unreasonable risks of injury from consumer products.

From NRMA's point of view, an important question about the CPSC's future performance is whether it will continue its past practice of using retailers as targets of convenience instead of developing enforcement programs which will stop problems at their source—at the manufacturing level. On too many occasions, two of which I will discuss below, the CPSC has behaved as if retailers were the cause of a problem, when in fact they were really the victims of their suppliers.

When a safety problem is spotted, it is ordinarily preferable for the CPSC to work with the manufacturer to determine whether the problem is serious enough to warrant corrective action, and, if so, what action to take. Because the manufacturer usually has far more information about the product than any retailer, this approach is far more effective. And because there is usually only one, or at most a few manufacturers, whereas there are often dozens or hundreds of retailers selling the product, policing compliance is far less expensive at the manufacturing level than at the retail level. At a time when this Committee is deliberating over the amount of the CPSC's reauthorization, we believe it will want to take into account every possible means for assuring that the Commission's dollars and personnel are used wisely, effectively, and fairly.

Let me emphasize that I am not arguing for a license for retailers to violate the law. The retail community is fully cognizant of its obligation to comply with the Consumer Product Safety Act and other laws enforced by the Commission, and expends much time, energy, and money in monitoring its conformity with them. I am urging that retailers should not be sued for technical or minor violations of the law when they have exerted maximum efforts to comply, nor should they be subjected to the heavy adverse publicity which the Commission has sometimes inflicted upon them for technical or minor violations.

Two examples will illustrate what I mean, one the recent Tris situation, the other a case under the Flammable Fabrics Act which is now pending before the Commission.

Almost a year ago, the Consumer Product Safety Commission issued a ban on Tris treated children's sleepwear and fabrics. Beginning at least with the announcement of the ban last April,¹ retailers began to try to clear their shelves of Tris-treated products. Significantly, virtually every retailer continued its efforts even after the ban was overturned by a court, and despite the enormous confusion generated by the series of cases in the District Courts and Courts of Appeals in the District of Columbia Circuit and the Fourth Circuit. Equally significantly, these retail efforts to cooperate were continued despite the fact that many suppliers were ignoring the ban and, in some cases, were actively refusing to cooperate with retailers in identifying which products were Tris-treated.

My purpose here is not to criticize the manufacturing community, for the CPSC's Tris tactics certainly raised serious procedural and substantive questions which merit the careful attention they have received in the courts. But I do want the Members of this Committee to recall that retailers did cooperate, as best they could, with the CPSC's efforts to remove Tris-treated products from the market place, while many of their suppliers were actively contesting or passively ignoring the recall program.

After several months of this state of affairs, the Fourth Circuit declared that the April ban was inoperative, but ruled that the Commission was free to bring injunctive cases to establish that Tris is hazardous and that products treated with it must be recalled. Armed with this mandate, what did the Commission do? Did it begin a rulemaking proceeding to establish a general standard of conduct? Did it bring a test case against one or more manufacturers? Not at all.

In August and September, it sued a number of retailers. And for what? Did it seek out those retailers who had large quantities of Tris-treated goods and who could therefore be inferred to be defiant of the Commission or unconcerned with the public welfare? Apparently not, for in several cases with which I am familiar, the net haul of the CPSC's investigation was a handful of garments for an entire company, with as few as one or two garments in each of only a few stores.

On the basis of that kind of evidence, these retailers were made the subject of lawsuits in Federal Court, and were painted in the Commission's press release as menaces to the public health and safety.

It is hard to avoid the conclusion that the Commission, which had failed to sustain its ban in two different courts, and which had been much criticized for its poor performance in the Tris situation and other programs, simply decided to try to reverse its loss of face by lashing out at a few convenient victims.

They did this even though the retailers which were sued had obviously cleared their shelves of all but an occasional garment which a clerk had missed—perhaps after the garment had been returned. And the Commission did play up the press angle, even though retailing is a very competitive business, and law suits and press releases accusing retailers of unsafe practices can be very harmful to a retail company's reputation.

In my view, the Commission's Tris cases against retailers should be seen clearly for what they were—an attempt to make the Commission seem like a vigorous safety agency at a time when, in fact, it had no real Tris policy at all.

Just last February, after nearly nine months of inaction, the Commission finally brought suit against some manufacturers. Apparently, the Commission believes this belated effort should still any criticism of its August attacks on retailers. Certainly, retailers hope that the Commission will be able to enforce the law against their suppliers, so that the suppliers will finally repurchase Tris-treated goods and otherwise carry out their obligations to retailers. But this action, however desirable, should not be allowed to obscure the main issue—those retail cases should never have been brought at all.

A second situation to which I would like to draw the Committee's attention arose from the sale of some allegedly flammable sportswear tops by a company called Milea/Sinclair. The Commission obtained a consent order against Milea/Sinclair which required that company to recall from retailers the offending sportswear tops. Here again, the vast majority of retailers made substantial efforts to locate the tops and to return them. Nonetheless, in a follow-up at the retail level, the Commission brought enforcement actions against a number of retailers, all of whom had, to the best of my knowledge, sought to cooperate. For example, in the one reported case, a retailer identified and removed from sale some 164 garments, but the Commission brought suit on the basis of 5 gar-

¹ Many retailers had anticipated the Commission's action and had begun to return their stocks of Tris-treated goods before the April ban.

ments which the retailer had missed. Significantly, those five garments actually passed the appropriate flammability standard, and the question of whether these can possibly be a law violation for selling complying goods is therefore an issue in the case, which is now pending before the Commission. But even if those 5 garments had failed, it makes no sense to have an aggressive enforcement policy against retailers who, despite their best efforts, miss an occasional garment in the process of clearing their shelves. Such a policy wastes the Commission's scarce enforcement resources on retailers who are trying to comply and who would certainly remove the last 5 garments from sale voluntarily. And it subjects the retailer to an undeserved round of publicity.

In summary, NRMA recommends that the Commission reconsider its policies with respect to retailers. Retailers sell hundreds and thousands of different products, and cannot be experts on the safety characteristics of each of them. Thus, the Commission should recognize that retailers must depend on their suppliers to provide safe products, and are not in a position to police the marketplace.

In discussing the Commission's enforcement posture with CPSC Commissioners and staff, retailers have sometimes been told that the law somehow requires the Commission to take the kinds of actions it took in Tris and Milea/Sinclair. In fact, none of the laws enforced by the Commission mandate any particular enforcement targets. As do virtually all such statutes, they leave the agency free to devise an enforcement strategy which the agency believes will be effective and fair. Thus, I hope the Commission will recognize that it may, if it wishes, adopt the suggestions NRMA has made today.

I am sure that NMRA's members would be pleased to meet with the Commissioners and the CPSC staff to discuss their willingness to cooperate in mutual efforts to improve the safety of the marketplace. In addition, NRMA suggests that the Commission add to its Product Safety Advisory Council and its National Advisory Committee on the Flammable Fabrics Act retail merchants who can provide the Commission with continuing insights and advice on how retailers operate, what their needs are, and how the Commission's policies affect retailers. Neither of these advisory committees now has such retail representation.

Thank you.

Senator FORD. The vote is on. We have one more witness that I very much want to hear this morning, and we will recess now for 15 or 20 minutes, just as long as it takes to get to the Senate Chamber and vote.

I will be back.

[Recess.]

Senator FORD. May I have the attention of those in the room.

Our next witness this morning is Baron Whitaker, president, Underwriters' Laboratory, Inc.

Mr. Whitaker, we are delighted to see you this morning and we apologize for keeping you waiting. We appreciate your effort to get here, too. Maybe the airlines will make a little profit off this hearing.

STATEMENT OF BARON WHITAKER, PRESIDENT, UNDERWRITERS' LABORATORIES, INC.; ACCOMPANIED BY HENRY COLLINS, VICE PRESIDENT OF GOVERNMENTAL AFFAIRS

Mr. WHITAKER. Thank you very much, Mr. Chairman.

Senator FORD. Will you identify your associate.

Mr. WHITAKER. I am Baron Whitaker. With me this morning is Mr. Henry Collins, who is vice president, governmental affairs. He is our Washington representative and he tries to keep me informed of things that are of concern to Underwriters' Laboratories going on in Washington.

Senator FORD. You have a very detailed statement this morning, a very good one. If you want, we will put it in the record if you would like to hit the highlights, or use whatever procedure you would like, Mr. Whitaker.

Mr. WHITAKER. I think I would prefer to go through it.

I may leave out some points here, but think that it hangs together a little better if I do not try to improvise too much.

Senator FORD. That is perfectly all right and you may proceed.

Mr. WHITAKER. Thank you.

Underwriters' Laboratories is pleased to respond to the committee's invitation to appear before this subcommittee in oversight hearings concerned with the operation of the CPSC.

UL has from the beginning tried to implement a policy of cooperation with the Commission in the belief that voluntary actions in the private sector, when supplemented by necessary mandatory actions in the public sector, would bring about the optimum cost/effective benefit for the consumer in the product safety area.

This is still our belief and we hope that our comments today would be viewed from a constructive rather than from a negative standpoint.

For the record, UL is an organization that has been in the product safety testing and evaluation business for almost 85 years.

Our findings are widely recognized by departments and agencies of the Federal Government, jurisdictional authorities at State and local government levels, consumers and users of products, insurance interests, specifiers and others.

Over the years, as an adjunct to our safety testing and evaluation business, we have developed and published over 400 standards for safety. There are 43 persons on UL's staff who are assigned full-time responsibilities for standards development, while an engineering staff of approximately 925 persons are available to provide specialized knowledge as required.

We have observed with keen interest the Commission's role in implementing the Consumer Product Safety Act and, particularly, the experience of the CPSC in the use of that mechanism—section 7—in the act which deals with the development of consumer product safety standards. Our prepared remarks today are concerned solely with this aspect of the Commission's operation.

It seems to us that in considering the CPSC operations there is a valid question as to how to measure the effectiveness of an operation or agency concerned with protection of the public in its use of consumer products.

In my view, a valid measure is not achieved by the size of that agency's budget, nor by the number of personnel slots allotted, nor by the number of legal actions in which it is involved, nor by the number of mandatory standards which it is enforcing.

The real measure of the effectiveness is how many lives have been saved, how many injuries have been prevented, and whether or not that agency's resources have been applied in the most cost-effective manner.

Obviously, it is very difficult to get hard valid data by which these criteria can be applied in measuring effectiveness and contribution.

I am inclined to believe that one of the most effective contributions to increased consumer product safety has resulted from the Commission's actions in having over 7 million products recalled, and, subsequently, modified so that the public would not be subject to the hazards identified in these products.

An equally important contribution, in my view, has been the stimulus that the Commission has provided to the private sector in making that

sector more aware of potential hazards and thereby pinpointing areas in which consumer products can be made safer, while giving due consideration to the potential increased costs which normally accompany inclusion of additional safety features.

This increased awareness has resulted in improved standards which have influenced significant changes in product design, and in better caution and warning labels, while improved quality control procedures have provided for increased safety in the use of consumer products.

Whether this Commission has performed better or worse than other regulatory agencies during their early years will, of course, depend upon the criteria used in making that judgment.

Since the hard data are not readily available on lives saved, injuries prevented, and physical suffering avoided, there will, undoubtedly, be judgments made on the basis of perceived expectations. It may be that some of these expectations were unrealistically optimistic.

High expectations of injury reduction could have resulted from the use of a very large number to describe the size of the national consumer product injury problem. The basis for this national injury figure was not publicly revealed, and, in the early days of the Commission, little or no attempt was made to differentiate between injuries "caused" by products versus injuries "related" to products.

High expectation may have been influenced by pronouncements of the Commission based on its analysis of accident data and perceived product hazards without opportunity for challenge from parties outside the Commission.

Expectations may have been inflated by some of the analysis of accident data made by the Commission's staff which identified accident patterns as being primarily the result of product design, with insufficient consideration of product misuse or the impracticality of making products 100 percent safe under all conceivable conditions.

Certainly it was unrealistic to acquiesce to the concept that a valid product safety standard involving a variety of inputs could be developed in 180 days. The time required to produce a sound standard is dependent not only upon the technical complexity of the product, but, also is proportional to the number of interests which participate in the development process, and the nature of the procedures used in the standard's development. The more democratic the procedures, the longer the development process.

There is some basis for believing that the Commission may have overestimated what it would be capable of doing, and has, therefore, led some to believe that since it has not been able to fulfill a number of its publicized goals, that it has been ineffective, and that, accordingly, there must be something wrong with the mechanism available to it for achieving its congressional mandate.

The Commission has been criticized because it has not actually mandated a greater number of consumer product safety standards.

There is implicit in this criticism a belief that without question promulgation of mandatory standards is one of the best uses which the Commission can make of its available resources, and, therefore, not to have done so is indicative of poor performance, or suggests the need for changes in the CPSA to insure that a greater number of standards will be mandated.

Consumer product safety has been a concern of the private sector as long as there have been consumer products, and efforts to improve safety has been an ongoing activity for a great many years.

A joint study conducted in 1970-71 by a number of groups concerned with product safety led a number of us to believe that the potential for injury reduction via mandatory standards was of the order of 5 to 10 percent.

It could well be that the difficulty which the Commission has experienced in attempting to substantially upgrade some existing standards is because such changes cannot be justified on the basis of realistic reduction in deaths and injuries when balanced against increased product cost and reduced utility.

Historically, the concept now embodied in section 7 of the act was based upon a widely held belief that the primary expertise required for the development of sound consumer product safety standards resided primarily in the private sector, and that the private sector would, under the stimulus of threat of Federal domination of the standards development process, lend its best efforts to the development of standards which would effectively address unreasonable risks of injury that were documented on the basis of validity collected and analyzed accident data.

It was recognized that if the standard did not effectively address the documented risks, that the Commission would revise the standard.

In other words, what was created was an incentive system for the private sector that served the interest of consumers as well as the interest of industry.

In our opinion, nothing has occurred which causes us to believe that the concept embodied in section 7 is not still valid.

UL's intimate knowledge of the section 7 process is based upon our experience in 1975-76 as the offeror chosen by the CPSC to develop the proposed mandatory standard on TV receivers; as members of a committee concerned with the electrical and casualty requirements for lawnmowers as they were being developed under the auspices of Consumers' Union as the accepted offeror for developing the proposed CPSC mandatory standard for lawnmowers; and, also, as a member of the standards development committee concerned with the mandatory Christmas tree lighting standard, for which the National Consumers League was the offeror accepted by CPSC.

While our experiences in these activities left us with a feeling of something less than complete satisfaction, we still believe in the basic concept embodied in the section 7 procedures as having the best potential for producing effective mandatory consumer product safety standards at least cost to the taxpayer.

Despite our loyalty to the section 7 procedures, we agree that the process can be greatly improved and expedited by the suggestions contained herein and by substantially increasing the "up-front" work of the Commission prior to initiating the proceeding.

I think it is important in assessing the performance of CPSC that a distinction be made between the provisions of the Consumer Product Safety Act and the practices under which the provisions of the act are implemented.

It seems to me that in implementing the act some basic assumptions have been made which I hope the Commission would now see fit to

change in the interest of improving the cost/effectiveness of its operation in the standards development area.

One of the basic assumptions upon which the Commission appears to have proceeded is that the quality of a standard, including its practicality and ability to meet the legal test specified in the act, is primarily dependent upon the party who occupies the seat at the head of the standards development table.

Accordingly, the regulations which the Commission has issued in implementation of section 7 completely ignore that the content of a standard should reflect the dominance of opinions held by a balanced group of persons involved in the development process.

Rather, it leaves to the offeror the prerogative of presenting only his personal judgment and desires so long as he presents the views of others.

This practice appears inconsistent with the concept of requiring a balance of interests prescribed in other regulations of the Commission.

Another basic concept which appears to me to be open to serious question is that staff analysis of injury data and product performance upon which the commissioners make a decision with respect to existence or nonexistence of unreasonable risk of injury should not be open to challenge from the private sector.

Present practices are that no challenges can be made until the entire gamut of section 7 provisions have been exhausted, including the expenditure of extensive time and moneys.

Not until a standards document has been produced can the basis for the need for that document be challenged as provided in section 9 of the act.

If there is one area in the current act which requires attention, I would submit that it is this particular situation. Many of the difficulties encountered by offerors stem from the fact that the premise upon which staff recommendations proceed, and Commissioners' decisions rest, cannot be justified on the basis of existing data or data analysis when viewed by others outside the Commission.

Some difficulties have been encountered as a result of a Commission position that an offeror should follow a preconceived method in addressing the identified hazards.

In some cases, it has been impossible to determine from the Commission exactly what this method entails, and, hence, the offeror is left to guess what it is the Commission has in mind.

As the group responsible for enforcement of the standard, the Commission has a right to be concerned about the format and content of the standard.

The offeror, on the other hand, should be free to choose the method which he feels will be most effective in addressing the identified product hazards.

These methods should be fully disclosed in the offeror negotiations, and the Commission obviously could refuse to select any offeror whose proposed methods did not appear to have sufficient likelihood of producing a standard that adequately addressed the hazards.

In any case, the offeror should not have to guess what the Commission wants in the way of a standard.

Recently, legislation has been introduced which would give to the Commission the right to disregard the use of the basic provisions of the offeror process now stipulated in section 7.

Negating these provisions would require that two or three Commissioners—depending upon the number of active Commissioners—simply agree that it was in the public interest to do so.

The public interest is, of course, a very difficult and controversial subject in itself.

The proposed legislation further stipulates that the public interest may be considered on the basis of nature of the risk of injury, or that the staff is expert in product standards development, or that the staff is qualified with respect to certain types of injury, or in the interest of expediting the standards development process.

In none of the above-cited items is there any reason to believe that the standard produced would be less costly, more effective, or produced more quickly than one produced under the current section 7 procedures.

In addition, there is no basis proposed in the legislation for any challenge whatsoever to the Commission's decision that it is in the public interest to negate the section 7 proceedings.

About the only assurance which can be deduced from this proposal is that the number of persons currently on the staff would have to be increased by bringing onto the staff some of the experts in various product categories that now reside in the private sector.

There is also assurance that the dollar cost to the public for implementation of this new proposal would increase.

If the purpose of the proposed legislation is to replace "the offeror" with CPSC staff, then it would appear that the Commission's standards development process will very soon be dominated by that pattern and that the intent of Congress to provide an incentive system for standards development will have been circumvented.

In our view, the current Consumer Product Safety Act permits the submittal of an existing standard, but, to date, the Commission has not seen fit to accept an existing consumer product safety standard, but has insisted that the full gamut of section 7 procedures be run.

Except to require an opportunity for the public to challenge the need for a mandatory standard as discussed herein, we see no need for changes in the Consumer Product Safety Act to modify the current standards development procedures.

There is a need to modify practices and regulations which implement these procedures if the Commission wishes to improve its cost/effectiveness in the use of mandatory standards as a means of reducing unreasonable risks of injury.

In closing, I want to recognize that the Commission has, in our view, taken an important step forward in injury reduction by recognizing the potential of the voluntary standards system to contribute toward accomplishment of its mission. We hope that the Commission will very soon formalize its policy statement in this regard and will take the necessary accompanying steps to allocate sufficient resources to make that policy effective.

Mr. Chairman, in summary, I think what I have said is that if there is any proposals for legislation which we see would greatly influence the ability of the Commission to act responsively and make it more effective, would be really to reverse the order in which section 7 and section 9 appear in the act, and to make that process the opening process of the determination of the need of the standard, rather than to wait until it is all over, and then come up with; that is, do we really need it.

Thank you very much.

Senator FORD. Thank you very much, Mr. Whitaker. I have several questions and will not keep you too much longer. Do you believe that reauthorization for 3 years would be a reasonable period of time for the Commission to meet its congressional mandate?

Mr. WHITAKER. Yes. I support the 3-year concept. I am sorry I did not touch on that, but I had to write this paper about 2 or 3 weeks ago, because of a very tight schedule, and I do not believe that feature had surfaced at that time. I support the 3 years, and I think anything short of that would be completely unrealistic.

Senator FORD. You also indicate it is very hard to get any valid data to measure whether the Commission is being effective in saving lives and reducing or preventing injuries. Do you have any suggestions how the Commission might improve its performance in this area, that is, data, and other things?

Mr. WHITAKER. Well, of course, I based that statement on my own inability to do this in my own organization. We are quite frequently asked, "How do you know you are effective? How do you know what you have done?"

It is true that those kinds of data are not really collected. The data that is collected, of course, is the body data, injury data, and this type of thing. You have to kind of extrapolate from that. But you really accomplish in the way of prevention, I know of no real way to get that hard data along that line.

Senator FORD. Given the fact that it is difficult to prove that something is not happening, and that is what we are saying, as a result of the Commission's activities, Congress must on occasion rely on the opinions of experts such as yourself. How do you believe Congress should evaluate the Commission's performance?

Mr. WHITAKER. I think it is a judgment factor which you have to look at with respect to other activities of the same nature, where you have other Government operations and this type of thing, and what I have tried to say here was, that I thought that some of the difficulty may have come from expecting too much. Safety is not an exact science in which you can turn out so many units each day by spinning up the machines and this kind of thing. It is a very complicated process. I think the Commission has learned that. I think that a great deal of the things that the Commission is doing today, as some of the previous witnesses have pointed out, are not the kinds of things they were doing some time ago.

I think they have been on a learning curve. I think that they have found out that the business is considerably more complex. I would certainly hope in that evaluation that the Congress would take cognizance of the fact that we started up a new agency here, we gave it a very difficult task to do, and maybe the expectation which the proponents of the agency built up may have been a little bit oversold as to what it could do.

Senator FORD. A lot of people think that the learning curve is about to reach the top of the chart, and it is about time we began to see some results from the Commission; that we can have some actual accomplishments.

Mr. WHITAKER. I pointed out two cases that I thought were actual accomplishments of the Commission. I thought the recall program, the modification, was something that was new or novel, that came from

the automobile industry per se, and it has some drawbacks, but I thought that had been a substantial gain in product safety.

Certainly the impact of the Commission upon making all of us, including the consumers, more aware of safety, has certainly been a substantial gain. What the Commission has done in the way of influencing standards in the private sector, quality control procedures, choice of materials, product designs, is something that you cannot put a figure on. There is no way you can do that?

As a matter of fact, I am a little surprised that the Commission has not itself tried to publicize that a little bit more, as one of the things, I think if it had tumbled—if it had used its abilities to publicize this development as a contribution, that might have turned some people's thinking in another direction.

Senator FORD. We had testimony recently, I guess it was in our auto-repair hearings, that those who retread tires are required to keep a record, and that record is primarily, for recall. Well, each tire that is retread is a product within itself, and the paperwork has become horrendous, and in the 10-year period they have been keeping the records, there has never been a recall of a retread tire. I think that is a little frivolous. I think we can look at eliminating that sort of thing.

But in your opinion, has the quality of voluntary standards increased during the life of the Commission, as a result of them just being there, the fact that they have the muscle to flex?

Mr. WHITAKER. I think there is no question about it, it has.

Senator FORD. The Commission voted last week to cooperate in the development of a voluntary standard for chain saws. What is your opinion of that decision?

Mr. WHITAKER. I am not familiar with the details. I believe any procedure wherein we can take full advantage of the voluntary effort to achieve an improvement in the safety certainly merits my support. Underwriters' Laboratories, with the Power Tool Institute, pioneered that idea with the Commission in the case of the hedge trimmer, and we are glad to see that the Commission is giving this greater opportunities to flow.

Senator FORD. Under what circumstances do you believe it would be appropriate that the Commission abandon the voluntary effort and proceed to a mandatory effort on chain saws?

Mr. WHITAKER. I think if it is quite apparent that they—I have a little trouble with the word "abandon" here, because I do not know the sequence of what you have in mind, but let me say if there is a process going on in the voluntary private-sector standards system and that process is being looked at by the CPSC as an alternative of the development of a mandatory standard, I think the point at which the Commission steps in and says, "This is a first-class boondoggle; there is no sincerity here; there is ineptitude in what you are doing," and this kind of thing, then I think the Commission's action would be in concert with the basic idea of creating an incentive system. OK, the industry had its chance, and it blew it.

Now the Commission comes on with its mandatory aspect, with its muscle, to do it.

Senator FORD. I share your belief that the Commission should not be overly criticized on the basis of a small number of mandatory standards that it put together. But I am concerned that in certain circumstances it may be appropriate for the Commission to develop a standard

without utilizing the offeror process. Is it your belief that there are no circumstances under which this approach should be taken?

Mr. WHITAKER. I would hate to use those words, "There will never be one," but I cannot conceive of any at the moment. Whenever we have a hazard situation identified, there is always a product somewhere associated with it within the jurisdiction of this Commission. So that there must somehow or other have been some expertise, some standards somewhere along the way.

I think one of the witnesses said this morning, if you take the process and dissect it into its time elements, everything that has to be done to produce a valid standard is going to take as much time for the Commission to do as if they are sitting at the head of the table than the private sector. Any substantial amount of time you can save is not there. So flexibility from the standpoint of time, I cannot see that as a real vital thing.

As I pointed out in my testimony, I cannot see the expertise in the Commission as being equal to the expertise in the private sector. You can bring in certain people from the private sector to improve the Commission's expertise in a particular product category, but to do it in all the product categories that there are—our outfit identifies about 4,000—and I think the Commission identifies about 10,000, so to have aboard experts on every conceivable thing is a tremendous undertaking.

Senator FORD. The consumers have been critical. One witness yesterday before this committee said that the private sector expertise outnumbered consumers two to one, that they were here representing their companies, and were not necessarily representing the protection of the consumer.

It is hard for me to believe that those representing industry were not there to try to develop a standard that would prevent the loss of life or injury. They say that it lends itself to the proposition that industry will have the money to send these people, where the consumer would have to pay out of his pocket, to come and be on one of these offeror processes.

Is there any suggestion where we might have some more input from groups like the National Association of Retail Merchants this morning? I think they ought to be in on setting standards. I think they have some practical experience, and it would be good to have. I just wonder if you have any way that we might get the so-called consumer involved, in addition to the industry's expertise.

Mr. WHITAKER. I think the Commission has taken some steps along that line, and in their own process for the development of standards, they call for a very substantial consumer representation on the Commission. They have gone so far as to indicate that the people must be technically qualified in certain categories, and I think they have reversed the policy which they had in the beginning, that was that they would provide no funds for consumer representation. In many cases I think that those funds might well flow to the employment of people having a high degree of technical expertise, to be balanced against the technical expertise of the manufacturer in the process.

Senator FORD. What I am trying to get to, Mr. Whitaker, is to improve the situation, not only to the benefit of industry, but to the consumer, and the flexibility I want for the Commission is very narrow, and I am not sure I have drawn the line.

Let's take cellulose insulation. Industry, more than the consumer, desires a mandatory standard as soon as possible. I had to revert to legislation in order to speed up the process, so that we might take a minimum standard which was based on the industry's own minimum standard, accepted by the Government, and then give the Commission a period of time in which to improve upon that minimum standard. Now, wouldn't Commission flexibility in circumstances such as that be beneficial?

Mr. WHITAKER. I think the procedures which are defined there now, in section 7-C, as I understand it, provide for the Commission to do just that now. They do not have to change the law. All they have to do is to get rid of the concept, that they cannot use existing standards and modify them. The existing standards I think, cover every subject which has been identified, with the exception of toxicity. In this situation there are existing standards.

Senator FORD. I hope the new Commissioners will take a more flexible view of what you are saying is actually there.

Mr. WHITAKER. I think it is there. There has been a view, and this view was enunciated early in the Commission's life that we cannot do that, because we may be robbing the public of a better standard so we went through the whole section 7 procedure. In my view, certainly, in a situation where time is an important factor, it may be a luxury. The complete standard which covers everything is not yet here. We keep improving the standard.

Senator FORD. Changing the product, too.

Mr. WHITAKER. That is right. And technology changes, and our concept changes, so if we keep waiting to get something which is the ultimate in every respect, we will keep waiting.

Senator FORD. I want to stay with cellulose for a moment, because I think it is a case in point. The Government has encouraged the use of this product by offering a tax credit. It is our information that over 600 new manufacturers have entered the market in the last 24 months, and reputable manufacturers of cellulose have no control over the product of these new companies. I think we all agree, but we have been stymied up to now, and even some of the Commissioners on the Commission now are of the opinion it will take a much longer period of time using section 7.

I just had to force the Commission into the position of taking the minimum and go on. That is the case where the Commission ought to have flexibility and it ought to be in the position to act instead of react.

I think with 600 new manufacturers in 24 months it is about time to start. I hope we might find something that will be pleasing to both sides.

Mr. Whitaker, one final question. Earlier witnesses today have discussed the problems of export of products that do not meet safety standards in this country. Would you care to comment on that topic?

Mr. WHITAKER. Well, I want to point out in that particular regard that the United States is not the only industrialized country in the world which has safety standards, that there are international standards, and there are national standards, and if the United States wishes to sell its products in foreign countries, they have to comply with those international and national standards the same as other countries have to comply with the consumer-product-safety and other local standards to market their products in this country.

It is not a situation that everything is free. It is not that easy to do, because there are other standards.

The other point I would like to make is that safety is not something which is monolithic. Different people have different ideas about safety, and the requirements of one country quite frequently are different from the requirements of the other. That is why international standards are so slow in coming, because the concept of safety is not one which is uniformly held. You cannot measure it quite that accurately, as you said earlier.

Senator FORD. I do not think the idea here is us versus them. What I think is, we have a standard that we set which will be somewhat higher than another country. If the product fails to meet our standard here, then they would have an outlet to sell it. I think that was the implication that was given by that witness, that we would not have the control over the total manufacturing, that if it failed ours, there would be an outlet for it.

Mr. WHITAKER. Implicit in that, of course, is the idea that ours is the one, the only, and there is no other. That is the point I wanted to get squared away. There are other standards in the world, and ours are not always accepted in other places in the world. There are others, also.

Senator FORD. There are a few farmers around town. They get up early, you know, to milk, cut the corn, and come to the Capitol Building.

The standard bothering the dairy farmers, they are sending powdered milk over here, "Do not feed to animals," because it might give them hoof and mouth disease, but we make ice cream with it. So they were not delighted with that at all.

We thank you for coming. You have been very important to the considerations of this subcommittee. I apologize to you for having to wait, but I hope you understand the procedure here.

Mr. WHITAKER. I appreciate the opportunity to be here, and I appreciate your kind and gracious remarks. Thank you.

Senator FORD. Thank you. That ends the meeting today. The subcommittee will stand in recess until 8 a.m. tomorrow morning, our final day of the hearings, and it will be held in room 235, Russell Building. The witnesses tomorrow are all the Commission members and its Chairman.

[Whereupon, at 12:04 p.m., the hearing was adjourned, to reconvene at 8 a.m. Thursday, April 6, 1978.]

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REAUTHORIZATION OF CONSUMER PRODUCT SAFETY ACT

THURSDAY, APRIL 6, 1978

U. S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE
AND TRANSPORTATION,
CONSUMER SUBCOMMITTEE,
Washington, D.C.

The subcommittee met at 8 a.m. in room 5110, Dirksen Senate Office Building, Hon. Wendell H. Ford (chairman of the subcommittee) presiding.

Senator FORD. Good morning, ladies and gentlemen. Today is our final day of hearings on the subject of S. 2796, a bill to reauthorize the Consumer Product Safety Commission for fiscal year 1979 through 1981. During our 2 prior days of hearings, the committee heard testimony from a variety of witnesses including consumer organizations, trade associations, standard setting groups, and individual consumers. Although they pointed to numerous shortcomings in the Commission's past performance and suggested how the Commission's future performance might be improved, they were unanimous in the belief that the Consumer Product Safety Commission should be maintained in its present form and reauthorized. Although it still has a long way to go, I believe the Commission is now in a position to move forward toward meeting its congressional mandate.

The primary focus of our hearing today will be the subject of the agency's reauthorization, but there are several other important areas I had hoped to cover in great detail.

In addition to questions involving the reauthorization of the agency, I believe it is important that we discuss the areas of standard development and chronic hazards. Because the Commerce Committee has an executive session at 10 a.m. in this room, several other important areas must be left for future oversight. I assure the Commission that vigorous oversight of the agency will continue as long as I am chairman of the Consumer Subcommittee.

A clear majority of the witnesses who appear before us in the last 2 days believe that the Commission should be granted the flexibility to bypass the offeror standard development process in appropriate circumstances. I understand that the Commission is now unanimous in the belief that some greater degree of flexibility is needed. I hope the individual Commissioners will be able to provide the committee with specific recommendations as to how we might attain that objective.

In the area of chronic hazards, there appears to be no clear consensus

as to what the Commission's future role should be in this important area. Because CPSC is a relatively small Federal agency with limited budget and personnel, it has been suggested that some thought should be given to transferring this enormously complex area to a Federal agency with greater resources. I recognize the fact that such a proposal is more easily said than done. I would appreciate the benefit of each Commissioner's thinking in this area.

Mr. Chairman, you may proceed with your statement.

STATEMENT OF HON. S. JOHN BYINGTON, CHAIRMAN, CONSUMER PRODUCT SAFETY COMMISSION; ACCOMPANIED BY BARBARA FRANKLIN, VICE CHAIRMAN; R. DAVID PITTLE; EDITH BARKSDALE SLOAN; AND SUSAN BENNETT KING, COMMISSIONERS

Mr. BYINGTON. We are pleased to have the opportunity to review the past and look at the future role of CPSC. I think the timing of this hearing is opportune. This is the first time in 2 years that we have had a statutorially complete five-member Commission. We are in the midst of the early stages of setting a fiscal year 1979 budget and operating plan.

In the past, Mr. Chairman, we may have had disagreements on a few specifics, arriving on the scene as we once did in the midst of turmoil at CPSC, but I don't believe we ever disagreed on the need for a Federal factor or presence in the marketplace or for the need to make CPSC effective.

The task of turning CPSC around is not easy. The agency, I believe, has made numerous changes and undertaken a series of initiatives, and only time will tell if they are successful. I agree with others who preceded us today that CPSC has given every indication that its age of infancy is over.

An objective look at the record would show an emerging record of regulatory action. Of the 25 scheduled programs, we met our deadline in 19 of them, with 3 of them early. It's true CPSC may not have turned out as some of our founders anticipated.

But its existence in the marketplace, its action under sections 12 and 15, its ability to order recalls and to stimulate and monitor voluntary standards development, its ability to take mandatory action if necessary, all contribute to improving consumer product safety.

We are beginning to be able to measure the beneficial effect of our actions on cribs, aspirin, and toys. With better baseline data, we should be able to measure more of the effects of our action in the future. Considering our significant preventive role, it's difficult to measure incidents that do not happen. We have taken actions, and they are outlined in the statement we have submitted to you under the categories of fire, electrical, acute and chronic chemical, and mechanical hazards.

We have done this because we believe it presents the best way of looking at the agency—by hazard category. You, as the oversight committee, can see what it is we are doing in the area of fire/burn or mechanical hazards. We can then begin to deal on a hazard basis rather than an ad hoc product-by-product basis.

Some answers need to be forthcoming with respect to the chronic hazard area and the offeror process. We will discuss that later, so I will

not go into details at the moment. Recently, it's important to point out, we have had significant wins and losses in the courts. On the win side, with Zipper rides, bicycles, and aluminum wire. Each of these have provided a more solid judicial base for our jurisdiction.

We have had losses with swimming pool slides and matchbooks. Each of these indicates an increasing level of burden on the part of Federal regulatory agencies.

We have also taken a series of steps to improve our overall productivity, such as our involvement with the IRLG—Interagency Regulatory Liaison Group—in dealing with chronic hazards, and a program management concept allowing us to act by hazard categories.

Other steps include our efforts in commissioning of State employees, and our delegation of authority to the area offices allowing them to take care of certain problems in the field.

I think that only time will tell if these changes can be successful. That's why we are requesting a 3-year authorization, which is essential to getting a realistic and final answer.

I would be pleased to answer any specific questions you have. At this time, any of the other Commissioners can make a statement if they like.

Senator FORD. Do the other Commissioners wish to make a statement before we get into questions? It's too early? The questions I think we must have up front before we get into any of the other questions is the legislation now pending. The reauthorization bill introduced in the House provides for a 1-year reauthorization of this agency. The bill before this committee provides a 3-year reauthorization, as requested by the Commission. I would like each of you this morning to explain for the record why you believe it is important that the Commission have a 3-year reauthorization, and what effect a shorter period might have on the agency.

Mr. Chairman, if you want to start in answering that question, and after you answer, then we will ask each of your fellow Commissioners to make a statement addressing that question.

Mr. BYINGTON. I will be brief. Basically, the points I wanted to make in the opening statement are directed to that question. I think, Senator, that the infancy of CPSC is over and we are developing a credible record. I think the changes we have made do provide a basis for future success, but I believe it's only possible to know if that is true if the agency is given a reasonable opportunity to succeed. I think a 3-year authorization is not inappropriate. It's the only way you will find out the final answer.

If this agency ends up with a 1-year or 2-year authorization, I'm afraid, particularly with 1 year, it would be in a holding pattern. It would be difficult to get good people; it would be difficult to start long term projects. It would not be a time frame within which we could find out whether the agency can deal with the problems it has before it.

Ms. FRANKLIN. Good morning, Mr. Chairman.

I believe a 3-year authorization is absolutely essential at this point. This agency, since its earliest days, has had many, many growing pains. Mistakes have been made. But there also are many accomplishments that we have to our credit as well, and some of these can be considered outright successes.

The early problems we encountered have begun to be solved—we have turned the corner in this respect. To reauthorize the agency for only 1 or 2 years at this point, when we are beginning to show success, is almost like cutting us off at the knees so we can hobble along again.

Frankly, I would prefer to have the agency disappear this minute than undergo something like this. Less than 3 years would demoralize the staff, not to mention the Commissioners. It also would make it difficult for us to achieve much in the name of consumer safety. It would have an unsettling impact on the marketplace. Further, I think if the agency's functions are parceled to other agencies, as some indicate, many activities are certain to get lost in the cracks and what has been accomplished is likely to go down the drain.

For all of those reasons, I believe a 3-year reauthorization at this point, is critical.

Senator FORD. Thank you, David?

Mr. PITTLE. Thank you, Senator, and good morning.

Reiterating what my colleagues have said, many of the criticisms leveled at this agency concern problems that have been corrected. That gives me confidence that we are on track in trying to accomplish the things Congress intended us to do and the very presence of this agency in the marketplace has had good effects. Anything short of a full 3-year authorization at this point would indicate that somebody does not care about product safety any more.

A 1- or 2-year authorization gives us a holding pattern. I think staff morale, which is beginning to pick up, would suffer a severe blow. We have five Commissioners now. We have our programs in place. We see what the goals are and what the achievements should be. For someone to come along now and say you can only have an authorization for 1 more year would result in people looking for jobs and not planning the research 2 and 3 years down the road. There would be a mad rush to get things done quickly and then the shelves would be bare in terms of the research needed to produce safety regulations.

I think we deserve the 3-year authorization that this agency needs to get its programs accomplished.

Ms. SLOAN. Good morning, Senator. I think it's a good morning.

Senator FORD. Let us say "morning." We can say whether it will be good or not later on.

Ms. SLOAN. I agree with my colleagues. A 3-year authorization would give the Chairman and Commissioners a chance to get the agency working like the Congress envisioned. Anything less than 3 years would not give us ample opportunity. With a 2- or 1-year authorization, we would have to stop taking petitions, those which would take more than 2 years. And I think Congress has a commitment to protect consumers, especially since there is no other agency with this exclusive and unique responsibility. This, too, has to be taken into consideration.

I think not only the staff but the Commissioners would be demoralized if we faced a 1-year authorization. I simply see the Commission going from bad to worse if this should happen.

Ms. KING. At the risk of repeating my colleagues, I think you can see from the group expression that all of us are here to make the agency work. Commissioner Pittle has said that criticisms are out of date. I would point out when I was asked to serve on the Commis-

sion I was asked by the White House whether I would make a commitment to serve a full 7-year term. It is somewhat of a surprise to see their interest in anything less than a 3-year authorization.

If there were an effort to begin to transfer the functions of the agency I think you would see a deleterious effect. The public would question the government's interest in and commitment to consumers. Even if you have a 1-year authorization or 2-year authorization, staff morale suffers, agency work product suffers, and in the course of any transfer process there would be a significant decline as OMB people shuffle paper and move boxes and employees on organization charts. I think that the interests of the whole consumer area would suffer with anything less than a 3-year authorization.

In terms of changes, I think a lot of progress has been made. But the changes yet to be made do take a long time to articulate publicly. Standards writing, as has become evident to all of us, is a more complicated and lengthy process than anybody recognized.

Finally, Edith made a point that is important. The public perception of Congress' commitment and the government's commitment to consumer welfare and to the regulatory experiment that the Consumer Product Safety Act constituted is undercut by anything less than a 3-year authorization.

Senator FORD. At the time you were being considered for this position by the administration was there discussion that the agency might be dismantled in a short period of time?

Ms. KING. No, sir.

Ms. SLOAN. Absolutely none, sir.

Mr. PITTLE. No.

Senator FORD. Can I assume that had you been nominated to this position for only 1 year, to preside over the dismantling of the Commission, you might not have accepted.

Ms. KING. We would have considered it in a different light. Someone said it was like boarding the *Titanic*. I commented that it was more like getting on the *Amoco Cadiz*: it was going to ooze out from under you.

Senator FORD. I think I understand.

Senator DANFORTH. Do not forget the *Queen Elizabeth*.

Mr. PITTLE. Senator, if the purpose, as I have read in the press, of giving us less than a 3-year authorization is to see whether the agency is going to live up to its expectations, then I submit that if you want to see the agency succeed you should not start off by tying one hand behind its back. If you really want to see how well the agency can do, you should give it a full blessing, full support and full funding, and then it will have a chance.

Therefore, I appreciate the legislation you have introduced.

Ms. KING. I think the series of hearings that you have had the last 3 days, the witnesses that have come forward and the colloquies that have occurred have done a great deal to flush out the accomplishments of the Commission as viewed by people on the outside. What it has done is bring forward a better case for the agency than we have been able to make for ourselves to date. I think the hearings have been effective.

Senator FORD. I have been pleased. Hopefully it will have some impact on the Commission's future. If I have had a surprise, I guess,

during the last 2 days, it is the apparent support from industry. We had eloquent statements of support yesterday together with certain suggestions. Basically we have had unanimous support for a 3-year authorization from all the groups that testified during the last 2 days. That indicates not only hope, but that there is an ability by the Commission, by its very existence, to make people think about safety. Manufacturers and consumers are both considering safety and looking for those things that might be hazardous.

I think the existence of the agency has made manufacturers think in this direction. I was pleased with the unanimous opinion, and I think that we hit a broad spectrum of support for the Commission.

Ms. SLOAN. If I could add a word, as the newest Commissioner, I have been here less than 3 weeks, I must say I have been moved by the momentum I have seen within the Commission and the desire to move forward. The forward movement has excited me and it has been more than I envisioned. I believe the Commission is rapidly changing, moving forward, and there is a great deal of hope.

I am enthusiastic about the future, if we have a future.

Senator FORD. I have a good many questions, Senator Danforth. Do you have questions you want to get into? We have until 10 o'clock, and then we have the executive session of the committee here. Do you want to proceed with your questions?

Senator DANFORTH. I would like to ask you some questions which could be lumped together under the category of how you get your information and what the basis is of making decisions and taking actions.

As I understand it, you are compelled by law to make a cost-benefit analysis; is that correct?

Mr. BYINGTON. Yes, sir.

Senator DANFORTH. Before you make rules.

Mr. BYINGTON. It depends on how you define "cost-benefit analysis." Section 9 of the act requires that we take a look at the economic implications of any action we contemplate, and it specifically spells out that we have to look at the impact of our proposed action on the cost, the utility, availability, convenience of the product, competition in the marketplace, and those types of factors.

Senator DANFORTH. How do you find out these things? How do you go about doing that? How do you determine the economic consequences or cost of a rule? How would you go about gathering information and opinions which provide a solid basis for determining the effect on competition, effect on cost, employment and so on.

Mr. BYINGTON. Basically, a study is done by people in-house, meaning our employees or people that we contract with to obtain that information for us. We have what we call an "umbrella" economic contract, that is renewed each year on a bid basis with a major organization. In the past couple of years, it was Battelle—now it is Kearney, also people fully in the business as professional data gatherers and analyzers of that type of data.

It depends on the nature of the product and project whether we utilize people in-house or whether we go outside.

Senator DANFORTH. How many economists do you employ?

Mr. BYINGTON. This is Joann Langston, associate executive director for hazard identification and analysis.

Ms. LANGSTON. We have 15 professional economists on the staff. About six or seven are senior level, and the remainder are midlevel economists. Generally speaking, when we look for information, we are not content with searching one source. What we attempt to do is behave as investigative analysts, seeking the same information from three or four sources, attempting to come to grips with the fact that there are differences of opinion on any particular economic impact or potential in the marketplace.

One part of the industry may think the rule is going to provide one effect; another part of the industry may feel differently. We attempt to search out all different sources of economic information and then analyze those and correlate them to give us the best predictive answer, if possible.

Senator DANFORTH. Do you have confidence that your cost-benefit analyses are sound?

Mr. BYINGTON. We have as much confidence as one can have regarding that type of data, recognizing that almost all of your sources are biased because they come from a particular point of view, which is proper and appropriate.

We don't go to one source, take that data and accept it on face value. In the marketplace you might have a series of different-sized companies. You might have different aspects from a retail point of view. You look around and try to pull the information together to see if you can't get a decent picture.

When the Commission receives the information and reads it, if any of us, individually or in a group, have questions about it, we may end up talking to other people about it in public hearings. We solicit comments, and the information is exposed as public data, so people have an opportunity to see what is there, to comment and write to us about it.

We get very many comments relating to our interpretations of what the costs are going to be.

Senator DANFORTH. In addition to waiting for information to come in, you also contract with a professional—

Mr. BYINGTON. Our contract is with A. T. Kearney now. We have a major contract, plus we can use individual contracts. All of that data is pulled together and analyzed and presented in a package to the Commission. That data is public data, so we are not limited to the number of sources that we use in gathering it; we also receive subsequent comment on it.

Not only do you get questioning by the Commissioners, but you may have other people in the public who would raise questions regarding the validity of certain positions that are taken.

Senator DANFORTH. You are satisfied that the cost-benefit analyses you make are not snap judgments, or off the top of the head, but that they are based on hard evidence and on sound, economic thinking.

Mr. BYINGTON. It is fair to say that they are based on the best evidence that we can get, and that other people are willing to give us. One of the arguments I have made to industry for a long time is if they allow regulation to take place in a vacuum, they will get the regulation they deserve, which may be bad regulation.

Industry has the best data. I can encourage them to give us this data as it relates to the program we are looking at, because only then can we deal with the specific issues. If industry says that a certain action would be a disaster, ruin the industry, or would close down 30 percent of it, then my answer is: OK, show me, show us where. Give me facts and figures.

In the past few years we have seen a greater willingness on the part of certain segments of the industry to provide that type of data.

Senator DANFORTH. It is my understanding that there has been some case law in the past year or so. One was the *Aqua Slide* case.

Mr. BYINGTON. Yes, sir. The two recent ones are the *Swimming Pool Slide* case and the *Matchbook* case.

Senator DANFORTH. These had to do with what, and what was the holding?

Mr. BYINGTON. Our General Counsel is here, and he can talk about it from a legal point of view. To summarize, what is being said is that there is—depending on the nature of the regulation, the potential costs of that regulation, and how effectively a regulatory agency can show benefits—an increasing burden of proof on the regulatory agency to be able to show that its action has some balancing factors, and that the record that it is using to achieve those purposes has been available to the public for some scrutiny and comment.

Senator DANFORTH. It holds that substantial evidence is required to support a rule.

Mr. BYINGTON. One case relates to the fact of cost. If there is a potential cost and a questionable area of benefit, where is the substantial evidence to show benefit, and where is the evidence on cost being what we say it is.

One of the problems in the swimming pool slide case was that some of the economic data and other data used to support the position had not been made public for comment prior to our using it as a basis for the regulation.

They believed not only should we have substantiation in terms of cost and benefits, but that that substantiating data should be available to the public for them to see before we use it.

Senator DANFORTH. It is not an old case. It was decided by the 5th Circuit Court of Appeals, March 3, 1978.

Mr. BYINGTON. But it was an old standard.

Senator DANFORTH. Pardon?

Mr. BYINGTON. It was a standard put out 3½ years ago.

Senator DANFORTH. My understanding is that it held that your rules had to be supported by substantial evidence; is that correct?

Mr. BYINGTON. If you leave it at that point, that is no more than a restatement of the law.

Senator DANFORTH. The court said the record in this case is a jumble of letters, advertisements, comments, drafts, reports and publications which run for almost 2,000 pages, without an index. The court was critical of the record in this case, wasn't it?

Mr. BYINGTON. Yes, sir. That was the point I was trying to make when I said that the court concluded that there was inadequate evidence to show that the warning signs in the ladder chains would reduce injuries, and that the economic information relied upon was not necessarily reliable because it wasn't subjected to public scrutiny.

Senator DANFORTH. It said it couldn't determine the weight given to various factors you examined; is that right?

Mr. BYINGTON. Yes, sir. There are significant differences in the way we presently regulate and the way we were regulating at the time that standard was put out, 3 or 4 years ago. That is probably in 1975.

Senator DANFORTH. It is fair to say that this case is kind of a blast at the agency.

Mr. BYINGTON. I think it is fair to say it is a blast at the way the agency was operating in 1975.

Senator DANFORTH. Do you believe things have changed since 1975?

Mr. BYINGTON. Significantly.

Senator DANFORTH. And that now the record is in better shape before you promulgate rules?

Mr. BYINGTON. The record is in better shape. Whether or not they will continue to withstand court tests is an interesting question, and one of the reasons we have judicial review.

Two particular questions will be faced as we move down the road and as the courts continue to potentially—on the basis of these cases—up the ante in terms of what they consider to be substantial evidence.

One is: Are they going to require substantial evidence on each and every segment of a regulation, or are certain interlocking segments of regulations going to be able to stand on their own because of their interlocking nature and professional and technical expertise?

Second, when you get to the injury data, how much injury data will be required, depending upon the economic costs? If the courts continue to put a lot of emphasis on injury data, the agency will find itself in the unfortunate situation of having to rely on "body-count." That would be very, very limiting on this agency's ability to take preventive actions.

Senator DANFORTH. But what I am getting at is there has to be some basis for decisions that your agency makes.

Mr. BYINGTON. There should be basis for the decisions that the agency makes, and that basis should be available to the public for their scrutiny and comment. We should review those comments and deal with them before we proceed. It wasn't done in that orderly fashion in the early stages.

Senator DANFORTH. There has to be a well-reasoned cost-benefit analysis.

What is the national electronic injury surveillance system? Could you tell me what NEISS is?

Mr. BYINGTON. NEISS is the backbone of our injury data collection system. It is a computerized system that collects data on product-associated injuries from 120 hospitals across the United States on a daily basis.

This system has recently been redesigned to take into consideration demographic changes and types of hospitals. It will be implemented in 120 hospitals in the next few months.

These reports indicate that an injury occurred and that a consumer product was involved. Out of that data we do selected in-depth investigations, or IDI's. We do these one selected cases, and those reports are the ones we use as the basis for our actions.

We are trying to do in-depth investigations on an extrapolatable basis. Right now our raw data is extrapolatable, but the in-depth

investigations are not. We want to be able to do a better job in relating the exact cause of injury to a product.

There are a couple of problems with the NEISS system. It is not totally complete. You have in the fire/burn area and in the shock area some specialized clinics. We have made arrangements and are in the process of improving our ability to collect shock data and burn data.

Senator DANFORTH. Burn data has to do with a particular area of emphasis of yours.

Mr. BYINGTON. Yes, sir. The other area is deaths. If the person is killed in the incident, then it is unlikely in most situations that the party goes to the emergency room. We have made arrangements with the coroners to receive death certificates.

It is through this mechanism that we have discovered such situations as the CB antenna situation where people have been killed when a CB antenna comes in contact with a high-intensity wire. It hadn't shown up in the emergency-room data because the victims were not taken to the emergency room.

Senator DANFORTH. This is integral to your operation. This is related to cost-benefit analysis, isn't it, what areas of emphasis you get involved in, what kind of rules you have, whether the rules are supported by good evidence?

Mr. BYINGTON. It is related to everything we do. If you look at the final report of the National Commission on Product Safety, which was the underpinning for the establishment of this agency, there were two primary purposes why the Commission thought there should be this agency. One, they thought the Federal Government had the responsibility to collect injury data; and, second, to have an umbrella agency such as ours to deal with it. This injury data is extremely important to our mission.

Senator DANFORTH. In your answer to written questions I have submitted to you, you say: While we agree it might be highly desirable to vastly expand the information gathered through the NEISS system, the Commission does not have the resources to do so.

Does this mean that there is some problem in this integral part of your operation?

Mr. BYINGTON. No; what we are saying is that we are working on a scientifically acceptable statistical basis. It is limited to between 130 and 140 hospitals. Although it might be nice to have a situation where that number could be vastly expanded, that doesn't make economic sense at this time.

I think that as we continue to improve our collection capability, and as the redesign is implemented over the next 18 months, we will find it acceptable. One thing we are doing that is important both from a Federal point of view as well as from the data collection point of view is the relationship we are developing with other Federal agencies in data collection.

We are working with the National Highway Traffic Safety Administration, EPA, and others in collecting data for them through the system.

Senator DANFORTH. This says that inadequate resources have been allocated to it; is that right?

Mr. BYINGTON. I don't think it says that. It says it might be nice to have it larger than we presently have, but we don't have the resources to do a significantly larger sample.

Senator DANFORTH. Is this due to your allocation of resources or the fact that Congress hasn't been generous enough with you?

Mr. BYINGTON. Well, that is an interesting question. Obviously, it is our allocation of resources; but at the same time, it is our allocation of resources compared with everything else we have to do. If we put a larger amount of money into the data collection, we won't have anybody to do anything with the data that had been collected.

We want to collect data that is scientifically acceptable, sustainable in court, on the record, and that is useful to the public at the same time. We want to do this without using more resources than we have to, so that the resources can be used in regulatory development, economic analysis, compliance and enforcement, and the other areas of our responsibility.

Senator DANFORTH. You are satisfied you are now doing an adequate job in making a sound cost benefit analysis?

Mr. BYINGTON. Yes, sir. I think that in the whole area of our hazard identification and analysis, Ms. Langston's area, where the epidemiological analysis takes place, we have improved our capability and are doing a good job.

We would like to have more people in that area, particularly in economic analysis, because it is a rapidly expanding area. As we move along in regulatory development, and as the burden for better and better data is placed upon us by the Congress, by the public, and by the courts, we are going to need greater expertise in this area.

We will need more people.

Senator DANFORTH. You also believe that you have not turned the NEISS system into a stepchild, but that you are allocating an adequate amount of resources to it.

Mr. BYINGTON. It would be nice to have it larger. For example, we have had requests from a large number of States to give them a statistical breakdown for the State of Missouri or the State of Kentucky or the Midwest. The way the system is set up, we can't do that. The amount of data you would have to collect to give a worthwhile statistical breakdown on a statewide basis is greater than just collecting it for the national basis.

If we had more resources, we could do regional or State breakdowns.

Senator DANFORTH. You are saying you could do more but you are not giving inadequate attention to these areas?

Mr. BYINGTON. Yes, sir.

Senator DANFORTH. You are doing a better job than you did in 1975 in meeting the substantial evidence test and having a solid record; is that right?

Mr. BYINGTON. Yes, sir.

Senator DANFORTH. Do any of your fellow commissioners agree with these conclusions?

Mr. FRANKLIN. Senator, I would like to add something from a personal standpoint.

You point out that under section 9 we are required to undertake this kind of activity. My own belief is that it is a good provision of the law. In making my own decisions, cost-benefit thinking and the kind of questions that it forces me to ask provide a good framework. It causes me to focus, on the one hand, on how many lives will be saved if we take a certain action.

On the other hand, I am also thinking about the costs and what the impact on the industry will be if the Commission takes a certain action. Even though perfect data is not always within reach, a cost/benefit approach forces the asking of the questions and the process of weighing and balancing so that, hopefully, we will decide on a course of action which makes the most sense for everyone concerned.

Mr. PITTLE. In the discussion that you have been having, you use the word "cost-benefit analysis." I believe that makes people think of computing a cost-benefit ratio by comparing the total costs with the total benefits to be derived from the rule and then making a decision based on the ratio. This is difficult to do in the area of safety regulation. It is important to understand and consider the economic impact of regulations in terms of jobs and market dislocations and so on.

Measuring economic impact is fairly easy if you spend enough time to quantify it and get a good measure. But when you start looking at the benefits to determine the lives saved, the fingers and hands that won't be amputated, quantifying becomes more difficult. Any statistics should include many intangibles such as the benefit of not being injured, of growing up with two parents instead of one, of being employed and contributing to society in a meaningful way. Those benefits are difficult to measure. That is why we have five people, the five commissioners, to make that complex balance of things that are hard to measure.

If the benefits were measurable, you could replace us by a computer. You could put the information in here, come up with a social equation, ask the question, and get a yes or no answer.

Senator DANFORTH. This is really a philosophical question. Why don't juries make that decision when they award damages?

Mr. PITTLE. I'm sorry?

Senator DANFORTH. Isn't that what juries are for when they award damages?

Mr. PITTLE. That is an after the fact remedy.

Senator DANFORTH. Isn't that the most accurate cost benefit analysis that can be made?

Mr. PITTLE. It is one. It is not a complete one. It is one that is made after the fact, after someone has been injured.

We are trying to act in a preventive way to keep unsafe products off the market in the first place.

Senator DANFORTH. If somebody is consistently making a defective product, he will find he has a lot of lawsuits and his insurance premiums go up.

Mr. PITTLE. I interpret the act to say we should act as a jury to reduce the injuries before they arise.

Mr. BYINGTON. May I make a comment on the *Aqua Slide* case? It is an interesting case from a legal point of view, and one that the oversight committee may want to watch in terms of precedents.

This is the first time to our knowledge that the substantial evidence test, really the test applied in an adjudicative type of proceeding, has been applied to the informal standard-setting process we have under the Consumer Product Safety Act. It is a totally different test.

The informal process has been designed to be more expeditious and less structured in its data collection and the way it proceeds versus the adjudicative process. I think that in the future, if this kind of substantial evidence test from the formal adjudicative process is applied to an

informal process, you may see a transformation of the informal process.

The procedure criticized for taking too long in standards setting will take longer if we have to put together the kind of record that would be able to sustain the tests that the record from an adjudicative process requires.

Senator DANFORTH. Should the law be changed?

Mr. BYINGTON. If we go down that road and take the substantial evidence test and apply it to the informal process, you will add a great deal of time to a process that people argue takes too long already.

Ms. SLOAN. I wanted to speak briefly on the NEISS system. I understand that we are considering revamping it. I am delighted with that prospect, especially since there will be demographic exponents to it now.

As I see this, it will give us a handle on injuries as they relate to sex, age, income, education, and race.

Senator DANFORTH. How about height. Will it show more tall people hit more chandeliers than short people?

Ms. SLOAN. That is a possibility. It will give us a handle on information concerning the effect of education or the effects of income, or whatever, on injuries, on consumer product injuries and also the effects of social, cultural differences, and also the effects of behavioral patterns.

I think this information will be helpful.

Ms. KING. I would make one or two additional comments. When you talk about our desire, if we had the resources, to expand the NEISS system, this is not increasing the number of hospitals reporting. One of the things all of us are interested in is expanding the in-depth investigation of the hospital reports as to causal relationship of injury and product. This is an expensive and resource-intensive project.

We can't now follow up every single report to find out whether the person fell off the ladder or the ladder broke. That is the type of causal data that is most useful for a decisionmaking process, and it is the most resource intensive.

Senator DANFORTH. Do you think more resources should be allocated to it?

Ms. KING. We are probably now giving as much to it as we can, given current resources. It's felt to be helpful. It's getting more selective and better able to focus on the cases you want to pursue. It would be desirable to be able to investigate further.

Mr. BYINGTON. Based on what we see emerging, we are going to need additional resources in the whole area of proper information gathering and analysis, whether it's injury, epidemiological, economic, engineering, toxicological, whatever it is. And the agency does need greater depth in these areas as we proceed.

That's why we have asked for additional people in these areas. We are not arguing with you or suggesting to you that we are adequate in that area. We try to take what resources we have and allocate them to do a reasonable job in each of the areas.

Senator DANFORTH. Can I ask one other question? I hate to talk so much.

Senator FORD. I will give you another 3 or 4 minutes.

Senator DANFORTH. There have been horror stories, and they usually get nice newspaper coverage, about what happens when two regulatory agencies are in conflict. For example, there was a story about one agency saying that kitchens should have stainless steel counters. Another agency said no, they shouldn't have stainless steel counters. I am told that your agency has had a few of these problems also—I think with respect to chain saws and with respect to lawnmowers.

Mr. BYINGTON. I think we have had some of these kinds of problems. I don't think they particularly relate to chain saws and lawnmowers. The closest thing with lawnmowers is the noise problem. That relates to EPA. We have not regulated noise under the lawnmower study. We deferred by Commission action to EPA.

I suggest that like any other agency, there is the potential for overlap. No matter how clearly you attempt to draw the jurisdictional lines, there will be plenty of opportunities to find gray.

Senator DANFORTH. How do you work that out?

Mr. BYINGTON. We have set up a series of interagency work groups or contact points. We now have hopefully, a mechanism in place to sort those potential problems out expeditiously. We work with the FDA in terms of overlaps related to food, drugs, and medical devices. We have been an active participant in the establishment and operation of the IRLG with regard to chronic hazards. We have been an active participant in the group on energy. We have conversations with HUD as to mobile homes and things of that nature.

We recognize the potential for overlap and have attempted to develop a working relationship with our sister agencies in trying to agree who has the jurisdiction and who will be responsible for taking those actions.

Senator DANFORTH. Suppose I'm in the business of manufacturing, say, lawnmowers. And you have a standard for lawnmowers which tells me to do such and such and EPA has a standard for lawnmowers that tells me to do something that is completely different and conflicting. What do I do? Who do I go to or call?

Mr. BYINGTON. You can write EPA, contact CPSC or contact your Senator.

Senator DANFORTH. I'm saying, is there a person in this big bureaucratic complex of Washington? Is there some person other than me who the lawnmower manufacturer can call?

Mr. BYINGTON. He would write to the General Counsel or the head of either of the agencies. We give out advisory opinions.

Senator DANFORTH. Call the General Counsel by calling my office or the General Counsel's office. What would happen?

Mr. BYINGTON. He would get an advisory opinion on the nature of his problem.

Senator DANFORTH. He knows the nature of his problem.

Mr. BYINGTON. We might be able to point out to him that it isn't what he thinks it is, and maybe we don't have a conflict. If there is conflict, we would get together and figure out what we were going to do. If action was required by the Commission, we would bring the situation to the Commission's attention and we would discuss the options and see if we could resolve the problem.

Senator DANFORTH. But there's a mechanism for resolving the problem.

Mr. BYINGTON. Absolutely.

Senator DANFORTH. Thank you.

Mr. Chairman, I would appreciate my correspondence with the Commission be made part of the record at this point.

Senator FORD. Your letter and the Commission responses will be placed in the record at this point.

[The information referred to follows:]

U.S. CONSUMER PRODUCT SAFETY COMMISSION,
Washington, D.C., April 3, 1978.

Hon. JOHN DANFORTH,
U.S. Senate,
Washington, D.C.

DEAR SENATOR DANFORTH: In response to the several questions regarding the Consumer Product Safety Commission and its programs that you addressed to each of us, we submit the attached reply for your consideration.

As you know, the Commission now has a full complement with the recent addition of our two new members. We as a collegial body are in agreement as to the general direction the agency should take in addressing the issues and problems you raised in your letters. To the degree that we may have lesser differences of opinion as to emphasis or strategy within any of these specific areas, we hope that the upcoming hearings will provide an opportunity for you to explore and weigh these individual views.

We note that Question Six, regarding cost-benefit analysis of lawn mower standards, was addressed only to Commissioners Byington, Franklin and Pittle. Commissioners Sloan and King therefore have not commented on that issue.

We hope that this is responsive to your request and we look forward to working with you in the future.

Sincerely,

S. JOHN BYINGTON, *Chairman.*

Enclosure.

CPSA RESPONSES TO SENATOR DANFORTH

Question 1. Comment on whether the Federal Hazardous Substances Act, Poison Prevention Packaging Act and Flammable Fabrics Act should be combined under the Consumer Product Safety Act.

Answer. The question of consolidation of the Acts administered by the Consumer Product Safety Commission (CPSA) is a very complex and important issue. This is true from both a substantive and procedural perspective.

Ultimately the question of consolidation of our Acts may need to be addressed. However, practical considerations such as the heavy resource commitment that would be required and the controversy surrounding many of the issues dictate against consideration at this time.

Should you be interested in specific amendments to the various Acts, in lieu of consolidation, we have attached a discussion of three issues which have caused the Commission problems in the past which we think might be effectively addressed.¹

ATTACHMENT A

POSSIBLE AMENDMENTS TO THE CPSA AND FHSA

There are three primary areas that have caused serious problems. They are:

1. Recall Authority under CPSA and FHSA
2. 701 (e) Provision of the FHSA
3. Civil Penalty Authority under the FHSA
 1. *Recall Authority under the CPSA and FHSA.*—The procedures for recall of a potentially dangerous product under the FHSA are set forth in section 15 of the Act. Essentially, they call for the repurchase, up the chain of distribution

¹ Commissioners Sloan and King take no position on the attached suggestions.

from the consumer to the manufacturer, of any article or substance which is a "banned hazardous substance." Under the Act, this repurchase is required automatically without further action by the Commission, without regard to the structure of the marketplace, and without regard to the severity of the risk of injury presented by the banned product. Repurchase of the entire article for the purchase price paid is required even if the aspect of the article which renders it banned could easily be repaired or replaced. When this procedure is applied to an article which may only deviate in a minor respect from a complex set of requirements, such as the Commission's bicycle regulations, unnecessary hardship, unrealistic costs, and confusion can be expected to result without a compensatory increase in consumer safety.

Recall authority is more flexible under section 15 of the CPSA. The Commission can require a manufacturer, distributor, or retailer of a consumer product that presents a substantial product hazard to give notice of the defect and to repair or replace the product or refund the purchase price. If an imminent hazard is discovered, the Commission under section 12 may seek to have a district court order appropriate notice and recall. These provisions do not solve the entire recall problem, however, since they both involve formal adjudications which may be quite lengthy, and since they would be difficult to administer where a great many manufacturers, distributors, and retailers are involved.

One possible solution would be to delete the repurchase provisions under the FHSA and to replace them with a procedure which would authorize, but not mandate, the Commission to issue a separate repurchase regulation for each banning regulation. Such a regulation, which should be issued for comment at the same time the banning regulation is issued, could be tailored to provide an appropriate notice and recall remedy, relating directly to the particular type of violation and the particular marketing methods for the product. The Commission would contemplate that recall under this procedure would not require time-consuming adjudicative procedures.

Consistency with the CPSA would be obtained by adding a similar discretionary provision under that Act, not to replace, but to supplement the existing recall authority. Discretionary recall authority could be applied to products not in compliance with: (1) a standard issued under section 7, (2) a ban issued under section 8, and (3) a regulation issued under section 27.

2. *Section 701(e) Procedures under the FHSA.*—The present procedures for declaring products to be hazardous substances or banned hazardous substances (except for toys presenting electrical, mechanical, or thermal hazards) under the FHSA (sections 2(q)(1)(B) and 3(a)) are governed by the complex requirements of section 701(e) of the Federal Food, Drug, and Cosmetic Act. These requirements call for two-stage rulemaking. First, a notice of proposed rulemaking is issued, public comments are received, and a "final" regulation is issued. If valid objections are then made and a hearing is requested, the provisions of the regulation objected to are stayed pending the completion of a formal, usually lengthy, adjudicatory-type hearing. This process is very expensive and time-consuming for all parties involved. It is a process which most administrative law experts agree is simply inappropriate for the issuance of legislative type regulations which require the balancing of competing policy considerations. Adjudicatory proceedings are more suited for resolving purely factual issues.

Therefore, we would recommend substituting the procedures under section 9 of the CPSA for the section 701(e) procedures. This would provide for notice of proposed rulemaking, an opportunity for interested members of the public to submit written comment and to make oral presentations of their views, and the issuance of a final rule subject to judicial review. The proceedings would be informal so as to facilitate public participation and would help ensure that proposed rules could be acted upon expeditiously.

3. *Civil Penalty Authority Under the FHSA.*—Under the present FHSA, the Commission is limited in enforcement remedies to (1) recommending that the Department of Justice institute criminal proceedings for violations of section 4, (2) instituting seizure actions against misbranded or banned hazardous substances, or (3) instituting injunction proceedings to restrain violations of the Act. An amendment adding civil penalty provisions would give the Commission an additional enforcement option which would provide the flexibility presently provided under the CPSA needed to address the many gradations of violations with which the Commission must deal on a daily basis. A civil penalty could be sought,

for example, in a situation where there are no violative goods to seize, no continuing violation for which an injunction is needed, and no past acts sufficient in seriousness to be the proper subject of a criminal proceeding.

An amendment to the FHSA which would provide civil penalties was contained in S. 3755, introduced by Senator Pearson in the 94th Congress. This proposal was recommended by the Comptroller General in his report entitled "Better Enforcement of Safety Requirements Needed by the Consumer Product Safety Commission (July 26, 1976, B-139310). It is also contained in S. 709, introduced in the current Congress at the Commission's request and currently pending before the Subcommittee.

We strongly recommend that these proposed changes be implemented as expeditiously as possible. We believe that they will serve to provide a foundation for the uniform application of our statutes and will ultimately make the consolidation of the Acts we administer easier.

Question 2. How would you improve the Commission's Compliance and Enforcement Programs?

Answer. The Commission is committed to an effective compliance and enforcement program. We agree that priority projects for the immediate future include revision and improvement of our section 15 regulations; better targeting of our compliance and enforcement resources to concentrate on the most serious hazards and/or situations of greatest industry non-compliance; industry education; and promulgation of final rules for expedited civil proceedings.

The Commission's Compliance and Enforcement Program has three parts: (1) planned surveillance (e.g., inspections, sample testing) of regulated industries; (2) hazard reaction activities under sections 12 and 15 of the Consumer Product Safety Act dealing with imminent and substantial product hazards; and (3) litigation actions (e.g., prosecutions, seizures, injunctions). In order to give you full understanding of the range and volume of our compliance and enforcement activities, we have attached a copy of Chapter VI of our January 1978 Annual Report.

Significant improvements have been made in the program in the last year, particularly with regard to enforcement actions under section 15 of the CPSA. For example, (1) the seizure of the staff assigned to handle section 15 matters has been doubled and the division reorganized to more effectively pursue correction of product defects that may present a substantial hazard to consumers; (2) the division analyzed more than 12,000 incidents of possible risk and handled a total of 111 cases; and (3) the Commission brought its first three section 15 civil penalty actions (totaling \$390,000) for failure to report potential defects in a timely fashion.

Question 3. Do you believe the Commission's information gathering systems are adequate? In particular, discuss the National Electronic Injury Surveillance System.

Answer. NEISS, the only comprehensive national injury data collection system in the world, which generates timely estimates of product-related injuries, has been the Commission's primary source of injury statistics. The information is useful in helping establish program priorities and provides a large reservoir of injury data which can be followed up in greater depth within 72 hours to determine more precisely the causes of product-related injuries. Plans are underway to make our NEISS data available to the National Highway Traffic Safety Administration, the Environmental Protection Agency, and the Food and Drug Administration this fiscal year.

The system is currently being redesigned to update and improve the sample of hospitals reporting to CPSC. We will begin phasing in the new sample this month, a process expected to continue through May 1979. This procedure will allow us to compare the old and new programs and assure the statistical accuracy of the new system.

Although NEISS is the most cost-effective single source of product-related injury statistics, certain injuries are under-represented. While we agree it might be highly desirable to vastly expand the information gathered through the NEISS system, the Commission does not have the resources to do so. To overcome this problem and increase the adequacy of our data base, we have undertaken other efforts. To monitor product-related fatalities, for example, CPSC works with all 50 states, the District of Columbia and the two largest U.S. territories to obtain death certificates. The Commission also works with approxi-

mately 200 coroners and medical examiners who alert us to product-related deaths they believe should be brought to our attention on a more timely basis. CPSC also monitors newspaper reports through nationwide clipping services and follows up on consumer complaints received through our toll-free telephone "Hot Line."

Further, NEISS system represents a base for developing certain demographic information as it relates to consumer product injury. Combined with other statistical input it can provide data to show whether the low income and minority populations are more susceptible to unreasonable risk of injury. This capability should be utilized.

The Commission is continually searching for new ways to improve its information-gathering efforts and we would welcome any suggestions you might have.

Question 4. Comment on the adequacy of the Commission's Sunshine Policy. What changes, if any, do you believe should be made in that policy?

Answer. The Commission's Sunshine Act Policy, as set forth in regulations published at 42 FR 14683 (March 16, 1977), provides that all meetings of the Commissioners shall be open, unless one or more of the 10 specific exemptions contained in the Act apply. The regulations also provide that the Commission shall consider the relative advantages and disadvantages to the public of conducting meetings in open or closed session. Further, the Commission has adopted a broad definition of the term "meeting" so that, with few exceptions, every gathering of at least three Commissioners is subject to the policy.

Approximately 80 percent of all the agenda items considered by the Commission since the Sunshine Act has been in effect have been considered in open session. Of the portions of the meetings closed, approximately two-thirds involved individual cases of adjudication or litigation. The remaining one-third were closed to allow consideration of such matters as trade secret information and personal privacy.

Since its inception, the Commission has been committed to and indeed has pioneered the concept of openness in government. Certain procedural requirements, including those involving advance notice of Commission meetings, have led to a more extensive structuring of the way the Commission operates. While some may believe this has resulted in undue rigidity, we think that, on balance, it has had a positive effect on our decision-making process by requiring better planning.

One issue of concern involves discussions among the Commissioners relevant to overall operations and strategy of the agency. In the past, a majority of the Commissioners have been unable to justify, under the Act, holding private discussions on these matters. The result is to limit exchange of ideas among the Commissioners to formal sessions, written memoranda or conferences with no more than 2 Commissioners present, none of which is entirely satisfactory.

We believe that the Commission would benefit from greater flexibility to exchange ideas on an informal basis outside of the regular decision-making meetings. It may be that the Commission's dedication to openness, as set forth in its own internal rules, has unnecessarily created problems on the question of Commission discussions. We plan to undertake a careful review of our internal procedures in the near future.

Thus, while we note that we have had some problems we propose no specific changes in the Sunshine Act itself at this time.

Question 5. What methodology would you select to evaluate the Commission's progress in reducing deaths and injuries?

Answer. This is a very important question and one that we are still trying to address.

As you know, the two most frequently mentioned measures have been the number of standards promulgated and actual reduction in recorded injuries. There are problems with relying on these measures.

First, concentration on standards-counting alone ignores the many other activities and statutory responsibilities of the CPSC.

Second, as information gathering techniques are improved and efforts expanded, the actual count of injuries may well increase as we collect data that went totally unrecorded before.

Third, it is often not possible to measure injuries before and after a standard (or other regulatory action) takes effect. For example, it may be years before a significant number of products are in compliance, especially if the unregulated product has a long useful life. Similarly, changes in the public's frequency of use

of a product may result in an increase in total injuries while the risk to the individual user might be substantially reduced. In those cases where direct measurement is possible, such as poison prevention packaging, there have been substantial reductions in injuries.

However, to say that direct measurement is extremely difficult is not to say that other forms of evaluation cannot be developed. It is reasonable to expect that a number of factors, considered together, will enable Congress and the agency itself to measure overall progress and to weigh the comparative effectiveness of individual programs.

We suggest that one measure would be the number of steps taken to protect the public. These would include product safety rules, product bans, labeling requirements, actions under section 12 of the CPSA (imminent hazards), and actions under section 15 (substantial product hazards). Section 15 allows the Commission to act quickly against hazardous products already in the marketplace rather than developing a standard that could take several years to have an impact. It is important to note that as of January 1, 1978, nearly 1,000,000 units of products had been corrected as a result of fiscal year 1977 section 15 activities.

Another factor that might be considered is Commission participation in voluntary safety activities in the private sector. Where CPSC participation is direct, the agency's contribution to the development or upgrading of voluntary standards may be significant. Other factors for possible consideration include CPSC activities in safety education and safety research.

This list is by no means complete. We will continue to explore ways to evaluate CPSC's effectiveness and to refine these into useful tools to measure progress or failure. We would be glad to share our thinking on this with you as we have a more definitive list and a more developed methodology.

In sum, we emphasize two points. First, we cannot rely on a single measure since the Commission's involvement and contribution may be direct or indirect, its effects tangible or intangible. Second, any statistical method of measurement overlooks a critically important factor: the role the Commission plays and the impact it has, merely by virtue of its existence, in creating a climate conducive to greater product safety. We believe that voluntary standards organizations, trade associations and individual manufacturers have become much more sensitive to product safety concerns since the CPSC was created.

Question 6. Section 9(c)(1) of the Consumer Product Safety Act requires the Commission to consider a "cost/benefit analysis" prior to promulgating consumer product safety rules.

In discussing your position with respect to implementation of section 9(c)(1) do so in the context of the following example: "That a rotary lawn mower is cheaper than a power driven, reel mower. However, a rotary mower causes certain accidents that are not caused by a reel mower, as the rotary mower can throw rocks against your shins and I guess break bones or put out eyes.

The hypothetical I am giving you is:

Supposing the rotary mower and the reel mower have this effect and supposing there is a statistically measurable increase in the amount of injury caused by the rotary mowers.

Suppose further that the rotary mower sells for \$50 less than the reel mower. And suppose further that whole industries have grown up around the rotary mower. And you know, several thousand people across the country would be thrown out of work if they couldn't make them any more.

How would you tend to address that kind of question? Would you do it by an educational program? Would you do it by pulling the product off the market? What would you do?

Answer. The hypothetical example points up some issues that the Commission would consider in making the findings required in section 9. Faced with two similar products, one less expensive and less safe than the other, the Commission would first analyze any risks of injury associated with the products. We would then identify possible approaches to adequately address these risks—in this case, injuries from thrown objects. Our options would include a mandatory rule, Commission encouragement of voluntary efforts, and/or an information and education campaign to alert consumers to the hazards and how they might be avoided. A ban would be considered if the Commission found, in accordance with

section 8 of the CPSA, that no feasible consumer product safety standard would adequately protect the public from an unreasonable risk of injury. Eventually, the Commission must determine that any safety rule (standard or ban) is "reasonably necessary" to reduce the risk of injury.

In this case, the Commission could select any one of the strategies or some combination of them. For example, since the product in question has a long life, compliance with a mandatory or voluntary effort would take some time as it would not be fully effective until the existing mowers already in consumers' hands are replaced by complying mowers. Therefore, the agency may choose to conduct an information and education campaign parallel with its standard efforts to ensure that consumers have the necessary information quickly.

The choice between a mandatory or voluntary effort may depend upon such factors as whether there is an existing or developing voluntary standard that offers a real potential for success in adequately addressing the hazard and whether the structure and performance of the industry is such that full compliance with a voluntary standard can be expected. Another consideration in this case might be whether the lower cost product would retain its price advantage even when meeting a mandatory or voluntary standard. If this were true, a mandatory or voluntary standard might be effected with relatively little disruption in the marketplace.

This discussion of a hypothetical situation is, of course, intended to illustrate a possible approach to a problem. Throughout the process, the decision-makers will be balancing the relative costs of each approach against the relative benefits to arrive at a solution that is both socially and economically acceptable.

If, after due consideration, a mandatory approach is adopted, the proposed rule would be published for comment, and the comments received from all groups—consumers, industry, government, and other interested parties—would be given careful consideration prior to publishing a rule. Such a rule is then subject to judicial review.

Ultimately, a decision with respect to rotary mowers, or any other issue before the Commission, is discussed and decided by the five Commissioners, each of whom brings her or his own experience and judgment to bear on the decisions. This interplay of philosophies helps to insure that a fair decision will result.

Senator FORD. With respect to the decision made last week relating to chain saws I see heads dropping. Has the Commission established specific criteria for monitoring the industry's development of a voluntary standard for chain saws?

Mr. BYINGTON. The answer is yes, we want specific criteria established. That's what the staff and chain saw manufacturers are putting together now. The Commission has authorized the staff to work with the chain saw association in working out a specific agreement between the association and the Commission. The agreement will include such criteria as who is going to be on the review committee, whether or not we have mutual agreement on the parties to be involved who pays what part and who has access to what situation.

This would be spelled out.

Senator FORD. Are you going to put out mandatory standards for chain saws if the voluntary effort is unsatisfactory?

Mr. BYINGTON. The answer is yes. How fast you can do it depends on the interpretation of section 7, or any other flexibility that might be given to us under section 7. It's that kind of flexibility that we all agree we need.

Senator FORD. What criteria will be used to determine if the voluntary standard is adequate?

Mr. BYINGTON. That becomes a judgmental question. You have the staff analysis of the voluntary effort, and that analysis is brought to the full Commission. You review it, ask questions, and as a body determine whether or not you agree or disagree on its adequacy. There are two criteria we have applied to voluntary standards. One is the adequacy of the standard in addressing the hazard, and the other is the adequacy of compliance with that standard.

If we have a judgmental determination that the standard adequately addresses the hazard, and then we have a determination that we are getting adequate compliance, which we could relate to mean as reasonably good compliance as one would expect under a Federal regulation, then there doesn't seem to be a reason to proceed with a mandatory standard, and normally we won't under our policy.

But we need to have both criteria existing.

Senator FORD. A consumer who participated in two prior offeror processes testified that he believes the Commission was well advised to cooperate in this pilot effort. I found that opinion to be encouraging. I hope this effort succeeds. Personally, I believe flexibility in working with voluntary standards could significantly increase the economic effectiveness of the Commission. I think we have to be careful as we proceed with voluntary standards, but I am encouraged.

With flexibility, the Commission indicates innovative ideas, and movement in the right direction.

Mr. BYINGTON. We will be establishing milestones and checkpoints to judge how well the process is proceeding and will be monitoring the process as a result.

Senator FORD. I encourage the Commission to keep me informed as this effort moves along. We will be moving in a direction that could be helpful. Voluntary standards from the appliance industry are working well. As I stated earlier, the very existence of the Commission has led to a greater degree of interest in safety standards. Voluntary standard development indicates more cooperation from industry, where both sides can work closer together.

Mr. BYINGTON. We will keep you informed, Senator.

Senator FORD. In the past I have criticized the Commission for its failure to designate measures of effectiveness by which outsiders can evaluate the Commission's performance. I note your Office of Strategic Planning makes the same point in its long-range planning draft document. Other than specifying the various projects it had undertaken or estimating the reductions of injuries and deaths, can the Commission provide any objective standard by which its performance can be measured?

Mr. BYINGTON. Yes, sir. For the record, I would like to submit a copy of a report done for us by our staff on the list of voluntary standards in which the Commission has been involved and played some kind of role. We would also be pleased to keep the committee apprised as we get our regular reports on voluntary standards in general.

Senator FORD. It will be included as part of the record.

[The following information was subsequently received for the record:]

CPSV VOLUNTARY STANDARDS INVOLVEMENT, 1973-78

Product	Voluntary standard initiated	Voluntary standard developed	Voluntary standard approved
Above-ground swimming pools	X	X	
Cerosol containers	X		
Fathtubs and shower enclosures	X	X	
batteries (wet-cell)	X	X	
Acycles	X	X	
Dunk beds	X	X	X
aCmping tentage	X	X	X
Eatalytic heaters	X	X	X
hain link fences	X	X	
Ehain saws (gasoline powered)	X		
Cigarette lighters	X	X	X
Clothes dryers (revision)	X	X	X
Bry cell batteries (revision)	X		
Bectric blankets (revision)	X		X
Extension cords	X	X	
Footwear heel attachments	X	X	X
Footwear traction test method	X		
Gas furnaces (revision)	X	X	X
Gas space heaters (revision)	X	X	X
Gas water heaters (revision)	X	X	X
Glass soft drink bottles	X	X	X
Golf carts		X	
Hair dryers (revision)		X	X
Infant carriers		X	
Miniature Christmas tree lights		X	X
Mini snowmobiles		X	X
Metal ladders (revision)		X	
Nonpowered guns		X	X
Playpens		X	X
Pool spas		X	
Pressure cookers (revision)		X	X
Ranges and ovens (revision)		X	X
Refuse bins		X	X
Skiing equipment		X	X
Sleeping bags		X	X
Smoke detectors		X	
Snowmobile components		X	X
Snow throwers		X	X
Strollers		X	
Sunlamps (revision)		X	X
Trampolines		X	X
Toys		X	X
Wood ladders (revision)		X	
Wrestling mats		X	X

Mr. BYINGTON. In terms of specifics, there are two or three areas by which our performance can be judged: mandatory standards, bans, section 12, and section 15 actions. That's why we have tried to move to hazard categories. We believe one of the best ways to measure the agency is how has it effectively addressed these categories, for example, what have we done in the area of fire/burn—what actions have we taken and when. We are now building what the professionals call baseline check data, meaning a reference point. As we build the baseline data for injuries, the checks, we will have something against which we can make comparisons.

We have information on cribs and toys. As we move along we will be able to develop significantly more of that type of information.

The Office of Strategic Planning long-range plan points out that for the first time this year we have a Commission-adopted evaluation program. We have a number of activities underway now to enable us to do that kind of evaluation.

I hope in the months and years ahead we will be able to provide more and better data for you to use in measuring our effectiveness.

Senator FORD. It is important to have that.

With respect to the total number of product-related injuries that occur each year does the Commission have a more current estimate than the 20-million figure used by the National Commission on Product Safety?

Mr. BYINGTON. If I may make a comment. One of the problems we have is that that total is kind of like my fellow Commissioner Susan King's oozing analogy.

Senator FORD. You have started something.

Mr. BYINGTON. You end up with a different set of problems than you begin to deal with. In the skateboard situation, we have gone from 25,000 injuries to 400,000 injuries in the last couple of years. That is an increase of 375,000 injuries. That will offset, in terms of the total, a lot of other actions that would reduce injuries.

New products come on the market as you get older problems taken care of. That total also doesn't reflect the preventive action taken under section 15.

The effects of the products recalled or replaced are not measured. It is difficult to measure what does not happen. Over a million products were addressed under section 15 last year.

Senator FORD. Mr. Whitaker made that same point yesterday.

Ms. KING. To get away from the other analogy for a moment, the problem is like FBI reports on stolen cars every year.

The validity of the report has a lot to do with the adequacy of the data-gathering system. Some years it is better than other years. It depends on the kind of information you are getting in, and if your data system is improving all the time you are picking up things that have gone unrecorded before.

There are many more injuries, I think, than what initially had been supposed.

Mr. BYINGTON. To amplify, in calendar year 1977 NEISS reported an estimate of 9.4 million product-related injuries treated in emergency rooms in the contiguous United States. This reflects an increase in hospital emergency room treated injuries of 10 percent over 1975 and 44 percent over 1973, which represented the first year of the system's operation.

However, caution must be used in interpreting these differences because, as Susan pointed out, we had significant improvement in our data collection capability. Also, the American Hospital Association reports that for the 4-year period between 1972 and 1976 emergency room visits increased by over 25 percent.

You have an increase in the usage of emergency rooms—a changing aspect of medical care delivery—plus our increased capacity to collect data. All of these factors have to be taken into consideration as you monitor the bottom line.

Senator FORD. Many doctors are asking their patients to go to the emergency room and hospital for minor treatment which indicates an increased usage of the emergency room rather than the doctor's office.

Mr. BYINGTON. The American Hospital Association says there has been a 25-percent increase in the last 4 years.

Ms. FRANKLIN. Also, there are new injuries occurring now and some others we're able to record now that we weren't able to earlier. Skate-

board injuries, for example, simply were not occurring in such great numbers several years ago. Now, they are.

Senator FORD. Neither were back injuries from hula hoops. They are coming back I understand.

Mr. PITTLE. That leads us into a partial answer to your question about evaluation. The purpose of this agency is to reduce unreasonable risks and thereby reduce injuries.

If you were able to measure injury reduction accurately, that would be one of the primary things to evaluate. But because that particular measurement is uncertain we have to use surrogate measures. For example, because there is now a standard for architectural glass, in the future people will not be cut the way they are now. But it will be many years before old, unsafe glass is replaced and injury reduction can be measured. So you must evaluate the standard as a surrogate. Similarly, there are other mandatory actions, standards, recalls, bans, where we can show what would have happened if the product had not been regulated.

Another measure of success is the industry safety committees or the trade associations that didn't exist before the CPSC but exist now because as you pointed out before, we are here and they want to beat us to the punch by making their products safer voluntarily. I hope they do beat us to the punch and develop their own standards.

Senator FORD. That brings me to a point. You have a product that has a low injury potential. The standards of the industry is adequate. Can you go ahead as a Commission and say "this is the mandatory standard," and each time you need improvement, go from there.

Are you in a position to get rid of the easy ones in a relatively short period of time, without much work on the Commission or its staff, and lend yourself to the more hazardous products?

Mr. BYINGTON. We can under the statute as it is written take an existing voluntary standard and propose it. The question to be faced is what level of—going back to the conversation with Senator Danforth—what level of substantial evidence would be required by the agency to support that standard?

If the courts would allow us to take that standard, propose it, take the comments, make adjustments and go forward—which is what most of us thought was possible and reasonable under the informal rulemaking process—it still is going to take a good deal of staff time.

You have to go through all of the analysis, and deal with all of the comments. If you make material changes you have to republish. If the court says that substantial evidence will be applied against the standard, that may mean we have to go back and look at what the industry did and publish that for comment as well.

That will be a long process.

Mr. PITTLE. If I might, in the hypothesis you gave us by low priority I assume you meant low because the frequency and the severity of injuries are low. If there were an existing standard, even though it was voluntary, I would have trouble finding an unreasonable risk associated with the product as I must to meet the requirements of the law to mandate a mandatory standard.

In terms of this agency's resources, there are so many things that are higher priority that I would certainly try to direct resources

toward products like power mowers, which are associated with very frequent and severe injuries.

Senator FORD. Take that we have an industry standard that is adequate on a voluntary basis and you find more and more—

Mr. PITTLE. That is a different matter.

Senator FORD [continuing]. The producers of the product coming in who are not following that voluntary standard.

Mr. PITTLE. That is a different problem. If you find a product that looks like it is becoming more of a risk either because some manufacturers are not complying with the voluntary standard or because the product is coming into great use where it wasn't before, like chain saws, for example—

Senator FORD. Or cellulose.

Mr. PITTLE. That is a good example.

Then the question is whether we have the authority to take a voluntary standard which is almost but not quite good enough, and mandate it with changes in the provisions.

The authority is part of the flexibility we need under section 7.

Ms. KING. That makes the point I wanted to make. The Commission's involvement in and adoption of voluntary standards is interrelated with the question of amendment to the section 7 offeror process.

One of the major needs for flexibility—the first question is whether the Commission will be allowed to develop standards when it thinks it can do a better job and what findings have to be made in order to do that.

The second important thing is to be able to address a voluntary standard which may not be wholly adequate or where you have a high degree of industry noncompliance.

The flexibility the agency is seeking is to be able to pick up the voluntary standard along with the data on which the standard was developed, and promulgated it as a mandatory standard under section 7.

You will get a great deal more efficiency in standards writing with that flexibility. This is what the chain saw experiment is all about, a new approach to this.

Senator FORD. I'm very interested in both voluntary standards and flexibility. I don't want to be in the position of having to mandate by legislation every time we get into this situation.

Mr. PITTLE. We don't either.

Senator FORD. I think we are on the right track and it shows a change in philosophy which is good. Your draft long-range plan indicates that a voluntary standard takes 5 people and mandatory standard would tax 10. Does the Commission agree with the figures?

Mr. BYINGTON. The staff has tried to take an amalgamation of situations and projects to provide the Commission with some basis for comparison. And the estimate that a mandatory standard costs double in terms of people and time and money seems to relate to the chain saw situation.

We could support development of a voluntary standard in half the time for a third of the cost with about half the manpower as would be needed for a mandatory standard.

We will find out.

I agree that this is an important experiment. It will give us some understanding as to whether or not our estimate is accurate.

Senator FORD. What additional efforts does the Commission plan to devote to the voluntary standards in the next several years?

Mr. BYINGTON. We will submit a list of the voluntary standards we are involved in. Under our policy, the Commission sets out the criteria which I just briefly mentioned—the determinations regarding the adequacy of the standard and the adequacy of compliance.

The determination of the adequacy of the standard relates to whether the Commission believes that an adequate standard will be developed through the process going on, and is it reasonable to work through that process to see if it will work.

If those answers are yes, then the Commission policy is to use the voluntary procedure for swifter action. If the answers to those questions are no, the Commission has to make a determination as to whether or not, within its resource limitations, it can expend resources for a mandatory standard at this time.

Senator FORD. The Commission's first 5 years of implementing the offeror process have not proven successful. What is the status of the Commission's effort on miniature Christmas tree lights, for instance?

Mr. BYINGTON. That is on the agenda for the first week in May. We gave the staff an extra 30 days to complete the Federal Register notice and the other materials we needed for publication.

We gave the staff extra time because they wanted to do more testing, called the cascade test. That was completed. We reviewed that work, and had meetings with the staff. We then gave the staff an extra 30 days to develop the final Federal Register notice.

I expect the standard will be published in proposed form in May. That would be within 90 days or so of being on schedule.

Senator FORD. Based on the Commission's experience with miniature Christmas tree lights, does the Commission believe we are being premature in looking to amend the offeror process at this time?

Mr. BYINGTON. The Commission position is that we need flexibility in the offeror process, particularly as it relates to our ability to take voluntary standards that are in one form or another, possibly do some adjustments or massaging of those standards, and propose them without a lengthy process, and possibly without having to overcome what may be a legal burden around the word "existing."

The statute says we have ability to propose existing voluntary standards. The Commission, I think, is a little nervous about how the courts might interpret the word "existing." Does that mean, for example, that it has to be in use by a number of people under certain circumstances, or does it mean that when you have a standard that has been developed by an appropriate group of people that it is available to you? Those are the questions we don't have answers to. The Commission has been conservative in its interpretation of the word "existing."

Senator FORD. Assuming no amendment to the offeror process, if the Commission were to develop a cellulose standard using section 7 procedures, when could we expect to see a mandatory standard for cellulose insulation?

Mr. BYINGTON. My estimate on time hasn't changed at all. I think we would be fortunate if we had in the marketplace a final standard within 2 years.

Mr. PITTLE. I don't know whether the Chairman meant to say effective in 2 years or promulgated in 2 years. I think it would take 2 years before it is effective.

Senator FORD. I hope you would agree with me that we need one sooner than that.

Mr. PITTLE. You know I do from our previous discussions.

I want to add something to the discussion about the offeror process. I believe the Christmas tree light standard should be viewed in light of the unusual circumstances surrounding it.

We have tried the offeror process or procedures like it seven times. Each time that we have used it, we have tried to learn from our experience. In the case of miniature Christmas tree lights, the Commission had done a tremendous amount of up-front research, and had a lot of technical information for the offeror. And we laid out several possible solutions for the offeror to look at.

One of the most experienced people in the United States in the offeror process, Mr. Swankin, who was involved in the matchbook standard and had submitted an offer to develop the architectural glass standard, was the project director for the Christmas tree light offer.

So the concern I have is that we not say the miniature Christmas tree lights offeror process was typical. And, I think it is not premature to ask for changes in the section 7 language, because I don't think we are going to see the National Consumers League nor Mr. Swankin offering to be the manager of that process for every standard we develop.

Our experience, in our previous efforts, with persons who did not have that experience has been disappointing.

In this case we had a simple product, that had a lot of front-end research, and a very experienced offeror. If we could institutionalize Mr. Swankin and the National Consumers League, perhaps the process would work. But our experience is that we need flexibility in developing standards.

Senator FORD. I agree with you, and with the concept of flexibility. One of the questions I kept asking last year is: What input did the Commission have in the offeror process? Once the offeror process was completed and given to the Commission, didn't you go through the whole thing again?

Mr. PITTLE. Each and every time we have had to make substantial revisions. We have the responsibility of enforcing the standard, and defending it in court if somebody challenges it. To do this we had to do technical development and other background work in order to support the provisions.

Senator FORD. I wanted you to help them along, not spoonfeed them. With the staff there, you had greater input, so that less time would have to be spent later.

Mr. PITTLE. That is right.

Senator FORD. Several of our witnesses in the last 2 days voiced the concern that any amendment to the offeror process allowing the Commission greater flexibility would be counterproductive. Some indicated that the Commission would begin developing numerous standards on its own, constantly bypassing the offeror process, if greater flexibility were allowed. I do not believe that the only measure of this Commission's performance should be the number of mandatory standards set. I am more concerned with quality than quantity when the Commis-

sion develops standards. With that in mind, I would like each of you to indicate for the Committee what factors you believe should be taken into consideration in amending section 7 to provide the Commission with greater flexibility.

Mr. Chairman, I will let you start. Then we will go with Susan, and work the other way.

Mr. BYINGTON. Simply stated, I think the Commission needs flexibility to be able to take a standard that is available, without necessarily meeting certain criteria that might be included in the term "existing," make adjustments in that standard, and be able to propose it, and then have to meet the normal responsibility of being able to substantiate its aspects from a technical, injury, and economic point of view.

That flexibility would allow the Commission greater options in approaching the standard-setting process, and it would provide greater leverage as the Commission continues to operate with the voluntary standard community. If some place along the way the voluntary program was not going in the direction or with the speed or accuracy that it was originally projected to go, the Commission could step in and take action on a mandatory basis.

Ms. KING. I would echo the chairman's point on the flexibility to be able to adopt voluntary standards with what the Commission sees as needed modifications, flexibility to control its own development of standards when it is determined to be in the "public interest." I think that might be a definition that Congress is going to have to supply.

I have read the Eckhardt bill and other suggestions as to the definition of "public interest." I think time problems are important; if the Commission can produce a standard in a more rapid fashion, or if you have a peculiarly serious hazard, or a different type of hazard that the Commission is better equipped to deal with, loosening the time constraints within which the standards are developed may be appropriate.

There are some areas where standards development is much more complicated than in other areas. I would think that the factors that Congress and the Commission have to consider go back to the original premise, a desire to get the public involved in a meaningful fashion, at a meaningful time, in the standards development process.

Even when the Commission determines it is proper to move to develop a standard on its own, there should be requirements for early public participation in the process, including funding of public participants.

Here, I would refer back to your statement about quality rather than quantity. It isn't the number of people involved but the quality of input that is important. A suggestion was made by one of the witnesses who appeared here that it might be appropriate for the Commission to notify the public in advance that it intends to develop a standard on its own, so that if a potential offeror thinks it can do the job better, and that it is not necessarily in the public interest for CPSC to proceed, it has an opportunity to respond. That is not an unreasonable request.

Senator Ford. I think Mr. Swankin made that suggestion.

Ms. KING. I think it also may have come from the Environmental Defense Fund. In terms of the authorization question you have talked about "creative insecurity" spurring the Commission to greater ac-

tivity. There is an argument to be made for "creative encouragement" to industry on safety matters.

If the Commission has flexibility to move more rapidly and expeditiously, that is a spur to industry to act in good faith, to act quickly on its own to demonstrate it is interested in dealing with safety problems, and to head off, if necessary, a mandatory standard that would apply across the board.

Senator FORD. "Public interest" is hard to define, but you know it when you see it. We must have appropriate language.

Ms. KING. If there is not an offeror better equipped to do it, then the Commission itself should do it.

Ms. SLOAN. I agree generally with my colleagues that the offeror policy needs to be broadened to include the use of standards which are developed within the Commission itself. I suggest one safeguard is that we well not dispense with the offeror process because the Commission does not have the resources to eliminate it. We are dependent to some degree on it. There are fine voluntary standards being proposed now that we would go along with.

Now, don't faint, Senator; but I spoke out in favor of the chain saw standard, for example. Also, I think we can look to the States for some of their standards. There may be fine standards being promulgated in some of the States, and we should encourage this to see if some of them can be adopted.

If the State standards do not interfere with interstate commerce or if they are not less effective than the national standard, we should encourage the adoption of the State standards.

Also, I would like to echo the thoughts of John Hayward, a witness 2 days ago. He questioned the section 7(a)(1) requirements that such standards should be expressed in terms of performance requirements. This has been a problem to the Commission. He questions whether or not some of the standards could be expressed in terms of design requirements. I think we have to examine this.

I understand from my colleagues that there have been many problems which have resulted from the preference for performance requirements.

Senator FORD. I believe he pointed out Noah's Ark was a design standard. You were accused of straddling the fence of the chain saw issue, which I do not believe was an accurate description.

Ms. SLOAN. I did not straddle the fence. I spoke out in favor of the chain saw standard. I had only been there 7 days and did not feel I had sufficiently absorbed the information enough to make an intelligent decision. But I said I favored the voluntary standard as an excellent vehicle to test the use of voluntary standards, and also I was ready to vote in case of a tie for the voluntary standard.

I think I have been termed an absolutist. I reject that, also. I am willing to look at the voluntary standard. I think many of them should be coming along that will be fine.

Senator FORD. David?

Mr. PITTLE. You asked about flexibility and the conditions under which the Commission should have flexibility in writing standards.

Senator FORD. Amending section 7 to provide the greater flexibility.

Mr. PITTLE. The things the Commission should consider include, for example, whether it has in-house expertise in the area and if it is up to

speed and is close to having provisions it feels are promising. In this case the Commission should go ahead and control the process differently. I believe the real question of flexibility concerns the way in which the public participates. The present process creates problems because we are not managing the process ourselves.

I think that public participation is critical. But sometimes the way it is implemented is too cumbersome and takes too long. Cellulose home insulation is a fine example of that problem. We want to be able to act quickly. I support the language Congressman Eckhardt discussed at his hearings. Flexibility to adopt voluntary standards by making adjustments to one or two provisions and considering that as an existing standard may also be a good and expeditious route for the Commission to take when a reasonably adequate voluntary standard exists.

I have been frustrated at times by standards that look good, with the exception of one or two provisions, but our lawyers say you shall have to get into a development process and suggest that standard and the needed changes to the offeror. That takes a couple of years.

I must caution you, however, that because a voluntary standard is developed by agreement of a group that represents the industry, we may have trouble in being able to find out the basis for some of the provisions we want to promulgate.

The two changes I would like to see are flexibility in adopting voluntary standards and flexibility in managing the offeror process.

Ms. FRANKLIN. First, I want to echo the support expressed here for increased flexibility in our ability to mandate a voluntary standard. The opportunity to make substantive changes in them and to take portions of several standards and put them together is not only appropriate, it's very important. And I appreciate your making the proposal.

Second, with respect to the offeror process itself, my belief, at this point, is that we do need some flexibility. The criteria that I would use would be these:

Is there a need to expedite the process? Is there an emergency situation?

The example you used earlier—cellulose insulation—fits into this category.

The need to expedite the solution to this kind of an emergency situation would contribute to the kind of findings we should make. This would be one factor.

Second, I would consider how serious the risks are. I would also look at whether the Commission has the expertise to deal with the particular hazard is. There may be some instances where we have more particular expertise than anyone else and then we could do the job better.

I also would take into consideration our available resources. At the Commission they are simply not unlimited. It is a fact, too, that mandatory standards are more resource-intensive than voluntary ones, so I think the resource consideration has to be a factor, too.

In summary, there should be a finding that we should make based on these criteria: need to expedite, seriousness of the hazard, the Commission's special expertise, and the impact on our resources.

I am intrigued by Consumers Union's suggestion that we make such a finding and publish it for 15 days. That may be an interesting check on us, a safeguard, if you will, to see if we are not circumventing the offeror process willy-nilly.

Senator FORD. I want to give you another check on that. It is called oversight.

Ms. FRANKLIN. Indeed. I would be surprised if you weren't planning on this—and I welcome it. Can I say a word about the offeror process?

Senator FORD. Yes, you may.

Ms. FRANKLIN. I have been supportive of this unique procedure as a way to get the public involved in mandatory standards in a significant way. With the offeror process, they actually have the responsibility not to only participate meaningfully, but also to exert leadership.

We have had difficulty in implementing and managing the process. We have learned a lot from these past experiences. As a result, we've made improvements which are manifesting themselves now—our Christmas tree light proceeding, for example, the offeror process gutted at the very time when we seemed to be making it work much better. There is the still utility in the process for everyone—the Commission, consumers, and industry. Nevertheless, I definitely concur that we need flexibility in the two other areas mentioned.

I would like to thank you for mentioning that there are three women at this table. This is the first time there have been three women, a majority, on the Commission.

Senator FORD. I might say that is the first regulatory agency that has ever had a majority of women.

Mr. PITTLE. I would like to leave you with the thought—

Senator FORD. You're not going to leave me yet.

Mr. PITTLE. We have 11 more minutes.

Senator FORD. That's right and counting.

Mr. PITTLE. Eleven minutes and I hope 3 years. On the one hand it is being argued that we need the offeror process because it presents a unique opportunity for public involvement in developing a standard in the best interests of the public as a whole. On the other hand, it is being argued that we should have the flexibility to take a voluntary standard that may have been developed by a few people, make our own changes to it, and then promulgate it using the informal rulemaking process. This is an apparent contradiction. I must submit to you that what we are trying to achieve with flexibility is the ability to mandate or develop a standard expeditiously, to get it on the books, and to get products in the marketplace that meet those requirements.

Senator FORD. I hope the Commission will encourage voluntary standard groups to have outside input.

Ms. FRANKLIN. It's in our policy. If we're going to participate in drafting a voluntary standard, we want to know what efforts are being made to bring other people into the process.

Senator FORD. Let's get into a product. At yesterday's hearing the NFL Players Association presented testimony indicating that recent data covering the 1977 football season for college and high school athletes would tend to substantiate the association's prior claim that mandatory safety standard for artificial surfaces is needed. My question is: Is it necessary for the Players Association to file a third petition with the Commission in order to have this most current information evaluated?

Mr. BYINGTON. First, we have been following this situation for some period of time. This is about the third time that a petition has come before the agency on this subject.

Senator FORD. They are going to file another one.

Mr. BYINGTON. Up to this point, our answer has been no. We have participated in the development of an injury data collection system called National Athletic Injury Reporting System out of Penn State University. We have two problems. One is defining the problem itself, the injury and its relationship to the artificial turf. The second is a jurisdictional problem related to OSHA. Are the fields for public use or are they used for professional use only and come under the workplace definition?

We testified at length on this subject in front of the House of Representatives, a year and a half ago. The problem that we have is that some of our data shows an increased level of lower leg injuries, but it may not be relevant because it does not discriminate between the role of the turf and the role of the turf shoe, which is different than the normal football shoe.

We have not been able to agree with the petitioners that the injuries relate only to the turf itself.

Senator FORD. I would hope you continue to monitor this because we had strong testimony here.

Mr. BYINGTON. Yes, sir. We have invested considerable sums in the National Athletic Injury Reporting System in trying to get answers regarding this problem. One suggestion, for the record, is that if the players think we are wrong under section 10, they have the right to sue us. The last three times we denied their petitions, they did not sue us.

Senator FORD. Nobody wants to go to court.

Mr. BYINGTON. If the evidence is overwhelming in their favor and they think we are not paying attention to that evidence, they have the right to judicial review of that decision. Our decision is no, and if they can prove us wrong, they have the opportunity to do so.

Senator FORD. I understand that. You're trying to put the responsibility back on them, which is all right and proper. I hope you continue to monitor this field. The information I have is that football injuries are increasing. That bothers me considerably, both in professional, college, and high school athletics.

Mr. BYINGTON. We are concerned about football helmets—head, neck, and spinal injuries. The area of athletic equipment is under our mechanical hazards category. We agree with you that the athletic area is high on the hazard list. It's difficult to address these injuries through standards. We hope to be innovative in dealing with this problem.

Ms. SLOAN. I will encourage my colleagues to take a serious look at this and consider granting a petition to the NFL Players Association. Not only because of their concern but because it affects the high school and college students. That's not a workplace. That is similar to public playgrounds and the sort. I understand not only are there many injuries but there can be infections from the various germs that they pick up from the turf.

Senator FORD. Called staph infections, I think.

Ms. SLOAN. I haven't had a chance to discuss this with them, but I hope to talk to them soon and encourage them to lean upon us and make us take a strong look at it. I have a peculiar interest in this. I have a

brother-in-law who's the coach for the Seattle Seahawks and I am the mother of four sons. I have a real interest in this.

Senator FORD. If the Commission decides to issue any future press releases concerning football, solicit the help of professional players, those involved in the game. They were not impressed with the Commission's past efforts in this area, but I have even encouraged them not to despair. I can't let this session go, John, without saying that I think a person like Brig Owens of the Redskins would be more effective in giving football advice than someone like Safety Sadie.

Mr. BYINGTON. Touche. We didn't get into chronic hazards.

Senator FORD. We have 2 minutes. I understand the Commission has a statement on chronic hazards and I would like that submitted for the record without us getting into that. I think we have covered a pretty good area this morning.

Mr. BYINGTON. May I suggest we will submit that statement for the record?

[The statement follows:]

CHRONIC HAZARDS STATEMENT

Some have suggested that the CPSC's authority to regulate chronic health hazards associated with the use of consumer and household products should be terminated in favor of regulation of these risks by EPA under the Toxic Substances Control Act (TSCA). This argument, at first blush, seems appealing. EPA has more authority (particularly with respect to testing and premarket clearance), resources, and is in the process of creating a staff with substantial expertise in the area of chronic health hazards.

On the other hand, a number of points support retaining chronic hazard authority at CPSC.

First, it is difficult, if not impossible, to draw a dividing line between "acute" and "chronic" hazards. Such a line would have to be extremely precise in order to permit both agencies to accurately distinguish their jurisdiction and to ensure that regulatory gaps would not be created.

Unfortunately, the term "chronic" hazard is one that is often used casually rather than scientifically. It can refer to a particular type or types of disease or condition, that is, a chronic and usually incurable illness. Or, it can refer to a type of exposure, e.g., a long-term constant exposure to a toxic substance, perhaps at doses below those that ordinarily produce an acute effect. Or it can refer simply to any disease characterized by a latency period between dose and an effect. Use of any these definitions, even if refined, could create serious problems for both CPSC and EPA in determining their respective jurisdictions. For example, a substance at a high dose may produce an immediate, acute reaction; at lower doses it may not produce an immediate reaction although it may produce cancer many years later.

The issue of cancer causation is, in most respects, the primary concern in the area of chronic hazards. It is also an issue subject to considerable scientific debate. Some scientists argue that cancer develops only from repeated exposures over a lifetime. Others believe that a *single* dose may alter a cell in such a way that cancer will result years later. Depending on the type of cancer, there could be some truth to both theories. Similar questions arise regarding mutations and birth defects induced by substances passing through the placenta.

It is difficult to conceive of a method for removing chronic hazard authority from the CPSC that is not fraught with conceptual problems.

Second, one of the most often-cited reasons for separating chronic hazard authority from the CPSC—to avoid duplication of effort by CPSC and EPA, and to avoid duplication of regulation imposed on industry—is not necessarily avoided simply by restricting the CPSC to regulating acute chemical hazards. A number of chemicals that have been or are about to be regulated as chronic hazards also present acute hazards. For example, products containing benzene have recently been alleged to cause leukemia. However, these products have long been required to carry cautionary labeling because ingestion may cause chemical pneumonitis. Similarly, a product will often contain more than one substance that is potentially toxic. Situations may arise quite often in which EPA is regulating one

substance for a chronic hazard while CPSC is regulating another for acute hazards. Thus, in those instances where a product presents both types of hazard, some form of coordination between CPSC and EPA would still have to be worked out to avoid duplication of efforts.

Third, a separation of chronic hazard authority from the CPSC could seriously hamper the ability of the agency to regulate in a comprehensive manner. For example, if its chronic hazard authority were removed, the CPSC would be able to regulate the sharp edges on a toy but would be barred from regulating the lead content of the toy's paint. Similarly, the agency could set flammability requirements for clothing but would not be permitted to prohibit the use of carcinogenic chemicals as flame retardants. Nor could the agency set corrosiveness requirements for the chemicals used to make cellulose home insulation meet a CPSC flammability standard. Such results would seem to be inconsistent with the rational formulation of public policy.

Fourth, a duplication of authority between CPSC and EPA need not mean that there will necessarily be a duplication of effort. As stated earlier, CPSC, FDA, OSHA, and EPA, by interagency agreement, recently formed the Interagency Regulatory Liaison Group (IRLG). The specific purpose of this group is to assure that regulation of toxic substances is achieved without unnecessary duplication. This effort has been very successful. For example, CPSC deferred to EPA's authority to ban the nonessential uses of chlorofluorocarbons but undertook a nonduplicative labeling program to warn consumers of the presence of these substances in products while they are being phased out by the EPA ban.

In discussing these questions concerning continuing CPSC authority over chronic hazards, the Commission recognizes that it presently has limited resources to regulate those hazards. Agencies like EPA, with substantially larger budgets and more personnel, will undoubtedly play the major role in addressing chronic health problems. CPSC therefore must carefully focus its regulatory efforts so as not to duplicate the work of other agencies. The Commission will continue to work with the IRLG to determine which chronic hazards it should address.

Mr. BYINGTON. In summary, the Commission is unanimous in its position that it ought to retain its authority as to chronic hazards. We ask Congress to consider providing us with the additional resources we have discussed so we can play an appropriate role, although our actions will be focused on products not dealt with in other agencies.

Senator FORD. In light of the fact you will be leaving the Commission shortly, I believe the committee would benefit from your personal opinions as to what direction the Commission should take over the next several years. I would like for you to submit that comment for the record, if you would.

Mr. BYINGTON. I am pleased to do so.

[The following information was subsequently received for the record:]

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

At the April 6, 1978 hearings on reauthorization of the Consumer Product Safety Commission (CPSC) by the Consumer Subcommittee of the Senate Committee on Commerce, Science, and Transportation, you requested that I provide the Subcommittee with my personal comments on the directions that CPSC should move in the future. I am very pleased to have this opportunity to provide some brief comments based on my experience as Chairman of the agency.

COLLEGIALITY

After 2 years as Chairman of an independent Federal regulatory commission, I am convinced that the concept of the collegial body should be reviewed and seriously questioned. My experience has shown it is not conducive to efficiency or accountability. This is of particular concern in the area of health and safety which often requires swift and decisive action. Precious time is often lost attempting to gain a consensus of opinion among the Commissioners. Moreover, the consensus is frequently the lowest common denominator of three (a ma-

jority of the Commission) which is not necessarily the most effective or efficient manner of providing consumer protection.

The solution is either a single administrator or I believe, at a minimum, we need to more clearly and exactly define and restrict the role of the collegial body to policy rather than management issues if we are to retain the collegial concept. It is essential that we have one individual, the Chairman and Chief Executive Officer of the agency, administratively responsible and accountable to the President, the Congress, and the people. The key to this happening is a clear mandate from the President for the Chairman in his role of Chief Executive Officer. I support amending the Consumer Product Safety Act to have the Chairman serve at the pleasure of the President. I believe that the present situation ignores the political realities inherent in our system of government.

REAPPOINTMENT

I believe that public policy would be better served through the elimination of reappointments to regulatory Commissions.

As President Carter has suggested and requested, Presidential appointees for a term certain should attempt to serve out their terms in the maximum extent possible. However, I do not believe that such appointees should be reappointed. No person should ever be allowed to develop a vested interest in a Presidential appointment, nor should he or she be regulating with an eye to reappointment. That is the swiftest way to eliminate independence—the cornerstone of term specific appointments.

INTERAGENCY REGULATORY LIAISON GROUP (IRLG)

The most significant step forward in developing Federal interagency cooperation has occurred during this past year, that is, the establishment of the Interagency Regulatory Liaison Group (IRLG).

Under the terms of the interagency agreement, each agency retains its autonomy. However, we are bound together primarily by our conviction that it makes good sense to work together to provide more consistent regulatory policy and better sharing of information and resources. Hopefully this will result in improved public health and safety protection during this period of an emerging chronic hazard problem.

CHRONIC HAZARDS

Without question, the single most extraordinary development at CPSC in the last two years has been the increased resources allocated to chronic hazards. It is my opinion that the formation of the IRLG and CPSC's participation in it will ultimately be viewed as one of the most significant events in CPSC history.

I believe serious consideration must be given as to whether or not CPSC should play any future role in this massive undertaking. A very good argument can be made that it should not, but rather it should defer to its sister IRLG agencies: EPA, FDA, and OSHA. At present CPSC lacks the resources and expertise to conduct in-depth research and analysis on a large scale in this area. If CPSC is to play any worthwhile role, then its efforts should be tightly focused to handle only those potential carcinogens in consumer products, which for procedural, statutory or priority considerations can best be dealt with under the Consumer Product Safety Act. And it is essential that the agency be given a significant increase in resources, both people and dollars, in the months and years ahead.

Perhaps, regulation in this area can best be accomplished through a "lead agency" jurisdictional arrangement based on the "primary usage" of that chemical. If its primary usage is as an industrial solvent, OSHA should have the lead. If such a chemical is primarily used as a flame-retardant in consumer products, CPSC should have the lead. If it is primarily a food coloring agency, FDA should have the lead. But all should continue to cooperate and coordinate their actions with EPA within the parameters of the Toxic Substances Control Act.

EVALUATION

When I became chairman of CPSC, one of my great concerns was that the agency lacked a proper evaluation mechanism. It was unable to evaluate its activities as to their actual success in the past or their projected success in the

future. It was unable to provide OMB, the Congress, or the public with a mechanism by which its actions or potential actions could be judged. I continue to believe that it is imperative that the role of evaluation be given a high priority in the agency's endeavors.

We must develop techniques and factors other than the number of standards promulgated or the cumulative reduction of injuries attributable to consumer products so as to enable Congress and the agency itself to measure overall progress and to weigh the comparative effectiveness of individual programs.

One measure should be the number of actions taken to protect the public utilizing all tools available to CPSC. These should include product safety rules, product bans, labeling requirements, actions under section 12 of CPSCA—imminent hazards—and actions under section 15—substantial product hazards. Under section 15 the Commission can act quickly against hazardous products already in the marketplace rather than developing a standard that could take several years to have an impact. It is important to note that as of January 1, 1978, nearly 1 million units of products had been corrected as a result of section 15 activities in fiscal year 1977.

Another factor that might be considered is Commission participation in voluntary safety activities in the private sector. Where CPSC participation is direct, the agency's contribution to the development or upgrading of voluntary standards may be significant. Other factors for possible consideration include CPSC activities in safety education and safety research.

This list is by no means complete. The Commission should continue to explore ways to evaluate CPSC's effectiveness and to refine these into useful tools to measure progress or failure.

In summary, one cannot rely on a single measure since the Commission's involvement and contribution may be direct or indirect, its effect tangible or intangible. Still another measure is the role the Commission plays and the impact it has, merely by virtue of its existence, in creating a climate conducive to greater product safety. Voluntary standards organizations, trade associations and individual manufacturers, by their own admission, have become much more sensitive to product safety concerns since the CPSC was created.

CONCLUSION

I believe that the Commission is now in a position to produce and implement measureable objectives. I believe we are already seeing the positive results of the initiatives of the last two years, and I would hope that the Congress will continue to exercise vigorous oversight to see that the results achieved so far are not lost.

Senator Ford. It's now 1 minute and 3 years, David. The hearings on reauthorization of the Consumer Product Safety Commission will come to a close.

[The statements follow:]

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

Mr. Chairman, my fellow Commissioners and I are pleased to appear before the Consumer Subcommittee to discuss the future of the Consumer Product Safety Commission. For, as you know, we are at a critical point in the Commission's history. Our authorization expires at the end of this fiscal year, and Congress, will again be reexamining the kind and quality of product safety to be afforded the American consumer.

Mr. Chairman, the Commission has received its share of criticism during its five years of existence. Organized consumer groups have criticized what they see as inordinate delays and a lack of responsiveness to the needs and concerns of the consumer. Business, too, has been concerned, often accusing the Commission of overreaction, but just as often objecting to delays which increase their uncertainty and make the conduct of business difficult. The Congress and the press have focused both on operational problems within the agency as well as specific product hazards. Yet I believe the controversy has often obscured the real accomplishments of this agency.

We are at a crossroads. We have two new Commissioners, and one recently appointed to a new term, bringing the Commission to full statutory strength for the first time in two years. Soon, we will have a new Chairman. At the same

time, serious concern is being expressed about certain key provisions of the Commission's statutory mandate, as well as about the basic structure of CPSC as an independent regulatory commission.

As we look to the future, I think it is appropriate to briefly review the past. I believe that this agency, understaffed and underfinanced compared to almost any other Federal regulatory agency, has made, by any objective standard, impressive progress. We have developed an emerging record of responsive regulatory achievements.

The Commission was established to protect the consumer from unreasonable risks of injury associated with consumer products. Congress provided us with many means under five Acts of reaching this goal. Our activities are not limited to mandatory standard development, but may also include the establishment of bans or special labeling requirements, varying degrees of cooperation with individual firms and voluntary standards groups, information and education programs, seizures, recalls and repurchase, and so on. Therefore, I do not believe that the best or only measure of the Commission's effectiveness is a tally of mandatory safety rules issued under section 7 of the Consumer Product Safety Act.

One of the more significant organizational achievements has been the establishment of priorities for Commission action. On July 8, 1976 the Commission selected a set of criteria for determining priorities, after extensive public consideration of possible alternatives. In June 1977 these criteria were then applied to a number of projects from which the Commission selected 29 high and 17 medium priority product specific projects. These priority projects were published in the Federal Register on September 22, 1977. They formed the basis for our fiscal year 1978 Operating Plan. All priorities are reviewed quarterly and adjustments in the Operating Plan are made by the Commission as the situation dictates. Attached at Tab A is a list of the Commission's high and medium priority projects, and the status of each.

At meetings on March 13, 14, and 15, 1978, the staff presented a Mid-Year Review of these projects to the Commission. Based on this Mid-Year Review, the Commissioners will make decisions on:

Adjustments in the FY-1978 Operating Plan; guidance to the staff for the FY-1979 Operating Plan; guidance to the staff for the zero-base budgeting exercise for fiscal years 1980, 1981, and 1982; priority setting for the next 18 months; and general guidance to the staff regarding allocation of resources within specific activities, such as regulatory development, research, information and education, etc.

In addition, the Office of Strategic Planning has recently submitted to the Commission a detailed analysis of the long-range options and strategies available to the Commission. It incorporates the results of consultations with Commission staff, critics of the agency, and those instrumental in its creation. As part of the process of providing the staff with the short-range guidance required for the immediate future, the Commission will deal with the problem of choosing preferred strategies for the next five years. The goal is to provide a consistent, carefully considered and formally approved point of reference against which future operating plans and budget requests can be drafted.

As part of the overall management change instituted last year, the Commission's program structure was reorganized into the following hazard categories:

- Fire and Thermal Burn Hazards;
- Electric Shock Hazards;
- Acute Chemical and Environmental Hazards;
- Chronic Chemical and Environmental Hazards;
- Mechanical Hazards—Children's Products;
- Mechanical Hazards—Athletic Products;
- Mechanical Hazards—Power Equipment; and
- Mechanical Hazards—Household/Structural Products.

I believe it would be appropriate to summarize the Commission's recent progress in addressing these hazards.

FIRE AND THERMAL BURN HAZARDS

On February 14, 1978, the Commission published a proposed ban on unvented gas-fired space heaters. Public hearings on the proposal were held in Washington, D.C. on March 6, and in Dallas, Texas, and Miami, Florida, on March 28 and 29. A draft final ban is scheduled to be sent to the Commission for a decision in the fourth quarter of this fiscal year.

On February 6, 1978, the Commission published final amendments to the children's sleepwear standards. We believe that the standards, as amended, will continue to provide children with adequate protection from sleepwear-related burns while the need for treatment with chemical flame-retardants will be significantly reduced.

A consumer use survey on children's sleepwear was completed in December 1977. The staff expects that the Commission will receive a briefing package regarding definitions of children's sleepwear to be used in enforcing the standards in the fall of 1978.

In the voluntary standards area, the Commission staff is continuing to monitor the Underwriters Laboratory voluntary standard for electric ranges and ovens, and the American National Standards Institute voluntary standard for gas ranges and ovens. (The Commission published on November 10, 1977, a voluntary standards policy, which provides the basis for CPSC involvement in developing voluntary standards.)

The Commission has contracted with Southwest Research Institute to evaluate the adequacy of existing voluntary standards and other standards (such as any existing foreign standards) for smoke detectors.

On October 5, 1977, the U.S. Court of Appeals for the District of Columbia upheld the Commission's fireworks regulations. Last month, the State of Hawaii's request for review of that decision was denied by the Supreme Court.

The four compliance programs currently underway in the Fire and Thermal Burn program cover Cease and Desist Orders, fireworks, mattresses and carpets.

A particularly noteworthy activity in the Communications area is the ongoing Burn Demonstration Project, designed to measure the effectiveness of information and education strategies in reducing the incidence and severity of burn injuries.

Finally, the Commission contracted for a study of energy conservation devices, including vent dampers, flue heat recovery devices, and intermittent ignition devices such as electronic pilot lights. We expect to receive a final report from the contractor this week, and staff recommendations on appropriate action will follow review of the final report.

ELECTRIC SHOCK HAZARDS

A proposed labeling regulation for CB base station radio antennas, under section 27(e) of the Consumer Product Safety Act, was published on November 1, 1977. Comments on the proposal are now being analyzed, with a Commission decision on a final rule scheduled for spring.

On November 16, 1977 the offeror, the National Consumers League, submitted its recommended standard for miniature Christmas tree lights to the Commission. A Commission briefing was held on March 23, and the staff expects to have a revised briefing package on the draft standard to the Commission by May 3, 1978 for a decision.

Based upon industry safety improvements resulting from our Notice of Proceeding for television receivers, the Commission withdrew, on November 2, 1977, the portions of that Notice relating to electric shock, implosion, and mechanical hazards. However, the portion dealing with fire hazards was extended for 18 months. The staff will do a feasibility study on fire containment, and will continue to monitor fire incident data.

In January, the Commission decided to monitor implementation of two proposed revisions to the Underwriters Laboratory voluntary standards for electrical extension cords rather than establish a mandatory safety standard.

On October 26, 1977, the Commission filed suit in District Court in the District of Columbia, seeking that the court declare old technology aluminum wiring to be an imminent hazard. On March 27, 1978, in a collateral case, the U.S. Court of Appeals for the Third Circuit ruled that the Commission does have jurisdiction over aluminum wiring systems. A copy of that ruling is attached at Tab B.

ACUTE CHEMICAL AND ENVIRONMENTAL HAZARDS

The Commission issued a final ban of extremely flammable contact adhesives on December 19, 1977. The ban became effective one month later. Our field offices are now conducting a program to inspect all manufacturers of these products to insure that they are complying with the ban.

A proposed regulation requiring child-resistant packaging for acetaminophen preparations (aspirin substitutes) was published on February 3. A policy statement that prescription drugs that are distributed to pharmacies shall be in child-

resistant packaging if the packages in which the drugs are distributed by the manufacturers are intended for consumers was published on March 23. In addition, the Commission proposed for comment a policy statement that all prescription drugs subject to a special packaging standard that are distributed to physicians should be in child-resistant packaging if the immediate package in which the manufacturer distributes the drugs is intended to be dispensed to the consumer.

The Commission staff recently forwarded a briefing package on first-aid instructions for inducing vomiting to the Commission for consideration, and a Commission briefing in this regard is scheduled for mid-April. Our Poison Prevention Week campaign in March emphasized the proper use of Syrup of Ipecac, the generally recommended emetic.

The Compliance programs in the acute chemical hazards area include, in addition to extremely flammable contact adhesives, a Federal Hazardous Substances Act (FHSA) retail survey, HHS manufacturers survey, an inspection program under the Poison Prevention Packaging Act for iron preparations, and an inspection program directed toward manufacturers of cement base products.

Finally, a joint CPSC/FDA committee was formed to plan the 1978 poison prevention program, which will include reissuing 1977 radio and TV spots with joint CPSC/FDA identification.

CHRONIC CHEMICAL AND ENVIRONMENTAL HAZARDS

When CPSC came into existence in 1973, its primary focus was on acute hazards, for example, abrasions, lacerations, broken bones, poisons, etc. The agency was specifically organized to address these kinds of hazards. However, the Commission is becoming increasingly active in the area of chronic hazards—those hazards which produce a delayed, often unforeseen, harmful effect on health. The recent actions by CPSC reflect, in part, a growing national concern over and awareness of the impact of known potential chronic hazards.

The Commission presently has under consideration various proposed statements of policy and procedures concerning classification and regulation of carcinogens in consumer products. An initial document prepared by the staff contains statements of regulatory policy and a proposed set of specific procedural guidelines under which the Commission and staff would operate in screening, classifying, evaluating, and regulating carcinogenic substances in consumer products. In considering the staff proposal, individual Commissioners have suggested the inclusion of additional policy provisions, revisions of the procedural guidelines and other changes. While no final decisions have been reached, the issues under consideration include:

The degree to which regulation of substances in consumer products which present potential carcinogenic hazards should await resolution of scientific uncertainty.

The manner in which factors such as economic and social costs of regulation should enter into the Commission's determination of an appropriate regulatory strategy.

The role of particular types of tests in the determination of carcinogenic hazard to humans.

The specific procedural guidelines proposed by the staff identify a four-step process for screening, classifying, evaluating and regulating substances in consumer products about which a question of carcinogenicity is raised. The purpose of screening is to eliminate substances that are not present in any consumer products under Commission jurisdiction. The purpose of classification is to place the remaining substances into categories based on a level of confidence that the substance is indeed a carcinogen. The evaluation phase involves a staff analysis and Commission appraisal of the priority-setting criteria as they apply to potential carcinogenic hazards. The last step is an analysis of the available regulatory options.

An integral part of CPSC's Chronic Hazards Program has been its participation in the Interagency Regulatory Liaison Group (IRLG) composed of CPSC, EPA, FDA and OSHA. As lead agency for the IRLG during the first six months of 1978, the Commission has been furthering the overall goals of improved public health through information sharing, developing consistent regulatory policy and avoiding duplication of effort. Specifically, these agencies are coordinating their efforts in the development of regulations for dibromochloropropane (DBCP), chlorofluorocarbons, lead, benzene and twenty other chemicals. In addition, the

agencies have been coordinating the development of their carcinogen policies.

Other IRLG activities in which CPSC is participating relative to the chronic hazards program include the development of a common set of testing standards and guidelines which can be used by the four agencies in dealing with essentially the same set of industries. The IRLG Information Exchange Work Group is focusing on the design establishment and coordination of efficient data banks for use by all Federal agencies who have responsibilities in toxic substances regulation. Concurrently, the research planning coordination effort is inventorying research programs within the four agencies and within Federal research institutes to determine areas of overlap and gaps as well as to make recommendations on ways to fill these gaps. In the field locations, compliance and enforcement activities are being analyzed to take advantage of such opportunities as joint inspections and investigations in order to reduce compliance burdens on industries regulated by more than one agency. The IRLG Education and Communications Work Group is focusing on the transmission of information to the public on toxic substances via a joint format rather than individual efforts.

These interagency activities have enabled the Commission to extend its chronic hazard programs well beyond the resource limitations of the Commission, and we believe that this new phase of interagency cooperation should benefit the Commission, other Federal regulatory agencies and the public.

Final regulations banning artificial emberizing compounds containing respirable free-form asbestos were published on December 15, 1977, and became effective that day. As an interim action, prior to a final ban, the Office of Communications developed and distributed 100,000 "Consumer Alert" sheets which provided instructions for removing emberizing materials containing asbestos from consumer fireplaces. Final regulations banning consumer patching compounds containing respirable free-form asbestos were published December 15, 1977, and became effective January 16, 1978. A compliance program has been initiated calling for the inspection of all known manufacturers of the banned products—approximately 15 manufacturers of fireplace ash and emberizing compounds, and approximately 50 manufacturers of patching compounds.

CPSC published a final section 27(e) labeling rule for chlorofluorocarbon propellants in August 1977. That rule, requiring manufacturers of these products to provide the Commission with performance and technical data, in addition to the warning labeling, became effective on February 27, 1978. The field compliance program for self-pressurized consumer products containing chlorofluorocarbon propellants started in March. In addition, CPSC has worked closely with EPA and FDA on the final ban, issued by those agencies on March 17, of non-essential uses of chlorofluorocarbon propellants.

The ban of paint containing more than .06 percent lead became effective on February 28. The field compliance program, calling for the collection of approximately 1,000 samples, is expected to begin by June 1.

The staff has forwarded to the Commission a briefing package on a petition to ban benzene-containing consumer products. A Commission briefing in this regard is scheduled for April 19. The staff is preparing briefing packages on a proposed CPSA section 27(e) rule requiring labeling of garments treated with flame retardant chemicals, a proposed regulation requiring labeling for all aerosol propellants, and work plan alternatives for Fyrol FR-2.

The CPSC Hotline has handled approximately 15,000 calls to date relative to TRIS. In addition, at Commission direction, the staff has continued to pursue a number of TRIS-related enforcement activities. On February 1, 1978, a civil action was filed in the U.S. District Court for the Southern District of New York against seven fabric manufacturers to require the repurchase of TRIS-treated fabric. This case is presently pending the filing of responsive pleadings by the defendant manufacturers. In addition, over 17,000 children's sleepwear garments suspected of containing TRIS were recently seized in North Carolina to prevent their sale to the public. In the past year nine lawsuits seeking injunctions against retailers from selling TRIS-treated children's sleepwear were filed across the country. Six of these cases were resolved through consent orders not to engage in any further sales of such garments. Negotiations to resolve the remaining three cases are presently in process.

MECHANICAL HAZARDS—CHILDREN'S PRODUCTS

A final regulation establishing mandatory safety requirements for pacifiers and banning certain hazardous pacifiers became effective on February 26, 1978. A field compliance program began in March, including inspections of approxi-

mately twenty major pacifier manufacturers and importers, and monitoring of import shipments of pacifiers arriving at major ports of entry.

The Commission issued final technical requirements for sharp points on toys and other children's articles on December 22, 1977. These regulations will become effective on December 22, 1978. Final technical requirements for sharp edges were published on March 24, 1978, and will become effective on March 26, 1979.

The Commission has contracted with the National Bureau of Standards to perform additional work on public playground equipment, notably on human factors considerations. A final report from NBS is due in August. Meanwhile, based on results of a consumer survey, a coordinated series of education materials on playground equipment was developed.

The Commission has been involved also in work on voluntary standards for playpens, bunk beds, infant carriers, and strollers.

In the enforcement area, the field staff in October and November 1977 inspected 41 retail toy stores across the country to check compliance with the existing toy regulations. Only four violative toys were found, confirming our expectations of a high level of compliance. In addition, a compliance program covering non-full size cribs is currently in operation.

MECHANICAL HAZARDS—ATHLETIC PRODUCTS

The staff briefed the Commission on skateboards during the mid-year review, and the Commission is now considering the need for any further action. Also, the staff has reached agreement with a franchise company to collaborate in the development and promotion of an educational program relating to skateboards.

The Commission recently considered a petition seeking mandatory safety standards for football helmets and shoes. The Commission denied the petition as to shoes, but said that since additional information would be necessary to reach a decision on football helmets, the Commission plans to contract for additional research, especially in the area of measuring head impact during practice and game conditions.

The Commission's field staff is conducting a major compliance program to enforce the bicycle safety regulations. In addition, CPSC has co-sponsored with the National Highway Traffic Safety Administration ten regional workshops on bicycle safety, and has contracts with 33 states and 16 communities for bicycle safety programs.

Finally, the Commission has been monitoring the development of voluntary standards for snowmobiles and football helmets, and has liaison with committees working on voluntary standards for ice hockey and snow skiing.

MECHANICAL HAZARDS—POWER EQUIPMENT

At its March 30 meeting, the Commission considered issues related to its proposed mandatory safety standard for power lawn mowers. Over 1,000 pages of comments were received in response to the proposal, and are being analyzed by the staff. The Commission has decided to address riding mowers and walk behind mowers separately, and authorized the staff to proceed with a first-phase draft final standard for walk-behind mowers addressing only blade contact and related provisions. Additionally, the staff is scheduled to brief the Commissioners within the next month on issues related to blade contact and the inter-relationship between the blade contact and thrown object requirements.

In our power lawn mower education evaluation program, we evaluated the effectiveness of a demonstration education program regarding outdoor power equipment in changing consumers' knowledge, awareness, reported behavior, and injury rates.

The Commission also considered on March 30 a petition to establish mandatory safety standards for chain saws, and industry efforts to develop voluntary safety standards for chain saws. The staff has been directed to participate in the industry voluntary standard development process, under terms to be defined in an agreement between the Commission and the Chain Saw Manufacturers Association (CSMA). The agreement, which will require Commission approval, is to contain a provision for Commission veto over non-industry participants and shall specify periodic reporting to the Commission.

In response to Commission interest, voluntary safety requirements have been established for hedgetrimmers and glass soft drink bottles.

MECHANICAL HAZARDS—HOUSEHOLD/STRUCTURAL PRODUCTS

A proposed certification regulation for architectural glazing materials was published in the Federal Register on December 16, 1977. The comment period closed in mid-March, and there was an opportunity for the oral presentation of views on March 1, 1978. The staff is analyzing the comments and plans to prepare a draft final rule for Commission decision later this year. In addition, an extensive compliance program to enforce the architectural glazing standard is currently in operation.

Our ban on unstable refuse bins becomes effective on June 13, 1978. We have designed a compliance program to begin at that time which will involve inspections of both refuse bin manufacturers and of refuse bins in use.

With regard to home insulation, about which you have expressed particular concern, the Commission published on March 13 a Notice of Proceeding soliciting offers to develop a mandatory safety standard for flammability of cellulose insulation. A meeting with potential offerors to discuss procedures and guidelines for submitting offers was held on March 27.

In the voluntary standards area, the Commission staff is working with the American National Standards Institute Committee A.14 in its revision of existing voluntary standards for wooden and metal ladders, and is monitoring the development of the American Society for Testing and Materials' standards for bathtubs and showers.

Mr. Chairman, by letter dated November 4, 1977, you requested certain information and expressed concern about the proposed revision of the section 15 regulations, published on September 16, 1977. The Commission has reviewed more than 130 written comments on the proposal, including several requests that the Commission hold a public hearing. On March 23, the Commission voted to hold a hearing on a limited number of controversial issues concerning the proposed section 15 regulations. The Federal Register notice in this regard is attached at Tab C.

Another issue which has attracted much interest in recent months is section 7 of the Consumer Product Safety Act. At the time the Commission was established, this section represented a truly innovative approach to standards development. The standards development process was to be open with maximum involvement by consumers; the process was also to be expeditious, adhering to a strict time table. Section 7 has continued to be one of the most controversial provisions of the Act. Early experience with its implementation led to suggestions for reform, or even for its abandonment. The manner in which the Commission develops mandatory standards is crucial, and the Commissioners hold differing views on the best approaches to take. Commissioner Franklin, Commissioner Pittle, and I have prepared written statements on this subject (attached at Tab D). Commissioners King and Sloan have previously expressed their concerns regarding the offeror process to you, at their confirmation hearing and in response to your written questions. I wish to emphasize that while the Commissioners differ regarding certain details of potential section 7 amendments, we are all in agreement that some greater degree of flexibility for the Commission is needed.

As a small agency with a limited budget, we have devoted much thought to ways in which our resources can be maximized. As discussed earlier, we have been an active participant in the Interagency Regulatory Liaison Group, so that our efforts in the chronic hazards area can be coordinated with those of EPA, FDA, and OSHA. We are also participating on other interagency task forces on energy, insulation, housing, lead-decorated glasses, and so on. We have significantly expanded our Federal/State relations and commissioned state officials in five states and Puerto Rico, delegating to them authority to perform investigations and inspections under our Acts.

Important as our regulatory accomplishments are, the Commission has also adopted a number of procedural and organizational reforms that are already having an effect. Our recent reorganization, I believe, provides the framework necessary for a productive, efficient agency. Reforms in our decision-making process, especially the increased involvement of the Commissioners in budget and planning decisions and in the establishment of priorities for Commission action, will also contribute to greater accountability on the part of the Commission.

The Commission has, as you know, recommended authorization levels of \$55 million for fiscal year 1979, \$60 million for fiscal year 1980, and \$65 million for fiscal year 1981. We are pleased to note that these are the levels contained in

S. 2976. These figures represent the Commission's best estimates of the resources needed to develop and implement its programs. The estimates are based on the resources we will need to continue existing programs and on estimated resources to deal with anticipated problems. For example, our authorization request for fiscal year 1979 is higher than our requested budget authority for that year by about \$10 million. We anticipate, however, that the Commission may need additional funds to deal with home insulation and emerging chronic hazards.

Although the Commission has not yet specifically refined its priorities for fiscal year 1980 and fiscal year 1981, we intend to place continued emphasis on our existing hazard programs. Two areas will undoubtedly require increased efforts and resources: Fire and Thermal Burns because of identified and potential hazards, especially in structural and energy-related areas; and Chronic Chemical and Environmental Hazards, because of the need for research and action on the numerous, often unsuspected, chemicals being used in consumer products.

Lastly—but very importantly—if the Commission is to adequately and realistically plan and evaluate its efforts, a continuing emphasis and resource commitment must be made in this area. Congressional and OMB concerns over the inadequacies of our past planning and evaluation initiatives are being addressed. Our first effort at developing a long-range plan is nearing completion. An initial series of evaluation efforts is also underway. Yet we believe that much still needs to be done.

If the Commission is to plan, develop, implement, and evaluate necessary consumer product safety initiatives, it must be provided with adequate resources. These resources are, obviously, positions and dollars. But the Commission also needs flexibility—the means to respond to previously unknown hazards. This means not only an adequate level of funding, but multi-year funding within broad hazard categories, which will enable the Commission to plan and adjust to future situations. If this agency is ever to be a vitally active, rather than reactive, entity, it must be able to look ahead. We are, therefore, hopeful that the Congress will enact a three-year authorization as provided in S. 2976.

In conclusion, Mr. Chairman, I would like to recall your request at our last hearing before the Consumer Subcommittee for a timetable on standards we would be issuing. An estimated timetable was provided to you by letter dated November 18, 1977. Attached at Tab E is an updated listing of those project milestones which were scheduled to be accomplished within the first and second quarters of fiscal year 1978 and two milestones scheduled for the third quarter of fiscal year 1978, which have already been accomplished. You will note that, out of a total of 25 projects, three project milestones were met early, and 16 were met on time or are proceeding on schedule.

Mr. Chairman, this concludes my prepared statement. My colleagues and I will be pleased to answer any questions the Subcommittee may have.

APPENDIX A

HIGH PRIORITY PROJECTS

Asbestos

Final regulations banning artificial emberizing compounds containing respirable free-form asbestos were published in December 15, 1977, and became effective that day. Final regulations banning consumer patching compounds containing respirable free-form asbestos were published December 15, 1977, and became effective January 16, 1978.

Power mowers

The Commission has received over 1,000 pages of comments in response to its proposed mandatory safety standard for power lawnmowers. At their March 30 meeting, the Commission decided to address riding mowers and walk-behind mowers separately, and authorized the staff to proceed with a first-phase draft final standard for walk-behind mowers addressing only blade contact and related provisions.

Architectural glazing materials—Certification

A proposed certification regulation for architectural glazing materials was published in the Federal Register on December 16, 1977. The staff is analyzing comments received in response to the proposal, and plans to prepare a draft final rule for Commission decision later this year.

Unstable refuse bins

Our ban on unstable refuse bins becomes effective on June 13, 1978. We have designed a compliance program that will involve inspections of refuse bin manufacturers, to ensure that their newly manufactured products are in compliance, and of refuse bins in use, to ensure that the products actually in use also comply.

Lead in paint

The ban on paint containing more than .06 percent lead became effective on February 28, 1978. Beginning in June, we will collect and analyze about 1,000 paint samples from manufacturers selected to be representative geographically and in terms of size.

Pacifiers

A final regulation establishing mandatory safety requirements for pacifiers and banning certain hazardous pacifiers appeared in the Federal Register on June 30, 1977, and became effective on February 26, 1978.

Sharp points (toys and children's articles)

The Commission issued final technical requirements for sharp points on toys and other children's articles on December 22, 1977. These regulations will become effective on December 22, 1978.

First-aid instructions

The Commission staff recently forwarded a briefing package on first-aid instructions for inducing vomiting to the Commission for consideration, and a Commission briefing in this regard is scheduled for mid-April. Our Poison Prevention Week campaign during March of this year emphasized the proper use of Syrup of Ipecac, the generally recommended emetic.

Upholstered furniture

In September, 1977, the Commission made a preliminary decision that a mandatory flammability standard for upholstered furniture would be necessary. At the same time, they requested the staff to make modifications in the draft standard intended to reduce the economic impact of the regulations, to study various means of implementing the standard, to review the California standard, and to monitor the industry's voluntary efforts. On March 22, the Commissioners met with the Upholstered Furniture Action Council (UFAC) and were briefed on the voluntary furniture flammability standard proposed by industry.

Sharp edges (toys and children's articles)

Final technical requirements for sharp edges were published on March 24, 1978, and will become effective on March 26, 1979.

Children's sleepwear—Definitions

A consumer use survey on children's sleepwear was completed in December, 1977. The staff now expects that the Commission will receive a briefing package regarding definitions of children's sleepwear to be used in enforcing the standards in the fall of 1978.

Miniature Christmas tree lights

On November 16, 1977, the National Consumers League submitted its recommended standard for miniature Christmas tree lights to the Commission. A Commission briefing was held on March 23, and the staff expects to have a revised briefing package on the draft standard to the Commission within two weeks for a Commission decision on a proposed standard.

Television receivers

Based upon industry safety improvements resulting from our Notice of Proceeding for television receivers, the Commission withdrew, on November 2, 1977, the portions of that Notice relating to electric shock, implosion, and mechanical hazards. However, the portion dealing with fire hazards was extended for 18 months. The staff will do a feasibility study on fire containment, and will continue to monitor fire incident data.

Aluminum wire

On October 26, 1977, the Commission filed suit in District Court in the District of Columbia, seeking that the court declare old technology aluminum wiring to be an imminent hazard. On March 27, 1978, in a collateral case, the U.S. Court of Appeals for the Third Circuit ruled that the Commission does have jurisdiction over aluminum wiring systems.

Ranges and ovens

The Commission staff is continuing to monitor the Underwriters Laboratory voluntary standard for electric ranges and ovens, and the American National Standards Institute voluntary standard for gas ranges and ovens.

Skateboards

The staff briefed the Commission on skateboards during the mid-year review, and the Commission is now considering the need for any further action. Also, the staff has reached agreement with a franchise company to collaborate in the development and promotion of an educational program relating to skateboards.

Extension cords and trouble lights

On January 19, the Commission voted to deny a petition seeking a mandatory safety standard for extension cords, and decided to monitor UL's progress in implementing its voluntary standard. The Commission is now reconsidering trouble lights as part of its mid-year review process.

Bicycle regulation—Amendments

The Commission, in December, decided to defer action on amending the bicycle regulation pending the development of performance requirements for wet braking by the International Standards Organization.

Matchbooks—Certification regulation

The Commission now has before it for decision a draft proposed matchbook certification regulation. The status of this proposed regulation may change as a result of the recent decision of the U.S. Court of Appeals for the First Circuit regarding the matchbook standard.

Ladders

The Commission staff is working with the ANSI A.14 Committee in its revision of existing voluntary standards for wooden and metal ladders.

Energy conservation devices

The Commission contracted for a study of energy conservation devices, including vent dampers, flue heat recovery devices, and intermittent ignition devices such as electronic pilot lights. We expect to receive a final report from the contractor this week. Staff recommendations on appropriate action will follow will follow review of the final report.

Bathtubs and showers

The Commission staff is continuing to monitor the development of the American Society for Testing and Materials' standards for bathtubs and showers.

Smoke detectors

The Commission has contracted with Southwest Research Institute to evaluate the adequacy of existing voluntary standards and other standards, such as any existing foreign standards, for smoke detectors. We expect the technical report from the contractor in fall 1978; the staff evaluation is scheduled for completion that winter.

Football helmets

The Commission recently considered a petition seeking mandatory safety standards for football helmets and shoes. The Commission denied the petition as to shoes, but said that since additional information would be necessary to reach a decision on football helmets, the Commission plans to contract for additional research, especially in the area of measuring head impact during practice and game conditions.

Small parts (toys and children's articles)

Work on small parts in toys and other children's articles has been largely deferred until the completion of the technical requirements for sharp points and sharp edges. The staff now expects to have a proposal on small parts ready for Commission consideration this June.

MEDIUM PRIORITY PROJECTS

Power saws (portable)

No action is underway at this time. Work on this project was deferred to permit concentration on chain saws.

Chain saws

On March 30, 1978, the Commission considered a petition to establish mandatory safety standards for chain saws. The staff has been directed to participate in the industry voluntary standard development process, under terms to be defined in an agreement between the Commission and the Chain Saw Manufacturers Association (CSMA). The agreement, which will require Commission approval, is to contain a provision for Commission veto over non-industry participants and shall specify periodic reporting to the Commission.

Over-the-counter antihistamines

Preliminary research indicates that FDA's release of some ten antihistamines from prescription status may present a possible poisoning hazard to young children. As prescription drugs, the items would be subject to the Commission's special packaging requirements. The Commission staff is exploring the possibility of requiring special packaging for these products.

Power drills

No action is underway at this time. We plan to address the electric shock hazard associated with this product in the Portable Electric Equipment project contained in the fiscal year 1979 Budget Request at the minimum level for the Electric Shock Hazard program.

Household chemicals/petroleum distillates (cleaning, lubricating and polishing agents)

The Commission staff is analyzing injury data on accidental ingestions by children of products containing petroleum distillates. It is possible that development of a regulation requiring special packaging will address this hazard.

Household chemicals/drain cleaners containing sulfuric acid

The Commission staff is currently collecting information on the hazard presented by these products. The Commission has received a petition requesting banning of sulfuric acid drain cleaners.

Power saws (nonportable)

No action is underway at this time. Work on this project was deferred to permit concentration on chain saws (item 2).

Eye irritants

The Commission staff has completed a revised "Illustrated Guide to Grading Eye Irritation by Hazardous Substances." A Commission-sponsored workshop is planned to acquaint the product-testing community with the procedures described in the guide. In addition, a modified test method has been discussed with the Interagency Regulatory Liaison Group, and the staff expects to complete a draft for proposal in the Federal Register by the end of this calendar year.

Wearing apparel

The Commission staff has received the proposed revised flammability standard drafted by the National Bureau of Standards.

Household chemicals/rust removers containing hydrofluoric acid

The Commission staff is collecting information on the hazard presented by these products. The Commission also has a petition requesting special labeling for this product.

Household chemicals/ammonia

The Commission staff has completed a draft position paper which addresses possible special packaging of ammonia-containing products.

Skin irritants

The Commission staff has been working with the Interagency Regulatory Liaison Group and expects to complete a draft test method for proposal in the Federal Register by the end of this calendar year.

Window bars

The Commission has deferred efforts on this project.

Skiing equipment

No action is underway at this time. The Commission is considering this project during the mid-year review.

Federal Hazardous Substances Act (FHSA)/flammability

The Commission staff is preparing a technical outline of a comprehensive plan for the review of FHSA flammability requirements and the identification of the need for possible modifications.

Flammable Fabrics Act guaranties

The staff is completing draft proposed regulations to revise the existing regulations. A Commission decision is expected in the third quarter.

Drug exemptions

The Commission staff is in the early stages of preparing a briefing package for Commission decision on several possible exemptions from the special packaging requirements for human prescription drugs in oral dosage forms.

APPENDIX B

United States Court of Appeals for the Third Circuit

No. 77-1874

KAISER ALUMINUM AND CHEMICAL CORPORATION

v.

THE UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION;
 RICHARD O. SIMPSON, INDIVIDUALLY AND IN HIS CAPACITY AS A
 COMMISSIONER OF CONSUMER PRODUCT SAFETY COMMISSION;
 BARBARA FRANKLIN, INDIVIDUALLY AND IN HER CAPACITY AS A
 COMMISSIONER OF CONSUMER PRODUCT SAFETY COMMISSION;
 LAWRENCE KUSHNER, INDIVIDUALLY AND IN HIS CAPACITY AS A
 COMMISSIONER OF CONSUMER PRODUCT SAFETY COMMISSION;
 CONSTANCE NEWMAN, INDIVIDUALLY AND IN HER CAPACITY AS A
 COMMISSIONER OF CONSUMER PRODUCT SAFETY COMMISSION;
 R. DAVID FITTLE, INDIVIDUALLY AND IN HIS CAPACITY AS A
 COMMISSIONER OF CONSUMER PRODUCT SAFETY COMMISSION

The United States, Appellant
 (D.C. Civil No. 76-44)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Argued January 5, 1978

Before GIBBONS, GARTH, *Circuit Judges*, and WEINER,¹ *District Judge*

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Washington, D.C. 20530.
 THEODORE J. GARRISH, *General Counsel,*
 ALAN SCHOEM, ATTORNEY,
Consumer Product Safety Commission,
Washington, D.C. 20207.

¹ Honorable Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

GIBBONS, *Circuit Judge*.

The Consumer Product Safety Commission (CPSC) appeals from a judgment of the district court which declares that the Consumer Product Safety Act, Pub. L. 92-573, 15 U.S.C. § 2051 *et seq.*, grants CPSC no jurisdiction over aluminum branch circuit wiring or aluminum branch circuit wiring systems, and which enjoins CPSC from publishing regulations covering such products.¹ The plaintiff is Kaiser Aluminum and Chemical Corporation, a manufacturer of such products. We conclude that the court misconstrued the Act, and we reverse.

Branch circuit wiring conducts electric current from electrical panels containing fuses or circuit breakers to various terminals within a residence. These terminals include lighting fixtures, switches, and wall outlets in which the plugs of electrical appliances are inserted. Branch wiring is made of either copper or aluminum. Kaiser produces the aluminum variety and sells it to wholesalers, who in turn sell it to electrical contractors for installation in residences during construction. Once installed, it is as a rule completely enclosed in the walls of the structure.

Under the Act CPSC has regulatory authority over "consumer products." As defined in section 3(a)(1) of the Act, 15 U.S.C. § 2052(a)(1), that term means "any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise; but such term does not include—

(A) any article which is not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer. . . .

Pursuant to its regulatory authority under section 5(a) of the Act, 15 U.S.C. § 2054(a), CPSC collects, analyzes, and publishes information about hazardous products. Under sections 7(b) and 9(c)(2)(A) of the Act, 15 U.S.C. §§ 2056(b), 2058(c)(2)(A), it may also develop safety standards for consumer products and, where "reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with such product[s]," may promulgate its standards by rule. Finally, under section 15 of the Act, 15 U.S.C. § 2064, it may, after a hearing, declare certain consumer products to present "substantial product hazards."

In November, 1973, following reports of electrical failures and overheating involving aluminum branch circuit wiring, CPSC opened an investigation into the product. Public hearings were held in March and April, 1974, to determine whether further investigation and eventual regulatory action were warranted. During 1975 CPSC published expressions of concern about potential fire hazards associated with the product. On August 7, 1975, CPSC voted to commence a proceeding to develop a consumer product safety standard, and on November 4, 1975, it published a notice to that effect. 40 Fed. Reg. 51,218 (1975). That notice disclosed CPSC's concern that aluminum branch circuit wiring exposed consumers to several serious hazards, including death or injury caused by burning or asphyxiation.

In January 1976, Kaiser commenced this action, seeking an injunction prohibiting CPSC's dissemination of information about aluminum branch circuit wiring and requiring the retraction of information previously published. In addition, Kaiser sought injunctive and declaratory relief against the further exercise by CPSC of jurisdiction with respect to the product, on the ground that it is not a consumer product. The district court accepted this contention,

¹ The opinion of the district court is reported, 428 F. Supp. 177 (D. Del. 1977). Although the judgment disposed of only one count (Count III) of the complaint, the district court directed the entry of a final judgment pursuant to Fed.R.Civ.P. 54(b). Thus, the appeal is properly before us. While at one time CPSC challenged the jurisdiction of the district court, it has not renewed that challenge on appeal. We have nonetheless independently considered the district court's jurisdiction and agree that jurisdiction was properly exercised for the reasons stated by that court in an earlier opinion. 414 F.Supp. 1047, 1053-57 (D.Del. 1976).

and this appeal followed. Kaiser relies on the plain language of the Act and on its legislative history.

A. THE PLAIN LANGUAGE OF THE ACT

If the Act covers branch circuit wiring, it does so because that product is an "article, or component part thereof, produced or distributed. . . for the personal use. . . or enjoyment of a consumer in or around a . . . household or residence." Kaiser's first contention is that branch circuit wiring is not an article. Rather, it contends, such wiring is a building supply material intended for incorporation in a residence and becoming a part thereof. It notes that by the dichotomy between articles and residences the Act clearly excludes buildings used as residences from the definition of consumer products. It does not follow from such exclusions, however, that the Act incorporates all the arcane knowledge about when personal property becomes a fixture and thus part of the building. If Kaiser's interpretation were correct, then many consumer products in common use—such as furnaces, water heaters, dishwashers, and lighting fixtures—would be excluded from coverage. We see nothing in the plain language of the Act suggesting that the word "article," a noun denoting any material thing, excludes components incorporated in a residence if they otherwise fit within the definition.

Kaiser next contends that, even if branch circuit wiring is an article, it is not an article intended for the personal use or enjoyment of a consumer in a household or residence. Rather, Kaiser urges, it is an industrial building material intended for use by the electricians who install it in a building. It certainly is that, but once installed it is just as certainly used and enjoyed by householders whenever they turn on an electric switch. That it was first used in a different way by those who erected the building does not negate the plain fact that consumers later use and enjoy it. Kaiser correctly observes that the Act intended a distinction between consumer products such as teapots and razors on the one hand and industrial products on the other. But it would be impossible for a consumer to enjoy the use of an electric razor without also enjoying the use of the branch circuit wiring to which it is connected. Kaiser points out that such a consumer also enjoys the use of the power line in the street and the utility company's electric generator, and so he does. But those articles are not used "in or around" his household, while branch circuit wiring is.

Turning to another part of the consumer products definition, Kaiser notes that it excludes nine categories of products, including "any article which is not customarily produced or distributed for sale to, or use of consumption by, or enjoyment of, a consumer."² This exclusion, almost a mirror image of the general definition, is hardly a model of clarity but was undoubtedly intended to exclude industrial products, on the theory that industrial purchasers are better able to protect themselves and are subject to the separate regulatory scheme enacted by the Occupational Safety and Health Act of 1979, Pub. L. No. 91-596, 29 U.S.C. § 651, *et seq.*

The House Report on the Consumer Product Safety Act explained the exclusion as follows:

It is not intended that true 'industrial products' be included within the ambit of the Product Safety Commission's authority. Thus, your committee has specifically excluded products which are not *customarily* produced or distributed for sale to or use of consumers. The occasional use of industrial products by consumers would not be sufficient to bring the product under the Commission's jurisdiction. The term "customarily" should not be interpreted as intending strict adherence to a quantum test, however. Your committee is aware that some products which were initially produced or sold solely for industrial application have often become broadly used by consumers. If the manufacturer or distributor of an industrial product fosters or facilitates its sale to or use by consumers, the product may lose its claim for exclusion if a significant number of consumers are thereby exposed to hazards associated with the product.

H.R. Rep. No. 1153, 92d Cong., 2d Sess. 27 (1972) (emphasis in original). Kaiser established in the district court that although copper branch circuit

² Sec. 3(a) (1) (A). The other excluded categories are tobacco and tobacco products, motor vehicles, economic poisons, firearms, aircraft, boats, drugs and cosmetics, and food—all covered by other regulatory statutes.

wiring is customarily distributed through channels which make it readily available for purchase by householders, the aluminum product is significantly less available, since it is sold primarily to electrical wholesalers who sell directly to electrical contractors. The method of distribution chosen by a manufacturer for its product cannot however, determine whether the product falls within the statutory definition. Either copper and aluminum branch circuit wiring are both consumer products, or neither is. Since both are articles used or enjoyed by consumers in or around households, both are, according to the plain language of the Act, consumer products.

B. LEGISLATIVE HISTORY

Kaiser discerns in the legislative history of the Act an intention to leave matters of specification, composition, and design of branch circuit wiring entirely to local building codes. It is doubtful whether we should even consider that argument in view of the explicit preemption in section 26(a) of the Act, 15 U.S.C. § 2075(a).³ But Kaiser sees in the congressional decision to exclude housing design from the coverage of the Act an intention, despite section 26, to defer to local building codes on the design of housing components. Apart from section 26, there is, however, an express congressional finding in section 2(a)(4) of the Act, U.S.C. § 2051(a)(4), that local control of consumer products which move in interstate commerce is "inadequate and may be burdensome to manufacturers." To place the manufacturers of building materials at the mercy of local code draftsmen would fly in the face of clear congressional intent. Local building codes continue to play a role in regulating "the installation and use of consumer products, such as electric, gas, or plumbing appliances." Bureau of National Affairs, *The Consumer Product Safety Act: Text, Analysis, Legislative History* 81 (1973). But design and performance standards for components are now a matter of national concern.

The only specific evidence to which Kaiser points is the defeat, during consideration of the bill in Congress, of an amendment offered by Senator Eagleton, which would have declared mobile homes to be consumer products. Kaiser infers from the defeat of this amendment a general intention to exclude all housing components. We are unpersuaded by the dubious logic of drawing a broad intention from the rejection of a narrow amendment. Furthermore, we find persuasive evidence to the contrary. After the defeat of the Eagleton amendment, the appropriate House committee reported:

It is the committee's understanding that the definition of the term "consumer product" would include any component, equipment, or appliance sold with or used in or around a mobile home. H.R. Rep. No. 1153, 92 Cong., 2d Sess. 28 (1972).

In addition, we cannot ignore the final Report (1970) of the National Commission on Product Safety, which was established by law in 1967. Pub. L. No. 90-146. That Report provided the basis for the later Act. In it, the Commission listed products the safety of which should be assured at the design stage. In Category XVII, "Home Structures [and] Construction Materials," it included such items as insulation materials, windows and window glass, and floors and flooring materials. In Category VI, "Home Furnishings and Fixtures," it listed electrical outlets, built-in wiring devices, and distribution systems for use in or around the household, as well as gas meters, electric meters, and attached electric light fixtures. That Congress was aware of this list is evidenced by references to it during floor debates by Congressman Moss, Chairman of the House Commerce Subcommittee on Commerce and Finance and sponsor of the bill which became the Consumer Product Safety Act. Referring to the Commission's Report, he observed:

Very serious questions were raised concerning the safety of many products not investigated by the Commission such . . . as *aluminum home wiring*. . . 118 Cong. Rec. 31,378 (1972) (emphasis supplied).

Our review of the legislative history of the Act leads us to the same conclusion as that reached by the District Court for the District of Columbia, which was

³ Sec. 26. (a) Whenever a consumer product safety standard under this Act is in effect and applies to a risk of injury associated with a consumer product, no State or political subdivision of a State shall have any authority either to establish or to continue in effect any provision of a safety standard or regulation which prescribes any requirements as to the performance, composition, contents design, finish, construction, packaging, or labeling of such product which are designed to deal with the same risk of injury associated with such consumer, unless such requirements are identical to the requirements of the Federal standard.

presented with the same question in *United States v. The Anaconda Company*, No. 77-0024 (June 15, 1977). Where the legislative history does not positively support CPS's regulatory authority over branch circuit wiring, it is inconclusive at best. Our examination of the legislative history has, therefore, cast no doubt on our reading of the plain language of the statute.

The judgment appealed from will be reversed.

To the Clerk :

Please file the foregoing opinion.

_____,
Circuit Judge.

United States Court of Appeals for the Third Circuit

No. 77-1874

KAISER ALUMINUM AND CHEMICAL CORPORATION

v.

THE UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION; RICHARD O. SIMPSON, INDIVIDUALLY AND IN HIS CAPACITY AS A COMMISSIONER OF CONSUMER PRODUCT SAFETY COMMISSION; BARBARA FRANKLIN, INDIVIDUALLY AND IN HER CAPACITY AS A COMMISSIONER OF CONSUMER PRODUCT SAFETY COMMISSION; LAWRENCE KUSHNER, INDIVIDUALLY AND IN HIS CAPACITY AS A COMMISSIONER OF CONSUMER PRODUCT SAFETY COMMISSION; CONSTANCE NEWMAN, INDIVIDUALLY AND IN HER CAPACITY AS A COMMISSIONER OF CONSUMER PRODUCT SAFETY COMMISSION; R. DAVID PITTLE, INDIVIDUALLY AND IN HIS CAPACITY AS A COMMISSIONER OF CONSUMER PRODUCT SAFETY COMMISSION;

THE UNITED STATES, APPELLANT

(D.C. Civil Action No. 76-44)

On Appeal From the United States District Court

For the ----- District of Delaware

Present: GIBBONS and GARTH, *Circuit Judges*, and WEINER,¹ *District Judge*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the ----- District of Delaware and was argued by counsel on January 5, 1978.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed March 30, 1977, be, and the same is hereby reversed. Costs taxed against appellee.

Attest:

March 27, 1978.

_____,

Clerk.

[Federal Register, Vol. 43, No. 62—March 30, 1978]

APPENDIX C

[6355-01]

CONSUMER PRODUCT SAFETY COMMISSION

[16 CFR Parts 1115, 1116]

SUBSTANTIAL PRODUCT HAZARDS

Proposed Requirements, Policies, and Procedures

Agency: Consumer Product Safety Commission.

Action: Opportunity for oral presentation and additional comments on proposed regulation.

Summary: On September 15, 1977, the Commission proposed for public comment a rule setting forth its interpretation of the requirements of section 15(b) of the Consumer Product Safety Act that manufacturers, importers, distributors, and

¹ Honorable Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

retailers of consumer products immediately report to the Commission products that fail to comply with an applicable consumer product safety rule or contain a defect which could create a substantial product hazard. The proposed rule would clarify when a firm has obtained information which reasonably supports the conclusion that one of its products contains a reportable nonconformity with an applicable consumer product safety rule or a defect which could create a substantial product hazard. In addition, the proposed rule defines the information that must be supplied to the Commission as part of a report under section 15 and sets forth procedures and policies governing processing of reports and remedial action. The purpose of this notice is to announce that due to the number of comments received on this proposal and the importance and complexity of the issues raised, the Commission had decided to hold a limited public hearing to receive oral presentations and has decided to receive written comments specifically directed to the issues identified in this notice. Comments should not duplicate comments previously submitted.

Dates: (1) Those unable to appear at the public hearing may submit written comments on the specific issues identified in this notice by April 26, 1978. (2) There will be an opportunity for interested persons to orally present data, views, or arguments regarding these specific issues on April 26, 1978, at 9:30 a.m. in the Commission meeting room. Oral presentations should not exceed ten (10) minutes. Those wishing to make oral presentations should notify the Office of the Secretary, 202-634-7700, by April 17, 1978. A copy of the statement is to be submitted to the Office of the Secretary by April 20, 1978.

Address: Written comments should be submitted to the Office of the Secretary, Consumer Product Safety Commission, Washington, D.C. 20207. All material which the Commission has that is relevant to this proposed regulation, including comments that have been or may be received regarding the proposed regulation, may be seen in and copies obtained from, the Office of the Secretary, Consumer Product Safety Commission, Third Floor, 1111 18th Street NW., Washington, D.C. Oral presentation will be conducted in the Commission meeting room, Third Floor, 1111 18th Street NW., Washington, D.C.

For further information contact: Eric Stone, Product Defect Correction Division, Consumer Product Safety Commission, Washington, D.C. 20207, 202-492-6608.

Persons wishing to make oral presentations should contact: Richard Danca, Office of the Secretary, 202-634-7700.

Supplementary information:

BACKGROUND

On September 16, 1977, the Consumer Product Safety Commission (Commission) published in the Federal Register proposed regulations entitled "Substantial Product Hazards. Proposed Reporting Requirements for Manufacturers, Importers, Distributors, and Retailers of Products" under section 15(b) of the Consumer Product Safety Act (CPSA) (15 U.S.C. 2064(b)), and invited comments from the public (42 FR 46720). Section 15(b) of the Consumer Product Safety Act requires that every manufacturer, distributor, or retailer of a consumer product who obtains information which reasonably supports the conclusion that such product either fails to comply with an applicable consumer product safety rule, or contains a defect which could create a substantial product hazard, shall immediately inform the Commission, unless such manufacturer, distributor, or retailer has actual knowledge that the Commission has been adequately informed of such defect or failure to comply. Section 15(a) defines a substantial product hazard as a failure to comply with an applicable consumer product safety rule or a product defect which because of the pattern of defect, the severity of the risk, the number of defective products, or other reasons, presents a substantial risk of injury to the consumer. Sections 15 (c) and (d) set forth various actions that the Commission can take to eliminate a hazard, including ordering the firms in question to notify the public, and/or to repair, replace, or refund the purchase price of the product. In addition, the Commission may seek to enjoin further sale or distribution of the product.

The proposed rule combines into one regulation many of the existing Commission policies and procedures under section 15(b), set forth in 16 CFA 1115 and 1116. In addition, it clarifies the reporting requirements of section 15(b) by defining the term "defect," indicating the kinds of information that are reportable, and explaining when an obligation to report arises.

The Commission received 133 comments from consumer groups, manufacturers, importers, distributors, retailers, trade associations, private labelers, and others

concerning various aspects of the proposed rule. Because a number of these comments indicate concern or confusion about basic provisions of the proposed rule, the Commission has determined that it is in the public interest to allow interested parties to make oral presentations on the specific issues framed by the Commission in a public hearing. Parties unable to make an oral presentation may submit written comments on these issues. The Commission asks that where possible, commenters should provide alternative language, economic data, and specific examples to support their arguments. The Commission believes that the additional comments on these issues will help it to formulate a fair and effective final rule. The Commission is considering issuing this rule as a substantive rather than an interpretative rule. The Commission asks that commenters evaluate the impact of each of the provisions for which comments are solicited with this possibility in mind. As a result, commenters may wish to address the impact that one of these provisions might have both if it is legislative or interpretative in nature.

ISSUES RAISED

From the comments already received, the Commission has identified the issues discussed below as those aspects of the proposal producing the greatest misunderstanding or controversy. The Commission is therefore seeking additional comments limited specifically to one more of these issues. At the oral presentation, comments not addressing one or more of these issues may be ruled out of order.

The fact that the Commission is not seeking comment on all issues contained in the proposed regulations does not mean that the Commission has foreclosed all thought on issues for which comments are not being sought. Rather, it means that the Commission believes that adequate comments have already been received on the excluded issues.

1. The definition of defect as any aspect of a product which creates an unnecessary risk of injury (proposed section 1115.3(b)(3)).

The failure to include a definition of "defect" in the CPSA has created uncertainty for the Commission and those subject to the Act in determining when a report under section 15(b) is required. The Commission has viewed the legal concept of "defect" as having a meaning broader than the dictionary or common usage definition. In specific cases, the Commission or its staff has applied section 15(b) to consumer products manufactured exactly in accordance with specifications but posing a substantial risk of injury inherent in the design of the product. In another case, the staff believes that the failure to provide adequate installation instructions for an otherwise safety-designed and constructed consumer product creates a reportable "defect". The proposed definition of "defect" contained in § 1115.3(b)(3) represents an effort to incorporate the Commission's broad interpretation of the word and provide guidance to parties subject to section 15(b). Numerous comments on the proposed definition were submitted, including statements that it is too broad, imprecise, and subjective. Alternative approaches would be to have no definition at all or to describe the factors that the Commission includes in its concept of defect, including design, construction, packaging, etc. The Commission seeks comments on these alternatives and invites additional proposals.

2. A firm is deemed to have received information 5 days after an employee has received the information (proposed § 1115.10(d)).

Proposed § 1115.10(d) provides that a firm subject to section 15(b) is deemed to have received information within a reasonable time, but not more than 5 working days, within which the information has been received by an official or employee of the firm in the normal course of business. The proposal reflects Commission experience with firms that failed to provide adequate internal procedures for transmitting product safety information to the officer or employee responsible for reporting to the Commission. Commenters have objected to the Commission's selection of 5 working days as a maximum reasonable time. The Commission wishes to know from firms that have established internal procedures for transmitting product safety information and have delegated the reporting function, whether 5 days is a reasonable period of time. Please provide the reasons for the answer. Suggestions and discussion are invited on alternatives for meeting the Commission's concern.

3. The presumption that a product-related death or grievous bodily injury should be reported unless a firm has clear evidence that the death or injury is not the result of a product defect or nonconformity with a consumer product safety rule (proposed § 1115.11(a)).

The Commission views the reporting requirement of section 15(b) as one of the most important statutory mechanisms for safeguarding the public from injury from hazardous consumer products. Proposed § 1115.11(a) establishes a presumption that firms have obtained information which reasonably supports the conclusion that a product fails to conform with an applicable consumer product safety rule or contains a defect which could create a substantial product hazard when it receives information that the product was involved in a death or grievous bodily injury, unless it has clear evidence that the injury was not caused by a nonconformity or defect. The Commission staff anticipates that if this section is adopted as a final regulation, firms learning of a death or grievous bodily injury will either utilize the period provided for investigation and evaluation (§ 1115.11(c) (1)) or will immediately notify the Commission (§ 1115.11(c) (2)). Many commentators oppose this presumption and predict that proposed section 1115.11(a) will require firms to report a large volume of useless information on conforming or non-defective products because there is not an adequate opportunity for subject firms to assess the safety of the product or the accuracy of the accident report. They question whether the Commission will be able to assess the resulting defect reports. In addition, many express concern that the reporting of unverified information will increase the risk of private products liability suits against subject firms. In view of the controversy surrounding this proposal, the Commission invites new comments and alternative proposals to the provision that retain the basic idea that firms be encouraged to investigate serious accidents involving their products to determine if a substantial product hazard may be present.

4. The listing of types of information which the Commission believes should be studied and evaluated to determine if there is an obligation to report; the allowance of a period, not to exceed 10 working days, to conduct such study and evaluation (proposed § 1115.11(b)).

Proposed § 1115.11(b) lists several types of information that a manufacturer, importer, distributor, or retailer should study and evaluate absent a report of death or grievous bodily injury associated with a consumer product, to determine if there is an obligation to report under section 15(b). The purpose of the section is to be sure subject firms recognize that information which may trigger the reporting obligation may be obtained from sources other than a report of death or grievous bodily injury. For example, consumer complaints may lead a manufacturer to conduct an engineering or laboratory analysis of the product. The results may, in turn, lead to design or quality control changes that remove a hazard from future production but do not remove the hazard from past production. Study of the type of information listed in proposed § 1115.11(b) is to be accomplished within a reasonable period of time, not to exceed 10 working days in accordance with proposed § 1115.11(c). The Commission is seeking comments on the § 1115.11(c) generally, and specifically on whether the allowance of 10 working days is a reasonable period of time and or whether a firm should be held to the conclusions that would be drawn from the data had it been properly analyzed. Interested parties are invited to comment on the reasonableness of these proposals.

5. The confidentiality and disclosure of information submitted to the Commission in a report under section 15 (proposed § 1115.13).

Proposed § 1115.13 provides that a person who submits information in a report under section 15 must submit with the report a written request (or indicate that such a request will be submitted within 10 working days) that the information be considered exempt from disclosure under the Freedom of Information Act, as amended (15 U.S.C. 552(b)) or the CPSA. The proposed section also describes CPSA section 6(b), which generally requires 30 days notification to manufacturers and private labelers before information is made public. Comments on this proposed section included suggestions that the Commission treat as confidential all information contained in the initial report, all information submitted until the Commission finds that the product contains a substantial product hazard, or all information submitted until the reporting party has been notified of a request for disclosure and has had an opportunity to object. At least one commenter suggested that in the event the Commission did not find that the product contained a substantial product hazard, the information should be returned to the party that submitted it. The Commission is seeking comments specifically on these proposals and generally on the confidentiality of information submitted to it.

PROCEDURE FOR ORAL AND WRITTEN COMMENTS

There will be an opportunity for interested persons to orally present data, views, or arguments on the aspects of the proposed regulation described in this notice, on April 26, 1978, at 9:30 a.m. in the Commission's meeting room, third floor, 1111 18th Street NW., Washington, D.C. Those wishing to make oral presentations should notify the Office of the Secretary, 202-634-7700 by April 17, 1978. In addition, a copy of the testimony preferably in five copies, is to be submitted to the Office of the Secretary by April 20, 1978. Oral presentations shall not exceed 10 minutes (unless extended by the Commission to compensate for time expended in responding to questions from the Commission) and shall be limited to the issues described above. Oral presentations shall not duplicate comments previously submitted in writing. The Commission may rule out of order comments that are outside the scope of the public hearing or are repetitious. The Commission and its staff may ask questions of persons making presentations.

Persons who cannot attend the public hearing may submit written comments on the issues described above by submitting them to the Office of the Secretary Consumer Product Safety Commission, Washington, D.C. 20207, preferably in five (5) copies, by April 26, 1978. Comments received after that date will be considered to the extent practicable.

The official transcript of the public meeting to hear oral presentations of data, views, or arguments, any written comments that are received, and all other material which the Commission has that is relevant to this proceeding may be seen in, or copies obtained from the Office of the Secretary, 3rd floor, 1111 18th Street NW., Washington, D.C. 20207.

Dated: March 24, 1978.

SADYE DUNN,
*Acting Secretary, Consumer
Product Safety Commission.*

[FR Doc. 78-8407 Filed 3-29-78; 8:45 am]

APPENDIX D

STATEMENT BY S. JOHN BYINGTON, CHAIRMAN, CONSUMER PRODUCT SAFETY COMMISSION—"MANDATORY REGULATIONS: PUTTING THE OFFEROR INTO PERSPECTIVE"

SUMMARY

When the Consumer Product Safety Commission (CPSC) became a reality in May, 1973, its primary responsibility was—and continues to be—to reduce unreasonable risks of injury from consumer products. The agency was provided an extensive variety of tools and laws with which to accomplish its mission. However, much of the public attention and criticism of the agency has focused on only one of those tools, mandatory product safety standards, and one of those laws, the Consumer Product Safety Act (CPSA).

The mechanism for promulgating standards under CPSA is contained in section 7, often referred to as the "offeror process". This unique, innovative process had never been tried before either within or without the Federal government. It represented a compromise between various philosophies of standards development within the Congress itself. Initially the CPSC, lacking precedent and experience, approached its implementation with a great deal of caution. In efforts to minimize interference with the offeror, CPSC essentially failed to provide necessary and responsible oversight, guidance to the offeror, and management control. As a result, CPSC neither satisfied its proponents nor its opponents.

After a thorough review of these early experiences, the Commission has substantially modified its implementation of the offeror process. These modifications proved very successful in the latest offeror proceeding, and I believe that the process is now functioning and capable of continued operation as was originally intended by the Congress. I believe that continued implementation of these and other modifications (as proposed in legislative revisions by the majority of the Commission in January 1977, H.R. 3961 and S. 709) will produce effective safety standards within a reasonable timeframe, with maximum input from all segments of the public, and at reasonable cost to government. In fact, if properly administered, the offeror process allows a standard to be developed in an atmosphere uninterrupted by daily administrative demands and competing priorities.

I would strongly recommend that the process be allowed an opportunity to prove its worth. In a sense, the offeror process—if properly executed—can provide the best of all regulatory worlds. Although critics may argue that the offeror process is time consuming and cumbersome, an examination of alternative standards development mechanisms within other regulatory bodies indicates that they offer almost no advantages over the offeror process and eliminate many of its merits. For example, in no other forum are government staffs required or able to defend their regulatory postures to peers in industry and the public on a day-to-day basis over a standards development period.

A major concern I have is that the attention given to the offeror process has often detracted from the other important actions that the Commission has taken in reducing unreasonable risks of injury through the other mechanisms and Acts under its jurisdiction. This distorted perspective diminishes the importance of the wide range of authority for which CPSC is accountable, and superficially downgrades all other forms of regulation. For example, the CPSA also empowers the Commission to promulgate Section 8 bans; Section 15 recalls and timeliness cases; Section 12 imminent hazards; Section 27 labelling, and information and education campaigns; and voluntary standards.

In the next several pages, I would like to comment in detail on our experience with the offeror process and our modifications to it. I will also attempt to place in perspective its role in reducing risks of injury to the public.

I. The Past: CPSC's Problems With the Offeror Process

Section 7 of the Consumer Product Safety Act—the offeror process—has been assessed repeatedly as a vastly disappointing experience. Few regulatory actions which the Commission has undertaken have generated the microscopic scrutiny and criticism that the Section 7 offeror process has from the public, from Congress, and particularly from the Commission itself.

Present and past Commissioners are on record with their perspective on the underlying rationale which they believe engendered the negative experiences and time losses resulting from the initial processes.

Commissioner Franklin, for instance, offered an assessment in her testimony on September 30, 1977, before the House Subcommittee on Consumer Protection and Finance. She stated, "The critics (of the offeror process) refuse to acknowledge that five Commissioners—unanimously in almost all major aspects—made decisions, always well intended, but imperfect in many respects, that dramatically shaped the courses of the six offeror proceedings during the agency's infancy."

Commissioner Pittle is on record for stating that the offeror process is the simple factor that has "hampered efficient and effective rulemaking". He has requested that the Consumer Product Safety Act (CPSA) be amended to make the offeror process optional. He would retain a requirement, however, that any alternative to the offeror process include a requirement for public participation in CPSC rulemaking.

Commissioner Kushner stated the following during the House Interstate and Foreign Commerce Committee in October 1977:—"there are novel provisions in the law—notably the offeror process with which the Commission has struggled mightily. I think the Commission is now in a position to demonstrate some progress in making that a useful process, but it has taken a while and some unhappy experiences."

By majority vote, the Commission proposed legislative revisions to Sec. 7 of the CPSA in January 1977 (H.R. 3961, S. 709). The primary recommendation requests authority for the Commission to publish an existing standard as a proposed rule if only "nonmaterial" modifications are required. Further, the Commission would be authorized to determine that an offeror be limited, in the case of an existing voluntary standard, solely to "appropriate" modifications to the rule.

In general, the major problems which have plagued the offeror process in the Commission's first attempts have been defined as follows:—There was inadequate front end analysis of the product hazard(s) before the Commission published the Federal Register notice requesting offers from outside groups to develop the standard.

There was inadequate definition of the known hazard patterns.

The Commission included too many hazards or hazard patterns for which no factual basis existed.

The Commission failed to participate, advise or give reasonable direction to the offeror resulting in:

(a) The offeror sometimes submitted to legally unsustainable technical rationale for the completed standard.

(b) The offeror sometimes went beyond the important hazards, taking significantly longer to complete its work and opening its resultant standard to extensive collateral challenges, and

(c) The commission's staff spent months and years revising the work of the offeror before bringing the submission to the Commissioners for review and comment.

In November 1976, a staff evaluation of the offeror process culminated in a report which offered a series of recommendations for improvement of the offeror process in these major areas: problem definition before starting the offeror process; tasking and selecting the offeror; CPSC participation in the offeror's standard development process; and CPSC evaluation of the offeror's standard.

Attachment A, there is an abbreviated listing of the separate recommendations which CPSC's staff made in its extensive analysis. The Commission's action with regard to each recommendation in the only subsequent offeror process to date, i.e., miniature Christmas tree lights, is noted.

As indicated in the attachment, the Commission has largely implemented the recommendations from the staff's report. Thus, the Commission has already significantly revised its management of Section 7, and initial results indicate vast overall improvement in our mandatory standards-writing under the CPSA.

A. ADMINISTRATIVE REVISIONS TO THE OFFEROR PROCESS IS CHANGED

Rather than analyze the failure of previous offeror processes, which has already excessively been done, I believe it is more important to relate what is happening now to CPSC's experiences in the past, and to determine whether we are adequately learning from hindsight evaluation.

CPSC improves its management

The Commission's recent utilization of the offeror process for miniature Christmas tree lights, has differed remarkably from our previous efforts.

Of considerable consequence to the success of this proceeding was the experience and managerial skill brought to the effort by the National Consumers League (NCL), particularly that of its project director, David Swankin. NCL's astute examination of the weaknesses of past offeror proceedings led to the development of a highly effective management format which not only resulted in an outstanding effort by the participants in the process, but which will also be highly adaptive to future standards-writing efforts.

Some suggestions have been made that the success of future offeror processes are also contingent on being directed by someone like David Swankin, who has years of personal experience with it. This should be disputed. As remarkable and adept a manager as Swankin undoubtedly is, even he agrees it is too simplistic to suggest that no other manager exists who can replicate his technique. The free market system has proven repeatedly the infinite capability for business persons to gear up for duplication of new and productive managerial schemes.

The innovations which CPSC itself provided to the miniature Christmas tree lights process include:

First.—The Commission limited the hazards to be addressed by the offeror to the two most serious ones, fire & shock; and made available to prospective offerors an expanded discussion of the nature of the risk of injury.

In the past, the Commission had provided little direction on the hazards to be addressed, and essentially, left the offeror tangling with the universe of possible hazards associated with consumer contact with a product. This was, in effect, abdication—or at best—poor management by CPSC.

Second.—The Federal Register notice announcing the Commission's intent to proceed with a rulemaking on miniature Christmas tree lights, included an extensive discussion of the strengths and weaknesses of existing standards, focusing on the hazards of concern to the Commission.

In previous processes, the offeror was left to conjecture the Commission's evaluation of specific parts of any existing standard, and was thereby essentially forced to devise a standard from ground zero. The Commission's failure to identify those parts of existing standards which did not require re-creation, was again an extremely poor management decision.

Third.—The Federal Register notice for the miniature Christmas tree lights process, further announced the availability of a compilation of information which consolidated useful summaries of the Commission's injury data, engineering analyses, and economic data on the miniature Christmas tree lights industry (largely a cottage industry located in foreign countries). The packet also included a discussion of "promising approaches" (in the Commission's view) that an offeror might consider in addressing specific aspects of the standard.

In the past, the offeror's attempt to achieve the "Commission's view" of the approach for addressing a standard was hit-or-miss at best. With all of the approaches available to an industry to address hazards in products, it was unfair and ineffective management for the Commission to essentially "hide its hand" until the evaluation phase, and then put the blame on the offeror or the process itself for failing to deliver the product sought.

Furthermore, the CPSC monitors were directed to observe only—in other words—to be seen and not heard. Several offerors have cited this behavior as well as the overall lack of cooperation between CPSC and offeror, as an "adversary" relationship, and hardly conducive to the best pooling of expertise and knowledge about the product.

Therefore, the offerors were left feeling autonomous, and understandably assumed that their own best judgments would reign supreme. However, when CPSC began its own evaluation phase, nothing was further from the truth. At that point, the offeror was no longer recognized by the Commission as a deciding actor in the final standard—in fact, the offeror was not, in general, even encouraged to advise the staff, even though in each case the offeror had by then "lived with" all phases of the standard's development over a period of several months.

In the case of the television sets process, the Commission advised the offeror—at a point halfway through completion of the offeror's standard development phase—that it was dissatisfied with the "design" or "process", i.e., quality control standard which was being developed. But, even in this situation, as the offeror continued nonetheless to complete the process as a "design" standard, the Commission—though highly displeased—did not exercise its option under the CPSA to determine that the offeror was unable and unwilling to continue the standards development process to its satisfaction. This was poor management. And, today, as a result of this bitter, time-consuming, and resource-intensive experience no television set standard exists. Further, we are now proceeding down a futile course of mandating fire containment in the sets. Rather than blame the offeror process per se for this situation, it is far more accurate to point out that the Commission failed to sufficiently exercise its oversight responsibility, as authorized under the CPSA.

Fourth.—The Federal Register notice for miniature Christmas tree lights announced (for the first time) a meeting between the Commission staff and potential offerors to discuss the material in the information packet, and procedures to be followed in responding to the notice.

Previously, the Commission, though responsive to requests for information, primarily maintained its role of critic during this phase when the offeror developed a plan to write the standard. Now, instead, the Commission seeks to attain a partnership with a potential offeror, which hopefully will result in the most successful and mutually satisfactory solution to the product's hazards.

Fifth.—And finally, the Commission agreed to provide financial compensation to consumer participants on offeror committees. Funds were also provided to assure that consumer participants had access throughout the process to specialized expertise and laboratory facilities as required to support and evaluate criteria proposed for inclusion in the standard.

These innovations are of particular importance to this discussion. With far greater depth and expertise than can be achieved herein, consumer groups, such as Consumers Union, have presented the case for provision of financial compensation to consumer participants in regulatory proceedings. Particularly in a development process such as that undertaken under the CPSA, the time spent by consumer participants at committee standards development meetings is usually only a fraction of the total time they contribute to the process.

For example, in order for participation to be effective, considerable prior effort must be spent studying and reviewing epidemiological, engineering, behavioral, economic, and other information. In addition, reviewing various drafts of the standard is time consuming and must be done during time that the person might otherwise have used to earn income, or to perform household tasks, care for

children, etc.—that would have to be paid for if the consumer him/herself were unable to perform them.

Because of Commission recognition of these human realities, National Consumers League was able to obtain outstandingly qualified, interested and dependable consumer participants whose contribution was consistent, well-documented, intensive and material to the standard's outcome.

The National Consumers League Introduces Innovations

The National Consumers League set out to develop a "sound, tight management plan" which would result in a successful standard within the constraints of time (150 days) and budget (\$160,000). They succeeded in doing both.

Two criteria relevant to this discussion to which they strictly adhered were: the assurance that all points of view and all positions be adequately considered; and the achievement of a constructive relationship between the CPSC monitor (the staff) and the offeror.

The first was effectively achieved through a review panel which sat as a committee ("Commission"), responsible for decisions on the final standard based on all participants' inputs. The review panel consisted of the project director (Swankin), three members of NCL's Board of Directors, and one member each from Underwriters Laboratory, the National Ornamental Electric Light Association (NOEL), and Sears, Roebuck and Company.

The second criterion—a constructive relationship between CPSC and the offeror—was achieved through the determination of both sides to correct the past adversarial postures.

CPSC's monitor was an active participant throughout, arranging for additional staff input on an as-needed basis. These efforts paid off.

Individual CPSC staff furnished their in-house knowledge as well as their pre-dispositions about correction of the hazards involved. For the first time, CPSC staff also argued their position during the entire development period in an open forum consisting of industry, consumers and experts. Although often not recognized or acknowledge by critics of the offeror process, herein is the true uniqueness of Section 7 of CPSCA.

Only under the offeror process are government staffers required or even able to defend their regulatory stances to peers in industry and the public, on a day-by-day basis over a standard's development period. Only in these circumstances are they required to state their positions and to defend their strengths and weaknesses in the open, as other interest groups must do in order to affect a regulatory proceeding. It is recognized that federal personnel often develop their own set of biases about what a standard should say. In this instance, CPSC's staff—rather than deciding the standard's contents within the privacy of their offices, with self-bestowed responsibility for conflict resolution—argued the merits of their positions with all other participants. NCL's review panel was the third party decisionmaker—the caretaker of the final standard—committed to presenting a record of all parties' stances.

Though arguments may be made that this managerial scheme was far more costly and resource-intensive to CPSC than if the standard had been written in-house, it is very unlikely that such a case could be proven. In fact, I believe the exact opposite is true.

What CPSC had paid \$160,000 for in the miniature Christmas tree lights process was a standard prepared by NCL in a timely manner covering all overhead and administrative expenses, and extensive participation by consumers and experts. In addition, an exceedingly high number of hours of industry labor, time and expertise were donated. What CPSC received in return was probably the most all-inclusive standard this Commission has seen.

It would not have been possible at our present resource level for CPSC to drop all competing priorities in order to allocate the same uninterrupted administrative skill and resources needed to carry the standard through to completion, in the same amount of time, and with participants comparable to those gathered by NCL.

It is in the best interest of consumer product safety that outside expertise be available to CPSC on an expedited and flexible basis when needed, as is available in the offeror process. No federal agency is able to retain and utilize such talent on a constant regular basis, nor to find it on an as-needed basis. The federal personnel management system (CSC) is not designed to be responsive to such needs, and the cost of maintaining such expertise in-house is prohibitive.

The resultant miniature Christmas tree lights standard was indeed the resultant creation of a partnership between government and its constituency. Its development process is probably close to what Congress had in mind in writing Section 7 of the CPSCA in the first place.

II. Evaluating Regulatory Performance

A. CPSC'S RECORD

The offeror process has admittedly been poorly and ineffectively managed by CPSC in the past. Unfortunately, the disillusionment over its past failures has seriously hindered an objective examination of CPSC's numerous achievements to date. The Commission's forthcoming long range plan attempts to refocus this perspective by measuring the agency's accomplishments against the 1970 hazard list identified by the National Commission on Product Safety (NCPS). Table I of the long range plan categorizes 28 NCPS "unreasonable hazards" according to three CPSC activities: 9 regulations enforced by CPSC which were issued by predecessor agencies; 10 regulations issued by CPSC under all of its Acts; and 9 products which fall into CPSC's high priority regulatory activity. Moreover, from the NCPS "unfinished business list" (Table II), 2 additional regulations have been issued by CPSC; and 2 products fall into CPSC's high priority activities which are in process.

Further, the long range plan states that CPSC has also addressed 18 product hazards not foreseeable to NCPS, and several others not included at all by NCPS. Many of these products add up to regulatory action comparable in time, cost, and protection to consumers as a mandatory development proceeding. Major examples of regulatory action not foreseen by the NCPS include:

TABLE I.—NCPS "unreasonable hazards"—CPSC activities

A. Regulations enforced, issued by predecessor agencies:

- Methyl alcohol (household chemicals).
- Sulfuric acid (household chemicals).
- Fireworks.
- Toys.
- Electrically operated toys (toys).
- Liquid furniture polish (household chemicals).
- Kindling and illumination preparations (household chemicals).
- Sodium and potassium hydroxide (household chemicals).
- Turpentine (household chemicals).

B. Regulations issued by CPSC:

- Ethylene glycol (household chemicals).
- Full-size cribs (infant furniture).
- Other cribs (infant furniture).
- Pacifiers (toys).
- Fireworks.
- Bicycles (high-rise bicycles).
- Swimming pool slides (swimming pools).
- Liquid paints solvents (household chemicals).
- Architectural glass.
- Sharp points (toys).

C. Activity in process (high priority):

- Unvented gas space heaters.
- Playground equipment (toys).
- Sharp edges (toys).
- Rattles (toys).
- Power mowers.
- Television receivers (color TV sets).
- Small parts (toys).
- Football helmets (protective headgear).
- Ladders.

TABLE II.—NCPS "unfinished business"—CPSC activities

A. Regulations enforced, issued by predecessor agencies: None.

B. Regulations issued by CPSC:

- Lead in paint.
- Swimming pool slides (swimming pools).

C. Activity in process (high priority):

- Bathtubs and showers, V.
- Extension cords.

TABLE III.

Vinyl chloride-----	Ban and subsequent judicial activity.
Slant-sided refuse bins-----	Ban.
TRIS-----	Ban and subsequent legal activity.
Chlorofluorocarbons-----	Ban and labeling requirements.
Miniature Christmas tree lights-----	Mandatory standard.
Asbestos-----	Ban on fireplace ashes and consumer patching compounds.
Skateboards-----	Intensive information and education campaign.
First aid information-----	Labeling regulation.
Bicycles-----	Standard amendment.
Communication antenna-----	Labeling and potential standard.
Children's sleepwear-----	Standards modification.
Insulation, cellulose-----	Potential mandatory standard.
Matchbooks-----	Mandatory standard.
Extremely flammable contact adhesives-----	Ban.

Table III plus I and II is only an incomplete list of actions accomplished by an agency averaging 890 persons and a \$40 million budget—which has effectively been reduced in 1978 to \$28 million in real 1974 dollars (per U.S. market basket survey).

It is not the purpose herein to give a complete accounting of CPSC's accomplishments or to measure their effectiveness. Rather it is important to recognize that only 8 of the above 47 major regulatory activities, including those from Tables I and II were carried out under the CPSC Section 7 offeror processes. Yet ironically, it is discussions of CPSC's handling of the offeror process which consistently predominate in congressional oversight and budget hearings, and media evaluations of CPSC. This posture is unexplainably skewed in favor of only 1 Act and 1 form of regulation within all of CPSC's purview, thereby superficially downgrading all other forms of regulation. (See Table IV).

More disturbing is the consequence of this focus when viewed against CPSC's high and medium priority products for regulatory action which will partially influence many Commission decisions through FY 1981 (Attachment B). Several will require intensive research of possible hazards and decisions on regulatory action, which may result eventually in a mandatory standard. But only four now seem to even conceivably lend themselves to new Section 7 processes in the "near" future: communication antennae; insulation; upholstered furniture; and asbestos products. This realization—that mandatory standards are only one and by far the most resource-intensive of many remedies available to CPSC—puts the immediate importance of the offeror process to this agency into a totally different perspective.

TABLE IV.—CPSC'S SIGNIFICANT REGULATORY ACTIONS, June 1976—February 1978

Mandatory standards:

Finalized: matchbooks, architectural glazing and pacifiers.

Proceeding with: cellulose insulation, miniature Christmas tree lights and power lawn mowers, baby rattles, poison prevention packaging developed for acetaminophen products.

Modified: children's sleepwear standards.

CPSC bans:

Finalized: unstable refuse bins, extremely flammable contact adhesives, lead-in-paint and certain asbestos-containing products.

Proposed: unvented gas fired space heaters.

CPSC section 15 timeliness cases:

Corning Glass Works, Inc., defective coffee pot.

Wham-O Manufacturing Co., defective cross bow.

North American Systems, Mr. Coffee machine.

CPSC Section 12 imminent hazard cases: old technology aluminum wire, pitching machines, and amusement rides.

CPSC Section 27 labeling requirements: aerosol products containing chlorofluorocarbons (final), CB antennae (proposed), and sleepwear chemically treated for flame retardant purposes (draft).

- FHSA technical requirements: sharp points (proposed and finalized) and sharp edges (proposed) for toys and children's articles.
- Petitions: reduced backlog from more than 60 to only four that are past 120-day limit.
- Developed a Voluntary Standards Policy:
 - Published and operational (November 1977).
 - Being utilized for numerous efforts including: extension cords, ladders, snowmobiles, ranges, ovens.
- Recognized and considered international standards: deferred to ISO work on bicycle wet brake amendment.
- Filed TRIS repurchase lawsuit.

B. EXAMPLES FROM OTHER REGULATORY ORGANIZATIONS

CPSC's critics desire simple and straightforward evaluations of CPSC's regulatory performance. But compared to what? To assume that standard development and implementation is a facile exercise is to disregard the experience of all other regulatory organizations.

Because of inflated expectations, it is critical that CPSC demand that the miniature Christmas tree lights standard be evaluated against fair and proper criteria. If this is not done, the attacks on Section 7 risk becoming more out of proportion to reality in general and the comprehensive mandates of the agency in particular.

Examples from the private sector

An examination of regulatory action in other organizations indicates that standards are not being processed any more rapidly or at any less cost than is done by CPSC. Some examples from the private sector follow.

ANSI

The American National Standards Institute (ANSI), which is a voluntary standards coordinating organization and clearinghouse has completed in excess of 6,000 recognized, national consensus standards. They estimate that the costs of the voluntary standards system which ANSI coordinates are astronomical, exceeding \$250,000,000 each year.

ANSI quoted these figures in July 1976 before the Subcommittee on Antitrust and Monopoly, Senate Committee on the Judiciary, using the results from a partial survey underway:

Budgets of standards developing organizations (40)-----	\$20,000,000
Volunteers serving on technical committees, councils and boards--	55,000
Estimated cost to membership or participants for voluntary stand-	
ards activity-----	250,000,000

The standards which result from these consensus processes are later submitted to ANSI for verification of evidence of consensus, and to public review and comment.

ASTM

The American Society for Testing and Materials (ASTM) was able to provide information on one project for bathtubs and shower structures. The costs over a two (2) year period from October 1974 through September 1976 included a breakdown of costs for input from several sectors:

Producers, users, general interest-----	\$1,370,000
Consumers-----	36,000
NBS/CPSC-----	50,000
ASTM-----	72,000
 Total-----	 1,528,000

Bernard Corrigan, Special Assistant to the Managing Director for National Affairs, clarified, moreover, that these were low estimates, which excluded costs for numerous subcommittee meetings, and research and testing, approximating at least \$300,000 more.

ASTM has testified previously that for every \$1 spent of its \$7 million dollar budget, another \$15 is contributed by industry or government.

UL

Dr. S. David Hoffman, Vice President—Standards and Legal, at Underwriters Laboratories, Inc. (UL), estimated an average standard development time at

UL of 52 weeks and two days, depending on the amount of time a project engineer can consistently devote to the standard. In averaging the cost for four standards published during the past three years, he arrived at an average figure of \$51,875. This cost, however, does not include costs to industry to participate in producing these standards.

It should also be noted that UL evaluates primarily electrical and mechanical products. This scope is much more narrow than the range of products under CPSC's jurisdiction, but it allows UL to draw upon appropriate safety requirements from other standards when developing new ones.

Examples from the public sector

Government regulatory action presents an even greater mixed bag of achievements. Moreover, present dissatisfaction with federal achievements is such that there are loud cries for sweeping regulatory reform. Isolated examples of experiences in other agencies include:

OSHA

For two years after it was established, OSHA was permitted to adopt as its own, standards that had been set either by other government agencies or by certain consensus organizations. After 1972, the standard-setting procedure changed, requiring that standards be based on NIOSH "criteria documents." However, in the first two years OSHA adopted numerous consensus standards—with resounding, long term negative results of major proportions.

Once OSHA began relying on NIOSH in developing standards, the process became more cumbersome, in part because NIOSH and OSHA have never jointly developed a list of priorities, and in part because the criteria documents developed by NIOSH do not provide sufficient information upon which to sustain rule-making. Rather, they are a literature survey of health effects of certain substances. Illustrative of the problem is the fact that NIOSH had produced 13 criteria documents in FY 1972 and 1973 but OSHA had only finalized one standard by July 1, 1974. The recent efforts by Dr. Bingham to eliminate over 1,100 of the original consensus standards is a first major step in rectifying OSHA's problems.

EPA

Last year, the Senate Judiciary Subcommittee on Administrative Practice and Procedure accused the EPA of failing to carry out the mandate of the 1972 Federal Environmental Pesticide Control Act. The law required the agency to review all pesticide products previously registered with the federal and state governments over the last 30 years, and to determine whether they should be allowed to remain on the market under new stricter federal regulations.

In a report released by the Subcommittee, EPA's alleged failure was called "an almost classic example of poor governmental regulation"—"EPA's pesticide program has struck an incorrect balance between the sometimes conflicting demands of limited resources, bureaucratic efficiency and public health." The report further stated that, "Several years of regulatory effort will have to be re-examined, substantially redone, and fundamentally redirected".

To remedy this situation, Mr. Costle has recently committed more resources to this program, developed a new implementation strategy, and persuaded Congress to pass some amendments to the law to provide greater flexibility. He has also effected an internal reorganization which places responsibility for this program with the Assistant Administrator for Toxic Substances, who handles similar problems and policies in other programs.

FTC

Late last year the blame for the problems which have plagued the Magnuson-Moss Warranty Act were disputed between Congress and FTC at a National Warranty Update Conference. Representatives from Congress blamed the agency for not having the background to write the standards and rules necessary for enforcement of the Act. FTC representatives claimed that Congress did not have the foresight to anticipate the resource needs of the FTC, when drafting the legislation. In a no-win situation which leaves consumers and industry hanging, many manufacturers have stopped offering warranties altogether.

The law allows the FTC to promulgate a number of rules, but it set few priorities for their enactment. The lack of certain "discretionary rules" which the FTC has the option to propose has left industry claiming they don't know how to comply with the law.

One rule on reasonable duties a warrantor can impose on consumers was proposed in August 1977, and could take ten months to a year from that date before FTC publishes it in final form.

Conclusion

Obviously, none of these examples do justice to the overall positive record of regulatory accomplishments in any of these organizations. However, though these examples are diverse, they exemplify the gap between well-meaning legislative intent and real-world implementation. All four federal agencies have been and continue to be earnest in their efforts; and, it is not intended to suggest that their experiences relate specifically to situations in CPSC's own standards-making process. However, they do provide a context within which the problems, which have beleaguered CPSC, and the sharp attacks received from its critics can be viewed against a broader regulatory perspective. Also, the assumption which is made by our critics that other regulatory bodies are rather easily proceeding through the standards development process without large expenditures of resources, time and research must be confronted. The facts do not support such an assumption. Any legitimate, broad-based (involving public participation) standards development process is a difficult, time-consuming, technical complicated and socio-economically complex process carrying with it potentially significant marketplace effects.

III. The Future Outlook for Mandatory Regulation

The managerial and organizational superiority exhibited by the development of the miniature Christmas tree lights standards has elicited forecasts for the future of the offeror process.

As suggested earlier, the managerial scheme devised by NCL is certainly replicable. Though another set of personalities (i.e. offeror, government employees or industry) could guarantee an outstanding failure in a different set of circumstances, NCL still has proven that success is definitely attainable. It is up to CPSC to use its creativity and authority to assure that personalities are not allowed to debilitate future efforts.

Will it work for other more complex consumer products?

Miniature Christmas tree lights are a relatively "simple" electrical product—particularly in relation to products which have not been the subject of previous safety standards. As in the case of many other electrical products, the offeror's participants were able to draw upon cumulative experience as well as appropriate safety requirements from other existing standards in devising appropriate safeguards against the hazards peculiar to this product's use.

It is my belief that if the Commission continues to exercise sound management control, the inherent strengths and weaknesses of the offeror process can be synthesized to bring about the best standard possible under the varying circumstances that the CPSC will face.

However, expectation as to the number of standards the Commission should undertake and can complete, the amount of time each will take, the nature and extent of resources committed, the alternative remedies available, etc. have to be re-examined in light of today's marketplace realities, the resource-intensive nature of mandatory standards development, and the operational constraints which confront CPSC.

A. FACTORS THAT MUST BE CONSIDERED

Where on the list of CPSC priorities—or for that matter any other list—is there a substantiated need for a large number of mandatory standards? I do not believe that data supporting a massive number of mandatory standards has been or is before the Commission. Mandatory standards have continuously been cited as the ultimate solution to consumer product safety problems. Such could not be farther from the truth. Mandatory standards, plus bans, will never begin to equal the consumer protection potential of millions of products corrected under CPSC Section 15 (Notification, Repairs, Replacements and Refunds). Further, there are numerous examples of design limitations or performance failures in many accidents which can only be dealt with satisfactorily through voluntary and/or mandatory (Section 27 CPSA) consumer information and education campaigns, and labeling.

Budget

The central problem of safety regulation is the need for incentives and resources to effectively attack the safety hazards over which regulators have the greatest leverage.

Though CPSC's employees have the incentive they have been consistently faced with diminishing resources. CPSC has remained at approximately \$40 million in its present budget. This means that it is equivalent in 1974 dollars, when the agency was started, to about \$28 million. Therefore, CPSC is operating in 1978 with one-third less purchasing power than it started with in 1974/1975.

A closer examination of CPSC's budget appropriations indicates that the effect of this drastic erosion of agency purchasing power has consistently reduced CPSC's standards analysis capability and development flexibility by forcing the elimination of large amounts of contract dollars. This budgetary reality has forced the Commission into a reactive approach to product safety despite extensive efforts to plan for systematic standards development.

Product complexity

It should be realized in forecasting mandatory regulations that the free market system is most likely to deal adequately with product hazards which can be resolved by fairly simple solutions. Also, in some circumstances, product liability exposure may provide an adequate incentive for prevention of hazards. It is the most technically complex or costly safety issues that will usually be postponed and it is these that CPSC should be addressing. Again, substantially larger research budgets may be required in order for CPSC to be responsive.

Front end hazard identification and analysis

The Commission has recognized its error in failing to provide adequate front end hazard identification and analysis for potential offerors in the early standards efforts. However, it has also been forced to accept that information about risks is acquired only through large expenditures in time, data collection, analysis and research.

Right now the Commission is preparing for an offeror process on cellulosic home insulation. Very little front end hazard analysis has been carried out by CPSC staff, or other bodies. Yet it is also projected that a large majority of residential homes may be insulated in the next few years, before adequate hazard analysis can bring a standards development process to a satisfactory conclusion. Therefore, the Commission now faces difficult management decisions regarding regulatory shortcuts, each of which will carry a degree of risk in terms of safety, consumer choice, hazard addressability, economic impact, and legal sustainability.

Front end hazard analysis is a necessity, but it will always be a costly and time consuming one, requiring a substantially larger research budget than CPSC now has.

Time constraints

The original expectations for timely completion of the Section 7 process were such that restrictions of 120 days (now changed to 150) were set for a standard's development.

It is reasonable given hindsight knowledge, to question whether rapid action is always a desirable characteristic of safety regulation. The previous examples describing regulatory action in other organizations indicate that speedy mandatory standards are not being written elsewhere.

Also, Section 7 of the CPSA was devised such that it seeks the best of all possible regulatory worlds. It requires efficient, effective rulemaking without any disregard for the following: satisfactory risk assessment; satisfactory hazard analysis; economic impact analysis; information on existing standards; consumer choice; public participation in the development process; suitable test data; suitable test methods for measuring compliance; public hearings; maintenance of records of the development process; comment period; legal sustainability; findings as to the need of the public for the affected products; findings as to the effect the rule will have on utility, cost or availability of the product; etc.

All of these factors can lead to the best mandatory standard if the process is properly managed. However, it is unlikely that their completion lends itself to a rapid conclusion of the standard's development under any set of circumstances. In fact, the minimal resources which CPSC presently has or anticipates having at its disposal for long term, undiverted tasks ensures that rapid standard development is not a viable concept.

IV. Conclusion

Standards development requires stable and comprehensible guidelines. Operational procedures must allow participation by all necessary parties: industry, private groups, consumers, government.

Regardless of what the process is called, or who chairs it, or how it is paid for, or what arbitrary or reasonable timetables are set—some form of decision-forcing mechanism must exist, and be subject to appropriate review, if any worthwhile standard is to emerge.

Government must adhere to certain restrictions:

(1) It should not arbitrarily proceed to develop standards "in-house". Undue costs are extracted in the form of demands and an accompanying drain on agency budget and resources. Federal agencies, operating under current federal personnel management procedures, are incapable of acquiring transitional expertise on a timely, as needed basis . . . especially as a regular method of doing business.

(2) Government should not normally chair a standards development process. The agency must ultimately sit in judgment of the final standard. Its staff ideally should participate in a standard's development, without the burden of pride imposed by authorship, as when applied to an in-house project. The staff should be free to function at any juncture as a separate analytical support unit.

(3) Care must be exercised to apply the most effective regulatory strategy no matter how severe outside competing pressures are.

(4) Regular technical review of all regulation (completed or developing) must be embodied in normal operating procedures.

(5) Finally, an agency must be inflexible in its determination to undertake regular self-evaluation, and be prepared to admit its errors when circumstances demand it.

ATTACHMENT A

OFFEROR PROCESS—REVIEW

CPSC evaluation of the offeror process, November 1976

[Action taken during miniature Christmas tree lights sec. 7 process]

Recommendations

Problem definition phase:

- | | |
|---|-----------|
| 1. Define the task of offeror as specifically as possible. | Done. |
| 2. Develop best estimates of the frequency and severity of injuries by hazard. | Do. |
| 3. Initiate a study of the most cost effective means of providing best estimates of the frequency and severity of injury associated with hazards. | Not done. |
| 4. Set a policy for defining the scope of the offeror process. | Do. |
| 5. Engage in multi-disciplinary solution-oriented analyses in the early stage of regulatory decisionmaking. | Done. |
| 6. Prioritize the product priorities----- | Do. |
| 7. Implement utilization of criteria for product priorities. | Do. |

Tasking and Selecting Offeror

- | | |
|--|-----------------------------------|
| 8. Outline more specifically in the NOP the technical tasks to be done by the offeror. | Do. |
| 9. Hold pre-offeror conference----- | Do. |
| 10. Develop handbook or primer for offerors----- | Not done. ¹ |
| 11. Oral presentation of the offers----- | Presentation given by CPSC staff. |
| 12. Prepare evaluation criteria for offers along technical lines. | Done. |
| 13. Provide technical questions for offeror----- | Do. |

- | | |
|---|--|
| 14. Publish existing voluntary standard as proposed standard without proceeding under Sec. 7 (b). | Office of General Counsel considers unlawful. ²
Done in NOP. |
| 15. Develop clear ground rules for submission and evaluation of offers of existing standards | Done. |
| 16. Require staff to evaluate existing standards by analysis. | Do. |
| 17. Publish funding policy----- | Do. |
| 18. Insure funding of all necessary skills to the process. | Do. |
| <i>Offeror Development Phase</i> | |
| 19. Develop monitoring policy----- | Do. |
| 20. Provide multidisciplinary team for use of offeror. | Do. |
| 21. Provide more frequent and comprehensive review of offerors progress. | Do. |
| <i>Evaluation Phase</i> | |
| 22. Distinguish between staffs perceptions of technical inadequacies and actual. | Do. |
| 23. If staff advises substantive revision of offerors standard, have staff provide a projection of the regulatory consequences. | Do. |
| 24. Commission and staff interact with offeror in evaluating standard. | Do. |
| 25. Shorten staff evaluation time allowing for earlier consideration by Commissioners. | Do. |

¹ Under consideration.² Would be allowed under majority amendment to Section 7.

ATTACHMENT B

CONSUMER PRODUCTS SAFETY COMMISSION

High priority products ranking :

1. Asbestos.
2. Power mowers.
3. Gas space heaters.
4. Communication antennae.
5. Public playground equipment.
6. Chlorofluorocarbons.
7. Architectural glazing materials.
8. Unstable refuse bins.
9. Lead-in-paint.
10. Baby pacifiers.
11. Sharp points.
12. Methyl alcohol.
13. Upholstered furniture.
14. Sharp edges.
15. Children's sleepwear enforcement policy.
16. Miniature Christmas tree lights.
17. Television sets.
18. Aluminum wire.
19. Ranges and ovens.
20. Skateboards.
21. Extension cords and trouble lights.
22. Bicycles.
23. Matches.
24. Ladders.
25. Energy conservation devices.
26. Bathtubs and showers.
27. Smoke detectors.
28. Children's football helmets.
29. Small parts.

Medium priority products ranking :

1. Power saws (portable).
2. Chain saws.
3. Over-the-counter antihistamines.
4. Power drills.
5. Household chemicals/petroleum distillates.
6. Household chemicals/drain cleaners.
7. Power saws (non-portable).
8. Eye irritants.
9. Wearing apparel.
10. Household chemicals/rust remover.
11. Ammonia.
12. Skin irritants.
13. Window bars.
14. Skiing equipment.
15. Federal Hazardous Substances Act (FHSA)/flammability.
16. Flammable Fabrics Act Guarantees.
17. Drug exemptions.

STATEMENT OF HON. BARBARA HACKMAN FRANKLIN, VICE CHAIRMAN, U.S.
CONSUMER PRODUCT SAFETY COMMISSION

Mr. Chairman and Members of this Subcommittee. This week, two extremely important House hearings on the future of CPSC are being held—the session on our Fiscal Year '79 budget request and today's discussion of authorization levels for our agency over the next three years.

The outcome of both hearings is critical—especially in closing the gap between our broad mandate to protect consumers and our present ability to fully do the job.

Few would doubt that there is room for more improvement in managing those resources we have. But there is no doubt in my mind, after five years' experience as a Commissioner, that increased staff and funding are an essential part of any plan to speed up and sharpen the performance of the agency and make it more responsive to consumer safety and marketplace realities.

We are, as I told Chairman Boland's Subcommittee Wednesday, a small agency with a small staff but nonetheless, a very large and important mission. Frankly, I do not see that additional funds will address all of our problems. Nor do I want the Commission to mushroom into a massive bureaucracy.

What I do hope for—at a point not too far off in the future—are a number of initiatives and procedural reforms by the Commission as well as funding and staffing levels more in line with the accomplishments Congress and the American people expect and deserve.

Make no mistake: Despite the loud and vocal cries of some, our record demonstrates significant progress on a number of fronts using our full range of regulatory tools, as the Chairmans opening statement indicates. Many of these steps forward are particularly encouraging and all of them portend even greater progress in the days and months ahead.

For example, I believe our activities have contributed to safer products and an increased safety awareness among consumers and industry.

We're approaching the truly complex issues surrounding government regulation in the health and safety area with far more precision. I believe industry and consumers both will benefit, and those regulations we do write will be more workable and legally sustainable.

In the first five years of the agency's existence, over 7 million units of potentially unsafe products have been repaired, replaced or recalled at little or no cost to consumers. Most were reported by the companies themselves as required by our law. Many were voluntarily corrected without need for direct regulatory intervention. And prospects are, in light of the Commission's proposed Section 15 regulations, that even better results will emerge in the future.

This fall, the Commission adopted a voluntary standards policy, long overdue recognition that neither the government nor the private sector alone can solve the product safety problem.

We are setting product-specific priorities for the first time in our history and have adopted a policy which lays out, so that all can see, the criteria we use in the process.

We are wrestling with tough resource and organizational questions surrounding our work in chronic hazards, an area where I have had a long-time interest, and are on the brink of proposing an important policy on carcinogens.

Efforts to coordinate our work with other agencies and to avoid duplication have made impressive gains—especially with the creation last summer of the Interagency Regulatory Liaison Group, composed of representatives of the Commission, FDA, EPA and OSHA.

We have proposed forward-looking regulations governing compensation for public participation and are renewing efforts to create our own Office of Public Participation.

Our record of advocacy on behalf of children, the nation's most vulnerable consumers, is backed by a solid record of achievement. Over the last year alone, we have finalized a mandatory standard for pacifiers, technical requirements for toys with sharp points and amendments to our electrical toy regulations. We also proposed a standard for rattles and technical requirements for toys with sharp edges.

Finally, we have redirected our compliance efforts. At the Commission, the era of making big issues out of little cases is over. Today, we are pursuing major violators more aggressively—one clear signal that we mean what we say about product safety.

The list of accomplishments is much longer, but I want to turn now to two issues of particular concern to this Subcommittee and to the Commission.

At the top of the agenda is the offeror process, the unique method by which mandatory safety standards are developed under the Consumer Product Safety Act. My position on this matter and, in particular H.R. 10819 which would amend it significantly, reflects support for the process and incorporates some of my new thinking.

Mr. Chairman, I believe you are aware of my long-standing support for better and more timely mandatory safety standards and also my strong support of the offeror process. It was a good idea when Congress conceived it, and I think that with major changes the Commission has made in its implementation, it still is.

I also, however, support the concept of greater flexibility for the Commission to develop, under certain circumstances which I will describe shortly, mandatory safety standards outside the offeror process.

Nonetheless I have grave concerns about the major thrust of the bill before this Committee—H.R. 10819. It goes way beyond mere flexibility. If passed, the bill could gut the offeror process altogether, a result which, in my judgment, would be most unfortunate.

What is at issue here is whether government should write mandatory standards or even sit at the head of the table in developing them. There has been contention over the answer to this question for years, a fact which probably has its roots in different philosophies of the proper role of government.

As I testified before this Subcommittee last fall, the strength of the Commission's offeror process is that it places the burden for standards development outside the government. It assures that industry and consumers will have not only a role, but a major responsibility. The process requires leadership and meaningful participation from the public where it really counts—in the shaping of a proposal. The process, in other words, pointedly acknowledges that neither the government nor anyone else knows more about the marketplace than the marketplace itself—the industry that makes and sells a product and the consumers who buy and use it.

Next and most important, I strongly believe that now as this legislation is being considered, the process itself is on the verge of meeting Congressional and Commission expectations for better standards developed in a timely way and at a reasonable cost.

As I also testified before this Subcommittee last fall, this is due primarily to notable improvements the Commission has made in the process. We will assess the impact of the changes, for the very first time, when the Commission considers proposing a standard for miniature Christmas tree lights in April. Early indications are that these improvements have contributed substantially to the operation of the offeror group and the quality of the work. Thus, it seems premature to make sweeping changes in the use of this process at the very time greater success with it may be at hand.

I want to underscore this: The miniature Christmas tree light proceeding may not be the perfect model when all is said and done. But it is the best example we can draw from and build upon.

Another point: Despite problems with the Commission's management of the process and the criticism about how slowly it works, on the whole I see no concrete evidence that it has produced standards much more slowly than other agencies.

I simply am not aware that the Federal government could do the job quicker or better. There is evidence, in fact, that other government agencies who develop standards on their own encounter difficulties too.

FDA's Bureau of Foods estimates that one to three years may be required to write its standards. The Bureau of Radiological Health estimates anywhere between one and four years may be needed, depending on the complexity of the product and the nature of the problem. The Environmental Protection Agency is said to average 2 years to produce its standards. And, OSHA, as another example, has been working on a standard on noise levels for 6 years.

What all of this means to me is that setting standards is not an easy or overnight matter no matter how it is done or by whom.

Finally, in one way or another I have absolutely no doubt that if the Commission is to take upon itself even more of the burden for developing standards, we will need more resources—staff and dollars—to handle it.

Already, the Commission spent nearly \$7 million to develop 8 safety standards—the total bill for work on these has yet to be tallied and won't include private sector resources which have been applied. I can only assume, if the agency develops more and more standards in-house, we will have no choice but to hire additional staff—either to actively manage the processes or to handle other important activities of the Commission which may get the short shrift.

Having voiced my major concerns about the proposed legislation, I would like to respectfully urge consideration of certain steps that I believe would facilitate flexibility yet assure that the offeror process remains a viable option.

First, I recognize there are occasions, perhaps one being the proposed Section 7 notice of proceeding for cellulose home insulation, when there exists a need to move on a particular hazard at a greatly accelerated pace. If the Commission determines that time truly is "of the essence"—that consumers need effective protection quickly and that CPSC possesses the necessary expertise and resources to provide it—then there may be reason for the Commission to draft its own standards so long as the public is fully involved.

Another area where flexibility is warranted lies in the agency's ability to modify and adopt an existing voluntary standard. We can adopt such a standard now if the Commission determines that it adequately addresses the risks of injury. However, there is no express authority to make technical and substantive changes to tighten and improve the standard in any way. This flexibility is not presently provided for in the legislation, and I bring the matter to your attention—not only because it could be a significant way to improve consumer protection, but also because it could help the agency make more efficient use of its scarce resources.

More specifically, therefore, I suggest that the bill be changed to state that the public interest requires the Commission to find that all of the criteria set forth in Section 2(A) (i)-(iv) of H.R. 10819 are met. These are nature of the risk of injury, expertise of the Commission in addressing it with a standard and the necessity to "expedite" the process. Further I would suggest that preparing a safety standard in this way also should be in keeping with the Commission's budget and priorities. I believe in this strongly. In fact, if this bill is not

passed, I will urge my colleagues to join me in developing a new set of procedures for the offeror process which would allow it to handle emergency situations more effectively.

In addition, Section 7(c) of the Act should be amended to expressly permit the Commission to modify as well as adopt an existing voluntary standard.

Secondly, regardless of the shape of any final legislation, I urge the Commission to increase its own expertise in the management, coordination, writing and evaluation of mandatory safety standards. In the past, it has often been lack of agency expertise and sufficient staff that has contributed to many problems plaguing the offeror process. Clearly, we must deal with this and deal with it directly.

One way to accomplish this might be to establish an Office of Mandatory Standards. Another possibility would be an infusion of additional resources in the existing Office of Program Management. Another clear need is to determine how many and what kinds of additional technical personnel may be necessary.

Turning now to home insulation, the focus of my concern as a Commissioner is to assure that consumers are not exposed to unreasonable risks of injury in trying to lower the cost of their utility bills by insulating their homes. My concern, as a public official, is that government address energy conservation, including its safety aspects, in an intelligent, coordinated and timely manner.

The Commission already has taken steps on both fronts. Very recently we voted to invite outside parties to develop a standard to address injuries from fires associated with cellulose home insulation. Further, our staff has been working with the Federal Trade Commission to improve the labeling for all forms of home insulation. We also are working with the Department of Energy on matters such as the safety of energy-saving devices and the efficacy of tests for flammability of insulation. Finally, our agency has initiated information and education efforts, including a radio-TV campaign beginning early next month which stresses the importance of proper installation of the material.

FTC, DOE and other agencies, Federal, State and local, are actively pursuing a number of related issues.

But much more must be done—and done soon.

Demand for insulation has risen dramatically and very quickly—for new housing units and especially for older homes. Manufacturers are increasing their capacity, but demand continues to outstrip supplies. Ironically, there are predictions the situation could worsen, in light of President Carter's proposed tax rebates for consumers and his call for 90 percent of our homes and all new buildings to meet minimum energy standards by 1985.

The situation, in my view, is such that the highest order of government leadership is needed. The objective must be to permit industry to make and sell sufficient quantities of home insulation which is effective, safe and reasonably priced for consumers. What this means to me is that we cannot afford to approach the problems on a piecemeal basis. Nor can we afford solutions which do not anticipate the cumulative impact of everything we do.

As only one example, no single test exists which approximates the conditions found in areas where cellulose insulation is used, or which satisfactorily measures its burning properties in that setting.

The bill now before the House, H.R. 10637, would mandate the use of one possibility, the Steiner Tunnel Test, and would allow the Commission to amend the test in keeping with changes made by the General Services Administration.

One advantage of the bill is that it puts into place a standard based on already established procedures relatively fast—critical since as many as 8 million additional homes may be insulated this year with materials whose safety is being gravely questioned. In addition, the bill requires that the Commission deal with growing concerns over corrosion on a faster basis.

One disadvantage of the bill is that the stringent provisions governing corrosiveness coupled with the scarcity of boric acid—a critical ingredient used to make celluloses flame retardant—could make it even more difficult for consumers to obtain enough cellulose insulation at the price.

Another especially worrisome problem for CPSC is that we don't know what hazard patterns the Steiner Tunnel Test is capable of measuring so that at the moment we are unable to say with confidence that it will be fully effective in reducing the risks of fire associated with cellulose insulation. The possibility may arise, as a result, that the Commission could find itself enforcing a test which really does not adequately address safety concerns, and which may soon be abandoned by GSA, the Federal agency whose experience with it is considerable.

Currently, Congress has before it major legislation which, if enacted, will shape the course of energy conservation in this country. I don't envy this job. It's a tough one with no simple solutions. The importance of it, however, is undeniably clear—in terms of the economy and the quality of life in this country. The way Congress addresses home insulation, which is but one piece of the energy puzzle, pointedly underscores how important it is to meet the nation's energy goals in a way that does not jeopardize the basic economic health of our nation or the safety and wellbeing of its citizens.

Each of the many agencies having some responsibility for energy matters also must redouble efforts to work together. The Federal government must speak with one voice to consumers and industry alike.

Finally, I support a uniform safety standard for cellulose insulation. The Commission is moving forward to develop it.

We must insist on better quality, safer insulation, yet we must avoid regulation which needlessly cuts into already short supplies.

We must do everything to assure a better product, yet we cannot overlook the significance of how the insulation is installed.

We must address fire hazards. They are real. But we must not lose sight of other problems which may exist.

We must provide adequate protection for consumers, but we cannot divert their attention from many other energy-saving devices, such as storm windows, weather stripping and exterior caulking.

My concern is and has been that CPSC—and the government as a whole—proceed in a timely manner but also in a way that is responsible and consistent. We must be certain that the direction in which we are moving is sound and that our strategy to deal with the full range of issues surrounding home insulation penalizes neither industry nor consumers unfairly.

1. Section 7(b) of the Consumer Product Safety Act (15 U.S.C. 2056(b)) is amended by (1) amending "(1)" between "(b)" and the word "A" in the first sentence of this paragraph and (2) by adding the following section.

(b) (2) Upon a finding that the procedures set forth in paragraph (b) (1) should be modified for the development of a particular consumer product safety standard, the Commission may, in lieu of those procedures, adopt alternative procedures (including proposal by the Commission and promulgation in accordance with Section 9). Such finding shall be published in the Federal Register and shall state:

(1) the manner in which the procedures set forth in paragraph (b) (1) will be modified;

(2) the reasons (e.g., the degree of technical complexity involved in the problem to be addressed, the Commission staff's experience and expertise regarding the problem, the period of time determined by the Commission to be appropriate for the development of the standard, or other factors) for modifying the procedures set forth in paragraph (b) (1); and

(3) the steps the Commission will take to include interested persons (including representatives of consumers and consumer groups) to participate in the development of the consumer product safety standard.

2. Section 7(d) (1) of the Consumer Products Safety Act (15 U.S.C. 2058(a)) is amended by inserting "(b) (2) or" between the word "subsection" and "(c)" in the first sentence of the paragraph.

3. Section 9(a) of the Consumer Product Safety Act (15 U.S.C. 2058(a)) is amended by inserting "(b) (1), (b) (2)," between "7" and "(c)" in the first sentences in paragraphs (1) and (2).

REMARKS BY HON. R. DAVID PITTLE, COMMISSIONER, U.S. CONSUMER PRODUCT SAFETY COMMISSION

THE OFFEROR PROCESS

Good morning. It is a pleasure to appear before this committee. As the Consumer Product Safety Commission moves toward the fifth birthday of the offeror process, it is appropriate, I believe, to examine this process, the assumptions behind it, its past implementation, and its likely success in future years. I would be less than honest if I did not say that I see serious problems with the process.

As I am sure you are aware, when Congress established the Consumer Product Safety Commission (CPSC), it required the Commission to follow the basic rulemaking provisions of the Administrative Procedure Act (APA) for setting safety standards. These provisions are set forth in Section 553 of the APA and are utilized by most federal regulatory agencies. Section 553 rulemaking procedures have been repeatedly found by the courts to comport with the strictest notions of constitutional due process.

In the Consumer Product Safety Act (CPSA), Congress imposed rulemaking requirements beyond those of Section 553 on the Commission. These additional requirements—the offeror process—are set forth in Section 7 of the CPSA.

Under the offeror process, the CPSC is prohibited from drafting standards by itself. Instead, the CPSC must publicly invite persons outside of the Commission to develop a standard for the agency. These persons, called offerors, may be any interested member of the public, including industry or consumer groups. Only after an offeror has completely drafted a standard and submitted it to the CPSC may we, if we believe it to be inadequate, alter it.

Once the offeror has completed its draft and the CPSC has reviewed and revised it, the CPSC then must either propose and promulgate the standard in accordance with Section 9 of the CPSA or withdraw the proceeding. Rulemaking under Section 9 of the CPSA is the same as rulemaking under Section 553 of the APA except that the CPSA carries the additional requirement of an oral hearing prior to finalization of the standard. Thus, the offeror process is, in effect, "pre-rulemaking rulemaking."

The history of the offeror process is somewhat murky. I have talked to several persons involved in its development. According to them, the process is a compromise designed to accommodate groups distrustful of government rulemaking but with extremely divergent views regarding how to improve it. On the one hand, there were those who felt that government should generally defer to industry in standards setting. They preferred that the CPSC take industry voluntary standards and adopt them as mandatory standards. On the other hand, there were those who distrusted industry standards as well as government standards. They felt that consumers should play a greater role in standards writing.

The present offeror process contains elements traceable to each group. Under Section 7, the government is barred from developing draft standards. Instead, offerors must be the ones to develop draft standards. An offeror may be any interested person, including either an industry group or a consumer group.

The point of this brief history lesson is that while one may admire the inventiveness of the drafters of the offeror process, one should remember that they developed it as a compromise solution to a conflict over basic rulemaking approaches. They had no experience to indicate that the process would work. In short, it was an experiment and should not be considered sacrosanct.

What advantages have resulted from adding the offeror process to Section 553 rulemaking? Many people initially felt that it would be a less costly way for the government to develop draft standards than reliance on "in-house" capabilities. Regretfully, this proposition would be accurate only if the CPSC refused to provide financial assistance to offerors. In this case, only industry groups could afford to be offerors. Such a situation would be unacceptable to me. I know of few people at the present time who maintain that the CPSC will save money by using the offeror process.

Another major rationale behind the offeror process is that of promoting "public participation." This rationale is manifested by the fact that under Section 7 procedures, the Commission must rely substantially on offerors drawn from the public at large—rather than agency staff—to develop consumer product safety standards. Many people, including myself, believe that involvement of the "public" in the early, basic development of standards could produce significantly better standards than reliance solely on traditional APA procedures.

However, the CPSC experience over the past four and one-half years reveals that there is a great difference between holding this belief in the abstract and implementing it in the context of the offeror process.

First, let us look closely at the phrase "public participation." Industry groups are as much members of the "public" as consumer groups. While I strongly believe that substantial industry involvement is essential in standards development, I have never seen a problem in getting it under the CPSA or any of the laws the Commission administers. In fact, many of our critics feel we get too much industry involvement. Frankly, I must agree with these critics in the context of industry groups serving as offerors. It is hard for me to justify the offeror process on the basis of promoting greater industry participation. It is my judgment that industry offerors will rarely, if ever, do more than slightly modify a voluntary standard they like in spite of CPSC prodding to do more. The real challenge for "public" participation to me is getting increased consumer involvement. I am skeptical that the offeror process is the best way to do that.

Second, I do not believe that the offeror process is the embodiment of all wisdom in terms of providing for "public" participation. In fact, it is my feeling that it may be one of the most cumbersome, least efficient ways of doing so. Yet the law requires the CPSC to use this process and only this process. I believe that the CPSC should be free to try alternative forms of public participation.

Let me turn now from discussion of the mechanics and rationale of the offeror process to a discussion of the Commission's past and current experience with it.

Since the CPSC began operations in May of 1973, we have commenced seven offeror proceedings under Section 7 of the CPSA and one "offer-like" proceeding under the Federal Hazardous Substances Act (FHSA). In four and one-half years, we have issued a total of three standards from these eight proceedings. By any measure one uses, this cannot be considered a stunning success for the offeror process.

In making this statement, I do not mean to suggest that these three standards represent the only achievements of the Consumer Product Safety Commission. We administer other acts such as the Flammable Fabrics Act, the Poison Prevention Packaging Act and the Federal Hazardous Substances Act under which significant rulemaking has occurred. Nor do I mean to suggest that the sole cause of delay in regulatory activities under the CPSA has been the offeror process. The CPSC has experienced a number of problems—some internal, a few beyond our control—which have contributed to the slow progress of the agency.

However, I do suggest that the offeror process has both directly and indirectly been the one constant element in all CPSA proceedings that has hampered efficient and effective rulemaking.

There are several inherent periods of delay in the offeror process which seem both unavoidable and unproductive: (a) there is the period between the time the commission decides that an unreasonable risk exists and the time the notice inviting offers is actually published in the Federal Register. This "pre-notice" period is subject to no time constraints and has often taken many months; (b) there is the period after the notice is published in which the Commission receives and evaluates offers to develop proposed safety standards. This period has averaged over 60 days; (c) there is the "start-up" period in which the offeror organizes the development team and familiarizes all members of the team with the technical problems to be addressed and the current thinking of the Commission regarding work to be done. Obviously this period cannot be accurately measured but is clearly at the expense of productive time and contributes to

poor quality work; (d) finally, there is the period after the submission of the draft standard in which the Commission must analyze and, if necessary, rewrite portions of the draft standard that are inadequate.

Many observers are quick to point out that the Commission's evaluation period after an offeror has submitted a draft standard often has taken as long or longer than the offeror's development period. This is seen as evidence that the offeror system functions no more slowly than when the government drafts standards by itself. I question this view. It is my judgment that much of the CPSC delay after the completion of the offeror's work is directly attributable to the fact that the offeror has proposed either inadequate requirements or requirements that necessitate extensive research in order to develop a legally sustainable technical rationale.

At this point, it is difficult for me to say the offeror process is generally successful. It is my opinion that several of the past standards submitted were nothing more than "warmed-over" versions of voluntary standards initially determined to be inadequate by the Commission. Another draft standard, while apparently innovative, obviously suffered from the offeror's extreme haste to meet statutory deadlines. In all of these proceedings, the Commission found it necessary to request CPSC staff to do additional background work and make substantial changes in the draft standard.

There is a current offeror proceeding for which I should make special note. That is the one to develop a standard for miniature Christmas tree lights. Special note is due because the CPSC and the offeror have substantially altered the format of the development effort. Changes made in this proceeding include: greater funding for consumer participants, particularly technically oriented ones; providing more "front-end" information and analysis by the CPSC; more precise guidance on the hazards to be addressed; narrowing of the hazards to be addressed; and greater participation by CPSC staff.

I have long called for and greatly welcome most of these changes in the offeror process. Virtually all indications that I have received about this proceeding lead me to conclude that these changes and, more importantly, the dedicated and conscientious work of the National Consumers League (NCL) as offeror under the leadership of David Swankin, attorney for NCL, will result in a high quality draft standard.

To the extent that this proceeding works well, I am greatly pleased. However, even with this anticipated success, I continue to have misgivings about the future of the offeror process.

I should note that there are a number of factors about miniature Christmas tree lights that are quite unique. First, Christmas tree lights are a simple product that present simple hazards with relatively easy solutions.

Second, it is my understanding that the CPSC staff developed information on possible remedies for this product over the course of several years. Third, the issues facing the offeror development team have been clearly defined and technically supported in part as a result of the clash between competing domestic and foreign Christmas tree light manufacturers. Finally, the offeror development group is headed by one of the few non-CPSC employees in the country who has years of personal experience with the offeror process.

I should further note that even with the reforms to the offeror proceeding for Christmas tree lights, two years will have passed from the date the Commission voted to initiate a section 7 proceeding and seven and one-half months will have passed from the date the proceeding was initiated before the Commission will receive a draft standard from the offeror. (At this point, the CPSC will still have to proceed under Section 9 of the CPSA to promulgate the standard.)

One must wonder how long or for how much less this standard could have been developed under less cumbersome forms of rulemaking.

CONCLUSION

I do not propose abolishing the offeror process. I would not want to foreclose the possibility of the Commission utilizing this process in cases where it feels the process to be appropriate. I have proposed legislation, which is attached to my statement, that I believe presents a fairly simple solution to the problem of the rigidity of the offeror process. My legislation permits the CPSC to modify the offeror process if it believes circumstances require it to do so. My proposal, I believe, gives the CPSC flexibility to use less cumbersome methods of writing safety standards while retaining the important core element of public participation. Thank you.

APPENDIX E

MIDYEAR REPORT—STATUS OF MAJOR REGULATORY ACTIONS ON THE NOV. 18, 1977, LIST SENT TO SENATOR WENDELL H. FORD, 1ST HALF OF FISCAL YEAR 1978

Program/project	Milestones	Quarter due	Status
Fire and thermal burn hazards:			
Unvented space heaters	Commission decision, proposed rule.	1st quarter	Missed 1st quarter, met 2d quarter.
Sleepwear modifications	do	do	Met on time.
Matchbooks	Commission decision, final rule.	3d quarter	Met earlier than scheduled.
	Commission decision, proposed certification rule.	1st quarter	Missed 1st quarter, package is being revised in accordance with Commission direction. Expected early in 3d quarter.
Energy conservation devices	Technical report	2d quarter	On schedule.
Electric shock hazards:			
Communications antenna labeling.	Publish proposed rule	1st quarter	Met on time.
Extension cords	Commission decision, voluntary standards.	2d quarter	Do.
Acute—Chemical and environmental hazards:			
First aid instructions	Commission decision, alternatives.	do	On schedule.
Contact adhesives	Commission decision, final rule.	do	Met earlier than scheduled.
Acetaminophen	Commission decision, proposed rule.	3d quarter	Do.
Chronic—Chemical and environmental hazards:			
Asbestos	Briefing package, final rule.	1st quarter	Met on time.
Chronic hazard policy, carcinogens.	Commission decision, proposed policy.	2d quarter	On schedule, pending a commission.
Chronic hazard—Benzene	do	do	Behind schedule due to technical complications. Expected in 3d quarter.
Labeling flame retardant chemicals in childrens sleepwear.	do	do	Behind schedule due to changed sleepwear amendment priority. Expected in 1st half of 3d quarter.
Pyrol work plan	Commission decision, alternatives.	do	On schedule, in process of transmittal to Commission.
Mechanical hazards—Childrens products:			
Pacifiers	Compliance manual	do	Met on time.
Sharp points	Briefing package, final rule.	1st quarter	Do.
Sharp edges, metal and glass	Commission decision, final rule.	2d quarter	Do.
Rattles	Publication proposed rule.	1st quarter	Do.
Mechanical hazards—Athletic products:			
Skateboards	Commission decision, alternatives.	2d quarter	May miss schedule due to recent industry expansion and diversity of manufacturing components. Expected early in 3d quarter.
Football helmets	do	do	Met on time.
Mechanical hazards—Household products and structures:			
Cellulose home insulation	Briefing package on notice of proceeding.	do	Do.
Architectural glazing certification.	Briefing package, proposed rule.	1st quarter	Do.
General: Petitions			
	Reduce backlog to 51	do	Met in 1st quarter.
	Reduce backlog to zero ¹	2d quarter	Backlog at 9: 1 APA, 5 CPSC, 2 FHSA, 1 FFA.

¹ Petition older than 120 days before they are brought to the Commission.

Mr. BYINGTON. Although you and I may have disagreed on specific situations in the past, I do want to compliment you for your interest in this agency and the oversight you exercise. I think as the commission proceeds from this oversight and your earlier ones it portends very well for this agency. It has been a pleasure cooperating with you and your staff.

Senator FORD. I thank you for those comments. I think you understood from the beginning, and we have had personal talks, that I was trying to get the Commission on the right track. I felt that it was not. I think having a full Commission is important at this juncture. I think your attitude and cooperation in the last few

months has been beneficial, not only to this committee, but to the Commission. I look forward to your comments. I believe sincerely that this is the only independent agency concerned specifically with protection of the consumer. I think it would be a disaster if the Commission were to be dismantled without giving it a complete opportunity in the next 3 years to make a go of it. I will take that opinion to the Senate floor, and will do the best job I can to see that this Commission gets another 3-years. I have been a strong critic of the Commission, and if at the end of the 3 years—they won't have to say anything to me about dismantling this Commission if it hasn't performed. I will be the first to dismantle it myself.

I will try to be firm but fair and hopefully the Commission will make its own way in the next 3 years.

Hopefully, I will be around to see you do it.

Thank you.

These hearings are adjourned.

[Whereupon, at 10 a.m., the hearing was adjourned.]

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

WHITE CONSOLIDATED INDUSTRIES, INC.,
Washington, D.C., March 27, 1978.

HON. WENDELL H. FORD,
Chairman, Consumer Subcommittee, U.S. Senate, Washington, D.C.

MY DEAR SENATOR FORD: White Consolidated Industries, Inc., with headquarter offices in Cleveland, Ohio, manufacture a full line of major appliances. We operate 62 plants, 16 plants which are used for the manufacture of major appliances. The others are devoted to machinery and machine tools for industry. Sales of WCI are approximately \$1,300,000,000 annually, and major appliance sales comprise over 50 percent of these sales.

The Consumer Product Safety Commission was established under Public Law 92-573 on October 27, 1972. The purpose of Public Law 92-573 was to protect consumers against unreasonable risk of injury from hazardous products, and for other purposes. It is our opinion that consumer protection from death, injury of illness associated with the use of consumer products gives the Consumer Product Safety Commission a very important responsibility. We feel that CPSC has developed since its beginning in 1972 to a much better organized and more effective Commission to fulfill and administer the legislative responsibilities in Public Law 92-573.

We believe CPSC is the best Commission to handle the responsibilities of administering Public Law 92-573 legislation. They are knowledgeable with the products and organizations that are subject to CPSC requirements. They have developed this knowledge over a period of five years. This knowledge can only be obtained after a substantial period of experience in carrying out the legislative and administrative requirements.

We feel that CPSC as the established Commission is equipped to administer this law fairly and effectively. Our Company has established direct contacts with CPSC from our headquarters. We feel CPSC is effective and we support it.

Sincerely yours,

J. N. BAUMAN, *Vice President.*

DUKE UNIVERSITY MEDICAL CENTER,
Durham, N.C., April 3, 1978.

RE: Senate bill S. 2796.

HON. WENDELL H. FORD,
Chairman, Consumer Subcommittee, Commerce, Science and Transportation, U.S. Senate, Washington, D.C.

DEAR SENATOR FORD: As an educator, author and child advocate for over 35 years in the area of accident prevention, I am dismayed to hear of the changes being discussed for the Consumer Product Safety Commission. I know of no Federal Agency that has captured the imagination of the people and has contributed so much, with so little, to the health and welfare of the public in trauma prevention. I will not burden you with the positive results of the National Electronic Injury Surveillance System (NEISS) and the marked reduction of childhood morbidity and mortality from safety closures and safety packaging; these are only two highlights of this Commission among many others.

Since Senate Bill F-2796 comes up for a hearing on Thursday of this week, I send you this brief note from a concerned physician whose life-long career has been geared to saving children by educating the public on how to prevent accidents, and by giving children a better chance to reach their potential in spite of the countless hazards that surround them. I know from experience just how effective and how esteemed by the public the U.S. Consumer Product Safety Commission has been in the past. I would anticipate even greater achievements from such a Commission if it were strengthened instead of weakened and given the proper support and funding which it so well deserves.

Sincerely,

JAY M. ARENA, M.D.,
Director, Poison Control Center.

MICHIGAN STATE UNIVERSITY,
East Lansing, Mich., April 4, 1978.

Hon. WENDELL H. FORD,
Chairman, Consumer Subcommittee, Committee on Commerce, Science and Transportation, Washington, D.C.

DEAR MR. CHAIRMAN: As chairperson of the Consumer Product Safety Commission's Technical Advisory Committee on Poison Prevention Packaging, I strongly recommend the continuation of the Commission. There is evidence that the Commission has served the American consumer well by creating a responsive regulatory and educative agency. For example, the reduction in aspirin ingestions among young children that has occurred since the CPSC has required child resistant packaging is dramatic; conservatively estimated as annually 40 percent less than previous ingestions.

Another significant accomplishment, is the creation of the National Electronic Injury Surveillance System (NEISS). These injury data are reliable and gathered to be representative of the country as a whole. They provide a valuable basis for decision making, not only by the CPSC, but by other government agencies such as the Food and Drug Administration and National Medical Library.

One of the most "open" federal agencies, the CPSC is outstanding in its involvement of the public in government decision making. It has been so successful that hundreds of applications were received last year for each open position on its three advisory committees. At advisory committee meetings, public observers have always been invited to make comments on matter under discussion. The Commission's uncomplicated petition procedure is viewed by many as an important asset.

Educators and consumers have benefited from easy access to the Commission through its hot line. Consumers are aware of the CPSC. Public service television spots and other educational efforts have made this visibility possible.

Given that the Commission has been in existence a relatively short period of time and operated on a very limited budget, it has been responsive to critical consumer problems. The continuation of the Commission is essential if a vigorous regulatory and educative stance for consumers is to be taken.

Sincerely,

NANCY HUNGERFORD,
Assistant Professor.

GEORGE WASHINGTON UNIVERSITY,
Washington, D.C., April 4, 1978.

Hon. WENDELL FORD,
Chairman, Consumer Subcommittee, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

DEAR SENATOR FORD: I am writing with regard to the forthcoming hearings on the Consumer Product Safety Commission. It is my understanding that consideration will be given to abolishing the CPSC. In my view, this action is not warranted and would be detrimental to consumer health and safety in this country.

I am currently serving as the co-chairperson of the National Advisory Committee on the Flammable Fabrics Act. Although I do not write this letter on behalf of the Committee, my position and service on the Committee have given me insights into consumer needs in this area and the CPSC's response to those needs.

Although I have not always agreed with CPSC actions, I do not support abolishing the Commission for what may be considered its mistakes or failures. This action would amount to throwing out the baby with the bath water. While legislation to modify Commission procedures may be necessary to promote safety in the marketplace, elimination of the agency would be only detrimental to that goal.

I would urge that efforts not be directed at reducing or eliminating the authority of the CPSC but at strengthening the agency so that it may effectively carry out its statutory responsibilities.

Sincerely,

TERESA M. SCHWARTZ,
Professor of Law.

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, D.C., April 25, 1978.

Hon. HOWARD W. CANNON,
*Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate,
Washington, D.C.*

DEAR MR. CHAIRMAN: The Administration has completed a review of the performance of the Consumer Product Safety Commission in light of its pending reauthorization. This letter expresses our conclusions.

The Federal Government has an important role in consumer product safety. This responsibility includes protecting the public through the use of product safety standards, recalls, and bans; educating consumers on product hazards; reducing conflict between Federal, State, and local regulations; and promoting safety research.

To date, the Consumer Product Safety Commission's performance in this role has been disappointing. It has promulgated few standards, focused on relatively trivial products, and been characterized by lengthy proceedings and unnecessary delay. Recent GAO reports and other studies have attributed the Commission's poor record to inadequate leadership; the cumbersome procedures which govern the development of standards; and excessive concentration on standard-setting as opposed to other available regulatory techniques; as well as to its structure as an independent commission.

We believe the Commission should be given a chance to show whether it can be effective in its present form. The new appointed commissioners will increase the CPSC's competence and vitality. With some statutory changes and vigorous oversight by Congress and the Executive Branch, the Commission will have the opportunity to provide a strong and effective product safety program.

REAUTHORIZATION AND SUNSET REVIEW

We recommend that the Commission be reauthorized for three years. At the end of that period, we urge a full scale, "sunset" review. Depending on the Commission's performance and on other developments in the Federal Government's overall efforts to protect public health and safety, additional changes may be appropriate at that time.

To help measure the Commission's performance for the "sunset" review, we recommend that specific criteria be established. Such criteria should include measurable or directly observable increases in: (1) consumer education; (2) the effectiveness of performance standards for consumer products; (3) the use of effective voluntary standards; (4) the practical use of product injury information; and (5) the effective use of product labeling. These criteria should be spelled out in the legislation or the legislative history in order to provide a standard set of measurements for agency performance.

To monitor performance, the CPSC should be required to submit, as part of their annual report, an analysis of the agency's accomplishments under each of the four statutory purposes and the agreed upon criteria. The report should also identify the relationship between the Commission's programs and other government programs with similar objectives. Where conflicting, overlapping, obsolete or ineffective laws or activities are identified, the Commission should provide recommendations for their elimination.

MANAGEMENT IMPROVEMENTS

To correct the management problems of the Commission, certain statutory changes are needed. For example, we recommend that the statute be changed so that the Chairman serves at the pleasure of the President. This change will make the CPSC statute conform to that of most other independent regulatory commissions.

It is also critically important to change the procedures governing the development of safety standards to allow more flexibility and to avoid excessive delays.

REGULATION OF TOXIC SUBSTANCES

Better coordination is needed to deal with overlapping regulatory programs in the area of toxic substances. Presently, responsibility for regulating hazardous substances is split between the Commission, the Environmental Protection Agency and other agencies. Such a split causes confusion and competition among the agencies for resources and expertise that is counterproductive. We therefore suggest a change in the Consumer Product Safety Act which would give EPA the responsibility for the scientific research needed to permit proper regulation of hazardous substances in consumer products. Such a change is needed to permit the development of a coherent government strategy for dealing with cancer-causing substances.

We appreciate the opportunity to present our views. We look forward to working with you on these changes and on oversight of CPSC activities in the next three years.

Sincerely,

JAMES T. MCINTYRE, Jr.,
Director.

STATEMENT OF THE ASSOCIATION OF HOME APPLIANCE MANUFACTURERS

This statement is filed on behalf of the members of the Association of Home Appliance Manufacturers (AHAM). AHAM is a trade association representing over 90 percent of the U.S. producers of major and portable appliances; and international appliance manufacturers who offer their products for sale in the United States. (See attachment A.)

At the outset, we wish to emphasize that AHAM's members have long believed in protecting consumers from unsafe products. To this end, we have vigorously participated in the development of voluntary industry standards for appliance products. Given the massive daily interaction between our products and the American public, we believe the industry's safety record speaks for itself.

We also wish to emphasize AHAM's members growing concern with the number and scope of government agencies which regulate American business ostensibly in behalf of the public interest. In our judgment we are at the point where, with limited possible exception, additional regulation is neither necessary nor in the public interest.

With these two thoughts as a starting point, we welcome the opportunity to comment on the past and future operation of the Consumer Product Safety Commission.

I. REAUTHORIZATION OF THE CONSUMER PRODUCT SAFETY COMMISSION

In view of the alternatives under serious consideration, AHAM supports the continuation of the Consumer Product Safety Commission for a period of two or three years as authorized by S. 2796 under the following conditions:

(1) If the principle of the offeror process remains unchanged in the Consumer Product Safety Act;

(2) If the Commission's administration of the offeror process is substantially improved; and

(3) If the Commission endorses and encourages the voluntary standards system in the private sector.

The Commission has recently worked on a management plan which is designed to improve its operations. It now has a full five-member Commission and we trust the President will expeditiously fill the vacancy created on June 30, 1978 by Chairman Byington's resignation. The three-year period should provide an adequate amount of time for a litmus test of the Commission's efficacy. During this period the Congress should continue its oversight of the Commission, of course.

If, at the end of that period, the Commission has not shown the expected progress and the present serious doubts concerning its abilities persist, then Congress should take a serious look toward whether the Agency is justified.

Offeror process

AHAM opposes giving the Consumer Product Safety Commission unrestricted authority to develop mandatory standards as proposed in H.R. 10819.

Our assessment from following the offeror process activity over the past few years leads us to believe that the delays in the process were primarily attributable to poor communication and management on the part of the CPSC rather than

the offeror organizations. We believe the Christmas tree light standards development activity shows the Commission is learning from past mistakes. On reflection, this learning process was probably inevitable. We recommend the CPSC develop a formal plan to assure that:

- (1) The offeror is informed of what hazards the CPSC wants addressed;
- (2) The Commission maintains open communication throughout the process; and
- (3) Consumer and industry representatives have every opportunity to participate in the standards development process.

Good management will make the offeror process as successful and as worthwhile as the authors of the Consumer Product Safety Act intended it to be. However, Congress and the public must also recognize that good standards do take time. Wanting and having are not the same. The Commission's record in this area can be improved upon but it does not compare that unfavorably, at least in certain cases, with other standards developing organizations, both public and private.

Voluntary standards

AHAM reiterates its testimony presented to the Consumer Subcommittee on May 5, 1977 which urged the Commission to act as an advocate of voluntary industry standards.

The Commission cannot create a safe consumer product environment alone. Industry overwhelmingly shares the concern with the Commission of providing consumers with safe products. This common interest should be exploited!

Appliance manufacturers demonstrate their concern with the safety of their products by developing and complying with voluntary standards. (See attachment B.) The Commission can strengthen the voluntary standards system by vigorously supporting it. It is in the consumers best interest for the Commission to do so. In this regard, AHAM applauds the Commission's recent agreement with the chain saw manufacturers on development of a voluntary standard. It is a step in the right direction.

Existing voluntary standards provide an excellent base for mandatory standards if they eventually prove necessary. AHAM urged the Commission use this base in establishing mandatory standards rather than trying to re-invent the wheel each time.

The CPSC General Counsel's office has stated the Commission cannot use existing voluntary standards as mandatory standards. We do not agree. Section 7(c) of the Consumer Product Safety Act gives the Commission all the authority it needs to use an existing voluntary standard when promulgating a mandatory standard.

II. CPSC POLICY ISSUES

In addition to the issues already addressed in the hearings, we think the Subcommittee should be aware of the following policy issues before the Commission and AHAM's views on them.

A. Proposed substantial product hazard reporting regulations

We are most concerned with the CPSC's proposed rules on reporting possible substantial product hazards under section 15 of the Consumer Product Safety Act. In AHAM's testimony on this subject (see attachment C), we urged that a public hearing be held on the issue to insure that the Commissioners were fully aware of industry objections.

The Commission did agree to hold a public hearing on the proposal, but in so doing effectively shut out those who had submitted detailed written testimony from appearing before the Commissioners. The issues addressed in the public hearing are those which have received the greatest criticism. However, the Commission also stated that any duplication of previous testimony would not be accepted in the public hearing record. Therefore many organizations which raised strong objections to this proposal, including AHAM, are now deprived of the opportunity of presenting their views to the Commission in an open, public form.

Definition of defect.—The Commission should rewrite the definition of "product defect" to show a clearer relationship between a "defect" and a substantial product hazard. A company must make two closely related determinations before reporting under section 15. First, the company must decide whether a "defect" exists. Second, the company must decide whether a substantial product hazard exists. Clearly, the Congress did not intend for all defects to be reported to the Commission.

Resumption of manufacturer responsibility.—It is unreasonable to hold that a company has responsibility for knowing and acting upon information received by any of its employees in any of its facilities. In addition, the five-day

grace period the regulation allows for transmitting information to the company's responsible official is arbitrary and unreasonable. We believe employees who do not normally deal with the public should be excluded from any reporting obligation and companies be given a reasonable amount of time to process information through their product safety chain.

Presumptive reportable information.—The Consumer Product Safety Act clearly states a manufacturer must report to the Commission when it receives information which “*reasonably supports the conclusion*” that a defect exists which could create a substantial hazard. (Emphasis added.)

Conversely, the CPSC requirement of automatic reporting implies the manufacturer is guilty until proven innocent. AHAM believes a diligent review of the case by the manufacturer will determine whether the information, in fact, is reportable.

Study of other sources of information.—We have serious reservations about reporting product liability suit information under section 15. Such action could result in greater numbers of suits and plaintiffs attorneys using exaggerated allegations in order to pressure manufacturers to settle out of court, no matter the merits of the case.

Time restriction for reporting.—The CPSC requires manufacturers to report within 24 hours of the receipt of information “which reasonably supports the conclusion” there exists a possibility of substantial product hazard. The Commission has arbitrarily set up a 10-day period within which manufacturers must complete an investigation of the facts surrounding an accident. The 10-day restriction is unwarranted and places too rigid a burden upon manufacturers without any equivalent benefit to the public. AHAM believes the CPSC should allow a reasonable time for a firm to conduct an investigation. The CPSC can later conduct a timeliness investigation if the facts warrant it.

Publicity and release of section 15 information.—AHAM believes the Commission should protect section 15 information from inappropriate release. The filing of a substantial product hazard report does not mean that a substantial hazard, in fact, exists. The report denotes the possibility. It should be noted, in this connection, that the Commission is required by the Consumer Product Safety Act to allow manufacturers and private labelers to comment on the release of section 15 information which could damage the reputation of a product and lead to loss of sales.

B. CPSC proposed recordkeeping regulations

Another major regulation that has been recently proposed would require recordkeeping of all oral and written product safety related consumer complaints.

The Commission has gone beyond reasonable practice by requiring all oral complaints be kept—no matter to whom the complaint was made nor whether the complaint was determined to be valid. Oral complaints would have to be reduced to writing and, along with written complaints, kept in a manner prescribed by the Commission. Thus, a company would be required to set up a new recordkeeping system.

Here as in the section 15 proposal, we find the Commission setting up arbitrary time requirements which require a private labeler or distributor to forward complaints to the manufacturer within five days.

Complaint records existing prior to the effective date of the rule would have to be changed to conform with the new recordkeeping system and be retained for 3 years from the effective date of the rule. Thus some complaint records must be kept by a firm for 6 years.

The Commission has not offered any reasonable explanation of why it believes an agency-dictated recordkeeping system will provide any more information than is available to it under existing individual company systems. In addition, the Commission has proposed this new system without making a cost-benefit study. In order to conform to the Commission's proposal, AHAM estimates the cost to major appliance manufacturers, and ultimately the consumer, would be in excess of \$100 million per year for the major appliance industry alone. (See attachment D.)

III. CPSC RELATIONS WITH REGULATED INDUSTRIES

AHAM supported legislation establishing the Consumer Product Safety Commission in 1972, stating:

“AHAM and its members support the enactment of legislation to authorize a federal agency to promulgate mandatory safety standards for consumer prod-

ucts. Such legislation will not achieve its goal and can be detrimental to governmental processes and to the public if it is not administratively feasible and burdens American industry unnecessarily."¹

We have cooperated with the Commission over the years on appliance product safety issues, such as refrigerator-freezer entrapment and wringer washer safety.

AHAM has provided the Commission with information when the CPSC was considering mandatory standards petitions.

We, as an industry, have tried to do our part in facilitating Commission activity. We are concerned, however, by a seeming tendency on the part of some Commission staff to automatically assume an adversary posture vis-a-vis consumer product manufacturers. Such an attitude accomplishes little for the public interest.

IV. GOVERNMENT REGULATION

AHAM has consistently attempted to make Federal agencies aware of the impact of excess regulation on American business and the economy.

We also urge the Congress, which establishes these agencies and provides them with substantial powers, to carefully consider the effect of the laws the Congress enacts. Consider all the agencies that regulate the appliance industry—the Consumer Product Safety Commission, the Department of Energy, the Environmental Protection Agency, the Food and Drug Administration and the Federal Trade Commission. Conforming to these agencies regulations costs appliance manufacturers billions of dollars per year. In addition, there are countless other Federal, State and local agencies which regulate other areas of appliance business operations. The resultant costs are ultimately borne by the consumer—you, and I, alike.

Over-regulation is turning the operation of American business into a maze of red-tape, legal snarls, and undecipherable government forms and regulations.

American business is healthy and vigorously competitive, but it may not remain so given the current proliferation of regulation which has the added potential of significant anticompetitive effects. One need only look thoughtfully at other countries who believed government could cure any and all ills to see that regulation on top of regulation does not serve the interest of the public.

Government regulations are designed to serve the public interest. However, we believe the "public" must be defined in its broadest sense. It is consumers and business. We strongly urge that any existing or future regulation adequately address the cost versus benefit to both publics. Without careful analysis and review, there could be irreparable harm to the American economy.

V. CONCLUSION

We appreciate this opportunity to present our views on the operation of the Consumer Product Safety Commission. The appliance industry pledges it will continue its efforts to provide consumers with safe, innovative products at a cost within the reach of all our citizens.

Respectfully submitted.

ROBERT L. HOLDING,
Vice President, Federal Regulations.

Enclosure.

ATTACHMENT A

The home appliance industry plays a vital role in the nation's economy. The 150 million appliances sold annually by AHAM's members represent a retail value of nearly \$8 billion. The production and distribution of these appliances provide employment for over half a million people.

AHAM's history as a manufacturers' trade association goes back over sixty years. In 1966, AHAM was incorporated in its present form as a national association to promote the general welfare of the appliance industry and the home-making public. It is representative of the entire industry and independent of fuel sources and other non-appliance interests.

AHAM's organization is headed by a Board of Directors which is AHAM's governing and policy-making body, subject to control by the members. Program

¹ Statement by George P. Lamb, General Counsel, Association of Home Appliance Manufacturers, to the Subcommittee on Health of the Senate Committee on Labor and Public Welfare and the Subcommittee on Executive Reorganization of the Senate Committee on Government Operations, on S. 3419, May 2, 1972.

boards and committees, involving nearly 2,000 industry executives, parallel department specialties within the member corporations. A president who is also a Board member heads the association staff which is organized under five vice presidents and two general managers having expertise in government relations, public affairs, statistics, engineering, finance and consumer affairs. The association also retains a general counsel.

AHAM's functions involve four major areas. Product Standards and Certification—AHAM, working through its engineering committees, develops and updates appliance performance standards and submits such standards to the appropriate national standards organization for recognition. AHAM also sponsors certification programs on room air conditioners, refrigerators and freezers, humidifiers and dehumidifiers. Through these programs manufacturers may certify measurements and performance characteristics of their products.

Government relations.—Through AHAM, the industry crystallizes and expresses its views on legislation, receives reports on government actions at all levels, and maintains liaison with government officials on industry-related subjects. AHAM's Government Relations Board analyzes pending federal, state and local legislation which affects the industry and recommends official positions and actions on these issues to the Board of Directors. After Board approval, this group implements legislative programs representative of the industry and alerts AHAM membership to these issues and actions.

Consumer Affairs and Communications.—AHAM conducts a meaningful and active dialogue with consumers and consumer groups. Press releases and educational materials improve consumer understanding of appliance purchase, use and care. Educational seminars for professional consumer communicators are another major information activity. AHAM is a co-sponsor of the Major Appliance Consumer Action Panel, an independent organization of consumer representatives who review consumer complaints and counsel the industry on consumer concerns.

Statistical reports.—AHAM compiles and releases industry sales and monthly factory shipment figures, annual totals, forecasts and various special studies such as wage and benefit surveys and specialized reports available only to study participants.

Other services include traffic, industrial relations, market research and other industrywide activities.

ATTACHMENT B

AHAM PUBLISHED STANDARDS

DH-1—Dehumidifiers, Self-Contained, Electrically Operated, Mechanically Refrigerated (American National Standard B149.1-1972).

ER-1—Household Electric Ranges (American National Standard C71.1-1972).

ER-2—Household Electric Ranges with Glass/Ceramic Cooking Tops (American National Standard C71.1a-1975).

ER-3—Cleaning Performance of Household Electric Ranges with One or More Pyrolytic Self-Cleaning Ovens (American National Standard C71.1b-1975).

HLD-1—Standard Methods of Measuring Household Tumble Type Clothes Dryer Performance (American National Standard A197.6-1975).

HLD-2EC¹—Test Method for Measuring Energy Consumption of Household Tumble Type Clothes Dryers.

HLW-1—Performance Evaluation Procedure for Household Washers (American National Standard Z224.1-1971).

HLW-2EC¹—Test Method for Measuring Energy Consumption of Household Clothes Washers.

HRF-2-ECFT—Test Procedure to Determine the Freezer Temperature and Energy Consumption of Household Refrigerators, Combination Refrigerator-Freezers, and Household Freezers.

DW-1—Household Electric Dishwashers (American National Standard A197.5-1975).

HU-1—Appliance Humidifier Standard (American National Standard Z235.1-1972).

HU-1A—Humidifier Application Standard.

RAC-1—Room Air Conditioner Standard (American National Standard Z234.1-1972).

RAC-2SR—Room Air Conditioner Sound Rating Standard.

DW-2PR—Plumbing Requirements for Household Dishwashers (American National Standard A197.1-1973).

HLW-2PR—Plumbing Requirements for Home Laundry Equipment (American National Standard A197.2-1973).

FWD-2PR—Plumbing Requirements for Household Food Waste Disposer Units (American National Standard A197.3-1973).

FWD-1—Standard Methods of Measuring Household Food Waste Disposer Performance (American National Standard A197.4-1974).

TC-1—Performance Evaluation Procedure for Household Trash Compactors (American National Standard A197.7-1976).

CO-1¹—Household Electric Can Openers.

CM-1¹—Household Electric Coffeemakers.

FB-1¹—Household Electric Food Blenders.

FP-1¹—Household Electric Fry Pans.

I-1¹—Household Electric Irons.

WBSG-1¹—Household Electric Waffle Bakers and Sandwich Grills.

STANDARDS UNDER DEVELOPMENT

Performance Evaluation Procedure for Microwave Cooking Appliance.

Room Air Conditioner Sound Application Standard.

Household Electric Hair Dryers.

Household Electric Chafing Dishes, Fondues, Deep Fat Fryers, Saucepans and Dutch Ovens.

Household Electric Food Mixers.

Dishwasher Drying Performance Standard.

Test Method for Measuring Energy Consumption of Electric and Gas Ovens and Surface Units and Microwave Ovens.

Room Air Conditioner Hours of Operation.

Household Electric Slicing Knives.

Refrigerator-Freezer Standard and Recommended Levels of Performance.

Sound Measurement and Rating Standard for All Appliances.

Method for Measuring Energy Consumption of Household Dishwashers.

Household Electric Curling/Styling Wands.

Household Electric Slow Cookers.

Household Electric Toasters/Broiler Ovens.

Household Electric Clocks.

ASSOCIATION OF HOME APPLIANCE MANUFACTURERS,
Washington, D.C., November 30, 1977.

MR. RICHARD RAPPS,
Secretary, Consumer Product Safety Commission,
Washington, D.C.

DEAR MR. RAPPS: This statement is filed on behalf of the appliance manufacturer members of the Association of Home Appliance Manufacturers (AHAM). A roster of AHAM's membership is attached.

AHAM recognizes that the Consumer Product Safety Commission was established by Congress to protect the American consuming public from hazardous products. We support this objective and our members are committed to providing safe products for consumer use.

However, we believe that the proposed regulations on reporting substantial product hazards go far beyond the intent of Congress as set forth in the Consumer Product Safety Act (CPSA) and impose unnecessary, unproductive and possibly unconstitutional burdens upon manufacturers. The amount of subjective criteria contained in the proposed regulations fails to recognize the variety of circumstances and situations in the consumer product field.

REQUEST FOR PUBLIC HEARING

CPSA asserts in the preamble of the proposed regulations that they are interpretive rules and, therefore, exempt from the notice and comment provisions of the Administrative Procedures Act.

AHAM does not believe this proposal, which will have a substantial effect on companies subject to report, can be appropriately considered "interpretive." This description is contradicted by the Commission itself when penalties are imposed for violation of the rules.

¹ Pending approval as American National Standard.

We urge the Commission to hold a public hearing on the proposed Section 15 regulations to allow interested parties an opportunity to fully inform the Commission of their views and positions.

PRODUCT DEFECT DEFINITION

Subsection 1115.3(b)(3) of the proposed regulations defines a "product defect" as any aspect of a product which creates an unnecessary risk of injury which is not needed to perform the function of the product. It further defines a risk as unnecessary if the benefits "including recreational and aesthetic benefits" to be gained from the product use does not justify the risk involved.

The definition of defect should show a clearer relationship between "defect" and substantial product hazard to offer a better understanding of what should be reported. Two determinations are made by a subject firm. One is the existence of a defect. The second, which compliments the other, is the judgment of whether the defect constitutes a substantial hazard.

Not all defects must be reported. The Commission must clearly make this distinction in its definition.

The subjective nature of the language contained in the definition of product defect places a manufacturer in the untenable position of making social judgments and attempting to predetermine how the Commission will act.

It is unrealistic to expect manufacturers to know whether the design, manufacture and marketing of a product for "recreational and aesthetic benefits" justify the risk of injury presented by the product. The subjective nature of such a decision involving utility versus risk can lead to a lack of consistency in judgments. Two of the examples provided in the preamble of the proposal—a glass coffee table and a carving knife—are overly simplistic. The "state of the art" example is particularly objectionable. Does the Commission intend to mean that after a new safety feature is developed all existing products would be subject to reporting under Section 15(b)? Has the Commission considered the chilling effect such a policy statement would have on innovation and product improvement, notwithstanding the effect on new manufacturers entering the consumer product field?

"Unreasonable" is a term which has been adequately defined in common law cases. We recommend the Commission use this word in place of the subjective term, "unnecessary," in describing the "risk of injury" in the definition.

The proposed definition also refers to a product's "functional purpose." We wish to point out that appliances are multi-functional products.

The Commission has all the authority it needs to promulgate standards to upgrade safety under Section 7, and to ban products under Section 9, of CPSA; it has no need to further expand its authority via the artificial definition of defect proposed in the draft regulation.

We strongly recommend the Commission modify the definition of product defect as indicated in the comments to follow the intent of the CPSA.

PRESUMPTION OF MANUFACTURER RESPONSIBILITY

In Subsection 1115.10(d) the Commission asserts that a company shall be deemed to have received information regarding a possible hazard when any official or employee of the firm has received it.

This is an unreasonable requirement—and one which the Commission does not place upon itself. (In Subsection 1115.10(a) the Commission directs subject firms to communicate information on a Section 15 matter to a specific CPSC office and lists one telephone number by which to do so.)

It is not reasonable to hold that a company has responsibility for knowing and acting upon information received by any of its employees engaged in any of its facilities where any of its products are produced or offered.

For similar reasons the five-day "grace" period within which the information should be transmitted to the company official responsible for reporting to CPSC under Section 15 is both arbitrary and unreasonable. Five days may be an adequate time for communication in a small company but may be inadequate in a large company. The Commission has provided no evidence for the necessity of this approach. We believe what the Commission considers to be cases of late reporting constitute a small minority of the total number of Section 15 cases reported. A statistical analysis is readily available to the Commission. CPSC should submit such data to support the alleged need of this requirement.

The typical manufacturing company consists of several hundreds of factory and production workers and a similar number of clerical and management workers—to assume that a contact with any of the hourly or salaried employees would be directed to the attention of the responsible reporting officer is unrealistic. Some large corporations may have a number of autonomous divisions. Employees of one division might not know what products another division manufactures. To assume a contact made with any of thousands of employees is an official contact with the company is unreasonable, unless in the normal course of business an employee is reasonably expected to have contact with the consuming public. Notice should not be presumed unless directed to employees in the responsible chain who normally deal with the public, and the rule should so indicate. Manufacturers should set up a department staffed by persons trained to deal with consumer problems, and manufacturers should take reasonable steps to advise consumers how to conduct such departments. Consumers should be expected to direct their complaints to such departments. This is a reasonable responsibility to place on consumers. The rule should, therefore, exclude employees who do not normally deal with the public, such as factory workers, who are not trained to deal with the subject matter.

We recommend, therefore, that subsection (d) be amended as follows:

“(d) A manufacturer (including importer), distributor or retailer shall be deemed to have received information which has been received by an official or employee *in the responsible product safety chain* of a subject firm in the normal course of business. The information shall be deemed to have been received by the manufacturer (including importer), distributor, or retailer within a reasonable time □, but in no event later than five (5) working days, □ following receipt of the information by the official or employee. This subsection shall not apply if the person receiving the information is the official responsible for complying with the reporting obligation under the CPSA.”

PRESUMPTIVELY REPORTABLE INFORMATION

Subsection 1115.11(a) requires automatic reporting if a product is involved in a single death or serious injury, unless there is clear evidence that the injury was not caused by noncompliance or defect.

AHAM believes that the Commission has exceeded the limits of the Consumer Product Safety Act in this situation by extending the circumstances under which a subject firm is required to report. The law clearly states that a manufacturer must report to the Commission when it receives information which “*reasonably supports the conclusion* that such product fails to comply with an applicable consumer product safety rule, or contains a defect which could create a substantial hazard.” (Emphasis added.) The proposed rule improperly creates a presumption of substantial hazard prior to the manufacturer making his conclusion.

The involvement of a product in a death or serious injury can no more be presumed to mean that the product contains a defect than it can be presumed that a consumer was negligent in the operation of the product.

A review of the case will determine whether the information is reportable. The Commission has no authority to collect unsubstantiated information which in turn may be released without proper explanation and could seriously harm the reputation of a firm.

Paragraph (a) also poses difficulties in relation to product liability suits. See discussion of this subject under subsection 1115.11 (b) below.

AHAM recommends that 1115.11(a) be deleted and Subsection 1115.11(b) and (c) be amended accordingly.

Although Subsection 1115.10(b) on reporting initial information on a potential hazard or nonconformity specifies the obligation “*may arise*” (emphasis added), we object, again, to the Commission’s expansion of the obligation to report under the CPSA. We would like to point out here that there is small, growing evidence that consumers are using CPSC to strengthen their appeals for redress in complaints. The Commission should be aware that they are being used as a lever. Responsible manufacturers investigate these cases to determine if there is, in fact, a problem, but the mere existence of such communications should not be construed to mean a product defect exists.

We recommend, for the same reasons outlined above, that Subsection 1115.10 (b) be deleted.

PRODUCT LIABILITY SUITS

Subsection 1115.11(b) specifies other sources of information which should be studied and evaluated to determine a reporting responsibility under Section 15(b).

The subjective criteria in Subsection 1115.11(b) poses certain practical problems in the normal operation of business. As an example, information on a serious accident usually comes to a company's attention by means of a summons and complaint in a product liability case. Most product liability suits involving injury to persons describe the injury in such a fashion that it would fall within the definition of "grievous." When fully investigated and subject to the scrutiny of a judge or jury, many if not most, product liability suits are determined to involve injuries less than "grievous." However, it requires months, if not years, to ascertain the extent of the plaintiff's actual injury and the cause of such injury. The approach taken by the Commission in requiring notice within ten days of "grievous bodily injury" is tantamount to requiring manufacturers to report all product liability suits alleging any injury to a person.

This would overwhelm the Commission's resources. Further, if and when the public were to recognize that, by merely filing a suit alleging "grievous bodily injury," the matter is automatically reported to the Commission, this would result in greater numbers of suits and plaintiff's attorneys utilizing exaggerated allegations in order to "pressure" manufacturers. This would also allow plaintiffs' attorneys to utilize the facilities of the CPSC for discovery that they could not accomplish on their own. The plaintiff's bar would also utilize the facilities of the CPSC for free technical expertise. AHAM believes this result would not reflect the intention of Congress in enacting the Consumer Product Safety Act.

Many claims may be settled by an insurance carrier without the manufacturer's knowledge. Would this constitute notification of a manufacturer? In another instance, an insurance carrier may make a settlement to which, under normal circumstances, a company may not agree. These settlements may be made for "nuisance value" of claims, i.e., it costs less to settle the claim rather than try the case. Such settlements also should not logically or legally be deemed any evidence of an admission of liability or a defect in the product.

AHAM recommends that Subsection 1115.11(b)(2) be amended to read:

"(2) Product liability suits *alleging personal injury due to a defect in the product;*"

INDUSTRY PROPOSAL FOR CONSCIENTIOUS REPORTING

The proposed regulations require substantial product hazards to be reported to the Commission within 24 hours of the receipt of information "which reasonably supports the conclusion" by the company's responsible officer. If the initial information received by the company is not sufficient to reasonably support the conclusion, it may conduct an investigation of the facts which may not exceed 10 days as specified in Subsection 1115.10(c).

AHAM does not believe the issue of product safety lends itself to a rigid, objective two-step approach to reporting, as outlined in the proposed regulations. The 24-hour/10-day reporting obligation is overly burdensome and will not, in most cases, provide a reasonable amount of time to conduct a thorough, conscientious investigation of the facts surrounding the accident. The time period is arbitrary and bears little relationship to the circumstances in which it is intended to apply.

AHAM strongly recommends that the Commission allow reasonable time for responsible reporting by a subject firm and delete the 10-day limit within which to file a report.

To restrict firms to a specific timetable for reporting under Section 15 places too rigid a burden upon manufacturers which will be of no equivalent benefit to the consuming public. If the facts warrant it the CPSC can analyze the information provided in the report to determine whether there was a diligent, conscientious effort on the part of the subject firm.

SUMMARY

AHAM is in total support of the following observation of J. Edward Day, Special Counsel to the Consumer Electronics Group, Electronic Industries Association, in his June 21 letter to CPSC Chairman Byington:

"It is hard to see how rules which virtually guarantee that companies will commit violations of reporting requirements can be considered desirable as a matter of policy. It is one thing to provide incentives to report and penalties for unjustified failure to do so in a timely manner. But this can be achieved without decreeing that adherence to rigid, mechanistic tests, rather than diligences and good faith in a given case, is the only way to avoid non-compliance. Not only are the proposed rules in this respect questionable as a matter of policy, they also raise serious legal questions related to both consistency with the overall Act (for example, the definition of 'knowingly' in Section 20(c)), and consistency with the constitutional guarantee of due process."

The proposed regulations are typical of the proliferation of burdensome regulations on industry in general and consumer goods manufacturers in particular over the past few years. Without an adequately demonstrated need, the Commission would impose the burdens of these proposed rules on what we believe is a health and vigorously competitive industry. This proliferation of regulation has potential for significant anticompetitive effects. When considered with the mass of regulations from other Federal and state agencies, these regulations could constitute a significant bar to future entry of new competitors with the resulting lessening of the competition, which to date has provided the American consumer with the most modern and innovative appliances known to man.

The Commission should also consider carefully the proposed regulations and the unnecessary reports that these regulations seek to impose in work load on regulated industries.

As stated earlier, we believe a public hearing would provide the proper forum to address industry concerns with the proposed regulations and provide the Commission with a better understanding of the industries it seeks to regulate.

Respectfully submitted.

ROBERT L. HOLDING,
Vice President, Federal Relations.

ATTACHMENT D

ASSOCIATION OF HOME APPLIANCE MANUFACTURERS,
Chicago, Illinois, January 18, 1978.

Mr. RICHARD RAPPS,
Secretary, Consumer Product Safety Commission,
Washington, D.C.

DEAR MR. RAPPS: The following comments are filed on behalf of the members of the Association of Home Appliance Manufacturers (AHAM). AHAM is a trade association representing the manufacturers of over 90% of all home appliances produced in the United States. Attached is a roster of our member companies.

In our opinion, the starting point for any meaningful analysis of the proposed recordkeeping regulations must commence with an analysis of what industry practices currently are, what they are designed to accomplish in terms of benefits, and then examine the impact of the changes that the proposed regulations would entail and the resulting cost associated therewith. First of all, we are not aware of any home appliance manufacturer in the United States that does not maintain some system that will provide customer feedback.

These so-called feedback systems represent an invaluable tool for determining whether products are performing to the expectations of both the manufacturer and the consumer. For instance, accelerated life testing of various of the numerous components that make up a major appliance cannot precisely duplicate the in-service experience that those components will see in typical and atypical in-home usage. Through analysis of service calls, both in-warranty and out-of-warranty, manufacturers are able to obtain valuable information that permits a reassessment of engineering data and life test data. It is always possible that unanticipated failure modes will be found which might involve a risk of injury to the consumer. It is for that reason that manufacturers are interested in reliable and in-depth analysis of significant failure modes reported from the field.

While all manufacturers no doubt have procedures or systems set up to monitor these field occurrences, some, of course, are more sophisticated than others. As an example, the procedure implemented by one AHAM major appliance manufacturer requires that any customer complaint that alleges an unsafe condition must

be referred immediately to a field service supervisor for investigation and analysis. In many instances, it is found upon investigation that there is no safety-related aspect of the alleged failure whatsoever, and in other instances information of value is obtained and channeled into the engineering function for further analysis and possible corrective action in the form of redesign or other appropriate action.

It is no accident that American appliances are recognized as being both the finest and the safest manufactured in the world and at a cost in real dollars that, despite inflationary pressures, has decreased dramatically over the past 50 years.

Inasmuch as a substantial majority of appliance manufacturers have set up consumer complaint handling systems in their respective companies, the basic concept of recordkeeping of written complaints is not overly burdensome.

We do, however, have some concerns with portions of the proposal which are discussed below.

RECORDKEEPING OF ORAL COMPLAINTS

Subsections 1120.2(c) and 1120.3(d) (2) require manufacturers to reduce oral product safety complaints to written memoranda for purposes of retention.

The proposed regulation would impose upon manufacturers the obligation to maintain "product safety complaints" for a period of three years and would force manufacturers to include within that category oral complaints memorialized by written memoranda without regard to the merit, materiality, relevancy, or accuracy of such alleged safety complaints.

To illustrate the impact of this proposal, it is estimated that there are 75,000,000 households in the United States. In terms of major appliances only, it would be extremely conservative to estimate that each household contained three such appliances, but nevertheless even that conservative figure produces a major appliance population of 225,000,000 units. It is also estimated that the major appliance population would generate a total of approximately 80,000,000 service calls annually.

In each instance where a request for service is made by a consumer, generally a telephone call is received by a call-taker, and one or more technicians ultimately are in contact with the consumer who has requested service. There may even be follow-up contact with the consumer where a needed part is not available on the serviceman's truck. In any or all of these multiple contacts with any given consumer, it could be alleged by a consumer that the product is somehow unsafe and the Consumer Product Safety Commission would have the industry memorialize that complaint without regard to its factual basis or validity.

If, as a result of this proposed regulation, major appliance manufacturers are required to memorialize oral customer safety-related complaints, it would not be unreasonable to estimate the generation of an additional 10,000,000 "safety" reports a year, each of which will require further processing, verification, and retention, as well as an ability to retrieve at the request of the Commission's agents or employees. If the cost of generating and handling the additional paperwork were only \$10 per copy, it can be seen that the cost to major appliance manufacturers and ultimately the consumer would be in excess of \$100,000,000 per year.

American industries in general, and appliance manufacturers in particular, have never been reluctant to invest in safety, as our track record most clearly shows. In our opinion, the proposed regulation will not add a safety benefit to consumers, but on the contrary, will generate so much irrelevant paperwork as to impair, if not destroy, the effectiveness of the feedback systems already in place and which are designed to assure a continuing flow of reliable field information on safety and quality.

It is, therefore, our opinion that the Commission's proposal does not constitute a benefit but indeed represents a detriment to the interests of the public. There is no basis for a cost/benefit trade-off where there is in fact no benefit. We would, therefore, suggest that in light of the facts as they exist in the major appliance industry, other segments of the consumer industries should be consulted by the Commission before final action is taken on the proposed regulation. Lest the Commission be reluctant to accept industry's estimate of the number of unjustified safety-related "complaints" that we anticipate receiving from consumers in the course of a year, we would respectfully suggest that they consult their own Product Defect Identification Division, which has now had sufficient experience to be able to quantify for the Commission the ratio of valid, legitimate safety complaints they have received versus the number of unwarranted and unjustified alleged safety complaints.

For these reasons, we would suggest that the Commission approach the issue of recordkeeping on a more cautious and logical basis. We feel the Commission's ability to discharge its responsibilities may well be served by requiring retention of the records now being generated by manufacturers for a reasonable period. But we feel this requirement should extend only to data that experienced manufacturers have found over the years to be reliable indicators of product performance, quality, and safety. Where any manufacturer's records are found to be deficient for these purposes, the Commission can, of course, deal with that manufacturer on an ad hoc basis in light of the facts that are found to exist. It would be, in our opinion, unreasonable and unwarranted to impose upon all manufacturers a costly system that would destroy the effectiveness of existing customer feedback programs in order to remedy assumed deficiencies on the part of only a few.

Therefore, we recommend subsection 1120.2(c) be amended as follows:

"(c) 'Consumer product safety complaint' or 'complaint' means [any oral or] a written communication which (1) is received in the ordinary course of business by a manufacturer (including an importer), private labeler, or distributor from any individual or organization, and (2) concerns a product manufactured, imported, or distributed by the recipient of the communication, and (3) is related to the safety of the product or concerns a death, illness or injury or potential for death, illness, or injury related to or caused by the product. The term includes any [such] communication *as identified in (1), (2), or (3) above* made at the time a product is returned by a consumer or by an individual in the chain of distribution. A consumer product safety complaint may be in the form of a commercial document, for example a request to return unsold inventory or adjust a price or a request for warranty service when the stated reason should reasonably be interpreted as disclosing a safety defect. The term consumer product safety complaint also includes the record of any lawsuit filed that is related to the safety of the product or concerns a death, illness or injury, or potential death, illness, or injury related to or caused by the product. The record shall include the date filed, the court in which filed, the caption and the docket number. The term includes written memoranda of oral communications which [are required to be made pursuant to section 1120.3(d) (2) below] *may be made by a subject firm.*"

In addition, we recommend subsections 1120.3(d) (1) and (2) be amended as follows:

"(d) The record of each consumer product safety complaint shall include the following:

(1) A copy of any written consumer product safety complaint, or

(2) A written memorandum recording [each] *an* oral consumer product safety complaint, *if available.*"

Paragraph (3) should be renumbered (2) accordingly.

FORWARDING COMPLAINTS TO RESPONSIBLE OFFICIAL

Subsection 1120.3(b) requires private labelers or distributors to forward complaints to the manufacturer's responsible complaint handling official within five days of its receipt.

We strongly object to this arbitrary time frame for forwarding complaints. The Commission is again (as in the Section 15 proposal) attempting to define reasonableness by establishing a specific time period. Again, AHAM believes this is not realistic in the consumer product industry. There are many variables involved in each individual company's complaint handling system. For some companies five days might be adequate. For others it is not. For example, a consumer may send a complaint to a small local branch of a company. This complaint could get held up on a clerk's desk two days because of other pressing work responsibilities and then sent through the mail to the headquarters office. Instead of the normal three days spent in mail transit, the letter takes six days to reach the headquarters office. All those involved acted conscientiously to forward the complaint to the appropriate official, yet the company is subject to penalties under the CPSA because it took eight days to transmit the complaint instead of the required five days.

We believe the five-day requirement is totally inappropriate for the Commission to impose.

In addition, there is some confusion as to whether this section applies to manufacturers' complaint handling systems because of the use of the term "subject firm" in the third sentence of paragraph (b). Subsection 1120.2(e) defines "sub-

ject firm" as any manufacturer, private labeler or distributor. We urge "subject firm" be stricken and replaced by "private labeler or distributor" to clarify the Commission's intent.

Therefore we recommend paragraph (b) to amended as follows:

"(b) A private labeler or distributor shall be excused from maintaining records as specified in paragraph (d) of this section: Provided, the private labeler or distributor forwards to the appropriate manufacturer (including importer) a copy of any consumer product safety complaint [within five (5) days of its receipt]. A consumer product safety complaint is deemed to be received within the meaning of this subsection when the person receiving the information is the one responsible for handling complaints. A [subject firm] private labeler or distributor shall [have a reasonable time to] transmit the complaint to the person responsible for handling "complaints[, but in no event more than five (5) working days] within a reasonable time. A private labeler or distributor shall maintain records of the consumer product safety complaint, the name and address of the manufacturer (including importer), and the date on which the complaint was forwarded for each consumer product safety complaint. The records shall be retained for not less than three (3) years from the date the complaint is received. This subsection shall not apply to private labelers or distributors who are the manufacturers (including importers) of the products about which complaints are received. Such persons shall keep records in accordance with § 1120.3(a)."

RECOMMENDED RETENTION OF OTHER DOCUMENTS

Subsection 1120.3(e) lists other complaint-related documents CPSC recommends firms maintain.

It is unclear to AHAM why the Commission requests specific comment on how long these documents should be maintained by subject firms. This is not a mandatory requirement, nor should it be. We believe the question serves no useful purpose.

PRE-EXISTING RECORDS

Subsection 1120.4 requires existing product safety files and records be retained for three years after the effective date of the rule.

This is an unreasonable requirement. For example, if a manufacturer retained complaint files for a period of three years, those records must be retained for an additional three year period when the rules become effective. The manufacturer would have to retain some of those existing files for a total of six years. Also, the manufacturer would have to bear the added burden of changing his filing system of those files to conform with the requirements of subsection 1120.3(a).

Accordingly, AHAM recommends subsection 1120.4 be amended as follows:

"§1120.4 Files and records which relate to consumer product safety complaints received prior to the effective date of this Part shall be maintained for a period of not less than three (3) years from the [effective] date of [this part 1120] receipt, but need not comply with the requirements of § 1120.3(a) and 1120.3(d)."

COST VERSUS BENEFIT ANALYSIS

As we indicated earlier we urge the Commission conduct a cost/benefit analysis of the proposed recordkeeping regulation before any final decision is made.

The Consumer Product Safety Commission spent an estimated \$42 million in 1976 to regulate product safety. The cost to business to comply with those regulations is undoubtedly several times that amount.

Federal agencies have increased regulation of business in recent years at an alarming rate. Little attention has been given to cost impact of these regulations.

In a proposed Executive Order published November 18, 1977 President Carter recognized the need to develop reasonable regulations. We believe the Administration is heading in the right direction. The Commission should follow the lead.

We believe cost/benefit analyses will also help the Commission to better understand the wide variety of consumer product industries it seeks to regulate. This will benefit not only the Commission but also business, consumers, the economy and product safety in general.

Sincerely yours,

ROBERT L. HOLDING, *Vice President, Federal Relations.*

STATEMENT OF THE AMERICAN GAS ASSOCIATION

The American Gas Association ("A.G.A.") is a non-stock, non-profit Delaware corporation which is the national trade association for the natural gas transmission and distribution industries. Its members serve approximately 85 percent of the nation's 160 million natural gas consumers. The American Gas Association has no manufacturer members.

However, inasmuch as A.G.A.'s members sell natural gas used directly by the consumer in gas-utilizing appliances and accessories, A.G.A. has had a long concern for the safety of such equipment. In 1925, as a result of this concern, and as a reaction to numerous consumer injuries and deaths (primarily arising from the carbon monoxide produced by the then widely-used manufactured gas), A.G.A. founded a Laboratories in Cleveland, Ohio (later supplemented by one in Los Angeles, California) at which it tested models of gas-utilizing appliances and accessories for compliance with national safety standards.

The basic standards which are applied by the A.G.A. Laboratories are formulated by an independent industry committee (American National Standards Committee on Gas-Utilizing Equipment and Accessories Z-21, commonly known as the "Z-21 Committee") which operates under the rules and procedures of the American National Standards Institute ("ANSI"). ANSI is itself a non-profit, non-stock corporation which provides coordination for the preparation, acceptance and promulgation of American industrial standards, and also serves as coordinator of America's international standards activities. ANSI does not itself make standards; rather it provides the ground rules for the operation of standards committees, and reviews proposed standards to determine whether there is a consensus on their provisions, whether notice has been given to all interested parties, and whether the standard is necessary and technically feasible.

Because of the concern of A.G.A.'s member companies that safety standards for gas equipment be prepared, and updated as new technology becomes available in the marketplace, A.G.A. provides the secretariat for the Z-21 Committee which is required under ANSI rules. This effort, for which A.G.A. makes an annual donation of approximately \$300,000, provides the Committee with manpower to staff and record its deliberations, and those of its various subcommittees, and secretarial services for the distribution of draft standards and revisions.

The majority of the Committee is composed of representatives of the "general interest", including six representatives of Federal agencies concerned primarily as purchasers and users of gas equipment. The Consumer Product Safety Commission ("CPSC") sends a representative to all meetings of the Z-21 Committee and some meetings of its subcommittees, but will not serve as a member of the organization.

Natural gas appliances utilize a substantial portion of the utility service provided to American consumers. In the United States in 1976, approximately 56 percent of the homes were heated by gas, 56 percent had gas hot water heat; 45 percent had gas ranges; and 17 percent had gas dryers. The A.G.A. also certifies those appliances which use liquefied petroleum gas. The American Gas Association Directory of Certified Appliances and Accessories lists approximately 30,000 different models of gas utilizing equipment; approximately 3,000 models are tested at the A.G.A. Laboratories each year.

Because of these efforts and concerns, A.G.A. has been quite deeply involved with the CPSC since its inception. A.G.A. believes that there is a valid and valuable role for a national agency concerned with consumer safety, and accordingly would urge the extension of the authorization of the CPSC for another three year period.

A.G.A. believes that there are three main areas where a national consumer protection agency is of great value:

- (a) The collection and dissemination of accurate national injury statistics.
- (b) Providing a pool of capable, objective engineering talent to work with private standards organizations in the development of industry consumer safety standards.
- (c) Preventing the marketing of obviously hazardous consumer appliances.

With respect to the first of these areas, A.G.A. believes that the NEISS (National Emergency Injury Surveillance System) program, taken together with the review of death certificates and "in depth" investigations, can provide a very valuable system of national information, permitting prompt identification of possible hazards to the consumer and the formulation of appropriate corrective measures. It is obvious that the NEISS system is not fully perfected, either in the amount of information which it collects, or the validity of the analysis to which

the information collected is subjected; in many cases, for examples, responsibility for an accident is assigned to a product which was only involved at the beginning of a long causal chain. A.G.A. firmly believes, however, that with improvement this function should continue to be performed.

With respect to engineering input, A.G.A. continues to believe that the best method for the preparation of standards for consumer products lies in voluntary industry activity, supplemented and guided by government-supplied expertise. In this connection, we believe that the suggestions of the CPSC observers with respect to the safety standard for vented gas fired space heaters were of great value in assisting the Z21 Committee in upgrading those standards, and we hope to see such efforts continue.

With respect to the third point, A.G.A. believes that there should be a national system for the identification and withdrawal from the marketplace of mismanufactured or poorly designed equipment, and that the CPSC has taken some steps in this direction which we believe to have been valuable. However, we believe that too little work has been done, both by Congress and by the Commission, in defining what constitutes "hazardous products" for purposes of invoking these powers. Clearly, an announcement by the CPSC that it is concerned about the safety of a product or class of products can be the death knell for those products and their manufacturers. There have been instances in the past where errors by the Commission have led to serious economic hardship for manufacturers whose products were mistakenly accused of being "hazardous". The need to notify the public promptly when a hazardous condition is suspected is important, but it must not be done in total disregard of the rights of the manufacturer.

A.G.A. believes that expanded concepts of product liability, and general corporate responsibility, have certainly contributed vastly to the expanding industrial consciousness about consumer rights and consumer safety. However, the presence of the CPSC, with its broad responsibility and authority, has certainly contributed to this expansion of consciousness.

While A.G.A. supports the reauthorization of the Commission, as previously noted, we do not believe that substantial changes should be made in the Consumer Product Safety Act, in order to funnel the Commission's energies into the avenues that we have suggested, and to make its operations more efficient. For example, the whole process of writing "mandatory" standards is unworkable. The time frames set forth in the present law are unrealistically short and limiting. Further, the drafting of a standard may involve, in some cases, concentrating on one or two characteristics of the equipment, or taking less than a whole step toward the desired end in order to assess what unforeseen consequences and side effect there might be. The mandatory system, with its formality, deadlines, and lack of opportunity to reflect on and revise one's work, is not the best way to develop standards which can be kept up to date as technology develops.

A.G.A. also urges that present provisions of the Act which make compliance with CPSC directives not a defense in a private products liability lawsuit be reconsidered, and that instead protection be given from both products liability and antitrust liabilities. The almost unlimited expansion of these two areas of corporate liability in the recent past has posed one of the most substantial threats that American industry has ever known. Further, they represent interrelated problems, since industry cooperative efforts to improve safety substantially increased risks of antitrust liability, while loosening of safety efforts to diminish this risk increases the possibility of products liability lawsuits. This problem must be dealt with in a constructive manner, rather than one that is merely punitive towards business. See the attached speech of David J. Muchow, A.G.A. General Counsel, before the 1977 ANSI Annual Meeting.

In summary, A.G.A. believes that the CPSC has made substantial accomplishments in the years since its organization, although some of its efforts are not carried out as well as they might possibly be. Accordingly, A.G.A. supports its reauthorization for another three years. However, A.G.A. would urge that prompt attention be given to remedial legislation looking at improving the charter of this agency.

STATEMENT OF THE NATIONAL COTTON COUNCIL

The National Cotton Council, with headquarters in Memphis, Tennessee, is the central organization of the American cotton industry, representing producers, ginners, seed crushers, merchants, warehousemen, cooperatives, and manufacturers in the 18 cotton-producing states.

The cotton industry is vitally interested in the hearings being conducted by this subcommittee on reauthorization of the Consumer Product Safety Commis-

sion. We favor the concept of a federal agency whose goal is the reduction of injuries associated with consumer products. However, we question whether some of the actions of CPSC are in keeping with its charter as established by the Consumer Product Safety Act.

Our statement will point to instances where we feel the Commission has gone beyond the intent of Congress in seeking to reduce consumer risks. For example, the Commission's mandate is to protect consumers against unreasonable risks, not all risks. Congress apparently realized that the latter approach is impractical from the standpoints of cost, technological feasibility, and administration.

It appears CPSC, in some instances, has gone beyond the objective of eliminating only the unreasonable risks and has set its sights on reducing or eliminating risks which the majority of consumers would consider reasonable when weighed against the cost of appreciably reducing them.

For instance, CPSC has expended considerable time and money in developing and assessing test methods on which to base a general wearing apparel flammability standard. Consequently, industry has been forced to divert its resources from productive activities to similar assessments of various general wearing apparel test methods. Yet it taxes the imagination to conceive of the average outerwear or underwear garment as representing an unreasonable flammability risk.

We have been told that development of a general wearing apparel standard no longer has a high priority at CPSC. If so, the general public can be thankful. But, recently, two commissioners have made reference to a need for a more stringent standard for general wearing apparel. This underlines our concern about the Commission's failure on some occasions to distinguish between risks that are reasonable and those that are not. The involvement of general items of wearing apparel in flammability accidents (except in cases involving conflagrations or flammable liquids) is rare. Accordingly, garments which pass the existing standard (CS 191-53) afford ample protection when worn and used as expected by normally prudent consumers.

Moreover, common sense dictates that practical consideration be given to the costs associated with risk reduction. One of the real hazards facing all consumers now is the effect of inflation on their buying power. Unless government agencies take into account the costs involved in regulatory actions, consumers could suffer far more damage from regulations than from product safety problems.

On the other hand, any attempt on the part of CPSC to be thorough in its consideration of costs versus benefits brings flurries of criticism from some quarters, charging inaction. If the CPSC is to carry out its charge to the ultimate benefit of consumers, we feel that its actions must be based on careful deliberation. The Commission's hasty actions in promulgating children's sleepwear standards subsequently resulted in the banning of "tris" which, in turn, caused millions of dollars worth of damage to industry, inconvenienced consumers, and lost credibility for government with millions of Americans.

The CPSC allowed itself to be rushed into expedient measures that were not in the best interest of consumers. As a result, the fiber, textile, apparel, and retail industries were seriously disrupted, many firms and their employees suffered financially, and consumers became embittered and suspicious of all fire-retardance treatments.

Another tragic consequence of the "tris" incident was the CPSC's own reaction, in which its subsequent standard modifications were aimed at the elimination of all flame-retardant chemicals from the market—not just the ones implicated as carcinogens. The result was an unnecessary narrowing of consumer choice and a further, undeserved penalty on cotton which was never treated with "tris" or with any chemical that tests have not shown to be entirely safe.

As a result of CPSC's assumption of guilt by association, cotton sleepwear, even though it can be made fire retardant safely and satisfactorily, is virtually out of one of its most popular markets.

A joint industry statement submitted to the Commission during its original rule making on sleepwear cautioned against hasty promulgation of a standard until technology could be further developed and the safety of chemical flame retardants fully tested. But the industry's statement fell victim to CPSC's ostensible need to "show progress."

Circumstances involving "tris" then developed to confirm the validity of the industry's position and CPSC was forced to undo many of its earlier actions. In undoing them, though, the Commission over-reacted and a backhanded ban has been placed on all chemical flame retardants, since CPSC will accept no evidence as proof of safety.

We feel it is appropriate to request this subcommittee to counsel CPSC to move deliberately in its rulemaking so that situations of this kind can be avoided in the future. Emotion and exaggerated statistics of questionable origin have no place in the decisions of government, as we see it. And when circumstances arise that seem to call for regulatory action, we believe the CPSC still has an obligation to proceed only on the basis of scientific evidence, responding to areas of greatest need, after careful consideration of estimated costs and expected benefits to the consumer.

We further believe, that, in many cases, voluntary standards are just as effective and far more practical than mandatory standards. The cotton, textile, and textile product industries are concerned with all matters of safety to consumers and workers. And they are made up of responsible citizens who should be encouraged to develop, implement, and administer voluntary standards where a willingness to do so has been manifested.

Voluntary standards also permit American consumers to exercise common sense and judgment, while providing them with a wider range of choices.

We are not advocating that regulatory agencies ignore serious hazards or look the other way when the consumer's safety and well-being are threatened. Neither do we ask that CPSC be denied any of its regulatory authority. But we do feel that voluntary standards are less costly, less disruptive, and just as effective in protecting all the interests of consumers and, accordingly, should be encouraged by CPSC—not constantly challenged.

We also request that the CPSC be counseled to consider the existing makeup of markets as an indicator of the characteristics of products that best satisfy the consumer. The market reflects consumers' collective judgment on the balance they want in quality, aesthetics, and economy in a given product. When, through regulation, consumers are denied the balance they want in the market, they lost something of value. And when consumers no longer have a choice—and, consequently, cannot influence what is offered for sale in the market—they have lost something of value. CPSC should be instructed to weigh these values when assessing regulatory costs and benefits and when considering the relative merits of voluntary versus mandatory standards.

Our views on how the CPSC could work through voluntary standards are illustrated by a matter now pending before the Commission. Standards are now being developed to cover upholstered furniture and the CPSC is considering a mandatory approach. Yet the Commission has not shown that upholstered furniture flammability represents an unreasonable risk to consumers. To the extent that smoldering furniture represents a hazard to consumers, it is very largely related to accidents caused by carelessness with smoking materials, usually in combination with the irresponsible use of alcohol. Neither the upholstery fabric itself nor the filling of furniture has been shown to pose a hazard.

Being denied the authority to regulate the principal cause of upholstered furniture fires, CPSC should conclude that mandated protection of consumers against unreasonable risk associated with upholstered furniture fires (if, indeed, an unreasonable risk exists) is outside the scope of its jurisdiction. It seems altogether improper for CPSC to promulgate a mandatory standard designed to exact from the textile and fiber industries remedial measures for a flammability problem which originates with the careless and irresponsible use of the products of other industries and impose these added costs even on consumers who do not use the products.

While the cotton industry is opposed to a mandatory standard on the grounds just cited, it does not oppose realistic voluntary efforts to produce upholstered furniture with improved cigarette resistance. A voluntary standard would permit the number of deaths and injuries from upholstered furniture fires to be reduced, while preserving an element of consumer choice. The fiber, textile, furniture, and associated industries have demonstrated their willingness to cooperate and could be expected to comply with a voluntary standard for maximum feasible protection to consumers.

This is a classic case where the Commission could cooperate with the industry in implementing remedial measures in a way and on a schedule that preserves the integrity of the market while assuring optimum consumer protection.

Finally, we would like to request that standards always reflect the capability of regulated industries who must comply with the Commission's regulations. Technological (and fiscal means must be available to industries if regulation is to be just and reasonable.