Procedural Aspects of the Consumer Product Safety Act

Antonin Scalia

Frank Goodman
Univ of Penn Law School, fgoodman@law.upenn.edu

Follow this and additional works at: http://scholarship.law.upenn.edu/faculty_scholarship

Part of the Administrative Law Commons, Consumer Protection Law Commons, Legal History, Theory and Process Commons, Legislation Commons, and the President/Executive Department Commons

Recommended Citation
http://scholarship.law.upenn.edu/faculty_scholarship/1410

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.
The Consumer Product Safety Act\(^1\) is the first legislation since the days of the New Deal to create an independent commission for the purpose of imposing federal regulation on an established area of commercial activity.\(^2\) In the intervening period, there have been significant changes in our conception of the appropriate structure, functions, and procedures of independent regulatory agencies. Several of these fresh approaches to regulatory theory are reflected in the new legislation—among them increased public participation in the administrative process, detailed judicial oversight, the concept of the "private attorney general", broad public access to agency information, increased agency self-sufficiency, and independence from presidential control. In

\(^1\) Pub. L. No. 92-573 (Oct. 28, 1972). The entire text of the Act is included in the appendix following this Article. Although the Act has been codified (15 U.S.C.A. §§ 2051-81 (1970)), it will hereinafter be cited to the public law section number only.

\(^2\) The Atomic Energy Commission, established by the Atomic Energy Act of 1946, 42 U.S.C. §§ 2011-2282 (1970), was originally more concerned with research, development, manufacturing, and operational functions than with regulation, and those activities still constitute a large part of its function. The Federal Maritime Commission, established by Reorganization Plan No. 7 of 1951, merely received a transfer of regulatory functions from preexisting agencies, as did its predecessor, the Federal Maritime Board, established by Reorganization Plan No. 21 of 1950.
thus departing from well-worn paths the Act raises interesting and 
important questions of Congressional intent and of the most appro­
riate means for administrative implementation. It is the 
purpose of the present Article to examine some of the novel problems 
of administrative procedure posed by the new legislation 
with the hope of assisting in their early resolution.

I. HISTORY AND OVERVIEW OF THE CONSUMER

PRODUCT SAFETY ACT

For nearly two decades before enactment of the statute, Con­
gress had legislated on product safety in a piecemeal fashion, 
adopting—usually in the wake of a widely publicized tragedy—
a variety of specialized measures such as the Flammable Fabrics Act, the Poison Prevention Packaging Act, and the National Traffic and Motor Vehicle Safety Act. The result was “a patchwork of laws which, in combination, extend to only a small portion of the products produced for consumers.” Recognizing the problem, Congress created, in November 1967, the National Commission on Product Safety (NCPS) and instructed it to “conduct a comprehensive study and investigation of the scope and adequacy of measures now employed to protect consumers against unreasonable risk of injuries which may be caused by hazardous household products.” The Commission labored more than two years, holding several widely publicized informational hearings in which it received evidence from more than 225 witnesses and compiled a hearing record in excess of 7,000 pages. This effort culminated in a final report transmitted to the President and Congress in July 1970.

The Commission found that 20,000,000 Americans were
injured each year in the home as a result of accidents connected 
with consumer products; that industry self-regulation, the common law, existing federal programs, and state and local agencies

---

Hazardous Substances Act, 15 U.S.C. §§ 1261-63 (1970); Child Protection and 
were inadequate to protect the public from this excessive hazard, and that comprehensive federal legislation was essential. Accordingly, the Commission recommended creation of an independent, highly visible, multi-member Commission with authority to develop and set mandatory product safety standards, enforce compliance with those standards through a broad range of civil and criminal sanctions, seek injunctions against the marketing of specific products deemed unreasonably hazardous, conduct hearings and investigations, and disseminate information to the public. It further proposed appointment by the President of a consumer safety advocate to represent the interests of the consumer before the Product Safety Commission. Specific legislation was proposed to carry out these objectives.

Congress was quick to respond. Bills designed to implement the NCPS recommendation were introduced in the summer of 1970 as the 91st Congress drew to a close. Early the following year, Senator Magnuson and Representative Moss submitted identical bills (hereinafter, the “NCPS bill”) substantially tracking the NCPS proposal. The Administration offered a proposal of its own, calling for the establishment of a product safety program within the Department of Health, Education, and Welfare, rather than the creation of a new agency. At committee hearings in both Houses, industry spokesmen generally sponsored the HEW approach; consumer representatives usually supported the separate agency proposal. The responsible committees of the two Houses chose the latter, but they differed as to the mode of implementation. The Senate Commerce Committee approved, and in June 1972 the Senate passed, a bill providing for the establishment of an independent Food, Drug, and Safety Agency headed by a single administrator, with authority to regulate all consumer goods and to exercise functions transferred from other agencies, including the Food and Drug Adminis-

---

10 Id. at 333-35.
13 Id. at 337-38, 445-47.
12 Id. at 337-38, 446.
The House Commerce Committee approved, and in September 1972 the House adopted, a bill more closely modeled on the NCPS proposal, providing for a multi-member regulatory commission with transferred functions not including those of the FDA. Neither the House nor the Senate bill provided for a consumer safety advocate as the NCPS had recommended. The bill that emerged from conference, and was approved by both Houses in October 1972, resembled the House and therefore the NCPS bill in nearly all important respects.

The reach of the new Act extends to all consumer products—a term that is circularly defined to include all articles or components produced or distributed for sale to, or use by, a consumer. Exceptions are made for tobacco, firearms, and for certain products already regulated under other legislation, notably motor vehicles, economic poisons, aircraft, boats, drugs and cosmetics, and food products.

The Act establishes a Consumer Product Safety Commission of five members, appointed for seven-year terms, and authorizes appropriations, at prescribed ceilings, only through fiscal

---

20 The House Commerce Committee dropped the provision for a consumer advocate during its drafting sessions on the bill, explaining that the question of representation was being taken care of in separate legislation. The bill originally approved by the Senate Commerce Committee provided for appointment of a consumer counsel to represent the consumer interest in rulemaking proceedings before the Commission. The Committee indicated, however, that if a separate consumer advocacy agency were created, reliance should be placed on attorneys furnished by that agency. S. Rep. No. 749, 92d Cong., 2d Sess. 19 (1972). The bill was subsequently referred to the Senate Labor Committee for its consideration; in the process, the provision for a consumer advocate was discarded. As it turned out, the proposal for a separate consumer protection agency to perform the advocacy function died late in the 1972 session. It was revived in the 93rd Congress and, in several variations, is presently pending. S. 707, S. 1160, H.R. 14, H.R. 21, H.R. 564, 93d Cong., 1st Sess. (1973).
21 Section 3(a)(1).
22 Id.
23 Sections 4(a), 4(b)(1).
24 Section 32. The ceilings are $55 million for fiscal 1973, $59 million for fiscal 1974, and $64 million for fiscal 1975. The appropriations limitations do not apply to funds for planning and constructing research and testing facilities. The practical effect of these limitations is to assure conscious action by the entire Congress, rather than merely an appropriations committee or subcommittee, in order to increase the level of the Commission's activities or to extend them beyond fiscal 1975. This is highly unusual. All other legislation establishing permanent agencies except it is believed, that applicable to the Administrative Conference, authorizes the appropriation of "such sums as are necessary"; even the Administrative Conference is limited only as to the level of appropriations authority and not as to its duration.
year 1975. The new Commission will assume many of the product safety duties formerly performed by other agencies. However, product risks covered by the major preexisting product safety legislation can be regulated only in accordance with the provisions of that legislation, unless those provisions are found inadequate.25

The functions of the Commission are essentially twofold: (1) To develop, through research and testing, to collect, and to publish data relating to the cause and prevention of death and injury attributable to consumer products,26 and (2) to develop, promulgate and enforce consumer product safety standards and bans.27 The Commission's powers include the ability to seize imminently hazardous products through court action,28 to require information concerning new products before their distribution,29 to require certification and labeling indicating compliance with safety standards,30 to impose obligations of notification and of repair, replacement, or refund with respect to products sold in violation of standards or bans,31 and to conduct inspections and require detailed recordkeeping.32 Violation of the Commission's rules and orders and failure to provide required access or to furnish required information are made subject to civil and (if the non-compliance is willful) to criminal penalties.33

Private citizens are given the power to sue for damages sustained by reason of violation of Commission rules or orders,34 and

---

25 Section 30(d).
26 Sections 5-6.
27 Sections 7-11.
28 Section 12.
29 Section 13.
30 Section 14.
31 Section 15.
32 Section 16.
33 Section 19-21.
34 Section 23. While Commission action can thus be used as a sword, other provisions seek to prevent its use as a shield in state-law proceedings. Section 25(n) provides that compliance with Commission standards "shall not relieve any person from liability at common law or under state statutory law." Quaere, whether this means that evidence of such compliance cannot be introduced as one element of the proof of due care—or merely that it cannot be conclusive of the issue. Quaere, further, whether this provision is meant as an absolute ban—or rather as a mere clarification that no federal preemption of state law in this regard is intended, so that a state legislature might, if it wished, provide that compliance with Commission standards is relevant to the defense. If, as seems likely, the former is intended in each case, quaere as to Congress' power to prevent the states from referring to federal law in traditional tort or warranty actions. The most appealing case against such power is one in which the plaintiff's injury was caused by a product feature positively required by Commission rule. Perhaps similar doubt concerning Congressional power exists with respect to Section 25(b), which decrees that the failure of the Commission to take action shall not be admissible in evidence in litigation governed by state law. The most appealing case here is one in which the plaintiff (though not suing upon the federally created cause of action) has asserted violation of the federal law.
to sue for enforcement of Commission standards and bans by court injunction if the Commission itself declines such enforcement.\textsuperscript{35} A procedure is also provided whereby any person can cause a United States District Court to compel Commission initiation of a rulemaking proceeding.\textsuperscript{36}

The Act establishes a fifteen-member Product Safety Advisory Council to advise the Commission, composed of five members each from governmental agencies, consumer product industries, and consumer organizations.\textsuperscript{37} There is specific provision for cooperation with state agencies, including commissioning of state employees as Commission officers for purposes of conducting examinations, investigations, and inspections.\textsuperscript{38} The federal standards, however, cannot ordinarily be exceeded by state product safety requirements.\textsuperscript{39}

\section*{II. ROLE OF THE CHAIRMAN}

While Section 4 of the Act, which establishes the structure of the Commission, generally parallels legislative provisions applicable to the other principal independent regulatory commissions, there are some significant differences. The commissioners are removable only for "neglect of duty or malfeasance in office"; the usual statutory grounds are "inefficiency, neglect of duty, or malfeasance in office."\textsuperscript{40} Omission of "inefficiency" in the present statute is a concrete expression of the importance Congress attached to protecting the Commission's independence. The practical significance of the omission is dubious, however, because even under the more permissive standard, no member of an independent regulatory commission has ever been removed by the President since the Supreme Court established Congress' right to insulate such agencies from executive control in 1935.\textsuperscript{41}

\textsuperscript{35} Section 24.
\textsuperscript{36} Section 10.
\textsuperscript{37} Section 28.
\textsuperscript{38} Section 29.
\textsuperscript{39} Section 26.
\textsuperscript{41} Humphrey's Ex'r v. United States, 295 U.S. 602 (1935). That is to say, there is no instance in which the President formally and publicly exercised such removal power. It is highly probable, however, that resignations have been precipitated by the White House. See, e.g., PARMET, EISENHOWER
The President is to designate one of the members as Chairman of the Commission, who shall serve in that capacity until the expiration of his term of office as a commissioner.\textsuperscript{12} This last provision is a deviation from the practice in the other independent regulatory agencies, where the designee's tenure as Chairman (though not as a commissioner) is ordinarily at the pleasure of the President.\textsuperscript{13} Still another deviation from the norm is the provision that reserves to the Commission members the right to elect a Vice-Chairman annually.\textsuperscript{14} For those other regulatory agencies that have a statutory Vice-Chairman, it is ordinarily provided that he also be designated by the President.\textsuperscript{15}

The role of the Chairman is defined in Section 4(f). He is the principal executive officer of the Commission and exercises all of its executive and administrative functions, including appointment and supervision of personnel, distribution of business among the units of the Commission, and the use of funds. These provisions closely track reorganization plans presently governing the structure of most of the independent regulatory commissions.\textsuperscript{16} One point of difference, however, is that whereas those plans require collegial approval for the appointment of "the heads of major administrative units", the Consumer Product Safety Act specifies only five individual officers whose appointment is subject to Commission approval.\textsuperscript{17} One might reasonably infer from this that other appointments (except, of course, the staff of the individual commissioners) are to be made by the Chairman alone. This would give the Chairman somewhat greater authority respecting personnel decisions than is the practice in those agencies operating under the reorganization plans.

On the other hand, Section 4(f)(2) contains the important qualification that in the exercise of all his executive and

\textsuperscript{12} Section 4(a).

\textsuperscript{13} Exceptions to this general rule are the Chairman of the Civil Aeronautics Board who serves for one year (49 U.S.C. § 1321 (1970)), and the Chairman of the Board of Governors of the Federal Reserve System who serves for four years (12 U.S.C. § 242 (1970)).

\textsuperscript{14} Section 4(d).


\textsuperscript{17} Section 4(g)(1).
administrative functions, the Chairman must be governed by "general policies of the Commission." Although there has not been any authoritative determination of the extent to which such a provision authorizes the members of an agency to outvote the Chairman on administrative and personnel questions, the legislative history of the 1950 reorganization plans supports the argument that any question is one of general policy if the members of the agency choose to make it so.\footnote{See, e.g., 96 CONG. REC. 7163-64, 7362 (1950).} One element which has undoubtedly tended to avoid tests of strength between Chairman and their commissioners has been the fact that in existing agencies the Chairman is the choice of the incumbent President and is almost invariably of the same political affiliation as the majority of agency members. Since Section 4(a) of the Act creates the possibility of a Chairman who possesses neither the confidence of the President nor the political sympathy of a majority of his colleagues, disputes may well arise.

III. Consumer Product Safety Rules

The heart of the Consumer Product Safety Act is contained in Sections 7, 8, and 9, which provide for the Commission's adoption of product safety rules. These are of two types: product safety standards and product bans. Section 9 sets forth requirements applicable to the adoption, amendment, and revocation of rules of both types, while Sections 7 and 8 provide what might be termed pre-rulemaking requirements for standards and bans, respectively. Sections 7 and 8, in other words, establish the conditions and procedures for developing the proposed product safety standards (Section 7) and proposed product bans (Section 8) to be considered for adoption under Section 9. While the rulemaking procedures of Section 9 are fairly standard, the pre-rulemaking requirements of Section 8 and (especially) Section 7 are unique.

A. Section 7—Development of Product Safety Standard Proposals

1. General Description of Provisions

In ordinary informal rulemaking (so-called "notice and comment" rulemaking, governed by 5 U.S.C. § 553), the first required step is the agency's publication of its proposal in the Federal Register for comment by interested persons. Section 7 of the Consumer Product Safety Act takes the innovative step of intro-
ducing structured requirements at an earlier stage, when the agency is still in the process of developing its own initial proposal. Under the provisions of this section, the first required step is that the Commission publish in the *Federal Register* not a proposed rule but "the Commission's determination that a consumer product safety standard is necessary" with respect to a particular product and risk.\(^{49}\) That publication must include an invitation for any person, including any state or federal agency, to submit an existing standard as the proposed rule or to develop a new standard. Unless the Commission determines that an existing governmental or private standard would, if adopted, suffice, it must accept at least one of the responsible offers to develop a proposal. The Commission may agree to contribute to the development cost,\(^{50}\) and it must prescribe regulations governing the development which include provision for "notice and opportunity by interested persons (including representatives of consumers and consumer organizations) to participate in the development . . . ." and for the maintenance of public records disclosing the course of the development and the comments received.\(^{51}\)

During the period fixed for development of the proposed standard by the offeror (set forth in the Commission's invitation—150 days unless the Commission for good reason specifies otherwise\(^{52}\)), the Commission may not itself proceed with development, except that the Commission may proceed simultaneously if the only development offer accepted is one by a manufacturer, distributor, or retailer of the product in question.\(^{53}\) Not more than 210 days after publication of its original notice\(^{54}\) (unless the Commission extends the time by public notice stating good cause), the Commission must publish a notice in the *Federal Register*

\(^{49}\) Section 7(b)(2).

\(^{50}\) Section 7(d)(2) requires the Commission to adopt regulations setting forth "the items of cost in which it may participate." While rulemaking of this type would fall within the so-called "proprietary" exemption to normal rule-making requirements of the Administrative Procedure Act (5 U.S.C. § 553(a)(2) (1970)), it is undesirable for the agency to rely upon that exemption when compliance with the requirements would not otherwise be "impracticable, unnecessary, or contrary to the public interest" (the standard established for the more limited exemption from 5 U.S.C. § 553(b) (1970)). See Administrative Conference of the United States, *Recommendation* 69-8 (October, 1969). The practice of most agencies is in accord with this principle.

\(^{51}\) See Section 7(d)(3)(B) & (C).

\(^{52}\) Section 7(b).

\(^{53}\) Section 7(e)(2).

\(^{54}\) This period would normally give the Commission thirty days in which to consider and revise the offeror-developed standard—that is, the portion of the 210 days remaining after expiration of the required period for submission of offers (thirty days) and the normal period for the successful offeror's development of a standard (150 days).
either withdrawing its initial notice of proceeding or setting forth a proposed product safety standard or ban and thereby initiating a normal section 553 rulemaking proceeding. \textsuperscript{55}

2. Basic Approaches

Depending upon how they are interpreted and applied, the "pre-rulemaking procedures" of Section 7 may constitute anything from the very core of the rulemaking process to a set of troublesome but inconsequential preliminaries. In and of themselves, these procedures have little operative effect. They do not produce a rule, or even a proposed rule, but rather a proposal for a proposed rule—which, if accepted by the Commission, then becomes nothing more than the basis for debate in the rulemaking proceeding under Section 9.

One of the major issues of procedural policy the Commission will face is the importance it wishes to assign the Section 7 stage of the rulemaking process. Obviously, the Commission must reserve to itself, and accept responsibility for, the ultimate determination concerning the appropriate standards to be adopted. It may approach this task, however, in either of two ways. It may rely heavily upon its selection of an appropriate developer and upon its specification of development procedures (pursuant to Section 7(d)(3)) to assure a proposal which can ordinarily be adopted without substantial independent work. Or it may instead plan to devote a large portion of its own resources to standard development, and treat Section 7 as essentially a means of placing useful private suggestions before its staff.

The statute can be read to permit either approach. Although the Commission itself is precluded from developing its own standards during the "development period" in which a private offeror is making satisfactory progress, it may do so immediately thereafter. And it is clear that even during the development period, the Commission can prepare to evaluate the pending proposal by conducting research which will in all likelihood be the same research needed to develop a proposal on its own.\textsuperscript{56} Moreover, the ban on Commission formulation of a standard during the development period has a major exception which, depending upon how it is interpreted, may almost succeed in swallowing the

\textsuperscript{55} Section 7(f).

\textsuperscript{56} H.R. REP. No. 1593, 92d Cong., 2d Sess. 45 (1972): "These provisions should not be interpreted ... as preventing the Commission or its staff—while awaiting the submission of recommended standards—from developing or acquiring the technical capability necessary to properly evaluate the standards recommended to it."
rule. On the other hand, the intricate requirements of Section 7—and particularly the provisions of subsection (d)(3) for recordkeeping and for participation by "interested persons" in the offeror's development process—are inexplicable unless they were meant to result in proposals that generally would be evaluated and (if necessary) revised without major independent work.

A second major issue of procedural policy which the Commission will have to confront is that of when its major evaluation of proposals developed under Section 7 is to be made. Is it to take place immediately upon termination of the Section 7 process, and before a proposal is set for rulemaking—so that the standard noticed for comment in the normal section 553 rulemaking proceeding (Section 9 of the Act) is the Commission's own best approximation of the ideal? Or is the Commission's judgment substantially to be exercised only upon termination of the Section 9 proceeding, when it determines what final standard to promulgate?

Once again, these positions are polar, and there are innumerable gradations between them. Obviously the second of them is more consonant with an approach that seeks to accord great weight to the private developer's efforts. It has the advantage of avoiding the appearance, and perhaps even the substance, of the Commission's having made up its mind before the Section 9 rulemaking is commenced. The rulemaking process has frequently been criticized on the ground that the agency's real decision-making occurs in the formulation of the proposed rule, which is done without public participation, and that the subsequent public proceeding to establish the final rule is often an empty show in which parties vainly try to reverse judgments already made. The procedure of Section 7 of the present Act provides a means of avoiding such agency precommitment if the privately developed proposals are not intensively evaluated by the Commission until the conclusion of the Section 9 stage. On the other hand, the Section 9 proceeding is wasted if it is addressed to a proposal substantially different from that which the Commission ultimately wishes to adopt; there is indeed case law voiding rules which significantly depart from the agency action fairly forewarned in the rulemaking notice. From the sole standpoint of focusing dis-

57 See text accompanying notes 72-79 infra.
58 See Wagner Elec. Corp. v. Volpe, 466 F.2d 1013 (3d Cir. 1972). Such invalidation can always be avoided by conducting a further rulemaking whenever, at the termination of the Section 9 proceeding, the Commission finds that it prefers a course substantially different from anything noticed or discussed; but this procedure should certainly be a last resort rather than a regular practice.
discussion in a Section 9 proceeding, it is undoubtedly preferable for the Commission to make substantial evaluation and revision of the Section 7-developed standard as soon as possible.

In practice, the Commission's manner of operation may lie somewhere between (1) automatically noticing the Section 7-developed proposal for Section 9 rulemaking and (2) fully refining the Commission's own position before commencement of the Section 9 proceeding. There are means by which the Commission can focus the Section 9 inquiry upon the issues it deems significant without entirely defining its own standard: When publishing the privately developed standard, it can identify certain features as problems which it would like to have addressed; and its own staff may make written and oral comments in the proceeding which channel the discussion still further.

3. Necessary Findings

The commencement of a Section 7 proceeding requires a determination by the Commission that "a consumer product safety standard is necessary to eliminate or reduce the risk of injury." No procedures are set forth by which this determination is to be made, and presumably it can be done informally by the Commission's internal process without public consultation.

After the Commission has received (or developed on its own) a proposed product safety standard, it may decide that it is not worthwhile to proceed into the Section 9 stage of the rulemaking, and abort the proceeding immediately. Although the Act does not set forth any particular determination which must be made in order to do this, it would be exceedingly strange to terminate the proceeding without giving any reason. No matter the terms in which that reason is expressed (for example, infeasibility of establishing a standard, excessive social cost of increased product prices), it must in fact boil down to a contradiction of the earlier determination that a standard was "necessary." Since that is so, it can be expected that the Commission's initial determinations of necessity will be couched in tentative terms—for example, "on the basis of information now available to it, the Commission has tentatively determined, etc."

4. Selection of Offeror

When the Commission receives offers to develop product safety standards under Section 7, there are several important de-
terminations it must make. First is the determination that "the offeror is technically competent, is likely to develop an appropriate standard within the period specified in the invitation . . . and will comply with the regulations of the Commission [governing standard development]." Only if these requirements are not met can the Commission decline all offers and proceed to develop a standard itself. It would seem desirable for the Commission to adopt regulations defining as specifically as possible the "technical competence" it will require. These general regulations could be supplemented by specific requirements set forth in the notice inviting offers in the particular case. The House Committee report makes clear that the offeror need not have past standard-writing experience or particular knowledge of the product for which the standard is intended, and that universities and research laboratories are potential candidates. The Commission's authority to contribute to the offeror's cost of developing a standard is intended to enable consumer organizations and other groups without economic resources to play a role in the development process.

The statute does not prevent the Commission from choosing more than one qualified offeror and provides no criteria for preferring one to another. The choice apparently need not be supported by reasons, and is probably not judicially reviewable absent an extraordinary abuse such as bribery or racial discrimination.

5. Regulations Governing Development of Proposed Consumer Product Safety Standards by Offerors

The provision of the Act requiring the Commission to prescribe regulations compelling "notice and opportunity by interested persons . . . to participate in the development of standards" provides a useful means of promoting truly broad-based private proposals. If not intelligently applied, however, it could seriously hamper the operation of an already cumbersome rulemaking procedure.

It is not clear from the language of the Act that all interested persons must be allowed to participate—and indeed, if that were the case we would have a rulemaking on the rulemaking—that is, a full-fledged public proceeding under Section 7 in order to develop the proposal that will be the subject of a full-fledged

---

61 Section 7(d)(1).
63 Section 7(d)(2).
65 Section 7(d)(3)(D).
public proceeding under Section 9. This result can only be avoided by the Commission’s exercise of reasonable discretion in limiting the number of “interested persons” who may participate and the manner of their participation. This seems permissible within the language of the statute. It would probably be best achieved by the Commission’s including in the general regulations adopted under Section 7(d)(3) a cross-reference to specific provisions that will be applied to each particular proceeding and included in the Commission’s notice soliciting offers. Thus, the general regulation might merely state that the offeror shall give notice of his project to such individuals and organizations as the Commission may specify in its notice, and that he shall permit such of those individuals and organizations to participate as the Commission may subsequently direct after receipt of their request to do so. The number and identity of participants in each case could thereby be regulated by the Commission, rather than left to the discretion of the offeror or to the clearly unsatisfactory determination of circumstance.

The Act does not describe what “opportunity to participate” consists of, and it will be up to the Commission to give content to the term. It certainly means more than just being informed—and must be interpreted to include some ability to make comments and suggestions. On the other hand, it probably cannot be read to give persons other than the developer final say on any issue.66 But within these broad limits, there are widely varying manners and degrees of “participation” that the Commission might require. Obviously, its willingness to put “teeth” into the participation requirements should vary directly with the degree of reliance it intends to place upon the private development process.67

If the number and identity of participants is restricted as suggested above, one model for implementing the participation requirement might be the following: The Commission’s general regulations might contain requirements for weekly meetings at which the developer would give progress reports to representatives of the participants and receive their comments and suggestions. This model—and any model which envisions some oral proceedings—raises the issue of recordkeeping. The Act requires

66 The beginning of Section 7(d)(3) refers to regulations “governing the development of proposed consumer product safety standards by persons whose offers are accepted” (emphasis added). Moreover, the prohibition against the Commission’s contracting with third parties during the development period (Section 7(e)(2)(B)) would be nugatory if the Commission could compel the developer to accept the determinations of others.

67 See text accompanying notes 56-58 supra.
the "maintenance of records . . . to disclose . . . the comments
and other information submitted by any person in connection with
such development."\(^{68}\) The Commission's regulations might well
specify that comments and information will not be deemed "submit­
ted" for the purposes of this provision unless provided to the de­
developer in written form. The courts would likely give deference
to this Commission interpretation of the statute rather than im­
posing the impractical and seemingly unnecessary requirement
of verbatim transcripts for all oral presentations.

The Act does not set forth the procedures by which the de­
development regulations required by Section 7(d)(3) are to be
adopted. In the absence of specification, the "notice-and-com­
ment" informal rulemaking procedures of the Administrative
Procedure Act would normally apply.\(^{69}\) It is arguable, however,
that these regulations fall within the "proprietary" exemption\(^{70}\) or
the "procedural" exemption\(^ {71}\) to this provision of the APA.
Even if these exemptions could validly be applied, it would be
extremely unfortunate not to follow the section 553 procedures
for the adoption of regulations so central to the functioning of the
regulatory scheme.

6. Special Provision for Offeror Who is a "Manufacturer, Dis­
tributor, or Retailer"

As noted above, the Commission cannot develop its own
standard while an offeror is proceeding satisfactorily with his de­
development. This restriction, insubstantial in any case, does not
even apply when "the sole offeror whose offer is accepted . . . is
the manufacturer, distributor, or retailer of a consumer product
proposed to be regulated by the consumer product safety
standard."\(^{72}\) The language of this exception poses a difficulty:
Does the exception to the prohibition of Commission develop­
ment apply when the offeror is a trade association or a combina­tion
of manufacturers, distributors, or retailers?

Strictly interpreted, the language of the exception would not
cover a trade association, since "manufacturer", "distributor",
and "retailer" are defined terms that do not include such an or­
ganization.\(^ {73}\) Whether this strict interpretation should be fol­
lowed depends upon what the purpose of the exception is consid­

\(^{68}\) Section 7(d)(3)(C).
\(^{71}\) Part (A) of the last sentence of 5 U.S.C. § 553(b).
\(^{72}\) Section 7(e)(2).
\(^{73}\) Sections 3(a)(4), 3(a)(5), & 3(a)(6).
erected to be. If it is seen as an expression of skepticism that a businessman can be expected to develop a really “tough” standard for his own product, then clearly a trade association should be treated like an individual manufacturer. On the other hand, the provision might have quite a different purpose—namely, not to protect the public against businessmen, but to protect businessmen against their competitors. That is, it might be thought exceedingly unwise to give a single manufacturer the opportunity of developing a proposed standard which he knows only his product, and not his competitor’s, can meet.

Both views find support in the legislative history. The bill passed by the House would have barred the Commission from developing a proposal once it had accepted a private offer to develop one.74 The bill adopted by the Senate, on the other hand, contained two provisions designed to maximize the standard-setting role of the Commission and minimize that of industry. The first, derived from the NCPS bill,75 would have permitted the commissioners to develop proposals even after accepting a private offer.76 The second, an amendment added on the floor by Senator Nelson, would have precluded “a manufacturer, developer, or retailer or the employee of a manufacturer, developer or retailer of a consumer product” from offering to develop a standard with respect to that product.77 The purpose of this amendment, in Senator Nelson’s words, was “to insure that, whenever the Consumer Agency delegates to a nongovernment group the responsibilities for suggesting proposed consumer product safety standards, that group or any of its members would not have an economic stake in the manufacture or sale of the products involved. . . .”78 The bill which emerged from conference compromised the disagreement by permitting industry members to develop standards (contrary to the Senate provision) but allowing the Commission to proceed on its own when they do so (contrary to the House provision). From this much, one might reasonably

---

74 H.R. 15003, 92d Cong., 2d Sess. § 7(e)(2) (1972).
75 S. 983, 92d Cong., 1st Sess. § 8(e) (1971); H.R. 8157, 92d Cong., 1st Sess. § 8(e) (1971).
77 Id. § 303(c)(1)(C).
78 118 Cong. Rec. S. 9925 (daily ed. June 21, 1972). Senator Nelson further described the problem as follows:

The most serious condemnation of the voluntary standards system which emerged from the studies of the Product Safety Commission and others—upon whose recommendations this entire bill is based—was the chronic tendency of the standards committees to be dominated by companies with an economic stake in the product. The result was that standards generally met the lowest common denominator in the marketplace.

Id.
infer that the exception from the prohibition of Commission development was a limited response to the same problem addressed more drastically by the Nelson amendment—namely, the danger of lax, self-serving industry-developed standards—in which case it should be applicable to an offer from a group or association of self-interested persons no less than to an offer from a single individual with an economic stake in the outcome. During the floor debate, however, Representative Broyhill, one of the House conferees, offered a different explanation for the conference compromise:

The conference version retains a very limited portion of the Nelson amendment providing that in the very limited situation wherein a manufacturer of a product is the one and only offeror in a bid to create a product standard, the Commission may concurrently investigate and develop a similar standard. Such a provision is justified in that the Commission should have independent knowledge of the subject matter where only one outfit is working up a standard which will apply to its product and similar products of possible competitors. In all other cases the Commission is foreclosed from duplicating the work of offerors to avoid unnecessary double expense.79

It should be noted that neither the Nelson purpose nor the Broyhill purpose is wholly achieved by Section 7(e)(2), since the exception to the prohibition of Commission standard development is never applicable when two or more offers are accepted, even though they all come from interested companies. In such a situation there remains intact both the danger that the resulting proposals might be lax, for the benefit of the industry as a whole, and the danger that they might be designed to favor the particular developers over their competitors. But it is at least within the Commission's power to avoid this situation, since there is no obligation to accept more than one qualified offer.

The choice between these two positions is extremely close. The dialectic process of proposal and counterproposal out of which the provision emerged makes it almost inescapable to infer that it was a partial accommodation of Senator Nelson's concern, rather than a response to an anti-competitive problem not previously discussed—and hence to conclude that standard development by the Commission is no more precluded when the only accepted offer comes from a trade association than when it comes from an individual manufacturer. Nevertheless, it is difficult to disregard the only statement in the legislative history specifically directed to the point, especially when made by a member of the conference committee in which the provision originated.

7. Conclusion of Section 7 Portion of Proceeding

Within 210 days after publication of its invitation, the Commission must either (1) withdraw the notice of proceeding, (2) publish a proposed safety standard, or (3) publish a proposal to ban the relevant product. A special problem arises when the Commission adopts the third alternative: is such a publication of a ban proposal made under authority of Section 7(f) alone, or must it also comply with Section 8? That is, must the publication be accompanied by the Section 8 findings that the product is distributed in commerce and presents an unreasonable risk of injury, and that no feasible product safety standard can eliminate the risk? Of course it is essential that the Commission consider these elements likely before commencing a product ban rulemaking—just as any agency, in proposing a rule, must consider it likely that the rule is in the public interest; but that is a far cry from "finding" it to be correct in advance, which amounts to a formal prejudgment. It is certainly arguable that Section 8 sets forth not merely one means of issuing a proposed ban but procedures that must be followed whenever a proposed ban is issued. However, Section 8 is not in terms exclusive; and unless Section 7 were intended to provide an independent means of issuing a ban proposal, one would expect to find the phrase "pursuant to section 8" at the end of Section 7(f). It may seem anomalous that a statute which expressly requires the Commission to make a finding of infeasibility, even without having tried to develop a standard, should dispense with such a finding in circumstances where the effort has actually been made. But it is reasonable to view the scheme of the statute to be that before the Commission can commence a product ban rulemaking, it must either make the findings required by Section 8 or (as adequate assurance of the same careful deliberation) complete the pre-rulemaking procedures of Section 7. On balance, therefore, it seems permissible for the Commission to take the desirable step of omitting the Section 8 finding if it decides to issue a ban proposal upon conclusion of a Section 7 proceeding. There is, however, clearly no requirement that it do so. And as a matter of pure prophesy, it is difficult to envision its testing this legal point merely in order to avoid a technical prejudgment of the sort it may be making with some regularity in issuing ban proposals under Section 8 alone.

---

80 Section 7(f).
81 See text accompanying notes 90-91 infra.
B. Section 8—Development of Product Ban Proposals

I. Consequences of Choice Between Standard and Ban

Section 8 provides the procedure for developing a product ban proposal. Before discussing the details of that procedure, it might be well to point out the principal consequences of adopting a product ban instead of a product safety standard. Perhaps the most important practical difference is that a ban can kill an entire product industry, whereas a standard—since it must be based, to the extent feasible, upon performance characteristics—allows the product industry to work its way around the problem through technological innovation. In the days when bicycles had the rather unstable configuration of a high front wheel and a tiny rear wheel, a product ban of bicycles would have prevented, or at least retarded, development of the less dangerous velocipedes we now know; a product standard, on the other hand, requiring the vehicles to display certain stability characteristics, would in all likelihood have hastened technological progress. Of course, this particular distinction between ban and standard loses significance in direct proportion to the Commission's willingness (1) to base bans, as well as standards, upon performance characteristics, and (2) to reconsider bans not based on such characteristics when technology has enabled the product to be rendered safe.

A second practical difference between a ban and a standard is that only the latter subjects manufacturers and private labelers to the certification, testing, and labeling requirements of the Act. In some situations, then, businessmen might prefer a complete ban of a sub-product to a safety standard applicable to the broader product category. For example, modern manufacturers of bicycles might well prefer an absolute ban of high-wheeled vehicles to a standard which in effect proscribes them by specifying certain stability characteristics for all bicycles.

A third practical difference concerns the applicability of standards and bans to previously manufactured products. A standard can never be applied to products manufactured before its effective date; the retroactivity of product bans is not similarly restricted. The importance of this distinction should not be exaggerated, however, since in serious cases the Commission can, without issuing a ban, seek a judicial declaration under Section 12 that previously manufactured products are imminent hazards.

\[^{82}\text{See Section 7(a).}\]
\[^{83}\text{See Section 14.}\]
\[^{84}\text{See Section 9(d)(1).}\]
\[^{85}\text{It is unclear whether the Commission, without proceeding in court under Section 12, can adopt both a standard applicable prospectively to future output.}\]
Finally, under the Act it is only a standard that prevents states from generally adopting more stringent requirements. A stability standard for bicycles that effectively prohibits vehicles with wheels of more than a thirty-six inch diameter would be uniform and nationwide; no state would be able to adopt standards that in effect prohibit diameters of more than thirty inches. A ban of bicycles with wheel diameters of more than thirty-six inches, on the other hand, could be supplemented by state standards or state bans that impose more stringent requirements. (Of course there is no problem about states prescribing less stringent requirements. Whether adopted by standard or by ban, the federal protection will establish a national minimum.89)

2. Scope of Commission Freedom in Selection Between Standard and Ban

The choice between standard and ban poses an intriguing question under the Act: Is the selection to some extent dictated by the very nature of the safety result sought to be achieved; or is the Commission free in each case to use either device, depending upon its preference for Section 7 or for Section 8 pre-rulemaking procedures, and upon its desire to achieve or to avoid the practical results of standard-making just described?

To present the problem more concretely: If the Commission were concerned about the use of poisonous beans in baby rattles, it might choose to adopt a standard for baby rattles requiring that their contents be non-poisonous; but it might just as logically adopt a ban on rattles which contain inedible contents. Instead of banning hand guns (a subject actually not within the scope of a product and a ban applicable retroactively to previous output. The very existence of the standard can be said to preclude the finding—essential to a product ban under Section 8—that "no feasible consumer product safety standard . . . would adequately protect the public." On the other hand, it can be asserted that the impermissibility of a retroactive standard is the strongest possible basis for a finding that nothing less than a ban "would adequately protect the public" against dangerous articles already in being. In implementing the latter view, the relevant product—widgets, for example—would be described differently in the standard and the ban; the standard would apply to "all widgets", the ban to "nonconforming widgets manufactured before the effective date of the standard." It is doubtful, however, that the Commission has this much flexibility in defining the subject product, and in choosing between standard and ban. See text accompanying notes 87-89 infra.

86 It might be well to point out an apparent but unreal distinction relating to the effective date of standards and bans. Section 9(d)(1) provides that only standards cannot be made effective sooner than thirty days after their promulgation without good cause. The inference that product bans are not subject to a similar restriction is erroneous, because a substantially identical provision is contained in subsection 553(d) of the Administrative Procedure Act, which is applicable to both standards and bans (Section 9(a)(2)) and which cannot be derogated from except "expressly" (5 U.S.C. § 559 (1970)).
of the Act,\textsuperscript{87} but irresistible as an example), it might just as effectively adopt a standard requiring all firearms to have thirty-six inch barrels. The explanation of this sophistry, of course, is that while a ban and a standard are in fact two different things when they are applied to the same product, a standard for product $A$ may really amount to the same thing as a ban of product $B$, where product $B$ is a subcategory of product $A$. Unless some principle of limitation is imposed, the difference between a standard and a ban may reduce itself to no more than the Commission’s choice whether to express itself (1) by describing the characteristics a product must contain or (2) by proscribing a product that contains or does not contain certain characteristics. To be sure, some cases may lend themselves more naturally to one or the other form of treatment. But there is likely to be a large common ground, where either a standard or a ban might be a logical choice; and even the cases which fall naturally into one category will often be compressible into the other.

It seems extremely unlikely from the structure of the Act that Congress considered there to be no \textit{inherent} difference between a product standard and a product ban—that is, no difference other than the varying effects provided by the Act itself. It appears that different treatment was accorded to what were deemed to be two different things, and not that different procedures and effects were intended to attach to two different ways of doing the same thing.\textsuperscript{88} In short, there must be some objective means for determining what is appropriate for a standard and what is appropriate for a ban other than the mere linguistic formula which the Commission chooses to use or the Commission’s result-oriented preference.

The need for an external criterion to distinguish between standard and ban is much more easily recognized than supplied. The answer probably lies in the direction of placing upon the phrase “consumer product” limitations not explicitly set forth in

\textsuperscript{87} See Section 3(a)(1)(E).

\textsuperscript{88} If, to sustain this point, it is not sufficient to cite the language and structure of the entire Act, it might be pointed out that the contrary interpretation, if applied consistently, almost cancels itself out. Although that interpretation would give the Commission complete freedom to proceed under either Section 7 or Section 8, it would also give the affected manufacturer the ability to negate the choice and compel a Section 7 proceeding. For in order to promulgate a ban, the Commission must find that “no feasible consumer product safety standard” would achieve the same effect. But if one adopts the view that there is no difference between a standard and a ban other than in the manner of expression, then every Section 8 proceeding could be defeated and forced back into Section 7. The manufacturer of hand guns could quite easily demonstrate that a feasible safety standard for firearms (prescribing the length of their barrels) would achieve the same salutary effect as the absolute ban.
the definition. Perhaps some such principle as the following would suffice: The “product” to which either a standard or a ban is applied must include all items within a generally recognized consumer goods category that are interchangeable for the same specific consumer use; and must not include any items not within that category and so interchangeable. Applying this principle to our earlier examples: It would not be possible to apply a product ban to baby rattles with inedible contents, because the relevant “product” is all baby rattles—there is neither a generally accepted category of, nor a specific consumer use for, rattles with poisonous beans. Conversely, it would not be possible to adopt a product safety standard requiring all firearms to have thirty-six inch barrels, because firearms as a class do not constitute a “product”—for even if firearms are a consumer goods category (which may be doubtful), rifles are not interchangeable with hand guns for the same consumer use. To be sure, a limiting principle such as this could not be applied with mathematical precision. For example, there is surely some question whether rubber squeak-toys can be joined with baby rattles in the product category of “crib toys”; and whether a proper “product” category of firearms is “long-barrel sporting weapons”, or rather “shotguns” and “rifles” broken out separately. But with a problem of this sort, mathematical precision cannot be expected, and it is probably desirable that there be some degree of play in the joints. In any case, the Commission’s good faith application of such a standard would likely satisfy the courts.

3. Procedures Preliminary to Product Ban Rulemaking

Compared with the intricate procedures which must be followed to develop a proposal for a product safety standard, the procedures for developing a proposed product ban are simple. They are nonetheless unusual; not often is an agency required to make specific findings in order merely to commence a rulemaking proceeding. Section 8 requires three findings: (1) That the product is or will be distributed in commerce; (2) that it presents an unreasonable risk of injury; (3) that no feasible consumer product safety standard can protect against the risk. The procedure by which these findings are to be made is not specified; presumably it can be done informally, without public notice or consultation. These initial determinations are, of course, not judicially reviewable, since they result not in any final Commission ac-

---

89 See Section 3(a)(1).
90 See text accompanying notes 49-55 supra.
tion, but merely in the commencement of a deliberative proceeding looking toward possible action.

It seems strange to require the Commission to determine in advance the very issues that will be the subject of the rulemaking proceeding. All three of these findings, of course, must be "re-found" in the Section 9 proceeding in order to promulgate a ban.91 Thus, the language of the statute has something of the flavor of "judgment first, trial later." Of course at the close of the proceeding the Commission may determine that a ban is not appropriate, but to do so it would have to reverse one or another of its earlier findings.

It may be possible for the Commission to avoid this formal prejudgment by declining to proceed under Section 8 and proceeding instead under Section 7. As noted above, at the conclusion of the Section 7 proceedings, the Commission may set for rulemaking, if it wishes, not a proposed standard but a proposed ban—and it can arguably do so without making the Section 8 findings.92 This method of proceeding has the further advantage of generating for use in the Section 9 rulemaking what is presumably the most effective safety standard that could be adopted as an alternative to a ban; it is frankly difficult to see how the "in-feasibility" of such an alternative can be established without some preliminary attempt at developing one. The only disadvantage of proceeding via Section 7 instead of Section 8 is the greater amount of time involved, by reason of the 150-day "development period." But if the matter were truly urgent, the Commission would not proceed exclusively by rulemaking anyway, but would move in the courts under Section 12 to eliminate an "imminent hazard."93 Section 8 does not produce an immediate ban; it merely

---

91 The last two of them must be specifically recited. Section 9(c)(2) provides:

The Commission shall not promulgate a consumer product safety rule unless it finds (and includes such finding in the rule)—

(C) in the case of a rule declaring the product a banned hazardous product, that no feasible consumer product safety standard under this Act would adequately protect the public from the unreasonable risk of injury associated with such a product.

As for the first of the findings—that the product is or will be distributed in commerce—it would seem essential in order to sustain the constitutionality of federal action. For the word "commerce" is defined (Section 3(a)(12)) to include not merely "trade, traffic, commerce or transportation" which is between or among states, but also any other trade, traffic, commerce or transportation which "affects" such interstate commerce. Thus "distribution in commerce" under the Act amounts to the constitutional minimum, unless it is thought possible for interstate commerce to be affected, and for the definition of "consumer product" (Section 3(a)(11)) to be met, without any distribution (see Section 3(a)(11)) in any trade, traffic, commerce or transportation. This seems most unlikely, if not utterly impossible.

92 See text accompanying notes 80-81 supra.

93 See text accompanying note 183 infra.
commences what may be a protracted Section 9 proceeding. Time pressures, therefore, can justify use of the Section 8 procedure only when a lengthy delay is tolerable but the addition of 150 more days to that delay is not. Such situations will be rare.

C. Section 9—Rulemaking Proceedings to Adopt, Amend or Repeal Product Safety Rules

1. In General

Once the pre-rulemaking stage of Section 7 or 8 has been completed, the fundamental framework of procedure for adoption of product safety rules is not unusual. Section 9(a) provides for ordinary section 553 “notice-and-comment” rulemaking—that is, a procedure whereby a proposed rule is published by the agency and interested parties are given an opportunity to file written comments within a specified period—with the added requirement that parties be permitted to make oral presentations. This is not an “on-the-record” proceeding, so that the Commission may properly consider information which comes to its attention by means other than the formal written responses and oral presentations. The Commission may receive ex parte presentations by some parties without opportunity on the part of other parties to respond; it is not necessary that those Commission employees who make argument in the course of the oral presentation be separate and distinct from those who advise the Commission with respect to its final determination; and it is not necessary that the oral proceeding be conducted by an administrative law judge.

Of course, these Section 9 requirements for notice and comment and oral presentation are merely minimums. The Commission may, if it wishes, adopt additional procedures of various types, including an opportunity for the parties to comment upon one another’s presentations. It could even provide for a full-fledged trial-type proceeding like those governed by sections 554, 556, and 557 of the Administrative Procedure Act, though that would in most cases be clearly inappropriate.96

---


96 See Administrative Conference of the United States, Recommendation
2. Role of the Commission Staff

A question immediately arises as to the role which the Commission staff should play in Section 9 proceedings. Should they appear to argue in favor of the proposed rule, with or without certain modifications? Or is it more reasonable—especially in view of the fact that the proposed rule may not have been developed by the Commission itself—to use the proceeding as merely an occasion for receiving the comments of private parties, and to reserve the staff's input for a later stage when they will advise the Commission itself on its final decision? On balance, the former procedure seems preferable, if not inevitable.

The Act requires the courts to overturn a final rule unless the Commission's underlying findings are "supported by substantial evidence on the record." Although the artificial definition of "record" for that purpose enables the Commission to bring to the court's attention matters not actually set forth in the proceedings connected with the rulemaking, the plaintiff would almost surely be granted an opportunity to refute such new evidence through a court-ordered remand to the Commission for that purpose. The Commission should therefore insure that the record made before it contains evidence which will support its final determinations. It seems essential to this end that the staff make its own presentation.

3. Necessity of Reason for Inaction

Agencies are not ordinarily required to give reasons for inaction. The Consumer Product Safety Act, however, directs the Commission to make a specific finding if it chooses not to adopt a product safety rule after commencement of a rulemaking proceeding. Indeed, the decision not to proceed further must itself be made "by rule." While the necessary finding is of the most generalized sort (to wit, that the product safety rule is not "reasonably necessary . . . or . . . in the public interest"), it will in all probability be subject to judicial review. It is to be noted that because of possibly greater amenability to court challenge of action under this provision, it is likely that the Commis-

65 Section 11(c).
66 Section 11(a). See text accompanying notes 133-44 infra.
67 Section 11(b) specifically permits application for such remand.
68 Id. (a)(1)(B).
69 Id.
70 Id.
sion will be induced to abort a Section 7 proceeding before it reaches the Section 9 stage, if the undesirability of a rule is by that time already clear. 102

4. Ability to Adopt Different Type of Product Rule from Type Noticed

Nothing in Section 9 of the Act explicitly requires the rule which is promulgated at the termination of the proceeding to be of the same type (i.e., standard or ban) as that proposed in the notice. In fact, the statutory language seems to imply the contrary by requiring the Commission to promulgate merely “a consumer product safety rule”103 rather than “a consumer product safety rule of the type published.”

As a matter of general administrative law, and aside from the peculiar provisions of the present Act, all that is necessary to sustain a rule is that the end product of the rulemaking proceeding be sufficiently similar to the action formally proposed (or raised as a possibility) in the notice as to have afforded interested persons a realistic opportunity to address the issues relevant to the agency’s final decision.104 It would seem that a product ban proposal would automatically raise those issues relevant to adoption of a product standard—because one of the elements which must be established for a product ban determination is the infeasibility of any product standard to eliminate the relevant risk. The converse is certainly not true, however, since consideration and rejection of a product standard does not necessarily lead to the next step of considering whether a complete ban is in the public interest. It would seem that the Commission could remove all doubt of compliance with this requirement of general administrative law by explicitly setting forth in its notice, as one of the issues it wishes to have addressed, “whether, if the proposed [standard] [ban] is undesirable, some other product safety rule designed to meet the same risk, including a [different standard or a product ban] [product safety standard] would be in the public interest.”

But aside from the requirements of general administrative law, the peculiarities of the Consumer Product Safety Act probably make it impossible, even if adequate warning is given, to begin a Section 9 proceeding with a product ban proposal and to end by promulgating a product safety standard. For if the Commission were allowed to operate in that fashion, the private develop-

102 See text accompanying notes 152-57 infra.
103 Section 9(a)(1)(A) (emphasis added).
ment provisions of Section 7 could be evaded. Of course there is no problem where Section 7 proceedings have already been held and, because they produced no feasible standard, have resulted in issuance of a ban proposal rather than a standard proposal under Section 7(f). But where the ban proposal has been developed via the Section 8 route rather than the Section 7 route, it would seem impermissible—and is in any event clearly undesirable—for the Section 9 proceeding to terminate in promulgation of a standard. This is an additional reason for generally developing product ban proposals under Section 7 rather than under Section 8.

5. Identification of "Risk of Injury"

Section 9(b) requires that the rule itself identify the risk of injury which it is designed to eliminate or reduce. Obviously, this risk will be susceptible of description with greater or lesser specificity. The more narrowly it is defined, the easier it becomes to challenge particular provisions of the rule as unnecessary and therefore arbitrary. On the other hand, in the case of a product standard the more broadly the risk is described, the greater the danger that desirable state action will be inadvertently foreclosed—since the risk description is the mechanism that controls the preemption provisions of Section 26(a).

6. Stockpiling Provision

The stockpiling provision of the Act is in one respect inartfully drawn. It states that the Commission may prohibit "a manufacturer" from stockpiling, so as to prevent "such manufacturer" from circumventing the purpose of the product safety rule. This language should not be interpreted as implying that the Commission may direct such action against one manufacturer alone, rather than applying the provision to the entire relevant market. For the action in question is to be taken "by rule", and a rulemaking proceeding is clearly inappropriate for action directed punitively against a single individual or directed against him because he alone for some reason threatens to violate the spirit of the law. Although it must be acknowledged that the definition of "rule" in the Administrative Procedure Act would make the word technically

105 See text accompanying notes 80-81 supra.
106 Section 9(d)(2) (emphasis added).
107 5 U.S.C. § 551(4) (1970) defines "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ." Recommendation No. 1 of the recent American Bar Association proposals for amendment of the APA would delete the words "or particular." See The 12 ABA Recommendations for Improved Procedures for Federal Agencies, 24 Am. L. Rev. 390-91
applicable to such action, common usage and common sense are opposed to such an interpretation.

It is not entirely clear whether the Commission may promulgate an anti-stockpiling rule of universal effect, applicable prospectively to all product safety rules later adopted; or whether it must rather tailor such prohibitions specifically to products covered by product safety rules already in existence or under consideration. The latter interpretation seems the more plausible. The anti-stockpiling provision of the statute is complete and self-contained and could stand on its own without further agency elaboration except for two variables—rate of permissible divergence from base period rate, and identification of base period—left for later Commission determination for the evident reason that their appropriate content is likely to change considerably from product to product and perhaps even from manufacturer to manufacturer. Though the courts might defer to a different Commission interpretation of its powers, application on a product-by-product basis seems almost the unmistakable intent.

Since application of stockpiling restrictions must be “by rule”, the normal notice-and-comment procedures of the Administrative Procedure Act must be followed, unless “the agency for good cause finds . . . [they] are impracticable, unnecessary, or contrary to the public interest.” Conceivably such a finding could be made with respect to every stockpiling rule, but it would seem much more desirable and consonant with the principles of the Administrative Procedure Act for the Commission, where it intends to apply anti-stockpiling provisions to a particular product safety rule, to give notice of this intention simultaneously with the notice of the proposed rule, and to conduct a rulemaking proceeding on both issues jointly.

7. Amendment and Revocation of Rules

All amendments of product safety rules must be “by rule.” This means that normal notice-and-comment procedures must be followed prior to their adoption and that amendments cannot be effective sooner than thirty days after their issuance in final form—unless the Commission can establish good cause for dispensing with either or both of these requirements. In addition to these normal requirements, “material” amendments of prod-

---

(1972). If the definition were so amended, the word would not properly apply to a stockpiling prohibition directed explicitly against a single manufacturer.

108 Section 9 (d)(2).
Product safety rules are subject to the same procedures under Sections 7, 8, and 9 as are applicable to the adoption of product safety rules.\(^{111}\) This means that even when a single “material” alteration of a product safety standard is adopted, the entire “offer” ceremony of Section 7 must be repeated; and for all material amendments oral presentations will have to be permitted in addition to written comment.

Revocation requires a rulemaking proceeding under Section 9 similar to that necessary for adoption of the rule. Revocation, however, can be decreed only if the Commission determines that the rule is not “reasonably necessary to eliminate or reduce” the relevant risk.\(^{112}\) This provision curiously fails to track Section 9(a)(1)(B), discussed earlier,\(^{113}\) which allows the Commission, upon the conclusion of a Section 9 rulemaking proceeding, to withdraw the proposed rule before promulgation not only upon a determination that it is not “reasonably necessary” but also upon a determination that it is not “in the public interest.” It is difficult to believe the verbal divergence was intended to imply any substantive difference between the test for refusing to adopt a proposed rule and the test for agreeing to revoke an existing one. Perhaps harmony can be restored by concluding that any rule not in the public interest is unreasonable and hence not “reasonably necessary.”

D. Section 10—Rulemaking by Court Order

Section 10 of the Act prescribes a unique procedure for compelling the Commission to initiate rulemaking proceedings. Any interested person may petition the Commission “to commence a proceeding for the issuance, amendment, or revocation of a consumer product safety rule.”\(^{114}\) The petition must set forth facts establishing the necessity for the desired action and a brief description of the substance of the rule if issuance or amendment is requested.\(^{115}\) The Commission may—but apparently need not—hold a public hearing or conduct an investigation.\(^{116}\) If it grants the petition, it must promptly commence “an appropriate proceeding under Section 7 or 8.”\(^{117}\) If it denies the petition, it must publish its reasons for doing so in the Federal Reg-

\(^{111}\) Section 9(e).
\(^{112}\) Id.
\(^{113}\) See text accompanying notes 99-102 supra.
\(^{114}\) Section 10(a).
\(^{115}\) Section 10(b).
\(^{116}\) Section 10(c).
\(^{117}\) Section 10(d).
ister, and its denial may be made the subject of court action.\textsuperscript{118} In the latter event, when the court is satisfied by a preponderance of the evidence in a trial de novo that the product presents an unreasonable risk of injury and that "the failure of the Commission to initiate a rulemaking proceeding under section 7 or 8" unreasonably endangers the petitioner or others, it must order the Commission to initiate "the action requested by the petitioner.\textsuperscript{119} The court has no authority to order the promulgation of a rule, only the initiation of a proceeding.\textsuperscript{120}

For the most part, these provisions are not novel. The Administrative Procedure Act confers upon interested persons the right to petition an agency for the issuance, amendment, or repeal of a rule\textsuperscript{121} and requires a statement of grounds for the denial of such relief.\textsuperscript{122} The judicial review provisions of Section 10, however, are without precedent. It is not clear under the APA whether denial of a rulemaking petition is reviewable at all;\textsuperscript{123} at most it is reviewable for arbitrariness or abuse of discretion. The review provisions of Section 10(e), contained neither in the NCPS nor the Administration bill, were added by the conference committee without explanation.

It is natural to view the Section 10 procedure as a mechanism for consumer participation in the decision process. It should not be overlooked, however, that industry, too, can employ the petition device to secure amendment or revocation of product safety rules felt to be onerous. Indeed, experience under the National Traffic and Motor Vehicle Safety Act\textsuperscript{124} suggests that regulated companies may be the most frequent users of the petition procedure and its principal beneficiaries.\textsuperscript{125}

1. Power of Court to Preclude Commission Choice Between Standard and Ban

The operation of this Section is straightforward so long as the petitioner asks for a product standard rather than a product

\begin{itemize}
\item \textsuperscript{118} Sections 10(d) & 10(e)(1).
\item \textsuperscript{119} Section 10(e)(2).
\item \textsuperscript{120} Section 10(e)(3).
\item \textsuperscript{121} 5 U.S.C. § 553(e) (1970).
\item \textsuperscript{122} 5 U.S.C. § 555(e) (1970).
\item \textsuperscript{123} It has been categorically stated that it is not. Office of the Attorney General, Manual on the Administrative Procedure Act 39 (1947).
\end{itemize}
ban. Where a ban is requested, difficulties emerge. Would the
Commission be granting or denying such a petition if it agreed to
commence a product standard proceeding under Section 7 but ref-
used to propose a ban under Sections 8 and 9? If such action
constitutes a denial, the options open to a court under Sec-
tion 10(e)(2) would be clear: either to affirm the Commission
or to order it to commence a Section 8 proceeding. The court's
options would be anything but clear, however, if the Commis-
sion's denial took the form not of opening a Section 7 proceed-
ing instead of the requested Section 8 action, but of refusing any
action on the ground that no product safety rule of any kind is
called for. If it finds this action erroneous, what does the court
do? Must it order the commencement of a Section 8 proceed-
ing, that being the "action requested by the petitioner"?126 May it,
at least, do so if satisfied that an effective standard cannot feasi-
ibly be developed? Or must it simply order the Commission "to
commence a proceeding for the issuance . . . of a consumer prod-
uct safety rule",127 that being the "action requested", leaving
the Commission to decide whether to proceed under Section 7 or
Section 8? And if the more specific relief is in order—i.e., if the
court can "second guess" the Commission's preference for Section
7 over Section 8—is there any logical reason why Section 10 rel-
ief should not be available even in situations where, at the time
the petition is filed, the Commission has already commenced a
Section 7 proceeding or recently terminated one without propos-
ing a rule?

The answers to these questions depend largely upon which
of two alternative approaches to Section 10 one adopts. Under
the broad view, the "action requested by the petitioner", the re-
lied to be granted or denied by the Commission and ultimately
the court, is simply the "commencement of a proceeding for the
issuance [or "amendment" or "revocation", as the case may be]
of a consumer product safety rule"128—nothing more specific
than that. True, the petitioner must describe the rule he claims
should be adopted; but this description in no way limits the
Commission's options. The fact that the petitioner would prefer
a rule banning the product rather than one setting a standard does
not mean that the Commission must proceed under Section 8
rather than Section 7 in order to be deemed to have granted the
petition; either will do. Judicial review comes into play only if the
Commission refuses to initiate any proceeding; and in that case the

126 Section 10(e)(2).
127 Section 10(a).
128 Id.
court, though reversing, must let the Commission choose the type of product safety rule to consider.

The alternative (narrow) view holds that the relief petitioned for, the "action requested", is, specifically, either a product standard proceeding under Section 7 or a product ban proceeding under Section 8; that a petition for the latter is effectively denied if the Commission agrees merely to the former; and that the court, if satisfied that the Commission's inaction creates unreasonable hazard, may, indeed must, prescribe a Section 8 proceeding rather than give the Commission the option.

The broad interpretation seems much more in keeping with the basic purposes of the Act, in particular that of encouraging the experimental development of product safety standards. As noted earlier, it would generally be undesirable for the Commission to ban a product without first having attempted to develop a standard through the Section 7 process. Without actually having tried, the Commission, for all its expertise, would be hard put to find that "no feasible consumer product safety standard . . . would adequately protect the public." 129 A court, lacking the Commission's experience and technical resources, would be even less able to do so. Hence it would be doubly undesirable for the court to channel the rulemaking proceeding into Section 8 when the Commission prefers to proceed under Section 7. Certainly it should not do so merely because the petitioner has requested a product ban rather than a product standard—especially since the Section 7 process may, in the end, result in a ban, and in any case will develop the evidence necessary for an informed evaluation of the petitioner's request. Hence, unless the language of the Act were compellingly to dictate otherwise, Section 10 should be construed as leaving the choice of ban-or-standard to the Commission. The language does not so dictate.130

---

129 Section 8(2).
130 Though admittedly it gives some difficulty. The requirement that the Commission, upon granting the petition, commence "an appropriate proceeding under section 7 or 8" might be taken to mean "a proceeding appropriate for the issuance of the petitioner's desired rule"; and "action requested by the petitioner" might, in a similar vein, be construed as referring specifically to either a Section 7 or Section 8 proceeding. It is no great strain, however, to read the phrase "appropriate proceeding" as meaning a "proceeding deemed appropriate by the Commission" or, alternatively, "proceeding for the issuance, amendment, or revocation of a product safety rule, whichever is appropriate"; and to construe "action requested by the petitioner" as distinguishing merely between the issuance, amendment, and revocation of a rule. At any rate, the narrow interpretation is likewise fit at ease with a literal reading of the statute. The court's order to initiate "the action requested by the petitioner" is to be predicated on a finding that the Commission's failure "to initiate a rulemaking proceeding under section 7 or 8" (emphasis added) unreasonably exposes petitioner or others to danger. Surely this narrow interpretation has produced an illogical statute if it requires,
and accordingly the Commission and the courts should adopt the interpretation which best comports with the larger aims of the statute—that is, the broad interpretation set forth above.

2. Power of Court to Prevent Abortion of Product Standard Proceeding at Section 7 Stage

Questions may arise concerning the effect of a Section 10 order and the degree to which it controls the Commission's discretion in the ensuing Section 7 proceeding. In Section 10(e)(3), the Act provides that "the district court shall have no authority to compel the Commission to take any action other than the initiation of a rule-making proceeding in accordance with section 7 or 8." This means, at the very least, that the Commission may not be required to adopt a particular rule, or indeed any rule. It is less clear, however, whether the Commission may be required to carry the Section 7 proceeding to the point of proposing a rule, thus triggering the Section 9 procedure. One can argue that once a court has determined the product, and the Commission's inaction, to be unreasonably hazardous, the Commission may not conclude otherwise without at least receiving comments and oral argument from the interested public—a result which is not assured by the Section 7 proceeding alone. This interpretation can, with difficulty, be reconciled with Section 10(e)(3) by interpreting the phrase "rule-making proceeding" as referring to the Section 9 procedure proper, albeit initiated in the special manner prescribed by Sections 7 and 8. The better view, however, and certainly the more natural reading of the statutory language, is that nothing more can be required of the Commission than that it commence a Section 7 proceeding and conduct it in good faith; and that if this requirement is satisfied, the court's order is not disregarded by closing the proceeding without proposal of a rule. This interpretation is particularly compelling if one notes that the Section 7 proceeding may not produce any private offers to develop the requested standard—in which event the court (if the

upon a bare finding that some product rule is called for, commencement of proceedings to adopt the more drastic rule—and this even though the court itself might prefer the more moderate. Furthermore, if the Commission's preference for Section 7 over Section 8 is subject to judicial review do now in situations where the Commission had been inactive until petitioner's request, why should it not also be subject to such review in cases where a Section 7 proceeding is already pending or has recently been aborted without issue? Yet the literal language of Section 10(e)(2), which presupposes "the failure of the Commission to initiate a rule-making proceeding", seems to foreclose that result; indeed, few would seriously argue for it. In sum, neither of the alternative interpretations of Section 10 is altogether compatible with the most natural reading of the literal language; some strain is inevitable.
former reading of the language were adopted) would be forcing
the Commission itself to spend public funds in its own develop-
ment of a standard it believes unnecessary or, worse, infeasible.

It is possible, however, that a Section 10 order obligates the
Commission to turn square corners in the Section 7 proceeding—
that the Commission's determinations under Section 7 will be subject
to somewhat closer scrutiny when the proceeding is court-ordered
than when it is voluntarily initiated. Ordinarily, determinations
that one or all offerors are unqualified or have failed to make
satisfactory progress, or that the proceeding should be aborted
without proposal of a rule, are judicially reviewable, if at all, only
for arbitrariness or abuse of discretion. The Commission prob-
ably need not give reasons. With a Section 10 order outstanding,
however, one can argue that the Commission must satisfy the
court that it has proceeded in good faith and, to that end, must
give reasoned justification for declining to propose a rule. Failure
to do so might be deemed a violation of the spirit if not the letter
of the court's order; or, more likely, it might simply be viewed
as an abuse of discretion under a stricter-than-usual application
of the traditional standard of review. To avoid these possible
pitfalls, the Commission would be well advised to spell out its rea-
sions for those determinations which result in aborting a Section
10-compelled Section 7 proceeding.

3. Timing and Frequency of Petitions

The timing and frequency of Section 10 petitions may also
present a problem. How soon after the actual adoption of a
product safety rule may a party petition the Commission to initiate
proceedings for its amendment or revocation and obtain de novo
judicial review of the Commission's refusal? The Act does not
in its terms establish any limit. Clearly, however, Section 10 was
not meant to provide stringent judicial review of the rule which
issues from Section 7, 8 and 9 proceedings, but merely to as-
sure that such proceedings, where appropriate, are conducted
—that is, that the Commission duly deliberates and explores the
need for a rule. An adopted rule is subjected to judicial review
by a different provision of the Act (Section 11) in a different
court (the court of appeals) under a different standard (the "sub-
stantial evidence" test).\footnote{See text accompanying notes 153-44 infra.}
A party who proceeded to chal-
gen a recent rule by the Section 10 route should therefore be
told by the district court either that his sole recourse was to
the court of appeals under Section 11 or that the Commission's re-
fusal to start proceedings for the amendment of a newly minted rule does not, whatever the merits of that rule, "unreasonably" endanger the consuming public, at least in the absence of new evidence not considered or available to the Commission at the time it acted.

Somewhat similar is the question of how soon a Section 10 proceeding may be brought to obtain reconsideration of a rule considered but rejected at the Section 7 or Section 9 stage. Roughly the same answer would be appropriate. Apart from Section 10, the Commission decision not to propose, or at least not to promulgate, a product safety rule would, if reviewable at all, be subject to non-statutory review of minimal scope.\textsuperscript{132} The district court, having jurisdiction in either case, might treat the civil action under Section 10 as a proceeding for such non-statutory judicial review. Quite clearly, however, it should not be willing to review de novo the Commission's recent judgment that no product safety rule is desirable—especially if, as suggested earlier, a court order under Section 10 cannot compel the Commission actually to propose a rule, but merely to initiate a Section 7 proceeding.

E. Judicial Oversight of the Rulemaking Process

Both action and inaction of the Commission in the course of the rulemaking process are subject to judicial review of one kind or another. The major situations and problems are discussed below.


A consumer product safety rule promulgated by the Commission under Section 9 is judicially reviewable in a court of appeals under Section 11. The rule cannot be affirmed "unless the Commission's findings under subsection 9(c) are supported by substantial evidence on the record taken as a whole."\textsuperscript{133} For the purposes of this provision, "record" is defined in a fashion which is to our knowledge unique in legislative draftsmanship, and perhaps in human contemplation:

For purposes of this section, the term "record" means such consumer product safety rule; any notice or proposal published pursuant to section 7, 8, or 9; the transcript required by section 9(a)(2) of any oral presentation; any written submission of interested parties; and any other information which the Commission considers relevant to such rule.\textsuperscript{134}

\textsuperscript{132} See text accompanying notes 146-57 infra.
\textsuperscript{133} Section 11(c).
\textsuperscript{134} Section 11(a) (emphasis added).
The obvious purpose and effect of the last clause is to make "record" include that which in lawyerly and even common parlance would more precisely be described by the term "non-record." This verbal absurdity is more than accidental; it reveals a basic problem that has developed in the judicial review of informal rulemaking.

The two most frequently applied statutory bases for setting aside agency action, findings, and conclusions are (1) the determination that they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law";\textsuperscript{135} and (2) the determination that they are "unsupported by substantial evidence in a case . . . reviewed on the record of an agency hearing provided by statute."\textsuperscript{136} While the former is applicable to review of all agency action, the latter is an additional rigor imposed upon on-the-record adjudication and rulemaking—that is, in those instances the action must not only be shown to be not arbitrary, capricious, abusive of discretion, or otherwise not in accordance with law, but also must be shown to be a reasonable action on the basis of the evidence adduced in the required proceedings and without reference to extrinsic evidence that the parties had no opportunity to refute. This scheme is entirely rational, and is indeed essential to the distinctive character and purpose of an on-the-record proceeding.

What appears to have happened, however, is that the "substantial evidence" test has acquired a vague reputation as the more demanding of the two without appreciation of the fact that it is only rationally applicable to an "on-the-record" proceeding. As a result, it has in recent legislation apparently been included when Congress has desired particularly "tight" review, without reference to whether the reviewed proceeding was "on the record."\textsuperscript{137} This mistakes the nature of the standard. The essential constraint of the "substantial evidence" test is not that it requires a higher degree of support for an agency determination (the arbitrary and capricious standard itself would probably be violated by a determination made on the basis of insubstantial evidence) but rather, that it requires this support to be contained within the confines of the public record made pursuant to the provisions of sections 556 and 557 of the Administrative Procedure

\textsuperscript{137} E.g., section 655(f) of the Occupational Safety and Health Act of 1970. 29 U.S.C. § 651 et seq. (1970), provides that the findings of the Secretary of Labor shall be conclusive if supported "by substantial evidence in the record considered as a whole," even though the proceeding is not an on-the-record proceeding.
If there are no such confines, there can be no such constraint. To avoid this logical impasse, one commentator has suggested that judicial review provisions which require "substantial evidence on the record" to support informal rulemaking in effect convert informal rulemaking to formal rulemaking on a closed record.

The odd definition of "record" in Section 11(a) apparently represents an attempt to deal with this problem. The NCPS bill, as introduced in both the Senate and the House, provided for judicial review in accordance with the Administrative Procedure Act, 5 U.S.C. §§ 701-06—that is, in effect, on the basis of the "ar-

---


To be sure, the concurring opinion in Charlton v. United States, 412 F.2d 390 (5th Cir. 1969) asserts a clear distinction between the "arbitrary, capricious or abuse of discretion" test and the "substantial evidence" test:

While agency action which is arbitrary and capricious, or which constitutes an abuse of discretion, would no doubt be action which is "unsupported by substantial evidence," the reverse is not true . . . . [E]ven where the agency action is not arbitrary and capricious or an abuse of discretion, there may still not be substantial evidence in the accepted use of that test to justify the agency action. The very listing of the substantial evidence test as a separate and alternative ground for reviewing agency action indicates a legislative intent that it be a different standard from that permitting the setting aside of the findings or conclusions of an agency as arbitrary, capricious or an abuse of discretion.

Id. at 398. This language, however, is entirely compatible with the view expressed in the text that the essence of the distinction, when evidentiary support is at issue, is simply the requirement that the support appear on the record.

This is not to say that the two concepts are, in all contexts, coextensive, for often an assertion of arbitrariness or abuse of discretion is not based upon an alleged lack of evidentiary support for the determination. A decision may be "arbitrary," for example, if it rests in part upon unlawful considerations, or deviates unaccountably from previous agency decisions. But in the limited class of cases in which the ground for challenging the agency action is the inadequacy of its evidentiary basis, it is difficult to imagine a decision having no substantial evidence to support it which is not "arbitrary," or a decision struck down as arbitrary which is in fact supported by "substantial evidence." In short, in an evidentiary context the level of required support seems about the same whether the "substantial evidence" or the "arbitrary" test is used. Beyond noting that rough equivalence, we share Professor Davis' belief that "[a]ny attempt to refine the formulas for review is likely to be unprofitable." K. Davis, Administrative Law Treatise § 29.02, at 125 (1958).

139 The very term "substantial evidence test" should perhaps be abandoned. It is, of course, useful as a means of describing the degree of evidentiary support required—distiguishing the APA standard from the "preponderance of the evidence" test on the one hand and the so-called "scintilla rule" on the other. But this is no longer the point of confusion it once was. To stress what now needs stressing is the degree of the evidence rather than its degree. To refer to the APA standard as the "record evidence" test—or, if both source and degree must be reflected, the "substantial record evidence" test.


141 S. 983, 92d Cong., 1st Sess. § 28(c) (1971).

142 H.R. 8157, 92d Cong., 1st Sess. § 28(c) (1971).
arbitrary, capricious, . . . abuse of discretion” standard. The Administration bill, on the other hand, contained a straightforward “substantial evidence on the record” provision. Both the Senate and the House chose the latter alternative, making it one of the few provisions of the Administration bill to survive the legislative process. It was the conference committee which added the unique, all-inclusive definition of “record.” While the conference report does not explain the new provision, it is a reasonable surmise that it resulted from a realization that the judicial review provision might be construed to require the use of trial-type procedures in the rulemaking and would in any case force the Commission, through its staff, to establish publicly its evidentiary case in advance of decision. To avoid this, one suspects, the conferees chose the seemingly less drastic and certainly less visible approach of watering down the substantial evidence test by an expansive definition of “record” rather than flatly abandoning that test in favor of an “arbitrariness” standard. As the preceding discussion indicates, however, the practical effect is substantially, if not entirely, the same. In fact, in one respect the substantial evidence test, not limited to a genuine record, may be theoretically more lenient than an “arbitrariness” standard. In attempting to establish that an agency’s action was arbitrary the petitioner can presumably not be defeated by the agency’s development and presentation of entirely new data that was not available and therefore not taken into account when the allegedly arbitrary decision was made. The present Act’s novel definition of “record”, however, so as to include “any other information which the Commission considers relevant,” would appear not to impose such a limitation.144

2. Judicial Review of Failure to Initiate Rulemaking

The Commission, thus answerable to the courts of appeals for the concrete product of its rulemaking process, appears to be much more strictly accountable to the district courts for failing to invoke that process in the first instance. Under Section 10, as we have seen, a civil action may be brought in an appropriate district court to challenge the Commission’s denial of a petition to initiate rulemaking proceedings. The court must order the initiation

---

143 S. 1797, 92d Cong., 1st Sess. § 11(b) (1971); H.R. 8110, 92d Cong., 1st Sess. § 11(b) (1971).
144 Of course if the Commission does present such entirely new data in the appeal, the petitioner would have a good case for remand to enable him to present written and oral rebuttal, which is explicitly provided for by Section 11(b).
of such a proceeding if satisfied merely "by a preponderance of the evidence in a de novo proceeding" that the product is unreasonably dangerous and that the Commission's failure to act "unreasonably" exposes consumers to risk of injury. It is surprising that inaction by the Commission—failure to alter the status quo—should be subject to a greater degree of judicial control than affirmative Commission action restricting or even banning the sale of products (which, as we have seen, merely requires "substantial evidence", rather than "a preponderance of evidence", in order to avoid judicial intervention). In practice, however, the Section 10 standard may not be quite as rigorous as it looks. The question for the court to decide, albeit by a "preponderance of the evidence", is whether the Commission has "unreasonably" endangered consumers. The reasonableness, not the wisdom or correctness, of the Commission's judgment is in issue; the court is not invited to substitute its judgment for the Commission's or to reverse the Commission's decision merely because the court itself would have decided differently on the same evidence. So viewed, the standard of review does not seem significantly stricter than the traditional one which condemns agency action only when "arbitrary" or "capricious."


Both the availability and scope of judicial review are clear when the Commission either refuses to initiate rulemaking in the first instance or concludes the rulemaking process by adopting a rule. The major area of uncertainty is the situation in which the Commission initiates a rulemaking proceeding but later terminates it without adopting, or perhaps without even proposing, a rule. There are two stages at which this can be done: (a) after commencing a Section 9 proceeding, the Commission may, upon finding that the product safety rule it has proposed is unnecessary or not in the public interest, "withdraw by rule the applicable notice of proceeding"; (b) even earlier, at the end of the Section 7 proceeding the Commission may, instead of proposing a rule, publish in the Federal Register a notice withdrawing the notice of the proceeding. No specific findings are required.

Neither of these actions is subject to judicial review under Section 11 or any other provision of the Act. Both, however, may be subject to "non-statutory" judicial review in accordance

---

145 Section 10(e)(2).
146 Section 9(a)(1)(B).
147 Section 7(f).
with the Administrative Procedure Act. The APA provides that any person adversely affected by "agency action" is entitled to judicial review;\(^{148}\) that in the absence of a special statutory review procedure, review may be had in "any applicable form of legal action," including an action for injunction or declaratory judgment in a court of competent jurisdiction;\(^{149}\) and that in such an action, the reviewing court shall set aside agency action which is "arbitrary, capricious, an abuse of discretion" or (in cases "reviewed on the record of an agency hearing") which is "unsupported by substantial evidence."\(^{150}\) These provisions do not apply, however, to "agency action . . . committed to agency discretion by law";\(^{151}\) such action is unreviewable. Thus, "withdrawal of notice" under either Section 7(f) or Section 9(a)(1)(B) is subject to non-statutory judicial review in a district court, through an action for mandatory injunction or declaratory judgment, if and only if it is deemed to be "agency action" not "committed to agency discretion by law."

a. Withdrawal of Notice at the Section 9 Stage. The case for judicial review is probably stronger in respect to withdrawals under Section 9(a)(1)(B). The fact that termination of the proceeding must be accomplished by rule, and on the basis of findings (albeit general ones), not only makes it easier to character-


Professor Raoul Berger, in a lively, long-running controversy with Professor Kenneth Davis, has taken the position that all agency action is reviewable for abuse of discretion; that the apparent exception in 5 U.S.C. § 701(a)(2) for "agency action . . . committed to agency discretion by law" does not limit the broad injunction in 5 U.S.C. § 706 to set aside agency action which is "arbitrary", "capricious", or an "abuse of discretion" but merely means that a court may not substitute its judgment for that of the agency when the latter is properly exercising its discretion. Professor Davis, on the other hand, maintains that the section 701(a)(2) exception does make some discretionary action unreviewable and argues, with deliberate circularity, that agency action should be deemed "committed to agency discretion by law", hence unreviewable, when and only when it appears from all the circumstances, including the language, history, and purpose of the statute, and the nature of the action itself, that Congress intended it (or, upon reflection, would have intended it) to be unreviewable. See Berger, Administrative Arbitrariness and Judicial Review, 65 Colum. L. Rev. 35 (1965); K. Davis, Administrative Law Treatise § 20.16 (Supp. 1965); Berger, Administrative Arbitrariness—A Reply to Professor Davis, 114 U. Pa. L. Rev. 783 (1966); Davis, Administrative Arbitrariness—A Final Word, 114 U. Pa. L. Rev. 814 (1966); Berger, Administrative Arbitrariness—A Rejoinder to Professor Davis' "Final Word", 114 U. Pa. L. Rev. 816 (1966); Davis, Administrative Arbitrariness—A Postscript, 114 U. Pa. L. Rev. 823 (1966); Berger, Administrative Arbitrariness: A Sequel, 51 Minn. L. Rev. 601 (1967); Berger, Administrative Arbitrariness: A Synthesis, 78 Yale L.J. 965 (1969). See also Saferstein, Nonreviewability: A Functional Analysis of "Committed to Agency Discretion", 82 Harv. L. Rev. 367 (1968).
ize the decision as “agency action” rather than inaction, but also
suggests that Congress consciously intended it to be reviewable
rather than “committed to agency discretion.”

This conclusion, however, is not without difficulties. It is
extremely unlikely that a court, however convinced of the need,
could properly compel the Commission to adopt a rule. Even Sec-
tion 10—which goes to unprecedented lengths in creating man-
damus-like review of agency inaction—stops far short of that.152
Very likely the court can do no more than set aside the rule ter-
minaling the Section 9 proceeding and send the matter back for a
new round of proceedings and better articulated reasons. This
may well seem a pointless exercise, wasteful of both judicial and
administrative resources and unlikely to have been intended by
Congress. Nonetheless, the strong presumption of reviewability
that normally attaches to a “rule”, and the powerful current
trend toward ever more liberalized judicial review, would proba-
bly lead to this result.

The standard of review is not specified. Certainly the Com-
mission’s withdrawal of notice would be set aside if found to
be arbitrary or capricious. The “substantial evidence on the
record” test, properly speaking, should not be applicable since
there is no “on the record” proceeding involved.153 It is, more-
over, possible for the withdrawal to occur shortly after com-
cencement of the Section 9 proceeding and before anything that
could even inappropriately be called “the record” has been made.
The fanciful Section 11 definition of “record” is not applica-
ble.154

b. Withdrawal of Notice at the Section 7 Stage. The avail-
ability of judicial review is more doubtful where the Commission
aborts the rulemaking proceeding under Section 7(f) without
even proposing a product safety rule. Here the withdrawal of
notice is not done “by rule”, and no findings, not even general
ones, are expressly required; notice in the Federal Register
alone suffices. Because of this informality, and the relatively
early stage at which the decision is made, the Section 7 withdraw-

152 See Part III(D)(2) supra.
153 See text accompanying notes 115-39 supra.
154 Section 11(a) recites that that definition only applies “[f]or purposes of
this section.”
gument would be that a decision to terminate a rulemaking proceeding before the public has had a real opportunity to contribute its views is more in need of judicial scrutiny than one which has benefited from those views and has thus acquired a stronger presumption of validity. The Act, after all, reserves the most stringent judicial review for the Commission's failure to take even the first step in the rulemaking process; arguably the necessity for judicial oversight diminishes, rather than increases, as the process unfolds. On balance, however, it is probable that a Section 7 withdrawal would not be reviewable. If it were reviewable, it seems clear that the "arbitrary or capricious" standard rather than the "substantial evidence" standard should apply, since the latter is only proper when there exists a record that is intended to be the exclusive basis of the agency decision, which is not the case here. In fact, even if a court were willing to apply the "substantial evidence" test to a non-exclusive "record", it would rarely be able to find a record of any sort at the Section 7 stage, unless it be the "records" maintained by the developer pursuant to Section 7(d)(3)(C).

IV. ADMINISTRATIVE PROCEDURES FOR REQUIRING NOTICE AND REPAIR, REPLACEMENT, OR REFUND

Section 15 of the Act provides formal administrative procedures and remedies designed to protect the public from defective or substandard products already on the dealer's shelves or in the consumer's hands. Upon determining that a product presents a "substantial product hazard"—that is, contains a product defect or fails to comply with an applicable product safety standard—the Commission may order the manufacturer, distributor, or retailer to give notice of the hazard. Upon the same deter-

155 See Section 10 & text accompanying note 145 supra.
156 The strength of the argument for non-statutory review of Section 7(f) withdrawals depends to some extent on one's assumption as to the power of the court in such an action to order the Commission to propose (as distinct from promulgate) a product safety rule, and thus force the rulemaking process forward to the Section 9 stage. Absent such power, non-statutory review of Section 7 withdrawals might well be considered futile. If one assumes that a court order under Section 10 can force the Commission into Section 9, non-statutory review of a Section 7 withdrawal could be described as an alternative means to the same end. The contrary assumption—that a Section 10 order cannot require the proposal of a rule—weakened but does not destroy the case for the existence of such a remedy in connection with review of Section 7 withdrawals. One can still argue that Congress, through ruling out so drastic a use of judicial power in the context of a de novo proceeding under Section 10, was willing to see it exercised upon a determination that the Commission's failure to propose a rule was "arbitrary, capricious [or] an abuse of discretion", the Section 7 standard.
157 See text accompanying notes 135-40 supra.
158 Section 15(c).
mination, the Commission may also, or alternatively, order the manufacturer, distributor, or retailer "to take whichever of the following actions the person to whom the order is directed elects": (a) bring the product into conformity with the standard or repair the defect; (b) replace the product; or (c) refund the purchase price. It may also require the submission of a satisfactory plan for taking the action elected.

A. Separation of Functions

The determination of "substantial product hazard" may be made only after giving all interested persons an opportunity for a formal trial-type hearing in accordance with section 554 of the Administrative Procedure Act. In such a proceeding, unlike the rulemaking proceedings provided for in Section 9 of the Consumer Product Safety Act, the Commission is required to comply with separation of functions requirements. That is to say, no employee who engaged in investigation or advocacy at the hearing stage of the proceeding may participate in the decision—for example, by giving the Commission advice off-the-record. In all likelihood, this disqualification applies to high-level staff members—such as the General Counsel, the Director of Engineering Sciences, or the Director of Epidemiology—who may have supervised the attorneys and technicians presenting the staff's case at the hearing. This means, in effect, that the Commission must either create a separate staff of attorneys and technicians to try Section 15 cases, create a separate staff of advisers to help it decide those cases, or limit its off-the-record consultation to the commissioners' personal assistants or opinion writers.

B. Requirement that Administrative Law Judge Preside

The Administrative Procedure Act requires that section 554 proceedings be presided over by either the agency itself (in this case the Commission), one or more members of the agency (in this case one or more of the commissioners), or—what is usually the practice—an administrative law judge. It is possible to argue that this provision does not apply to Section 15 proceedings under the present Act. As noted above, all the statute says is that the hearing shall be conducted "in accordance with section 554" of the APA and it is not section 554 itself which

---

150 Section 15(d)(3).
151 Id.
155 Section 15(f).
requires administrative law judges, but rather section 556, which describes the personnel that must be used in section 554 proceedings. In addition, the present Act states elsewhere that the Commission “may, by one or more of its members or by such agents or agency as it may designate, conduct any hearing or other inquiry necessary or appropriate to its functions anywhere in the United States”; and that the Commission may “delegate any of its functions or powers, other than the power to issue subpoenas . . . to any officer or employee of the Commission.”

The question is whether these broad authorizations can be construed to alter what would be the normal effect of a reference to APA section 554—particularly in light of another provision of the APA which states that no statute may be held to supersede or modify its provisions “except to the extent that it does so expressly.”

The delegation language in the Consumer Product Safety Act is, to say the least, unusual. Statutes and reorganization plans that authorize the subdelegation of functions by most independent regulatory agencies expressly provide that section 556 of the APA shall not be superseded. It can certainly be argued that the omission of comparable language here reflects a deliberate policy choice. It is also arguable that Section 27(a) of the Act, in specifically authorizing the delegation of power to conduct hearings, does “expressly” supersede APA section 556.

The better view, however, is to the contrary. Since Section 27 makes no reference to the APA, it should not be deemed to

---

165 Section 27(a).
166 Section 27(b)(8). Whatever its effect upon the point here under discussion, this delegation provision has another important impact upon the hearing process: It relieves the Commission of the obligation to review every hearing officer's determination, and enables instead a system of “discretionary” review in which the decision of the hearing officer (as in Civil Aeronautics Board hearings, see Reorg. Plan No. 3 of 1961, 49 U.S.C. § 1324 note (1970)) or of an intermediate review board (as in the Federal Communications Commission, see 47 U.S.C. § 155(d) (1970)) is final absent the agency's decision to review. The advantage of such delegation, of course, is to free agency members from routine adjudicatory duties in order that they may devote their attention to broader issues of programs and policies. In view of the wide scope of its activities, the Commission can be expected to make use of this provision if a considerable volume of contested Section 15 proceedings arises.

have "expressly" superseded it.\(^{169}\) Moreover, in view of the regularity with which Congress has declined to authorize delegation of trial-type hearing functions, it is most unlikely that it would have deliberately broken the pattern here without specifically saying so. This conclusion is reinforced by the Congressional refusal to permit delegation to employees of the much less important subpoena power.\(^{170}\) The language of Section 27(a) is best explained as applicable not to the trial-type hearings required by Section 15 but only to legislative-type hearings, such as those contemplated by Sections 9 and 10, and to proceedings of a more general nature designed to inform the Commission and the public on matters of consumer product safety. This interpretation is supported by the subsection's last sentence ("[t]he Commission shall publish notice of any proposed hearing in the Federal Register and shall afford a reasonable opportunity for interested persons to present relevant testimony and data") and by the heading of the Section—"Additional Functions of Commission"—which implies that the "hearings" contemplated in subsection (a) are above and beyond those required or even mentioned in the preceding provisions of the Act.

C. Relationship to other Enforcement Provisions

There is obviously considerable overlap between Section 15 and the other, judicial, enforcement provisions of the Act (to be discussed in Part V below). A product which does not conform to an applicable consumer product safety standard and thus presents a "substantial product hazard" under Section 15 may also constitute an "imminently hazardous product" under Section 12. Its manufacture or distribution would likewise be a violation of Section 19 subject to injunction under Section 22, and, if knowingly done, might give rise to civil or criminal penalties under Sections 20 or 21. Judicial proceedings under any or all of these provisions might, in theory at least, unfold simultaneously with the administrative proceeding under Section 15.

A problem of apparent fairness is clearly involved when the Commission asserts in court a violation requiring civil, criminal, or injunctive relief, while at the same time purporting to sit in impartial judgment of the same issue at the administrative level. With respect to the civil and criminal penalty provisions (Sections 20 and 21), it does not seem that the Commission would often be forced into such a position; it is difficult to conceive of any

---


\(^{170}\) Section 27(b)(8).
practical compulsion to impose such penalties before completion of the Section 15 proceeding. With respect to injunctive relief (Section 22), however, the dilemma may be more difficult to avoid—though even here, it seems likely that, once a Section 15 proceeding is commenced, the businessman will ordinarily postpone further distribution of the product voluntarily rather than risk additional liability for refund, replacement, or repair, to say nothing of civil and criminal penalties. This problem of apparent prejudgment can of course be eliminated by the Commission's delegating to its staff the decision whether to seek judicial relief in cases where administrative action is pending or contemplated; but this may be neither desirable nor reasonable with respect to criminal proceedings. Such abstention by the Commission from the dual role of prosecutor and judge is not, in any case, strictly required by the Administrative Procedure Act.\(^{173}\)

The Commission may on occasion deem it desirable to proceed simultaneously under Section 12 (providing judicial relief against “imminently hazardous products”) and Section 15. Where Section 12 is invoked, the administrative proceeding might be thought superfluous, in that all of the sanctions available to the Commission under Section 15 are likewise available to the court under Section 12; and the judicial route will inevitably be more expeditious, if only because a Section 15 order, once issued, is subject to non-statutory review in a district court.\(^{172}\) Nevertheless, in view of the possibility that the court may find the product not “imminently hazardous”, and may thus grant no relief at all, concurrent pursuit of the administrative remedies may sometimes be thought desirable.\(^{173}\) In any event, although the determina-

\(^{173}\) The separation-of-functions provisions of the APA do not apply to the agency heads themselves. See Part (C) of the last sentence of 5 U.S.C. § 554(d) (1970). Moreover, it is by no means clear that the decision to initiate a judicial proceeding or to refer a matter to the Attorney General constitutes, without more, “an investigative or prosecuting function” within the meaning of 5 U.S.C. § 554(d), performance of which would disqualify an staff member from participating in the administrative decision of the merits under Section 15.

\(^{172}\) See text accompanying notes 174-76 infra.

\(^{173}\) In bringing an action under either Section 12 or Section 22, the Commission runs the risk that the court’s decision, or some language in its opinion, if adverse, may embarrass or even foreclose any subsequent administrative proceeding under Section 15. A judicial ruling under Section 22 that the product does not violate an applicable product safety rule would be binding upon the Commission and preclude a contrary administrative determination under Section 15. And while a judicial determination under Section 12 that the product does not “imminently” threaten “death, serious illness, or severe personal injury”, would not necessarily foreclose a subsequent administrative finding that it poses a “substantial risk of injury to the public”—the two issues not being identical—broad language in the opinion might well disincline the Commission to take further administrative action. This consideration suggests that, where injunctive relief under Section 22 is not urgently required (presumably the need for relief
tions to be made in the two proceedings are somewhat different, the element of unreasonable risk is common to both and, therefore, the problem of apparent prejudgment discussed above in connection with Sections 20-22 is, to some degree, present also in Section 12.

D. Judicial Review

The Act makes no explicit provision for judicial review of Section 15 determinations, but presumably they are subject to “non-statutory review” in a district court—either in an action for injunctive or declaratory relief brought by the aggrieved party or in a civil or criminal proceeding under Section 20, 21, or 22 brought by the Commission to enforce compliance with the Section 15 order. Whether challenged in an offensive or defensive posture, the Commission’s determination will be upheld unless found to be arbitrary or capricious, unsupported by substantial evidence on the record, or otherwise not in accordance with law.

The weight to be accorded the Commission’s determination under Section 15 may also become an issue in a suit under Section 22 to restrain further distribution of a product alleged to be not in compliance with an applicable product safety rule. This type of offensive Commission action (unlike the actions referred to in the preceding paragraph) does not seek enforcement of a Section 15 order as such; but it places in issue the very same question of rule-compliance which will have been adjudicated in an earlier Section 15 proceeding. In such a situation, is the court to make an independent judgment, or is it to accord the Commission’s prior determination the same presumption of validity it would receive in a proceeding to review or enforce the Section 15 order itself, upholding it if supported by “substantial evidence”? Either position is defensible. For the former view, one can argue that if Congress had intended the same degree of judicial deference as that accorded to other applications of Section 15, it would simply have included a cease-and-desist order against future distribution as one of the judicially enforceable sanctions which the Commi-

under Section 12 will always be urgent), the Commission may generally be expected to conclude the administrative proceeding before invoking the aid of the courts. By doing so, it may be able not only to secure enforcement of its order before risking an adverse judicial decision in an action under Section 22, but also to improve its eventual chances in such an action, to the extent the court gives deference to the prior administrative determination.

174 See text accompanying notes 148-51 supra.
175 See text accompanying notes 177-82 infra.
sion itself could impose. By requiring the Commission to initiate this particular sanction before the courts, it presumably intended the judicial function to be something more. This view is supportable only if it is conceded that the court’s Section 22 determination will not undo the effect of the Commission’s Section 15 determination for other purposes (such as requiring repair or replacement of products already distributed); for Section 22 is clearly not intended as a subtle and indirect means of imposing de novo judicial review on Section 15 itself. This very limitation, however, renders the opposite view more plausible, for only on the basis of the clearest statutory indication should it be assumed Congress intended to create a system under which an agency determination could be found erroneous in one judicial proceeding and correct in another. There is no such clear indication here, since the Congressional refusal to grant the Commission cease-and-desist powers could conceivably have been intended to provide de novo judicial judgment not on the issues already adjudicated under Section 15, but only on the ultimate question whether an injunction should issue.

V. JUDICIAL REMEDIES FOR THE COMMISSION

The Commission has a variety of tools for enforcing the Act in the courts. These remedies may overlap to a certain extent or give the Commission a choice as to how to deal with particular situations.

A. Judicial Enforcement of Section 19 Prohibitions

Probably the Commission’s basic and most important litigating authority is its power to sue for enforcement of the prohibitions contained in Section 19 of the Act. Section 19 makes it unlawful to manufacture or distribute products which do not conform to an applicable product safety standard or which have been banned as hazardous products. It also prohibits violation of ancillary provisions of the Act, such as the requirements for furnishing certificates, making reports, and permitting access to records. Finally, Section 19 makes it unlawful to fail to comply with an order issued under Section 15(c) or 15(d), relating to notification of defects and repair, replacement, and refund.

To enforce the prohibitions of Section 19, the Commission with the concurrence of the Attorney General (or the Attorney General alone)\(^{177}\) may sue in the United States District Courts for

\(^{177}\) For a discussion of the relationship between the Commission and the Department of Justice, see text accompanying notes 187-90 infra.
injunctive relief and for seizure of the offending products.\textsuperscript{178} In the case of \textit{knowing} violations the Commission may assess, and sue to collect, civil penalties.\textsuperscript{179} Although the statute is not entirely clear on the point, it appears that a suit to impose and collect a civil penalty would be tried de novo in the district court rather than be reviewed on the record of an administrative determination.\textsuperscript{180} Consequently, the Commission is not obliged to set up any formal trial-type procedure for assessing civil penalties in the first instance.

Finally, the Act provides criminal penalties for a person who knowingly and willfully violates Section 19 "after having received notice of noncompliance from the Commission."\textsuperscript{181} Criminal prosecutions could not, of course, be initiated by the Commission itself but would have to be referred to the Department of Justice. The criminal penalty provisions do, however, raise a procedural problem for the Commission—the notice of noncompliance. The Act does not describe the nature of the notice or the procedures, if any, which must precede it. Several of the acts which constitute violations of Section 19 are, by their very nature, failures to comply with orders directed to the person in question.\textsuperscript{182} Probably the notice of noncompliance cannot be merged with the initial command in order to precipitate an immediate violation of Section 21, but a variety of intermediate forms of "notice" can easily be imagined. The Commission can be expected to specify by regulation the precise form a notice of noncompliance is to take and who may issue it.

\textbf{B. Judicial Relief Against Imminent Hazards}

In addition to its authority to seek judicial enforcement of the prohibitions in Section 19, the Commission has another litigating tool under Section 12. That Section authorizes the Commission to sue in federal district court to prevent the distribution of

\textsuperscript{178} Section 22.
\textsuperscript{179} Sections 20, 27(b)(7).
\textsuperscript{180} The civil penalty provisions administered by some agencies, e.g., Federal Communications Commission, 47 U.S.C. §§ 503, 504 (1970); Civil Aeronautics Board and Federal Aviation Administration, 49 U.S.C. §§ 1471, 1473(b) (1970) are specific on this point. The unspecific provision of Section 20(b) of the Consumer Product Safety Act is very similar to the civil penalty provision of the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1398(b) (Supp. 1973). In implementing the latter, the National Highway and Traffic Safety Administration does not use an adjudicative process to impose the penalties. Penalty assessments are either settled at the administrative level or referred to the Department of Justice for collection through civil action. Of course the Commission can bring such a civil suit in its own name. Section 27(b)(7).
\textsuperscript{181} Section 21.
\textsuperscript{182} E.g., Sections 19(a)(3), 19(a)(5).
"imminently hazardous" consumer products. Such a product is defined as one which "presents imminent and unreasonable risk of death, serious illness, or severe personal injury." Section 12(a) provides specifically that such an action may be filed whether or not there is an outstanding safety rule banning or setting a standard for the product, and whether or not other administrative or judicial proceedings are pending under the Act. Since with respect to products violating an applicable rule the remedy under Section 12 essentially duplicates that under Section 22, the basic thrust of Section 12 appears directed against those products not covered by any applicable rule and those products which, although they are in compliance or arguably in compliance with an applicable rule, nevertheless appear to pose imminent hazards.

One potential difficulty with respect to Section 12 is that it appears to call upon the courts for what is primarily an administrative or legislative decision, that is, the initial determination as to whether a product, which does not violate any outstanding order or regulation, presents an imminent and unreasonable risk. For this reason, and also because the Commission's pressing of suit under Section 12 enables it to evade the more elaborate procedures required under Section 9 and Section 15, it seems likely that the courts will demand an extraordinary showing on the part of the Commission to justify a grant of relief.

C. Judicial Relief for Private Parties

Sections 23 and 24 create private rights of action to supplement official enforcement of the Act. Section 23 permits damage suits in the federal district courts for injuries sustained by reason of any knowing or willful violation of a safety rule or other rule or order issued under the Act. The amount in controversy must exceed $10,000. This damage remedy is in addition to and not in lieu of other remedies existing under statute or common law. Section 24 empowers any "interested person" to seek injunctive relief for violation of safety rules or orders issued under Section 15. No injury to the plaintiff need be shown; his intended role is that of a "private attorney general." However, before bringing a suit under Section 24 the prospective plaintiff must give thirty days notice to the Attorney General, the Commission, and the prospective defendant. No suit will lie if the same alleged violation is the subject of a pending civil or criminal ac-

---

183 Section 12(a).
185 Section 23(b).
tion by the government (though it may be brought while an administrative proceeding is pending under Section 15). The notice provision therefore provides opportunity for the private suit to be foreclosed by both the prospective defendant (through compliance) and the government (through commencement of a civil or criminal action of its own).

It seems somewhat doubtful that the Section 23 remedy will prove significant, because it duplicates existing common-law or statutory remedies (tort or breach of warranty) and requires an additional showing of knowing violation. It does, however, afford access to the federal courts which otherwise might not exist, and may thus offer tactical advantages.

Section 24 is far more significant. It is evidently intended to deal with the failure of enforcement authorities to act with sufficient zeal. Conceivably, Section 24 suits might prove of value to the Commission in circumstances where its own failure to act was attributable to lack of resources; in many cases, however, the failure to act will be based on a disagreement with the prospective plaintiff as to the merits of the case or the importance of the violation. In addition to the possibility that Section 24 might be misused by well-meaning consumers and consumer groups, there is the risk of its being abused by competing manufacturers or distributors.

While suits under Sections 23 and 24 are between private parties, the Commission is not necessarily relegated to the role of an observer. Rule 24(b) of the Federal Rules of Civil Procedure provides:

When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.\(^{136}\)

Thus the Commission may, in the discretion of the court, intervene to present its own position with respect to the asserted violation.

D. Relationship Between the Commission and the Department of Justice

Most federal departments and agencies either rely entirely on the Department of Justice for representation in litigation or

\(^{136}\) Fed. R. Civ. P. 24(b).
have authority to be represented by their own attorneys and to control their own litigation (subject to the Solicitor General's control of all Supreme Court litigation involving the government). The independent regulatory commissions are generally in the latter category.

The Consumer Product Safety Act puts the Commission in a middle position. It has authority to appear in court in its own name and by its own attorneys,\(^{187}\) but under an unusual degree of control by the Department of Justice. The Commission's authority under Section 27(b)(7) to litigate through its own attorneys is qualified by the words "with the concurrence of the Attorney General"—who is apparently to exercise whatever degree of control he chooses, including insistence upon the Department's own attorneys. There are similar provisions in several other sections of the Act: Injunction suits by the Commission under Section 22(a) must be brought "with the concurrence of the Attorney General";\(^{188}\) judicial enforcement, under Section 27(c), of Commission subpoenas or similar orders may be sought "with the concurrence of the Attorney General." On the other hand, in actions brought under Section 12 the Commission is authorized to direct attorneys employed by it to appear and represent it "[n]otwithstanding any other provision of law."\(^{189}\)

In those sections providing for suits against the Commission (Sections 10 and 11), there is no special provision regarding control of litigation, and Section 27(b)(7) would presumably govern, as it would in situations involving non-statutory review of Commission actions (e.g., a suit to review a Commission rule other than a product safety rule, or a suit to review a Commission order issued under Section 15).

The relationship of Section 27(b)(7) to the other specific provisions regarding control of litigation is somewhat puzzling. Section 12(f) appears to have been intended as an exception to Section 27(b)(7), and there is legislative history to this effect.\(^{190}\) The provisions regarding Attorney General concurrence contained in Sections 22(a) and 27(c) appear to duplicate Section 27(b)(7) and probably should be regarded as surplusage. It might be argued, however, that while Sec-

\(^{187}\) Section 27(b)(7).
\(^{188}\) Such concurrence is not specifically required, however, for libels under Section 22(b). This is probably an oversight.
\(^{189}\) Section 12(f).
\(^{190}\) Congressman Broyhill stated in the floor debate: "Except as to injunction proceedings for imminent hazards..., the basic control of litigation was left with the Department of Justice." 118 Cong. Rec. H. 9909 (daily ed. Oct. 13, 1972).
tion 27(b)(7) would be satisfied by some sort of general and prospective concurrence by the Attorney General in Commission control of its own litigation, the former provisions can be satisfied only by concurrence in the particular suit or proceeding.

CONCLUSION

The Consumer Product Safety Act was not, of course, intended as a textbook study of administrative procedure, and analysis of it from that standpoint alone is as inadequate as a geometrical description of a rose. Nevertheless, it is fair to say that the framers of this legislation were more than usually attentive to matters of procedural detail, and displayed rare inventiveness in a conscious effort to fashion a process which makes maximum use of the expertise available in the private sector and permits maximum participation by industry and consumer interests in the standard-setting process, while at the same time reserving to the commission that measure of discretion and authority necessary to permit it to efficiently and effectively carry out its responsibilities.\textsuperscript{101}

The success of the legislation will depend upon whether the balance between these competing procedural objectives was wisely struck and can be effectively maintained.

It is never possible to predict with assurance the operation and effect of new legislation—especially when it is to be implemented by a newly created agency not yet fully staffed. Much depends upon the vigor and strictness of implementation. Here, that normal uncertainty is compounded by the extraordinary degree to which private parties have been empowered to initiate standard-development and enforcement activities.

The key question, which time alone can answer, is whether these vague procedural opportunities will prove to be of greater benefit to consumers or to the affected commercial interests. It seems likely that the Section 7 provision for private standard-development will be used chiefly by industry groups; that, at least, was the expectation which led Ralph Nader and other consumer spokesmen to oppose this feature of the Act. Experience suggests, ironically, that industry may also be the principal beneficiary of the Section 10 provision enabling private individuals, with judicial assistance, to compel initiation of the rulemaking process.\textsuperscript{102} In this connection, the elimination of the consumer-advocate proposal of the original NCPS bill is highly significant, since it was specifically designed to insure that these “extra-


\textsuperscript{102} See note 125 supra.
agency" initiatives would be taken for the benefit of the consumer. Without that provision, one suspects that the procedural opportunities afforded by this legislation will (like most procedural opportunities) be grasped principally by those groups that are sufficiently cohesive and have enough at stake to warrant the legal costs—in a word, by commercial rather than consumer interests. The issue, however, is not yet closed, since separate legislation establishing a federal consumer advocate to appear before other federal agencies is now pending in both houses of Congress. 193

Finally, one must note the probability—and the desirability—that this legislation will be revised during the first few years of its operation. It obviously contains some loose ends—such as the requirement that the Commission exercise those product safety functions transferred from existing agencies only in accordance with the procedures established by prior legislation. With the adoption of omnibus product safety regulation, it makes little sense to continue without modification the special provisions of earlier piecemeal legislation—provisions that will repeatedly confront the Commission with unnecessary questions of product classification and force it to shift from one procedural scheme to another. It is understandable that this arrangement was left untouched in the closing weeks of the session in order to secure enactment of this controversial legislation; but it seems unlikely to survive, especially since the Commission itself can be expected to press for its elimination.

It is desirable for other reasons, too, that Congress keep a watchful eye on the Act during the early years of its operation and remain receptive to proposals for modification. Many of the provisions, particularly in the area of administrative procedures, are admittedly experimental; like all experiments, they should be closely and carefully evaluated. Congress apparently recognized this when it limited the appropriations authorization for the new agency to three fiscal years, and thereby ensured a second Congressional look at the Commission in 1975. Even that date may be too early to permit sound conclusions from initial experience under the law, especially since some of its most innovative provisions do not become operative until 1975. One can hope, however, that the necessary funding revision will prompt the Congress to take at least the first step in the continuing refinement of what may prove to be pioneering legislation.

CONSUMER PRODUCT SAFETY ACT

APPENDIX

CONSUMER PRODUCT SAFETY ACT

Public Law 92-573
92nd Congress, S. 3419-2
October 28, 1972

An Act

To protect consumers against unreasonable risk of injury from hazardous products, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE; TABLE OF CONTENTS

SECTION 1. This Act may be cited as the "Consumer Product Safety Act".

TABLE OF CONTENTS

Sec. 1. Short title; table of contents.
Sec. 2. Findings and purposes.
Sec. 3. Definitions.
Sec. 5. Product safety information and research.
Sec. 6. Public disclosure of information.
Sec. 7. Consumer product safety standards.
Sec. 8. Banned hazardous products.
Sec. 9. Administrative procedure applicable to promulgation of consumer product safety rules.
Sec. 10. Commission responsibility—petition for consumer product safety rule.
Sec. 11. Judicial review of consumer product safety rules.
Sec. 13. Imminent hazards.
Sec. 15. Product certification and labeling.
Sec. 16. Notification and repair, replacement, or refund.
Sec. 17. Inspection and recordkeeping.
Sec. 18. Imports.
Sec. 19. Prohibited acts.
Sec. 20. Civil penalties.
Sec. 21. Criminal penalties.
Sec. 22. Injunctive enforcement and seizure.
Sec. 23. Suits for damages by persons injured.
Sec. 24. Private enforcement of product safety rules and of section 15 orders.
Sec. 25. Effect on private remedies.
Sec. 26. Effect on State standards.
Sec. 27. Additional functions of Commission.
Sec. 29. Cooperation with States and with other Federal agencies.
Sec. 30. Transfers of functions.
Sec. 31. Limitation on jurisdiction.
Sec. 32. Authorization of appropriations.
Sec. 33. Separability.
Sec. 34. Effective date.
FINDINGS AND PURPOSES

Sec. 2. (a) The Congress finds that—
(1) an unacceptable number of consumer products which present unreasonable risks of injury are distributed in commerce;
(2) complexities of consumer products and the diverse nature and abilities of consumers using them frequently result in an inability of users to anticipate risks and to safeguard themselves adequately;
(3) the public should be protected against unreasonable risks of injury associated with consumer products;
(4) control by State and local governments of unreasonable risks of injury associated with consumer products is inadequate and may be burdensome to manufacturers;
(5) existing Federal authority to protect consumers from exposure to consumer products presenting unreasonable risks of injury is inadequate; and
(6) regulation of consumer products the distribution or use of which affects interstate or foreign commerce is necessary to carry out this Act.

(b) The purposes of this Act are—
(1) to protect the public against unreasonable risks 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.

DEFINITIONS

Sec. 3. (a) For purposes of this Act:
(1) The term “consumer product” 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
(B) tobacco and tobacco products,
(C) motor vehicles or motor vehicle equipment (as defined by sections 102(3) and (4) of the National Traffic and Motor Vehicle Safety Act of 1966),
(D) economic poisons (as defined by the Federal Insecticide, Fungicide, and Rodenticide Act),
(E) any article which, if sold by the manufacturer, producer, or importer, would be subject to the tax imposed by section 4181 of the Internal Revenue Code of 1954 (determined without regard to any exemptions from such tax.
provided by section 4182 or 4221, or any other provision of such Code), or any component of any such article,

(F) aircraft, aircraft engines, propellers, or appliances (as defined in section 101 of the Federal Aviation Act of 1958),

(G) boats which could be subjected to safety regulation under the Federal Boat Safety Act of 1971 (46 U.S.C. 1451 et seq.); vessels, and appurtenances to vessels (other than such boats) which could be subjected to safety regulation under title 52 of the Revised Statutes or other marine safety statutes administered by the department in which the Coast Guard is operating; and equipment (including associated equipment, as defined in section 3(8) of the Federal Boat Safety Act of 1971) to the extent that a risk of injury associated with the use of such equipment on boats or vessels could be eliminated or reduced by actions taken under any statute referred to in this subparagraph,

(H) drugs, devices, or cosmetics (as such terms are defined in sections 201(g), (h), and (i) of the Federal Food, Drug, and Cosmetic Act), or

(I) food. The term "food", as used in this subparagraph means all "food", as defined in section 201(f) of the Federal Food, Drug, and Cosmetic Act, including poultry and poultry products (as defined in sections 4(c) and (f) of the Poultry Products Inspection Act), meat meat food products (as defined in section 1(j) of the Federal Meat Inspection Act), and eggs and egg products (as defined in section 4 of the Egg Products Inspection Act).

See sections 30(d) and 31 of this Act, for limitations on Commission's authority to regulate certain consumer products.

(2) The term "consumer product safety rule" means a consumer product safety standard described in section 7(a), or a rule under this Act declaring a consumer product a banned hazardous product.

(3) The term "risk of injury" means a risk of death, personal injury, or serious or frequent illness.

(4) The term "manufacturer" means any person who manufactures or imports a consumer product.

(5) The term "distributor" means a person to whom a consumer product is delivered or sold for purposes of distribution in commerce, except that such term does not include a manufacturer or retailer of such product.

(6) The term "retailer" means a person to whom a consumer product is delivered or sold for purposes of sale or distribution by such person to a consumer.

(7) (A) The term "private labeler" means an owner of a brand or trademark on the label of a consumer product which bears a private label.

(B) A consumer product bears a private label if (i) the product (or its container) is labeled with the brand or trademark of a person other than a manufacturer of the product, (ii) the person with whose brand or trademark the product (or container) is labeled has authorized or caused the product to be so labeled, and (iii) the brand or
trademark of a manufacturer of such product does not appear on such label.

(8) The term "manufactured" means to manufacture, produce, or assemble.


(10) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, Wake Island, Midway Island, Kingman Reef, Johnston Island, the Canal Zone, American Samoa, or the Trust Territory of the Pacific Islands.

(11) The terms "to distribute in commerce" and "distribution in commerce" mean to sell in commerce, to introduce or deliver for introduction into commerce, or to hold for sale or distribution after introduction into commerce.

(12) The term "commerce" means trade, traffic, commerce, or transportation—
(A) between a place in a State and any place outside thereof, or
(B) which affects trade, traffic, commerce, or transportation described in subparagraph (A).

(13) The terms "import" and "importation" include reimporting a consumer product manufactured or processed, in whole or in part, in the United States.

(14) The term "United States", when used in the geographic sense, means all of the States (as defined in paragraph 10).

(b) A common carrier, contract carrier, or freight forwarder shall not, for purposes of this Act, be deemed to be a manufacturer, distributor, or retailer of a consumer product solely by reason of receiving or transporting a consumer product in the ordinary course of its business as such a carrier or forwarder.

CONSUMER PRODUCT SAFETY COMMISSION

SEC. 4. (a) An independent regulatory commission is hereby established, to be known as the Consumer Product Safety Commission, consisting of five Commissioners who shall be appointed by the President, by and with the advice and consent of the Senate, one of whom shall be designated by the President as Chairman. The Chairman, when so designated, shall act as Chairman until the expiration of his term of office as Commissioner. Any member of the Commission may be removed by the President for neglect of duty or malfeasance in office but for no other cause.

(b)(1) Except as provided in paragraph (2), (A) the Commissioners first appointed under this section shall be appointed for terms ending three, four, five, six, and seven years, respectively, after the date of the enactment of this Act, the term of each to be designated by the President at the time of nomination; and (B) each of their successors shall be appointed for a term of seven years from the date of the expiration of the term for which his predecessor was appointed.

(2) Any Commissioner appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the remainder of such term. A Commissioner may continue to serve after the expiration of his term un-
In carrying out any of his functions under the provisions of this subsection the Chairman shall be governed by general policies of the Commission and by such regulatory decisions, findings, and determinations as the Commission may by law be authorized to make.

(1) The Chairman, subject to the approval of the Commission, shall appoint an Executive Director, a General Counsel, a Director of Engineering Sciences, a Director of Epidemiology, and a Director of Information. No individual so appointed may receive pay in excess of the annual rate of basic pay in effect for grade GS-18 of the General Schedule.

(2) The Chairman, subject to subsection (f)(2), may employ such other officers and employees (including attorneys) as are necessary in the execution of the Commission's functions. No full-time officer or employee of the Commission who was at any time during the 12 months preceding the termination of his employment with the Commission compensated at a rate in excess of the annual rate of basic pay in effect for grade GS-14 of the General Schedule, shall accept employment or compensation from any manufacturer subject to this Act, for a period of 12 months after terminating employment with the Commission.

(b) (1) Section 5314 of title 5, United States Code, is amended by adding at the end thereof the following new paragraph:
“(59) Chairman, Consumer Product Safety Commission.”

(2) Section 5315 of such title is amended by adding at the end thereof the following new paragraph:

“(97) Members, Consumer Product Safety Commission (4).”

PRODUCT SAFETY INFORMATION AND RESEARCH

SEC. 5. (a) The Commission shall—

(1) maintain an injury information Clearinghouse to collect, investigate, analyze, and disseminate injury data and information, relating to the causes and prevention of death, injury, and illness associated with consumer products; and

(2) conduct such continuing studies and investigations of deaths, injuries, diseases, other health impairments, and economic losses resulting from accidents involving consumer products as it deems necessary.

(b) The Commission may—

(1) conduct research, studies, and investigations on the safety of consumer products and on improving the safety of such products;

(2) test consumer products and develop product safety test methods, and assist public and private organizations, administratively and technically, in the development of safety standards and test methods.

(3) offer training in product safety investigation and test methods, and assist public and private organizations, administratively and technically, in the development of safety standards and test methods.

(c) In carrying out its functions under this section, the Commission may make grants or enter into contracts for the conduct of such functions with any person (including a governmental entity).

(d) Whenever the Federal contribution for any information, research, or development activity authorized by this Act is more than minimal, the Commission shall include in any contract, grant, or other arrangement for such activity, provisions effective to insure that the rights to all information, uses, processes, patents, and other developments resulting from that activity will be made available to the public without charge on a nonexclusive basis. Nothing in this subsection shall be construed to deprive any person of any right which he may have had, prior to entering into any arrangement referred to in this subsection, to any patent, patent application, or invention.

PUBLIC DISCLOSURE OF INFORMATION

SEC. 6. (a)(1) Nothing contained in this Act shall be deemed to require the release of any information described by subsection (b) of section 552, title 5, United States Code, or which is otherwise protected by law from disclosure to the public.

(2) All information reported to or otherwise obtained by the Commission or its representative under this Act which information contains or relates to a trade secret or other matter referred to in section 1905 of title 18, United States Code, shall be considered confidential and shall not be disclosed, except that such information may be disclosed to other officers or employees concerned with carrying out this Act or when relevant in any proceeding under this Act. Nothing in this Act
shall authorize the withholding of information by the Commission or any officer or employee under its control from the duly authorized committees of the Congress.

(b)(1) Except as provided by paragraph (2) of this subsection, not less than 30 days prior to its public disclosure of any information obtained under this Act, or to be disclosed to the public in connection therewith (unless the Commission finds out that the public health and safety requires a lesser period of notice), the Commission shall, to the extent practicable, notify, and provide a summary of the information to, each manufacturer or private labeler of any consumer product to which such information pertains, if the manner in which such consumer product is to be designated or described in such information will permit the public to ascertain readily the identity of such manufacturer or private labeler, and shall provide such manufacturer or private labeler with a reasonable opportunity to submit comments to the Commission in regard to such information. The Commission shall take reasonable steps to assure, prior to its public disclosure thereof, that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of this Act. If the Commission finds that, in the administration of this Act, it has made public disclosure of inaccurate or misleading information which reflects adversely upon the safety of any consumer product, or the practices of any manufacturer, private labeler, distributor, or retailer of consumer products, it shall, in a manner similar to that in which such disclosure was made, publish a retraction of such inaccurate or misleading information.

(2) Paragraph (1) (except for the last sentence thereof) shall not apply to the public disclosure of (A) information about any consumer product with respect to which product the Commission has filed an action under section 12 (relating to imminently hazardous products), or which the Commission has reasonable cause to believe is in violation of section 19 (relating to prohibited acts, or (B) information in the course of or concerning any administrative or judicial proceeding under this Act.

(c) The Commission shall communicate to each manufacturer of a consumer product, insofar as may be practicable, information as to any significant risk of injury associated with such product.

CONSUMER PRODUCT SAFETY STANDARDS

Sec. 7. (a) The Commission may by rule, in accordance with this section and section 9, promulgate consumer product safety standards. A consumer product safety standard shall consist of one or more of any of the following types of requirements:

(1) Requirements as to performance, composition, contents, design, construction, finish, or packaging of a consumer product.

(2) Requirements that a consumer product be marked with or accompanied by clear and adequate warnings or instructions, or requirements respecting the form of warnings or instructions.

Any requirement of such a standard shall be reasonably necessary to prevent or reduce an unreasonable risk of injury associated with such product. The requirements of such a standard (other than requirements relating to labeling, warnings, or instructions) shall, whenever feasible, be expressed in terms of performance requirements.
(b) A proceeding for the development of a consumer product safety standard under this Act shall be commenced by the publication in the Federal Register of a notice which shall—

1. Identify the product and the nature of the risk of injury associated with the product;
2. State the Commission’s determination that a consumer product safety standard is necessary to eliminate or reduce the risk of injury;
3. Include information with respect to any existing standard known to the Commission which may be relevant to the proceeding; and
4. Include an invitation for any person, including any State or Federal agency (other than the Commission), within 30 days after the date of publication of the notice (A) to submit to the Commission an existing standard as the proposed consumer product safety standard or (B) to offer to develop the proposed consumer product safety standard.

An invitation under paragraph (4)(B) shall specify a period of time, during which the standard is to be developed, which shall be a period ending 150 days after the publication of the notice, unless the Commission for good cause finds (and includes such finding in the notice) that a different period is appropriate.

(c) If the Commission determines that (1) there exists a standard which has been issued or adopted by any Federal agency or by any other qualified agency, organization, or institution, and (2) such standard if promulgated under this Act, would eliminate or reduce the unreasonable risk of injury associated with the product, then it may, in lieu of accepting an offer pursuant to subsection (d) of this section, publish such standard as a proposed consumer product safety rule.

(d) (1) Except as provided by subsection (c), the Commission shall accept one, and may accept more than one, offer to develop a proposed consumer product safety standard pursuant to the invitation prescribed by subsection (b)(4)(B), if it determines that the offeror is technically competent, is likely to develop an appropriate standard within the period specified in the invitation under subsection (b), and will comply with regulations of the Commission under paragraph (3) of this subsection. The Commission shall publish in the Federal Register the name and address of each person whose offer it accepts, and a summary of the terms of such offer as accepted.

2. If an offer is accepted under this subsection, the Commission may agree to contribute to the offeror’s cost in developing a proposed consumer product safety standard, in any case in which the Commission determines that such contribution is likely to result in a more satisfactory standard than would be developed without such contribution, and that the offeror is financially responsible. Regulations of the Commission shall set forth the items of cost in which it may participate, and shall exclude any contribution to the acquisition of land or buildings.

3. The Commission shall prescribe regulations governing the development of proposed consumer product safety standards by persons whose offers are accepted under paragraph (1). Such regulations shall include requirements—

(A) that standards recommended for promulgation be suitable for promulgation under this Act, be supported by test data or
such other documents or materials as the Commission may reasonably require to be developed, and (where appropriate) contain suitable test methods for measurement of compliance with such standards;

(B) for notice and opportunity by interested persons (including representatives of consumers and consumer organizations) to participate in the development of such standards;

(C) for the maintenance of records, which shall be available to the public, to disclose the course of the development of standards recommended for promulgation, the comments and other information submitted by any person in connection with such development (including dissenting views and comments and information with respect to the need for such recommended standards), and such other matters as may be relevant to the evaluation of such recommended standards; and

(D) that the Commission and the Comptroller General of the United States, or any of their duly authorized representatives, have access for the purpose of audit and examination to any books, documents, papers, and records relevant to the development of such recommended standards or to the expenditure of any contribution of the Commission for the development of such standards.

(e)(1) If the Commission has published a notice of proceeding as provided by subsection (b) of this section and has not, within 30 days after the date of publication of such notice, accepted an offer to develop a proposed consumer product safety standard, the Commission may develop a proposed consumer product safety rule and publish such proposed rule.

(2) If the Commission accepts an offer to develop a proposed consumer product safety standard, the Commission may not, during the development period (specified in paragraph (3)) for such standard—

(A) publish a proposed rule applicable to the same risk of injury associated with such product, or

(B) develop proposals for such standard or contract with third parties for such development, unless the Commission determines that no offeror whose offer was accepted is making satisfactory progress in the development of such standard.

In any case in which the sole offeror whose offer is accepted under subsection (d)(1) of this section is the manufacturer, distributor, or retailer of a consumer product proposed to be regulated by the consumer product safety standard, the Commission may independently proceed to develop proposals for such standard during the development period.

(3) For purposes of paragraph (2), the development period for any standard is a period (A) beginning on the date on which the Commission first accepts an offer under subsection (d)(1) for the development of a proposed standard, and (B) ending on the earlier of—

(i) the end of the period specified in the notice of proceeding (except that the period specified in the notice may be extended if good cause is shown and the reasons for such extension are published in the Federal Register), or

(ii) the date on which it determines (in accordance with such procedures as it may by rule prescribe) that no offeror whose offer was accepted is able and willing to continue satisfactorily
the development of the proposed standard which was the subject of the offer, or

(iii) the date on which an offeror whose offer was accepted submits such a recommended standard to the Commission.

(f) Not more than 210 days after its publication of a notice of proceeding pursuant to subsection (b) (which time may be extended by the Commission by a notice published in the Federal Register stating good cause therefor), the Commission shall publish in the Federal Register a notice withdrawing such notice of proceeding or publish a proposed rule which either proposes a product safety standard applicable to any consumer product subject to such notice, or proposes to declare any such subject product a banned hazardous consumer product.

**BANNED HAZARDOUS PRODUCTS**

**SEC. 8.** Whenever the Commission finds that—

1. a consumer product is being, or will be, distributed in commerce and such consumer product presents an unreasonable risk of injury; and

2. no feasible consumer product safety standard under this Act would adequately protect the public from the unreasonable risk of injury associated with such product,

the Commission may propose and, in accordance with section 9, promulgate a rule declaring such product a banned hazardous product.

**ADMINISTRATIVE PROCEDURE APPLICABLE TO PROMULGATION OF CONSUMER PRODUCT SAFETY RULES**

**SEC. 9.** (a)(1) Within 60 days after the publication under section 7(c), (e)(1), or (f) or section 8 of a proposed consumer product safety rule respecting a risk of injury associated with a consumer product, the Commission shall—

(A) promulgate a consumer product safety rule respecting the risk of injury associated with such product if it makes the findings required under subsection (e), or

(B) withdraw by rule the applicable notice of proceeding if it determines that such rule is not (i) reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with the product, or (ii) in the public interest; except that the Commission may extend such 60-day period for good cause shown (if it punishes its reasons therefor in the Federal Register).

(2) Consumer product safety rules which have been proposed under section 7(c), (e)(1), or (f) or section 8 shall be promulgated pursuant to section 553 of title 5, United States Code, except that the Commission shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions. A transcript shall be kept of any oral presentation.

(b) A consumer product safety rule shall express in the rule itself the risk of injury which the standard is designed to eliminate or reduce. In promulgating such a rule the Commission shall consider relevant available product data including the results of research, development, testing, and investigation activities conducted generally and pursuant to this Act.
(c)(1) Prior to promulgating a consumer product safety rule, the Commission shall consider, and shall make appropriate findings for inclusion in such rule with respect to—

(A) the degree and nature of the risk of injury the rule is designed to eliminate or reduce;

(B) the approximate number of consumer products, or types or classes thereof, subject to such rule;

(C) 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

(D) 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.

(2) The Commission shall not promulgate a consumer product safety rules unless it finds (and includes such finding in the rule)—

(A) that the rule (including its effective date) is reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with such product;

(B) that the promulgation of the rule is in the public interest; and

(C) in the case of a rule declaring the product a banned hazardous product, that no feasible consumer product safety standard under this Act would adequately protect the public from the unreasonable risk of injury associated with such product.

(d)(1) Each consumer product safety rule shall specify the date such rule is to take effect not exceeding 180 days from the date promulgated, unless the Commission finds, for good cause shown, that a later effective date is in the public interest and publishes its reasons for such finding. The effective date of a consumer product safety standard under this Act shall be set at a date at least 30 days after the date of promulgation unless the Commission for good cause shown determines that an earlier effective date is in the public interest. In no case may the effective date be set at a date which is earlier than the date of promulgation. A consumer product safety standard shall be applicable only to consumer products manufactured after the effective date.

(2) The Commission may by rule prohibit a manufacturer of a consumer product from stockpiling any product to which a consumer product safety rule applies, so as to prevent such manufacturer from circumventing the purpose of such consumer product safety rule. For purposes of this paragraph, the term "stockpiling" means manufacturing or importing a product between the date of promulgation of such consumer product safety rule and its effective date at a rate which is significantly greater (as determined under the rule under this paragraph) than the rate at which such product was produced or imported during a base period (prescribed in the rule under this paragraph) ending before the date of promulgation of the consumer product safety rule.

(e) The Commission may by rule amend or revoke any consumer product safety rule. Such amendment or revocation shall specify the date on which it is to take effect which shall not exceed 180 days from the date the amendment or revocation is published unless the Commission finds for good cause shown that a later effective date is in the public interest and publishes its reasons for such finding. Where an
amendment involves a material change in a consumer product safety rule, sections 7 and 8, and subsections (a) through (d) of this section shall apply. In order to revoke a consumer product safety rule, the Commission shall publish a proposal to revoke such rule in the Federal Register, and allow oral and written presentations in accordance with subsection (a)(2) of this section. It may revoke such rule only if it determines that the rule is not reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with the product. Section 11 shall apply to any amendment of a consumer product safety rule which involves a material change and to any revocation of a consumer product safety rule, in the same manner and to the same extent as such section applies to the Commission’s action in promulgating such a rule.

COMMISSION RESPONSIBILITY—PETITION FOR CONSUMER PRODUCT SAFETY RULE

SEC. 10. (a) Any interested person, including a consumer or consumer organization, may petition the Commission to commence a proceeding for the issuance, amendment, or revocation of a consumer product safety rule.

(b) Such petition shall be filed in the principal office of the Commission and shall set forth (1) facts which it is claimed establish that a consumer product safety rule or an amendment or revocation thereof is necessary, and (2) a brief description of the substance of the consumer product safety rule or amendment thereof which it is claimed should be issued by the Commission.

(c) The Commission may hold a public hearing or may conduct such investigation or proceeding as it deems appropriate in order to determine whether or not such petition should be granted.

(d) Within 120 days after filing of a petition described in subsection (b), the Commission shall either grant or deny the petition. If the Commission grants such petition, it shall promptly commence an appropriate proceeding under section 7 or 8. If the Commission denies such petition it shall publish in the Federal Register its reasons for such denial.

(e) (1) If the Commission denies a petition made under this section (or if it fails to grant or deny such petition within the 120-day period) the petitioner may commence a civil action in a United States district court to compel the Commission to initiate a proceeding to take the action requested. Any such action shall be filed within 60 days after the Commission’s denial of the petition, or (if the Commission fails to grant or deny the petition within 120 days after filing the petition) within 60 days after the expiration of the 120-day period.

(2) If the petitioner can demonstrate to the satisfaction of the court, by a preponderance of evidence in a de novo proceeding before such court, that the consumer product presents an unreasonable risk of injury, and that the failure of the Commission to initiate a rulemaking proceeding under section 7 or 8 unreasonably exposes the petitioner or other consumers to a risk of injury presented by the consumer product, the court shall order the Commission to initiate the action requested by the petitioner.

(3) In any action under this subsection, the district court shall have no authority to compel the Commission to take any action other
than the initiation of a rule-making proceeding in accordance with section 7 or 8.

(f) The remedies under this section shall be in addition to, and not in lieu of, other remedies provided by law.

(g) Subsection (e) of this section shall apply only with respect to petitions filed more than 3 years after the date of enactment of this Act.

JUDICIAL REVIEW OF CONSUMER PRODUCT SAFETY RULES

SEC. 11. (a) Not later than 60 days after a consumer product safety rule is promulgated by the Commission, any person adversely affected by such rule, or any consumer or consumer organization, may file a petition with the United States court of appeals for the District of Columbia for the circuit in which such person, consumer, or organization resides or has his principal place of business for judicial review of such rule. Copies of the petition shall be forthwith transmitted by the clerk of the court to the Commission or other officer designated by it for that purpose and to the Attorney General. The Commission shall transmit to the Attorney General, who shall file in the court, the record of the proceedings on which the Commission based its rule, as provided in section 2112 of title 28 of the United States Code. For purposes of this section, the term "record" means such consumer product safety rule; any notice or proposal published pursuant to section 7, 8, or 9; the transcript required by section 9(a)(2) of any oral presentation; any written submission of interested parties; and any other information which the Commission considers relevant to such rule.

(b) If the petitioner applies to the court for leave to adduce additional data, views, or arguments and shows to the satisfaction of the court that such additional data, views, or arguments are material and that there were reasonable grounds for the petitioner's failure to adduce such data, views, or arguments in the proceeding before the Commission, the court may order the Commission to provide additional opportunity for the oral presentation of data, views, or arguments and for written submissions. The Commission may modify its findings, or make new findings by reason of the additional data, views, or arguments so taken and shall file such modified or new findings, and its recommendation, if any, or the modification or setting aside of its original rule, with the return of such additional data, views, or arguments.

(c) Upon the filing of the petition under subsection (a) of this section the court shall have jurisdiction to review the consumer product safety rule in accordance with chapter 7 of title 5, United States Code, and to grant appropriate relief, including interim relief, as provided in such chapter. The consumer product safety rule shall not be affirmed unless the Commission's findings under section 9(c) are supported by substantial evidence on the record taken as a whole.

(d) The judgment of the court affirming or setting aside, in whole or in part, any consumer product safety rule shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification, as provided in section 1254 of title 28 of the United States Code.

(e) The remedies provided for in this section shall be in addition to and not in lieu of any other remedies provided by law.
IMMINENT HAZARDS

SEC. 12. (a) The Commission may file in a United States district court an action (1) against an imminently hazardous consumer product for seizure of such product under subsection (b)(2), or (2) against any person who is a manufacturer, distributor, or retailer of such product, or (3) against both. Such an action may be filed notwithstanding the existence of a consumer product safety rule applicable to such product, or the pendency of any administrative or judicial proceedings under any other provision of this Act. As used in this section, and hereinafter in this Act, the term “imminently hazardous consumer product” means a consumer product which presents imminent and unreasonable risk of death, serious illness, or severe personal injury.

(b)(1) The district court in which such action is filed shall have jurisdiction to declare such product an imminently hazardous consumer product, and (in the case of an action under subsection (a)(2)) to grant (as ancillary to such declaration or in lieu thereof) such temporary or permanent relief as may be necessary to protect the public from such risk. Such relief may include a mandatory order requiring the notification of such risk to purchasers of such product known to the defendant, public notice, the recall, the repair or the replacement of, or refund for, such product.

(2) In the case of an action under subsection (a)(1), the consumer product may be proceeded against by process of libel for the seizure and condemnation of such product in any United States district court within the jurisdiction of which such consumer product is found. Proceedings and cases instituted under the authority of the preceding sentence shall conform as nearly as possible to proceedings in rem in admiralty.

(c) Where appropriate, concurrently with the filing of such action or as soon thereafter as may be practicable, the Commission shall initiate a proceeding to promulgate a consumer product safety rule applicable to the consumer product with respect to which such action is filed.

(d)(1) Prior to commencing an action under subsection (a), the Commission may consult the Product Safety Advisory Council (established under section 28) with respect to its determination to commence such action, and request the Council’s recommendations as to the type of temporary or permanent relief which may be necessary to protect the public.

(2) The Council shall submit its recommendations to the Commission within one week of such request.

(3) Subject to paragraph (2), the Council may conduct such hearing or offer such opportunity for the presentation of views as it may consider necessary or appropriate.

(e)(1) An action under subsection (a)(2) of this section may be brought in the United States district court for the District of Columbia, or in any judicial district in which any of the defendants is found, is an inhabitant or transacts business; and process in such an action may be served on a defendant in any other district in which such defendant resides or may be found. Subpoenas requiring attendance of witnesses in such an action may run into any other district. In determining the judicial district in which an action may be brought under this section in instances in which such action may be brought in more than
one judicial district, the Commission shall take into account the convenience of the parties.

(2) Whenever proceedings under this section involving substantially similar consumer products are pending in courts in two or more judicial districts, they shall be consolidated for trial by order of any such court upon application reasonably made by any party in interest, upon notice to all other parties in interest.

(f) Notwithstanding any other provision of law, in any action under this section, the Commission may direct attorneys employed by it to appear and represent it.

SECTION 13

(a) The Commission may, by rule, prescribe procedures for the purpose of ensuring that the manufacturer of any new consumer product furnish notice and a description of such product to the Commission before its distribution in commerce.

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

SECTION 14

(a)(1) Every manufacturer of a product which is subject to a consumer product safety standard under this Act and which is distributed in commerce (and the private labeler of such product if it bears a private label) shall issue a certificate which shall certify that such product conforms to all applicable consumer product safety standards, and shall specify any standard which is applicable. Such certificate shall accompany the product or shall otherwise be furnished to any distributor or retailer to whom the product is delivered. Any certificate under this subsection shall be based on a test of each product or upon a reasonable testing program; shall state the name of the manufacturer or private labeler issuing the certificate; and shall include the date and place of manufacture.

(2) In the case of a consumer product for which there is more than one manufacturer or more than one private labeler, the Commission may by rule designate one or more of such manufacturers or one or more of such private labelers (as the case may be) as the persons who shall issue the certificate required by paragraph (1) of this subsection, and may exempt all other manufacturers of such product or all other private labelers of the product (as the case may be) from the requirement under paragraph (1) to issue a certificate with respect to such product.

(b) The Commission may by rule prescribe reasonable testing programs for consumer products which are subject to consumer product safety standards under this Act and for which a certificate is required under subsection (a). Any test or testing program on the basis of which a certificate is issued under subsection (a) may, at the option of the person required to certify the product, be conducted by an independent third party qualified to perform such tests or testing programs.

(c) The Commission may by rule require the use and prescribe the
form and content of labels which contain the following information (or that portion of it specified in the rule)—

(1) The date and place of manufacture of any consumer product.

(2) A suitable identification of the manufacturer of the consumer product, unless the product bears a private label in which case it shall identify the private labeler and shall also contain a code mark which will permit the seller of such product to identify the manufacturer thereof to the purchaser upon his request.

(3) In the case of a consumer product subject to a consumer product safety rule, a certification that the product meets all applicable consumer product safety standards and a specification of the standards which are applicable.

Such labels, where practicable, may be required by the Commission to be permanently marked on or affixed to any such consumer product. The Commission may, in appropriate cases, permit information required under paragraphs (1) and (2) of this subsection to be coded.

NOTIFICATION AND REPAIR, REPLACEMENT, OR REFUND

SEC. 15. (a) For purposes of this section, the term "substantial product hazard" means—

(1) a failure to comply with an applicable consumer product safety rule which creates a substantial risk of injury to the public, or

(2) a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public.

(b) Every manufacturer of a consumer product distributed in commerce, and every distributor and retailer of such product, who obtains information which reasonably supports the conclusion that such product—

(1) fails to comply with an applicable consumer product safety rule; or

(2) contains a defect which could create a substantial product hazard described in subsection (a)(2), shall immediately inform the Commission of such failure to comply or of such defect, unless such manufacturer, distributor, or retailer has actual knowledge that the Commission has been adequately informed of such defect or failure to comply.

(c) If the Commission determines (after affording interested persons, including consumers and consumer organizations, an opportunity for a hearing in accordance with subsection (f) of this section) that a product distributed in commerce presents a substantial product hazard and that notification is required in order to adequately protect the public from such substantial product hazard, the Commission may order the manufacturer or any distributee or retailer of the product to take any one or more of the following actions:

(1) To give public notice of the defect or failure to comply.

(2) To mail notice to each person who is a manufacturer, distributor, or retailer of such product.

(3) To mail notice to every person to whom the person required to give notice knows such product was delivered or sold.
Any such order shall specify the form and content of any notice required to be given under such order.

(d) If the Commission determines (after affording interested parties, including consumers and consumer organizations, an opportunity for a hearing in accordance with subsection (f)) that a product distributed in commerce presents a substantial product hazard and that action under this subsection is in the public interest, it may order the manufacturer or any distributor or retailer of such product to take whichever of the following actions the person to whom the order is directed elects:

1. To bring such product into conformity with the requirements of the applicable consumer product safety rule or to repair the defect in such product.
2. To replace such product with a like or equivalent product which complies with the applicable consumer product safety rule or which does not contain the defect.
3. To refund the purchase price of such product (less a reasonable allowance for use, if such product has been in the possession of a consumer for one year or more (A) at the time of public notice under subsection (c), or (B) at the time the consumer receives actual notice of the defect or noncompliance, whichever first occurs).

An order under this subsection may also require the person to whom it applies to submit a plan, satisfactory to the Commission, for taking action under whichever of the preceding paragraphs of this subsection under which such person has elected to act. The Commission shall specify in the order the persons to whom refunds must be made if the person to whom the order is directed elects to take the action described in paragraph (3). If an order under this subsection is directed to more than one person, the Commission shall specify which person has the election under this subsection.

(e)(1) No charge shall be made to any person (other than a manufacturer, distributor, or retailer) who avails himself of any remedy provided under an order issued under subsection (d), and the person subject to the order shall reimburse each person (other than a manufacturer, distributor, or retailer) who is entitled to such a remedy for any reasonable and foreseeable expenses incurred by such person in availing himself of such remedy.

2. An order issued under subsection (c) or (d) with respect to a product may require any person who is a manufacturer, distributor, or retailer of the product to reimburse any other person who is a manufacturer, distributor, or retailer of such product for such other person's expenses in connection with carrying out the order, if the Commission determines such reimbursement to be in the public interest.

(f) An order under subsection (c) or (d) may be issued only after an opportunity for a hearing in accordance with section 554 of title 5, United States Code, except that, if the Commission determines that any person who wishes to participate in such hearing is a part of a class of participants who share an identity of interest, the Commission may limit such person's participation in such hearing to participation through a single representative designated by such class (or by the Commission if such class fails to designate such a representative).
INSPECTION AND RECORDKEEPING

SEC. 16. (a) For purposes of implementing this Act, or rules or orders prescribed under this Act, officers or employees duly designated by the Commission, upon presenting appropriate credentials and a written notice from the Commission to the owner, operator, or agent in charge, are authorized—

(1) to enter, at reasonable times, (A) any factory, warehouse, or establishment in which consumer products are manufactured or held, in connection with distribution in commerce, or (B) any conveyance being used to transport consumer products in connection with distribution in commerce; and

(2) to inspect, at reasonable times and in a reasonable manner such conveyance or those areas of such factory, warehouse, or establishment where such products are manufactured, held, or transported and which may relate to the safety of such products. Each such inspection shall be commenced and completed with reasonable promptness.

(b) Every person who is a manufacturer, private labeler, or distributor of a consumer product shall establish and maintain such records, make such reports, and provide such information as the Commission may, by rule, reasonably require for the purposes of implementing this Act, or to determine compliance with rules or orders prescribed under this Act. Upon request of an officer or employee duly designated by the Commission, every such manufacturer, private labeler, or distributor shall permit the inspection of appropriate books, records, and papers relevant to determining whether such manufacturer, private labeler, or distributor has acted or is acting in compliance with this Act and rules under this Act.

IMPORTED PRODUCTS

SEC. 17. (a) Any consumer product offered for importation into the customs territory of the United States (as defined in general headnote 2 to the Tariff Schedules of the United States) shall be refused admission into such customs territory if such product—

(1) fails to comply with an applicable consumer product safety rule;

(2) is not accompanied by a certificate required by section 14, or is not labeled in accordance with regulations under section 14(c);

(3) is or has been determined to be an imminently hazardous consumer product in a proceeding brought under section 12;

(4) has a product defect which constitutes a substantial product hazard (within the meaning of section 15(a)(2)); or

(5) is a product which was manufactured by a person who the Commission has informed the Secretary of the Treasury is in violation of subsection (g).

(b) The Secretary of the Treasury shall obtain without charge and deliver to the Commission, upon the latter's request, a reasonable number of samples of consumer products being offered for import. Except for those owners or consignees who are or have been afforded an opportunity for a hearing in a proceeding under section 12 with respect to an imminently hazardous product, the owner or consignee of the
product shall be afforded an opportunity by the Commission for a hearing in accordance with section 554 of title 5 of the United States Code with respect to the importation of such products into the customs territory of the United States. If it appears from examination of such samples or otherwise that a product must be refused admission under the terms of subsection (a), such product shall be refused admission, unless subsection (c) of this section applies and is complied with.

(c) If it appears to the Commission that any consumer product which may be refused admission pursuant to subsection (a) of this section can be so modified that it need not (under the terms of paragraphs (1) through (3) of subsection (a)) be refused admission, the Commission may defer final determination as to the admission of such product and, in accordance with such regulations as the Commission and the Secretary of the Treasury shall jointly agree to, permit such product to be delivered from customs custody under bond for the purpose of permitting the owner or consignee an opportunity to so modify such product.

(d) All actions taken by an owner or consignee to modify such product under subsection (c) shall be subject to the supervision of an officer or employee of the Commission and of the Department of the Treasury. If it appears to the Commission that the product cannot be so modified or that the owner or consignee is not proceeding satisfactorily to modify such product, it shall be refused admission into the customs territory of the United States, and the Commission may direct the Secretary to demand redelivery of the product into customs custody, and to seize the product in accordance with section 22(b) if it is not so redelivered.

(e) Products refused admission into the customs territory of the United States under this section must be exported, except that upon application, the Secretary of the Treasury may permit the destruction of the product in lieu of exportation. If the owner or consignee does not export the product within a reasonable time, the Department of the Treasury may destroy the product.

(f) All expenses (including travel, per diem or subsistence, and salaries of officers or employees of the United States) in connection with the destruction provided for in this section (the amount of such expenses to be determined in accordance with regulations of the Secretary of the Treasury) and all expenses in connection with the storage, cartage, or labor with respect to any consumer product refused admission under this section, shall be paid by the owner or consignee and, in default of such payment, shall constitute a lien against any future importations made by such owner or consignee.

(g) The Commission may, by rule, condition the importation of a consumer product on the manufacturer's compliance with the inspection and recordkeeping requirements of this Act and the Commission's rules with respect to such requirements.

EXCEPTS

Sec. 18. This Act shall not apply to any consumer product if (1) it can be shown that such product is manufactured, sold, or held for sale for export from the United States (or that such product was imported for export), unless such consumer product is in fact distributed in commerce for use in the United States, and (2) such consumer product when distributed in commerce, or any container in which it is enclosed
when so distributed, bears a stamp or label stating that such consumer product is intended for export; except that this Act shall apply to any consumer product manufactured for sale, offered for sale, or sold for shipment to any installation of the United States located outside of the United States.

PROHIBITED ACTS

SEC. 19. (a) It shall be unlawful for any person to—

(1) manufacture for sale, offer for sale, distribute in commerce, or import into the United States any consumer product which is not in conformity with an applicable consumer product safety standard under this Act;

(2) manufacture for sale, offer for sale, distribute in commerce, or import into the United States any consumer product which has been declared a banned hazardous product by a rule under this Act;

(3) fail or refuse to permit access to or copying of records, or fail or refuse to make reports or provide information, or fail or refuse to permit entry or inspection, as required under this Act or rule thereunder;

(4) fail to furnish information required by section 15(b);

(5) fail to comply with an order issued under section 15(c) or (d) (relating to notification, and to repair, replacement, and refund);

(6) fail to furnish a certificate required by section 14 or issue a false certificate if such person in the exercise of due care has reason to know that such certificate is false or misleading in any material respect; or to fail to comply with any rule under section 14(c) (relating to labeling); or

(7) fail to comply with any rule under section 9(d)(2) (relating to stockpiling).

(b) Paragraphs (1) and (2) of subsection (a) of this section shall not apply to any person (1) who holds a certificate issued in accordance with section 14(a) to the effect that such consumer product conforms to all applicable consumer product safety rules, unless such person knows that such consumer product does not conform, or (2) who relies in good faith on the representation of the manufacturer or a distributor of such product that the product is not subject to an applicable product safety rule.

CIVIL PENALTIES

SEC. 20. (a)(1) Any person who knowingly violates section 19 of this Act shall be subject to a civil penalty not to exceed $2,000 for each such violation. Subject to paragraph (2), a violation of section 19(a)(1), (2), (4), (5), (6), or (7) shall constitute a separate offense with respect to each consumer product involved, except that the maximum civil penalty shall not exceed $500,000 for any related series of violations. A violation of section 19(a)(3) shall constitute a separate violation with respect to each failure or refusal to allow or perform an act required thereby; and, if such violation is a continuing one, each day of such violation shall constitute a separate offense, except that the maximum civil penalty shall not exceed $500,000 for any related series of violations.
(2) The second sentence of paragraph (1) of this subsection
shall not apply to violations of paragraph (1) or (2) of section 19(a)—
(A) if the person who violated such paragraphs is not the
manufacturer or private labeler or a distributor of the products
involved, and
(B) if such person did not have either (i) actual knowledge
that his distribution or sale of the product violated such para-
graphs or (ii) notice from the Commission that such distribution or
sale would be a violation of such paragraphs.
(b) Any civil penalty under this section may be compromised by
the Commission. In determining the amount of such penalty or whether
it should be remitted or mitigated and in what amount, the appropri-
ateness of such penalty to the size of the business of the person charged
and the gravity of the violation shall be considered. The amount of
such penalty when finally determined, or the amount agreed on com-
promise, may be deducted from any sums owing by the United States
to the person charged.
(c) As used in the first sentence of subsection (a)(1) of this
section, the term “knowingly” means (1) the having of actual knowl-
edge, or (2) the presumed having of knowledge deemed to be pos-
essed by a reasonable man who acts in the circumstances, including
knowledge obtainable upon the exercise of due care to ascertain the
truth of representations.

CRIMINAL PENALTIES

Sec. 21. (a) Any person who knowingly and willfully violates
section 19 of this Act after having received notice of noncompliance
from the Commission shall be fined not more than $50,000 or be im-
prisoned not more than one year, or both.
(b) Any individual director, officer, or agent of a corporation
who knowingly and willfully authorizes, orders, or performs any of the
acts or practices constituting in whole or in part a violation of section
19, and who has knowledge of notice of noncompliance received by
the corporation from the Commission, shall be subject to penalties under
this section without regard to any penalties to which that corporation
may be subject under subsection (a).

INJUNCTIVE ENFORCEMENT AND SEIZURE

Sec. 22. (a) The United States district courts shall have juris-
diction to restrain any violation of section 19, or to restrain any person
from distributing in commerce a product which does not comply with
a consumer product safety rule, or both. Such actions may be brought
by the Commission (with the concurrence of the Attorney General) or
by the Attorney General in any United States district court for a dis-
trict wherein any act, omission, or transaction constituting the violation
occurred, or in such court for the district wherein the defendant is
found or transacts business. In any action under this section process
may be served on a defendant in any other district in which the def-
endant resides or may be found.
(b) Any consumer product which fails to conform to an applicable
consumer product safety rule when introduced into or while in
commerce or while held for sale after shipment in commerce shall be li-
able to be proceeded against on libel of information and condemned in any United States district court within the jurisdiction of which such consumer product is found. Proceedings in cases instituted under the authority of this subsection shall conform as nearly as possible to proceedings in rem in admiralty. Whenever such proceedings involving substantially similar consumer products are pending in courts of two or more judicial districts they shall be consolidated for trial by order of any such court upon application reasonably made by any party in interest upon notice to all other parties in interest.

Suits for Damages by Persons Injured

Sec. 23. (a) Any person who shall sustain injury by reason of any knowing (including willful) violation of a consumer product safety rule, or any other rule or order issued by the Commission may sue any person who knowingly (including willfully) violated any such rule or order in any district court of the United States in the district in which the defendant resides or is found or has an agent, subject to the provisions of section 1331 of title 28, United States Code as to the amount in controversy, and shall recover damages sustained, and the cost of suit, including a reasonable attorney's fee, if considered appropriate in the discretion of the court.

(b) The remedies provided for in this section shall be in addition to and not in lieu of any other remedies provided by common law or under Federal or State law.

Private Enforcement of Product Safety Rules and Orders

Sec. 24. Any interested person may bring an action in any United States district court for the district in which the defendant is found or transacts business to enforce a consumer product safety rule or an order under section 15, and to obtain appropriate injunctive relief. Not less than thirty days prior to the commencement of such action, such interested person shall give notice by registered mail to the Commission, to the Attorney General, and to the person against whom such action is directed. Such notice shall state the nature of the alleged violation of any such standard or order, the relief to be requested, and the court in which the action will be brought. No separate suit shall be brought under this section if at the time the suit is brought the same alleged violation is the subject of a pending civil or criminal action by the United States under this Act. In any action under this section, such interested person may elect, by a demand for such relief in his complaint, to recover reasonable attorney's fees, in which case the court shall award the costs of suit, including a reasonable attorney's fee, to the prevailing party.

Effect on Private Remedies

Sec. 25. (a) Compliance with consumer product safety rules or other rules or orders under this Act shall not relieve any person from liability at common law or under State statutory law to any other person.

(b) The failure of the Commission to take any action or commence a proceeding with respect to the safety of a consumer product
shall not be admissible in evidence in litigation at common law or under State statutory law relating to such consumer product.

(c) Subject to sections 6(a)(2) and 6(b) but notwithstanding section 6(a)(1), (1) any accident or investigation report made under this Act by an officer or employee of the Commission shall be made available to the public in a manner which will not identify any injured person or any person treating him, without the consent of the person so identified, and (2) all reports on research projects, demonstration projects, and other related activities shall be public information.

**EFFECT ON STATE STANDARDS**

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 product, unless such requirements are identical to the requirements of the Federal standard.

(b) Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to a consumer product for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

(c) Upon application of a State or political subdivision thereof, the Commission may by rule, after notice and opportunity for oral presentation of views, exempt from the provisions of subsection (a) (under such conditions as it may impose) a proposed safety standard or regulation described in such application, where the proposed standard or regulation (1) imposes a higher level of performance than the Federal standard, (2) is required by compelling local conditions, and (3) does not unduly burden interstate commerce.

**ADDITIONAL FUNCTIONS OF COMMISSION**

SEC. 27. (a) The Commission may, by one or more of its members or by such agents or agency as it may designate, conduct any hearing or other inquiry necessary or appropriate to its functions anywhere in the United States. A Commissioner who participates in such a hearing or other inquiry shall not be disqualified solely by reason of such participation from subsequently participating in a decision of the Commission in the same matter. The Commission shall publish notice of any proposed hearing in the Federal Register and shall afford a reasonable opportunity for interested persons to present relevant testimony and data.

(b) The Commission shall also have the power—

(1) to require, by special or general orders, any person to submit in writing such reports and answers to questions as the Commission may prescribe; and such submission shall be made within such reasonable period and under oath or otherwise as the Commission may determine;
(2) to administer oaths;
(3) to require by subpoena the attendance and testimony of witnesses and the production of all documentary evidence relating to the execution of its duties;
(4) in any proceeding or investigation to order testimony to be taken by deposition before any person who is designated by the Commission and has the power to administer oaths and, in such instances, to compel testimony and the production of evidence in the same manner as authorized under paragraph (3) of this subsection;
(5) to pay witnesses the same fees and mileage as are paid in like circumstances in the courts of the United States;
(6) to accept gifts and voluntary and uncompensated services, notwithstanding the provisions of section 3679 of the Revised Statutes (31 U.S.C. 665(b));
(7) to initiate, prosecute, defend, or appeal any court action in the name of the Commission for the purpose of enforcing the laws subject to its jurisdiction, through its own legal representative with the concurrence of the Attorney General or through the Attorney General; and
(8) to delegate any of its functions or powers, other than the power to issue subpoenas under paragraph (3), to any officer or employee of the Commission.

(c) Any United States district court within the jurisdiction of which any inquiry is carried on, may, upon petition by the Commission with the concurrence of the Attorney General or by the Attorney General, in case of refusal to obey a subpoena or order of the Commission issued under subsection (b) of this section, issue an order requiring compliance therewith; and any failure to obey the order of the court may be punished by the court as a contempt thereof.

(d) No person shall be subject to civil liability to any person (other than the Commission or the United States) for disclosing information at the request of the Commission.

(e) The Commission may by rule require any manufacturer of consumer products to provide to the Commission such performance and technical data related to performance and safety as may be required to carry out the purposes of this Act, and to give such notification of such performance and technical data at the time of original purchase to prospective purchasers and to the first purchaser of such product for purposes other than resale, as it determines necessary to carry out the purposes of this Act.

(f) For purposes of carrying out this Act, the Commission may purchase any consumer product and it may require any manufacturer, distributor, or retailer of a consumer product to sell the product to the Commission at manufacturer’s, distributor’s, or retailer’s cost.

(g) The Commission is authorized to enter into contracts with governmental entities, private organizations, or individuals for the conduct of activities authorized by this Act.

(h) The Commission may plan, construct, and operate a facility or facilities suitable for research, development, and testing of consumer products in order to carry out this Act.

(i)(1) Each recipient of assistance under this Act pursuant to grants or contracts entered into under other than competitive bidding procedures shall keep such records as the Commission by rule shall
prescribe, including records which fully disclose the amount and disposition by such recipient of the proceeds of such assistance, the total cost of the project undertaken in connection with which such assistance is given or used, and the amount of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit.

(2) The Commission and the Comptroller General of the United States, or their duly authorized representatives, shall have access for the purpose of audit and examination to any books, documents, papers, and records of the recipients that are pertinent to the grants or contracts entered into under this Act under other than competitive bidding procedures.

(j) The Commission shall prepare and submit to the President and the Congress on or before October 1 of each year a comprehensive report on the administration of this Act for the preceding fiscal year. Such report shall include—

(1) a thorough appraisal, including statistical analyses, estimates, and long-term projections, of the incidence of injury and effects to the population resulting from consumer products, with a breakdown, insofar as practicable, among the various sources of such injury;

(2) a list of consumer product safety rules prescribed or in effect during such year;

(3) an evaluation of the degree of observance of consumer product safety rules, including a list of enforcement actions, court decisions, and compromises of alleged violations, by location and company name;

(4) a summary of outstanding problems confronting the administration of this Act in order of priority;

(5) an analysis and evaluation of public and private consumer product safety research activities;

(6) a list, with a brief statement of the issues, of completed or pending judicial actions under this Act;

(7) the extent to which technical information was disseminated to the scientific and commercial communities and consumer information was made available to the public;

(8) the extent of cooperation between Commission officials and representatives of industry and other interested parties in the implementation of this Act, including a log or summary of meetings held between Commission officials and representatives of industry and other interested parties;

(9) an appraisal of significant actions of State and local governments relating to the responsibilities of the Commission; and

(10) such recommendations for additional legislation as the Commission deems necessary to carry out the purposes of this Act.

(k)(1) Whenever the Commission submits any budget estimate or request to the President or the Office of Management and Budget, it shall concurrently transmit a copy of that estimate or request to the Congress.

(2) Whenever the Commission submits any legislative recommendations, or testimony, or comments on legislation to the President or the Office of Management and Budget, it shall concurrently transmit a copy thereof to the Congress. No officer or agency of the United
States shall have any authority to require the Commission to submit its legislative recommendations, or testimony, or comments on legislation, to any officer or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress.

PRODUCT SAFETY ADVISORY COUNCIL

Sec. 28. (a) The Commission shall establish a Product Safety Advisory Council which it may consult before prescribing a consumer product safety rule or taking other action under this Act. The Council shall be appointed by the Commission and shall be composed of fifteen members, each of whom shall be qualified by training and experience in one or more of the fields applicable to the safety of products within the jurisdiction of the Commission. The Council shall be constituted as follows:

1. five members shall be selected from governmental agencies including Federal, State, and local governments;
2. five members shall be selected from consumer product industries including at least one representative of small business; and
3. five members shall be selected from among consumer organizations, community organizations, and recognized consumer leaders.

(b) The Council shall meet at the call of the Commission, but not less often than four times during each calendar year.

(c) The Council may propose consumer product safety rules to the Commission for its consideration and may function through subcommittees of its members. All proceedings of the Council shall be public, and a record of each proceeding shall be available for public inspection.

(d) Members of the Council who are not officers or employees of the United States shall, while attending meetings or conferences of the Council or while otherwise engaged in the business of the Council, be entitled to receive compensation at a rate fixed by the Commission, not exceeding the daily equivalent of the annual rate of basic pay in effect for grade GS-13 of the General Schedule, including traveltime, may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5, United States Code. Payments under this subsection shall not render members of the Council officers or employees of the United States for any purpose.

COOPERATION WITH STATES AND WITH OTHER FEDERAL AGENCIES

Sec. 29. (a) The Commission shall establish a program to promote Federal-State cooperation for the purposes of carrying out this Act. In implementing such program the Commission may—

1. accept from any State or local authorities engaged in activities relating to health, safety, or consumer protection assistance in such functions as injury data collection, investigation, and educational programs, as well as other assistance in the administration and enforcement of this Act which States or localities may be able and willing to provide and, if so agreed, may pay in advance or otherwise for reasonable cost of such assistance, and
(2) commission any qualified officer or employee of any State or local agency as an officer of the Commission for the purpose of conducting examinations, investigations, and inspections.

(b) In determining whether such proposed State and local programs are appropriate in implementing the purposes of this Act, the Commission shall give favorable consideration to programs which establish separate State and local agencies to consolidate functions relating to product safety and other consumer protection activities.

(c) The Commission may obtain from any Federal department or agency such statistics, data, program reports, and other materials as it may deem necessary to carry out its functions under this Act. Each such department or agency may cooperate with the Commission and, to the extent permitted by law, furnish such materials to it. The Commission and the heads of other departments and agencies engaged in administering programs related to product safety shall, to the maximum extent practicable, cooperate and consult in order to insure fully coordinated efforts.

(d) The Commission shall, to the maximum extent practicable, utilize the resources and facilities of the National Bureau of Standards, on a reimbursable basis, to perform research and analyses related to risks of injury associated with consumer products (including fire and flammability risks), to develop test methods, to conduct studies and investigations, and to provide technical advice and assistance in connection with the functions of the Commission.

TRANSFERS OF FUNCTIONS

SEC. 30. (a) The functions of the Secretary of Health, Education, and Welfare under the Federal Hazardous Substances Act (15 U.S.C. 1261 et seq.) and the Poison Prevention Packaging Act of 1970 are transferred to the Commission. The functions of the Administrator of the Environmental Protection Agency and of the Secretary of Health, Education, and Welfare under the Acts amended by subsections (b) through (f) of section 7 of the Poison Prevention Packaging Act of 1970, to the extent such functions relate to the administration and enforcement of the Poison Prevention Packaging Act of 1970, are transferred to the Commission.

(b) The functions of the Secretary of Health, Education, and Welfare, the Secretary of Commerce, and the Federal Trade Commission under the Flammable Fabrics Act (15 U.S.C. 1191 et seq.) are transferred to the Commission. The functions of the Federal Trade Commission under the Federal Trade Commission Act, to the extent such functions relate to the administration and enforcement of the Flammable Fabrics Act, are transferred to the Commission.

(c) The functions of the Secretary of Commerce and the Federal Trade Commission under the Act of August 2, 1956 (15 U.S.C. 1211) are transferred to the Commission.

(d) A risk of injury which is associated with consumer products and which could be eliminated or reduced to a sufficient extent by action taken under the Federal Hazardous Substances Act, the Poison Prevention Packaging Act of 1970, or the Flammable Fabrics Act may be regulated by the Commission only in accordance with the provisions of those Acts.
(e)(1)(A) All personnel, property, records, obligations, and commitments, which are used primarily with respect to any function transferred under the provisions of subsections (a), (b) and (c) of this section shall be transferred to the Commission, except those associated with fire and flammability research in the National Bureau of Standards. The transfer of personnel pursuant to this paragraph shall be without reduction in classification or compensation for one year after such transfer, except that the Chairman of the Commission shall have full authority to assign personnel during such one-year period in order to efficiently carry out functions transferred to the Commission under this section.

(B) Any commissioned officer of the Public Health Service who, upon the day before the effective date of this section, is serving as such officer primarily in the performance of functions transferred by this Act to the Commission, may, if such officer so elects, acquire competitive status and be transferred to a competitive position in the Commission subject to subparagraph (A) of this paragraph, under the terms prescribed in paragraphs (3) through (8)(A) of section 15(b) of the Clean Air Amendments of 1970 (84 Stat. 1676; 42 U.S.C. 215 nt).

(2) All orders, determinations, rules, regulations, permits, contracts, certificates, licenses, and privileges (A) which have been issued, made, granted, or allowed to become effective in the exercise of functions which are transferred under this section by any department or agency, any functions of which are transferred by this section, and (B) which are in effect at the time this section takes effect, shall continue in effect according to their terms until modified, terminated, superseded, set aside, or repealed by the Commission, by any court of competent jurisdiction, or by operation of law.

(3) The provisions of this section shall not affect any proceedings pending at the time this section takes effect before any department or agency, functions of which are transferred by this section; except that such proceedings, to the extent that they relate to functions so transferred, shall be continued before the Commission. Orders shall be issued in such proceedings, appeals shall be taken therefrom, and payments shall be made pursuant to such orders, as if this section had not been enacted; and others issued in any such proceedings shall continue in effect until modified, terminated, superseded, or repealed by the Commission, by a court of competent jurisdiction, or by operation of law.

(4) The provisions of this section shall not affect suits commenced prior to the date this section takes effect and in all such suits proceedings shall be had, appeals taken, and judgments rendered, in the same manner and effect as if this section had not been enacted; except that if before the date on which this section takes effect, any department or agency (or officer thereof in his official capacity) is a party to a suit involving functions transferred to the Commission, then such suit shall be continued by the Commission. No cause of action, and no suit, action, or other proceeding, by or against any department or agency (or officer thereof in his official capacity) functions of which are transferred by this section, shall abate by reason of the enactment of this section. Causes of actions, suits, actions, or other proceedings may be asserted by or against the United States or the Commission as may be appropriate and, in any litigation pending when this section takes effect, the
court may at any time, on its own motion or that of any party, enter an order which will give effect to the provisions of this paragraph.

(f) For purposes of this section, (1) the term “function” includes power and duty, and (2) the transfer of a function, under any provision of law, of an agency or the head of a department shall also be a transfer of all functions under such law which are exercised by any office or officer of such agency or department.

LIMITATION ON JURISDICTION

SEC. 31. The Commission shall have no authority under this Act to regulate any risk of injury associated with a consumer product if such risk could be eliminated or reduced to a sufficient extent by actions taken under the Occupational Safety and Health Act of 1970; the Atomic Energy Act of 1954; or the Clean Air Act. The Commission shall have no authority under this Act to regulate any risk of injury associated with electronic product radiation emitted from an electronic product (as such terms are defined by sections 355(1) and (2) of the Public Health Service Act) if such risk of injury may be subjected to regulation under subpart 3 of part F of title III of the Public Health Service Act.

AUTHORIZATION OF APPROPRIATIONS

SEC. 32. (a) There are hereby authorized to be appropriated for the purpose of carrying out the provisions of this Act (other than the provisions of section 27(h) which authorize the planning and construction of research, development, and testing facilities), and for the purpose of carrying out the functions, powers, and duties transferred to the Commission under section 30, not to exceed—

(1) $55,000,000 for the fiscal year ending June 30, 1973;
(2) $59,000,000 for the fiscal year ending June 30, 1974;
and
(3) $64,000,000 for the fiscal year ending June 30, 1975.

(b)(1) There are authorized to be appropriated such sums as may be necessary for the planning and construction of research, development and testing facilities described in section 27(h); except that no appropriation shall be made for any such planning or construction involving an expenditure in excess of $100,000 if such planning or construction has not been approved by resolutions adopted in substantially the same form by the Committee on Interstate and Foreign Commerce of the House of Representatives, and by the Committee on Commerce of the Senate. For the purpose of securing consideration of such approval the Commission shall transmit to Congress a prospectus of the proposed facility including (but not limited to)—

(A) a brief description of the facility to be planned or constructed;
(B) the location of the facility, and an estimate of the maximum cost of the facility;
(C) a statement of those agencies, private and public, which will use such facility, together with the contribution to be made by each such agency toward the cost of such facility; and
(D) a statement of justification of the need for such facility.

(2) The estimated maximum cost of any facility approved un-
der this subsection as set forth in the prospectus may be increased by the amount equal to the percentage increase, if any, as determined by the Commission, in construction costs, from the date of the transmittal of such prospectus to Congress, but in no event shall the increase authorized by this paragraph exceed 10 per centum of such estimated maximum cost.

SEPARABILITY

Sec. 33. If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provisions to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

EFFECTIVE DATE

Sec. 34. This Act shall take effect on the sixtieth day following the date of its enactment, except—

(1) sections 4 and 32 shall take effect on the date of enactment of this Act, and

(2) section 30 shall take effect on the later of (A) 150 days after the date of enactment of this Act, or (B) the date on which at least three members of the Commission first take office.