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ABSTRACT

This legislative analysis of the actions of the 92nd Congress concerning consumer product safety bills, current as of March 20, 1972, presents briefly the background of Congressional investigations in this area. Describing in detail four major bills which focus on the establishment of an independent government agency regulating consumer products and the setting of minimum safety standards for a wide variety of consumer products, this booklet discusses the chief differences among these bills as well as the viewpoints of both proponents and opponents to new governmental legislation dealing with product safety. (AG)

LEGISLATIVE ANALYSIS



# CONSUMER PRODUCT SAFETY BILLS

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## BACKGROUND

### Introduction

On February 23, 1972, the Senate Commerce Committee began executive sessions to "mark up" a consumer product safety bill. These "mark up" sessions continue as this analysis goes to press; they are expected to result in a comprehensive product safety bill for consideration by the Senate this spring.

The Senate Commerce Committee and a subcommittee 1/ of the House Committee on Interstate and Foreign Commerce have held extensive public hearings on consumer product safety bills during the 92nd Congress. The Senate Committee completed public hearings in October 1971. The House subcommittee concluded public hearings in February 1972, and began meeting in executive session to discuss comprehensive product safety legislation on March 1.

### Brief History

In 1967, at President Johnson's request, the Congress authorized a National Commission on Product Safety. The commission was charged with investigating whether consumers were adequately protected against unreasonable risks of injury associated with the use of household products. After approximately two years of study, the commission recommended that Congress enact product safety legislation modeled on the draft product safety bill included in the commission's final report of June 1970.

The commission's legislative proposal included two fundamental changes in the federal government's approach to product safety. First, it recommended that a single independent agency be given the basic responsibility within the federal government for regulation designed to promote the safety of consumer products. Currently the responsibility for enforcing product safety laws is scattered among a number of federal agencies and departments. Secondly, the commission recommended that the new product safety agency have authority over the safety characteristics of a broad range of consumer products. Most existing federal product safety laws are restricted to relatively narrow product categories such as drugs, cosmetics, meat, poultry, fish, eggs, motor vehicles, tires, cigarettes, toys, flammable fabrics, and refrigerator doors.2/

Senators Magnuson, D-Wash., and Moss, D-Utah, introduced the commission's bill (S. 983) on February 25, 1971. 3/ On the preceding day, President Nixon had recommended in his consumer message to the Congress that the Department of Health, Education, and Welfare (HEW) be given the authority

to set minimum safety standards for a wide variety of consumer products. Bills containing this proposal were introduced last May. On the Senate side, the administration bill is S. 1797 by Senators Magnuson and Cotton, R-N.H. The companion bill in the House (H.R. 8110) was introduced by Representatives Staggers, D-W.Va., and Springer, R-Ill. Also in May, Representative John Moss, D-Calif., chairman of the House Subcommittee on Commerce and Finance, introduced a bill (H.R. 8157) based on the bill drafted by the National Commission on Product Safety but containing several significant changes.

At the start of the Senate Hearings last July, President Nixon and Secretary of HEW Richardson announced that, upon passage of the administration proposal, a new Consumer Safety Administration would be created within HEW; this new safety administration would absorb the existing Food and Drug Administration (FDA) so that one unit within HEW would have regulatory responsibility for the safety of foods, drugs, and most consumer products.4/

After eight days of public hearings, the staff of the Senate Commerce Committee prepared a new draft product safety bill based primarily upon the administration proposals and the commission bill. This draft bill (Committee Print 1 of S. 983) was completed in October and circulated among committee members and others who had shown an interest in the proposed legislation. Committee Print 1 was substantially revised, and a second committee draft (Committee Print 2 of S. 983) was printed in February to serve as a working draft for the executive sessions now underway.

The House Subcommittee on Commerce and Finance held public hearings on product safety bills during several days in November and December 1971 and on several days in January and February 1972 before concluding hearings on February 3, 1972. Executive sessions are now underway in the House subcommittee. However, the bill must clear the subcommittee, the full House Committee on Interstate and Foreign Commerce and the Rules Committee before it reaches the House floor.

Commission Bill (S. 983)

Consumer Product Safety Commission. The bill drafted by the National Commission on Product Safety would establish a new independent regulatory agency called the Consumer Product Safety Commission. This commission, located within the executive branch, would regulate most consumer products from the point of view of consumer safety, and it would have the power to set mandatory standards in order to reduce the risks of injury from consumer products found to be hazardous. The new agency would be governed by a commission composed of five members appointed by the President and confirmed by the Senate for staggered five-year terms. The commission chairman would be named by the President.

Independent Safety Advocate. This bill would also create an independent safety advocate to represent the interests of consumers before the new safety commission. The advocate would have the authority to handle complaints about the commission, request the commission to take action, participate in commission proceedings as a party or a witness, appeal commission orders to the courts, evaluate commission actions, and make public statements about any product safety matters within its responsibility. The advocate would be appointed by the President and confirmed by the Senate for a seven-year term. Also, a fifteen-member Product Safety Advisory Council would be appointed by the commission from the public, business, and consumer organizations.

Safety Standards. The commission would have the power to issue consumer product safety standards that it finds reasonably necessary to prevent or reduce the risk of death or personal injury. These minimum safety standards could include requirements pertaining primarily to performance but also pertaining to design, composition, contents, construction, finish, packaging, or labeling of consumer products.

The procedure for developing and promulgating product safety standards would be as follows: First, the commission would have to find that a product presents an identified hazard and that a safety standard or other regulation is reasonably necessary to reduce the risk of death or injury. Then the commission would publish in the Federal Register notice of its intent to develop a safety standard concerning an identified product hazard.

Any outside organization would have 30 days to offer to develop the proposed standard. If the commission should find that a proposed standard

maker is competent and will operate under fair procedures that satisfy due process, then the commission could allow the independent standard maker up to 180 days to develop a standard. At the same time the commission could develop the standard on its own or contract with another organization to develop the standard. If no outside organization offers to develop the standard, then the commission staff would have 180 days to develop one.

After the commission receives a proposed draft standard, it would have to consider it and publish it in the Federal Register within 60 days. A standard would take effect within 90 days after having been published. The commission would have the authority to extend the time limits for developing and promulgating safety standards provided that it finds an extension in the public interest and publishes its reasons for permitting a delay. The commission would also have the power to amend or revoke any safety standard, but any substantial amendment would be subject to the foregoing procedural requirements.

All safety standard proceedings would be subject to the informal rulemaking procedures under the Administrative Procedure Act.5/ This means that a public agency hearing would not necessarily be required before the agency could promulgate a final safety standard but the agency would have to give interested parties an opportunity to comment and present data in writing on a proposed safety standard.

If the commission should find that a particular product presents an imminent hazard to public health or safety, it would have the power to promulgate an interim safety standard effective immediately provided that it initiates promptly a proceeding to develop a permanent standard.

Notice to Consumers. Under the commission bill, any manufacturer who discovers information indicating that one of its consumer products either does not conform to an applicable safety standard or presents a substantial risk of injury would be required to notify the safety commission, distributors, and purchasers of that information. In addition to this notice requirement, the manufacturer would be responsible for repairing a hazardous product to bring it into conformity with applicable safety standards or for replacing an unsafe product with a safe one or for making a refund.

The commission would have the authority to exempt a manufacturer from the requirement of notifying purchasers and distributors if it finds that a safety defect does not create a substantial risk of injury. However, if the safety commission itself should discover that a product does not meet an applicable safety standard or presents a substantial risk of personal injury, then the commission could order the responsible manufacturer to notify dealers and purchasers of the safety defect.

This bill would also require a manufacturer to certify that each consumer product made by it conforms to applicable safety standards. Certifications would have to be based on product testing conducted under rules established by the safety commission.

Removal of Products from the Market. In addition to its standard-setting power, the new safety commission would have the power to ban hazardous consumer products from the market. The commission could order a product removed from the market if it should find that the product presents an unreasonable risk of death or injury and that public health and safety can be adequately protected only by removing it from commerce. The safety commission would have to give the responsible manufacturer an opportunity to present its position under the informal procedural requirements of the Administrative Procedure Act before ordering a product off the market; but it could declare a product banned, pending the completion of the administrative proceeding, if the product presents an imminent hazard.

Instead of moving administratively to order a product banned, the safety commission would have the alternative of petitioning a federal court to issue an order enjoining the sale of a consumer product. The safety commission would have to satisfy the court that the product presents an unreasonable risk of death or injury and that an injunction or some other form of equitable relief is appropriate before the court would issue an order.

Investigative Authority. The safety commission would be given broad authority to obtain information relevant to the causes and prevention of product-related injuries, to analyze that information, and to make it public. The commission would be authorized to inspect factories, assembly plants, and warehouses in order to obtain information about the safety of consumer products. It could conduct hearings, subpoena witnesses and documents, and require producers to maintain relevant records. It could authorize and fund testing to determine the safety of various consumer products.

The commission would be required to set up an injury information clearinghouse to conduct research and analysis into the causes of product-related deaths, injuries, diseases, and economic losses. Moreover, the commission would have the authority to publicize information pertaining to the safety of consumer products, including trade secrets, if it should determine that disclosure of a trade secret is necessary to carry out the purposes of the proposed legislation.

All administrative determinations of the new safety commission resulting in orders, rules, regulations, or safety standards would be subject to the informal procedural requirements of the Administrative Procedure Act; final orders, regulations, or standards would be reviewable in an appro-

priate U.S. Court of Appeals under existing statutory standards for judicial review of administrative action.6/

Enforcement Provisions. This bill would be enforceable by civil penalties, criminal penalties, and injunctions, and unsafe products would be liable to condemnation and seizure.7/ The following violations would be subject to a civil penalty of $2,000 per violation up to a maximum of $500,000, and anyone who knowingly or willfully commits one of these violations would be subject to a $50,000 fine and up to 180 days in prison:

1. Producing, shipping, or attempting to sell a banned hazardous product or a product that does not conform to an applicable regulation or safety standard.

2. Failing or refusing to provide required information or to permit inspection.

3. Failing to notify purchasers of an unsafe product or to provide repair, replacement or refund for such product.

4. Failing to certify that a product conforms to applicable safety standards or negligently furnishing a false or misleading certification.

This bill would also authorize injured individuals to sue knowing or willful violators of safety standards for treble damages, and in most cases under this bill federal regulations would replace state or local consumer product safety standards.

Coverage. This commission bill would cover all products affecting interstate commerce (including new and imported products) that are produced for the household or personal use of consumers except those already subject to regulations issued under the following statutes:

1. Flammable Fabrics Act (15 U.S. Code 1381).

2. Food, Drug, and Cosmetic Act (21 U.S. Code 301).

3. Federal Cigarette Labeling and Advertising Act (15 U.S. Code 1331).

4. Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S. Code 135).

5. Radiation Control for Health and Safety Act (42 U.S. Code 262).

6. National Traffic and Motor Vehicle Safety Act of 1966 (15 U.S. Code 1381).

Funding under this proposal would be authorized at $5 million for the first fiscal year during which it is effective, $7.5 million for the second, and $10 million for the third.

Moss Bill (H.R. 8157)

The Moss bill is essentially the same as the commission bill except for the following changes: First, the Moss bill would double the authorized funding level of the commission bill. Second, it would cover a broader range of consumer products; the product hazards regulated under the Flammable Fabrics Act and the Radiation Control for Health and Safety Act, which are exempted under the study commission proposal, would not be exempted from the Moss bill. Third, it would transfer some of the regulatory responsibilities under various safety laws from HEW, the Department of Commerce, and the Federal Trade Commission to the new safety commission.8/

In addition, the Moss bill would provide seven year terms for the safety commissioners instead of five as in the study commission bill. Finally, it contains a new provision which would prohibit safety commission employees from accepting employment or compensation from manufacturers subject to regulation under the proposal within one year after leaving the safety commission.

Administration Bill (S. 1797 and H.R. 8110)

HEW Authority--Internal Reorganization. The Nixon administration bill would give HEW authority to set minimum safety standards for a wide variety of consumer products. The administration proposes an internal reorganization of HEW and the creation of a new Consumer Safety Administration to set product safety standards and to take over the FDA's responsibility for regulating food, drugs, and cosmetics.9/ The administration bill does not contain any provisions covering the composition of the new safety administration, and it would not create an independent consumer safety advocate.

Coverage. The administration bill would not cover the same consumer products that the study commission bill would cover. For instance, both the administration bill and the study commission bill exempt food, drugs, and cosmetics, but the administration's proposed merger of the FDA into the new Consumer Safety Administration would bring those products under the regulatory authority of the new safety administration. Of course, regulation of food, drugs, and cosmetics would continue pursuant to the existing Food, Drug, and Cosmetic Act. In addition to the products exempted from the study commission bill, the administration bill would exempt products subject to health or safety regulation under the following statutes:

1. Federal Hazardous Substances Act.

2. Clean Air Act.

3. Public Health Service Act (title III, part F).

4. Act of March 4, 1913 (37 Stat. 832; pertaining to drugs and related substances intended for animals; see 21 U.S. Code 151).

5. Poison Prevention Packaging Act of 1970.

6. Occupational Safety and Health Act of 1970.

7. Act of August 2, 1956 (70 Stat. 953; pertaining to refrigerator doors; see 15 U.S. Code 1211).

8. Atomic Energy Act of 1954.

Moreover, the administration bill would exempt motor vehicles and tobacco without regard to any particular statute, and it would exempt products "which may be subjected" to health or safety regulation under the statutes listed above. The study commission bill would exempt only those products associated with hazards "subject to duly promulgated regulations" under one of the six statutes listed in the commission bill. Thus, apart from foods, drugs, and cosmetics, the study commission bill covers a broader range of consumer products than does the administration bill.

Safety Standards. The administration bill would give HEW the power to promulgate consumer product safety standards. Whenever HEW, or the product safety division within HEW, finds that a safety standard is needed to reduce an unreasonable product-related risk, HEW would be required to publish a detailed notice of its intention to develop a safety standard in the Federal Register. As under the study commission bill, an interested party would have 30 days to offer to develop the standard, but interested parties could also comment on the need for a standard under the administration bill Moreover, the administration bill would specifically authorize the secretary of HEW to adopt any existing standard "substantially acceptable to him" as a proposed standard. HEW would be directed to attempt to utilize an independent standard maker or an existing standard before undertaking to develop a safety standard itself.

HEW would be required to publish the name and location of any independent standard maker in the Federal Register and to develop rules governing the procedure for developing proposed standards. Such procedural rules would themselves be subject to the notice and opportunity-to-comment requirements of the Administrative Procedure Act, 10/ and they would have to afford interested parties the opportunity to participate in the develop-

ment of safety standards, require that standard makers maintain adequate records, and require that standards be based upon reliable test data.

Within 210 days after the original notice of intent to develop a safety standard, HEW would have to publish one of the following items in the Federal Register:

1. Notice of an extension of time including good cause for the extension.

2. Notice withdrawing the proposal to develop a product safety standard.

3. The proposed product safety standard.

4. A proposal to declare a product a banned hazardous consumer product.

Unlike the study commission bill, once HEW has published a proposed safety standard in the Federal Register, the administration bill would not place any more limits on the time during which the standard may be considered or on the time when it must become effective.

In its proposal to promulgate a safety standard, HEW would prescribe the procedure to be followed in considering whether to put the standard into effect. HEW would determine the time during which the standard would be examined and whether interested parties could comment on it orally or in writing. HEW could hold hearings to resolve any issue of material fact, and it would have to make specific findings demonstrating that the standard is reasonably necessary to reduce a serious product-related risk.

As soon as practicable, HEW would be required to promulgate the standard and its effective date together with the detailed findings supporting the standard. In setting the effective date, HEW would seek to minimize economic loss and disruption of commerce consistent with public health and safety.

Revocation and amendment of a safety standard would be subject to notice and opportunity-to-comment procedures except that any material amendment would have to go through the entire procedure for developing a new standard as described above.

Removal of Products from the Market. In those cases when a product safety standard could not adequately protect the public from a product hazard, HEW would have the power to declare the product a "banned hazardous consumer product." An order declaring a product banned would have to pass through the same procedure as a product safety standard. Firearms would be exempted from the banned product category.

Final safety standards and orders declaring a product banned would be reviewable in an appropriate U.S. Court of Appeals according to existing rules governing judicial review of administrative action. In particular, HEW decisions would be upheld if supported by substantial evidence on the record taken as a whole.

Notice to Consumers. The administration bill would not authorize interim safety standards, and it would not require a producer to certify that each of its consumer products conform to applicable safety standards. However, it would authorize HEW to order a producer or distributor to notify consumers of a product that fails to comply with the applicable safety standard if that product presents a significant risk of death, illness, or injury. Before issuing a notification order, HEW would have to give the producer or distributor an opportunity to present its position at an agency hearing under the Administrative Procedure Act.11/ In addition to ordering notification, HEW could also order a producer to repair a product to make it conform to applicable safety standards or to replace the product or to make a refund minus reasonable depreciation.

In order to prevent imminently hazardous consumer products from harming consumers, HEW would have to request the Department of Justice, under the administration bill, to petition a federal court to declare that a product is imminently hazardous and to grant appropriate equitable relief such as notice to consumers, recall, or seizure. The administration bill defines an imminently hazardous consumer product as one which presents imminent and unreasonable risk of death, serious illness, or severe injury.

Investigative Authority. The administration bill like the study commission bill would give the new product safety unit authority to collect and evaluate information about the causes and prevention of consumer product-related injuries. The HEW product safety division could inspect factories and warehouses and obtain warrants and subpoenas when necessary; it could require producers to maintain reasonable records; and it could authorize testing and conduct research to obtain greater understanding of how product-related injuries can be prevented. However, the administration bill would place definite restrictions on the information the safety division could make public. HEW could not make public information which would disclose trade secrets, formulas, costs, methods of doing business, or other competitive information not otherwise available to the public.12/ Moreover, unless court action is pending or contemplated, HEW would be required to give a manufacturer 30 days prior notice of any public announcement identifying the manufacturer and pertaining to product safety. The manufacturer could comment on the information to be made public and have its comments included in the public announcement. HEW would be specifically charged with making certain that information it releases is accurate and not misleading and with publishing retractions of any inaccurate or misleading information it makes public.

Enforcement Provisions. Government enforcement under the administation bill would be similar to enforcement under the study commission bill. The administration proposal would authorize civil penalties, criminal penalties, and injunctive relief for certain listed violations, as well as seizure of unsafe products. The violations that would support civil and criminal penalties are similar to those under the study commission bill, except that failure to certify a consumer product would not violate the administration proposal and altering a consumer product so that it no longer meets safety standards would be made a violation by the administration bill. The primary difference in this area between the administration bill and the study commission bill is that the administration bill would specifically require a knowing violation in order for a civil penalty to be levied and a willful violation for a criminal penalty to be levied. The study commission bill does not contain any requirement as to knowledge, care, lack of care, or intent in determining liability for civil penalties, and it would permit criminal sanctions for either knowing or willful violations. The administration bill also contains a different penalty structure: the maximum civil penalty would be $10,000 per violation; the maximum criminal fine would be $10,000 per act; and the maximum prison term would be one year.

The administration bill would not authorize treble damage suits, but it would authorize "citizen" suits to enforce product safety standards or similar regulations and to obtain appropriate injunctive relief. Any interested person desiring to bring a "citizen" suit would have to give HEW, the Department of Justice, and the person against whom the suit is directed 30 days notice before filing suit in an appropriate federal district court, and the prevailing party in such a suit would be entitled to recover reasonable attorney's fees as determined by the court.

In nearly all cases under the administration bill, federal safety standards would replace any similar state regulations pertaining to consumer product safety. The administration bill would not place a ceiling on the funds authorized to implement it.

Senate Committee Print (Committee Print 2 of S. 983) 13/

This bill combines a number of provisions based on the administration proposals, several taken from the bill recommended by the National Commission on Product Safety, and several entirely new provisions.

Consumer Safety Agency. Like the study commission bill, this bill would create a new independent regulatory agency within the executive branch to protect consumers against accidental harm resulting from the use of consumer products. This bill would also adopt the administration plan to consolidate into one governmental unit federal regulation to promote the safety of foods, drugs, and other consumer products, but it would

make that unit an independent agency rather than a new safety administration within HEW. Thus, under the committee print, all HEW responsibilities now administered through the FDA would be transferred to this new independent agency, to be called the Consumer Safety Agency.

The Senate committee print would not authorize the automatic transfer of personnel from the FDA to the new safety agency. Instead, it contemplates competitive civil service examination in staffing the new safety agency.

The Consumer Safety Agency would be headed by an administrator responsible for coordination and enforcement. The agency would contain three separate commissions: a commission of foods, a commission of drugs, and a commission of product safety. Each commission would be headed by a single commissioner responsible for eliminating products within his jurisdiction that present unreasonable risks of injury or harm.

The administrator and commissioners would be appointed by the President subject to Senate confirmation. The administrator would have a five-year term of office while the commissioners would serve at the pleasure of the President.

Budget Procedure. The committee print would put into effect a new budget procedure designed to increase the new safety agency's independence from the remainder of the executive branch.14/ It would require each commissioner to prepare annually a five-year budget which would be made public when submitted to the administrator. Normal review by the President's Office of Management and Budget (OMB) would not occur until the administrator had submitted the agency budget request to the President and had published it in the Federal Register. Then the President would include his decision on the safety agency's budget request in his annual budget. The President would of course continue to have the power to change the agency's budget requests and the Congress would determine the amounts appropriated, but this procedure would serve to make agency plans and requests more visible to the public. The committee print would set an authorized funding level of $225 million per year for the new safety agency (which would include FDA's fiscal 1973 budget request of approximately $125 million).

In addition to being able to report budget requests directly to the Congress, the new safety agency would make, without prior OMB review and approval, an annual report to the Congress containing detailed summaries and evaluations of its activities and programs together with recommendations for new legislation.

Consumer Information and Representation. The Senate committee print would place considerable emphasis on research, information gathering and evaluation, and making safety information available to the public. The administrator and the commissioners would have subpoena power, the authority to

conduct public hearings, and the authority to construct research and testing facilities to carry out their duties. The administrator and each commissioner would be responsible for providing the public with adequate notice and reasonable opportunity to participate in any public hearings before the agency or one of its commissions.

The Consumer Safety Agency would contain an office of consumer information and representation, a consumer safety information center, a national injury information clearinghouse, and a joint scientific committee. The office of consumer information and representation would have the responsibility for conducting consumer education programs, overseeing the safety information center's handling of consumer inquiries and complaints, and maintaining a public information room. The clearinghouse would establish a nationwide system for reporting product-related injuries in order to identify the causes of these injuries. The joint scientific committee would be composed of employees of all the commissions who would exchange technical information on the scientific detection of hazards.

Each commission would be required to coordinate its research and analysis with the above agency organizations. All elements of the agency would have broad responsibilities for making safety information available to the public. For instance, any communication to an agency employee concerning a matter before an agency rulemaking or adjudicatory proceeding would have to be made part of the public file of that proceeding. Information that relates to a trade secret or similar confidential competitive information, however, could not be released to the public by safety agency employees unless necessary to protect public health or safety or to protect the public against misleading safety information.

While the committee print would not establish an independent safety advocate, it would authorize the director of the office of consumer information and representation within the agency to employ attorneys and other experts who can effectively represent the consumer interest before the agency or one of its commissions. Moreover, this bill would create a fiduciary duty on the part of safety agency employees to protect individual consumers from being exposed to unreasonable risks of injury associated with the use of consumer products. This fiduciary duty would be enforceable in a civil suit brought by any individual or class of individuals exposed to an unreasonable risk. If a federal district court should find that an agency employee has breached this duty, it could order him to perform his duty, suspend him, remove him from the agency, or take any other appropriate action. In addition, the United States would be responsible for compensating individuals injured as a result of a safety agency employee's breach of this fiduciary duty.

In addition to pursuing normal agency procedures, any agency employee would have the authority and responsibility to report to the appropriate commissioner any potentially critical situation he discovers that could

cause significant injury. The commissioner and the administrator would have to process any of these critical safety problem reports rapidly and communicate them to the appropriate congressional committees along with a report of any action taken.

In order to avoid any potential conflict of interest, any former agency employee would be prohibited from assisting any person in any transaction involving the safety agency if the former employee participated in the transaction or had responsibility for it while working for the agency.

Coverage. The committee print contains a comprehensive definition of consumer products. It would cover any product imported or produced for personal use, except aircraft subject to safety regulation by the Federal Aviation Administration, consumer products exported, and products subject to safety regulation under the following statutes:

1. National Traffic and Motor Vehicle Safety Act of 1966.
2. Food, Drug, and Cosmetic Act.
3. Federal Insecticide, Fungicide, and Rodenticide Act.
4. Occupational Safety and Health Act of 1970.
5. Federal Boat Safety Act of 1971.
6. Gas Pipeline Safety Act.

The remaining broad range of consumer products would be under the regulatory jurisdiction of the commission of product safety.

In addition, regulation of foods, drugs, and cosmetics would be covered under the committee print because the FDA's responsibilities would be divided and transferred to the new commission of foods and the new commission of drugs.15/ The cosmetic section of the Food, Drug, and Cosmetic Act would be repealed and cosmetics would be classified as consumer products under the authority of the commission of product safety. Several other statutes would be repealed and regulation under them would be replaced by the broad power over consumer products to be given to the commission of product safety. Statutes that would be repealed under the committee print include the following:

1. Federal Hazardous Substances Act.
2. Flammable Fabrics Act.
3. Radiation Control for Health and Safety Act.

4. Poison Prevention Packaging Act.

5. Act of August 2, 1956 (pertaining to refrigerator doors; see 15 U.S. Code 1211).

Technically speaking, the transfer of the FDA's authority, functions, and assets would be to the administrator of the safety agency who would delegate authority to the appropriate commission within the new safety agency. The Senate committee version would require the administrator to submit a detailed plan of delegation to the Congress within 90 days after enactment; this plan would be subject to congressional veto for 90 days after being submitted.

The responsibilities and programs of HEW that are now administered by the Division of Biological Standards, National Institutes of Health, would also be transferred to the administrator of the safety agency. All laws in effect and associated with the transfer of functions contemplated by this proposal would remain in force unless specifically repealed as described above. Orders, rules, regulations, and permits issued or granted under these laws would remain in effect; those orders and regulations made under the authority of statutes which would be repealed by this bill would also remain in force until the appropriate authority within the new safety agency amends or repeals them.

Safety Standards. The consumer product safety portion of this Senate committee draft bill follows the outline of the administration bill. The committee draft would give the power to set consumer product safety standards to the new commissioner of product safety.

A product safety standard under the draft bill would cover performance whenever feasible. It also could cover marketing technique, as well as design, construction, et cetera, and could require that a product undergo a pre-marketing safety analysis study. Standards would be intended to distinguish products or types or classes of products that present unreasonable risks from those that present reasonable risks. The commissioner of product safety would be responsible for determining unreasonable risks by weighing the magnitude of the risk presented by a product against any reduction in performance or availability of that product which would result from reducing the risk. A risk would be considered unreasonable if it can be reduced without affecting performance or availability, or if the frequency or severity of anticipated injury would be of sufficient magnitude to justify the anticipated reduction in performance or availability.

The procedure to be followed under this bill in developing, promulgating, revoking, and amending product safety standards is very similar to the procedure the administration bill would establish. For instance, the committee print would require the commissioner to publish a detailed

notice of proposed standard making, including an invitation to challenge the need for a standard. The commissioner would be required, after an opportunity for public participation, to prescribe detailed regulations governing the development of proposed standards to insure that they are based upon reliable information and test data. The committee bill would adopt the administration bill's provisions that insure public participation between publication of a proposed standard and promulgation of a final standard. Hearings would be authorized to resolve factual disputes during this period, and the commissioner would have to publish detailed findings supporting the need for a standard before promulgating a final safety standard.

On the other hand, the committee print departs from the procedure the administration bill would set up in several significant respects. After publishing the notice initiating the standard-making procedure and evaluating any information submitted to challenge the need for a standard, the commissioner of product safety would be required by the committee bill to make a specific determination of whether to proceed with developing a safety standard. Should an existing standard be offered to the commissioner, he would be authorized under this bill to publish it as a proposed safety standard if acceptable to him, rather than substantially acceptable to him as the administration bill would provide.

One of the most important differences between the committee and administration bills involves the time limits the committee bill would place on developing and promulgating a safety standard. The 30-day period after the original notice initiating the procedure and during which outside parties could offer to develop a standard would be the same under these two bills and the study commission bill. From this point on, the committee bill would require a shorter, more rigorous time schedule than would either the administration or study commission bill. Within 150 days after the original 30-day notice period or 180 days after the original notice was published, the commissioner would have to publish a proposed standard or withdraw its plan to develop a standard. The administration and commission bills would allow 30 more days for developing a proposed standard or 210 days from the original notice.

Moreover, within 60 days after publication of a proposed standard, the commissioner would have to promulgate a final standard or withdraw the proposal to develop a standard; in this particular, the Senate committee bill adopts the approach of the commission bill. The administration bill would not place a time limit on this portion of the proceeding; nor would it set any requirements for when a new standard should become effective. The committee print would require the commissioner to justify any effective date more than six months after publication of a final standard, whereas the commission bill would have standards take effect 90 days after they are issued. Of course, the commissioner would have the authority to extend these time limits if he can publish good reason for an

extension.16/ The committee print also contains a new provision which would prohibit manufacturers from stockpiling nonconforming consumer products by increasing production during the period between the publication of a final safety standard and its effective date.17/

The committee print would put into effect two other features of the standard-setting procedure in the commission bill. It would explicitly authorize consumers or other interested parties to petition the commissioner to initiate safety standard proceedings; and it would empower the commission to move concurrently to develop a safety standard while an outside organization was developing one. The committee print omits the administration bill's provision that would require the standard-setting authority to choose an effective date that would minimize economic loss and disruption and dislocation of trade.

Removal of Products from the Market. The commission would have the power to declare a product to be a banned hazardous consumer product under this committee bill. Like the administration bill, this bill would require an order declaring a product banned to pass through the procedure for setting safety standards and to be based upon a finding that no feasible safety standard would adequately protect the public. Unlike the administration bill, the committee print would not exempt firearms from the banned hazardous category. Moreover, the committee print would require manufacturers, distributors, and sellers to repurchase a banned product if it was sold after the date on which the proposal to ban it was published.

The committee print would authorize the safety commission to require by regulation that manufacturers follow certain quality control procedures to insure that products comply with applicable safety standards. These quality control procedures would normally include testing by the manufacturer or an approved independent testing laboratory and certification that the product tested complies with applicable standards. If the commissioner should find, after an opportunity for public comment, that private testing and certification is not effective to insure a product's compliance, he may require that product to undergo other reasonable procedures including pre-market clearance. The commissioner would have the authority to require manufacturers to maintain the names and addresses of first purchasers of certain consumer products when he deemed such record-keeping reasonable, considering the magnitude of the risk and the cost of acquiring and keeping the names.

Judicial review of administrative action under this committee bill would be very similar to court review under the administration bill. The differences between the two bills are that, under the committee bill, interested persons could petition for review whether adversely affected or not, that the U.S. Court of Appeals for the District of Columbia would also have jurisdiction over any of these appeals, that the administrator of the safety agency rather than the attorney general would represent the

agency on these appeals, and that quality control and compliance regulations would be subject to court review.

Notice to Consumers. The committee bill would require a manufacturer, importer, distributor, or dealer who discovers a safety defect, such as a consumer product that fails to comply with applicable safety standards, to notify the product safety commission if that product has left the place of manufacture. In addition, after affording the opportunity for an agency hearing, the administrator would have the power to order manufacturers, et cetera, to notify consumers of a product that fails to comply with an applicable safety order or regulation, provided that such notification is necessary to protect public health or safety. In these circumstances, the administrator could also order repair, replacement, or a refund of the purchase price minus a reasonable allowance for use if the consumer had had the product for a year or more.18/

The committee bill would not authorize interim safety standards. But it would authorize the administrator, on the recommendation of the commissioner of product safety, to declare a product that presents an unreasonable risk of severe injury to be an "imminently hazardous consumer product." This declaration would be reviewable in the federal district courts; these courts would have the power to enforce the declaration by ordering notification of consumers, or recall, repurchase, repair or replacement of the product, or seizure of the product. In contrast, the administration bill would require the safety unit to request the Department of Justice to seek a court order declaring a product to be imminently hazardous and an appropriate order enforcing the declaration. Under the commission bill, the safety unit would have more authority to move quickly against a product hazard. It could issue an interim safety standard, seek an injunction against the sale of a consumer product, or declare a product banned pending the completion of an administrative proceeding.

Investigative Authority. In provisions similar to those in the administration bill and the study commission bill, the Senate committee version would give the product safety unit broad responsibility for collecting, evaluating, and disseminating information pertaining to product-related injuries, risks, and hazards. The commission of product safety would work together with other information gathering and evaluating elements in the safety agency to determine the causes of product-related injuries and methods of reducing the risk of such injuries. The commission would conduct research and exchange information in order, among other things, to help develop safety standards, to learn better how to evaluate product-related risks, and to encourage product innovation. The commission would test consumer products available on the market to determine if they meet applicable safety standards. It would have the power to inspect warehouses, assembly plants, and transport vehicles at reasonable times without prior notice in order to keep hazardous products from harming consumers. The commission could obtain subpoenas and warrants when necessary

and require manufacturers to maintain reasonable records relevant to the safety of their products.

The commission of product safety would be charged with making safety information available to the public, but would be prohibited from releasing information relating to trade secrets unless to protect public health or safety. Moreover, the commission would normally have to give a manufacturer notice and an opportunity to comment before releasing competitive information.

Enforcement Provisions. Government enforcement under the committee proposal would be very similar to enforcement under the administration bill. These bills, like the study commission bill, would provide for civil penalties, criminal penalties, and injunctions against persons who commit any of a list of prohibited acts. The committee bill adopts the administration bill's penalty structure, its requirements that a violation be a knowing one to support a civil penalty and a willful one to support a criminal penalty, and a list of prohibited acts that is very similar to the list in the administration bill. These unlawful acts would include the following:

1. Manufacturing, importing, or offering for sale or lease or actually selling or leasing any consumer product that does not comply with an applicable safety standard or has been declared a "banned hazardous consumer product" or an "imminently hazardous consumer product."

2. Violating the prohibition against stockpiling.19/

3. Failing to allow an inspection, to maintain required records, to submit required information, or to comply with required quality control procedures.

4. Altering a consumer product before sale with the result that it no longer conforms to an applicable standard or becomes a banned or imminently hazardous product.

It would also be unlawful under committee print 2 for any person to discriminate against a safety agency employee or interfere with his person, property, or job status because the employee had filed a critical safety problem report as required by the proposed legislation and described above.

The administrator of the safety agency and the Department of Justice would have the authority to seek court orders compelling the taking of any action required by this pending bill. The administrator would also have the power to seek court-ordered condemnation, seizure, or forfeiture of products that do not meet applicable safety standards or have been

declared banned or imminently hazardous products. Under this committee bill, the safety agency would have specific authority to seek civil penalties against anyone who knowingly commits any of the list of prohibited acts. Presumably only the Department of Justice could initiate a criminal prosecution under this proposal.20/

The committee print includes the administration bill's "citizen suit" concept under which any person who may be exposed to unreasonable risk presented by a consumer product would be able to bring suit to enforce a product safety standard or a declaration that a product is banned or imminently hazardous. As under the administration bill, the party bringing such a suit would have to give 30 days prior notice to the government and to the person against whom the suit is directed, and the court could award attorney's fees to the prevailing party.

This bill also includes the study commission's proposal that an injured person would be able to sue for damages against knowing or willful violators of safety standards, regulations or orders. However, the committee print would authorize only twofold damages plus reasonable attorney's fees, instead of the treble damages specified in the study commission bill. Both the committee print and the study commission bill would give federal courts jurisdiction over these damage suits without limitation based on the amount in controversy. This provision would probably result in the federal class action mechanism becoming available for product liability damage suits in those cases when individual damages are less than $10,000 but a knowing or willful violation of a safety regulation can be claimed.

In nearly all cases, the committee bill would provide that federal safety standards and similar regulations would replace and eliminate the need for any different state regulations covering the same consumer products.

## DISCUSSION

### Is New Product Safety Legislation Needed?

Proponents. Consumer spokesmen acknowledge that technological progress, growing affluence, and advances in product distribution have brought great benefits to American consumers over the past 30 to 50 years. These include the widespread availability of electrical appliances, power tools, household chemicals, medicines, and countless other products. But consumer advocates point out that accompanying such useful and labor saving products were new risks to the safety and health of the American public. Growing awareness of inadvertent poisonings, burns, lacerations, and fractures associated with the use of consumer products led to the creation in 1967 of a National Commission on Product Safety. Its mission was to investigate injuries connected with most products produced for personal, family, and home use. This responsibility did not include automobiles, foods, drugs, cosmetics, cigarettes, firearms, insecticides, radiological hazards, and some flammable fabrics largely because these products were already subject to some safety regulation by the federal government.

The national commission's final report, issued in 1970, concluded that modern technology poses a "bona fide and menacing" threat to the physical security of consumers. President Nixon, in his consumer message to the Congress in February 1971, described the mixed blessing of the consumer product revolution as follows:

> Technology, linked with the American free enterprise system, has brought great advantages and great advances to our way of life. It has also brought certain hazards.
>
> The increasing complexity and sophistication of many of our consumer goods are sometimes accompanied by the increasing possibility of product failure, malfunction, or inadvertent misuse resulting in physical danger to the consumer.21/

The National Commission on Product Safety reported that 20 million Americans are injured each year as the result of incidents connected with household consumer products:

> Of the total, 110,000 are permanently disabled and 30,000 are killed. A significant number could have been spared if more attention had been paid to hazard reduction. The

annual cost to the Nation of product-related injuries may exceed $5.5 billion.

The exposure of consumers to unreasonable consumer product hazards is excessive by any standard of measurement.22/

It is important to note that these figures do not include injuries resulting from automobile accidents, which have been widely reported to total 4 million injuries, 55,000 deaths, and an economic cost of more than $16 billion per year.

Arnold B. Elkind, chairman of the National Commission on Product Safety, told the Senate Commerce Committee and House Commerce and Finance Subcommittee that approximately 20 percent of the injuries associated with use of consumer products could be prevented. Specifically he said:

A significant number of injuries and deaths each year could be avoided by channeling our technology toward the goal of hazard reduction in consumer products.

Our gut estimate was that the laissez faire approach to consumer products costs the American public about 20 percent of the overall toll that the public pays in injuries or deaths for the privileges of enjoying consumer products. This translates into 6,000 lives, 22,000 permanent cripples, 4 million injuries, and $1.1 billion in treasure that could be saved each year by an effective system for making products safe to use. Parenthetically, it also means that 16 million injuries and 24,000 deaths may occur annually from using consumer products regardless of the care, skill and best efforts of our society.23/

Supporters of product safety legislation contend that 6,000 deaths plus associated injuries and economic costs are too high a price to pay for having an unregulated consumer product market. They argue that the same technology that is partially responsible for these injuries can and should be harnessed to help protect consumers.

The national commission observed that greater consumer care and more effective consumer education, improved home design and construction, as well as better consumer product design and manufacture, would reduce product-related injuries. However, the commission concluded that the most effective and least costly target for concentrating the product safety effort was the design, manufacturing, and marketing of consumer products. The commission summarized this argument as follows:

There are those who believe that safety, like charity, begins at home in the behavior of the family--steadying

ladders, storing knives, supervising children. Others believe that safety begins with the home itself, the environment where hazardous products find their uses--good lighting, well-insulated wiring, slipproof bathtubs and rugs, latched cabinets for medicine and household chemicals. A third view is that safety begins in the factory and involves design, construction, hazard analysis, and quality control.

None of these views is wholly right or wrong. The classical concept of epidemiology counts all three factors: host, environment, and agent. Close examination of the three uncovers many subsidiary factors: hosts of different capacities and habits; differing social, political, and psychological as well as physical environments; and agents acting in combination, additively, or serially.

With due regard for the multiple factors affecting household safety, sound strategy for a safety program is to seek the weak link in a chain of events leading to injury and to break the chain at that point.

After considering the many forces contributing to the toll of injuries in and around the American home, we have concluded that the greatest promise for reducing risks resides in energizing the manufacturer's ingenuity.

We do not mean that manufacturers by themselves can do all that is needed to achieve an optimal safety record. We mean that with Government stimulation they can accomplish more for safety with less effort and expense than any other body--more than educators, the courts, regulatory agencies, or individual consumers.

Manufacturers have it in their power to design, build, and market products in ways that will reduce if not eliminate most unreasonable and unnecessary hazards. Manufacturers are best able to take the longest strides to safety in the least time. The capacity of individual manufacturers to devise safety programs, without undue extra cost, has been demonstrated repeatedly in the course of our [the commission's] short history: in safety glass, double-insulated power tools, baffles on rotary mowers, noncombustible TV transformers, and releases on wringer washers....

> Prospects for measurable reform of human behavior are distant. Similarly, there is little hope for an early improvement of the home environment. The limited power of conventional educational methods has been described by our witnesses.
>
> Consequently, while continuing to educate and seeking even better ways, there seems little choice but to concentrate on reducing unreasonable hazards by encouraging additional care in the design and manufacture of products.24/

In short, consumer advocates contend that it is easier to fit a product to man than man to a product.

Not only do proponents of consumer legislation find the manufacturer the most promising agent for improving consumer safety, but they also contend that the consumer has a right to expect safe products. They note that President Nixon announced in 1969 that the buyer is entitled to a bill of rights, including "the right to expect that his health and safety is taken into account by those who seek his patronage."25/ Government intervention is necessary, they continue, to secure the right to safe products, because the free market does not always reward the builder of the safest product. The national commission put it this way:

> In the absence of compulsion to reduce risks in consumer products, manufacturers who cut corners on safety have an unfair competitive advantage over responsible manufacturers....
>
> Even the best-intentioned programs of industry advocates of safety fall afoul of the forces of competition. When safe design must compete with eye appeal, pushbutton convenience, and low production costs, safety may be compromised.26/

Moreover, the argument continues, the antitrust laws discourage cooperation among competitors to eliminate unsafe products and to promote safe ones.

Voluntary industry standards, advocates contend, are not very effective at improving product safety. Since voluntary safety standards depend upon consensus, an industry frequently settles for the least common denominator--i.e., what the least safety-minded manufacturer is willing to accept. Safety is rarely the primary concern of the people who develop industry standards. Moreover, there is no way to assure that all manufacturers will comply. Consequently, consumer advocates conclude, government action is necessary if product-related risks are to be reduced substantially.

They also argue that only the federal government can effectively deal with the problem of product safety. State and local governments can affect only a small portion of the great bulk of consumer products that are produced for the national market. Moreover, state and local regulation will result in a number of different and inconsistent rules. Compliance with different local requirements would be more costly and burdensome than meeting a uniform national standard. Thus advocates of product safety legislation argue that regulation at the federal level will be the most effective and most economical way to promote consumer safety.

What is needed now, consumer spokesmen argue, is a positive program designed to prevent accidents and injuries from happening. These spokesmen acknowledge that it is becoming easier for a person injured by a product to sue the manufacturer and receive compensation for his injuries. But they point out that the courts are not designed to prevent accidents and injuries; at most, the prospect of a successful damage suit may deter some manufacturers from marketing unsafe products. The federal government, safety advocates insist, should have regulatory authority to require producers to make safer products and thereby stop injuries--insofar as possible--before they happen. Preventing injuries is too important, they say, to rely only on the deterrent effect of requiring manufacturers to compensate consumers injured by their products.

Consumer advocates also insist that, in order to prevent product-related injuries, any new federal program must have jurisdiction over a comprehensive range of consumer products. They contend that the piecemeal approach of the past with regulatory authority limited to particular products and specific hazards has been unable to deal effectively with newly discovered hazards; legislation in bits and pieces, they argue, is a slow and inefficient way to protect consumers. Senator Moss took this position in his statement opening the Senate hearings:

> Categorical programs--toy safety, flammable fabrics, refrigerator safety, poison prevention packaging, hazardous substances, electronic product radiation--are vestiges of Congress' past inability to proceed except by halting steps to meet only the most obvious or well publicized hazards--usually long after charred or mutilated bodies have begun to pile up.
>
> The time has plainly arrived to establish a comprehensive safety program with full authority to move to head off any unreasonable product safety hazard, no matter what product, no matter what hazard....27/

Moreover, consumer spokesmen observe, jurisdiction over a broad residual category of consumer products will enable the federal safety authority to obtain a comprehensive data base and thus to better inform safety

experts in uncovering the primary factors contributing to consumer injuries.

Backers of product safety legislation conclude that a federal authority is clearly needed to monitor the performance of consumer products, to identify the ones that present unreasonable hazards, and to find means of protecting people from these hazards. As Senator Cook, R-Ky., put it:

> Unlike some proposed legislation, the need for an omnibus product safety law appears to be well documented. Not only has this committee had considerable experience in safety legislation--from automobiles through toys--but also the committee's creation of the National Commission on Product Safety provided the hard data necessary for consideration in developing a meaningful and workable law.28/

Opponents. Critics of much of the product safety legislation currently pending before the Congress assert that product-related injuries must be placed in perspective. They point out that there were fires and falls and accidents long before the so-called consumer product revolution. They note that all safety experts agree that total safety is impossible to achieve, and they question whether there has been an increase in home injuries and whether any increase can be fairly traced to consumer products.

Secondly, students of the injury problem point out that the statistics on product-related injuries published by the National Commission on Product Safety are derived from estimates by HEW's National Center for Health Statistics. These estimates are not based on an actual count; moreover, the HEW statistics are an estimate of home injuries. Opponents of the pending bills assert that certainly all of the 30,000 accidental deaths per year in American homes cannot be attributable to the products the national commission studied or the pending legislation would cover. Thus, they observe, even yet no one knows the real dimensions of the consumer product safety problem. Even assuming that Mr. Elkind is correct in his estimate that 20 percent of product-associated injuries could be prevented, his conclusion that 6,000 lives per year could be saved as the result of a new safety program does not follow because no one knows how many of the 30,000 deaths reported resulted from products the new program would cover.

In addition, critics note that Mr. Elkind characterized his 20 percent estimate as a "gut" estimate. They prefer to call it a guess. Industry representatives suggest that probably less than 10 percent of household injuries could be affected by the contemplated legislation. Of the remaining 90 percent, they contend, the bulk is traceable to human error or other human behavioral patterns.29/ Hugh L. Ray, a member of the National Commission on Product Safety, has cautioned against being misled

into expecting too much from product safety legislation:

> Of the over twenty million injuries that occur each year in the home, we found that such items as stairs, floors, windows, doors and outside structures rate high in regard to accident involvement....
>
> The National Health Survey indicates falls account for about one third of all accidents....
>
> Sport and recreation equipment are involved in over four million injuries to youngsters....
>
> Knives commonly used in the home are a major cause of accidents.
>
> It is important that we do not mislead by implying that a large part of household accidents can be eliminated by writing new programs for product safety standards.30/

Even after acknowledging that falls may result from defective ladders and that sports equipment and knives can be made safer, those who are skeptical of the safety claims of consumer advocates contend that it is unreasonable to expect that the proposed product safety legislation can cut injuries by 20 percent. They argue that there is simply no hard evidence to support that figure. More effective consumer education plus any increase in consumer carefulness in the use and maintenance of consumer products, when added to better home and product design, will probably never result in a 20 percent reduction, according to critics of the legislation.

A recent Fortune article by Wyndham Robertson on toy safety reported an example of how injury statistics can be misunderstood and misinterpreted. Robertson related that the National Commission on Product Safety

> reported that in the U.S. more than 15,000 children under fifteen "die each year from accidents" and another 17 million "are injured severely enough to restrict normal activity or require medical attention." These figures are totals for all kinds of accidents, including automobile accidents, and therefore do not tell anything about the dangers from toys. Yet one Congressman, James Corman of California, appeared as a witness at the House hearings and announced: "It is reported that more than 15,000 children under fifteen years of age are killed by accident in handling unsafe toys each year....Seventeen million children a year are reported injured by playing with

> unsafe toys." He went on to declare: "These shocking statistics demand that Congress must act immediately to safeguard the nation's children." Congressman Corman's statement was never corrected on the record of the hearings. The bill passed the House in September, 1969, by a vote of 327 to 0.
>
> A staff report of the National Commission on Product Safety, dated June, 1970, estimated that in 1967 the number of children under fifteen who died of accidents clearly involving toys was not 15,000 but 72. And a dozen of these were deaths by drowning in which the products involved in the fatality were wheeled ride-on toys or kits. The drownings suggest a lack of supervision rather than dangers inherent in the toys themselves. It is far from clear that any conceivable legislation could have prevented a large proportion of the deaths, or, for all one knows, any of them.31/

Critics warn that the need for the proposed product safety bills is not nearly so overwhelming as its advocates would have us believe; they also warn that advocates' proposals are not likely to be as successful as they predict. Thus critics counsel deliberation, as well as resistance to being stampeded into costly and ineffective legislation.

Some safety experts contend that the current concern over product safety is more the result of a growing humanitarian awareness of the human costs of accidents, a heightened sensitivity to the unfairness that innocent victims feel, and a greater confidence in our wealth and technology than the result of any demonstration that our product safety problem is getting worse. Critics reason that uncertainties about injury statistics and doubts about the efficacy of safety legislation do not mean we should do nothing about product safety. They agree that concern needs to be harnessed into effective programs; if lives can be saved by appropriate efforts, such efforts should be made. But they warn that the drafters and supporters of product safety legislation should temper their zeal with a more realistic appraisal of what a new law can accomplish. Thus, opponents argue, only the money and the authority that can be effectively used in a realistic program should be earmarked for product safety.

Opponents argue further that a number of secondary economic costs will result from an expanded product safety program: the cost of new consumer products will be increased; product innovation may be discouraged; and small businesses will be particularly hurt by the added costs of developing new products and building up a nationwide capability for recalling consumer products. New legislation, they contend, is likely to reduce freedom of choice; a federal program, particularly an excessive one, can make needed products unavailable or too expensive for those who need them.

Disruption of distribution systems is likely. Whatever the costs and burdens of a new program, opponents feel one thing is certain: such burdens will be borne primarily by the consumer and the taxpaying public. Critics caution that any new program should seek to achieve the optimal balance between product availability and safety and that its burdens must not be greater than its benefits. In short, the burdens it will cause should be measured by what it can reasonably be expected to accomplish.

Safety experts contend that a new safety program can be carefully designed so as to reduce its cost. For instance, some argue that government should not intervene unless there is a clear need. They assert that giving the federal government broad residual authority over all unregulated consumer products does not seem necessary. Unless government authority is limited to areas of demonstrated need, it will be dissipated and wasted over the broad field of consumer products. By limiting new authority to those products or hazards where a need has been convincingly documented, scarce public resources can be concentrated where they are needed most.

Another source of saving in program design is the use of private resources for developing safety standards and testing products. Much of the technical expertise and many of the facilities necessary to undertake these tasks are already in existence in private industry. Duplication of these in the government will be very costly. Therefore critics argue that maximizing the use of private resources is a promising way to cut costs and increase efficiency in a new product safety effort.

What is really needed, opponents insist, is more information about what factors contribute to injuries. To what extent are injuries due to consumer negligence rather than the products involved? They assert that it is impossible to legislate safety and point out that requiring seat belts in motor vehicles has met with limited success. Before going overboard on regulatory and enforcement powers that present an unprecedented increase in government control over what people buy and sell, they suggest a prior step: giving broad information-gathering authority to a new safety program so as to determine what the facts really are.

## What Federal Unit Should Administer Any New Program?

Advocates of an Independent Agency. Those who support the concept of a new independent safety agency or commission insist that a new safety unit must be conspicuously independent from any parent agency and from the White House. An independent agency, they argue, is less likely to be overruled on matters of policy and less susceptible to political pressures from elsewhere in the executive branch. Consequently it can give more objective, single-minded attention to consumer safety. Moreover, an independent agency can be given undivided responsibility for product safety and therefore can be more easily held accountable for any failures.

Consumer spokesmen assert that safety is the most important interest consumers have--important enough to command, as a minimum, a separate agency devoted exclusively to product safety. In order to minimize the agency's independence from political pressures, it should be headed by administrators or commissioners who serve for specific terms of office.

Advocates of independence argue that independent status, plus the authority to publicize budget requests and legislative recommendations without censorship, will enable the product safety function to compete more effectively for money, manpower, and authority. In addition, independent status will help confer greater prestige on product safety regulation and make it more visible to the public.

A number of experts on the regulatory process argue that public awareness and concern over what an agency is doing is one of the most important factors in stimulating that agency to exercise its full powers in the public interest. Consumer advocates contend that an independent agency is more likely to receive public attention; while all agencies are required to be open to comments from the public, an agency in the public spotlight is more likely to hear consumer viewpoints together with industry viewpoints.

Because the first few years of establishing product safety standards and product safety consciousness are the critical years of the safety unit's operation, Mr. Elkind has insisted that it be independent during that time. He has suggested that after the bulk of the standards have been set, an independent safety agency might then be moved into a large department such as HEW.

Safety advocates also take the position that an independent agency would provide the nucleus for centralizing and consolidating consumer safety programs that are now dispersed through approximately 30 different federal organizations. Consolidation would permit a more efficient, better coordinated, and less fragmented attack on different safety problems. These proponents point out that the draft bill in the Senate committee would repeal six existing product safety statutes and transfer the authority over those programs to a single new safety agency.

The committee bill would also transfer the remaining authority of the FDA under HEW to the new agency. A number of consumer spokesmen are strong critics of the FDA's performance as a protector of consumers. They contend it has a poor record in protecting health and safety, that it has been underfunded and understaffed, that it has not made sufficient use of the authority it has to protect consumers, and that it does not possess a firm policy giving health and safety priority over competing considerations. Many of its critics say the FDA is too responsive to industry interests, that it is more disposed to grant a delay for industry's convenience than to press ahead with measures to prevent sickness or injury.

The Intergovernmental Relations Subcommittee of the House Government Operations Committee has been quite critical of the FDA's efforts to promote consumer safety. This subcommittee reported that the FDA was inexcusably slow in warning the public of the dangers of cyclamates and, later, in removing cyclamates from the market.32/

A major criticism of the FDA is that it is dependent on private industry for much of the technical information and expert opinion about the safety of products. According to safety advocates, this prevents it from moving quickly when there is controversy or industry opposition. As examples, FDA critics cite the cyclamates situation and the current controversy over hexachlorophene. They also note that the FDA has been slow in implementing two relatively new statutes that are quite similar to the proposed comprehensive product safety legislation: the Child Protection and Toy Safety Act of 1969 and the Poison Prevention Packaging Act of 1970. These safety advocates assert that the latter statute has had almost no effect on the marketing of poisonous household products some 14 months after its enactment and that the FDA moved to implement the toy safety statute only after strong pressure from Consumers Union.

Advocates of an independent agency conclude that, by and large, the FDA and HEW have failed as guardians of consumer safety. Thus they argue that the FDA should be replaced by a new product safety unit with more vigorous personnel and an opportunity to make a fresh start; they oppose automatic transfer of FDA personnel to the new safety unit, and they vigorously object to new safety authority being given to HEW and to any reorganized version of the FDA.

Advocates of a New Division within HEW. Those who support the administration approach argue that HEW is the logical place for a new health and safety program. Moreover, they contend, product safety does not have a higher priority than all other public health interests and, therefore, it would be a misdirection of priorities and resources to give it disproportionate emphasis at the expense of other pressing accident and health problems. Thus they oppose devoting an entire separate federal agency to problems of product safety.

Supporters of an HEW consumer safety administration argue that independent agencies are not necessarily more visible than regulatory units within larger departments. They see no evidence that the Federal Trade Commission, for example, is more visible than the FDA or that the Civil Aeronautics Board is better known than the Federal Aviation Agency. Moreover, they express doubt that independent agencies are any more resistant to pressures from so-called special interests; political appeals come through the Congress as well as through the executive branch, and some suggest that an independent agency may be more responsive to requests for special treatment from members of Congress than are agencies such as the FDA. As Secretary Richardson phrased it: "Nor do I think that independent regulatory agencies have historically shown a greater resistance than other

agencies to the pressures that often cause agencies to identify their interests with those of the industries they regulate."33/

Advocates of an HEW safety administration observe that an independent agency such as the Federal Trade Commission has come in for its share of criticism for failing to protect consumers, and they doubt that independent agencies as a group have had any more success than departmental units at getting approval for increases in staff and funding. Indeed, some students of the budget process suggest that new authority to publicize budget requests may remove some of the incentive to make responsible, difficult budgetary choices within the regulatory units themselves, probably the best informed level at which many of these choices can be made.

Supporters of an HEW safety administration argue that the proposal to create another independent agency runs counter to the current trend of the governmental streamlining and the consolidation of separate units whenever possible. As evidence of the most informed thinking about governmental organization they point to the Ash Council's recommendations for reorganizing the executive branch and consolidating separate units under broad functional groupings and its criticisms of most independent regulatory agencies. Creating another independent agency to safeguard consumers would be wasteful and inefficient, they contend, because it would duplicate existing capabilities, and any prohibition on automatic transfer of personnel from FDA would be particularly wasteful.

Advocates of an HEW safety unit further argue that the FDA has the knowledge and experience to serve as a nucleus for a consumer safety administration that can move to implement new legislation more quickly than a new agency can. They note that the FDA has had considerable experience with promoting the safety of consumer products, including toys, cosmetics, foods, drugs, and pesticides and with protecting consumers against radiological hazards, household poisons, and other hazardous substances. Moreover, it already has a field staff and testing facilities, which a new agency would have to build, probably from "scratch," and it is developing a computerized injury reporting system. Thus, they contend, it would be economical and efficient to place new product safety authority in an expanded HEW safety administration.

Supporters of the HEW approach also believe that the bulk of the recent criticism of the FDA has been unfair. They contend that most of the FDA failings resulted from lack of funds, manpower, and authority. The FDA's responsibilities have been growing much faster than its resources; the industries under its jurisdiction have been growing rapidly, and a great deal of new responsibility has been given to the FDA during the last decade. Administration spokesmen point out that they have proposed increasing FDA funding by nearly one-third this year to help redress the imbalance between responsibility and capability.

FDA defenders also note that it has recently been reorganized with an eye toward improving its product safety performance; they state that the FDA has done a good job in enforcing the toy safety statute by requiring that a large number of toys be taken off the market. Moreover, they argue, when the FDA has moved slowly, it has often been because there was genuine disagreement as to the proper balance between product availability and product safety. As an example, for some time there was considerable dispute among experts over the values and dangers of cyclamates. In the area of toy safety, an FDA official has been reported as stating that marbles and baseball bats are probably the most dangerous of all toys, but he doubts the FDA should ban them.34/ In short, FDA supporters contend that it has been criticized by safety advocates for moving deliberately in cases when there were valid reasons for not rushing to ban a product.

Those who support the administration approach conclude that on the whole the FDA has not done a bad job and that it certainly has not performed so poorly that it should be abolished. In fact, these FDA supporters argue that abolishing the FDA was not really considered in the product safety hearings. They assert that wiping out the FDA would prove controversial enough to slow down product safety legislation and probably even prevent it from being enacted this year. They argue, also, that the government operations committees and labor committees probably have jurisdiction over parts of such a far-reaching proposal and would have to consider it, making floor consideration in both houses unlikely before adjournment. In short, they say, any attempt to abolish the FDA would kill the chances of a comprehensive product safety law being enacted by this Congress.

## What Authority Should A New Safety Program Contain?

Advocates of Strong Powers. Advocates of strong powers to promote consumer safety insist that the safety bill that is ultimately passed should contain flexible and far-reaching powers sufficient to attain its proper goal--to help prevent as many consumer injuries as possible. They insist that, since this legislation seeks to prevent injuries, it is essential that it cover all consumer products from toys to lawnmowers so that the safety unit will have the authority to deal with product hazards before they can lead to a large and tragic number of injuries.

Consumer advocates urge that a new safety law authorize, at a minimum, a special safety unit with the power to set mandatory standards for hazardous products, to remove products from the market if they cannot be made reasonably safe, and to move quickly in exceptional cases against products that present imminent risks of such magnitude that consumers must be protected from them before the normal regulatory process has time to deal with the hazard. All of the major pending bills meet this general requirement. However, safety advocates argue that the administration

bill would permit any interested party to obstruct the regulatory process and as a practical matter to veto a safety action by delaying the promulgation of a safety order indefinitely or making it exceedingly difficult and costly to promulgate one. These advocates prefer the approach of the commission bill and the committee bill because it would require the safety authority to act decisively and quickly by setting time limits on the safety standard-setting procedure. They hold that the safety unit must be able to move quickly when a clear and serious threat to safety is present, and that informal administrative procedures are sufficient to insure accuracy and fairness when lives could be saved during the time more formal procedures would take.

Advocates of strong powers maintain that new safety legislation should contain a quality control or certification program to try to make certain that products actually on the market do not contain any defects or features that safety regulations have prohibited. Proponents of this point of view contend that even pre-market clearance may be necessary in some cases because the essential feature of this program should be identifying hazards and eliminating them before they result in injuries.

Safety advocates insist that the new safety authority have broad powers to obtain information about injuries and products. They maintain that accurate information about injuries and the factors that contribute to injuries plus complete, detailed information about products is essential to translate what it learns about injuries into product safety regulations. For this reason, safety advocates urge that the safety unit have independent testing capabilities in order to build up enough technical expertise so that it will not be dependent on industry's technical experts.

Consumer spokesmen advocate a number of different sanctions to enforce a new product safety law. The sanction that many of them advocate most strongly is publicity. Proponents of strong legislation believe that a statute which makes information about products and safety readily available to the public will be very effective at motivating manufacturers to market-safe products. Manufacturers know the value of publicity, according to these advocates who regard it as essential that safety legislation be drafted so that getting vital safety information to the public will be given greater emphasis than protecting competitive information.

Advocates of strong legislation support a long list of different remedies to maximize deterrence and to insure that the new law is enforced by a sanction appropriate to the particular violation. They believe that notification of purchasers or other forms of publicity about product hazards will frequently be all that is needed to enforce the law. Either recall, replacement, repair, or refund under the new statute, advocates say, will serve to compensate purchasers of hazardous products in the bulk of cases where there are no injuries. Injunctive relief should be available when the safety unit needs to move quickly or needs the additional power of a

court order to make sure that a hazard is eliminated. Civil penalties, supporters of strong authority say, are appropriate to penalize deliberate or near deliberate violations and hopefully to deter them.

Proponents of strong sanctions regard criminal penalties as appropriate because they believe that reckless disregard for consumer safety is criminal behavior. Moreover, they take the view that criminal sanctions provide a powerful deterrent to businessmen while civil fines are rarely large enough to threaten a large company and the businessmen who run it. Condemnation and seizure are necessary, it is argued, to make certain that consumers do not get possession of products that are found to be very dangerous, particularly when a manufacturer has refused to recall a product or cannot do so. Many consumer spokesmen support double or treble damage suits to deter the manufacture of unsafe products and to encourage consumers to take small as well as large cases into the courts because these multiple damage suits will better compensate the injured after litigation expenses are subtracted. Finally, they favor authorizing private suits to enforce safety orders to guard against an excessively timid or inactive safety authority.

The draft bill in the Senate committee contains several other provisions that, like private enforcement, are intended to spur the safety unit to be responsive to the consumer interest and to prevent bureaucratic indifference and inaction. These provisions include the one creating a fiduciary duty running from safety agency employees to consumers together with a right to sue for breach of that duty. Backers of such provisions also support the requirement for employees to make critical safety problem reports, the requirement to put all conversations concerning pending cases on the public record, the prohibition against potential conflicts of interest on the part of former agency employees, and the authorization of full or part-time consumer representatives to advocate consumer viewpoints before the agency. Support for these provisions is grounded primarily on the conviction that they are needed to help insure that the primary responsibility of the safety unit and its employees is to consumer safety.

Many supporters of strong legislation favor an independent safety advocate located within the new safety unit but otherwise autonomous. They contend that a permanent and well-funded consumer representative is needed to balance the normally constant and able advocacy that industry interests receive.

Proponents of Limited Authority. Many of those who are critical of the commission bill and the committee bill argue that the drafters of those two bills let their concern for consumer safety run roughshod over other valid considerations. These critics assert that the two bills contain excessive and unrealistic powers that have the potential to stifle the marketing of consumer products throughout the United States.

Advocates of more restricted authority contend that the initial responsibilities of any new safety unit should be to acquire the information necessary to understand what really will promote consumer safety and then to establish effective consumer education programs to convey that understanding to consumers. In order to maximize the effectiveness of the safety information collection effort, advocates of limited authority advise that the safety unit make full use of existing facilities, both government and private, for product testing and data gathering.

Supporters of limited authority urge that new safety legislation require an adequate, statistically-based finding that a safety regulation is needed before that regulation is put into effect. Moreover, they insist that safety regulations be examined during a formal public hearing before they are issued in order to insure accuracy, fairness, and a meaningful opportunity for judicial review. Those who take this position criticize all the pending bills for leaving the decision on whether to hold a hearing to the safety unit's discretion in most situations.

Supporters of moderate authority maintain that the time limits in the commission and committee bills are too short to put a well-prepared standard into effect. They criticize the 60-day limit between publishing a proposed standard and issuing a final standard. In the committee print particularly, they contend, this time limit is unrealistic because it has been superimposed on administration bill's requirements that during this period interested parties have a reasonable opportunity to comment, that public hearings be held to resolve factual disputes, and that detailed findings be prepared before a final standard is promulgated. These critics suggest that any case involving controversy will require more than 60 days to complete these procedures, and they assert that at least this much administrative review is essential.

These critics also attack the requirement in the committee bill that a safety standard be effective within 6 months after it is issued. They contend that 6 months, not to mention 90 days, is too short a time to conduct the testing necessary to determine if a product complies with a standard, make any changes necessary or develop a new product, and get a new or modified product into production.

Advocates of moderation assert that the normal time for developing a standard can be extended beyond the unreasonably strict limits in the committee draft and commission bill without depriving the safety unit of the authority to move quickly in those exceptional cases when an imminent hazard exists. Moreover, these advocates prefer that the imminent hazard procedure be left to the Department of Justice and the courts because it includes extraordinary powers that call for greater separation between the enforcement authority and the regulatory authority. In fact, many critics of the pending legislation contend that all enforcement authority including the power to seek civil penalties should be vested in the Justice

Department in order to achieve a reasonable separation of enforcement power from rulemaking power.

Those who favor limited legislation object to the fact that the committee bill and the administration bill would authorize one individual to make the final decisions which determine the content of a safety regulation. They believe that such quasi-legislative decisions should always be left to a group such as a commission or a legislative body; in addition, they argue that the power to promulgate product safety standards that have the effect of law is a major delegation of congressional authority that should be subject to a congressional veto provision similar to the one contained in the bill giving the Federal Trade Commission the power to issue legislative rules, a bill which passed the Senate last session.35/

Advocates of restraint contend that the pending product safety bills represent a drastic increase in federal control over the production and marketing of consumer products. They observe that, if the contemplated comprehensive safety legislation is enacted, "producers of articles subject to the Food, Drug, and Cosmetic Act and the Traffic and Motor Vehicle Safety Act, for example, will be subject to materially lower substantive standards, fairer procedures, and lesser penalties," than will producers under the new product safety law.36/ They wonder if it is appropriate to give the entire field of consumer products tougher scrutiny than products such as motor vehicles, foods, and drugs receive. It would seem, they say, that products possessing the demonstrated potential to cause injury that automobiles and drugs possess should be covered by a stronger law than are most consumer products and that the drafters of these safety bills have failed to build this appropriate set of priorities into the pending legislation.

Advocates of restraint argue that one feature of some of the pending bills in particular represents a marked increase in federal control over what is bought and sold. This feature, authorizing the safety authority to impose pre-market clearance requirements on practically any consumer products, including new ones, met the following criticism from Secretary Richardson:

> We believe, in view of the countless number of new products marketed each year, that the implementation of any (pre-market clearance) requirements would be a misallocation of limited resources, and would have an unreasonably chilling effect on the introduction of new products and, in consequence, on their availability to the consumer.37/

According to supporters of limited legislation, pre-market clearance is not the only proposed compliance procedure that will be wasteful and costly. They insist that any federally imposed quality control procedures,

certification requirements, and record-keeping requirements will add costs to consumer products that are not justified by their potential for reducing injuries. Numerous consumer products, they observe, are priced lower than the cost of maintaining a record of the purchasers of those products. Therefore, advocates of limited legislation argue that a reasonable product safety program should concentrate on product performance and results where more of the regulatory dollar can be spent on preventing injuries and less on simply controlling manufacturers. This approach, they continue, should stimulate manufacturer cooperation and thereby further reduce costs to taxpayers, consumers, and stockholders.

Advocates of moderation point out that notification of purchasers and recall of consumer products are also costly. Whether recall is accomplished through a repurchase arrangement, an undertaking to repair, or simply by replacement or refund, they assert that it will be expensive to producers and ultimately, to consumers. Consequently these moderates urge that consumer notification and recall of products not be considered mild remedies, and they advocate that any new safety law restrain the product safety unit from employing them arbitrarily or without regard to their economic consequences.

Supporters of limited authority observe that giving the safety authority power to make product information public is perhaps the most powerful sanction among those contemplated by safety advocates. For instance, they note that the public notice recently about the danger of botulism in one kind of Bon Vivant soup together with the recall of that soup led to the company's bankruptcy. Advocates of moderation argue that the power to publicize product information is more open to abuse and error than are administrative and judicial sanctions. They contend that it is quite difficult to correct an inaccurate impression about a product when the source of that inaccuracy is the government, with its image of impartiality. Advocates of restraint urge that safeguards be built into the pending bills to prevent product-killing errors from being made in government disclosures to inform consumers about the risks associated with various products; and they urge that the safety bill that is passed contain a specific procedure that will indemnify manufacturers for losses resulting from inaccurate disclosures by the safety authority.38/ Moreover, those who support limited legislation are convinced that a safety unit can release information adequate to protect public safety and still protect bona fide trade secrets.

Critics of unlimited authority oppose authorizing class action suits, multiple damage suits, criminal prosecutions, condemnation and seizure actions, private suits to enforce safety rules, and suits against agency employees for breach of fiduciary duty because together the presence of these remedies constitute a punitive approach and a demand on judicial resources that they consider unwarranted by the product safety problem. These voices of moderation indicate that authorizing injunctive relief

and civil penalties represent a sufficient charge on court time for enforcing a product safety statute. Moreover, they consider these other judicial remedies novel and out of proportion to any demonstrated culpability on the part of manufacturers or government employees. In particular, supporters of limited authority find class action suits for multiple damages inappropriate because they consider that anyone injuried by a product already has an adequate remedy in the form of a suit for damages on a contingent fee basis. What is needed, advocates of moderation say, is to speed up the judicial process so that these victims can receive their just compensation more quickly. While the availability of class actions and the potential for double or triple damages may draw a few more victims into court, these devices are not likely to result in faster disposition of court cases; in fact, critics of these procedures contend that they will slow down the judicial process and delay recovery because of the complexity and the amount of money they will involve.

Advocates of moderation also oppose criminal penalties in the product safety context as inappropriate and unworkable. Criminal prosecutions are so expensive and time consuming that they have rarely been initiated under product safety statutes such as the Child Protection and Toy Safety Act, 39/ probably because, as these advocates contend, a manufacturer's failure in the product safety area rarely involves criminal intent, and, even when it is suspected, criminal behavior is almost impossible to prove against a background of corporate decision making.

Supporters of a moderate approach oppose the creation of an independent consumer advocate within the safety unit. They prefer giving the safety unit the chance to make a good record at promoting product safety and being responsive to the consumer interest without being saddled from the beginning with a built-in institutional adversary. They consider giving the consumer unit the authority to hire consumer representatives a more reasonable approach toward making certain that consumer viewpoints are represented.40/

## NOTES TO TEXT

### Notes to Chapter 1

1/ Subcommittee on Commerce and Finance.

2/ For a listing of current product safety statutes, see Congressional Quarterly Weekly Report (December 18, 1971), p. 2627.

3/ 92nd Congress, 1st session. In January 1971, companion bills to S. 983 were introduced in the House, H.R. 260 by Representative Murphy, D.-N.Y., and H.R. 1569 by Representative Ryan, D.-N.Y.

4/ See Hearings before the Committee on Commerce on S. 983, S. 1685, S. 1797, U.S. Senate, 92nd Congress, 1st session, p. 95. (Hereafter cited as Senate Hearings.)

### Notes to Chapter 2

5/ See 5 U.S. Code, section 553.

6/ See 5 U.S. Code, section 706. However, this bill would limit judicial review in those cases in which the safety commission finds that a particular product hazard presents an imminent risk to public health or safety. In these cases any resulting commission order consisting of an interim safety standard or a preliminary determination that a product should be banned could be overturned on appeal only by clear and convincing proof that it is arbitrary.

7/ It appears that the drafters of this bill intended for the new safety commission to enforce its provisions by seeking civil and criminal penalties and other relief in the federal district courts; see sections 16(g) and 25(b). However, in view of the fact that the attorney general normally possesses the authority to seek such court enforcement and of the absence of any specific grant of this authority to the new safety commission, this bill, as currently drafted, would leave open to dispute the question of who should enforce its penalty provisions.

8/ Section 33 of H.R. 8157 is the transfer provision which sets out the specific responsibilities that would be transferred.

9/ The administration did not submit any legislation covering the proposed reorganization within HEW; it took the position that HEW has the power to make this reorganization without any new statutory authority.

10/ See 5 U.S. Code, section 553.

11/ See 5 U.S. Code, section 554.

12/ See 5 U.S. Code, section 552(b).

13/ Committee Print 2 carries on its cover the number of the administration bill (S. 1797) as well as S. 983, but the bill description refers to the committee print as a version of S. 983.

14/ See S. 448, a bill to change in a similar manner the appropriations requesting procedure for existing regulatory agencies, together with hearings this session on S. 448 before the Intergovernmental Relations Subcommittee of the Senate Committee on Government Operations.

15/ See Committee Print 2, section 202(a) for the specific functions to be transferred to each new commission.

16/ The commissioner could also withdraw any proposed standard or regulation, thereby gain time to consider how to attack a particular hazard, and then start again at the beginning of the standard-making procedure.

17/ See section 311; note that this section as currently drafted would prohibit a manufacturer from significantly increasing production of any consumer product about to be covered by a safety standard whether or not a product conforms to the safety standard. It appears that the purpose of this provision is to prevent stockpiling of nonconforming products only; see the committee description of the bill located in Committee Print 2 at p. 2.

18/ This bill does not contain a provision which specifically covers court review of notification orders or accompanying orders to repair, replace, et cetera; note that section 309 covers judicial review of other administrative orders by the safety commission. Presumably judicial review of notification orders would follow only the requirements of chapter 7, title 5, U.S. Code.

19/ See section 314(a); subsections (2) and (3) both make stockpiling a prohibited act; perhaps this is the result of a typographical error. The provision in the administration bill on which section 314 is based would make failure or refusal to comply with a notification order an unlawful act; see S. 1797 or H.R. 8110, section 15(2).

20/ See note 7 supra and accompanying text.

Notes to Chapter 3

21/ 117 Congressional Record S1881 (daily ed., February 24, 1971).

22/ The National Commission on Product Safety, Final Report (Washington: U.S. Government Printing Office, 1970), p. 1. (Hereafter cited as Commission Report.)

23/ Senate Hearings, p. 142.

24/ Commission Report, pp. 3-4 (emphasis added). Note that Committee Print 2, section 301(e) authorizes the product safety commissioner to exchange information with local government authorities in an effort to promote home safety through revision of building codes or housing codes.

25/ 115 Congressional Record H10308 (daily ed., October 30, 1969).

26/ Commission Report, pp. 4, 114.

27/ Senate Hearings, p. 2.

28/ Ibid., p. 3.

29/ See testimony of Stanley Groner representing the National Association of Manufacturers at Hearings before the Subcommittee on Commerce and Finance of the Committee on Interstate and Foreign Commerce on H.R. 8110, H.R. 8157, H.R. 260, and H.R. 3813, U.S. House of Representatives, 92nd Congress, 1st and 2nd sessions, pp. 945-46.

30/ Commission Report, p. 120.

31/ Wyndham Robertson, "Tempest in Toyland," Fortune (February 1972), pp. 115, 145.

32/ See House Report no. 1585, 91st Congress, 2nd session.

33/ Senate Hearings, p. 100.

34/ See Robertson, supra note 31, pp. 145-46.

35/ See title II of S. 986, 92nd Congress, 1st session.

36/ See Senate Hearings, p. 552. The reader will recall that, if any of the pending product safety bills are enacted, the food and drug portions of the Food, Drug, and Cosmetic Act and the National Traffic and Motor Vehicle Safety Act will remain in effect.

37/ Senate Hearings, p. 102.

38/ For comparison see H.R. 13366, a proposal to indemnify companies injured by the ban on cyclamates. This proposal is currently under consideration by the House Committee on the Judiciary.

39/ See Robertson, supra note 31, p. 146.

40/ Note also that bills are now pending before the Congress to create an independent consumer protection agency to represent consumer interests before all federal regulatory agencies. See S. 1177 and H.R. 10835; the latter passed the House on October 14, 1971.

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