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## Congress on the Consumer Bandwagon: The Consumer Product Safety Act of 1972

On March 27, 1968, President Lyndon Johnson appointed a seven-man, bipartisan National Commission on Product Safety (NCPS) to "conduct a comprehensive study and investigation of the scope and adequacy of measures now employed to protect consumers against unreasonable risk of injuries which may be caused by hazardous household products."<sup>1</sup> After more than two years of study, the NCPS found that 20 million Americans are injured annually in the home as a result of using consumer products. Of that total, 110,000 are permanently disabled, and 30,000 are killed. These product-related injuries exceed an annual cost of \$5.5 billion.<sup>2</sup>

The NCPS also found that the federal government had no central authority to establish minimum standards or to ban dangerous items, but instead attempted to curb those hazards "in narrow product categories"<sup>3</sup> resulting in selective, piecemeal regulation. Furthermore, the states were prevented by jurisdictional limitations from exercising broad control over the manufacturing and distribution of consumer goods, and the courts were more involved with postinjury remedies than with preventive control.

As a result of these findings, the NCPS recommended the "establishment of an independent Consumer Product Safety Commission"<sup>4</sup> to be supported by federal funds. The insistence on an independent agency grew out of a concern that subordination to a larger existing agency would cause "the emphasis on consumer safety . . . to suffer."<sup>5</sup> The powers to be delegated to the proposed Commission included the following: to establish mandatory consumer product safety standards; to seek injunctions against products which create an "unreasonable risk to the safety of the public;"<sup>6</sup> to hold public hearings on consumer products; and to establish testing laboratories and conduct safety research. The NCPS also suggested the appointment of a "Consumer Safety Advocate"<sup>7</sup> to present consumer complaints before the

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1. Pub. L. No. 90-146, § 2(a) (Nov. 20, 1967).

2. NATIONAL COMMISSION ON PRODUCT SAFETY, FINAL REPORT 1 (1970).

3. *Id.* at 2. Legislation authorized control only over products which presented an immediate danger to the consumer, such as flammable fabrics, toys, automobiles, drugs, cosmetics, etc.

4. *Id.* at 113.

5. *Id.* at 114.

6. *Id.*

7. *Id.* at 115.

agency, and allowances for class actions, as well as treble damages, for consumers injured as a result of violations of safety standards.

### I. *Legislative Background*

The question of the proposed Commission's status as an independent agency became the focal point of debate between proponents of the NCPS report and the Nixon administration. In a message to the 92d Congress, President Nixon called for "broad Federal authority for comprehensive regulation of hazardous consumer products."<sup>8</sup> This authority would be vested within the Department of Health, Education, and Welfare (HEW), and would provide for "full participation on the part of private organizations and groups in the development of standards."<sup>9</sup>

In July, 1971, the Senate Committee on Commerce began hearings on the Magnuson bill, S. 983,<sup>10</sup> which essentially adopted the recommendations of the NCPS, and S. 1797, the Nixon administration bill.<sup>11</sup> In April, 1972, the Committee reported out a "clean" bill, S. 3419, on which hearings were held by two other Senate committees before passage on June 21, 1972.<sup>12</sup>

On November 1, 1971, the House Subcommittee on Commerce and Finance began thirteen days of hearings on eleven similar bills<sup>13</sup> which attempted to regulate hazardous consumer products. The hearings centered on the administration bill, H.R. 8110,<sup>14</sup> and the counterpart of the NCPS

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8. Message from Richard M. Nixon to the 92d Congress, Feb. 24, 1971. See also special message from President Nixon to the 91st Congress, Oct. 30, 1969, urging Congress to design a program around a "Buyer's Bill of Rights;" and message on consumer affairs from President Lyndon B. Johnson to the 90th Congress, Feb. 16, 1967.

9. *Id.*

10. See SENATE COMMERCE COMM. PRINT ONE AND TWO ON THE CONSUMER SAFETY ACT, 92D CONG., 1ST & 2D SESS. (1972). The bill followed essentially the same format as S. 4054 introduced by Senators Warren Magnuson (D-Wash.) and Frank Moss (D-Utah) during the 91st Congress. Nothing of substance was accomplished during that session. No committee action was taken, and, therefore, no product safety bill made it to either floor of Congress.

11. *Id.* The bill was introduced, by request, by Senator Magnuson.

12. Hearings were held by the Senate Government Operations Committee and the Senate Labor and Public Welfare Committee. See S. REP. NO. 92-749, 92D CONG., 2D SESS. (1972). See also *Hearings on S. 3419 Before the Subcomm. on Health of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess. (1972), and the report of the full committee, S. REP. NO. 92-835, 92D CONG., 2D SESS. (1972); and *Hearings on S. 3419 Before a Subcomm. of the Senate Comm. on Government Operations*, 92d Cong., 2d Sess. (1972). The final vote in the Senate was 69-10. 188 CONG. REC. 9932 (daily ed., June 21, 1972).

13. See *Hearings on H.R. 8110, H.R. 8157, etc. Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce, Pts 1, 2, & 3* 92d Cong., 1st & 2d Sess. (1971-72) [hereinafter cited as *House Hearings*].

14. Introduced, by request, by Rep. Harley Staggers (D-W. Va.).

report, H.R. 8157.<sup>15</sup> The subcommittee reported out H.R. 15003, which assimilated major aspects of both bills, to the full committee. The House Committee on Interstate and Foreign Commerce reported favorably on the bill with certain amendments.<sup>16</sup> H.R. 15003 was sent to another committee before passage on September 20, 1972.<sup>17</sup> The House-Senate Conference Report was agreed to,<sup>18</sup> and, despite speculation that it would be vetoed, the President signed the bill on October 27, 1972.<sup>19</sup>

Virginia Knauer, Special Assistant to the President for Consumer Affairs, hailed the measure as

[O]ne of the most significant pieces of consumer legislation any President has ever signed. . . . The new regulatory authority will be flexible enough to stimulate product safety advances in the private sector, yet firm enough to ban from the marketplace those products which present unacceptable dangers to the American consumer.<sup>20</sup>

Congressman John Moss, one of the House sponsors of the bill, called it a "milestone"<sup>21</sup> in federal consumer legislation.

Beneath the enthusiastic response to the new law lay a history of deep divisions of opinion as to the basic structure of the new agency, its purpose, function, and power. The new measure reflected, as most laws do, a series of differences, amendments, and ultimate compromises which produced what nearly everyone agreed was sorely needed: a federal response to hazardous consumer products. How strong and effective that response would be became the ultimate issue between the supporters of the NCPS report and the administration.

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15. Introduced by Rep. John E. Moss (D-Calif.). Rep. John Murphy (D-N.Y.) reintroduced a NCPS bill, H.R. 260, in the House on January 22, 1971. That bill adopted the same features as H.R. 18208, introduced in the 91st Congress by Rep. James O'Hara (D-Mich.), but no action was taken. See generally *supra* note 10. These bills all followed the NCPS guidelines and recommendations.

16. See H.R. REP. NO. 92-1153, 92D CONG., 2D SESS. (1972).

17. The House Committee on Rules sent the bill to the floor where it was passed 319-50. 118 CONG. REC. 8607 (daily ed., Sept. 20, 1972).

18. See H.R. REP. NO. 92-1593, 92D CONG., 2D SESS. (1972). The Senate came out with very little of its bill remaining in the final form.

19. The Washington Post, Oct. 29, 1972, at A20, col. 2, reported:

The administration vigorously opposed establishing a separate independent agency for [consumer] products. [HEW] Secretary Elliot A. Richardson reportedly recommended a veto of the bill because it set up a new agency instead of giving HEW jurisdiction.

The bill became Pub. L. No. 92-573 [hereinafter cited as Act].

20. See press release of Virginia Knauer, Office of Consumer Affairs, Oct. 28, 1972, on file in C.U. Law Review office. See also statement by President Nixon, Oct. 28, 1972, also on file.

21. Washington Post, *supra* note 19.

## II. *The New Product Safety Commission: Consolidation or Independence?*

The administration's approach to protecting the consumer against hazardous products consisted of a "consumer product safety program which shall include the promulgation and enforcement of product safety standards"<sup>22</sup> established and directly controlled by the Secretary of HEW. This consolidation, the administration argued, would be more economical and practicable since HEW already had laboratories and professional expertise in the Food and Drug Administration (FDA), and needless proliferation could, therefore, be avoided. Testifying before the House Subcommittee on Commerce and Finance, former Secretary of HEW, Elliot Richardson, envisaged a consolidated federal structure to implement the needs of consumers:

Enactment of the President's reorganization proposals, by transferring these, as well as other product safety programs, to a new Department of Human Resources, would further consolidate consumer protection responsibility in a single Federal entity.<sup>23</sup>

Critics of the administration's approach focused their attacks on the failures of FDA,<sup>24</sup> and warned that consolidation within HEW would condemn the

22. H.R. 8110, p.2.

23. *House Hearings* 973. Although the administration portrayed HEW as ready to undertake a consumer product safety program, it became clear that such an undertaking would be a first step toward a plan to consolidate all existing federal programs under a single agency at some indefinite point in the future:

Secretary Richardson. This legislation, whether hazardous substances or the Flammable Fabrics Act, is established and is, in some cases, getting underway more effectively.

Mr. Eckhardt. It seems to me, Mr. Secretary, that the flammable substances are so closely related to hazardous products it seems difficult for me to reconcile your statement that there is a need for consolidation with a recommendation that consolidation not be accomplished.

Secretary Richardson . . . I was trying to say that we think that there should be a period of time in which, with this new legislation [the administration bill], the responsibility over other consumer products should remain as it is under existing legislation, looking toward a future date . . . to consolidate responsibility.

Mr. Eckhardt. Then you would favor the principle of consolidating that function in some agency, . . . but you would simply not recommend it at this time, is that correct?

Secretary Richardson. Yes, that is correct.

*House Hearings* 1045-46.

24. Congressional reluctance to extend additional responsibilities to FDA stems, in part, from a series of recent studies which were sharply critical of the agency's abilities to carry out the duties already assigned to it. Principal among these studies, reprinted in *House Hearings*, are: the Kinslow report of July, 1969, which offered an analysis of FDA's consumer protection objectives and programs, *House Hearings* 1025; followed by a departmental review of FDA in July, 1969, the Malek report, *House Hearings* 982; and ending in May, 1971 with the Ritts Committee report which reviewed FDA's "total scientific effort," in *House Hearings* 986. "Each of these studies identified structural shortcomings in FDA, citing inadequacies in internal procedures

new program to the same fate. Arnold Elkind, former Chairman of the NCPS, testified:

[O]ne must conclude that a delegation to [HEW] would predictably fail to be effective in raising the quality of consumer protection from product hazards.

. . . .

It is frustrating to find that the administration desires to bury this new consumer activity with the very people who have had such a poor track record. . . .<sup>25</sup>

NCPS bill supporters called for an independent agency free from political pressures.<sup>26</sup> The full House committee agreed,<sup>27</sup> and provided in § 4 of H.R. 15003 for a five-man Commission appointed by the President<sup>28</sup> with Senate approval, each to serve for a seven-year term. Section 4(a) insulated the members from partisan politics by providing for removal only for neglect of duty or malfeasance in office. Section 5 authorized the Commission to conduct research, investigate, analyze and disseminate information relating to hazardous consumer products, and to promulgate mandatory consumer product safety standards.

The Senate Commerce Committee also approved of the NCPS' recommendation for an independent agency,<sup>29</sup> but provided for a different organizational structure in its bill. The new agency would be headed by an administrator, appointed by the President with Senate approval, for a five-year term. The administrator would be the coordinator and chief overseer of the agency, and would be limited by only one reappointment. Besides the administrator, four commissioners would be appointed to serve at the pleasure of the President, with approval by the Senate. Each commissioner could conduct public hearings, have subpoena power, and generally carry out the purposes of the Act in coordination with the rest of the agency.

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and organization. Following each study, the prescription has been for more money and manpower and for reorganization." H.R. REP. NO. 92-1153, 92D CONG., 2D SESS. 25 (1972). See also the Heffron report, written for the National Commission on Product Safety, which studied then-existing federal regulations on consumer product safety, *House Hearings* 535.

25. *House Hearings* 304.

26. Ralph Nader told the House subcommittee: "The higher visibility of a vigorous new independent agency is necessary to create consumer confidence in product safety." *House Hearings* 887. Among consumer groups to support an independent agency were the Consumer Federation of America, Consumers Union of the United States, and the National Consumers League (see *House Hearings* 1325-326). See also Chamber of Commerce statement opposing a new agency, *House Hearings* 1316-320.

27. See H.R. REP. NO. 92-1153, 92D CONG., 2D SESS. 24-26 (1972).

28. See the editorial in the *Washington Post*, Mar. 7, 1973, at A26, cols. 1 & 2, urging President Nixon to hasten the nomination of Commission members. The President named four Commissioners on May 14, 1973. They are: Richard O. Simpson, Chairman; Constance Newman, Lawrence M. Kushner, and Barbara Franklin, Commissioners.

29. S. REP. NO. 92-749, 92D CONG., 2D SESS. 1 (1972).

Although the Senate bill subjected the commissioners to serve at the whim of the President, it did provide for more far-reaching authority by transferring the functions of FDA to the new agency, something which the House bill avoided and completely the opposite of what the administration wanted. This advantage was lost, however, in the conference report with the agreement to accept the House provisions on the composition and authority of the new Commission.<sup>30</sup>

Once it became clear that Congress intended to create an independent agency, the controversy settled on which functions should be transferred to it. Besides transferring FDA to the new agency, the Senate bill also included the food inspection authority of the Department of Agriculture. That provision, however, had to be deleted on the floor by one of the bill's sponsors to prevent delay in passage.<sup>31</sup> The House bill only transferred the functions of HEW under the Federal Hazardous Substances Act, the Poison Prevention Packaging Act, and the Flammable Fabrics Act, all included in the Senate bill as well. The House's cautious, wait-and-see approach was adopted,<sup>32</sup> with certain consumer items explicitly exempted from the Commission's control.<sup>33</sup>

The novel idea of a Consumer Safety Advocate was dropped because of the expected passage of the Consumer Protection Act which also provided for a consumer ombudsman.<sup>34</sup> Emphasis is placed instead on private initiative to effectuate the purposes of the Act.

### III. *Establishment and Enforcement of Product Safety Standards*

#### A. *Rule-making Procedures*

The Commission's authority to promulgate safety standards raises questions as to the proper procedure to be used in adopting them, the scope of participation by the private sector (both consumer groups and industry) during the development period, and the procedures involved in compelling compliance. Section 7 of the Act outlines the development of the standards; it commences with notice that a safety standard is necessary for a given consumer product to reduce the risk of injury, and includes a provision which invites any

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30. See H.R. REP. NO. 92-1593, 92D CONG., 2D SESS. 32-33 (1972).

31. Senator Frank Moss felt compelled "with no great joy" to delete the amendment of the Committee on Labor and Public Welfare and the Committee on Government Operations since it "would greatly delay the bill before us, while we discussed the matter in committee and held hearings and later had to come to the floor." 118 CONG. REC. 9883 (daily ed., June 21, 1972).

32. See Conference Report, *supra* note 30, at 35-36.

33. The Commission would not have authority over tobacco products, motor vehicles, aircraft, boats, pesticides, food, drugs, and cosmetics. See Act § 3(a)(1).

34. See 118 CONG. REC. 8570 (daily ed., Sept. 20, 1972).

interested party to offer an existing standard or develop one. The Commission may also accept an existing standard without inviting an offer. If the Commission accepts a development offer, it may contribute funds to the offeror's cost in developing the safety standard. During the development period, the Commission must provide notice and opportunity for participation by other interested parties, including consumer groups. The Act is unclear, however, as to how interested parties may participate in the developmental process once an offer has been accepted.

#### B. *Commission Standards*

The Commission is authorized to promulgate its own standard if an offer to develop one is not accepted within thirty days after the notice of proceedings provided in § 7(b). This provision allows the Commission wide discretion in the selection of offerors. If the Commission determines that an offeror is not making satisfactory progress in developing a standard, it may issue its own standard or appoint a new third party; or if a sole offeror is accepted who happens to be too closely connected to the product, the Commission can develop its own proposals for a standard during the development period. Otherwise, the Commission cannot issue a safety standard during that time. The Act requires publication of a proposed standard or withdrawal of notice of proceedings within 210 days, unless the period is extended for "good cause" by the Commission.

#### C. *The Ban and Imminent Hazards*

In extraordinary circumstances, the Commission may, under §8 of the Act, ban a product which presents an unreasonable risk of injury when no "feasible" safety standard can be developed or applied. However, this ban cannot take effect until after the appropriate administrative proceedings of §§ 7 and 9 take place. These banned products, as well as other products in violation of the Act, may then be seized by application to the district court for the jurisdiction in which they are located. The proceedings "shall conform as nearly as possible to proceedings in rem in admiralty."<sup>35</sup>

Section 12, on the other hand, authorizes the Commission to disregard administrative proceedings in actions against imminently hazardous products. Rather than acting with the approval of the Attorney General, as other provisions of the Act require, including the banning provision of § 8, the Commission may sue in district court using its own attorneys. However, the supposed intent of §12 to allow speedy action when necessary, is hampered by the requirement that judicial proceedings occur *before* acting against such

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35. Act, § 22(b).



imminently hazardous products. Consumer groups argued that the Commission should have the authority to declare a product an imminent hazard with judicial review *after* the administrative action. Two prominent consumer advocates, Ralph Nader and Judy Jackson, made the following arguments before the House subcommittee:

Miss Jackson. . . . The problem is that courts notoriously, in the consumer safety area, have been unwilling to grant injunctions. You may run into problems getting the Justice Department to go in and get one.

So I think it is most important that there be an ability in the agency itself, and I think, particularly from the standpoint of dealing with the situation quickly for extreme hazards, to be able to go in and administratively ban a product and then put the burden on the manufacturer to come in and show wherein the agency was wrong in doing that. . . .

Mr. Nader. The Toy Safety Act, for example, has enabled the HEW [sic] to put out a banned list of toys, and if you see the length of that list, you can imagine the difficulty of going to the Justice Department to obtain injunctions for 200 different kinds of toys.<sup>36</sup>

#### D. *Rule Promulgation and Stockpiling*

Section 9 provides that within sixty days after the safety standard has been proposed in accordance with § 7, the Commission shall promulgate the applicable rule, still allowing for oral or written arguments from interested parties before the rule's effective date. The effective date of the new safety rule begins not less than thirty nor more than 180 days after promulgation.<sup>37</sup> The rule would not apply to affected products manufactured before the effective date, and this provision caused some consideration to be given to the possibility that a forewarned manufacturer would step-up production and stockpile the product to avoid the reach of the Act. Section 9(d)(2) gives the Commission power to prohibit a manufacturer, including importers,<sup>38</sup> from stockpiling any product between the date of promulgation of the safety rule and its effective date if it can show that production during

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36. *House Hearings* 911.

37. Congressman Staggers successfully amended § 9(d) allowing at least thirty days before an effective date could be set after promulgation "to be sure that they have time in which to amend their practices." 119 CONG. REC. 8592 (daily ed., Sept. 20, 1972). Thus, a loophole could have been exploited were it not for § 9(d)(2).

38. The Act's reach extends to imports which do not comply with its provisions (§ 17(a)), but not to exports (§ 18). The fact that American manufacturers may ship abroad products deemed unsafe at home is defended on the grounds that the United States should not hamper competition in foreign countries which do not take the trouble to promulgate their own safety standards. *See* discussion in the House on this point, 119 CONG. REC. 8598-599 (daily ed., Sept. 20, 1972).

that time exceeded that of a normal base period. The provision on stock-piling came essentially from the Senate bill, as there was no comparable House provision.<sup>39</sup>

#### E. *New Products Clearance*

Of considerable concern to the administration and some congressmen was the question of procedure in developing safety standards for new products ready to be marketed. They questioned the need of giving the Commission power, in effect, to grant a premarket clearance for new products. The applicable provision, §13, sparked some debate on the House floor over the fundamental authority of the Commission to regulate new products, and the liability of businessmen, including retailers, who may unknowingly be caught in the broad sweep of the Act.<sup>40</sup> But the basic approach of the Act is to attempt to balance the rights of private industry with the need to protect innocent consumers without destroying business incentive. To accomplish this, the Act provides for an extended timetable for establishing a final product safety rule—always allowing for maximum input from any interested party.

#### IV. *Private Initiative and Judicial Review*

The Act relies heavily on participation by interested persons to achieve a meaningful control over consumer products. Section 10 permits any interested party to petition the Commission to initiate a proceeding for the “issuance, amendment, or revocation of a consumer product safety rule.”<sup>41</sup>

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39. See Conference Report, *supra* note 30, at 46.

40. Mr. STAGGERS. . . . all a manufacturer would be required to do is just give a description and describe the intended use of the article and it can be put on the market . . . .

. . . .  
Mr. DENNIS. I understand, Mr. Chairman, that you do not have this to the place where a man has to have permission before he can sell; you have not gone that far. You have only taken the first step. He has got to give notice before he sells. I expect that maybe in a year or two from now we will be back here with a bill which makes a precondition. That is what I am worried about, the first step forward.

. . . .  
Mr. BROYHILL of North Carolina. . . . All this section does is provide a means for the Commission to keep informed about what is going on in the area of new products. That is all.

. . . .  
Mr. LLOYD. Even though he [the manufacturer] does not know of this new provision requiring that notice be given to the Commission, he will be subject to a civil fine?

Mr. STAGGERS. If he can prove that [i.e. lack of knowledge], I am sure he would not be subjected to the fine. . . .

118 CONG. REC. 8567 (daily ed., Sept. 20, 1972).

41. Act, § 10(a).

If the Commission denies the petition, the petitioner may commence an action in the federal district courts seeking to compel the Commission to initiate the rule-making proceedings of §§ 7 or 8. The Act also allows any "interested person"<sup>42</sup> to seek an injunction in the district courts to compel compliance with the safety rule or §15,<sup>43</sup> as long as notice is given to the Attorney General and the Commission.

Once a safety rule is promulgated and becomes effective, an aggrieved party may appeal to the circuit courts for review of the safety rule which can then be set aside in whole or in part. Moreover, instead of placing the burden upon the aggrieved party (i.e. the manufacturer or distributor) to show that the safety standard or banning order was arbitrary or capricious, the traditional grounds for court review, the Congress has required that the Commission support its action by "substantial evidence."<sup>44</sup>

#### A. Penalties

Section 19 lists conduct prohibited by the Act, and §§ 20 and 21 provide civil and criminal penalties respectively. The Commission may petition the district courts, with the concurrence of the Attorney General, to enjoin any violations of the Act. In order to be convicted of a violation of the Act, it must be shown that the accused "knowingly" committed the violation.<sup>45</sup>

#### B. Private Suits

Any person injured by reason of a violation of a product safety rule may sue in the district courts as long as the \$10,000 jurisdictional amount is met. Initially, there was no provision for the jurisdictional amount, but an amendment was offered and passed after considerable debate on the House floor,<sup>46</sup> and it was retained in the final bill. The amendment was probably passed to allay concern that product safety standards would encourage consumers to litigate, and subject industry and the courts to frivolous suits.

Section 25(a) and (b) make it clear that compliance with a product safety rule shall not relieve the defendant of liability in a civil suit for damages, and no evidence can be introduced to show that the Commission failed to take any action on the product. If the plaintiff proves noncompliance, however, a question arises as to whether the Act's requirement of a "knowing" violation would have any application in strict liability jurisdictions which do not even require a showing of negligence. Also unresolved is the problem

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42. *Id.*

43. See discussion of § 15 in text *infra*.

44. Act, § 9(c).

45. See exchange *supra* note 40.

46. See generally 118 CONG. REC. 8576-577 and 8592-593 (daily ed., Sept. 20, 1972).

of whether noncompliance could establish a prima facie case, obviating the necessity of showing a product defect in proving negligence. The intent of § 25(a),<sup>47</sup> therefore, is somewhat ambiguous and troublesome. It would seem that a court, in its discretion, could allow evidence that showed compliance with a safety standard to demonstrate adequate care or to rebut plaintiff's allegation of noncompliance. Such evidence of compliance, if admissible, could well "relieve any person from liability at common law,"<sup>48</sup> unless the plaintiff also proved negligence.

Originally, the NCPS had specifically recommended that evidence showing compliance be inadmissible except in actions to recover treble damages.<sup>49</sup> The unequivocal language of the NCPS' recommendation was not adopted, however, nor was the treble damages provision which some considered an effective deterrent to violations of the Act.<sup>50</sup>

### C. Other Provisions

The Commission has broad power under § 14 to require testing of products and certification that a given consumer item conforms to an applicable product safety rule. The burden is on the manufacturer or private labeler to issue a compliance certificate to the distributor or retailer. This certificate saves any person from prosecution for violations of §19, unless there is proof that the person knew the product was nonconforming. Again, it is not clear whether such certificates can be introduced in civil trials.

Section 15 empowers the Commission to force manufacturers, distributors, and retailers to give notice to the public that the product is defective (creating a "substantial risk of injury"), or fails to comply with applicable safety rules. This section also allows the offending party to elect to bring the product into conformity, replace the product, or refund the purchase price. Section 16 allows designated employees of the Commission to inspect both the facilities where consumer products are manufactured or held, and the records kept by the company showing compliance with the Act.<sup>51</sup>

The Commission is required under § 28 to establish a fifteen-man "Product Safety Advisory Council"<sup>52</sup> with equal numbers representing government,

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47. The section reads as follows: "Compliance with consumer product safety rules or other rules or orders under this Act shall not relieve any person from liability at common law or under State statutory law to any other person." It should be noted that damages received are in addition to, and not in lieu of, any other remedies provided by law, *i.e.*, the traditional products liability suits.

48. *Id.* The implication is, of course, that such evidence can be admitted in certain cases.

49. See COMMISSION REPORT, *supra* note 2, PROPOSED CONSUMER PRODUCT SAFETY ACT § 30.

50. See the Nader statement, *House Hearings* 907.

51. See generally, 118 CONG. REC. 8572 (daily ed., Sept. 20, 1972).

52. Act, § 28(a).

business, and the consumer. The council may propose safety rules, and generally serves in an advisory capacity for the Commission.

### V. Conclusion

The creation of the new Commission represents a significant and sorely needed first step in protecting the consuming public.<sup>53</sup> The Act's passage signifies a departure from the traditional, piecemeal approach to consumer protection to a consolidated federal response. By an assertive step, Congress deprived the President of exclusive budgetary control over the Commission by requiring that it also receive all budget requests or legislative recommendations submitted to the President.<sup>54</sup> At the very least, this requirement ensures the continuous existence of the Commission and checks any attempt by the President to dismantle it or assimilate its function within another agency. While this may prevent the Commission from functioning exclusively at the whim of the President, it could also subject the agency to partisan haggling.

While the Act might be an innovative achievement, limitations on the Commission's authority can be viewed as remnants of the old reluctance to allow a single federal entity too much clout over private industry. This reluctance can best be seen in the unwillingness of Congress to include *all* consumer products within the reach of the Act. By exempting certain product categories<sup>55</sup> from control, Congress may have seriously hampered the Commission's effectiveness. The Congress appointed the NCPS which painstakingly outlined what needed to be done and how to do it, yet many of its essential recommendations were never implemented. Examples of this deliberate weakening of the Commission's power are: the requirement, in most cases, that the agency be subjected to the political considerations of the Justice Department prior to proceeding in court; that the Commission obtain court approval before acting against certain products; and that judicial review be based on the broader "substantial evidence" test. These are hardly the trappings of a truly independent agency.

It must be conceded, however, that a stronger bill, like the one which passed the Senate, would never have been acceptable to the House or to the President. Thus, while the Commission's authority and power may not be as strong and pervasive as some would like, its very existence is a hopeful beginning.

David M. Pantalena

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53. See generally THE BUREAU OF NATIONAL AFFAIRS, THE CONSUMER PRODUCT SAFETY ACT (1973).

54. Act, § 27(j) and (k). See also Act, § 32(b).

55. See note 33, *supra*.