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CONSUMER PRODUCT SAFETY ACT SECTION 15 AND SUBSTANTIAL PRODUCT HAZARDS

*M. Stuart Madden**

I. INTRODUCTION

Seen at the outset as one of four complementary avenues for enforcement of product safety obligations under the Consumer Product Safety Act (CPSA),¹ section 15 has increasingly become the first among equals and the favored enforcement tool of the Consumer Product Safety Commission (Commission).² Section 15 permits the Commission to order the recall,

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1. 15 U.S.C. §§ 2051-2081 (1976). The Commission's formidable enforcement powers permit it to levy fines of up to \$500,000 per violation, to order businesses to conduct highly expensive recall campaigns, to promulgate regulations affecting thousands of businesses, to promulgate and enforce safety standards, and to ban specific consumer products.

2. Consumer Product Safety Act § 15, 15 U.S.C. § 2064 (1976). *See* Address of Commissioner Stuart M. Statler, Western Safety Conference, Anaheim, Cal. (May 8, 1980).

Since 1973, businesses have recalled approximately 117 million products under the auspices of the CPSA. The 1979 figure alone is 53.4 million products. 4 CONS. PROD. L. REP. (P-H) No. 19, § 2, at 16 (Sept. 18, 1980).

The predominance of § 15 enforcement activity is also indicated by the dollar amounts of the civil penalties exacted from covered firms. For example, in fiscal year 1979, the Commission recovered \$171,000 in civil penalties, \$100,000 of which was assessed against Pittway Corporation, d.b.a. BRK Electronics, for failure to report smoke detectors which the Commission determined could create a substantial product hazard. The other cases involved refuse bins (\$21,000) and flammable carpets (\$50,000). 1980 CPSC Ann. Rep. (Fiscal Year 1979) pt. 1, at 23.

The recent report of the Recall Effectiveness Task Force confirms the Commission staff's intention to maintain the prominence of § 15 in the Commission's hierarchy of enforcement measures. The task force recommended therein to the Commission:

The Commission has now processed more than twenty-five hundred corrective actions involving tens of millions of potentially hazardous product units which either the Commission's staff or product manufacturers believed required correction. For several reasons related to the nature of these cases and the direct and indirect costs of litigation, only a handful of these cases have been the subject of formal enforcement actions by the Commission following a breakdown in voluntary negotiations. Only once among these actions has a question of recall effectiveness been directly

repair, replacement, and refund of consumer products which represent a "substantial product hazard," and imposes reporting requirements upon firms distributing products which "could" create a substantial product hazard. Over the last two years it has eclipsed the significance of section 7, providing for the promulgation of product safety standards, section 8, providing for the banning of hazardous products, and section 12, providing for seizure of imminently hazardous products.³

There are many reasons for section 15's emergence as the Commission's principal enforcement mechanism. Most important from the Commission's standpoint is the speed and cost efficiency of section 15 actions as compared to the processes required to promulgate a standard, implement a ban, or proceed against an imminently hazardous product. The Commission's experience has been that the latter enforcement routes may take months or years,⁴ while section 15 actions have moved with sometimes astonishing swiftness in removing allegedly hazardous products from the hands of consumers.⁵

The speed and efficiency of section 15 is of heightened importance to the Commission because despite its far reaching regulatory and enforcement

in issue. The Task Force identifies several long-term costs associated with the historic infrequency of such litigation. On balance, we conclude that if the Commission wants to utilize its recall authority routinely as a formal regulatory response to product hazards, to push that authority to its limits of creativity and effectiveness, and to make clear that it will seek formal remedies if negotiations break down, it would appear that some amount of litigation designed to achieve these purposes is necessary. The Task Force recommends that both the Commissioners and the Executive Director seek to identify and advance litigation well suited to these purposes in a limited number of appropriate cases.

Report of the Recall Effectiveness Task Force, CPSC, Executive Summary, at 3 (Aug. 25, 1980).

As early as 1975, former Chairman Richard O. Simpson stated to the Consumer Subcommittee of the Senate Commerce Committee:

There is absolutely no question in any of our minds but that section 15 of the act has proven to be a key feature of the law, more key, I think, than was envisioned by the Congress when they drafted the law . . . [or] than envisioned by those of us in the agency who tried to initially allocate our priorities.

Hearings on Proposed Amendments to the Consumer Product Safety Act Before the Subcomm. for Consumers of the Senate Comm. on Commerce, 94th Cong., 1st Sess. 191 (1975) (Remarks of Richard O. Simpson).

3. 15 U.S.C. §§ 2056, 2057, 2061 (1976).

4. See Address of Margaret Freeston, Deputy General Counsel, CPSC, Product Safety Conference, Washington, D.C. (June 2, 1980); Statler Address, *supra* note 2.

5. *E.g.*, 11 NAT'L J. 357, 358 (March 1, 1980). In the recall of hand-held hair dryers containing asbestos insulating elements, "[o]nce the Commission had the hard data, it moved quickly. A few days after [the local television news account] broke, the agency met with leading manufacturers, and within a few weeks almost all the dryers were off the market." *Id.*

powers, it is one of the smallest regulatory agencies.⁶ In light of the pressures exerted by Congress and the public on federal agencies to prove their mettle or be dramatically reduced in stature,⁷ the Commission is predictably interested in providing prompt, complete, and inexpensive resolution of perceived consumer product safety problems.

Through its increased use of section 15 compliance investigations and civil penalty actions against firms for failing to promptly report substantial product hazards, and the recent reorganization of the Compliance and Enforcement Directorate to accomplish that end,⁸ the Commission has put businesses on notice that careful quality control and immediate reporting of potential safety problems are expected. In addition, both Commission members and staff have stated that they expect to use section 15 in the future to regulate specific products and product safety problems heretofore regulated, often ineffectively, by standards, bans, or injunctive actions.⁹

Despite the attraction of vigorous use of section 15, and the concomitant

6. The Commission has a budget of approximately \$40,000,000 and a staff of fewer than 900, making it one of the smallest regulatory agencies. *Id.* at 357. It has a budget allocation of 13% of that of the Food and Drug Administration, and less than 1% of that of the Environmental Protection Agency. Compared to the CPSC staff of 900, the FDA has 7,600 staff, the EPA has 10,600. Over the past four years, taking inflation into account, the Commission's real budget has declined 22%. Statler Address, *supra* note 2.

7. See *Hearing Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. 1, 2 (April 6, 1979) (Remarks of Rep. James H. Scheuer); Nguyen, *Regulatory Reform* (Heritage Foundation 1980), reported in 231 DAILY EXEC. REP. (BNA) A-9 (Nov. 28, 1980). See also *Budget Cuts Will Force CPSC to Look to Section 15*, 10 Prod. Saf. Letter 1 (Feb. 16, 1981).

8. See Memorandum of Susan B. King, Chairman of the CPSC (Sept. 18, 1980) (Reorganization of the Commission's Litigation Function). See also 9 Prod. Saf. Letter 1-2 (Sept. 22, 1980) & note 159 *infra*.

9. For example, in his statement to the Western Safety Conference, *supra* note 2, Commissioner Statler, following reference to the comprehensive hair dryer remedial actions under § 15, predicted:

In the future, we may choose to adopt this Section 15 approach in numerous other cases. For example, the Commission might find that a product lacking a specific safety device—perhaps a chain saw without a chain brake, a permanent noseguard, or low kickback chain—presents a *de facto* substantial product hazard subject to recall or other corrective action.

Economics provides one of the most compelling reasons to expand the use of our Section 15 authority. It has proved to be one of the Commission's most cost effective and timely means for ensuring consumer protection. While developing a mandatory standard can take years and cost hundreds of thousands of dollars, implementing a substantial product hazard action can, if need be, occur within weeks. More importantly, while standards generally focus on prospective hazards, Section 15 actions are explicitly designed to *remove* hazards already in consumers' hands. By avoiding the time-consuming legal and procedural delays inherent in standards development, the Commission can provide *more timely* and *more direct* consumer protection (emphasis in original).

diminution of the importance of sections 7, 8, and 12,¹⁰ there are, nevertheless, practical, legal, and public policy problems with the Commission's choice. These problems, discussed more fully herein, include the fact that section 15 recall efforts, directed towards the specific products of individual firms, have not been uniformly effective.¹¹ Nor is there any indication that they have been or are likely to be, even under optimal circumstances, as effective in removing unsafe products from distribution as are product safety standards or product bans. In addition, increased reliance on section 15 to remedy product safety problems will force the Commission to rely increasingly—and unnecessarily—on that section's vague language, such as "substantial product hazard"—a term which neither the statute nor the legislative history defines with any specificity.¹² In addition, the resulting case by case resolution of product safety questions is inevitably less instructive to covered firms, the public, and for that matter the Commission, than are explicit product safety standards or general prohibitions as to what represents an acceptable level of safety for a particular product or classes of products.

Moreover, section 15 contemplates a *substantial* product hazard and requires a level and magnitude of product hazard problem which differs from that required to promulgate a product safety standard under section 7, to ban a product under section 8, or to declare a product imminently hazardous under section 12.¹³ For these reasons, the fact that the Commission may now attempt to alleviate its real or perceived financial or political problems through the simple expedient of making section 15 its enforcement centerpiece, to the derogation of other enforcement procedures in the Act, has aroused concern.

In light of the increased use of section 15, familiarity with its substantive and procedural provisions takes on a new importance to manufacturers,

In an interview, CPSC Executive Director Richard Gross stated that he foresaw § 15 action on benzidine dyes, products containing asbestos, and products, such as wrapping paper, containing lead. 9 Prod. Saf. Letter 1 (March 10, 1980).

10. Freeston Address, *supra* note 4.

11. Commissioner Zagoria, in recognition of this, has proposed that the Commission review recalls which after six months fail to recover 10% of the affected product units. 9 Prod. Saf. Letter No. 2 (March 10, 1980). In this regard, the report of the Recall Effectiveness Task Force, *supra* note 2, at 3, noted:

The Task Force was created to address a continuing major concern of the Commission regarding the sometimes low rate of return, by consumers, of recalled hazardous products. The seriousness of this concern was reflected in the Commissioners' vote of November, 1979, to place the issue of recall effectiveness on its published list of regulatory process priorities.

12. See, e.g., note 31 *infra*. See also notes 21-61 *infra*.

13. See notes 64-66 *infra*.

distributors, retailers, importers, and private labelers. With reference, where appropriate, to the concerns expressed above, what follows will be an explanation of section 15, the regulations issued thereunder, and the formal and informal proceedings brought under the section.

II. OVERVIEW OF SECTION 15

The Consumer Product Safety Act, in section 15, compels firms to report to the Commission whenever a product is or even might be unduly dangerous, and gives the Commission broad powers to command product recalls under certain circumstances. Both recall and reporting requirements are keyed to the phrase "substantial product hazard." A recall can be required when a product is found "actually" to constitute a substantial product hazard, but a report to the Commission is also required when a product "could" be a substantial product hazard.

Specifically, section 15 requires a subject firm to notify the Commission that its product: (1) does not comply with an applicable consumer product safety rule, or (2) contains a "defect" which could create a "substantial risk of injury to the public" and therefore presents a substantial product hazard.¹⁴ When either the failure to comply with the rule or the actual defect creates a substantial risk of injury to the public and therefore constitutes a substantial product hazard, section 15 further authorizes the Commission, after a hearing, to order a firm to provide notice of any such hazard to the public, manufacturers, distributors, retailers, and purchasers (including consumers), and further to order replacement, repair, or refund of the purchase price, less a reasonable allowance for use.¹⁵

14. Section 15(a) defines "substantial product hazard" as

- (1) a failure to comply with an applicable consumer product safety rule which creates a substantial risk of injury to the public, or
- (2) a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public.

15 U.S.C. § 2064(a) (1975). Section 15(b) describes action to be taken upon discovery of potentially unsafe products:

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

- (1) fails to comply with an applicable consumer product safety rule; or
- (2) contains a defect which could create a substantial product hazard described in subsection (a)(2), shall immediately inform the Commission of such failure to comply or of such defect, unless such manufacturer, distributor, or retailer has actual knowledge that the Commission has been adequately informed of such defect or failure to comply.

Id. § 2064(b).

15. While the imposition of a reporting requirement caused much comment at the time

In addition to providing for voluntary remedial action, including "corrective action plans" and consent agreements, section 15 gives the Commission authority to seek injunctive relief to prevent further distribution of an allegedly dangerous product. Since the vast majority of section 15 investigations are concluded by the Commission's approval of a firm's voluntary remedial action, only a handful of section 15 matters have been litigated. However, the Commission has brought several "timeliness cases" against firms which assertedly failed promptly to report potential substantial product hazards.¹⁶

As noted above, the Commission cannot order public notice of a hazard under section 15(c) or a recall under section 15(d) unless a product actually constitutes a "substantial product hazard" within the meaning of section 15(a). In any event, as a practical matter, most recalls are conducted voluntarily, in most cases following a firm's voluntary report to the Commission under section 15(b).

In general terms, section 15(b)¹⁷ requires every manufacturer, importer, distributor, or retailer of a consumer product to notify the Commission upon learning that the product does not comply with a consumer product

the CPSA was enacted, such a requirement was not, as many thought, a novel provision. Earlier reporting requirements can be found in the Radiation Control for Health and Safety Act, 42 U.S.C. § 263(b)-(n) (1976), which requires manufacturers (but not distributors or retailers) of electronic products which fail to comply with a standard issued under that act or which have a "defect which relates to the safety of use of such product by reason of the emission of electronic product radiation," to notify the Secretary of Health, Education and Welfare. *Id.* at § 263(g). Section 151 of the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1381-1431 (1976), obliges manufacturers who learn that a motor vehicle or "item of replacement equipment" either contains a "defect" which "relates to motor vehicle safety" or does not comply with an applicable motor vehicle safety standard to notify the Secretary of Transportation, owners, purchasers, and dealers of the problem and remedy it in accordance with § 154 of that act. *Id.* at § 1411. Similarly, following passage of the CPSA, Congress enacted the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (1976), which in § 8(e) requires any manufacturer, processor, or distributor of a chemical substance who learns that the substance "presents a substantial risk of harm to health or the environment" to report this information to the Administrator of the Environmental Protection Agency.

16. See notes 130-48 and accompanying text *infra*.

17. Section 15(b) provides:

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

- (1) fails to comply with an applicable consumer product safety rule; or
- (2) contains a defect which could create a substantial product hazard described in subsection (a)(2) of this section,

shall immediately inform the Commission of such failure to comply or of such defect, unless such manufacturer, distributor, or retailer has actual knowledge that the Commission has been adequately informed of such defect or failure to comply.

15 U.S.C. § 2064(b) (1976).

safety rule or contains a defect which could create a substantial product hazard.

Failure to furnish information required by section 15(b) is prohibited under section 19(a)(4) of the Act, and a knowing violation of section 19(a)(4) may subject the violator to civil penalties.¹⁸ A violation can be

18. Section 19 ("Prohibited Acts"), 15 U.S.C. § 2068 (1976), provides in pertinent part:

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

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

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

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

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

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

Section 20 ("Civil Penalties"), 15 U.S.C. § 2069 (1976), provides:

(a)(1) Any person who knowingly violates section 19 of this Act shall be subject to a civil penalty not to exceed \$2,000 for each such violation. Subject to paragraph (2), a violation of section 19(a) (1), (2), (4), (5), (6), (7), (8), (9), or (10) shall constitute a separate offense with respect to each consumer product involved, except that the maximum civil penalty shall not exceed \$500,000 for any related series of violations. A violation of section 19(a)(3) shall constitute a separate violation with respect to each failure or refusal to allow or perform an act required thereby; and, if such violation is a continuing one, each day of such violations shall constitute a separate offense, except that the maximum civil penalty shall not exceed \$500,000 for any related series of violations.

(2) The second sentence of paragraph (1) of this subsection shall not apply to violations of paragraph (1) or (2) of section 19(a)—

(A) if the person who violated such paragraphs is not the manufacturer or private labeler or a distributor of the products involved, and

(B) if such person did not have either (i) actual knowledge that his distribution or sale of the product violated such paragraphs or (ii) notice from the Commission that such distribution or sale would be a violation of such paragraphs.

(b) Any civil penalty under this section may be compromised by the Commission. In determining the amount of such penalty or whether it should be remitted or mitigated and in what amount, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of such penalty when finally determined, or the amount agreed on compromise, may be deducted from any sums owing by the United States to the person charged.

(c) As used in the first sentence of subsection (a)(1) of this section, the term "knowingly" means (1) the having of actual knowledge, or (2) the presumed having of knowledge deemed to be possessed by a reasonable man who acts in the circumstances, including knowledge obtainable upon the exercise of due care to ascertain the truth of representations.

found with respect to each consumer product involved, with a maximum penalty of \$500,000 for a related series of violations. A knowing violation of section 19 following a Commission Notice of Noncompliance can subject the violator to criminal penalties under section 21 of the Act.¹⁹

III. DEFINITION OF "SUBSTANTIAL PRODUCT HAZARD"

A. *Failure to Comply With An Applicable Consumer Product Safety Rule*

The first prong of the definition of "substantial product hazard" sets up an automatic reporting requirement: if the product fails to comply with an applicable consumer product safety rule, it must be reported whether or not the noncompliance is likely to cause injury. A consumer product safety rule is defined in section 3(a)(2) of the Act to include "a consumer product safety standard described in section 7(a), or a rule under this Act declaring a consumer product a banned hazardous product."²⁰ Thus, standards such as the architectural glass standard,²¹ and bans such as the refuse bins ban,²² are both included under the rubric of consumer product safety rule. All violations, no matter how minor, are required to be reported.

Note, however, that the definition of consumer product safety rule does not include the failure of a product to comply with a standard or regulation issued under the four other statutes administered by the Commission: the Flammable Fabrics Act,²³ the Federal Hazardous Substances Act,²⁴ the Poison Prevention Packaging Act,²⁵ and the Refrigerator Safety Act.²⁶ Thus, a violation of the children's sleepwear standard or the bicycle standard does not automatically trigger reporting duties under section 15(b). Reporting is necessary, however, under the second prong of section 15(b),

19. Section 21 ("Criminal Penalties"), 15 U.S.C. § 2070 (1976), provides:

(a) Any person who knowingly and willfully violates section 19 of this Act after having received notice of noncompliance from the Commission shall be fined not more than \$50,000 or be imprisoned not more than one year, or both.

(b) Any individual director, officer, or agent of a corporation who knowingly and willfully authorizes, orders, or performs any of the acts or practices constituting in whole or in part a violation of section 19, and who has knowledge of notice of noncompliance received by the corporation from the Commission, shall be subject to penalties under this section, without regard to any penalties to which that corporation may be subject under subsection (a).

20. 15 U.S.C. § 2052 (1976).

21. 16 C.F.R. § 1201 (1980).

22. *Id.* § 1301.

23. 15 U.S.C. §§ 1191-1204 (1976).

24. *Id.* §§ 1261-1274.

25. *Id.* §§ 1471-1476.

26. *Id.* §§ 1211-1214.

if the noncompliance under these statutes results in a defect which could create a substantial product hazard.

Because of the limited number of product safety standards and product bans, Commission enforcement of section 15 has focused primarily on the provisions of section 15(b)(2).²⁷ Determining whether a report is required under this section is a complicated task, requiring careful analysis of both the statute and the facts surrounding the potential defect. Moreover, such decisions are usually made in a pressured atmosphere generated by the need to act as rapidly as possible to prevent injury if the product is found to be hazardous and to comply with the time limits implied by the statute and made explicit by the Commission's regulations.²⁸

Before examining these reporting requirements, one important factor should be noted: section 15 and the section 15 regulations plainly require reporting a defect whenever a product *could* be dangerous, not merely when there is some reason to conclude that it actually *is* dangerous. The reason is that injuries can be prevented if the manufacturer and the Commission focus on the problem early.²⁹

Turning to the statute itself, section 15(b)(2) requires a report when a product "contains a defect which could create a substantial product hazard" as described in section 15(a). Section 15(a), in turn, defines a substantial product hazard as:

- (1) a failure to comply with an applicable consumer product safety rule which creates a substantial risk of injury to the public, or
- (2) a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public.³⁰

Under section 15(a)(2) and section 15(b)(2), therefore, a series of ques-

27. Section 15(b), 15 U.S.C. § 2064(b) (1976), provides:

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

- (1) fails to comply with an applicable consumer product safety rule; or
- (2) contains a defect which could create a substantial product hazard described in subsection (a)(2),

shall immediately inform the Commission of such failure to comply or of such defect, unless such manufacturer, distributor, or retailer has actual knowledge that the Commission has been adequately informed of such defect or failure to comply.

28. 16 C.F.R. § 1115.14 (1980).

29. The regulations and the Commission's accompanying comments stress that firms should report promptly, even if there is some doubt as to whether a defect exists. See 16 C.F.R. § 1115.4(e) (1980).

30. 15 U.S.C. § 2064(b)(1), (2) (1976).

tions must be resolved in determining whether a particular product could create a substantial product hazard: is there a product "defect"? If so, does this defect create a substantial risk of injury to the public because of the pattern of the defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise? Each of these questions will be treated in order, followed by a discussion of various other questions raised by the statute and implementing regulations, such as who must make a report, and what information must be reported.

Due to the absence of a statutory definition of "defect" and several other operative phrases,³¹ and because of the scarcity of section 15 litigation, it is necessary to examine the Commission's section 15 regulations,³² staff memoranda published both before and contemporaneous with the section 15 regulations, the legislative history, and the common law to flesh out section 15—*i.e.*, to find out what constitutes a "defect," and in what circumstances that defect will be considered to present a substantial product hazard.

Because these rules are merely interpretive, failure to adhere to the strict letter of the rules will not, without more, constitute a violation of the Act.³³

31. The Commission staff has conceded the problems posed by the absence of a statutory definition of "defect." In its Interim Report to the Recall Effectiveness Task Force, the Recall Task Force observes:

The determination of a product's noncompliance [with a product safety rule] is a relatively straightforward matter. Such a finding is guided by the detailed standards contained in any one of the nine product safety standards or bans which have been promulgated under the CPSA. However, the questions of what constitutes a defect or creates a substantial risk of injury are ones about which the Commission and its staff have had much less detailed guidance.

Interim Report, Recall Effectiveness Task Force 6 (March 17, 1980). The term "defect" is not defined by the CPSA. Its definition is, however, the subject of discussion in a regulation published by the Commission in 1978 on the issue of when a firm's duty arises to report information suggesting a possible defect under § 15(b) of the Act.

32. 43 Fed. Reg. 34,988 (1978). An earlier set of regulations had been published on February 14, 1974, and codified at 16 C.F.R. § 1115 (1974) (effective March 21, 1974). The Commission had also issued regulations entitled "Policy and Procedures Regarding Substantial Product Hazards" on July 24, 1975 (effective August 25, 1975). Both of these previous regulations were superseded by the 1978 regulations.

33. As the Commission stated, "a firm charged with violating Section 15 through acts which are contrary to these rules will always have an opportunity to urge the reasonableness of its actions under the circumstances, thereby defeating the accusation." 43 Fed. Reg. 34,990 (1978).

In issuing these rules as "interpretive," the Commission eliminated the statement in the proposed rule that remedial and sanction actions would be brought for violations "of this Part." 43 Fed. Reg. 34,990 (1978). Commentators on the proposed rule claimed this language gave the rule substantive effect. In its comments on the 1978 rules the Commission explained its view of the difference between substantive and procedural rules in this way:

A substantive rule has the force and effect of law. Thus, a violation of a substantive rule issued under the CPSA is equivalent to a violation of the CPSA. In con-

However, inasmuch as the rules represent a thorough and specific expression of section 15 enforcement policy, all firms are best advised to devote close attention to the section 15 regulations.³⁴

trast, an interpretive rule offers guidance as to what a law means, but does not itself have the force and effect of law. A violation of an interpretive rule is not necessarily a violation of law; the failure to comply with an interpretive rule is a violation of the law under which it is issued only if the rule reasonably interprets that law. In issuing these rules under Section 15 of the CPSA, Commission believes it has reasonably interpreted the provisions and obligations of that section.

Id.

Former Chairman S. John Byington earlier endorsed the value of the proposed rules *as guidelines* for those subject to the reporting requirement of § 15(b). In a December 16, 1977 letter to Senator Wendell H. Ford, the Chairman observed:

The obligation of these groups exists by statute, whether there are regulations or not. However, the proposal does set forth guidelines for persons subject to section 15(b) of the Act to assist them in meeting the requirement to report all defects that *could create* a substantial product hazard.

The proposed regulations are intended to encourage and facilitate reporting by setting out the factors which persons subject to the requirement should consider and by indicating what factors the Commission believes are important (emphasis in original).

The statutory authority for promulgating substantive rules under § 15(b) was assayed in two staff memoranda before the amended rules were proposed. One memorandum found such authority in CPSA § 27. Memorandum of Catherine C. Cook to the Commission, Preliminary Evaluation of Comments on Proposed Section 15 Regulation, at 3 (Jan. 30, 1978). Another staff member concluded that "section 15 contains no express authority to issue such substantive rules, and we believe it is arguable whether Section 27 provides such authority." The latter staff member nevertheless concluded that, because the proposed rules had been the subject of public notice and comment, their characterization as substantive or interpretative was academic. Memorandum of Margaret A. Freeston to the Commission, Preliminary Evaluation of Proposed Section 15 Regulations, at 6 (Feb. 21, 1978).

By way of comparison, § 6(g) of the Federal Trade Commission Act, 15 U.S.C. § 46(g) (1976), specifically states that the FTC may "make rules and regulations for the purpose of carrying out the provisions FTC Act." In *National Petroleum Refiners Association v. FTC*, the court determined that this language empowered the FTC to issue substantive rules as a means of enforcing § 6(g) which contains a broad grant of rulemaking authority. 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). Unlike the Federal Trade Commission Act, the CPSA contains no analogous broad grant of rulemaking authority, although specific sections do mention rulemaking for specified purposes.

Some impetus for the § 15(b) rules change was provided by a 1978 report of the Government Accounting Office. The GAO noted that the Commission had no program for familiarizing firms with § 15 reporting responsibilities, and that the Commission and the Commission staff differed in their definition of substantial product hazards. The GAO report recommended, *inter alia*, that the Commission refine and particularize its criteria for identifying substantial product hazards and further devise means of informing firms of their responsibilities to report defects. GOVERNMENT ACCOUNTING OFFICE, THE CONSUMER PRODUCT SAFETY COMMISSION HAS NO ASSURANCE THAT PRODUCT DEFECTS ARE BEING REPORTED AND CORRECTED 11, 18, 26 (1978).

34. While issuing these regulations as "interpretive," the Commission nevertheless expressed its intent that "subject firms [be put] fairly on notice of the Commission's view of the

B. Meaning of "Defect"

1. Commission Interpretation of "Defect"

Absent an applicable consumer product safety rule, the first question to be resolved in deciding whether a section 15 report is needed is whether the product contains a "defect." The Commission's final³⁵ section 15 rules did not attempt to define "defect,"³⁶ but opted instead for a brief interpretation accompanied by illustrative examples. The section describes defect as including, at a minimum, the commonly accepted dictionary meaning of the word. In general terms, the rules continue, a defect is a "fault, flaw, or irregularity that causes weakness, failure, or inadequacy in form or function."³⁷

law," *i.e.*, that under the Act the Commission can issue substantive rules. 43 Fed. Reg. 34,990 (1978).

35. The 1975 regulations did not include any definition or explanation of the word "defect," instead restating the statutory language of § 15. 16 C.F.R. § 1116.3(a)(2) (1975).

In its proposed § 15 rules, the Commission provided the following definition of the term "defect":

A "defect" within the meaning of section 15 of the CPSA is any aspect of a product which creates an unnecessary risk of injury. Such aspects include, but are not limited to the following: Performance, composition, contents, design, construction, finish, packaging, warnings, and instructions. A product presents an unnecessary risk if the aspect which creates the risk is not necessary for the product to perform its functional purpose. A risk is also unnecessary if the benefits (including recreational and aesthetic benefits) to be gained from use of the product do not justify the risk of injury. A product defect within the meaning of § 15 includes both unintended manufacturing errors and/or imperfections and intended product aspects.

42 Fed. Reg. 46,720 (1977).

In making this proposal, the Commission staff interpreted § 15(a)(2) to mean that a product defect creates a substantial risk of injury to the public and represents, therefore, a substantial product hazard "if the nature and extent of public exposure to the hazard is substantial." Memorandum of Catherine C. Cook and William F. Kitzes to the Commission, at 3 (April 1, 1977), *reprinted in* PRACTICING LAW INSTITUTE, CONSUMER PRODUCT SAFETY ACT, Course Handbook Series No. 103 (1977). The Commission staff stated that the revisions "can provide further guidance by defining the term *defect* and by describing the way in which *substantiality* of a hazard will be assessed." *Id.* at 2.

36. In preparing the final regulations the Commission was persuaded by the concern of many commentators that a comprehensive Commission definition of "defect" would be applied by courts in civil products liability disputes, possibly increasing the financial exposure of subject firms. The Commission accordingly included the following language in the final version of the regulation: "Defect, as discussed in this section and as used by the Commission and staff, pertains only to interpreting and enforcing the Consumer Product Safety Act. The criteria and discussion in this section are not intended to apply to any other areas of law." 16 C.F.R. § 1115.4 (1980).

37. *Id.* The section continues:

A defect, for example, may be the result of a manufacturing or production error; that is, the consumer product as manufactured is not in the form intended by, or fails to perform in accordance with, its design. In addition, the design of and the materials used in a consumer product may also result in a defect. Thus, a product

The rules set out several representative illustrations of product defects: (1) manufacturing or production defect: an electric-appliance casing which can, through manufacturing error, be electrically charged by full-line voltage; (2) labeling and marketing defect:³⁸ athletic shoes advertised for, but unsuited to, running and which cause muscle or tendon injury; (3) defect due to inadequate warnings and instructions: a power tool without adequate instructions or safety warnings, even in the absence of reported injuries, where foreseeable use or misuse could result in injury based in part on the inadequate warnings or instructions; and (4) defect due to consumer reliance and product nonperformance: a garage exhaust fan advertised to activate when fumes reach a dangerous level, but which fails, for whatever reason, to do so.³⁹

In addition to describing manufacturing, design, labeling (including warning labels), and marketing defects, the Commission's discussion of defect implies a balancing test of utility and risk, using the example of a metallicized kite and an ordinary kitchen knife to illustrate the risk/utility evaluation. According to the Commission, while the finish of a metallicized kite may be attractive and the kite may fly better for its added weight, because the kite can conduct electricity from air to ground and can foreseeably become tangled with power lines, it is defective within the meaning of section 15(a), even if designed, manufactured, and marketed as intended, and thus is not defective in the sense of a manufacturing defect.⁴⁰

On the other hand, a kitchen knife, designed, manufactured, and marketed as intended, can also cause serious injury. However, because the knife's sharp edge is necessary for the proper functioning of the knife, and the risk of injury is outweighed by the usefulness of the knife, under the Commission's interpretation this "necessary" risk is not a defect within the

may contain a defect even if the product is manufactured exactly in accordance with its design and specifications, if the design presents a risk of injury to the public. A design defect may also be present if the risk of injury occurs as a result of the operation or use of the product or the failure of the product to operate as intended. A defect can also occur in a product's contents, construction, finish, packaging, warnings, and/or instructions. With respect to instructions, a consumer product may contain a defect if the instructions for assembly or use could allow the product, otherwise safely designed and manufactured, to present a risk of injury.

38. The term "marketing" is the Commission's. While the CPSA does not vest the Commission with authority to impose "marketing" requirements as such, it does, in § 7(a)(ii)(B), authorize Commission promulgation of standards which may include "[r]equirements that a consumer product be marked with or accompanied by clear and adequate warnings or instructions, or requirements respecting the form of warnings or instructions." 15 U.S.C. § 2056(a)(i)(B) (1976).

39. 16 C.F.R. § 1115.4 (1980).

40. *Id.*

meaning of section 15(a).⁴¹

2. *Common and Uniform Code Law*

The relationship between the Commission's interpretation of "defect" for section 15 purposes and the interpretation by courts of "defects" for product liability purposes raises the question of how the Commission will treat preexisting judicial interpretation of what represents a product defect. The Commission stated in the preamble to its final rules that it intends the term "defect" "to include the broadest meaning found in Federal and State statutes and in judicial pronouncements."⁴² The Commission also makes it clear that it will rely freely on product liability precedent in assessing the absence or presence of a product defect under the statute.⁴³

Reference to common law definitions of defect therefore offers useful comparisons for the purpose of anticipating how the Commission will in-

41. *Id.* In its explanatory comments the Commission stated that even though balancing of risk and benefit inheres in the concept of defect, subject firms were nevertheless cautioned "not to engage in lengthy analysis before reporting," and that "given the Commission's broad and inclusive interpretation of defect, they should report if in doubt as to whether a defect exists which could create a substantial product hazard." 43 Fed. Reg. 34,991 (1978).

On the basis of the public comments, the Commission eliminated its earlier proposed risk/benefit guideline providing that "[a] risk is also unnecessary if the benefits (including recreational and aesthetic benefits) to be gained from use of the product do not justify the risk of injury." 42 Fed. Reg. 46,720, 46,723 (1977).

Concerning the risk-benefit analysis in the Commission's proposed 16 C.F.R. § 1115.3(b)(3), the Cook-Kitzes Memorandum offered this example:

Thus a gasoline-powered lawnmower would contain a defect if its throttle tended to stick in the open position causing it to run away. The benefit to be derived—cutting grass with minimal human effort would not justify the risk of injury to the operator or passerby. This is especially so since the benefit could be retained and the risk reduced or eliminated by redesigning the throttle or correcting the throttle assembly.

Cook-Kitzes Memorandum, *supra* note 35, at 3.

42. 43 Fed. Reg. 34,991 (1978).

43. For example, although the final rule dropped the proposed reference to "any aspect" of a product, the Commission discussion of the final rule makes it clear that a defect in any aspect of a consumer product, including design characteristics, instructions, and warnings, can, taken separately, render the product "defective" within the meaning of § 15(a)(2). Acknowledging that design characteristics and inadequate instructions and warnings have been found to be product defects in product liability suits, the Commission's prefatory comments state:

[T]hose aspects of products which are accepted by the courts as presenting unreasonable risks, as well as those discussed specifically in § 1115.4, would be defective within meaning of section 15 of the CPSA. Of course neither the regulation nor judicial determinations constitute the definitive statement as to which aspects of consumer products may be found to be defective. Such a determination is made on a case-by-case basis.

Id.

interpret defect as used in section 15. What constitutes a defect has been the subject of repeated analysis by courts in product liability cases, especially those brought within the strict liability ambit of section 402A of the Restatement of Torts,⁴⁴ and will not be treated here in any detail. Generally, where liability is alleged on the theory of negligence, a manufacturer "is under a duty to use reasonable care to design a product that is reasonably safe for its intended use, and for other uses which are foreseeably probable."⁴⁵ Thus, the unifying premise of most decisions in negligence actions construing the term defect is to consider defective "those products . . . which are dangerous because they fail to perform in the manner reasonably to be expected in light of their nature and intended function."⁴⁶ Under concepts of strict liability, on the other hand, liability may attach even where a product performs precisely as intended, and "[t]he product is to be regarded as defective if it is not safe for such a use that can be expected to be made of it, and no warning is given."⁴⁷

The Model Uniform Product Liability Act,⁴⁸ a fairly recent attempt to order the diverse body of state product liability law, would assess liability where a "claimant's harm was proximately caused because the product was defective."⁴⁹ A product is considered defective if: "(1) It was unreasonably unsafe in construction . . . ; (2) It was unreasonably unsafe in design . . . ; (3) It was unreasonably unsafe because adequate warnings or instructions were not provided . . . ; or (4) It was unreasonably unsafe

44. RESTATEMENT (SECOND) OF TORTS § 402A (1965), which provides as follows:
Special Liability of Seller of Product for Physical Harm to User or Consumer.

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) The seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

45. W. PROSSER, *LAW OF TORTS* 645 (4th ed. 1971). See also *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050, 145 N.Y.S. 462 (1916); *Pitts v. Basile*, 55 Ill. App. 2d 37, 204 N.E.2d 43 (1965); *Seattle-First Nat'l Bank v. Tabert*, 86 Wash. 2d 154, 542 P.2d 774 (1975).

46. *Durham v. Baughan & Bushnell Mfg. Co.*, 42 Ill. 2d 339, 342, 247 N.E.2d 401, 403 (1969).

47. See Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791, 826 (1966); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 367 (1965).

48. 44 Fed. Reg. 62,714 (1979).

49. MODEL UNIFORM PRODUCT LIABILITY ACT § 104, 44 Fed. Reg. 62,721 (1979).

because it did not conform to the product seller's express warranty. . . ."⁵⁰ The Commission has not, to date, specifically decided how a party may use a showing that the manufacture of a product conformed to the state of the art.⁵¹ From at least the strict liability and Model Uniform Product Liability Act approaches, it follows that under section 15 the manufacture or distribution of a consumer product consistent "with the state of the art is a fact without independent legal significance; it is not an affirma-

50. *Id.* Each of the four clauses in § 104 refers to explanatory comments in the succeeding paragraphs, which state:

(A) *The Product Was Unreasonably Unsafe in Construction.* In order to determine that the product was unreasonably unsafe in construction, the trier of fact must find that, when the product left the control of the manufacturer, the product deviated in some material way from the manufacturer's design specifications or performance standards, or from otherwise identical units of the same product line.

(B) *The Product Was Unreasonably Unsafe in Design.*

(1) In order to determine that the product was unreasonably unsafe in design, the trier of fact must find that, at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms outweighed the burden on the manufacturer to design a product that would have prevented those harms, and the adverse effect that alternative design would have on the usefulness of the product.

(C) *The Product Was Unreasonably Unsafe Because Adequate Warnings or Instructions Were Not Provided.*

(1) In order to determine that the product was unreasonably unsafe because adequate warnings or instructions were not provided about a danger connected with the product or its proper use, the trier of fact must find that, at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms and the seriousness of those harms rendered the manufacturer's instructions inadequate and that the manufacturer should and could have provided the instructions or warnings which claimant alleges would have been adequate.

(6) *Post-Manufacture Duty to Warn.* In addition to the claim provided in Subsection (C)(1), a claim may arise under this Subsection where a reasonably prudent manufacturer should have learned about a danger connected with the product after it was manufactured. In such a case, the manufacturer is under an obligation to act with regard to the danger as a reasonably prudent manufacturer in the same or similar circumstances. This obligation is satisfied if the manufacturer makes reasonable efforts to inform product users or a person who may be reasonably expected to assure that action is taken to avoid the harm, or that the risk of harm is explained to the actual product user.

(D) *The Product Was Unreasonably Unsafe Because It Did Not Conform to an Express Warranty.* In order to determine that the product was unreasonably unsafe because it did not conform to an express warranty, the trier of fact must find that the claimant, or one acting on the claimant's behalf, relied on an express warranty made by the manufacturer or its agent about a material fact or facts concerning the product and this express warranty proved to be untrue.

Id. Cf. U.C.C. § 2-313, 2-315 (setting out provisions for express and implied warranties).

51. Instead, the Commission looks to state law for guidance. See note 43 and accompanying text *supra*.

tive defense.”⁵² The rule’s reference to the existing body of product liability law suggests that evidence of manufacture equivalent with the state of the art should be permitted to show use of reasonable care⁵³ or that the product is not defective.⁵⁴ Parenthetically, the evanescence of state of the art issues, and the difficulty in fixing a state of manufacturing art suitable for a product safety standard, are yet other reasons for the paucity of standards petitions and standards activity by the Commission. For example, in contemplating different enforcement alternatives with regard to residential smoke detectors, the Commission’s General Counsel concurred in the staff recommendation not to issue a product safety standard for several reasons, one of which was that “the state of the art seems to be still evolving, raising the possibility that a mandatory standard could become outdated.”⁵⁵

3. *The National Commission on Product Safety and the Legislative History*

The term “product defect” was given great reach by the National Commission on Product Safety (NCPS), which stated in its Final Report that a “defect may be in the design, construction, packaging or warnings and directions for use.”⁵⁶ The NCPS bill did not, however, define “defect” and instead authorized the proposed Commission “to promulgate regulations defining ‘defect which creates a substantial risk of personal injury to the public.’”⁵⁷

The ensuing Senate bill, S. 3419, would have imposed the duty to notify the Administrator of all defects, but limited the remedy of notice to the public to “manufacturing” defects.⁵⁸ As to design defects, the Senate Commerce Committee Report explained: “If a design defect were to present an unreasonable risk of injury or death, the Commissioner could proceed under authority of Section 311 to remove immediately the product from the marketplace or could resort to the standard-setting procedures contained in the bill.”⁵⁹ Section 15(a) of the House amendments⁶⁰ struck out the qualification that a defect be associated with the product’s manu-

52. See Note, *Product Liability Reform Proposals: The State of the Art Defense*, 43 ALB. L. REV. 941, 944 (1979), and cases cited therein. See generally Note, *The State of the Art Defense in Strict Products Liability*, 57 MARQ. L. REV. 649 (1974).

53. E.g., *Olsen v. Arctic Enterprises, Inc.*, 349 F. Supp. 761 (D.N.D. 1972).

54. E.g., *Mondshour v. General Motors Corp.*, 298 F. Supp. 111 (D. Md. 1969).

55. CPSC Briefing Materials on Residential Smoke Detectors 1 (April 3, 1980).

56. NCPS Final Report at 75.

57. Consumer Product Safety Bill Proposed by National Commission on Product Safety, reprinted in THE CONSUMER PRODUCT SAFETY ACT § 16(b) (1973).

58. S. 3419, 92d Cong., 2d Sess. § 313(b) (1972).

59. S. REP. NO. 749, 92d Cong., 2d Sess. 36 (1972).

60. H.R. 15003, 92d Cong., 2d Sess. (1972).

facture,⁶¹ and the "manufacturing" limitation was not included in the Consumer Product Safety Act as passed.

C. "Substantial Risk of Injury"

1. In General

Not all defects are reportable; rather only those which, for any reason, create a "substantial risk of injury to the public" need be reported. While the questions (1) "how widespread"? and (2) "how severe"? are central to the section 15 inquiry, section 15(a)(2) contemplates that a safety problem does not have to be *both* widespread and severe to be reportable. The Commission has concluded in its interpretations⁶² that "[e]ven one defective product can present a substantial risk of injury . . . if the injury which might occur is serious and/or if the injury is likely to occur."⁶³

61. Senator Eagleton criticized the manufacturing defect-design defect distinction in the Senate debate on S. 3419, stating:

We need only look to our recent experience with safety-related defects in automobiles to see that any effective product safety program must provide adequate remedies for all safety-related defects, whether they are technically deemed "manufacturing" or "design" related. Some of the most serious safety defects found in cars have related to design

. . . .
I would also stress the fact that no other product safety legislation of which I am aware—including the statutes which now regulate automobile safety and the safety of products with a potential radiation hazard—make a distinction between manufacturing and design defects. These laws go to any safety defect when it presents a sufficient danger to justify action. Nor does the proposed legislation of the Commission on Product Safety, after which the pending legislation is modeled, make such a distinction.

. . . .
It is clear to me, however, that more attention should be focused on this point. For the reasons I am about to set out, neither the standard setting procedure nor the emergency injunctive authority under section 311 provide an effective alternative for defectively designed products which are already on the market.

118 CONG. REC. 21901 (1972).

62. 16 C.F.R. § 1115.12(f)(i)(ii) (1980).

63. Thus, for example, in the case of White Consolidated Industries, Inc. (kelvinator), CPSC Docket No. 75-1 (initial decision) (Nov. 3, 1975), involving a defect in refrigerator defrost terminals which under some circumstances could cause arcing and heat buildup, Commissioner Constance Newman, sitting as administrative law judge, found the defrost terminals to be defective, but further found that in most circumstances the defect created no hazard. Summarizing § 15(a)(2), Commissioner Newman stated that in order to resolve whether there is evidence to support the contention that a proven defect creates a substantial risk of injury to the public: "it is necessary to consider in toto: (1) the probability of the defect existing in a given product; (2) the number of defective products in distribution; and (3) the severity of the risk." *Id.* at 62.

The Commission staff has taken the position that the § 15(a)(2) criteria should be considered disjunctively. In their memorandum to the Commission, Commission staff members Catherine C. Cook and William F. Kitzes wrote:

The phrase "substantial risk of injury" appears only in section 15 and suggests a standard different from that of "unreasonable risk" of injury, the terminology used elsewhere in the CPSA.⁶⁴ The difference between these standards needs to be explored.⁶⁵ For two principal reasons it can be inferred that "substantial product hazard" connotes a higher level of

In section 15, Congress has enumerated several factors to be considered by the Commission in deciding whether the public exposure to a hazard is substantial, i.e., extensive enough to make notice and recall action under section 15 appropriate. The statute does not state explicitly how extensive the public exposure need be before notice and recall are appropriate. Instead it suggests ways in which exposure may be measured and substantiality determined, *enumerates some of these ways in the disjunctive*, and indicates that all relevant evidence should be considered.

Cook-Kitzes Memorandum, *supra* note 35, at 4 (emphasis added).

64. Consumer Product Safety Act §§ 7, 8, 12, 15 U.S.C. §§ 2056, 2057, 2061 (1976).

65. The dictionary defines substantial as "considerable in quantity; significantly large;" while defining unreasonable as "exceeding the bounds of reason or moderation." Webster's New Collegiate Dictionary 1153, 1273 (1980).

In determining whether the risk of injury is sufficient to render a defective product a substantial product hazard, the rules state that the Commission and staff will consider:

The utility of the product involved; the nature of the risk of injury which the product presents; the necessity for the product; the population exposed to the product and its risk of injury; the Commission's own experience and expertise; the case law interpreting Federal and State public health and safety statutes; the case law in the area of products liability; and other factors relevant to the determination.

16 C.F.R. § 1115.4(e) (1980).

Reference to earlier safety legislation provides some guidance as to the meaning of "substantial" as it related to "injury." The prior regulations under the Federal Hazardous Substances Act define a hazardous substance as a product which "may cause substantial personal injury or substantial illness." The regulations further define a "substantial" injury or illness as "any injury or illness of a significant nature. It need not be severe or serious. What is excluded by the word 'substantial' is a wholly insignificant or negligible injury or illness." 16 C.F.R. § 1500.3(c)(7)(ii) (1974).

The Environmental Protection Agency imposes notification requirements for § 8(e) of the Toxic Substances Control Act comparable to those under the CPSA. In its February 24, 1978 Statement of Interpretation and Enforcement Policy, the Administrator defined a "substantial risk of injury to health or the environment" as "a risk of considerable concern because of (a) the seriousness of the effect . . . and (b) the fact or probability of its occurrence." 43 Fed. Reg. 11,110-11 (1978).

Section 313(b) of the Senate bill, S. 3419, confined its provisions to products evidencing an "unreasonable risk of injury," and authorized the "Administrator" to require public notice "[i]f any consumer product fails to comply with any applicable order issued pursuant to this title and thereby presents an unreasonable risk of injury or death or has a defect which causes it to present an unreasonable risk of injury or death." S. 3419, 92d Cong., 2d Sess. (1972).

The House version, H.R. 15003, recast obligations in terms of a "substantial hazard to the public" and imposed reporting duties upon covered firms discovering a "substantial product hazard," defined at § 15(a)(2) as:

- (1) a failure to comply with the applicable consumer product safety rule which creates a substantial hazard to the public, or
- (2) a product defect which (because of the pattern of defect, the number of defec-

product safety deficiency than that underlying an "unreasonable" risk of injury. First, by defining a substantial product hazard as applicable only to violations of product safety rules (by definition designed to eliminate an

tive products distributed in commerce, the severity of the risk, or otherwise) creates a substantial hazard to the public.

H.R. 15003, 92d Cong., 2d Sess. (1972).

In its Final Report, the NCPS discussed evaluation of risk in these terms (while styling its comments as "Evaluating Hazards"):

In assessing individual hazards, we studied data relating frequency, severity, duration, and sequelae of injury to the frequency and degree of exposure to the product. Other variables we looked at were the degree of inherent risk, the essentiality of the product, and the feasibility and approximate cost of safety improvements.

We also considered whether there were acceptable alternatives for a hazardous product; effects on the product of aging and weather; the contribution to hazards of defective maintenance and repair; exposure to instructions or warnings; influence of product advertising on behavior; the extent and forms of abnormal uses of the product; effects of storage, distribution, and disposal; and characteristics of the persons injured, including age, sex, skills, training, and experience.

NCPS Final Report at 10.

Later in its Report, NCPS described its method for evaluation of data:

Decisions as to which risk can and should be abated depend both on data and value judgments.

These decisions depend also on such human factors as personal experience and motivation, public opinion, and ease of administration.

In general, apart from technical information, the data to consider in setting priorities for hazards associated with consumer products include:

- Frequency of injury
- Severity of injury
- Exposure to injury
- Potential for hazard reduction
- Awareness of hazard by consumer
- Increase of hazard by age of product
- Hazard to nonuser
- Psychological impact of injury

The interaction among these factors requires some system of weighing each.

In appraising the importance of a product hazard, it is essential to determine that the product itself is the main risk factor. High on the physicians' list of consumer products linked to head injuries with possible chronic effects are bicycles, playground equipment, and, in person, baseball or football equipment. But the bicycle is not to blame for environmental hazards such as steep grades, loose road surfaces, or the lack of paths exclusively for pedal pushers. The playground cannot be blamed each time a child totters. By itself, a ball is harmless: the game does the damages.

NCPS Final Report at 43.

Later, in a discussion of acceptable levels of risk, the Final Report states:

If the degree of risk could be calculated for each product, the consumer might decide its acceptability for himself, but he would not have the right to say that his risk is acceptable to everyone.

Presumably, the acceptable risk will vary with the product, its utility, necessity, and inherent dangers.

NCPS Final Report at 70.

unreasonable risk of injury) which *in addition* constitute a substantial product hazard, section 15 suggests that a finding of substantial product hazard may frequently involve a higher degree of risk of injury than simple failure of the product to meet a product safety standard. Secondly, the fact that the extraordinary remedies of recall, repair, replacement, and refund available to the Commission under section 15, as well as the fact that section 15 remedies can reach back to products already in the consumers' hands—while product bans and product safety standards only apply prospectively—further supports the conclusion that Congress intended that section 15 remedies only be invoked upon finding a risk of injury more significant than that for simple “unreasonable” risks. For these reasons, congressional use of the phrase “substantial risk of injury,” unique to section 15, must, if it is to mean anything at all, contemplate a more severe injury, and a greater likelihood of injury, than that necessary to create an “unreasonable” risk of injury.⁶⁶

The question of substantiality turns on evaluation of the four criteria of section 15(a)(2): “pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise.”⁶⁷ Although the Commission must show that a product *does* present a substantial product hazard to order remedies under section 15(c) and (d), firms must report if the safety problem *could* create a substantial product hazard. Taken together, the use of the term “could,” the additional section 15(b)(2) requirement of “immediate” reporting, and the Commission’s repeated admonition that firms should report even if in doubt as to the nature and magnitude of a safety problem,⁶⁸ suggest that the threshold risk determination which triggers section 15 obligations may be lower than—and should in any event be more prompt than—the risk determination which accompanies promulgation of a section 7 standard or a section 8 ban.⁶⁹ Reflect-

66. See Note, *The Consumer Product Safety Act: Risk Classification and Products Liability*, 8 IND. L. REV. 846, 850 (1975). Taking the contrary position, one commentator comparing § 15 with § 12 has stated that “although the determinations to be made in the two proceedings are somewhat different, the element of unreasonable risk is common to both Comparisons of Section 15’s ‘substantial risk’ language with other sections’ ‘unreasonable risk’ standards are only instructive up to a point in assessing a firm’s obligation to report.” Scalia & Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 U.C.L.A. L. REV. 899, 944-45 (1973).

67. 15 U.S.C. § 15(a)(2) (1976).

68. See 43 Fed. Reg. 34,991 (1978); 16 C.F.R. § 1115.4(e) (1980).

69. As the Commission’s regulations explain:

The Commission considered incorporating the term unreasonable risk but on balance rejected the commenters’ suggestion. Within this agency the term unreasonable risk has taken on a special meaning in the agency’s proceedings under Sections 7 and 8 of the CPSA to promulgate CPSA standards and bans. The Commission does not want to give the impression that the extensive cost/benefit analysis in

ing this view that hazard information which is insufficient to support a ban or a standard may nevertheless be reportable information under section 15, the Commission staff has stated that a Commission decision not to initiate a standard setting procedure for a class of products will not excuse an individual manufacturer from the reporting requirements of section 15(b).⁷⁰

2. *To the Public*

The statute does not specifically state the degree of public exposure necessary to raise a product hazard to the level of substantial risk "to the public." It does, however, give some guidance by providing factors to be weighed in assessing substantiality. Section 15(a)(2) includes "the number of defective products distributed in commerce" as one factor.⁷¹ Accordingly, the Commission's regulations include "the population exposed to the product and its risk of injury" as criteria to be considered in determining "whether the risk of injury associated with the product is the type of risk which will render the product defective."⁷²

It would thus seem probable that the exposure of only one person to a product hazard would not satisfy the section 15(a)(2) requirement that the exposure be "to the public."⁷³ The regulations nevertheless clearly state

which it engages before promulgating a standard or ban should be undertaken by subject firms before reporting under Section 15(b) of the CPSA.

43 Fed. Reg. 34,991 (1978).

70. The Commission Office of the General Counsel so advised the Commission after the Commission's decision not to undertake standards development for aerosol products. Following industry statements that the Commission's decision not to proceed obviated the need for possible future § 15(b) reports, the Office of the General Counsel submitted an opinion letter to the Society of Cosmetic Chemists which restated the criteria which will trigger a duty to report a substantial product hazard, and advised further that while aerosol products as a class may not create an unreasonable risk of injury to consumers, an individual aerosol product might. CPSA Advisory Opinion No. 224 (Oct. 7, 1975).

71. The Committee report on H.R. 15003 stated that the substantiality of the risk of injury turned on "the extent of public exposure to the hazard." H.R. REP. NO. 1153, 92d Cong., 2d Sess. 2 (1972). The Committee Report also keyed the degree of public exposure to the distribution requirement of § 15(a)(2), stating: "This definition looks to the extent of the public exposure to the hazard. A few defective products will not normally provide a proper basis for compelling notification under this section."

72. 16 C.F.R. § 1115.4(e) (1980).

73. Compare the § 15 focus on exposure to the public to the reporting requirements of § 9 of the Radiation Control for Health and Safety Act, 42 U.S.C. § 263(b)-263(n) (1976), which are triggered by a risk of injury "to any person." That act, which requires firms to report a defect relating to safety of use, or the failure to comply with an applicable standard, also provides for exemptions from the public notice and repair or replacement provisions of that act only on a showing "that such defect or failure to comply is not such as to create a significant risk of injury, including genetic injury, to *any person*." (emphasis added) 42 U.S.C. § 263(g)(a)(2).

that "[e]ven one defective product can present a substantial risk of injury . . . if the injury which might occur is serious and/or if the injury is likely to occur,"⁷⁴ and further advise that in certain circumstances a firm should report even before public exposure can be evaluated. "Since the extent of public exposure and/or the likelihood or seriousness of the injury are ordinarily not known at the time a defect first manifests itself, subject firms are urged to report if in doubt as to whether a defect could present a substantial product hazard."⁷⁵

3. *Pattern of Defect*

The regulations, intended to guide staff evaluation of a "pattern of defect," are instructive for firms assessing the scope of a safety related problem.⁷⁶ More significantly, for firms which might be subject to section 15 reporting or remedial requirements, the pattern of defect may have some effect on which part of the total gets reported or recalled. If the pattern is clear—for example, 500 products of a 2,500 item production run present a safety problem—less than all need be reported or remedied. The regulations provide that in assaying the pattern of defect, the Commission and the staff "will consider whether the defect arises from the design, composition, contents, construction, finish, packaging, warnings, or instructions of the product or from some other cause and will consider the conditions under which the defect manifests itself."⁷⁷

Additional insight into the staff's interpretation of a pattern of defect can be gained from a memorandum issued by the Commission's Product Defect Corrective Division which sets guidelines and procedures for implementing the reporting requirements.⁷⁸ This CEPD memorandum lists the following factors to be considered: "(a) the ways in which the product may be used or misused; (b) the ways in which the product was manufactured, including techniques employed in quality control; (c) the time in product life at which the defect manifests itself; (d) the physical environment (*e.g.*, geographic area, atmospheric conditions) in which the defect manifests itself."⁷⁹

74. 16 C.F.R. § 1115.12(f)(1)(ii) (1980).

75. *Id.* § 1115.4(e).

76. *Id.* § 1115.12(f)(1).

77. *Id.* § 1115.12(f)(1)(i).

78. Memorandum from Catherine Cook to the Commission, Internal Procedures to Implement Section 15 of CPSA (Jan. 16, 1979) [hereinafter cited as CEPD Memorandum]. For the recent reorganization of CEPD functions, *see* note 159 *infra*.

79. CEPD Memorandum, attachment 1 at 5.

4. *The Number of Defective Products Distributed in Commerce*

The Commission's regulations interpret the "number of defective products" criteria of section 15(a)(2) in such a way that even a single product may create a substantial product hazard if the potential injury is severe, and the potential for injury is great.⁸⁰ The House Commerce Committee Report on H.R. 15003 phrases the distribution requirement somewhat differently from the Commission's rules, placing more emphasis on distribution than on the nature of the hazard associated with a particular product.⁸¹

Tracking the Commission's overall emphasis on early reporting, the CEPD Memorandum makes it quite clear that the Commission staff will not (and, impliedly, that reporting firms should not) delay a hazard determination "until such time as it can establish accurate distribution figures or ascertain to a certainty the number of defective or potentially defective products manufactured."⁸²

5. *Severity of the Risk*

The regulations describe the Commission's interpretation of "severity of the risk"⁸³ as congruent with its interpretation of the "number of defective

80. *Number of defective products distributed in commerce.* Even one defective product can present a substantial risk of injury and provide a basis for a substantial product hazard determination under Section 15 of CPSA if the injury which might occur is serious and/or if the injury is likely to occur. However, a few defective products with no potential for causing serious injury and little likelihood of injuring even in a minor way will not ordinarily provide a proper basis for substantial product hazard determination.

16 C.F.R. § 1115.12(f)(i)(ii) (1980).

81. "This definition [of substantial product hazard] looks to the extent of the public exposure to the hazard. A few defective products will not normally provide a proper basis for compelling notification under this section." H.R. REP. NO. 1153, 92d Cong., 2d Sess. 42 (1972). The House Commerce Committee's use of the phrase "not normally" arguably may be reconciled with the Commission's imposition of Section 15(b) requirements for "[e]ven one defective product" where "the injury which might occur is serious and/or if the injury is likely to occur."

82. CEPD Memorandum, attachment 1 at 5-6. This emphasis on early reporting is consistent with the explanatory comments to the 1978 regulations: "The Commission does not want to give the impression that the extensive cost/benefit analysis in which it engages before promulgating a standard or ban should be undertaken by subject firms before reporting under section 15(b) of the CPSA." 43 Fed. Reg. 34,991 (1978).

83. 16 C.F.R. § 1115.12(f)(1)(iii) (1980):

A risk is severe if the injury which might occur is serious and/or if the injury is likely to occur. In considering the likelihood of any injury the Commission and the staff will consider the number of injuries reported to have occurred, the intended or reasonably foreseeable use or misuse of the product, and the population group exposed to the product (e.g., children, elderly, handicapped).

products" language, stating that a risk will be considered severe where either the potential injury is serious or it is likely to occur. Additionally, special attention will be directed towards any foreseeable misuse of the product, and whether children, elderly, or handicapped persons are exposed to the products.⁸⁴

CEPD considers the severity of the risk "the most important of the factors considered in determining preliminarily whether a defect presents a substantial risk of injury."⁸⁵ The CEPD memorandum states that both the seriousness of the potential injury and the likelihood of its occurrence are to be considered together in determining overall risk severity: "[B]oth a product which can but is unlikely to cause serious injury and a product which is highly likely to cause slight injury might indicate a severe risk of injury."⁸⁶ To assist in these evaluations, the staff has written a "severity index" for injury classifications,⁸⁷ which classifies injuries on a spectrum ranging from amputation to an ankle sprain.⁸⁸

6. Other Considerations

Section 15(a)(2) does not describe the "otherwise" criteria in substantial product hazard determinations. The rules simply state that in addition to the four specific factors of section 15(a)(2), "[T]he Commission and staff will consider all other relevant factors."⁸⁹ As stated above, the Commission's comments on the section 15 regulations make it clear that it will refer to "the broadest meaning found in Federal and State statutes and in judicial pronouncements."⁹⁰

84. *Id.*

85. CEPD Memorandum, attachment 1 at 6.

86. CEPD Memorandum at 7.

87. *Id.*

88. To the 16 C.F.R. § 1115.12(f)(1)(iii) (1980) criteria for determining the likelihood of injury, the CEPD Memorandum adds:

In assessing the likelihood of injury, Compliance and Enforcement also considers where the product is or might be used and whether warning signals are given before the product presents a risk of injury. Based on these factors, the staff determines whether injury from a consumer's exposure to a defective product is highly likely, likely, not improbable, highly unlikely, or improbable. CEPD Memorandum at 7.

On January 19, 1981, the Commission adopted on an experimental basis staff procedures whereby the staff, when it makes a preliminary determination that a product presents a substantial product hazard, is required to place the product into one of three hazard priority categories based on likelihood and severity of harm.

89. 16 C.F.R. § 1115.12(f)(1)(ii) (1980).

90. 43 Fed. Reg. 34,991 (Aug. 7, 1980).

D. Case Law Construing "Substantial Product Hazard"

Administrative decisions in section 15 actions shed at least some light on the Commission's interpretation of what represents a "substantial product hazard." In *Kelvinator*,⁹¹ Commissioner Newman, sitting as the presiding officer, found that although certain refrigerator defrost terminals were defective, the defect did not create a substantial risk of injury to the public and therefore did not represent a substantial product hazard. Commissioner Newman based this conclusion on several determinations: (1) evidence that a series of circumstances necessary to create the defect were unlikely to appear; (2) enforcement counsel's failure to show there were any reported injuries involving the approximately 270,000 refrigerators in question; (3) evidence that the refrigerator's insulation was self-extinguishing; (4) and evidence that the refrigerator would shut down or a fuse would blow before a dangerous condition would be created.⁹²

In another section 15 action, *Francis Alonso, Jr. (Mylar Star Kites)*,⁹³ the Administrative Law Judge weighed the allegation that long-tailed aluminized kites posed a hazard of electrocution if they came into contact with high voltage lines. Evidence showed the near electrocution of one kite flyer and incidents of damage to parked cars and residences after the aluminized kites contacted and damaged high voltage conductors.

The manufacturer defended the kite's safety by showing that the kites were sold with the written warning: "*Never fly your dragon, or any other kite, near power lines or during wet weather. If the kite should land on or near electrical lines, contact local authorities immediately; do not attempt[t] to remove the kite yourself.*"⁹⁴ The manufacturer further claimed that the probability of injury or property damage was so statistically remote as to be negligible.

In concluding that the kites represented a substantial product hazard, the ALJ rejected as insufficient the manufacturer's offer to add an additional warning label to the kites and to distribute warning literature, observing: "[t]here is no guarantee that adequate instructions against flying kites near power lines will invariably be obeyed, even by adults."⁹⁵

The Commission set aside the initial decision on jurisdictional grounds,

91. *Kelvinator*, *supra* note 63.

92. *Id.* at 78-91.

93. 1 CONS. PROD. SAF. REP. (CCH) ¶ 75,109 (Initial Decision) (1976), *Proposed Order set aside on other grounds*, [1977-1979 Transfer Binder] CONS. PROD. SAF. DEC. (CCH) ¶ 75,155.

94. 1 CONS. PROD. SAF. REP. (CCH) ¶ 75,109 at 60,075 (Initial Decision) (emphasis in original) (1976).

95. *Id.*

but affirmed the ALJ's findings of fact concerning the existence of a substantial product hazard. In a discussion which doubtless affected the Commission's later reference (in its final regulations) to the risk-utility evaluation of metalized kites, the Commission concluded that the purely aesthetic value of an aluminized surface, with no compensating benefit to the kite's performance sufficient to justify the risk, was insufficient to mitigate against a finding of substantial product hazard.⁹⁶

In *Relco, Inc. (Wel-Dex Welder Mfg. Co.)*,⁹⁷ the Commission Notice of Enforcement alleged that an arc welder's "electrical output is not isolated from the input by a transformer . . . so that electricity of the same strength is present at the welder probes as at the electrical source"; that "the electrical terminals are located on the outside of the welder" presenting the risk of shock; that the electric cord was not of sufficient size to carry the current and could as well be cut by the welder's sharp edges; and that the uninsulated metal housing tended to overheat.⁹⁸ The Commission affirmed the Administrative Law Judge's finding that the Wel-Dex Electric Arc Welder had design and performance defects which could cause electric shock, burns, or fires, creating a substantial product hazard.

IV. REPORTING REQUIREMENTS

A. What Products Are Covered?

Section 15 applies to all "consumer products."⁹⁹ The Commission has

96. As the record below shows, these aluminized kites contain a serious defect because the design incorporates a conductive material which is capable of transmitting a lethal electric current to a person in contact with the kite. This aluminum surface does not add to the flying capability of the kite but merely adds to its aesthetic value. The Commission therefore believes that because of the nature and severity of the risk, without an offsetting benefit sufficient to justify the risk, a product such as this if properly the subject of a proceeding under the CPSA would present a substantial product hazard.

Francis Alonso Jr. (Mylar Star Kites), 2 CONS. PROD. SAF. GUIDE (CCH) ¶ 75,155 at 60,290 (1977).

To the manufacturer's argument that other toys, including non-metalized kites and wire controlled airplanes pose a comparable risk of creating an arc with overhead lines, the Commission stated: "Even if such contentions were demonstrated, we do not believe that we are obligated to act against every product that may pose a similar hazard in order to act against one that the record establishes is a hazard." *Id.*

97. 1 CONS. PROD. SAF. GUIDE (CCH) ¶ 75,121 (1976).

98. Interim Initial Decision and Order, CPSC Docket No. 74-4 (April 29, 1975).

99. Consumer products are defined by the Act to include:

any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise; . . .

taken the position that section 15 obligations attach to products manufactured before the May 14, 1973 effective date of the Act.¹⁰⁰ Additionally, the Commission staff has construed the reach of its jurisdiction to mean that even where a manufacturer has ceased production of the product there may be sufficient evidence of a substantial product hazard to require a section 15(b) report.¹⁰¹

B. Who Must Report?

Section 15(b) imposes reporting requirements upon "[e]very manufacturer of a consumer product distributed in commerce, and every distributor and retailer of such product." Importers are included in the section 3(a)(4) definition of "manufacturers" as "any person who manufactures or imports a consumer product."¹⁰² The regulations make it clear that importers are subject to section 15(b) reporting requirements.¹⁰³

As will be discussed more fully below, firms which have received reportable information must file an Initial Report.¹⁰⁴ Manufacturers and importers must also file a subsequent Full Report.¹⁰⁵ Distributors or retailers who are neither manufacturers nor importers of the products in question are subject to the reporting requirements of section 15(b) but can satisfy their notification obligations by complying with the less comprehensive reporting requirements of an Initial Report.¹⁰⁶

CPSA § 3(a)(1), 15 U.S.C. § 2052(a)(1) (1976).

100. Advisory Opinion No. 120 (June 26, 1974). The correctness of the General Counsel's conclusion that § 15 can be applied retroactively is not free from doubt. Generally, a law is presumed to apply only prospectively, *Hassett v. Welch*, 303 U.S. 303, 314 (1938), and will not be given retrospective application absent a clear expression of legislative intent. *Miller v. United States*, 294 U.S. 435, 439 (1935). As the United States Court of Appeals for the District of Columbia Circuit stated: "statutes are not to be applied retroactively 'unless the words used are so clear, strong, and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot be otherwise satisfied.'" *De Rodulfa v. United States*, 461 F.2d 1240, 1247 (D.C. Cir. 1972).

Neither the language of the Act nor the legislative history suggest that Congress intended retroactive application. In addition, the Act's specification that its operative provisions take effect 60 days after enactment suggests the contrary conclusion—that Congress intended only prospective application.

101. The Office of the General Counsel so stated in its Advisory Opinion No. 146 (October 25, 1974), determining that following a manufacturer's earlier notification, recall and repair campaign, the manufacturer's subsequent receipt of 12 guaranty registration cards and one report of personal injury demonstrated that the product was still being sold.

102. 15 U.S.C. § 2052(a)(4) (1976).

103. 16 C.F.R. § 1115.3(f) (1980).

104. *Id.* § 1115.13(c).

105. *Id.* § 1115.13(d).

106. *Id.* § 1115.13(b).

C. *When is a Product Distributed in Commerce?*

Reporting obligations under section 15(b) are triggered by product non-compliance or the existence of a substantial product hazard in any consumer product "distributed in commerce." Section 3(a)(11) of the Act states that "[t]he terms 'to distribute in commerce' and 'distribution in commerce' means to sell in commerce, to introduce or deliver for introduction into commerce, or to hold for sale or distribution after introduction into commerce."¹⁰⁷

By including importers within the definition of manufacturers, section 3(a)(4) brings imports within the compass of section 15(b) reporting obligations. Accordingly, the Commission's section 15 regulations expressly include importers within the definition of "subject firm[s]."¹⁰⁸

The regulations leave it unclear whether products not yet in channels of commerce, *i.e.*, products still in the plant, may nonetheless create an obligation to report under section 15. The prefatory comments to the 1974 section 15 regulations indicated that notification, reporting, or corrective action would not be required where a defective or noncomplying product has not left the plant:

For the purposes of [the 1974 regulations under section 15] a manufacturer who corrects a defect in a consumer product or a failure of a consumer product to comply with an applicable consumer product safety rule while all units of such product are still within his plant need not comply with the notification requirements of the act.¹⁰⁹

There is, however, no comparable limitation in the 1978 regulations or accompanying comments.

D. *When Does A Company "Obtain Information"?*

Two factors bear on when a company has "obtained information": (1) who in the company must know a fact before knowledge of it can be imputed to the company, and (2) how much time can elapse before the company will be presumed to know what its employees know.

As to the first point, a firm is presumed to know of product safety related

107. 15 U.S.C. § 2052(a)(11) (1976).

108. 16 C.F.R. § 1115.3(f) (1980).

109. See § 313(a) of Senate bill S. 3419, which imposed notification requirements only where the product "has left the place of manufacture." Similarly, H.R. 8157, 92d Cong., 1st Sess. § 16(a) (1971) (introduced by Rep. Moss), would have imposed notification requirements only "if such product has left the place of manufacture." S. 283, 92d Cong., 2d Sess. (1972) (introduced by Sen. Magnuson), imposed reporting requirements on a manufacturer having information "tending to show" that a consumer product which had left the place of manufacture "contains a defect which creates a substantial risk of injury to the public."

information when that information is received by a company official or employee capable of understanding its significance.¹¹⁰ No matter which employee first learns of product safety related information, the firm will be presumed to have learned of it within five days of that employee's receiving the information.¹¹¹

The Commission's explanatory comments to the 1978 rules justify the imputation provision under both section 20(c) of the Act and common law agency principles.¹¹² Section 20(c) provides that anyone knowingly violating the prohibited acts section is subject to civil penalties, and "knowingly" is defined to mean "the presumed having of knowledge deemed to be possessed by a reasonable man who acts in the circumstances, including knowledge obtainable upon the exercise of due care to ascertain the truth of representations."¹¹³ In relying on common law agency principles, the Commission recites the established rule imputing to the principal knowledge known to the agent "where the agent has actual or apparent authority to act on behalf of the principal."¹¹⁴

110. 16 C.F.R. § 1115.11(a) (1980).

111. *Id.* § 1115.14(b). In its July 22, 1977 proposed rules the Commission staff deleted as unnecessary a draft clause which "imputed to the firm the knowledge it would have if it had acted reasonably and diligently to collect and analyze this information." Mana Jennings Memorandum to Commission, Proposed Revision of Section 15 Regulations at 3 (July 22, 1977), reprinted in PLI COURSE HANDBOOK, *supra* note 35.

112. 43 Fed. Reg. 34,992 (1978).

113. See note 18 *supra*.

114. 45 Fed. Reg. 34,992 (1978). Notwithstanding its adherence to common law imputation standards, only a firm's chief executive officer can execute a § 15(b) report unless that task has been delegated in writing to another employee. 16 C.F.R. § 1115.13(a) (1980).

In its preliminary comments to the 1978 rules the Commission sought to allay some commenters' fears that a disaffected or uninformed employee might not pass on potentially defect-related information to an individual with reporting responsibility. The Commission addressed this concern with this comment:

If a subject firm faced with a civil penalty action for failure to report could show that an employee intentionally refused to pass relevant information to the subject firm and if the Commission based its case upon the subject firm's having actual knowledge of that same information from that particular employee, the Commission could not rely upon the first portion of section 20(c), that is, the having of actual knowledge. The Commission would then have to prove that the information otherwise available to the subject firm, irrespective of the withheld information, was sufficient to put a reasonable person in the position of the subject firm on notice of the information. The net result of the failure of the employee to pass the information on would be to increase the burden on the Commission and to provide the subject firm with a possible defense in a civil penalty action.

The Commission would consider the failure of the employee to pass on hazard-related information as a mitigating circumstance in an appropriate case (although, as stated above, the continuing violation after receipt of a notice of noncompliance would weigh heavily against a subject firm). In addition, the regulation has been

The Commission's comments recognize, however, that the five-day imputation period is a "guideline in the context of an interpretive rule," and that as such, "the reasonableness and due diligence of a subject firm, given the circumstances of a particular case, will be determinative, not the language of the rule."¹¹⁵

E. When Does Information "Reasonably Support the Conclusion" That a Substantial Product Hazard May Exist?

A firm must immediately, *i.e.*, within 24 hours, report information which reasonably supports the conclusion that a substantial product hazard may exist.¹¹⁶ In recognition of the weight attached to different types of product safety related information, the rules set out certain information which, in the Commission's view, constitutes information which reasonably supports the conclusion that a report is necessary.¹¹⁷ As a result, such information must ordinarily be immediately reported to the Commission. Other categories of information which are of uncertain substantiality must nevertheless be probed to determine if they "reasonably support the conclusion" that a substantial product hazard may exist.¹¹⁸

1. Information Which Should be Reported

A subject firm must immediately report information which indicates

amended to reflect that the reportable information must reach an employee capable of understanding its significance; thus, if the disgruntled employee were a cashier or stocker, there would be less likelihood that the Commission would deem that person capable of appreciating the significance of the information than if the person were the product safety officer of the subject firm or some other presumptively responsible corporate official.

43 Fed. Reg. 34,992-93 (1978).

Thus, 16 C.F.R. § 1115.11(b) (1980) provides:

In evaluating whether or when a subject firm should have reported, the Commission will deem a subject firm to know what a reasonable person acting in the circumstances in which the firm finds itself would know. Thus, the subject firm shall be deemed to know what it would have known if it had exercised due care to ascertain the truth of complaints or other representations. This includes the knowledge a firm would have if it conducted a reasonably expeditious investigation in order to evaluate the reportability of a death or grievous bodily injury or other information.

See also 16 C.F.R. § 1115.14 (1980).

115. 43 Fed. Reg. 34,992 (1978).

116. Consumer Product Safety Act § 15(b), 15 U.S.C. § 2064(b) (1976); 16 C.F.R. § 1115.14(e) (1980).

117. Examples of the kind of information required are set out in 16 C.F.R. § 1115.12 (1980). Reports must be made to the Commission's Product Defect Corrective Division, Consumer Product Safety Commission, Washington, D. C. 20207, (301) 492-6608.

118. 16 C.F.R. § 1115.12(a)-1115.12(e) (1980).

"that a noncompliance or a defect in a consumer product has caused, may have caused, or contributed to the causing, or could cause or contribute to the causing of a death or grievous bodily injury"¹¹⁹ unless the firm has "investigated and determined that the information is not reportable."¹²⁰ Of course, even in the absence of a death or grievous bodily injury, the rules state that "other information may indicate a reportable defect or non-compliance," and that the subject firm may be held responsible for knowledge which could be derived by a "reasonable and prudent manufacturer."¹²¹

2. *Information Which Should be Studied and Evaluated*

The regulations offer specific illustrations of the types of information a firm should consider in deciding whether or not to report. These include information concerning:

engineering, quality control, or production data . . . safety-related production or design change(s) . . . [p]roduct liability suit(s) . . . independent testing laboratory [results] . . . complaint(s) from a consumer or consumer group . . . [i]nformation

119. *Id.* § 1115.12(c). The regulations set out the following examples of grievous bodily injury: "mutilation, amputation/dismemberment, disfigurement, loss of important bodily functions, debilitating internal disorders, severe burns, severe electrical shocks, and injuries likely to require extended hospitalization." *Id.*

120. *Id.* The Commission originally proposed a section which stated that certain information was presumed to be reportable. Under the proposed rule, information that a product was involved in a death or grievous bodily injury, absent "clear evidence" to the contrary, was presumptively reportable within 10 days of the mishap. 42 Fed. Reg. 46,720, 46,723 (1977). In the Federal Register notice of March 30, 1978, the Commission observed that the "basic idea" underlying this section was to encourage firms to investigate serious accidents in order to determine whether a substantial product hazard might be present. 43 Fed. Reg. 13,393, 13,395 (1978).

In proposing the final § 15 rule revisions, the staff considered establishing a blanket rule that a Section 15 report must be filed whenever information of a death or serious bodily injury was received. *See* Cook Memorandum, *supra* note 33, at 4; Freeston Memorandum, *supra* note 33, at 8. The reasoning advanced was that such a requirement would eliminate the "legalese" of weighing any presumption. Commenters urged that such a mandate would ignore the language of § 15(b), which speaks of "information which reasonably supports the conclusion" that a product presents a substantial product hazard. Based on the comments it received, the Commission deleted the proposed presumption, directing instead that information suggesting that noncompliance or a defect may have caused death or serious bodily injury must be investigated and reported if causally related to the injury. 16 C.F.R. § 1115.12(c) (1980). *See* 43 Fed. Reg. 34,993 (1978).

121. "In evaluating whether or when a subject firm should have reported, the Commission will deem a subject firm to know what a reasonable and prudent manufacturer (including an importer) distributor, or retailer would know. (*See* § 1115.11)." 16 C.F.R. § 1115.12(d) (1980).

In addition, of course, the fact that a product fails to comply with a standard or ban must immediately be reported to the CPSC under § 15(b). 16 C.F.R. § 1115.2(b) (1980).

received from the Commission or another governmental agency . . . [or] information received from other firms, including requests to return a product or for replacement or credit.¹²²

The latter, the regulations provide, "includes both requests made by distributors and retailers to the manufacturer and requests from the manufacturer that products be returned."¹²³

Unless the information is clearly reportable, the firm can spend a reasonable time, not to exceed ten days, for investigation and evaluation. Recognizing that reportable information may be sketchy or unconfirmed, the rules permit reports to be made with disclaimers.¹²⁴

F. When Must Reports Be Submitted and How Will the Commission Respond to Late Reports?

Initial reports must be filed "[i]mmediately after a subject firm has obtained information which reasonably supports the conclusion" that a product "fails to comply with an applicable consumer product safety rule or contains a defect which could create a substantial risk of injury to the public."¹²⁵ The regulations further define "immediately" as "within 24 hours."¹²⁶ Initial reports which are not in writing must be confirmed in writing within forty-eight hours of the nonwritten report.¹²⁷

Where the subject firm learns of a death, grievous bodily injury, or other possibly reportable information, the regulations state that the firm must investigate and evaluate the information within ten days unless the firm "can demonstrate that a longer period is reasonable."¹²⁸ The Commission deems that "at the end of 10 days, a subject firm has received and considered all information which would have been available to it had a reasonable, expeditious, and diligent investigation been undertaken."¹²⁹

Where a subject firm has not notified the Commission in a timely fashion within the meaning of section 15 and the regulations, the Commission may seek assessment of civil penalties under section 20. The Commission

122. 16 C.F.R. § 1115.12(e) (1980).

123. *Id.*

124. *Id.* §§ 1115.12(a), 1115.14(d).

125. *Id.* § 1115.14(e).

126. *Id.* Weekends and holidays are excluded from these calculations. *Id.* § 1115.14(a).

127. *Id.* § 1115.13(c). The earlier rules required a covered firm to make an initial notification to the Commission within 24 hours of receiving information which reasonably supported the conclusion that there was a substantial product hazard. *Id.* § 1115.6. The initial notification would identify the product in question, describe the course of distribution, and "[s]pecify the nature and extent of the defect or failure to comply." *Id.* § 1115.5(a)-1115.5(e).

128. 16 C.F.R. § 1115.14(d) (1980).

129. *Id.*

has brought several "timeliness" cases for failure to report promptly enough.¹³⁰ In one of the earlier timeliness cases,¹³¹ certain Corning Electromatic Percolators manufactured in 1974 were alleged to have defective epoxy presenting a potential hazard of thermal burns. The percolators at issue suffered an adaptor top separation problem involving the risk that the ceramic bowl would separate from the stainless steel handle assembly.

Corning had submitted a section 15(b) report to the Commission on June 11, 1976. The Commission filed a Notice of Violation and Assessment of Civil Penalty in which it sought a \$400,000 penalty for Corning's failure to immediately inform the Commission of the alleged hazard. In bringing its timeliness action, the Commission relied on the Bureau of Compliance staff's allegations that as early as April 3, 1973, Corning's quality control staff knew of the problem and that on December 19, 1974, the manager of product assurance had obtained authorization to stop manufacturing and had suggested a recall. The Commission staff further claimed that Corning testing confirmed the existence of adaptor top separation; that in 1975 alone Corning received approximately 3,018 consumer complaints reporting adaptor top separations; and that by January 5, 1975, Corning had received approximately 202 reports of related consumer injuries.¹³² Corning settled the proposed timeliness penalty for \$325,000.¹³³

The Commission settled another proposed civil penalty against Wham-O Manufacturing Company¹³⁴ arising from allegedly faulty safety latches on many of the Power Master Crossbow Models No. 718, manufactured between August, 1974 and March, 1976. The Commission proposed a \$125,000 penalty for willful violation of the notice rules, claiming that Wham-O quality control inspectors knew of the manufacturing defects and reported this information to company superiors five months before Wham-O notified the Commission. Specifically, in proceeding against Wham-O, the Commission alleged that the company received numerous complaints over a period of fifteen months before reporting the faulty safety latches. The complaint asserted that at least five months prior to

130. Where the Commission issues a notice of violation of the § 15 timeliness requirements, the subject firm has the opportunity to show cause why a penalty should not be assessed. Where the Commission determines that the responding firm has not shown sufficient cause why a penalty should not be assessed, the matter is tried before an administrative law judge.

131. Bureau of Compliance Application for Order to Show Cause and Notice of Violation, Corning Glass Works, Inc., CPSC Docket No. 77-4 (undated).

132. *Id.*

133. Corning Glass Works, Inc., CPSC Docket No. 77-4 (July 14, 1977).

134. Wham-O Manufacturing Company, CPSC Docket No. 77-2 at 8-9 (October 28, 1977).

reporting the company "had returned the string latches for re-heat-treating and testing," and, further, that internal memoranda to responsible company officers contained "statements that the defect made the crossbows 'dangerous products' and that the firm should cease production of crossbows with defective string latches."¹³⁵ The Commission accepted a civil penalty of \$40,000 in settlement.

Pittway Corporation settled for \$100,000 another late reporting claim relating to incorrectly rated resistors used in smoke detectors manufactured from March, 1974 through September 26, 1975.¹³⁶ Having learned of the potential fire hazard from other sources, the Commission contacted Pittway on March 26, 1976. In bringing its civil penalty action for failure to notify the Commission timely, the Commission charged that between September, 1975 and January, 1976, Pittway obtained information which reasonably supported the conclusion that certain of its smoke detectors contained a defect which could create a substantial product hazard. The Commission asserted that the smoke detectors contained a design error since the carbon resistors in the smoke detectors were being used at or near their rated capacity and were being overpowered, leading to overheating and fires. Commission investigators alleged that Pittway learned of the defect as early as September, 1975, when one of their engineers investigated a fire in one of the detectors placed in a prison facility; that Pittway subsequently received a letter from the U.S. Bureau of Prisons advising of seven detector-related fires at facilities; and that Pittway's own records showed that between September, 1975 and February, 1976, consumers returned 126 units with evidence of burned resistors as well as two reported fires.¹³⁷

135. The complaint also alleged: "Observations and tests of returned crossbows were made by receiving department employees, who noted a number of defective string latches and cases of premature firing. Not only was the company aware of the returns, but this employee confirmed the defect by testing the returned crossbows." *Id.*

136. Pittway Corp., CPSC Docket No. 78-4 (August 18, 1978).

137. *Id.* The Commission also reached a \$25,000 settlement with North American Systems, Inc., for an alleged untimely notification following the recall of 3.1 million Mr. Coffee units. North American Systems, Inc. (Mr. Coffee), CPSC Docket No. 77-3 (June 16, 1977).

The Commission recently extended offers in settlement of alleged timeliness violations by Braun of North America, a Gillette Co. subsidiary, and Century Products for \$45,000 and \$25,000 respectively. The Braun settlement involved 9,300 "Aero Master" coffee makers which the Commission claimed contained defective thermostats which could cause overheating. The firm filed a substantial product hazard report with the Commission in August of 1978 and thereupon undertook corrective action. But the Commission stated that Braun received 14 complaints between December, 1976, and August, 1978.

Century Products was the manufacturer of approximately 300 "747 Command" high chairs between March 1974 and February 1975. The Commission staff stated that the firm received 5 complaints long before its August, 1977 "substantial product hazard" report to

In a consent order agreement noteworthy both for the dollar amount of the timeliness penalty and the scope of the remedy,¹³⁸ the Commission and Bassett Furniture Co. settled a Commission complaint over hazards associated with Bassett's "Candlelight" and "Mandalay" style cribs, which the CPSC reported had caused six infant deaths since 1977. By the terms of the agreement, Bassett undertook an extensive remedial action program and paid a \$175,000 civil penalty. As part of the required remedial action, Bassett agreed to run one-half page advertisements in TV Guide and Family Circle magazines, periodicals having between them a total readership of approximately 27,000,000 people, and to pay a \$5 cash award to anyone identifying a crib that had been unmodified pursuant to the repair provisions of the agreement. Perhaps most significantly, Bassett was required to send hazard notifications by direct mail to all parents having had children within the previous twenty-one months. The CPSC estimated that this mailing would reach more than four million parents of infants and small children.¹³⁹

There does not, to date, appear to be a consistent attitude by the Commission towards the amount of fines to be assessed in relation to the severity of the injury or the specifics of the failure to report. For example, the Bassett fine of \$175,000, involving six or seven reported infant deaths, was significantly less than the 1976 fine imposed on Corning Glass Works of \$325,000 involving no deaths.¹⁴⁰

More recently, the Commission filed four separate actions under section 15 alleging failure to timely notify the Commission of "substantial product hazards:" *In re Marriott Corporation*;¹⁴¹ *In re State Fair of Texas*;¹⁴² *In re Advance Machine Company*;¹⁴³ and *In re Athlone Industries, Inc.*¹⁴⁴ Both the *Marriott* and *State Fair* suits involve amusement park rides: Marriott's roller coaster ride known as the Willard's Whizzer, and the State Fair's aerial tramway known as the Swiss Skyride. The complaint against Marriott recounted injuries to thirty-three persons in two separate accidents in

the Commission. 9 Prod. Saf. Letter, 2 (Sept. 8, 1980); 1 PROD. SAF. AND LIAB. REP. (BNA) 639 (Sept. 5, 1980).

138. News from CPSC, 80-06, at 1-3 (Feb. 14, 1980).

139. *Id.*

140. See Bassett Furniture, Inc., CPSC Docket No. 80-002 at 1-2 (Feb. 7, 1980).

141. CPSC Docket No. 80-7 (Aug. 28, 1980), reprinted in 45 Fed. Reg. 70,964 (Oct. 27, 1980).

142. CPSC Docket No. 80-8 (Aug. 28, 1980), reprinted in 45 Fed. Reg. 70,962 (Oct. 27, 1980).

143. CPSC Docket No. 80-4 (Sept. 3, 1980), reprinted in 45 Fed. Reg. 59,372 (Sept. 9, 1980).

144. CPSC Docket No. 80-5 (Sept. 3, 1980), reprinted in 45 Fed. Reg. 59,374 (Sept. 9, 1980).

the summer of 1976, eleven incidents between 1976 and 1979 involving collisions due to brake failures or injuries to guests on the ride, and one death in 1980 in an accident in which eight other persons were injured. The complaint concluded that by July 24, 1976, and in any event no later than September, 1979, Marriott knew of information that the ride's brakes failed or were not sufficient to prevent collisions, that such information was reportable within the meaning of section 15(b), and that Marriott failed to report the information immediately.¹⁴⁵

The complaint against the State Fair alleged that Fair officials knew of an October 21, 1979 accident in which two gondolas on the Swiss Skyride fell to the ground, resulting in one death and eighteen additional injuries. The complaint attributed the accidents to the ride's lack of a device to measure wind velocity and shut the machine down during high winds, as well as the absence of cable catchers to retain the cable in the event the cable snapped, and charged that the lack of these safeguards constituted defects within the meaning of section 15(a)(2). The complaint further alleged that on October 21, 1979 State Fair officials refused to permit Commission investigators access to the ride or to provide complete information concerning the ride, its operation, and the injury reports.¹⁴⁶

The *Advance Machine* and *Athlone* suits involve the manufacturer and exclusive distributor, respectively, of pitching machines used by baseball players. The Commission alleged that the pitching machine spring and cable, even when disconnected from its power source, retain a high degree of tension which, when it vibrates, can cause the machines' metal pitching arm to go through the pitching motion, injuring bystanders. The complaint recounts a history of serious injuries caused by this machine dating back to 1965, and charges that Athlone's failure to report the problem until July, 1977, and Advance Machine's failure to report at any time, violated the timely reporting obligations.¹⁴⁷

These two actions are of special interest because in 1977 the Commission filed an "imminent hazard" action under section 12 of the Act concerning the same pitching machines. Both Advance Machine and Athlone entered a 1979 consent agreement terminating the section 12 action. The Commission had not sought civil penalties in the section 12 suit, nor did the consent agreement in the earlier action stipulate that the Commission

145. 45 Fed. Reg. 70,965 (1980). On January 27, 1981, the Commission announced that Marriott had agreed to pay a civil penalty of \$70,000 in settlement of the case. 10 Prod. Saf. Letter 2 (Feb. 2, 1981).

146. 45 Fed. Reg. 70,963-64 (1980).

147. See notes 143-44 *supra*.

was free to later prosecute section 15 timeliness issues.¹⁴⁸

G. When Is the Commission "Adequately Informed?"

A firm is not required to file a section 15(b) report if it possesses "actual knowledge that the Commission has been adequately informed of such defect or failure to comply."¹⁴⁹ The Commission is adequately informed when it has received all pertinent product information which is "reasonably available."¹⁵⁰ The regulations further define adequately informed as a situation in which "the Commission staff has received the information (provided in Initial Reports and Final Reports) . . . insofar as it is reasonably available and applicable or that the staff has informed the subject firm that the staff is adequately informed."¹⁵¹

H. What Information Should be Reported

1. Initial Reports

The rules require an initial report to contain, if "reasonably available and/or applicable," the identity and description of the product, the names and addresses of the manufacturers or importers (or if unknown, the distributors or retailers), the nature of the defect or failure to comply with a product safety rule, the nature of the injury or risk of injury, the name of the person submitting the information, and, where available, any additional information required of a "full" report.¹⁵²

148. See Memorandum of Points and Authorities in Support of Motion to Dismiss, *Athlone Indus., Inc.*, CPSC Docket No. 80-5 (Aug. 28, 1980).

149. Consumer Product Safety Act § 15(b)(2), 15 U.S.C. § 2064 (1976).

150. The comments preceding the 1978 rules explain:

Final § 1115.3(a) indicates that the Commission staff will be "adequately informed" when supplied with information which is "reasonably available." In addition the revised definition permits the staff to inform a subject firm that the staff is "adequately informed." Thus, sometimes a manufacturer or other subject firm may have to submit a full report in order for the staff to make a hazard determination. At other times less than a full report will "adequately inform" the staff.

16 C.F.R. § 1115.3(c) (1980).

151. *Id.* § 1115.3(a).

152. *Id.* § 1115.13(c):

- (1) An identification and description of the product.
- (2) The name and address of the manufacturer (or importer) or, if the manufacturer or importer is not known, the names and addresses of all known distributors and retailers of the product.
- (3) The nature and extent of the possible defect or the failure to comply with an applicable consumer product safety rule.
- (4) The nature and extent of the injury or risk of injury associated with the product.
- (5) The name and address of the person informing the Commission.
- (6) To the extent such information is then reasonably available, the data specified in § 1115.13(d) [the provision for "full" reports].

Distributors and retailers may satisfy their reporting obligations by making the "initial report."

2. Full Reports

Manufacturers and importers, after filing an initial report, must file a "full report." The regulations set out the information required in a full report,¹⁵³ which must include, where applicable: (1) the name, address, and title of the person submitting the full report; (2) the name and address of the manufacturer or the importer; (3) a description of the products (including price, serial, model or date codes, and a picture or sample of the product); (4) a description of the defect or noncompliance with an applicable rule; (5) the nature of the injury or potential injury associated with the defect or noncompliance; (6) a detailed description and chronology of the manner in which the defect or noncompliance was determined; (7) the number of products involved; (8) the dates of any sale, transfer or shipment of the products; (9) the present location of the products; (10) a description of and timetable for any corrective changes (*e.g.*, designs, adjustments, testing) which have been or will be undertaken; (11) information (such as letters, news releases, labels) about the defect or noncompliance which has been or will be sent to consumers; (12) a plan and schedule for any refund, replacement, or repair of the products; and (13) a detailed description of the manufacture, marketing, and distribution of the product. The rules further provide that a manufacturer or importer may be required to submit the names and addresses of distributors, retailers, and purchasers (including consumers) as well as any additional information requested by the Commission staff.¹⁵⁴ The Commission rules require a subject firm's chief executive officer (or delegate pursuant to a written delegation) to file any written reports to the Commission under section 15(b).¹⁵⁵ Covered firms may find that they are subject to reporting

153. The former rules, at 16 C.F.R. § 1115.7 (1975), set out detailed requirements for "subsequent notification" to the Commission, including a fuller description of the identity, and location of the products, the nature of the product hazard, and any corrective steps the firm had undertaken or planned to undertake, including notice to the public and purchasers, including consumers, and any refund, replacement, or repair actions.

154. 16 C.F.R. § 1115.13(d) (1980).

155. The 1978 rules provided recommended language for an acceptable "Delegation of Authority" at 16 C.F.R. § 1115.13. The chief executive officer must sign any § 15(b) report unless a written delegation has been submitted to the Product Defect Correction Division or is submitted simultaneously with the § 15(b) report. 43 Fed. Reg. 34,994 (1978) (now codified in 16 C.F.R. § 1115.13(a) (1980)).

In its comments accompanying 16 C.F.R. § 1115.13 (1978), the Commission states:

[T]he delegation of authority is frequently made to the product safety officer of a subject firm whose job usually includes a liaison function with government agen-

requirements under more than one product safety statute. For example, the manufacturer of a toxic substance which creates a substantial risk of injury to the public could simultaneously be subject to reporting requirements of the Commission, the Environmental Protection Agency, and the Department of Housing and Urban Development. The Commission's rules state that even where a product safety problem triggers reporting requirements under a different statute or regulation, the firm must also file a section 15(b) report where applicable under the Act and the Commission's regulations.¹⁵⁶

V. PROCEDURES FOR RESPONDING TO REPORTS

A. *Commission Procedures Generally*

When the Commission determines that a covered firm has failed to report a defect or a noncompliance which represents a substantial product hazard, it issues a Notice of Enforcement naming the firm as respondent.¹⁵⁷ The rules provide that the Commission may, following an administrative hearing, enter an order under section 15(c) requiring notice of a substantial product hazard to the public, manufacturers, distributors, retailers, and purchasers. Under section 15(d), the Commission may order

cies in the area of product safety. This individual is the logical choice as designee because this person has information sources valuable to both the Commission and the subject firm in addressing any potential hazard. In the Commission's nearly four years of experience working with the delegation system, the system has been a valuable tool in establishing contact with the employees of subject firms who can move quickly to identify and correct hazards.

43 Fed. Reg. 34,994 (1978).

156. The prefatory comments to the final rules acknowledge the potential of overlapping reporting requirements with this discussion:

Whenever the Commission receives a report about a product that is also subject to a reporting requirement of another agency, it attempts to communicate with the other agency to establish how to address the situation and the potential safety hazard presented. The other agencies do the same. The Commission believes this procedure is adequate and provides sufficient guidance to the subject firms involved, once they have reported. However, if it appears necessary, the Commission will attempt to establish interagency procedures regarding reporting obligations where jurisdiction is overlapping or unclear, will notify the public if interagency procedures are established, and will amend this regulation accordingly. Meanwhile, the Section 15(b) reporting requirements apply to consumer products, even if the reporting requirements of another agency also apply.

43 Fed. Reg. 34,990 (1978).

157. Corporate officers can be named as respondents in a Notice of Enforcement if they are in "top control" of the corporation, "formulating, directing and controlling corporate policies and practices" of the corporation, or having responsibility and authority either to prevent in the first instance or promptly correct an alleged substantial product hazard. *Kelvinator*, CPSC Docket 75-1 at 28.

the repair, replacement, or refund of the purchase price for any product presenting a substantial product hazard.¹⁵⁸ The same procedure governs regardless of whether the product noncompliance or substantial product hazard information is voluntarily reported by a firm, developed by investigation of the Commission staff, or gathered by both methods.

The Product Defect Correction Division of the Directorate of Compliance and Enforcement (CEPD) has established procedures for evaluating product safety information, rendering a preliminary determination as to whether the product presents a substantial product hazard, and taking appropriate corrective action.¹⁵⁹ The Hazard Evaluation Branch (HEB) of CEPD investigates and evaluates reports of potential product safety hazards received from subject firms or from other sources. The Hazard

158. Hearings are conducted in accordance with CPSA § 15(f), Administrative Procedure Act § 554, 5 U.S.C. § 554, and the Commission's Rules of Practice for Adjudicative Proceedings, 16 C.F.R. § 1025 (1980).

159. The Directorate of Compliance and Enforcement recently reorganized its § 15 enforcement staffing, combining Enforcement Division and CEPD staff to form a new Division of Administrative Litigation under the renamed Directorate of Compliance and Administrative Litigation. Part of the CEPD staff is assigned to a new Division of Corrective Actions, also within the Directorate of Compliance and Administrative Litigation. On December 14, 1978, the Commission delegated authority to its staff to handle minor statutory infractions and certain adjudicatory matters, including § 15 violations. Under the delegation, Area Directors of field offices advise the Director of Compliance and Enforcement (now Compliance and Administrative Litigation) (C&E) whether there has been a violation of the Act and recommend opening an enforcement case. See 16 C.F.R. § 1000.27 *as amended* 45 Fed. Reg. 86415 (Dec. 31, 1980). The Directorate of Compliance and Administrative Litigation can recommend to the Commission compliance action or closing the case. "Case Authority Delegations," Commission Decision (December 14, 1978). These procedures are set out in the CEPD Memorandum of February 1, 1979. See notes 78-82 and accompanying text *supra*.

The 1975 regulations provided for "case openings" upon receipt of a § 15(b) notification from a covered firm or "information concerning a product defect from [other] sources." 16 C.F.R. § 1116.4(a)(1)-1116.4(a)(2) (1975). Where the staff made a "tentative evaluation" that there existed a substantial product hazard, the staff could require the covered firm to submit the detailed report provided for in 16 C.F.R. § 1115.7 (1974). In addition, the 1975 regulations required of the staff to make a "preliminary determination" concerning the potential product hazard, 16 C.F.R. § 1116.5 (1975), and stated: "In order to afford the greatest possible protection to the public, the staff shall resolve any reasonable doubts in its tentative evaluation and preliminary determination in favor of finding that the product could present a substantial product hazard." 16 C.F.R. § 1116.5(b) (1975). The old rules set a timetable of 30 calendar days from the case opening for staff presentation to the Commission of (a) a proposed Corrective Action Plan, (b) a proposed Consent Agreement and Commission Order, (c) a proposed Notice of Enforcement and Recommendation for hearings pursuant to § 15(f), or (d) a recommendation that the case be closed. 16 C.F.R. § 1116.7 (1975). The regulations also provided for automatic staff investigations of "the possibility of any unlawful act committed by a manufacturer, distributor or retailer that relates to a failure to adequately inform the Commission that a consumer product could create a substantial product hazard."

Correction Branch (HCB) of CEPD has authority to secure and, where appropriate, monitor corrective actions, including corrective action plans.

The directors of HEB and HCB and other Commission staff sit on a Hazard Assessment Committee. The Hazard Assessment Committee is authorized to recommend to the director of CEPD that a product safety matter represents a substantial product hazard requiring corrective action; that a proffered corrective action by a subject firm should "be monitored at a reduced level"; or that a preliminary determination has been made that the matter should not be pursued by CEPD. The Hazard Assessment Committee will recommend that corrective action be sought when a substantial risk of injury is discerned and the consumer product in question "appears to have a causal relationship to the risk."¹⁶⁰ Where the Commission has received information from a subject firm but has determined that the risk of injury is less than substantial, and the firm has volunteered to undertake corrective action, the Hazard Assessment Committee will recommend that a corrective action plan be monitored "at a reduced level."¹⁶¹

When the staff determines that a substantial risk of injury to the public cannot be identified, and where no corrective action is pursued by the subject firm, the Hazard Assessment Committee will recommend that the matter not be pursued by CEPD. If information suggests the presence of a risk of injury but other factors indicate that CEPD action is not appropriate, the Hazard Assessment Committee will recommend to the Director of the Product Defect Corrective Division that the information be forwarded to the Emerging Priorities/Special Projects Team or another appropriate group.¹⁶²

In its investigation, the Commission staff will refer to "any source including, but not limited to, subject firms, experts within and without the Commission, and consumers." The staff will request additional data from subject firms, conduct inspections, and use any other appropriate investigative measures.¹⁶³ Where CEPD determines that a product does not comply with an applicable consumer product safety rule, it refers the matter to the appropriate area office to secure voluntary corrective action.¹⁶⁴ Should CEPD determine that a product creates a risk of injury which is not within the scope of an applicable consumer product safety rule, it will make a preliminary determination as to whether the product contains a

160. CEPD Memorandum, attachment 1 at 1, 2.

161. *Id.* at 2.

162. *Id.* at 2-3.

163. *Id.*

164. *Id.* at 3.

defect. If the CEPD staff decides that a product does contain such a defect, it will undertake further evaluation to determine if the defect creates a substantial risk of injury to the public within the meaning of section 15(a)(2) and the regulations.¹⁶⁵

If CEPD makes a preliminary determination that a consumer product represents a substantial risk of injury to the public, corrective action will usually be sought by the Compliance and Enforcement staff. While corrective action may be sought through issuance of either an administrative or judicial complaint, CEPD ordinarily tries to secure voluntary corrective actions. Corrective action sought by the staff will usually include notice to the public regarding the product hazard and elimination of the hazard through a repair, replacement, or refund program.

The CEPD memorandum states that acceptable corrective public notice will typically include some or all of the following methods of disseminating hazard and recall notices: notice may be "communicated directly to distributors, retailers, and consumers by mail or telephone or telegraph . . . , supplied with replacement parts for the involved product . . . , posted in retail stores and in repair shops . . . , communicated to the public through paid advertising in the media by which the product itself is advertised . . . , [or] communicated to the public through public service announcements or the coverage by the news media."¹⁶⁶ An additional way of securing this notice is through a joint Commission/company press release.¹⁶⁷

In its effort to secure voluntary compliance, Compliance and Enforce-

165. 16 C.F.R. § 1115.4 (1980). The CEPD Memorandum provides guidelines for determining when corrective action should not be pursued within CEPD:

*The product does not contain a defect within the meaning of Section 15 of the CPSA.

*The product contains a defect but does not present a substantial risk of injury within the meaning of Section 15 of the CPSA.

*The product is regulated as to the identified hazard. The matter is, therefore, referred to regulatory management within Compliance Enforcement.

*The product may have presented a substantial risk of injury at one time, but no longer does.

*The Commission has proposed or is considering proposing a regulation dealing with the product and hazard. The matter could, therefore, be referred to Regulatory Management and to Program Management.

*The matter seems to indicate an industry-wide defect which will consume considerable resources to correct either by CEPD Section 15 action or through proceeding in CEPD section 15 action or through promulgation of a standard or ban. Before proceeding in CEPD the advice of the Emerging Priorities/Special Projects Team of Program Management or of the Commission itself is sought.

Id. at 9-10.

166. *Id.* at 11.

167. *Id.*

ment will encourage firms to voluntarily repair or replace products or offer refunds of the purchase price.¹⁶⁸ Where a firm elects to repair or replace the product, Compliance and Enforcement will evaluate and monitor the corrective action "to ensure that the substantial product hazard has been eliminated."¹⁶⁹

B. Options for Commission Action

Section 15(c)¹⁷⁰ provides that the Commission, following a hearing, may require covered firms to notify the public, manufacturers, distributors, retailers, and purchasers of the existence of a substantial product hazard. Any firm or individual in the distribution chain may be subject to an order under section 15(c).¹⁷¹ However, a firm with a product which does not

168. *Id.* at 11-12.

169. *Id.* at 12.

170. Section 15(c) states:

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

- (1) To give public notice of the defect or failure to comply.
- (2) To mail notice to each person who is a manufacturer, distributor, or retailer of such product.
- (3) To mail notice to every person to whom the person required to give notice knows such product was delivered or sold.

Any such order shall specify the form and content of any notice required to be given under such order.

The Senate bill, S. 3419, provided in § 313(b)(1) that following an agency adjudication of noncompliance with an "applicable order issued pursuant to this title," a covered firm could be required by the agency (by order after an adjudicatory hearing) to give public notice containing the pertinent product safety information, and to mail this notice to consumers and others in the distribution chain. S. 3149, 92d Cong., 2d Sess. § 313(b)(1) (1972).

The House Committee Report on H.R. 15003 states:

In order to compel notification under this section, the Commission must afford interested persons an opportunity to orally present their views in addition to affording them the opportunity to make written presentations. Like the administrative procedures contained in § 9, this marks a departure from traditional informal rulemaking authority.

H.R. REP. NO. 1153, 92d Cong., 2d Sess. 42 (1972).

171. The sweep of the Commission's Section 15(c) authority is evidenced by this comment in the Senate Commerce Committee Report on the Senate bill, S.3419:

In addition to the authority to require public notice, including notice through the electronic media when necessary to protect the public health and safety, the Administrator could by order require anyone in the distribution chain to mail to each consumer of such product a notification of a failure to comply or a manufacturing defect containing such information as the Administrator may prescribe, upon the

comply with an applicable consumer product safety rule (and which is therefore required to file section 15(b) reports with the Commission) will not be subject to the notice requirements of section 15(c) unless the non-compliance with the rule actually *presents* a substantial product hazard.¹⁷²

With respect to notifying purchasers, section 15(c)(3) should not be interpreted to require individual notice to purchasers unknown to the covered firm at the time of the Commission order.¹⁷³ The legislative history indicates that section 15(c) authorizes the Commission to order a subject firm to purchase advertising space or broadcast time to disseminate product hazard information.¹⁷⁴ Congress did not, however, impose any concomitant obligation on the print or broadcast media to sell or donate advertising space or broadcast time for product hazard notices pursuant to section 15(c).¹⁷⁵

Where a particular product safety question has generated great public interest and attention, the Commission may choose not to require firms to publish additional public notice. An example of this is the section 15 proceeding concerning hand-held hair dryers containing asbestos.¹⁷⁶ In ac-

Administrator's determination that such notification is required to protect adequately the public health or safety. In any such notice, the manufacturer should not be permitted to disclaim the existence of the defect or the failure to comply.

S. REP. NO. 749, 92d Cong., 2d Sess. 36 (1972).

172. Consumer Produce Safety Act § 15(c), 15 U.S.C. § 2064 (1976).

173. The House Commerce Committee Report on H.R. 15003, *supra* note 170, at 42 states:

It should be noted that manufacturers, distributors, and retailers may only be required to mail notice to customers who are known to them. This is intended to mean customers of whom they have actual knowledge. Thus, the Commission would not have authority to require a manufacturer to comb the files of its retailers to learn the names of customers who have purchased the product.

174. The House Commerce Committee Report on H.R. 15003, *supra* note 170, at 41, 42 (1972), states that "[i]t is contemplated that a Commission order requiring public notice may, in appropriate cases, include a requirement that the manufacturer, distributor, or retailer purchase broadcasting time or buy advertising space in magazines or newspapers."

The notice provision of S. 3419 provided, at § 313(b)(1), for "public notice (including notice through electronic media when necessary to protect public health and safety)." S. 3149, 92d Cong., 2d Sess. (1972).

175. The House Commerce Committee Report on H.R. 15003 explains:

While broadcasters and other media may wish to make time and space available without charge, there is no compulsion that they do so. Nor is it intended that broadcasters or news media be required to sell time or space in order to facilitate public notice under this section. A manufacturer, retailer, or distributor who is ordered to purchase broadcasting time, but is unable to do so, would be deemed to have complied with the Commission's order so long as he exercised good faith in attempting to carry out the Commission's directive.

supra note 170, at 41-42. See 118 CONG. REC. 31,387 (1972) (remarks of Reps. Pickle and Staggers).

176. CPSC News Release 79-13 (Mar. 30, 1979).

cepting the corrective action plans presented by one group of eleven firms, the Commission adopted the CEPD staff's reasoning "that with regard to notice, the public has been informed to a sufficient extent of the hazard and that the remedies offered can be adequately announced by the methods proposed by the firms [largely notice throughout the respective distribution chains] and by current Commission activities (*e.g.*, the hotline and Commission mailings)."¹⁷⁷

Section 15(c) notices will often include a description of the program the firm has adopted to correct the safety problem. Although the practice has been that most firms voluntarily implement remedial programs, section 15(d) of the Act does authorize the Commission, following a hearing, to order a covered firm to recall, repair or replace a product which presents a substantial product hazard, or to refund the purchase price less a reasonable allowance for use.¹⁷⁸

As with section 15(c), section 15(d) orders may apply to more than one

177. M. Everhardt, Memorandum to the Commission at 2 (May 14, 1979).

178. Section 15(d) provides:

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

(1) To bring such product into conformity with the requirements of the applicable consumer product safety rule or to repair the defect in such product.

(2) To replace such product with a like or equivalent product which complies with the applicable consumer product safety rule or which does not contain the defect.

(3) To refund the purchase price of such product (less a reasonable allowance for use, if such product has been in the possession of a consumer for one year or more (A) at the time of public notice under subsection (c), or (B) at the time the consumer receives actual notice of the defect or noncompliance whichever first occurs).

An order under this subsection may also require the person to whom it applies to submit a plan, satisfactory to the Commission, for taking action under whichever of the preceding paragraphs of this subsection under which such person has elected to act. The Commission shall specify in the order the persons to whom refunds must be made if the person to whom the order is directed elects to take the action described in paragraph (3). If an order under this subsection is directed to more than one person, the Commission shall specify which person has the election under this subsection. An order under this subsection may prohibit the person to whom it applies from manufacturing for sale, offering for sale, distributing in commerce, or importing into the customs territory of the United States (as defined in general head-note 2 of the Tariff Schedules of the United States), or from doing any combination of such actions, the product with respect to which the order was issued. Consumer Product Safety Act § 15(d), 15 U.S.C. § 2064(c), (d).

respondent and may impose differing remedial duties.¹⁷⁹ For example, where a refund was ordered for certain aluminized kites,¹⁸⁰ the administrative law judge described the refund obligations of the manufacturer, distributors, and retailers *inter se*:

Clearly where the claim is made directly to the manufacturer, the latter is responsible for refund of the retail price under the conditions above set forth. The manufacturer would, of course, be at liberty to pursue his legal remedies for reimbursement of the respective mark-up from the distributor and retailer who having sold the patently hazardous device should share the financial responsibility therefor.

Where the claim is made to the retailer or distributor which actually sold the kite in question, such seller must pay the full allowable refund plus shipping charges if any were incurred. In this situation the retailer or distributor may obtain reimbursement from the manufacturer of the price he originally paid for the kites, absorbing the loss of the retail or wholesale mark-up plus shipping charges if any incurred.¹⁸¹

179. The House Commerce Committee Report on H.R. 15003 states:

The Commission is also authorized to specify which persons are to receive refunds where that remedy is elected. This would permit the Commission to control not only who will be entitled to refund but also what proof of claim must be made in order for a person to recover the purchase price. Accordingly, the Commission is intended to have authority to specify whether present owners or only first purchasers are entitled to refund and whether the product must be tendered or whether the sales slip or some other proof of purchase or ownership must be made.

Consumers who avail themselves of the remedy provided by Commission order shall not be charged and must be reimbursed for any reasonable and foreseeable expenses incurred in availing himself of the remedy. The Commission is given authority to require any manufacturer, distributor, or retailer to reimburse any other person in the distribution chain for his expenses in carrying out the Commission's order. While it is expected that the Commission in the exercise of this authority will most commonly order those at fault to reimburse others for their expenses, it is contemplated that the Commission would have the authority to place this obligation on the person most able to bear the cost where equitable and other considerations appear to warrant such action in the public interest. In this area, general rules are neither appropriate nor feasible. The Commission would be expected to exercise this power on an ad hoc basis taking into account the individual circumstances of each case.

H.R. REP. NO. 1153, 92d Cong., 2d Sess. 43 (1972).

180. Francis Alonso, Jr. (Mylar Star Kites), 1 CONS. PROD. SAF. GUIDE (CCH) ¶ 75,109 (initial decision) (1976)

181. *Id.* at 60,079. Referring to the language of the House Commerce Committee Report, the Commission in *Relco* stated:

Neither of the two situations mentioned in the legislative history warranting elimination of a tender requirement appear to be applicable here. The record demonstrates that the welder or the designated components are in a tenderable form and

Section 15(d)(3) does not impose any mandatory tender requirement; *i.e.*, the consumer is not invariably required to return a recalled product in order to receive reimbursement. While the House Commerce Committee contemplated such a requirement, it chose to leave the matter to the Commission's discretion.¹⁸² The Commission has thus imposed a tender requirement whenever the product is in tenderable condition and there is no showing that "tender of the product might unduly expose consumers and persons within the distribution chain to the hazards associated with the product."¹⁸³

Although section 15(d)(3) states that the firm subject to a section 15(d) order has the election of repair, replacement, or refund, repair is not a viable remedy for many products.¹⁸⁴ This is particularly so where the product is inexpensive, or has a short useful life, or both. This was the case in *Mylar Star Kites*, where the Administrative Law Judge's section 15(b) order excluded repair as an available remedy. In that case, the parties having conceded the "[r]epair of such kites . . . to be impractical," the manufacturer of aluminized kites was ordered to stop the manufacture of the kites, to give public notice of the hazard, and to "replace all aluminized kites produced and sold . . . with non-conductive kites, or refund their purchase price."¹⁸⁵

A firm subject to a section 15(d) order may elect to refund the purchase

no danger is presented to persons in the recall channels. Given the strong Congressional intent and the obvious statutory purpose of section 15, to protect the public by encouraging removal of dangerous products from the marketplace and consumers' homes, the Commission believes that tender should be required whenever practicable where no danger is presented in the tender process. A prime example of the danger to the public of a product which is not removed from the home was presented in this case. A defective welder which had been stored by the owner after not working properly was retrieved and caused a serious injury to a family member. As the example in this case demonstrates, a refund allowance not accompanied by a tender requirement would not advance the purposes of the legislation and might expose unwary consumers and other users to the dangers posed by the hazardous product.

Relco, Inc., 1 CON. PROD. SAF. GUIDE (CCH) ¶ 75,121 at 60,143 (1976).

182. See notes 179, 181 *supra*.

183. *Id.*; Relco, Inc., 1 CON. PROD. SAF. GUIDE (CCH) ¶ 75,121 (1976) (imposing tender requirement on persons wishing to participate in a refund remedy ordered following a finding that an electric arc welder presented a substantial product hazard).

184. It does not appear that the Commission could order resort to any one of the three Section 15(d) remedies to the exclusion of the others, insofar as Section 15(d) only permits the Commission to order the firm to "take whichever of the [three remedial options] the person to whom the order is directed elects." Consumer Product Safety Act § 15(d)(3), 15 U.S.C. § 2064(d) (1976).

185. Francis Alonso, Jr. (*Mylar Star Kites*), 1 CON. PROD. SAF. GUIDE (CCH) ¶ 75,109 at 60,078 (1976) (initial decision).

price "less a reasonable allowance for use, if such product has been in the possession of a consumer for one year or more (A) at the time of public notice under subsection (c), or (B) at the time the consumer receives actual notice of the defect or noncompliance, whichever first occurs."¹⁸⁶ Section 15 requires a full refund to persons who have held the product for less than one year.¹⁸⁷

The Commission may specify the persons entitled to refunds, and may impose proof of purchase requirements.¹⁸⁸ For example, the order of the Administrative Law Judge in *Relco, Inc.*,¹⁸⁹ upon a finding that certain electric arc welders presented a substantial product hazard, provided that persons holding the welders for less than one year but no longer in possession could file claims for a 100% refund, without the need to show why they no longer had the welder. Persons holding the welder for longer than one year would be entitled to a fifty percent refund only upon filing an affidavit indicating that they disposed of the welder after learning of its unsafe characteristics. The Commission amended the order to place identical requirements of proof for all purchases no longer in the claimant's possession.¹⁹⁰

Individuals other than manufacturers, distributors, or retailers entitled to remedies under section 15(d) orders may not be charged for participating in the remedy, and the firm subject to a section 15(d) order must reimburse the person entitled to the remedy "for any reasonable and foreseeable expenses incurred by such person in availing himself of such remedy."¹⁹¹ Although no such orders have to date been issued, the Act provides that under section 15(c) or (d) the Commission may require a firm to reimburse other manufacturers, distributors, or retailers for "expenses in connection with the order."¹⁹²

Ordinarily a covered firm which submits a section 15(b) report, or which receives Commission notification of a product noncompliance or defect creating a substantial risk or injury to the public, will agree to a voluntary corrective action or a consent order agreement plan. Commission rules expressly provide for corrective action plans and section 15 consent orders as the principal voluntary remedies available to subject firms.¹⁹³ The

186. Consumer Product Safety Act § 15(d)(3), 15 U.S.C. § 2064(d)(3) (1976).

187. See *Relco, Inc.*, 1 CONS. PROD. SAF. GUIDE (CCH) ¶ 75,121 at 60,143 n.4 (1976).

188. *Id.* at 60,143 n.5.

189. See note 183 *supra*.

190. *Relco, Inc.*, 1 CONS. PROD. SAF. GUIDE (CCH) ¶ 75,121 at 60,143.

191. Consumer Product Safety Act § 15(e)(1), 15 U.S.C. § 2064(e)(1) (1976).

192. Consumer Product Safety Act § 15(e)(2), 15 U.S.C. § 2064(e)(2) (1976).

193. 16 C.F.R. § 1115.20 (1980). The Cook-Kitzes Memorandum to the Commission characterized the proposed rule revisions in this way: "These proposed rules retain the most

Commission rules provide that a corrective action plan or a consent order agreement may include a mechanism for recall, repair, replacement, or refund (less a reasonable allowance for use) of the product.

Where the Commission staff and the covered firm are unable to agree on appropriate voluntary corrective action, the Commission may authorize the bringing of an enforcement action to remove the product from the market.¹⁹⁴

Corrective action plans¹⁹⁵ are not legally binding on either the covered firm or the Commission. The rules permit the Commission to reopen and attempt to broaden a corrective action plan in the light of new information or if it determines the plan does not adequately protect the public.¹⁹⁶ A corrective action plan does not require that the covered firm admit that a defect or noncompliance creates a substantial product hazard. The rules permit the firm to include in any plan the statement: "the submission of this corrective action plan does not constitute an admission (by the subject firm) that either reportable information or a substantial product hazard exists."¹⁹⁷

The most significant substantive provisions included in a corrective ac-

successful provision of the present rules—the incentive to report. This incentive is provided by the fact that a voluntary corrective action plan is a possible remedy if a firm has fulfilled its reporting obligations under Section 15(b) of CPSA." Cook-Kitzes Memorandum, *supra* note 35, at 1.

194. *E.g.*, Ambroy Corp., CPSA Docket No. 77-5 (Oct. 26, 1977); *In re* G.L. Elec. Flash-heat Co., CPSC Docket No. 78-2 (Mar. 24, 1978).

195. 16 C.F.R. § 1115.20(a)(xiii) (1968). The 1975 rules under § 15 also prescribed the requirements for "Corrective Action Plans," 16 C.F.R. § 1116.2 (1975), defined as "a remedial program" prepared by the firm and "envisioned by the Commission as an expeditious means of protecting the public from a substantial product hazard." 16 C.F.R. § 1116.2(b)(2), (b)(2)(i) (1975).

196. 16 C.F.R. § 1115.20(a) (1980).

197. A corrective action plan is effective only upon acceptance by the Commission. 16 C.F.R. § 1115.20(a)(1)(xiv) (1980). In deciding whether to recommend that the Commission approve the plan, the staff is directed to consider favorably the subject firm's promptness in reporting and any remedial actions already undertaken. *Id.* § 1115.20(a)(2) (1980). The subject firm's previous involvement, if any, in a corrective action plan will also be considered "if such involvement bears on the likelihood that the firm will comply fully with the terms of the corrective action plan." *Id.*

Interested parties may file written comments on the plan by filing a Notice of Intent to Comment at least 48 hours before the Commission meeting which will consider the plan. Where such a Notice is filed, the Commission will, "if practicable," docket consideration of the plan for the following week's agenda. Interested parties then must file any written comments at least 48 hours before the session.

The 1975 rules provided for public participation in § 15 activities, including public availability of summaries of meetings and telephone conversations, and written comments on proposed Corrective Action Plans, Consent Agreements, and Commission Orders. 16 C.F.R. § 1116.8 (1975).

tion plan "as appropriate" are as follows: a description of the alleged hazard, the nature of the alleged defect or noncompliance, and the injury or potential injury presented; a proposal for the means of notice to the public, including consumers, together with an identification of the classes of persons who will be contacted, and copies of the notices to be used; a description of the corrective action which has been or will be undertaken, including any provisions for repair, replacement, or refund; where the plan calls for returning the products to the subject firm, a description of the disposition of the product, *e.g.*, reworked, destroyed, returned to foreign manufacturer; a statement of steps that have been or will be taken to prevent recurrence of the alleged hazards and to correct products already in the distribution chain, including the number and location of these units and a timetable for the corrective action.¹⁹⁸ The rules further require the subject firm to acknowledge in the plan that the Commission may monitor implementation of the plan and may require the subject firm to furnish customer lists. The Commission may further require an agreement that the Commission may publicize the terms of the plan.¹⁹⁹

A corrective action plan is effective only upon acceptance by the Commission.²⁰⁰ In deciding whether to recommend that the Commission approve the plan, the staff is directed to consider favorably the subject firm's promptness in reporting and any remedial action already undertaken.²⁰¹ The subject firm's previous involvement, if any, in a corrective action plan will also be considered "if such involvement bears on the likelihood that the firm will comply fully with the terms of the corrective action plan."²⁰²

Corrective action resolution of an alleged hazard has been followed even where no injuries have been reported from use of the product.²⁰³ Upon receiving a corrective action plan, the Commission publishes a summary of its provisions in the Commission's Public Calendar and schedules it for consideration by the full Commission.

Consent order agreements under section 15 of the Act may be proposed by the Commission staff or the subject firm.²⁰⁴ An approved consent order

198. 16 C.F.R. § 1115.20(a)(1) (1980).

199. *Id.*

200. *Id.* § 1115.20(a)(1)(xiv).

201. *Id.* § 1115.20(a)(2).

202. *Id.*

203. For example, Sears, Roebuck & Company and Red Devil, Inc. recalled thousands of Sears 44791 and Red Devil 3401 electric paint removers due to a potential shock hazard from a defect in wiring. Commission Announcement, [transfer Binder 1977-1979] CON. PROD. SAF. GUIDE (CCH) ¶ 44,134 (May 22, 1978).

204. Consent orders include "a proposed complaint setting forth the staff's charges and a proposed order by which such charges are resolved." The most significant additional requirements for a consent order are that it include, "as appropriate," (1) an admission of

operates as a final order in disposition of the proceeding.²⁰⁵ The rules permit a subject firm to disclaim, in the consent order, the existence of reportable information or the presence of a substantial product hazard, and provide that any consent order may include a statement such as "the signing of this consent order agreement does not constitute an admission by (the Consenting Party) that either reportable information or a substantial product hazard exists."²⁰⁶

When the Commission receives a proposed consent order executed by the subject firm and a Commission staff representative, the Commission may either provisionally accept it or reject it.²⁰⁷ If the Commission provisionally accepts the order, it places the agreement on the public record and announces its provisional acceptance in its public calendar and the Federal Register. Any person opposing the consent order has fifteen calendar days from publication in the Federal Register to file a written request that the Commission not accept the consent order.²⁰⁸

Where no such request is filed, the consent order becomes "finally accepted" twenty days after the announcement in the Federal Register. Where a timely request is received, the Commission sets the matter down for consideration and vote.²⁰⁹ A consent order becomes effective only upon acceptance by the Commission and service on the subject firm. The Commission is free to publicly disclose the terms of the consent order.

The Commission has actively resorted to consent order resolution of section 15 proceedings. It has approved hundreds of orders requiring notice to the public and consumers, replacement or repair (including addition of safety attachments), and the refund of the purchase price less allowances. In 1976 alone, the Commission approved consent orders in 140 section 15 matters.²¹⁰

jurisdictional facts by the subject firm and waiver of rights to any administrative or judicial hearing or review of the consent order; (2) "[a] statement that the agreement is in settlement of the staff's charges," (3) a statement that the Commission reserves the right to "seek sanctions for any violations of the reporting obligations of section 15(b)" as well as any other "appropriate legal action," (4) a statement that violation of the consent order is a prohibited act under § 19(a)(5) of the Act and may subject the consenting party to civil and/or criminal penalties under §§ 20 and 21 of the Act; (5) "[a] description of the alleged substantial product hazard," (6) a statement that the consenting party will perform certain acts and will refrain from certain acts pursuant to the agreement; and (7) a description of a corrective action plan as provided for in 16 C.F.R. § 1115.20(a). 16 C.F.R. § 1115.20(b)(1) (1980).

205. *Id.* § 1115.20(b)(5).

206. *Id.* § 1115.20(b)(1)(xii).

207. *Id.* § 1115.20(b)(3). The rules provide that the Commission may also take "any other action as it may deem appropriate." *Id.*

208. *Id.* § 1115.20(b)(4).

209. *Id.* § 1115.20(b)(5).

210. *See, e.g.,* The Kite Cases, CPSC Docket Nos. 75-15, 17, 18, 19 (April 1, 1976); The

If the Commission does not accept the consent order, it notifies the subject firm. This notification operates to withdraw the Commission's provisional acceptance of the consent order. The Commission will then issue a complaint, order additional investigation, or take any other "appropriate" action.²¹¹

VI. CONCLUSION

It is clear from the foregoing that the Commission proposes to use enhanced section 15 enforcement activity as both a sword and a shield. Its use as a sword against manufacturers, distributors, retailers, or importers who, in the Commission's view, have failed to enter timely reports of potential product safety problems, will also serve as a shield against Commission critics who complain that the Commission has not satisfactorily discharged its statutory obligation to expeditiously remove unsafe products from the hands of consumers.

In so proceeding, there is the danger that the Commission's section 15 enforcement policies will prove the old axiom that every administrative reform is accompanied by a new invitation for abuse. A potential for such abuse can be found in the prosecution of timeliness cases against firms with whom the Commission has previously litigated and settled product safety questions under other sections of the Act.²¹² Another potential for abuse is the anticipated use of section 15 enforcement to apply generic standards to broad categories of products heretofore pursued by the Commission in voluntary or mandatory standard setting proceedings.²¹³ An additional abuse, no less serious because it is not at this time determinable, is that the Commission will stretch the statutory definition of a "substantial

Aluminum Baseball Bats Cases, CPSC Docket Nos. 75-9, 10, 11, 12, 13, & 14 (Feb. 13, 1976). See also *In re* McCollock Corp., CPSC Docket No. 74-1 (May 6, 1974); *In re* Spray Tech Corp., CPSC Docket No. 75-7 (Oct. 14, 1975); *In re* Terranan Indus., Inc., CPSC Docket No. 76-C0028 (June 28, 1976); *In re* National Indus., Inc., CPSC Docket No. 74-2 (May 19, 1974).

211. *Relco, Inc.*, CPSC Docket No. 74-4 (Jan. 17, 1975) (Order Rejecting Proposed Settlement Agreement directs recovering of matter before administrative law judge).

212. See notes 143-48 and accompanying text *supra*.

213. See notes 8-9 and accompanying text *supra*. Section 15 regulation is best suited to relatively limited instances of defective products. As one Commissioner has stated:

Unlike hazards which are inherent in a specific design and thus capable of being corrected by a safety regulation, [substantial product hazards under Section 15] hazards normally arise unexpectedly and in relatively isolated situations. Frequently, they are related to quality control problems or assembly line malfunctions. Typically, instead of appearing in all products in a certain way, the hazard may arise only in a single manufacturer's product, or in a relatively small portion of a production run.'

Statler Address, *supra* note 2, at 15.

product hazard" into unrecognizable form in order to accommodate these ends.²¹⁴

Should the Commission continue on this course, covered firms will be left uncertain as to what product safety criteria govern the merchandising of consumer products, and consumers must rely solely on media announcements to determine what products are subject to Commission recall. In this connection, it cannot be overemphasized that rulemakings, applicable to a broad class of firms or products, are generally preferable to individual enforcement actions.²¹⁵

A far better course would be for the Commission to try to remove the procedural impediments to effective and prompt enforcement of its banning authority under section 8 of the Act, its standard setting authority under section 7, and its imminent hazard, declaratory relief authority under section 12.

214. This increased use of § 15 timeliness actions is also potentially at variance with the Commission's § 15 regulations which imply that timeliness penalty actions will be used sparingly. The Commission has stated:

[The Commission] does not believe that it should interpret the law primarily through civil penalty actions brought to assess penalties for failure to comply with the reporting requirements of § 15(b) of the CPSA. Most subject firms want to comply with the law and will do so if their obligations are made clear: this regulation offers guidance to these firms.

43 Fed. Reg. 34, 988 (1978).

215. As the United States Court of Appeals for the District of Columbia Circuit stated in *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 683 (D.C. Cir. 1973) (citing *FTC v. Universal-Rundle Corp.*, 387 U.S. 244, 251 (1976)): "Rule-making avoids the problem of singling out a single defendant among a group of competitors for initial imposition of a new and inevitably costly legal obligation."