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COMMENTARY

REVITALIZING THE CONSUMER PRODUCT SAFETY COMMISSION

Carl Tobias*

The Consumer Product Safety Commission (CPSC), having recently celebrated its sixteenth birthday, no longer can claim to be a young agency. On October 27, 1972, Congress created the Commission to protect individuals from deaths and injuries caused by dangerous or defective consumer products.¹ Yet the CPSC, as it approaches maturity, has failed to fulfill numerous purposes for which Congress established it.

Congress acted at the instigation of the National Commission on Product Safety, an entity it created in 1967 to assess risks posed by consumer products and to ascertain whether consumers needed new protections to reduce harm attributable to those products.² The National Commission conducted a thorough analysis and issued a Final Report during 1970 in which it found that unreasonable product hazards exposed the public to undue risk and that existing safeguards, such as federal and state consumer product safety legislation, manufacturer self-regulation, and common law tort suits, were insufficient.³ Accordingly, the Commission recommended that Congress create an agency with substantial power to regulate consumer products.⁴ Congress followed that suggestion by establishing the CPSC as an independent regulatory commission and endowing it with authority to regulate some ten thousand products manu-

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1. See Pub. L. No. 92-573, 86 Stat. 1207 (1972) (codified as amended at 15 U.S.C. §§ 2051-2083 (1976 & Supp. V 1981)). For analyses of the CPSC's creation and of the Consumer Product Safety Act (CPSA) which created it, see Scalia & Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 UCLA L. Rev. 899 (1973); Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 GEO. WASH. L. REV. 32 (1982).

2. See Joint Resolution to Establish a National Commission on Product Safety, Pub. L. No. 90-146, 81 Stat. 466 (1967). For discussions of the National Commission's creation and its work, see Scalia & Goodman, *supra* note 1, at 900-01; Schwartz, *supra* note 1, at 36-41.

3. See NATIONAL COMM'N ON PROD. SAFETY, FINAL REPORT PRESENTED TO THE PRESIDENT AND CONGRESS 1-3 (1970).

4. See *id.* at 3.

factured and distributed by more than one million businesses.⁵ The agency, created in the hope that federal regulation would reduce significantly product risks, has not achieved this goal.⁶

The CPSC's efforts have seemed star-crossed from the outset. All of the problems plagued it that attend creation of any governmental agency, such as identifying constituents and setting priorities.⁷ Congress assigned the CPSC statutory responsibilities that were difficult to accomplish and procedures for implementing them which could not be applied efficiently.⁸

The most important illustration of these phenomena was the process for promulgating consumer product safety standards, compulsory safety requirements to be imposed on manufacturers.⁹ Congress saddled the CPSC with relatively novel, untested procedures for setting those standards, and the procedures ultimately proved extraordinarily complex and time-consuming.¹⁰ The agency admirably attempted to carry out its statutory obligation to develop safety standards, but the Commission committed a number of mistakes.

The CPSC decided to develop mandatory standards for several products, such as swimming pool slides, for which the requirements were only marginally necessary because the products presented little danger or were amenable to treatment with voluntary standards.¹¹ Correspondingly, it tried to develop complex compulsory standards for other products, such as lawn mowers, which posed risks that could not be remedied easily with mandatory requirements.¹² Moreover, the Commission laudably attempted to maximize public participation in those initiatives and was one

5. 15 U.S.C. § 2053(a) (1976) established the CPSC. For figures on the number of products and businesses, see Schwartz, *supra* note 1, at 43.

6. Congress fashioned the CPSA as a thorough regulatory system "to protect the public against unreasonable risks of injury associated with consumer products." See 15 U.S.C. § 2051(b)(1) (1976).

7. See Schwartz, *supra* note 1, at 76; Tobias, *Great Expectations and Mismatched Compensation: Government Sponsored Public Participation In Proceedings of The Consumer Product Safety Commission*, 64 WASH. U.L.Q. 1101, 1161 (1986).

8. For the most comprehensive assessment of these difficulties, see Schwartz, *supra* note 1.

9. For thorough analysis of the "offeror" process for developing these standards, see Schwartz, *supra* note 1, at 57-95. For examination of the seven offeror proceedings conducted to develop the standards, see Tobias, *Early Alternative Dispute Resolution in a Federal Administrative Agency Context: Experimentation with the Offeror Process at the Consumer Product Safety Commission*, 44 WASH. & LEE L. REV. 409 (1987).

10. For descriptions of the procedures and the difficulties entailed in employing them, see Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 TEX. L. REV. 1329, 1400-01, 1412-16 (1978); Schwartz, *supra* note 1, at 57-68, 75-77.

11. For an analysis of the proceedings to develop standards for matchbooks, swimming pool slides, television receivers, and miniature Christmas tree lights, finding that the products presented little danger or were amenable to treatment with voluntary standards, see Tobias, *supra* note 9, at 437-58.

12. For analyses of the lawn mower proceeding which reach the conclusions in the text, see Schwartz, *supra* note 1, at 77-94; Tobias, *supra* note 9, at 424-37.

of the most solicitous federal agencies in this respect.¹³ Even that effort, however, haunted the CPSC, as neither producers nor consumers could resist the temptation to provide ever-increasing amounts of input, which complicated already prolix proceedings.¹⁴

Some of these attempts to write safety standards, which cost the agency hundreds of thousands of dollars and certain industries much more, resulted in no standards or led to requirements that afforded little additional protection for the public.¹⁵ The standard-setting endeavors and considerable additional Commission activity which occurred from the agency's inception until approximately 1978 made the CPSC appear less effective than it was and undermined the agency's credibility at a critical juncture in its brief existence.¹⁶

The Commission was rejuvenated in the late 1970s, however. The CPSC improved its standing by redefining the agency's focus, especially in deciding to develop fewer mandatory standards in-house while encouraging manufacturers' organizations, such as trade associations, to upgrade voluntary requirements.¹⁷ Nevertheless, the Commission's comparative success was relatively short-lived, ending roughly with the advent of the Reagan administration.

The difficulties which the CPSC experienced in its early years were exacerbated by developments that occurred during the second half of the

13. See Adler, *From "Model Agency" To Basket Case: Can the Consumer Product Safety Commission Be Redeemed?*, 41 ADMIN. L. REV. 61 (1989); *CPSC Oversight: Hearings Before the Subcomm. on Oversight and Investigation of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 1st Sess. 351 (1977) (statement of Professor Hamilton) [hereinafter 1977 *House Oversight Hearings*].

14. See Schwartz, *supra* note 1, at 75, 95; 1977 *House Oversight Hearings*, *supra* note 13, at 349-55 (statement of Professor Hamilton). For analysis of the difficulties an agency can create when it is too open to public involvement, see Statler, *Let the Sunshine In?*, 67 A.B.A. J. 573 (1981).

15. The CPSC spent more than \$800,000 attempting to develop standards for public playground equipment. See Tobias, *supra* note 9, at 460. Cf. Tobias, *supra* note 7, at 1138 (non-offeror attempt to develop standards for chain saws cost industry more than \$1,000,000 and the Commission more than \$500,000). The agency ultimately failed to promulgate any standards for television receivers, miniature Christmas tree lights, or public playground equipment. See Tobias, *supra* note 9, at 451, 455, 460. Courts invalidated certain components of the architectural glass, matchbook, and swimming pool slide standards that were promulgated. See *id.* at 419, 439, 447. This meant that these, and especially the swimming pool slide standard, offered the public little additional protection. See United States CPSC, *Statutory Rule Review Report to Congress 19-21* (May 1980) (pool slide standard offered minimal safety benefit and was anti-competitive).

16. For analyses of considerable additional CPSC activity, especially relating to its procedures, which made it appear less effective and undermined its credibility, see Adler, *supra* note 13, at 70-73; Schwartz, *supra* note 1, at 45-55, 68-70, 94-95. Both of these authors indicate the CPSC may not have deserved criticism and attribute its perceived ineffectiveness to factors for which CPSC was not responsible or could not control, such as Congressionally prescribed procedures. See Adler, *supra* at 70-73; Schwartz, *supra* at 62-67, 75, 95.

17. This development has been attributed to the leadership of CPSC's Chairman, Su-

agency's existence. The Reagan administration's anti-regulatory perspectives directly contravene much embodied in CPSC's statutory mandate.¹⁸ Thus, since the early 1980s, the emphases at CPSC, as at many other federal agencies, have been on deregulation, cooperation with manufacturers, voluntary controls and voluntary compliance, "prosecutorial discretion" (not to sue those who may be violating the law), and information and education campaigns.¹⁹ Symptomatic of this anti-regulatory climate was resolution of the all-terrain vehicle (ATV) "problem."²⁰ For several years, the CPSC "negotiated" with manufacturers, even as the agency acknowledged that with each month which passed the vehicles would be responsible for an additional twenty deaths, ten of which would be children.²¹ At the instigation of the Justice Department, the Commission finally entered into an unprecedented "consent decree," which permitted the continued sale of four-wheel ATVs while requiring manufacturers to institute safety education campaigns for riders and cease production of three-wheel ATVs.²²

Critics should not ascribe what has happened at the CPSC during the 1980s solely to the Reagan administration. Congress also bears substantial responsibility for the developments. In 1981, it amended the agency's organic statute in ways that make the standard-setting procedure so complex that it is virtually unworkable.²³ Moreover, Congress

18. These anti-regulatory perspectives are reflected in initiatives commenced at the inception of the Administration, such as issuance of Exec. Order No. 12,291, 3 C.F.R. 127 (1981) and creation of the Task Force on Regulatory Relief. Indeed, the Administration attempted to abolish the CPSC. See Letter from David Stockman, Director, Office of Management and Budget, to Senator Robert Kastan, Chairman, Consumer Subcommittee of the Senate Committee on Commerce, Science, and Transportation (May 8, 1981). Congress rejected this effort. See H.R. REP. NO. 99-377, 99th Cong., 1st Sess. 7 (1985).

19. These phenomena are particularly troubling at agencies, such as the Environmental Protection Agency and the Food and Drug Administration, which like CPSC, have important responsibilities for protecting public health and safety. For analysis of the efficacy of education programs, see Adler & Pittle, *Cajolery or Command: Are Education Campaigns an Adequate Substitute for Regulation?*, 1 YALE J. ON REG. 159 (1984).

20. These are off-road vehicles which initially were used by ranchers as general-purpose work machines but which have enjoyed sales exceeding 500,000 vehicles in each of the last several years because of advertising portraying them as recreational vehicles for the family.

21. As numerous inexperienced drivers operated the vehicles, the number of deaths rose substantially, from 26 in 1982 to 268 in 1986. During 1986, 85,000 injuries requiring emergency room treatment were ascribed to ATVs. See *Government Asks Limits on All-Terrain Vehicles*, N. Y. Times, Dec. 22, 1987, at A1.

22. See *United States v. American Honda Co., Inc.*, Civ. Act. No. 87-3525 (April 27, 1988); see also Buckley and Rooney, *All-Terrain Vehicles*, 24 TRIAL 56 (Nov. 1988); Egan, *Roar in the Wilderness Raises Ire Over Vehicles*, N. Y. Times, July 15, 1988, at A12. Another casualty of anti-regulatory perspectives at CPSC and other agencies has been reimbursement of the public for costs incurred when participating in administrative proceedings. See Tobias, *Of Public Funds and Public Participation: Resolving the Issue of Agency Authority to Reimburse Public Participants in Administrative Proceedings*, 82 COLUM. L. REV. 906 (1982).

23. See Consumer Product Safety Act Amendments of 1981, Pub. L. No. 97-35, 95 Stat. 1301. For analysis of the amendments, see Klayman, *Standard Setting Under*

participated willingly with the administration in mandating large budget cuts that would have crippled the CPSC, even had it wanted to act more vigorously.²⁴

The agency, on its sixteenth birthday, stands wounded, as do thousands of Americans whose injuries from defective or dangerous products might have been prevented by a CPSC more attentive to its responsibilities. Many possible constructive measures exist to revitalize the Commission in the near future, however. The new administration and the new Congress should revise the agency's powers and streamline its procedures, especially for standard setting,²⁵ while restoring sufficient appropriations to facilitate the CPSC's effective accomplishment of its difficult but important missions.²⁶ President Bush should nominate and the Senate should confirm commissioners more committed to implementing vigorously the agency's statutory obligations.²⁷ Moreover, Congress and the CPSC must think constructively about novel ways of promoting increased product safety, such as developing incentives for manufacturers that evince a commitment to reducing risks posed by their products.²⁸ Those measures should enable the CPSC to achieve more efficaciously the task of protecting the American people from dangerous and defective products, the purpose for which the agency was created.

the Consumer Product Safety Amendments of 1981—A Shift in Regulatory Philosophy, 51 GEO. WASH. L. REV. 96 (1982).

24. The most drastic cut came in the 1982 fiscal year budget when CPSC lost 25% of its appropriations and staff. Since then, CPSC's budget has remained relatively the same so that for fiscal year 1989 it requested the same amount as for fiscal year 1982.

25. For suggestions as to possible revisions, see Adler, *supra* note 13, at 82-129; Klayman, *supra* note 23. For suggestions relating to revival of participant reimbursement, see Tobias, *supra* note 7, at 1163-64.

26. It is difficult to pinpoint a precise figure that would be appropriate; however, one target might be the level in constant dollars at which CPSC was funded in its first budget for fiscal year 1974 (CPSC's request for 1989 represents a 59% drop).

27. I am not saying that appointees necessarily must be "pro-regulation." Rather, protecting the American people from dangerous and defective products should be their top priority. For discussion of "reluctant regulators," see Adler, *supra* note 13, at 76.

28. Manufacturers frequently complain that safety does not sell or pay.

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