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U.S. CONSUMER PRODUCT SAFETY COMMISSION

WASHINGTON, D.C. 20207

September 12, 1978

Mr. Edward F. Kearney
Executive Director
National Committee on Uniform
Traffic Laws and Ordinances
1776 Massachusetts Ave., N.W.
Washington, D.C. 20036

Dear Mr. Kearney:

This responds to your January 24, 1978 letter to William Kitzes of the Commission's Office of Program Management concerning proposed changes in the Uniform Vehicle Code. You have asked for the Commission's views on these changes, which concern reflectivity and braking requirements for sidewalk bicycles and which have been recommended by some bicycle manufacturers.

The Commission's general policy is to have states and localities determine initially the preemptive effects of the Commission's statutes and regulations on state and local requirements. However, your letter raises some issues of broad applicability that the Commission has decided to consider, and we hope that the discussion below will prove helpful to you.

As you know, the Commission's bicycle regulations (16 CFR 1500.18(a)(12) and 16 CFR Part 1512) establish many different requirements for sidewalk and other types of bicycles. According to section 18(b) of the Federal Hazardous Substances Act (FHSA, as amended by the Consumer Product Safety Commission Improvements Act of 1976, Pub. L. 94-284), states and localities are prohibited from establishing or continuing in effect any non-identical requirement applicable to bicycles that is designed to protect against the same risk of injury that the Commission's bicycle regulations were established to protect against.

A number of the provisions in your existing model code are not identical to the Commission's bicycle requirements. (We have looked only at the provisions which were attached to your letter and which are the subject of the proposed changes.) In particular, the reflectivity and braking requirements contained in your model code differ from the Commission's requirements (compare UVC §§ 12-703 and 704 with 16 CFR 1512.16 and compare UVC § 12-706 with 16 CFR 1512.5). We point this out as a potential preemption problem even though your letter asked only about sidewalk bicycle preemption.

Your specific question was whether the Commission agrees with the contention that "states cannot ... require reflectors or brakes on sidewalk bicycles used on their highways because the CPSC does not require bicycle makers to install them." The Commission's bicycle regulation sets braking and reflectivity requirements for bicycles, but specifically exempts sidewalk bicycles from those requirements. That decision on sidewalk bicycles was based on the Commission's explicit findings that such requirements were not necessary to protect riders of sidewalk bicycles from an unreasonable risk of injury.

The Commission found that sidewalk bicycles "are intended to be ridden by young children inside the house and on sidewalks [and] are not meant for use after dark and on streets" (40 FR 25485, June 16, 1975). Further, "the Commission's intention was ... that small bicycles ridden by very young children inside houses or on sidewalks not be subject to all requirements applicable to bicycles suitable for use by older children on streets" (40 FR 25481, June 16, 1975). Based on this assessment of the risk of injury presented by sidewalk bicycles, the Commission specifically exempted them from the reflectivity and braking requirements that are applicable to all other bicycles covered by the regulation.

In this situation, the Commission believes that states are preempted from issuing non-identical braking or reflectivity requirements for sidewalk bicycles. Since the Commission's regulation contains no such requirements, states are prohibited from issuing any, as well. We believe that this conclusion is mandated by the statutory language and legislative history of the FHSA preemption provision.

Please note that the Commission has approved this advisory opinion.

Sincerely,

Stephen Lemieux, for
Margaret A. Freeston
Acting General Counsel

NATIONAL COMMITTEE
ON
UNIFORM TRAFFIC LAWS AND ORDINANCES

January 24, 1978

Mr. Bill Kitzes
Sports and Recreation
Consumer Product Safety Commission
1750 K Street, N.W.
Washington, D.C. 20207

Dear Mr. Kitzes:

The National Committee is responsible for revising the Uniform Vehicle Code and urging its adopting by the states. Since its initial publication, this document has served as the basis for most motor vehicle and traffic laws in the United States.

Naturally, the Uniform Vehicle Code contains a number of provisions related to bicycles and their use.

Proposed changes in our Uniform Vehicle Code are considered by one of six subcommittees. Enclosed is a copy of the Agenda to be used by our Subcommittee on Operations when it meets in Chicago on February 22-24, 1978.

We would like to know the Commission's views on item 47 (page 77) relating to "Bicycle Law Conflicts." Some bicycle manufacturers contend that the states cannot, for instance, require reflectors or brakes on sidewalk bicycles used on their highways because the CPSC does not require bicycle makers to install them. Does the Commission agree with this contention?

Sincerely,

Edward F. Kearney
Executive Director

cc: Bob Reeder
James Hayes
J. Forester
John Baer

46. RIDING ON BICYCLE PATHS

Proposal: Require bike paths be "safe" to use.

Proposed by: Dennis Robertson, Alaska Department of Public Safety.

Effect of Proposal: Would amend UVC § 11-1205 to read:

> c. Wherever a safe and usable path for bicycles has been provided adjacent to a roadway, maintained in safe and usable condition, bicycle riders shall use such path and shall not use the roadway.

Reason Stated to Support Proposal: Without altering the mandate to use available bicycle paths and shoulders of roads, the amendment does attempt to qualify the mandate by "requiring" that the paths and shoulders be safe to use (e.g., frequent driveway intersections produce more drivers backing across paths without enough concern for pedestrians and cyclists, although these same drivers are usually very cautious about backing into roadways where they may encounter more sizeable objects) and be maintained in a safe and usable condition (e.g., so that cyclists will not be required to weave in and out of chunks of chipped pavement, potholes, etc).

Code References: UVC § 11-1205.

Comparative Data: See the prior agenda item.

47. BICYCLE LAW CONFLICTS

Proposal: Amend the UVC to add provisions regarding bicycle equipment that would avoid conflict with Federal regulations.

Proposed by: John R. F. Baer, Counsel for Schwinn Bicycle Company; Ronald K. Kolins, Counsel for Bicycle Manufacturers Association of America, in a letter dated March 14, 1977.

Effect of Proposal: Would amend UVC § 12-701 to read:

> a. No provision in this chapter shall apply to bicycles nor to equipment for use on bicycles except as to provisions in this article or unless a provision has been made specifically applicable to bicycles or their equipment.
>
> b. Nothing herein is intended to be, nor shall be construed as being, in conflict with the requirements of the Federal Bicycle Safety Standard, 16 C.F.R. § 1500.18(a)(12) and Part 1512.

Would amend UVC § 12-703 to read:

> Every bicycle shall be equipped with a red reflector of a type approved by the department which shall be visible for 600 feet to the rear when directly in front of lawful lower beams of head lamps on a motor vehicle. This requirement shall not apply to a bicycle having a seat height no more than 635 mm (25 inches) with the seat height measured with the seat adjusted to its highest position.

Would amend § 12-704 to read:

> Every bicycle when in use at the times described in § 12-201 shall be equipped with reflective material of sufficient size and reflectivity to be visible from both sides for 600 feet when directly in front of lawful lower beams of head lamps on a motor vehicle, or, in lieu of such reflective material, with a lighted lamp visible from both sides from a distance of at least 500 feet. This requirement shall not apply to a bicycle having a seat height no more than 635 mm (25 inches) with the seat height measured with the seat adjusted to its highest position.

Would amend UVC § 12-706 to read:

> Every bicycle shall be equipped with a brake or brakes which will enable its driver to stop the bicycle within 25 feet from a speed of 10 miles per hour on dry, level, clean pavement.
>
> This requirement shall not apply to a bicycle having a seat height of less than 560 mm (22 inches) with seat height adjusted to its lowest position.

Reasons Stated to Support Proposal: The National Highway Traffic Safety Administration (NHTSA) has instituted a traffic safety program, pursuant to which each state would enter into an agreement with NHTSA to develop and maintain a pedalcycle safety program which would require pedalcycle operation to be in general conformance with the UVC's Rules of the Road. Although this has not yet been finalized, several states have proposed legislation which would adopt UVC provisions.

Several of the UVC provisions are expressed in terms which would require the use of certain equipment on the bicycle itself. The states, in adopting these provisions, might reword or construe them in such a way as to mandate certain equipment on new bicycles at point of sale to the consumer. If that happens, the bicycle industry will encounter some conflicts because the equipment provisions of the UVC are different from those in the Federal Bicycle Safety Regulations issued by the Consumer Product Safety Commission.

Any state law mandating equipment which is not identical to the Consumer Product Safety Commission (CPSC) requirements will be preempted -- no state can establish a requirement applicable to bicycle equipment regulated by CPSC unless it is "identical" to the CPSC requirement.

The UVC requirements for rear reflectors and brakes are not identical to federal requirements. The Code would require brakes and reflectors on small sidewalk bicycles while the CPSC regulations do not require them. Therefore, it is entirely likely that there would be federal preemption, since the CPSC has directly regulated in these two equipment areas. There may also be federal preemption with respect to the side reflector provision of the UVC although it is not as clearcut.

The addition of the moped sections would resolve the problem and rescue the consumer from potential controversy.

Code References: UVC §§ 12-701, 12-703, 12-704 and 12-706.

Comparative Data: While no state has yet adopted provisions to avoid conflicting with CPSC requirements, several have adopted laws like UVC §§ 12-701(b) and (f) to avoid conflicts with federal motor vehicle safety standards.

In the seven states with a definition of bicycle similar to the 1968 Code provision, conflict with CPSC requirements does not exist. In addition, New York excludes devices having solid tires and intended for use only on a sidewalk by pre-teenage children, and Ohio excludes bicycles designed solely as play vehicles from the definition of bicycle. The District of Columbia defines "sidewalk bicycle" as one that is not designed to be ridden on a roadway or that has two or more wheels all of which are less than 20 inches in diameter.

Statement by John Forester Concerning This Proposal: The bicycle manufacturers' request to change the UVC and State requirements for bicycle lights, reflectors and brakes to agree with the so-called "bicycle safety regulation" of the Federal Consumer Product Safety Commission places the NCUTLO and the State Legislatures in a very difficult position. The basic question is very simple: Should requirements for bicycle traffic safety equipment be relaxed to a dangerous level because a Federal commission with no other vehicular and no traffic or transportation responsibilities, and no discernible expert knowledge in these areas, has issued a regulation for bicycle design which does not require the traditional equipment and in one case offers an ineffective substitute?

The bicycle manufacturers have explicitly requested that some cyclists be allowed to operate without brakes, some without either headlamp or rear reflector at night, and implicitly, through the specific CPSC precedence requirement, that all cyclists be allowed to operate at night with a front reflector instead of a lamp and with the rear reflector (and quite possibly the front reflector also) concealed by baggage or clothing.

The brake omission request nominally extends only to small bicycles called "sidewalk bicycles". There is no evidence that small bicycles require no braking action beyond that produced by the feet, and considerable evidence that all cyclists operating upon sidewalks require braking action to avoid cars in driveways and to control their entrance onto the roadway at crosswalks. In addition, there is no limitation, either legal or practical, to the use of bicycles named "sidewalk bicycles" upon the roadway in traffic in the same way as other bicycles.

However the specific CPSC precedence clause would require that all larger bicycles be equipped with brake systems which have their braking effectivity dependent upon gear ratio. The concept is that slow bicycles need only weak brakes, while fast bicycles need better brakes. The faults of this concept are: On downhills both kinds of bicycle travel equally fast; in traffic, both kinds of bicycles should be operated with the lower gear ratios appropriate for weak brakes, but traffic dangers require the ability to stop quickly; no other driver could tell, by looking at a bicycle while he was driving, whether it whould have strong or weak brakes. These faults should be sufficient to show that the brake request is both dangerous and complicated.

The reflector request comes as the climax of a 5-year lobbying and propaganda campaign by the manufacturers to hoodwink the public into believing that the reflector-only system provides adequate nighttime safety. Although a reflector-only system is less effective than the front lamp and rear reflector system now required by traffic laws, the bicycle manufacturers argue that so many more people will use the reflector-only system that nighttime car/bike collisions will be fewer with the less effective system than with the more effective system. Needless to say, this hypothesis has never been tested, because the manufacturers won't bother and those competent to test it simply refuse to ride into known traffic dangers at night knowing that they are invisible.

We know only that there are no car/bike collision situations in which the reflector-only system is more effective than the front lamp and rear reflector system, and that in 64% of total (day and night) car/bike collision situations the reflector-only system does not reflect the motorist's headlamp beams back to his eyes until too late for him to avoid the collision. Furthermore, the concealed rear reflector which cannot be avoided if the manufacturers' request is accepted would be totally ineffective in what are now 23% of total (day and night) collisions. Admittedly, we do not have car/bike collision data separated by daylight and darkness, but the proportion of the total collisions which are adversely affected by the manufacturers' request are so overwhelming that we can only conclude that the reflector-only system is far more dangerous than the front lamp and rear reflector system. Therefore, the compliance increase would have to be very large to overcome this handicap.

The manufacturers have frequently argued to me that most cyclists do not intend to operate at night, so it would be foolish to require lamps for all which few will use. This is a red-herring argument, because at this time (and always in the past) the State Vehicle Codes and the UVC require lights only when operating in darkness, and there is no plan to require lights in the daylight. The manufacturers solution to their own foolish statement of the problem is to require all cyclists (except some who have no requirements at all) to carry a compromise system both day and night, a system which is a useless encumbrance during daylight and dangerous during darkness. In doing this they, and the CPSC which has been incompetent as to write their propaganda into law, have ignored the rights of those cyclists who intend to operate sometimes at night and properly equip themselves in accordance with present traffic laws and known safety requirements. They will be operating illegally if the manufacturer's request is accepted.

Possibly, in a statistical sense only, it might be reasonable to provide an optional system in which cyclists could choose either the reflector-only system or the front lamp and rear reflector system. This, given the present lax enforcement system, might produce the fewest nighttime casualties, but it would impose an impossible strain on the traffic law system. If some cyclists are allowed to operate without a headlamp or a visible rear reflector at night, any motorist who hits a cyclist who would have had the right-of-way during daylight must be held responsible, even though he couldn't see the cyclist and had no means of seeing him. For a first example, consider the motorist who waits at a boulevard stop until he sees no traffic approaching. He starts across the intersection and having started moving he sees a cyclist's reflectors strike his headlamp beams from the left at a point about 5 feet in front of his front bumper. That's where reflectors become visible. For a second example, a motorist driving at night suddenly sees a black shape in the roadway ahead of him, too close to avoid. In both cases under present law the motorist is free of liability and legal jeopardy, while under the proposed law the motorist would be fully liable, both financially and legally.

The problem is a very nasty one: the best solution is to void the CPSC regulation. Avoiding this situation was

one of my motives in challenging the CPSC regulation in court. Since final arguments were heard on 25 Oct 1976, the best immediate action is to wait until the court renders its decision. Since the CPSC was pressured into admitting in court that it had had no intention of regulating bicycles intended for adult use, it is highly probable that the court will exempt a large class of bicycles from the regulation, including many of those regularly used at night and properly equipped for night riding. Since some will then be required to be properly equipped in accordance with present laws when used at night, there will be much less reason for others to be exempt from the same requirement. Somewhat less probable, but I guess still more than 50% probable, is the total voiding of the regulation because of its numerous engineering and legal deficiencies, only two of which are pertinent to this discussion. Then there will be no problem at all.

The manufacturers make this request for money alone. Their willingness to sacrifice cyclists' lives by degrading the known necessary safety requirements shows that very clearly. Their argument to the NCUTLO that they are acting in cyclists' interests to prevent "confus(ing) the consumer and catch(ing) him in the middle over this controversy" is entirely mendacious. The manufacturers caused the situation by their lobbying of the CPSC for the strenuous efforts of consumers (that is, cyclists, the consumers of bicycles), and so far as cyclists are concerned the manufacturers should suffer not merely some financial expense but the penalties appropriate for homicide for financial benefit. Cyclists today are caught in the crossfire. They must purchase the reflector-only system, throw it away, and if they wish to ride at night they must purchase the front lamp and properly positioned rear reflectors. <u>I know of no cyclist among the hundreds that I know who travels at night using the reflector-system</u>. Converting the CPSC requirements into law will throw onto the cyclist the additional burden of carrying about with him the useless CPSC system in addition -- he won't be allowed to throw it away.

The first possible solution is to void the CPSC regulation, and as discussed above this is in process through court action.

Every other solution is far more difficult and complicated, because it concerns not merely the bicycle manufacturers but

also the complicated interaction of the Federal Consumer Product Safety Commission, its regulation itself, the federal pre-emption requirements in the Federal Hazardous Substances Act and the Consumer Product Safety Act, and the present procedures for establishing traffic laws and their scope.

One reason that the regulation is bad is because it was made by an appointed commission which has no responsibility or expertise in vehicular or traffic affairs, and whose activity was not expected to impinge on those fields. The reason that this incompetent regulation presents a problem which cannot be ignored is that both the Federal Hazardous Substances Act (under which the bicycle regulation was issued) and the Federal Consumer Product Safety Act (under which the CPSC usually operates and could in this case, after a legal revision) require that any state requirements about a certain hazard be identical to the requirement established by the CPSC for the same hazard, and they void all others. <u>When the CPSC regulation came into effect in May 1976 all requirements in State Vehicle Codes for bicycle brakes and nighttime protective equipment became theoretically null and void.</u>

This thesis may be disputed. The CPSC consistently argued to cyclists that no matter how bad its regulation is they may modify their bicycles to suit themselves after purchase. The CPSC has also made public statements and printed materials saying that cyclists should use lights at night. Also, the CPSC's authority is based upon the interstate commerce clause of the Constitution, and its legal authority extends only to bicycles in interstate commerce. (Note, a bicycle which has not been in interstate commerce is exempt from the regulation -- who knows which is which when in the hands of the cyclist?) Under this theory there is a definite termination of Federal authority at time of sale to the consumer, and initiation of State authority, so that the Federal pre-emption must cease at time of consumer sale. However the other side is that the Federal requirements are to protect the consumer, not the person trucking the bicycle from one state to another, and this can only be effective if the effect of the requirements extends to the period of use. This may be unconstitutionally beyond the interstate commerce clause -- who knows? Clearly, the problem is greater than traffic law alone, and nobody knows what to do about it.

Either legislative or judicial action may be sought to solve the problem.

1) As discussed above, the regulation may be voided because of its other illegalities. This is now in process.

2) States, and ACUTLO, might deliberately take no action on the practical assumption that nobody will test their theoretical abandonment of brake and nighttime protective equipment requirements. Obviously the bicycle manufacturers have attempted to get States to act already, and some State Legislatures will undoubtedly be conned into action because they don't know any better, so the stand-firm policy may well fail.

3) States might enact the CPSC requirements so they can enforce something, but this implies abandoning the present proper and safe requirements for something weaker and legally complicated.

4) Congress might specifically clarify the FHSA and CPSA pre-emption sections to apply Federal pre-emption to only purchase requirements, as the CPSC argues is true today. The consumer will still pay for two sets of equipment, but he won't be legally jeopardized for using the proper equipment. This a basically the present practical situation.

5) Congress might transfer responsibility for bicycles as vehicles to Department of Transportation, which would remove them from both the FHSA and the CPSA scopes. This would also place the responsibility for bicycle safety education squarely within DOT, where it belongs by function.

6) A Federal court might be persuaded to issue a Declaratory Judgment determining the extent of Federal pre-emption, either limiting it to purchase requirements, or by distinguishing between mechanical safety and traffic safety requirements.

7) The CPSC might be persuaded to change its regulation to agree with traffic laws and traffic expert knowledge. So far they haven't, despite a lot of expert advice, and their defense of their regulation has used many inaccurate and false statements.

Everyone of these possibilities is difficult to accomplish, and each of them, except the 3 that directly void the regulation, (1,5,7), may well go wrong and produce undesirable results.

As stated above, the best and safest course at present is to await the pending court decision.

48. MOPEDS AND MOTOR ASSISTED BICYCLES

Proposal: A. Add a definition of "motor assisted bicycles" to the Code.

B. Add provisions to regulate the use of motor assisted bicycles.

Proposed by: International Association of Police Chiefs.

Subcommittee Recommendation: Tabled at its February, 1975 meeting.

History of Proposal: This was originally proposed in the subcommittee on operations in its March, 1974 meeting (First Report of the Subcommittee on Operations, September 6, 1974, item 74, p. 145) and was then referred to the special panel on bicycle laws which met in October, 1974. The panel presented a proposal (Report of the Panel on Bicycle Laws, January 27, 1975, item 46, p. 116) which was then tabled by the subcommittee as its February, 1975 meeting. The International Association of Police Chiefs (IACP) has once again proposed that the matter be considered.

Reasons Stated to Support Proposal: According to IACP, there has been a significant increase in motor equipped bicycles on the nation's highways. The number of accidents involving these bicycles is increasing disproportionately to the amount of roadway use. Legal controls placed on these vehicles by the states are lacking in uniformity, which results in driver confusion. Moreover, the operation of water equipped bicycles by persons under the age of 16 has historically been a traffic safety disaster. For these reasons, it is proposing that motor equipped bicycles be placed into a new category of vehicles that prohibits operation under the age of 16, requires a valid driver's license, requires registration, financial responsibility and proper vehicle and driver equipment.