



U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

CPSC EXECUTIVE SESSION
May 22, 1975

1750 K Street, NW.
Washington, D.C.

Presiding: Chairman Simpson

Present : Commissioner Franklin
Commissioner Kushner
Commissioner Newman
Commissioner Pittle

ITEM

Response to the House Committee on Interstate and Foreign Commerce request for CPSC comments on H.R. 5361 (Consumer Product Safety Commission Improvements Act of 1975), a bill

To amend the Consumer Product Safety Act, and for other purposes.

(Briefing materials transmitted by Office of Secretary 5-19-75)

DECISION

The Commission approves the attached response to the House Committee on Interstate and Foreign Commerce request for CPSC comments on H.R. 5361.

VOTE

Concurring: Chairman Simpson
Commissioner Franklin
Commissioner Kushner
Commissioner Newman
Commissioner Pittle*

R. Simpson
B. Franklin
J. Kushner
C. Newman
R. David Pittle

Attachment

* Opinion to follow.

Submitted by:
Commissioner Kushner
June 9, 1975

JUN 02 1975

Honorable James T. Lynn
Director
Office of Management
and Budget
Washington, D. C. 20503

Dear Mr. Lynn:

I am pleased to provide to the Office of Management and Budget
accopy of our letter to the Chairman of the Committee on Interstate and
Foreign Commerce, House of Representatives, who had requested views of
the Consumer Product Safety Commission on H.R. 5361, a bill

"To amend the Consumer Product Safety Act,
and for other purposes."

Sincerely,

ORIGINAL SIGNED BY
RICHARD O. SIMPSON

Richard O. Simpson
Chairman

Enclosure

JUN 02 1975

Honorable Harley O. Stagers
Chairman
Committee on Interstate and
Foreign Commerce
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter is in response to your request for the views of the Consumer Product Safety Commission on H.R. 5361, a bill cited as the "Consumer Product Safety Commission Improvements Act of 1975."

The bill, drafted by the Commission and introduced at its request, contains various statutory revisions recommended by the Commission for effective implementation of its mandate.

The Commission urges favorable action by Congress on all the amendments contained in the bill.

Sincerely,
ORIGINAL SIGNED BY
RICHARD O. SIMPSON
Richard O. Simpson
Chairman

cc: Office of Management
and Budget

CONSUMER PRODUCT SAFETY COMMISSION
OF THE
UNITED STATES OF AMERICA

Re: S.5361; Proposed Amendments)
to Legislation Administered)
by CPSC)

SEPARATE STATEMENT OF
COMMISSIONER R. DAVID PITTLE

Although I concur in substantially all of the amendments proposed to Congress regarding the legislation enforced by this Commission, there are two items with which I am not in accord:

i) Limitations on Jurisdiction: The Commission proposed to extend the prohibitions on jurisdiction over cigarettes and handgun ammunition in Section 3 of the CPSA to all of the acts enforced by the CPSC. While I do not object to, and in fact endorse, our asking the Congress to clarify our jurisdiction over these products, I object to our asking simply for a declaration of no jurisdiction.

I believe that the many significant safety issues related to cigarettes and handgun ammunition will go unresolved if the only congressional action regarding them is a negative one regarding jurisdiction. I do not believe that these issues must necessarily be addressed by the Consumer Product Safety Commission, but I feel strongly that they should be addressed by some governmental body.

Questions of our jurisdiction are presently before the courts in the case of cigarettes, and before the Commission in the case of handgun ammunition. I expect they will be resolved through the normal, orderly procedures available for deciding such matters. If Congress wants to resolve these issues on a more expeditious basis, I hope that it will simultaneously investigate the hazards alleged to be associated with these products and take appropriate steps to reduce those hazards.

ii) Optional Use of Transferred Acts: Under Section 30(d) of the CPSA, a risk of injury that can be eliminated or sufficiently reduced by action taken under one of the transferred acts, may be regulated by the Commission only in accordance with the provisions of those acts.¹ The Com-

¹Where a risk of injury can neither be eliminated nor sufficiently reduced under one of these acts, the Commission has taken provisions from the CPSA and made them applicable to the transferred acts. For example, companies subject to regulation under these acts must comply with the requirements for notification of defects set forth in section 15(b) of the CPSA. See 16 C.F.R. § 1115; 37 Fed. Reg. 6061. Similarly, it has been proposed that companies subject to regulation under the transferred acts maintain and permit access to records and provide information relating to consumer product safety complaints in accordance with requirements drafted under the authority of section 16(b) of the CPSA. See 39 Fed. Reg. 31916 1974.

This approach has enabled the Commission to rectify many of the gaps found in the transferred acts and to promote uniformity in its administration and enforcement activities.

mission proposes to amend Section 30(d) to permit us to proceed against risks of injury under the CPSA, rather than under the transferred acts, whenever we decide such action would be in the "public interest." The notion of proceeding in this manner is initially very appealing. However, I have some deep reservations about such an approach.

I am afraid that the option of utilizing the CPSA as the "public interest" dictates, while it may arguably permit somewhat greater flexibility for the Commission, may also inject an unreasonable and unnecessary amount of uncertainty into the regulatory process. I say this for two reasons.

First, the term "public interest", although undoubtedly useful in many contexts, is highly subjective and ambiguous. All too often one person's notion of the "public interest" turns out to be another's notion of a "special interest." Given the inherent vagueness and breadth of the term, it will be difficult to maintain a reasonable degree of consistency in decisions to choose CPSA over one of the transferred acts.

Second, it is a matter of public record that there is a fundamental good-faith disagreement among the Commissioners of this agency regarding the desirability and legality of regulating products under the various acts administered by the CPSC. To direct the Commission to pick and choose among

our acts on the basis of where the greater "public interest" lies would, I fear, result in an erratic and unpredictable use of these acts according to fluctuating majority votes. Although it is impossible to predict accurately the extent to which the added subjectivity and uncertainty of this approach would be disruptive to regulated industries and consumers, I believe it would be considerable.

Finally, I fear that such an approach might invite wasteful litigation as both industry and consumers could contest each finding, or refusal to find, that the "public interest" would be better served under the CPSA.

I believe that at the heart of the present proposal to modify section 30(d) is the notion that the CPSA contains better provisions for the regulation of risks of injury than the transferred acts. I share this feeling to a great extent. But I also believe that certain features of the transferred acts are as good as, and occasionally superior to, those of the CPSA and should not be abandoned lightly.²

²The FHSA, for example, provides, in section 3(e)(2), for administrative banning of a dangerous product in the case where the Commission finds that it presents an imminent hazard to the public health. This unique procedure is responsive to the need to protect the public from an immediate danger. Similarly, Section 15 of the FHSA provides for the immediate and automatic requirement of repurchase of banned products by the industries that produced, distributed, and sold them. Although analogous provisions are contained in the CPSA, they are weaker and more time-consuming.

Further, there are sections of the CPSA that I would like to see modified before I could support complete reliance by the Commission upon it.³

In my opinion, the solution to the problem of choosing between the acts we administer lies not in a constant tug-of-war over which act the "public interest" dictates we choose, but in combining the best features of each act into one omnibus bill that applies uniformly to all consumer products.⁴

Absent such an approach, however, I prefer the present objective standard for determining jurisdiction set forth in Section 30(d) of the CPSA. As for the acknowledged deficiencies of the transferred acts, I have included

³Among the changes I feel necessary are revisions to Section 7 to give us the flexibility to develop certain standards and amendments to standards by using a modified offeror process where the added cost and delay in time in using the full offeror process would be unduly burdensome; to Section 7(c) to eliminate the requirements that standards must be "issued" or "adopted" before the Commission can consider proposing and adopting them; to Section 15 to eliminate the right of election of remedies by industries found to be selling, distributing, or retailing substantially hazardous products, and, instead, a requirement added for automatic recall, repair, notification, or replacement for products violating consumer product safety rules; and to section 21 to eliminate the requirement for specific notice of noncompliance in order to bring a criminal action.

⁴A blanket extension of the CPSA to encompass all aspects of risks covered by the transferred acts could not, in my opinion, be done simply by abolishing these acts. For example the Poison Prevention Packaging Act provides, by rule, a certain protocol for determining whether or not packages are child-resistant. It would be folly to ask for offerors to develop new protocols for each product found to require safety packaging. Similar problems would arise with the other acts.

with this statement an appendix containing amendments to these acts⁵ that I believe will improve our ability to protect the consumer. Included are the application of Federal preemption as written in the CPSA to apply to the FHSA; the abolition of overly lengthy adjudicatory hearings under Section 701(e) of the Food, Drug, and Cosmetic Act for objections to regulations under the FHSA and the substitution of a provision similar to section 9(a)(2) of the CPSA and the inclusion of civil penalties concurrent with the imposition of cease-and-desist orders under the FFA.

R. David Pittle

R. David Pittle, Ph.D.
Commissioners

⁵ I have also included a proposed amendment to the CPSA which would permit the Commission to address the problem of cigarettes as an ignition source. I believe substantial costs to both the industry and consumers can be saved by action directed against this source of fire in the home. The only alternative before the Commission at present is to require that materials in the home, that pose a serious risk of fire when ignited by smoldering cigarettes, be made flame-resistant.

ADDITION OF A PREEMPTION
CLAUSE SIMILAR TO SECTION 26
OF THE CPSA TO THE FEDERAL
HAZARDOUS SUBSTANCES ACT.

Section 18(b) of the FHSA is amended to read
as follows:

(b) Whenever labeling or banning regulations under this Act are in effect and apply to a risk of injury associated with a substance or article capable of being regulated in accordance with the provisions of this Act, no State or political subdivision of a State shall have any authority either to establish or continue in effect any provision of law addressed to the same risk of injury associated with such substance or article unless the provisions of law are identical to the Federal regulation.

(c) Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to a substance or article capable of being regulated under this Act for its own use if such requirement imposes more stringent requirements than those required by the Federal regulations.

(d) Upon application of a State or political subdivision thereof, the Commission may by rule, after notice and opportunity for oral presentation of views, exempt from the provisions of subsection (b), under such

conditions as it may impose a safety regulation described in such application, where the proposed regulation (1) imposes more stringent requirements than the Federal regulation, (2) is required by compelling local conditions and (3) does not unduly burden interstate commerce.

APPENDIX I

ABOLITION OF MANDATORY ADJUDICATIVE
HEARINGS FOR REGULATIONS DECLARING HAZARDOUS
SUBSTANCES AND ESTABLISHING VARIATIONS AND
EXEMPTIONS PURSUANT TO SECTION 3(a)

Section 3(a)(2) of the FHSA is amended to read as follows:

(2) Proceedings for the issuance, amendment, or repeal of regulations under this subsection shall be made by regulation in accordance with the procedures prescribed by section 553 (other than clause (B) of the last sentence of subsection (b) of such section) of Title 5 of the United States Code, except that the Commission shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions. A transcript shall be kept of any oral presentation. The Commission may elect, in lieu of the above procedures, those prescribed by subsection (e) of section 701 of the Federal Food, Drug, and Cosmetic Act, in which event such subsection and subsections (f) and (g) of such section 701 shall apply to the making of such determination. If the Commission makes such an election, it shall publish that fact with the proposal required to be published under paragraph (1) of such subsection (e).

ABOLITION OF MANDATORY ADJUDICATIVE
HEARINGS FOR BANNED HAZARDOUS SUBSTANCES
UNDER 2 (q) (B) OF FHSA

Section 2 (q) (2) of the FHSA is amended, in part, by deleting all words up to the word "provided" and substituting the following language:

(2) Proceedings for the issuance, amendment, or repeal of regulations pursuant to clause (B) of subparagraph (1) of this paragraph shall be made by regulation in accordance with the procedures prescribed by section 553 (other than clause (B) of the last sentence of subsection (b) of such section) of Title 5 of the United States Code, except that the Commission shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions. A transcript shall be kept of any oral presentation. — The Commission may elect, in lieu of the above procedures, those prescribed by subsection (e) of section 701 of the Federal Food, Drug, and Cosmetic Act, in which event such subsection and subsections (f) and (g) of such section 701 shall apply to the making of such determination. If the Commission makes such an election, it shall publish that fact with the proposal required to be published under paragraph (1) of such subsection (e).

ADDITION OF CIVIL PENALTIES
FOR VIOLATIONS OF THE
FLAMMABLE FABRICS ACT

Section 7 of FFA is amended to read as follows:

Sec. 7. (a) Any person who knowingly violates Section 3 or 8(b) of this Act shall be subject to a civil penalty not to exceed \$2,000 for each such violation, except that the maximum civil penalty shall not exceed \$500,000 for any related series of violations.

(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) 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.

ADDITION OF COMMISSION
JURISDICTION OVER TOBACCO
AND TOBACCO PRODUCTS
AS AN IGNITION SOURCE

Section 3(a)(1)(B) of the CPSA is amended to
read as follows:

(B) tobacco and tobacco products except to the
extent that they constitute a source of ignition for
clothing, furniture or other flammable consumer products,