

CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

CPSC EXECUTIVE SESSION

June 27, 1974
1750 K St., NW.
9:30 am

Presiding: Commissioner Kushner (Vice Chairman)

Present : Commissioner Newman
Commissioner Pittle

ITEM

Draft Bicycle Regulations

--Memo June 24, 1974, to Commissioners from R.A. Danca,
"Bicycle Regulations Revisions"

DECISION

The Commission approved the regulations under the Federal Hazardous Substances Act banning those bicycles not meeting certain specifications, and the proposal to require affirmative labeling for publication as soon as possible in the Federal Register.

A COMMISSION VOTE

Approve regulations and proposed affirmative labeling requirement:

Chairman Simpson

Commissioner Franklin

Commissioner Kushner

Commissioner Newman

Commissioner Pittle

OTHER OPTIONS CONSIDERED

- 1) Do not approve the Notice
- 2) Abstain

★ REF: Majority Opinion filed 7/8/1975 - copy Attached

Submitted by:
Commissioner Kushner
July 8, 1974

CONSUMER PRODUCT SAFETY
COMMISSION OF THE UNITED STATES
OF AMERICA

MAJORITY OPINION REGARDING THE
REGULATION OF BICYCLES AND TOYS UNDER THE
FEDERAL HAZARDOUS SUBSTANCES ACT

I. INTRODUCTION

Prior to the passage of the Child Protection and Toy Safety Act of 1969 (P.L. 91-113), which amended the Federal Hazardous Substances Act (FHSA)^{1/} there was no authority for taking federal regulatory action against children's articles, such as toys or bicycles, that presented mechanical, electrical, or thermal hazards. As stated in the House Report:

"This bill amends the Federal Hazardous Substances Act to protect children from toys and other children's articles which are hazardous due to the presence of electrical, mechanical, or thermal hazards. The existing law defines a hazardous substance as one which is toxic, corrosive, an irritant, a strong sensitizer, flammable radioactive, or which generates pressure through heat or other means. The bill enlarges this definition to include electrical, mechanical, and thermal hazards as to children's toys and articles.... Some of the toys are dangerous because they contain sharp projections which might puncture the eye or the throat, extremely hard or sharp surfaces which could cause cuts, puncture wounds, and abrasions...." H.R. Report No. 389, 91st Cong., 1st Sess., 3, 4 (1969).

The finding of need for legislation to protect the public from unreasonable risks of mechanical, electrical, and thermal hazards presented by children's articles was based on an interim report of the National Commission on Product Safety. This government study commission established in 1968 by Act of

^{1/} 15 U.S.C. § 1261 et. seq.

Congress (P.L. 90-146) documented numerous instances of injury to children from these hazards. Because the need to protect children was felt to be so great, the Congress addressed this problem immediately by amending the FHSA several years before passage of the Consumer Product Safety Act (CPSA)^{2/}. The amendment added to the definition of hazardous substance any toy or other article intended for use by children "which is determined by regulation to present an electrical, mechanical, or thermal hazard." The FHSA was further amended by the addition of a provision for the mandatory repurchase by the producers, distributors and retailers of articles which are banned hazardous substances.

On July 16, 1974 the Consumer Product Safety Commission promulgated regulations under the FHSA dealing with mechanical hazards associated with bicycles intended for use by children. (39 FR 26100). On January 7, 1975 the Commission published proposed regulations under the FHSA dealing with the hazards associated with toys containing sharp edges and sharp points. (40 FR 1488, 1491). This opinion is intended to supplement and explain these actions.

The proposed toy regulations are intended to describe and define features of toys that present unreasonable risks of injury from points or other protrusions, and edges, as

^{2/} 15 U.S.C. § 2051 et. seq.

these terms are used in section 2(s) of the FHSA^{3/}. Toys found to present such mechanical risks of injury are considered "hazardous substances" under section 2(f)(1)(D)^{4/} of the Act, and therefore banned automatically under section 2(q)(1)(A)^{5/}.

The bicycle regulations establish similar requirements for bicycles. Bicycles not meeting the requirements will be considered hazardous substances under section 2(f)(1)(D) and, therefore, banned under section 2(q)(1)(A) of the Act because they present unreasonable risks of injury.

In the present situation, both the Consumer Product Safety Act and the Federal Hazardous Substances Act arguably cover mechanical hazards presented by bicycles, toys, and other articles intended for use by children. In deciding to issue the toy and bicycle regulations under the FHSA, as opposed to the CPSA, the Commission, having considered the risks of injury involved, and the enforcement provisions of the FHSA and CPSA, has concluded that since the risks of injury with which we are dealing can be reduced to a sufficient extent by utilizing the FHSA, we are directed by section 30(d)^{6/} of the CPSA. This states in part:

...a risk of injury which is associated with consumer products and which could be eliminated or reduced to a sufficient

^{3/} 15 U.S.C. § 1261(2)(s).

^{4/} 15 U.S.C. § 1261(F)(1)(D).

^{5/} 15 U.S.C. § 1261(q)(1)(A).

^{6/} 15 U.S.C. § 2079(d).

extent by action taken under the Federal Hazardous Substances Act...may be regulated by the Commission only in accordance with the provisions of [this Act].
(Emphasis added).

The Commission's decision to promulgate both its toy regulations and its bicycle regulations under the FHSA, rather than the CPSA, is based upon careful examination of a number of issues. Stated in the form of questions, they are as follows:

- 1) May the Commission ban toys and bicycles on the basis of broad, general characteristics as well as on an individual basis?
 - 2) May the Commission issue prospective bans under the FHSA for toys and bicycles?
 - 3) Does the fact that the toy and bicycle regulations are issued prospectively leave the public unprotected against dangerous toys and bicycles introduced into commerce prior to the effective date of the ban?
 - 4) May the Commission regulate bicycles under the FHSA as articles intended for use by children even though a number of adults ride bicycles?
- 1) May the Commission ban toys and bicycles on the basis of broad, general characteristics as well as on an individual basis?

The instant regulations are not limited to specifically named toys or bicycles. Rather, they address hazards associated across-the-board with these products in a comprehensive manner. We believe that such an approach is both fairer and

more efficient than piecemeal bans of individual products. Under our approach, companies know in advance of production those features which the Commission believes to be potentially hazardous to consumers and the criteria which we apply to those features to determine whether or not they are reasonably free of hazards. With this information, they should be able to incorporate safe features in their designs at an early stage.

We believe that general comprehensive bans are consistent with the Congressional thinking behind the Child Protection and Toy Safety Amendments to the FHSA. Although the procedures contained in the final version of these amendments differ somewhat from the reported versions, language in both the House and Senate reports indicates Congress' preference, where possible, for general prescriptive rules.

The Senate Report states:

"In those situations where the risk is not of the greatest magnitude, the Secretary^{1/} may postpone the effective date of the rule in order to allow manufacturer(s) sufficient lead time to comply with it. It is intended that most determinations made by the Secretary^{1/} will be in the form of general prescriptive rules, further amplifying the definitions of electrical, mechanical, and thermal hazards set forth in the bill or the other categories of hazardous substances where necessary. These general rules will alert manufacturers of toys and other articles to the safety standards they are required to meet in order to avoid the prescriptions in the bill. Of course, in some situations the determinations by the Secretary^{1/} will have to proceed in a

^{1/} Now the Consumer Product Safety Commission.

more specific fashion because of the nature of the hazard. For example, it is very difficult to prescribe a safety standard for protrusion, particularly when the concept of 'unreasonable risk' must guide the Secretary^{7/} in any determination he makes. In such cases, determinations in accordance with section 553 will proceed on a case-by-case basis, in fact, although the rules prescribed will be written in general terms and serve as future guideposts...." S. Rep. No. 237, 91st Cong., 1st Sess., (1969). (Emphasis added).

Thus, the Senate anticipated that even where it would be too difficult to issue a general prescriptive regulation, the individual regulation would be as inclusive as possible. It clearly is not necessarily limited to a product-by-product determination.

In citing the Senate Report, the Commission is aware that the Conference Committee which met to iron out differences between House and Senate versions of the law did not adopt all of the features of the Senate bill. Careful scrutiny of the Conference Committee Report reveals that the Senate receded on the specific language to be utilized in the Act and on some procedures to be used in determining whether certain articles intended for use by children might be considered banned hazardous substances. However, nothing in the Conference Report indicates a substitution for or retreat from the Senate's

^{7/} Now the Consumer Product Safety Commission.

preference for general prescriptive rules^{8/}.

Moreover, the House Report also envisions such types of regulations:

"Under the subsection as introduced, a determination by the Secretary^{9/} (to be made in accordance with the notice and opportunity for submission of views requirement of section 553 of title 5 of the United States Code) would be required before a children's article could be covered by the Act as a hazardous substance as defined in the addition to existing law. Under the subsection as reported (and under existing law) no such prior regulatory determination by the Secretary is required before a children's article could be covered as a hazardous substance because of the presence of an electrical, mechanical, or thermal hazard which would result from application of the statutory definitions of electrical, mechanical, and thermal hazards and any clarification of those definitions by regulations prescribed under section 10 of the Act." H. R. Rep. No. 389, 91st Cong., 1st Sess., 9, 10 (1969). (Emphasis added.)

The issue of general prescriptive regulations was recently addressed in the case of Tuchinsky v. CPSC, Civil Action

^{8/} In key sections, the Conference Committee adopted more of the substance of the Senate version than of the House version. The House version would have required the Secretary of HEW to make a finding that an article intended for use by children that presents an electrical, thermal, or mechanical hazard is a "banned hazardous substance" in accordance with the generally time-consuming procedures of section 701 of the Food, Drug, and Cosmetic Act. The Senate version required instead the less time-consuming rulemaking procedures of section 553 of the Administrative Procedure Act (5 U.S.C. § 553). The Conference Committee adopted the Senate version. See H.R. Rep. No. 581, 91st Cong., 1st Sess., 5-6 (1969).

^{9/} Now the Consumer Product Safety Commission.

No. 219-73. (D.D.C., dismissed by stipulation on April 9, 1975 (unreported), in which a consumer group sought an order compelling the Commission to commence rulemaking to establish standards and criteria for determining which children's toys posed an unreasonable risk of injury. The Court specifically addressed the question of the authority of the Commission to issue regulations under the FHSA and concluded:

"Upon consideration of the statute's legislative history and upon consideration of the Act's purpose to protect children from hazardous toys, the court concludes that the agency is under an obligation to promulgate general prescriptive regulations." (Slip opinion p. 3)^{10/}. (Emphasis added.)

In addition to Tuchinsky, there has been a long history of judicial willingness to construe agency statutes to permit general rulemaking. See Mourning v. Family Publications Service, Inc., 411 U.S. 356 (1973); American Truckers Assn. v. United States, 344 U.S. 298 (1953); National Petroleum Refiners Association v. F.T.C., 482 F. 2d 672 (D.C. Cir. 1973), cert. denied, 94 S. Ct. 1475 (1974); and Morgan Stanley & Co. v. SEC, 126 F. 2d 325 (2nd Cir. 1942).

^{10/} Although not authorized to do so by the Commission, Counsel from the U.S. Attorney's office argued, on behalf of the Commission, that the legislative history of the FHSA did not anticipate general prescriptive regulations for mechanical hazards. (Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss, or in the alternative for Summary Judgment and in opposition to Plaintiff's Motion for Summary Judgment, p. 10). The court did not accept this argument and ordered the Commission to continue its rulemaking efforts on an expeditious basis.

The court in National Petroleum, supra, explained the judicial preference for general rulemaking.

"[T]here is little question that the availability of substantive rule-making gives any agency an invaluable resource-saving flexibility in carrying out its task of regulating parties subject to its statutory mandate. More than merely expediting the agency's job, use of substantive rule-making is increasingly felt to yield significant benefits to those the agency regulates. Increasingly, courts are recognizing that use of rule-making to make innovations in agency policy may actually be fairer to regulated parties than total reliance on case-by-case adjudication." (482 F. 2d 672 at 681).

In concluding that the Commission can and should use the banning power of the FHSA on a broad prescriptive basis, we are not unmindful of the fact that these bans serve functions equivalent to safety standards under the Consumer Product Safety Act or the Flammable Fabrics Act (FFA)^{11/}. That is, both FHSA bans and CPSA or FFA standards condition the right to sell and distribute a product upon its compliance with specific technical requirements which may be extremely detailed and complex. As with CPSA or FFA standards, broad prescriptive FHSA bans do not result in the complete prohibition of a product from the marketplace. Only noncomplying products are prohibited. Noncompliance may result from fairly minor deviations from the requirements of a regulation based on "fine line drawing." For example, a bicycle with a

^{11/} 15 U.S.C. § 1191 et. seq.

handbrake dimension of 90 mm rather than 89 mm is a noncomplying article on the basis of the 1 mm difference; just as textiles with a burn time of less than 4 seconds are noncomplying while those with a burn time greater than 4 seconds do comply.

These similarities between broad prescriptive FHSA bans and CPSA or FFA standards do not indicate that FHSA bans are illegal or improper. Nothing in the FHSA requires a ban to completely remove a product from the marketplace, nor is there any language limiting the imposition of safety requirements upon a product merely because they are detailed, technical requirements drawn on a "fine line" basis. In fact, a brief review of the products previously banned under the FHSA reveals that similar types of bans have been imposed since the banning amendments were first added to the Act.

For example, liquid drain cleaners containing 10 percent or more by weight of sodium and/or potassium hydroxide are banned hazardous substances^{12/} whereas those containing 9.9 percent are not. (16 C.F.R. § 1500.17(a)(4)). Similarly, certain products containing soluble cyanide salts in concentrations of cyanide greater than 25 parts per million are banned hazardous substances whereas those containing 24 parts per million are not (16 C.F.R. § 1500.17(a)(5)).

^{12/} Unless they are packaged in accordance with a standard for special packaging pursuant to the provisions of the Poison Prevention Packaging Act of 1970.

In short, the type of ban utilized in the toy and bicycle regulations is the type envisioned by Congress and regularly used since passage of the 1966 Amendment. The contemporaneous construction of a statute by the agency (FDA) charged with the responsibility of implementing it is considered critical by the courts in deciding upon the intent of the legislature. See Udall v. Tallman, 380 U.S. 1, 16 (1965).

Accordingly, the Commission concludes that it is acting within its statutory authority by issuing banning regulations on a broad prescriptive basis under sections 2(f)(1)(D), 2(q)(1)(A), and 3(e) of the FHSA rather than by issuing individual banning regulations under these sections.

2. May the Commission issue prospective bans for toys and bicycles under the FHSA?

The toy and bicycle regulations which are the subject of this opinion are to be issued prospectively. The proposed toy regulations contemplate an effective date of 180 days following publication of the final regulations in the Federal Register and ban only those noncomplying articles introduced into interstate commerce on or after the effective date. Likewise, the bicycle regulations will apply only to bicycles introduced into commerce on or after a future effective date.

The obvious result of prospective banning is that articles not conforming to the regulations which are distributed in commerce before the effective date are not considered violative. Of course, this does not mean that the Commission

is powerless to act against hazardous products introduced prior to the effective date of regulations covering those products. It means only that these hazardous products must be addressed by separate authority.

The Commission's conclusion that it may issue prospective bans under the FHSA is, we believe, consistent with the language of the FHSA and its legislative history. There is simply no evidence that Congress meant to require that all bans be retroactive^{13/}. Such an inflexible requirement would be illogical and unfair even in the case of less general product bans. A company that produced a highly defective lot of an otherwise safe product should not have its entire product line banned where a more limited ban would suffice. Further, we note that prospective bans are not new to the FHSA. The ban on lead content in household paints by FDA required 0.5 percent or less lead content only after December 31, 1972. (16 C.F.R. § 1500.17(a)(6)(i)(B)).

We do not suggest that all bans should be prospective. We do believe that they are legitimate exercises of FHSA powers. In our view, it is as appropriate to promulgate prospective bans for products under the FHSA as it would be to promulgate prospective standards under the CPSA which requires, except for good cause, that all standards be prospective^{14/}.

^{13/} Indeed, the Senate specifically stated that in "situations where the risk is not of the greatest magnitude, the Secretary may postpone the effective date of the rule in order to allow manufacturer(s) sufficient lead time to comply with it." S. Rep. No. 237, 91st Cong., 1st Sess., 6 (1969). (Emphasis added.)

^{14/} 15 U.S.C. § 2058(d).

The Commission's view that it may issue prospective bans is unaltered by section 15 of the FHSA which states that banned products must be repurchased by the retailers, distributors and producers of the product, whether or not the product was banned at the time of sale. We have reviewed this section and can find no language in it that in any manner prohibits prospective bans. Under section 15, banned products must be repurchased even though produced prior to the issuance of a ban. In the case of a prospective ban there are, by definition, no banned products prior to the effective date of the ban and it is, therefore, simply inapplicable. This section would thus apply only to products produced after a prospective ban's effective date.

A final issue regarding prospectivity revolves around section 3(e)(2) of the FHSA which gives the Commission the authority to declare toys or other articles intended for use by children to be an imminent hazard by publishing an order in the Federal Register. The authority to ban articles as imminent hazards was granted by Congress to insure that toys which present a serious hazard to children would be immediately removed from the marketplace. This provision might, at first glance, seem to be inconsistent with the concept of authority to promulgate general prospective regulations with lead time, since prospective bans do not remove products already on the market. But no inconsistency actually exists, since bans for imminent hazards address

different problems than do prospective bans. An example perhaps best illustrates this point. If the Commission were to find that one type of toy widget presented a grave risk of mechanical injury to children, it could ban it both prospectively and retroactively as an imminent hazard. Upon investigation into widgets in general, the Commission might find that, although no other widget actually presented the same hazard, most widgets were produced in a manner that might lead to a similar sort of injury. In this case, the Commission could promulgate a general prescriptive ban for widgets addressed to this mechanical risk of injury and provide the widget manufacturers with a 120-day effective date after finalization of the ban.

In short, the imminent hazard provision does have its place in the FHSA regulatory scheme. Simply because its use is inappropriate in one instance should not preclude its use in others.

3. Does the fact that the toy and bicycle regulations are prospective leave the public unprotected against dangerous toys and bicycles introduced into commerce prior to the effective date of the ban?

A prospective FHSA ban does not cover products introduced into commerce prior to its effective date. In this respect, FHSA bans are similar to safety standards under the CPSA. To cover products for which no standard has yet been developed, the CPSA has one section that the FHSA does not.

Under section 15(b) of the CPSA, the manufacturer, distributor, and retailer of a consumer product that contains a defect which could create a substantial product hazard must immediately report this fact to the Commission. If after affording the opportunity for a hearing, the Commission determines that (i) public notice or (ii) repair, replacement, or refund is required to remedy the situation, it may issue an order to this effect.

Although the FHSA does not have a provision similar to section 15 of the CPSA, this difference does not mean that the public is unprotected against dangerous toys and bicycles introduced into commerce prior to the effective date of the ban. First, for any such article found to be gravely dangerous, the Commission under the FHSA may issue an imminent hazard ban or individual ban on a retroactive basis. The full effect of the FHSA repurchase regulations would apply to these. Second, the Commission believes that it has the authority to apply the CPSA section 15(c) notification and section 15(d) repair, replacement, or refund provisions to consumer products regulated under the FHSA on a case-by-case basis where necessary and appropriate^{15/}.

Accordingly, since every protection available under the CPSA as well as the protection of the imminent hazard

^{15/} 39 Fed. Reg. 6061 et. seq.

provisions of the FHSA is available to the Commission, it is clear that the public is amply protected from hazards arising both before and after the effective date of a prospective FHSA ban.

4. May the Commission regulate bicycles under the FHSA as articles intended for use by children even though a number of adults ride them?

All of the discussion in this opinion is applicable to bicycles as well as to the proposed regulations governing sharp points and sharp edges for toys. One additional issue arises with respect to the bicycle regulation which is unique to that regulation. The Commission is regulating a product which can be used by adults as well as children under a statutory provision designed to regulate articles intended for use by children. Can the Commission legally regulate this product under the FHSA where adults use the product to some extent? This is an issue to which the Commission has devoted considerable thought. We believe that we can. If the Commission concluded that because some bicycle users are adults we should not be regulating bicycles as articles intended for use by children, we would establish an unduly limited interpretation of the scope of our authority. If this argument were applied by analogy to the definitions of "consumer product" in section 3(a)(1) of the CPSA^{16/} it would cripple our regulatory efforts, for if 50 percent of the fire extinguishers

^{16/} 15 U.S.C. § 2052(a)(1).

typewriters, swimming pools, fountain pens, were for commercial, nonconsumer use, they would not be considered "customarily produced or distributed for sale to, or use of, consumption by, or enjoyment of a consumer," and thus not consumer products under our jurisdiction. We cannot believe that such a result was intended by Congress. The Commission has taken and will continue to take a broad interpretation of its authority.

We believe our position concerning the scope of the bicycle regulations was well stated in the preamble to the proposed bicycle regulation issued July 16, 1974. We stated:

The Commission is aware that a large percentage of bicycles produced, particularly in recent years, are lightweight, relatively expensive, and sophisticated bicycles which are bought by adults for commuting, touring, and other recreational purposes. However, these same bicycles can be, and are used by children and adolescents. It is clear there is no precise way of distinguishing between those bicycles intended exclusively for adults and those intended for children as well as adults. Neither the manufacturer nor the retailer can accurately predict who the subsequent user will be, nor can the seller predict whether the adult purchaser will be the exclusive user or whether the purchaser will give the bike to a child or share it with a child. Indeed, the bicycle may be purchased exclusively for adult use and when a child in the family becomes physically able to ride it, the use may change. Moreover, an adult purchaser may subsequently sell the bicycle to a parent for a child's use. 39 FR 26105.

The Commission reaffirms the above-quoted position.

IV. CONCLUSION

The Commission believes that the action it has taken with respect to toys and bicycles are both legally sustainable and appropriate to deal with the risks of injury associated with these products.

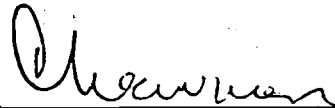
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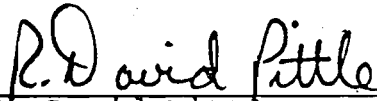
Lawrence M. Kushner



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R. David Pittle

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