U.S. CONSUMER PRODUCT SAFETY COMMISSION

WASHINGTON, D.C. 20207

CPSC Commission Meeting
March 23, 1978

1111 18th Street, NW
Washington, DC

Presiding: Chairman Byington

Present : Commissioner Franklin
Commissioner Pittle

Present but not voting: Commissioner King
Commissioner Sloan

ITEM

Draft Federal Register Notice on additional written and oral comments on a limited number of issues concerning the proposed Section 15, CPSA regulations

(Briefing material transmitted by the Office of the Secretary on February 22, March 3; and March 22, 1978.)

DECISION

The Commission voted to issue a Federal Register Notice announcing opportunity for oral presentations and additional comments on five specified issues relating to the proposed Section 15 regulations. Guidance was provided to the Office of the General Counsel for the preparation of a Final Federal Register Notice. A copy of the published Notice is attached.

VOTE

Concurring: Chairman Byington
Commissioner Franklin
Commissioner Pittle

Submitted by the Office of the Secretary

[6355-01]

CONSUMER PRODUCT SAFETY COMMISSION

[16 CFR Parts 1115, 1116]

SUBSTANTIAL PRODUCT HAZARDS

Proposed Requirements, Policies, and Procedures

AGENCY: Consumer Product Safety Commission.

ACTION: Opportunity for oral presentation and additional comments on proposed regulation.

SUMMARY: On September 15, 1977, the Commission proposed for public comment a rule setting forth its interpretation of the requirements of section 15(b) of the Consumer Product Safety Act that manufacturers, importers, distributors, and retailers of consumer products immediately report to the Commission products that fail to comply with an applicable consumer product safety rule or contain a defect which could create a substantial product hazard. The proposed rule would clarify when a firm has obtained information which reasonable supports the conclusion that one of its products contains a reportable nonconformity with an applicable consumer product safety rule or a defect which could create a substantial product hazard. In addition, the proposed rule defines the information that must be supplied to the Commission as part of a report under section 15 and sets forth procedures and policies governing processing of reports and remedial action. The purpose of this notice is to announce that due to the number of comments received on this proposal and the importance and complexity of the issues raised, the Commission had decided to hold a limited public hearing to receive oral presentations and has decided to receive written comments specifically directed to the issues identified in this notice. Comments should not duplicate comments previously submitted.

DATES: (1) Those unable to appear at the public hearing may submit written comments on the specific issues identi-

fied in this notice by April 26, 1978. (2) There will be an opportunity for interested persons to orally present data, views, or arguments regarding these specific issues on April 26, 1978, at 9:30 a.m. in the Commission meeting room. Oral presentations should not exceed ten (10) minutes. Those wishing to make oral presentations should notify the Office of the Secretary, 202-634-7700, by April 17, 1978. A copy of the statement is to be submitted to the Office of the Secretary by April 20, 1978.

ADDRESS: Written comments should be submitted to the Office of the Secretary, Consumer Product Safety Commission, Washington, D.C. 20207. All material which the Commission has that is relevant to this proposed regulation, including comments that have been or may be received regarding the proposed regulation, may be seen in and copies obtained from, the Office of the Secretary, Consumer Product Safety Commission, Third Floor, 1111 18th Street NW., Washington, D.C. Oral presentation will be conducted in the Commission meeting room, Third Floor, 1111 18th Street NW., Washington, D.C.

FOR FURTHER INFORMATION CONTACT:

Eric Stone, Product Defect Correction Division, Consumer Product Safety Commission, Washington, D.C. 20207, 202-492-6608.

Persons wishing to make oral presentations should contact: Richard Danca, Office of the Secretary, 202-634-7700.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On September 16, 1977, the Consumer Product Safety Commission (Commission) published in the FEDERAL REGISTER proposed regulations entitled "Substantial Product Hazards. Proposed Reporting Requirements for Manufacturers, Importers, Distributors, and Retailers of Products" under section 15(b) of the Consumer Product Safety Act (CPSA) (15 U.S.C. 2064(b)), and invited comments from the public (42 FR 46720). Section 15(b) of the Consmer Product Safety Act requires that every manufacturer, distributor, or retailer of a consumer product who obtains information which reasonably supports the conclusion that such product either fails to comply with an applicable consumer product safety rule, or contains a defect which could create a substantial product hazard, shall immediately inform the Commission, unless such manufacturer, distributor, or retailer has actual knowledge that the Commission has been adequately informed of such defect or failure to comply. Section 15(a) defines a substantial product hazard as a failure to comply with an applicable consumer product safety rule or a product defect which because of the pattern of defect, the severity of the risk, the number of defective products, or other reasons, presents a substantial risk of injury to the consumer. Sections 15 (c) and (d) set forth various actions that the Commission can take to eliminate a hazard, including ordering the firms in question to notify the public, and/or to repair, replace, or refund the purchase price of the product. In addition, the Commission may seek to enjoin further sale or distribution of the product.

The proposed rule combines into one regulation many of the existing Commission policies and procedures under section 15(b), set forth in 16 CFR 1115 and 1116. In addition, it clarifies the reporting requirements of section 15(b) by defining the term "defect," indicating the kinds of information that are reportable, and explaining when an obligation to report arises.

The Commission received 133 comments from consumer groups, manufacturers, importers, distributors, retailers, trade associations, private labelers, and others concerning various aspects of the proposed rule. Because a number of these comments indicate concern or confusion about basic provisions of the proposed rule, the Commission has determined that it is in the public interest to allow interested parties to make oral presentations on the specific issues framed by the Commission in a public hearing. Parties unable to make an oral presentation may submit written comments on these issues. The Commission asks that where possible, commenters should provide alternative language, economic data, and specific examples to support their arguments. The Commission believes that the additional comments on these issues will help it to formulate a fair and effective final rule. The Commission is considering issuing this rule as a substantive rather than an interpretative rule. The Commission asks that commenters evaluate the impact of each of the provisions for which comments are solicited with this possibility in mind. As a result, commenters may wish to address the impact that one of these provisions might have both if it is legislative or interpretative in nature.

ISSUES RAISED

From the comments already received, the Commission has identified the issues discussed below as those aspects of the proposal producing the greatest misunderstanding or controversy. The Commission is therefore seeking additional comments limited specifically to one or more of these issues. At the oral presentation, comments not addressing one or more of these issues may be ruled out of order.

The fact that the Commission is not seeking comment on all issues contained in the proposed regulations does not mean that the Commission has foreclosed all thought on issues for which comments are not being sought. Rather, it means that the Commission believes that adequate comments have already been received on the excluded issues.

1. The definition of defect as any aspect of a product which creates an unnecessary risk of injury (proposed section 1115.3(b)(3)).

The failure to include a definition of "defect" in the CPSA has created uncertainty for the Commission and those subject to the Act in determining when a report under section 15(b) is required. The Commission has viewed the legal concept of "defect" as having a meaning broader than the dictionary or common usage definition. In specific cases, the Commission or its staff has applied section 15(b) to consumer products manufactured exactly in accordance with specifications but posing a substantial risk of injury inherent in the design of the product. In another case, the staff believes that the failure to provide adequate installation instructions for an otherwise safely-designed and constructed consumer product creates a reportable "defect". The proposed definition of "defect" contained in § 1115.3(b)(3) represents an effort to incorporate the Commission's broad interpretation of the word and provide guidance to parties subject to section 15(b). Numerous comments on the proposed definition were submitted, including statements that it is too broad, imprecise, and subjective. Alternative approaches would be to have no definition at all or to describe the factors that the Commission includes in its concept of defect, including design, constuction, packaging, etc. The Commission seeks comments on these alternatives and invites additional proposals.

2. A firm is deemed to have received information 5 days after an employee has received the information (proposed § 1115.10(d)).

Proposed § 1115.10(d) provides that a firm subject to section 15(b) is deemed to have received information within a reasonable time, but not more than 5 working days, within which the information has been recieved by an official or employee of the firm in the normal course of business. The proposal reflects Commission experience with firms that failed to provide adequate internal procedures for transmitting product safety information to the officer or employee responsible for reporting to the Commission. Commenters have objected to the Commission's selection of 5 working days as a maximum reasonable time. The Commission wishes to know from firms that have established internal proce-

dures for transmitting product safety information and have delegated the reporting function, whether 5 days is a reasonable period of time. Please provide the reasons for the answer. Suggestions and discussion are invited on alternatives for meeting the Commission's concern.

3. The presumption that a product-related death or grievous bodily injury should be reported unless a firm has clear evidence that the death or injury is not the result of a product defect or nonconformity with a consumer product safety rule (proposed § 1115.11(a)).

The Commission views the reporting requirement of section 15(b) as one of the most important statutory mechanisms for safeguarding the public from injury from hazardous consumer products. Proposed § 1115.11(a) establishes a presumption that firms have obtained information which reasonable supports the conclusion that a product fails to conform with an applicable consumer product safety ruie or contains a defect which could create a substantial product hazard when it receives information that the product was involved in a death or grievous bodily injury, unless it has clear evidence that the injury was not caused by a nonconformity or defect. The Commission staff anticipates that if this section is adopted as a final regulation, firms learning of a death or grievous bodily injury will either utilize the period provided for investigation and evaluation (§ 1115.11(c)(1)) or will immediately notify the Commission (§ 1115.11(c)(2)). Many commentors oppose this presumption and predict that proposed section 1115.11(a) will require firms to report a large volume of useless information on conforming or non-defective products because there is not an adequate opportunity for subject firms to assess the safety of the product or the accuracy of the accident report. They question whether the Commission will be able to assess the resulting defect reports. In addition, many express concern that the reporting of unverified information will increase the risk of private products liability suits against subject firms. In view of the controversy surrounding this proposal, the Commission invites new comments and alternative proposals to the provision that retain the basic idea that firms be encouraged to investigate serious accidents involving their products to determine if a substantial product hazard may be present.

4. The listing of types of information which the Commission believes should be studied and evaluated to determine if there is an obligation to report; the allowance of a period, not to exceed 10 working days, to conduct such study and evaluation (proposed § 1115.11(b)).

Proposed § 1115.11(b) lists several types of information that a manufacturer, importer, distributor, or retailer should study and evaluate absent a report of death or grievous bodily injury associated with a consumer product, to determine if there is an obligation to report under section 15(b). The purpose of the section is to be sure subject firms recognize that information which may trigger the reporting obligation may be obtained from sources other than a report of death or grievous bodily injury. For example, consumer complaints may lead a manufacturer to conduct an engineering or laboratory analysis of the product. The results may, in turn, lead to design or quality control changes that remove a hazard from future production but do not remove the hazard from past production. Study of the type of information listed in proposed § 1115.11(b) is to be accomplished within a reasonable period of time, not to exceed 10 working days in accordance with proposed § 1115.11(c). The Commission is seeking comments on the § 1115.11(c) generally, and specifically on whether the allowance of 10 working days is a reasonable period of time and or whether a firm should be held to the conclusions that would be drawn from the data had it been properly analyzed. Interested parties are invited to comment on the reasonableness of these proposals.

5. The confidentiality and disclosure of information submitted to the Commission in a report under section 15 (proposed § 1115.13).

Proposed § 1115.13 provides that a person who submits information in a report under section 15 must submit with the report a written request (or indicate that such a request will be submitted within 10 working days) that the information be considered exempt from disclosure under the Freedom of Information Act, as amended (15 U.S.C. 552(b)) or the CPSA. The proposed section also describes CPSA section 6(b), which generally requires 30 days notification to manufacturers and private labelers before information is made public. Comments on this proposed section included suggestions that the Commission treat as confidential all information contained in the initial report, all information submitted until the Commission finds that the product contains a substantial product hazard, or all information submitted until the reporting party has been notified of a request for disclosure and has had an opportunity to object. At least one commenter suggested that in the event the Commission did not find that the product contained a substantial product hazard, the information should be returned to the party that submitted it. The Commission is seeking comments specifically on these proposals and generally on the confidentiality of information submitted to it.

PROCEDURE FOR ORAL AND WRITTEN COMMENTS

There will be an opportunity for interested persons to orally present data, views, or arguments on the aspects of the proposed regulation described in this notice, on April 26, 1978, at 9:30 a.m. in the Commission's meeting room, third floor, 1111 18th Street NW., Washington, D.C. Those wishing to make oral presentations should notify the Office of the Secretary, 202-634-7700 by April 17, 1978. In addition, a copy of the testimony, preferably in five copies, is to be submitted to the Office of the Secretary by April 20, 1978. Oral presentations shall not exceed 10 minutes (unless extended by the Commission to compensate for time expended in responding to questions from the Commission) and shall be limited to the issues described above. Oral presentations shall not duplicate comments previously submitted in writing. The Commission may rule out of order comments that are outside the scope of the public hearing or are repetitious. The Commission and its staff may ask questions of persons making presentations.

Persons who cannot attend the public hearing may submit written comments on the issues described above by submitting them to the Office of the Secretary, Consumer Product Safety Commission, Washington, D.C. 20207, preferably in five (5) copies, by April 26, 1978. Comments received after that date will be considered to the extent practicable.

The official transcript of the public meeting to hear oral presentations of data, views, or arguments, any written comments that are received, and all other material which the Commission has that is relevant to this proceeding may be seen in, or copies obtained from the Office of the Secretary, 3rd floor, 1111 18th Street NW., Washington, D.C. 20207.

Dated: March 24, 1978.

SADYE DUNN,
Acting Secretary, Consumer Product Safety Commission.

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