



U.S. CONSUMER PRODUCT SAFETY COMMISSION

WASHINGTON, D.C. 20207

Record of Commission Action
Commission Meeting of January 18, 1979

1111 18th Street, N.W.
Washington, D.C.

Presiding: Chairman King

Present : Commissioner Franklin
Commissioner Pittle
Commissioner Sloan
Commissioner Zagoria

ITEM

Proposed regulation banning aluminized polyester film kites under the Federal Hazardous Substances Act

(Briefing material transmitted by the Office of the Secretary on January 5, 1979).

DECISION

Based upon the information presented in the above-referenced material, the Commission approved the attached Federal Register document proposing a regulation banning aluminized polyester film kites.

VOTE

Concurring: Chairman King

Susan B. King

Commissioner Pittle

R. David Pittle

Commissioner Sloan

Edith Bartedel Sloan

Commissioner Zagoria

Sara Zagoria

Dissenting: Commissioner Franklin *

Barbara H. Frankl

*Opinion attached

Submitted by the Office of the Secretary

could break and fall as a result of an electric arc caused by the kites.

DATES: Comments must be received on or before March 27, 1979. The proposed effective date of the ban is 30 days after publication of a final banning regulation for aluminized polyester film kites.

ADDRESS: Send comments to the Office of the Secretary, Consumer Product Safety Commission, Washington, D.C. 20207. Received comments may be seen in, and obtained from, the Office of the Secretary, 1111 18th Street, N.W., 3rd Floor, Washington, D.C. 20207 during business hours, Monday through Friday.

FOR FURTHER INFORMATION CONTACT:

Elaine H. Besson, Office of Program Management, Consumer Product Safety Commission, Washington, D.C. 20207, (301) 492-6453.

NOTE.—All of the documents and materials referenced in the preamble are available for inspection or copying in the Office of the Secretary, 1111 18th Street, N.W., 3rd floor, Washington, D.C. 20207.

SUPPLEMENTARY INFORMATION:

BACKGROUND

In October of 1975, upon the recommendation of its enforcement staff, the Consumer Product Safety Commission issued a notice of enforcement under section 15 of the Consumer Product Safety Act ("CPSA", 15 U.S.C. 2064) alleging that certain aluminized polyester film kites manufactured between November 1, 1973 and March 31, 1974 constituted a substantial product hazard within the meaning of section 15(a) of the Consumer Product Safety Act. (See, Notice of Enforcement, October 30, 1975, In the Matter of *Francis Alonso, Jr., an individual doing business as Mylar Star Kites*, CPSC Docket No. 75-16, hereinafter "*Mylar Star Kites*.") A formal hearing on the staff's allegations was held before the Commission's administrative law judge at which oral testimony and written evidence were received from Commission and outside experts concerning the potential hazards associated with such kites. The respondent also presented evidence and has an opportunity to cross-examine witnesses presented by the Commission. (See, Transcript of Hearing and exhibits attached thereto, *Mylar Star Kites*, February 24-25, 1976, hereinafter, "Transcript.")

The technical evidence presented at the hearing concerning the electrical conductivity of aluminized polyester film kites showed that such material is an excellent conductor of electricity. When the kites manufactured by the respondent were tested at the Commission's engineering laboratory, they

[6355-01-M]

CONSUMER PRODUCT SAFETY COMMISSION

[16 CFR Part 1500]

ALUMINIZED POLYESTER FILM KITES

Proposed Banning of Hazardous Aluminized Polyester-Film Kites

AGENCY: Consumer Product Safety Commission.

ACTION: Proposed regulation.

SUMMARY: The Commission proposes a regulation banning aluminized polyester film kites because such kites are capable of conducting electricity and are susceptible to contact with high voltage electric power lines. This regulation is intended to reduce the risk of serious injury or death by electric shock created when an aluminized polyester film kite contacts a power line and conducts a strong electric current through the aluminized surface of the kite or its tail to a person in contact with the kite or its tail; and the risk of injury to persons in the vicinity of electric power lines which

were found to be capable of transmitting approximately 52 to 66 milliamperes of current at ordinary household voltage of 115 to 120 volts through a resistance of 1500 ohms, representing the resistance of the human body. (Transcript at 81.) Significantly more current can be conducted through aluminized polyester film at higher than ordinary household voltage. (Transcript at 84.) The evidence also showed that if an aluminized polyester film kite and/or tail were entangled across a live 12,000 volt line and a line which would act as a ground, an arc or ionized path could be created through which a significantly greater amount of current can flow than would be expected from the thin layer of aluminum coating on the kite. Tests conducted at the Pacific Gas and Electric Company's San Ramon facility, revealed that as much as 100 amperes (100,000 milliamperes) can pass through such an arc. (Transcript at 95-100.)

When an electrically conductive metalized kite, tail or string comes in contact with a high voltage power line, bodily contact with the kite, tail, or string can result in serious injury, ranging from tissue burns to respiratory paralysis, ventricular fibrillation, and death. Ventricular fibrillation, a condition in which the heart pulsates irregularly and stops pumping blood, will cause death if not defibrillated within three minutes. (Transcript at 261.) A lethal shock can occur as a result of exposure to 100 milliamperes of electric current for one second. (Transcript at 252-253.)

Evidence presented in the *Mylar Star Kites* proceeding also indicated that aluminized polyester film kites are susceptible to becoming entangled in electric power lines in such a way as to conduct electricity from one power line to another. Incidents of such entanglement cited in the record of the *Mylar Star Kites* proceeding include the following:

In early April 1975 at Herman Street, San Francisco, California, an aluminized polyester film kite and tail caused two 12,000 volt conductors to break and fall on a car. The live conductors burned a hole in the right rear of the seat and burn marks were found on the tires and wheels. (Transcript at 38.)

On April 15, 1975, near Jackson and Broderick Streets, San Francisco, California, an aluminized polyester film kite and tail, apparently having severed its string, crossed three high voltage conductors causing them to break and fall resulting in a power surge into nearby residences blowing a fuse box off the wall, exploding an electric meter and light fixture, and burning out a refrigerator compressor. (Transcript at 45.)

After a review of the testimony and other evidence presented in the proceeding, the administrative law judge found that aluminized polyester film kites manufactured by the respondent, including kites with tails 25 feet or more in length, box kites with dimensions of 36 x 28 inches, and "fighter" kites with dimensions of 25 x 31 inches, presented a substantial product hazard because they are conductive of electricity and susceptible to contact with high voltage power lines, thus presenting a hazard of electrical shock to users and retrievers of such kites, other persons in the vicinity of such power lines, and persons in homes and other buildings affected by high voltage surges caused by the kites. (See Initial Decision and Order, *Mylar Star Kites*, June 21, 1976, at 1.)

On review of the Initial Decision and Order, the Commission concluded that there was substantial evidence to support the administrative law judge's findings of fact as to the hazardous nature of aluminized polyester film kites. Specifically, the Commission found that the record showed the kites to contain.

"... a serious defect because the design incorporates a conductive material which is capable of transmitting a lethal electric shock to a person in contact with the kite. This aluminum surface does not add to the flying capability of the kite but merely adds to its aesthetic value." Commission Decision and Order, *Mylar Star Kites*, September 16, 1977, at 3.

The Commission conclude that because of the nature and severity of the risk without an offsetting benefit sufficient to justify the risk, a product such as the kites, if properly the subject of a proceeding under the CPSA, would present a substantial product hazard.

Notwithstanding this conclusion, the Commission determined that kites are articles intended for use by children and as such, fall within the scope of the Federal Hazardous Substances Act ("FHSA," 15 U.S.C. 1261). Since the majority concluded that the hazard presented by aluminized polyester film kites could be eliminated or reduced to a sufficient extent under the FHSA, the Commission, in accordance with section 30(d) of the CPSA (15 U.S.C. 2079(d)), as it existed at the time the proceeding was commenced, set aside the proposed order of the administrative law judge in *Mylar Star Kites* and instructed the staff to prepare the present proposed action under the FHSA.

¹Subsequent to commencement of the *Mylar Star Kites* proceeding, section 30(d) was amended to permit the Commission to regulate hazards under the CPSA notwithstanding the applicability of a "transferred act" if the Commission finds by rule that it is in the public interest to proceed under the CPSA. (Section 16, Pub. L. 94-284, 90 Stat. 508, May 11, 1976.)

The Commission recognizes that aluminized polyester film kites are also used by adults. Such incidental use by adults does not invalidate the Commission's regulation of this product under the FHSA as an article intended for use by children.

The authority of the Commission to regulate under the FHSA, as articles intended for use by children, products that may also be used by adults was upheld in *Forester v. CPSC*, 559 F.2d 774 (D.C. Cir. 1977). In *Forester*, which involved a petition for review of the Commission's safety regulations under the FHSA for bicycles, the court concluded that "[i]ncidental use of an item by adults would not deprive the Commission of the jurisdiction to regulate an item under the FHSA." 559 F.2d at 786. The court held that the determination as to whether an item may be regulated under the FHSA depends on whether the item is intended for use by children, a determination vested in the sound discretion of the Commission.

In the present case, the Commission observes that kites are generally recognized as articles intended for use by children and are widely used by children. Neither the retail price nor the design of aluminized polyester film kites would exclude use by children. Moreover, as in the case of bicycles, it would be impossible to set a regulatory distinction between "children's" and "adult" kites.

THE PROPOSAL

The *Mylar Star Kites* proceeding specifically concerned particular models of aluminized polyester film kites manufactured by the respondent. However, the evidence in the record indicates that any aluminized polyester film kite susceptible to contact with high voltage electric power lines would pose the same hazard of electric shock to persons coming in contact with the kite or its aluminized tail, or persons in the vicinity of electric power lines which could break and fall as a result of an electric arc caused by the kites. Accordingly, the banning regulation proposed below is intended to apply to any aluminized polyester film kite posing the same hazard as those involved in the *Mylar Star Kites* proceeding.

The American National Standards Institute standard for electric power lines (ANSI C2 1977)² allows a minimum horizontal clearance of 12 inches between power lines transmitting current not exceeding 8.7 kilovolts (8700 volts). This standard is observed nationwide by electric utilities, and results in uniform placement of electric power lines. In order to allow for a

²Available from American National Standards Institute (ANSI), 1430 Broadway, New York, N.Y. 10018.

margin of safety, the Commission is proposing to ban any kite containing a piece of aluminized polyester film measuring 10 inches or more. This provision allows for the possibility that electric power lines separated by a distance of 12 inches may be pulled together by a kite, its tail, or string becoming entangled in the line.

ECONOMIC CONSIDERATIONS

An assessment of potential economic impact has been made of the proposal set forth below. The Commission, on the basis of a staff investigation and analysis, has concluded that the proposed ban would affect only a small percentage of all kites manufactured in the United States. The precise number of kites manufactured in the United States is unknown but estimates indicate that approximately 40 million are produced annually. The average selling price of affected kites is \$5.00. In addition to prohibiting manufacture, distribution, or sale of aluminized polyester film kites, the proposed rule set forth below would require the repurchase of banned kites, in accordance with section 15 of the FHSA (15 U.S.C. 1274) and Commission regulations published at 16 CFR 1500.202 and 1500.203.

The repurchase requirement would have the effect of requiring the recall of any banned kites which had been previously manufactured or distributed. The cost of such recall may be significant for a small number of firms. However, the Commission notes several factors which may tend to limit such costs. The Commission's staff was unable to identify any firms which are still manufacturing the long-tailed "dragon" kites which were the subject of the original notice of enforcement issued in the *Mylar Star Kites*, and which were the type of kite involved in the incidents described above. Given the relatively short usable life of an aluminized polyester film kite, there may be very few previously sold kites still in consumers' hands and available for recall. Moreover, several of the firms which had previously manufactured these kites have already conducted a recall. In the recalls conducted, relatively few kites were actually returned by consumers. Several firms have, however, continued to manufacture and distribute box kites and other kites containing aluminized polyester film which would be subject to the proposed ban and repurchase. Greater numbers of those kites would be available in the chain of distribution or in consumers' hands and consequently subject to repurchase.

A copy of the economic assessment is on file and can be inspected in the Commission's Office of the Secretary at the above address.

ENVIRONMENTAL CONSIDERATIONS

An assessment of the potential environmental impact has been made of the proposal set forth below. The Commission concludes that there are no significant environmental effects associated with the proposal. Therefore, there is no need for an environmental impact statement. A copy of the environmental assessment is on file and can be inspected in the Commission's Office of the Secretary at the above address.

EFFECTIVE DATE

It is contemplated that the effective date will be 30 days after publication of a final banning regulation for aluminized polyester film kites. The regulation will be applicable to all kites meeting the definition, regardless of when manufactured or introduced into interstate commerce. Thus, as of the effective date, no kite meeting the definition set forth in § 1500.18(c)(1) below may be manufactured, introduced or delivered for introduction into, or received in, interstate commerce. Moreover, under section 15 of the FHSA (15 U.S.C. 1274), any such kite is subject to repurchase in accordance with 16 CFR 1500.202 and 1500.203. For purposes of this regulation, introduction into interstate commerce is defined as follows: A kite manufactured outside the United States is introduced into interstate commerce when it is first brought within a U.S. port of entry. A kite manufactured in the United States is introduced into interstate commerce (a) at the time of its first interstate sale, or (b) at the time of its first intrastate sale if one or more of its components and/or raw materials were received interstate.

CONCLUSION

Under the Federal Hazardous Substances Act (FHSA) the term "hazardous substance" includes any toy or article intended for use by children that the Commission determines by regulation presents an electrical hazard (sec. 2(f)(1)(D), 15 U.S.C. 1261(f)(1)(D)). Section 2(q)(1)(A) of the FHSA provides that such toy or article is also a banned hazardous substance.

"Electrical hazard" is defined by section 2(r) of the act, which reads

"an article may be determined to present an electrical hazard if, in normal use or when subjected to reasonably foreseeable damage or abuse, its design or manufacture may cause personal injury or illness by electrical shock." (15 U.S.C. 1261(r)).

Based on information available to the Commission, the Commission has preliminarily determined that certain aluminized polyester film kites, because of electrical hazards associated with their design (specifically their

size and electrical conductivity), present a risk of personal injury from electric shock as a result of their ability to conduct electricity and to become entangled in or otherwise contact high voltage electric power lines. The Commission believes that the potential for serious personal injury presented by such kites outweighs the potential economic impact that would result from a ban. Consequently, the Commission believes such kites should be banned from interstate commerce.

Accordingly, pursuant to provisions of the Federal Hazardous Substances Act (sec. 2(f)(1)(D), (q)(1)(A), (r), 3(e)(1), 74 Stat 372, 374, 375, as amended, 80 Stat. 1304-05, 83 Stat. 187-189, 15 U.S.C. 1261, 1262) and under authority vested in the Commission by the Consumer Product Safety Act (sec. 30(a), 86 Stat. 1231, 15 U.S.C. 2079(a)), the Commission proposes to amend Title 16, Chapter II, Subchapter C of the Code of Federal Regulations by adding a new paragraph (c)(1) to § 1500.18 as follows:

PART 1500—HAZARDOUS SUBSTANCES AND ARTICLES; ADMINISTRATION AND ENFORCEMENT REGULATIONS

§ 1500.18 Banned toys and other banned articles intended for use by children.

(c) *Toys and other children's articles (not electrically operated) presenting electrical hazards.* Under the authority of section 2(f)(1)(D) of the act and pursuant to provisions of section 3(e) of the act, the Commission has determined that the following types of toys or other articles intended for use by children (not electrically operated) present an electrical hazard within the meaning of section 2(r) of the act.

(1) Any kite 10 inches or greater in any dimension constructed of aluminized polyester film or any kite having a tail or other component consisting of a piece of aluminized polyester film 10 inches or greater in any dimension presents an electrical hazard and is a banned hazardous substance because its design (specifically its size and electrical conductivity) presents a risk of personal injury from electric shock due to its ability to conduct electricity and to become entangled in or otherwise contact high voltage electric power lines.

Interested persons are invited to submit, on or before March 27, 1979, written comments regarding this proposal. Comments and any accompanying data or material should be submitted, preferably in five copies, addressed to the Secretary, Consumer Product Safety Commission, Washington, D.C. 20207. Comments received after the close of the comment period will be considered to the extent practi-

cable. Comments and accompanying material may be seen in, or copies obtained from, the Office of the Secretary, 1111 18th St., N.W., Third Floor, Washington, D.C. 20207, during working hours Monday through Friday.

Dated: January 23, 1979.

SADYE E. DUNN,
*Secretary, Consumer
Product Safety Commission.*

[FR Doc. 79-2817 Filed 1-25-79; 8:45 am]

THE CONSUMER PRODUCT SAFETY COMMISSION
OF THE UNITED STATES OF AMERICA

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CONSUMER PRODUCT
SAFETY COMMISSION

(IN THE MATTER OF)
(CERTAIN METALIZED KITES)

DISSENTING OPINION OF
COMMISSIONER BARBARA HACKMAN FRANKLIN

On January 18, 1979, the Commission decided to propose a ban on metalized polyester-film kites.

I dissent from this decision.

In November of 1975, the Commission decided to serve notices of enforcement on five companies which manufactured metalized polyester-film kites. In the view of the Commission staff, these kites presented a substantial product hazard within the meaning of Section 15 of the Consumer Product Safety Act (CPSA). I dissented then from the decision to proceed under Section 15. I believed there was the possibility of a hazard, but that Section 15 of the CPSA was an inappropriate way to address it. In my view, there was a clear case that such items were toys intended for use by children, and as such had to be regulated under the Hazardous Substances Act (HSA). Attached is my opinion dated December 22, 1975, which makes these arguments.

Subsequently, four of the kite cases were settled by consent agreement. The specific kites associated with the hazard incidents -- those which were metalized and had long tails -- were taken off the market. In September, 1977, the one remaining case came back to the Commission and a decision was made, in which I concurred. This represented a change in the Commission's approach, probably as a result of changes in the membership of the Commission between 1975 and 1977.

Now, nearly a year and one-half after the staff was directed to draft a ban under the HSA, the Commission is to decide whether to propose it.

On November 6, 1975, Notices of Enforcement in the five above-listed matters were served regarding the manufacture and distribution of metallized polyester film kites which, in the opinion of the Commission staff, present a substantial product hazard within the meaning of Section 15 of the Consumer Product Safety Act (CPSA), 15 U.S.C. 2064(a)(2).

Adjudicative proceedings against these respondents are the direct result of Commission decisions on May 29, 1975 and October 23, 1975. I dissent from both these decisions.

In my opinion, the Commission is utilizing the wrong statute, the CPSA, to address the risks of injury associated with these products. For the Commission to choose the CPSA over the Federal Hazardous Substances Act (FHSA), 15 U.S.C. 1261 et seq., without first undergoing a rigorous analysis and application of the statutory criterion involved, can lead to a regulatory posture lacking in predictability and fairness for both consumers and producers.

The kites are articles intended for use by children, and, as such, can be regulated under the FHSA. Moreover, in accordance with Section 30(d) of the CPSA, the alleged risks of injury associated with the kites can be eliminated or reduced to a sufficient extent by rulemaking under the FHSA. Therefore, in my opinion, the majority erred in its decision to take action under the provisions of the CPSA.

I. BACKGROUND

As set forth in the Notices of Enforcement, the Commission's staff is of the opinion that the metallized polyester film kites made and distributed by the respondents could cause electric shock to users because of the following alleged design and/or performance defects:

- a) The kites conduct electricity and present a severe electric shock hazard if the tail of the kite is entangled in high-voltage overhead electrical power transmission lines.
- b) Entanglement of the kites in the high-voltage lines may lead to short-circuiting or power surges in household appliances, such as television receivers, and result in electric shock to persons nearby.

Also set forth in the Notices of Enforcement is the Commission's finding that the risks of injury associated with these kites must be regulated under the CPSA and not under the FHSA:

The Commission believes that the metallized kites at issue, though occasionally used or misused by children, are nevertheless not toys or other articles intended for use by children within the meaning of the Federal Hazardous Substances Act (15 U.S.C. 1261 et seq.). In addition, the Commission has determined that the risk of injury associated with metallized polyester film kites cannot be eliminated or reduced to a sufficient extent by action taken under the Federal Hazardous Substances Act. The existing scope and method of public notice which can be required under the Federal Hazardous Substances Act is potentially less effective for these kites than the notice which can be required under the Consumer Product Safety Act. Accordingly, pursuant to Section 30(d) of the Consumer Product Safety Act (15 U.S.C. 2079(d)), the Commission has determined that any regulatory action in this matter must be undertaken pursuant to the Consumer Product Safety Act.

It is on this point that I dissent.

II. THESE KITES ARE "TOYS OR OTHER ARTICLES INTENDED FOR USE BY CHILDREN" WITHIN THE MEANING OF THE FHSA.

My disagreement with the majority stems primarily from our differing interpretations and application of the phrase "toy or other article intended for use by children" as used in Sections 2(f)(1)(D) and 2(q)(1)(a) of the FHSA. The majority believes that metallized polyester film kites are not "toys or other articles intended for use by children."

In my opinion, the conclusion that these kites are in fact intended for use by children seems inescapable. The concept of an "article intended for use by children" was introduced by the Child Protection Act of 1966 (P.L. 89-756). This Act, which amended the Federal Hazardous Substances Labeling Act of 1960 (and deleted the word "labeling" from the statute's title), was specifically designed to regulate the safety of articles intended for child use. As stated succinctly by one court several years later:

The purpose of the Child Protection Act is to protect children. This is accomplished by banning hazardous toys from channels of interstate commerce which lead to children.

United States v. Chalaire, 316 F. Supp. 543, 548 (E.D. La. 1970).
(Emphasis in the original.)

The Child Protection and Toy Safety Act of 1969 (P.L. 91-113) further amended the FHSA by 1) adding to the definition of the term "hazardous substance," and thus to the basic coverage of the Act, "any toy or other article intended for use by children which . . . presents an electrical, mechanical, or thermal hazard," and 2) authorizing the Secretary of HEW (now the Consumer Product Safety Commission), under certain conditions and in accordance with certain specified procedures, to classify such a toy or other children's article as a "banned hazardous substance" which would be excluded from the interstate market.

In reporting the bill, the House Commerce Committee significantly cited "toboggans," "bicycles," and "other recreational equipment" as a few examples of "article(s) intended for use by children." H. R. Rep. , 91-389, 91st Congress, 1st Session 9 (1969), U. S. Code Cong. and Admin. News 1969, p. 1236.

The Senate report on the bill, while listing other examples such as a toy blowgun, S. Rep. No. 91-237, 91st Cong., 1st Sess. 2 (1969), pinpointed even more clearly Congressional intent:

In the hearing before the Consumer Subcommittee of the Commerce Committee testimony was elicited on the meaning of this phrase. It was decided that a "toy" was any article that was normally presented to the child for his amusement. The term "other article intended for use by children" included articles normally used for children in close proximity to them. The term "children" could not be precisely defined; the age limits encompassed changed as a function of the types of danger presented and ability of the individual using the object or exposed to the object to appreciate the danger and avoid it.

Id., at 5.

Finally, the statutory phrase was examined by the United States Court of Appeals for the Second Circuit in R. B. Jarts, Inc. v. Richardson, 438 F.2d 846 (2nd Cir. 1971). The Court held that lawn darts are a "toy or other article intended for use by children" under the FHSA and could properly be classified as a "banned hazardous substance" where the manufacturer 1) knew that the lawn darts could be and had frequently been used by children, but 2) refused to label them as "not a toy for use by children" or 3) refused to refrain from selling them in toy stores or toy departments. The manufacturer had insisted that it "always sold and promoted Jarts as an adult game." 438 F.2d, at 853.

In spite of this most compelling evidence, the majority of the Commissioners determined that metallized polyester film kites do not fall within the FHSA definition of "toys or other articles intended for use by children." As they stated in the Commission's May 29 minute reflecting the decision:

While many kites are toys and other articles intended for use by children, and therefore within FHSA jurisdiction, the aluminized mylar kites involved in this matter must be distinguished from kites in general. They measure as long as 45 feet, cost \$10 - 15, and appear to be designed for the most skillful kite enthusiasts. An informal telephone survey of some retailers of aluminized mylar kites has revealed that these kites are intended for and most often used by experienced kite fliers who are young adults in their late teens or older.

Accordingly, the Commission will initiate regulatory action against aluminized mylar kites under the authority of the CPSA.

The criteria set forth by the majority -- size, cost and design of the kites -- do not keep these allegedly hazardous articles, in the words of the Chalaire case, from the "channels of interstate commerce which lead to children." 316 F. Supp., at 548.

Regarding the size of the kites, the finding is simply inaccurate. The kites do not measure as long as 45 feet; rather the tails of the kites do.

Regarding cost, I submit that the \$10 - \$15 figure does not necessarily price a kite out of the reach of today's youngsters.

Regarding the market for whom the kites are designed ("the most skillful kite enthusiasts"), even a glance at the manufacturer's instructions for using the item involved in Matter of Little People Kites, CPSC Docket No. 75-15, indicates their extreme simplicity. ("It should never be necessary to run with the kite. . . [it] will fly overhead with ease. . . A completely safe and extraordinarily attractive kite for enthusiasts and amateurs of all ages.") (Emphasis added.)

Finally, the majority, based on an informal telephone survey, states that these kites "are intended for and most often used by experienced kite fliers who are young adults in their late teens or older." Closer examination of the staff briefing materials transmitted to the Commissioners on May 16, 1975 and again on October 14, 1975, prompts a completely different conclusion. For example, the December, 1974 investigation report compiled by the Commission's Consumer Safety Officer, Robert K. McGuire, in Matter of San Francisco Kite Factory, CPSC Docket No. 75-19, contains only two sentences under the heading of "distribution": "The firm distributes both locally and interstate. The interstate customers are the result of a promotional mailing to Toy Stores (sic)."

Further, the following are the only instances set forth in the briefing materials where age -- any age -- is referred to:

◦ An aluminized mylar kite being flown by a 12-year-old Fremont, Calif. boy became entangled in a 12,000-volt power line, knocking out power to 250 homes for four hours. The child was not injured, but a spokesman for Pacific Gas and Electric Co. said that if the youngster had pulled on the tail, he could have been killed. "Tangled Kite Kills Power for 250 Homes," Washington Star-News, February 17, 1975, at 6.

◦ A power outage of 20 minutes duration occurred in Terre Haute, Ind., when a metallized kite flew into two 12,000-volt lines of the Public Service Company of Indiana. The incident involved a woman and "a small child who had been flying a kite which had an approximately 50 foot long aluminum tail." The kite reportedly had been purchased in San Francisco for the child by his uncle. Matter of Little People Kites, CPSC Docket No. 75-15, June 26, 1975 memorandum from CPSC Consumer Safety Officer, Dwayne A. Kapelis. See also "Metallized 'Dragon' Kites Could be Flying Killers," Lifelines, published by the National Safety Council (June, 1975).

◦ A 30-minute power failure occurred when a metallized kite came in contact with a 12,000-volt power line operated by the San Diego Gas and Electric Co. Firemen said the kite, flown by an 11-year-old boy, severed the power line which collapsed into the street below. "Boy's Kite Caused Power Failure," San Diego Union, February 17, 1975.

◦ A March 26, 1975 news release entitled "Metal Kites 'Dangerous'" and issued by the Oklahoma State Department of Health strongly warns parents about certain metallized kites being marketed for children ("Parents, Beware! That fancy new kite called a 'Dragon Kite' you bought for your youngsters could be a killer in disguise. . . The toy is made by 'Little People Kites' of San Francisco. . . 'This is a very dangerous toy and should not be used' . . .")

In my judgment, the circumstances surrounding actual promotion, sale and use of these kites show clearly that they are intended for use by children and under the law administered by the Commission, should have been considered under the FHSA.

Virtually every shred of information available to the Commissioners, concerning intended use of these articles points to the conclusion that these are "toys or other articles intended for use by children." Kites are traditionally purchased by and/or for children as objects of amusement, and the majority's attempt to distinguish these kites from kites in general must fail.

III. THE RISKS OF INJURY ASSOCIATED WITH THESE KITES CAN BE REDUCED TO A SUFFICIENT EXTENT BY ACTION TAKEN UNDER THE FHSA, AND THUS MUST BE REGULATED ONLY IN ACCORDANCE WITH PROVISIONS OF THE FHSA.

The majority argues that, even if these kites are under FHSA jurisdiction, the risks of injury associated with them cannot be sufficiently reduced by action taken under that Act. I disagree on this point also.

Section 30(d) of the CPSA provides:

A risk of injury which is associated with consumer products and which could be eliminated or reduced to a sufficient extent by action taken under the Federal Hazardous Substances Act, the Poison Prevention Packaging Act of 1970, or the Flammable Fabrics Act may be regulated by the Commission only in accordance with the provisions of those Acts.

Under this section, the Commission is limited to operating under the language of the FHSA, to the extent that that statute provides a sufficient basis for the elimination or reduction of a particular risk of injury. The plain meaning of this section seems to be that, if the risk can be reduced "to a sufficient extent" under the FHSA, the Commission may not utilize any of its authority under the CPSA, "even if exercise of that authority might produce a more satisfactory result." See Bureau of National Affairs, Inc., The Consumer Product Safety Act (Washington, D. C. 1973), p. 88.

In short, there appears to be a distinct "legislative tilt" toward the FHSA and other transferred Acts. See N. Buc, "Transferred Acts and Preemption," Consumer Product Safety Act, Practising Law Institute (New York, 1973).

Nevertheless, the majority has determined that the risk of injury associated with metallized polyester film kites cannot be reduced or eliminated to a sufficient extent by action taken under the FHSA. The reason set forth is that the public notice which can be required under the FHSA is "potentially less effective for these kites" than that which can be required under the CPSA.

However, as stated in the House-Senate Conference Report, the Commission is required to "consider all aspects of the risk, together with the remedial powers available" under both the FHSA and CPSA. Conf. Rep. No. 92-1593, 92nd Cong., 2nd Sess. (1972). The fact that required public notice under the FHSA might be "potentially less effective" under the CPSA is not appropriate as the sole criterion for a "30(d) finding." What must be considered in order to support the finding are all aspects of the risk and all relevant remedies of both the FHSA and CPSA.

The FHSA remedial powers are not identical to those of the CPSA, but they are comparable -- and they are sufficient to reduce the alleged risks of injury associated with metallized polyester film kites.

Under Section 15 of the CPSA, the Commission is attempting to reach the kites on the market and in the hands of consumers through adjudicative proceedings brought against individual manufacturers. These proceedings could result in a Commission order requiring a) repair, replacement or refund (at the election of the manufacturer) and b) notification to purchasers. On the other hand, a regulation declaring these kites to be banned hazardous substances, proposed and promulgated under the FHSA, would trigger the automatic repurchase provisions of Section 15 of that Act: all manufacturers of such kites would be required to repurchase the kites from their distributors, and the distributors from their retailers, and the retailers from consumers. Both the CPSA order and the FHSA regulation can be enforced in the courts through seizure and injunction.

There are several advantages to promulgating a FHSA regulation over action initiated under Section 15 of the CPSA. The FHSA regulation would establish, for example, requirements for all manufacturers, distributors and retailers of metallized polyester film kites, not just the five against

whom adjudicative proceedings have been brought. Whereas the FHSA regulation would address all allegedly dangerous kites manufactured in the past, the present and the future, the CPSA order would not apply to similar kites made by other manufacturers next year or in the years ahead. Moreover, I might add that there is no indication that action under the FHSA would be any more cumbersome or time-consuming than CPSA adjudicative proceedings.

In my opinion, the risks of injury associated with these kites could be reduced to a sufficient extent by action taken under the FHSA.

IV. CONCLUSION

As a matter of law, metallized polyester film kites are clearly articles intended for use by children within the meaning of the FHSA, and the identified risks of injury can be reduced to a sufficient extent by action taken under that Act.

As a matter of fairness, the Commission's implementation of section 30(d) of the CPSA should be both predictable and consistent. For the Commission to utilize one Act instead of another without first undergoing a rigorous analysis and application of the statutory criterion found in that section, is potentially unfair and disruptive to the producers of consumer products.

Finally, as a matter of consumer protection, the Commission should not have rejected as insufficient the specific child protection provisions of the FHSA without compelling reasons for doing so. I am hopeful we will guard against further actions which blunt the usefulness of this special law designed to protect children.


Barbara Hackman Franklin
Commissioner

December 22, 1975