

**STATEMENT OF CHAIRMAN JACQUELINE JONES-SMITH  
ON SECTION 15/37 INTERPRETIVE RULES**

July 23, 1992

I voted to publish final rules interpreting the modified section 15 and the new section 37 of the Consumer Product Safety Act; although I did have strong reservations concerning one of the modifications made during the meeting. These revised rules amend the Commission's existing interpretive rules governing "substantial product hazard" reporting requirements in conformance with the provisions of the Consumer Product Improvement Act of 1990.

These industry reporting requirements have been a vitally important source of information for the Commission in undertaking its statutory obligations to protect the public from unsafe products. Over the past several years, this information has helped generate the hundreds of corrective action plans and recalls, involving millions of consumer products, that this agency has successfully undertaken.

Nonetheless, both the Commission and the Congress recognized that there was a need to facilitate additional reporting, on a more timely basis. The 1990 Amendments were the result. Two additional grounds for reporting under section 15 were incorporated, and a new catch-all section 37 law suit reporting provision was adopted.

These amendments are already in effect and industry is currently responsible for complying with these new requirements. However, since enactment, firms have raised pertinent questions as to the proper interpretation of these new reporting obligations.

The Commission, therefore, initiated a formal procedure to amend its existing interpretive rules to provide sound guidance to subject firms. It chose to do so by means of a notice and comment procedure. I believe that, while it was under no obligation to adopt this method, the Commission properly determined that this procedure was best calculated to address these matters in the most fair and effective manner. Today's Commission action culminates this process.

It is important to note that in protecting the American public from unsafe consumer products, Congress and the Commission have distinct roles and responsibilities. Congress enacts the law; the Commission interprets and enforces it. The Commission does not legislate; it may not revise the law; and it may not substitute its own judgement for that of Congress. In interpreting the provisions of a law, it is the Commission's obligation to accurately and fairly construe statutory language in accordance with its plain meaning and consistent with the intent of Congress, where that is clear. This is frequently a challenging task.

Such has been the case with sections 15 and 37, particularly given the complexity and controversial nature of some of the issues contained within these interpretive rules. Nonetheless, I am satisfied that, with one important exception elaborated upon below, the decisions the Commission reached today are consistent with the important principles articulated above. I might also make note of the exceptional contribution of the Staff in working with the Commission to produce this final product.

As mentioned above, a number of the items addressed by these interpretive rules generated considerable -- and constructive -- commentary from the public. The Commission has been briefed by the Staff on several occasions as to its recommendations. Today, the Commission agreed to publish a modified version of the Staff's latest, formal proposal. Given the sensitivity of many of these issues, and because of my strong objections to one of the motions that carried today, I believe that it would be appropriate to elaborate upon several of them in some detail.

Several important provisions were modified with reference to the new section 15 reporting requirements, as follows:

**1. VOLUNTARY STANDARDS RELIED UPON BY THE COMMISSION**

Congress modified section 15(b)(1) of the CPSA to require a firm to report a failure to comply "with a voluntary consumer product safety standard upon which the Commission has relied under section 9." Several significant, interpretive issues were raised by this new requirement.

- a. What official Commission actions are referenced by the clause "has relied under section 9"?
- b. Under what circumstances can it be determined that the Commission has in fact relied upon a voluntary standard?
- c. Does this provision have any retroactive application or does it exclusively apply prospectively?
- d. How will the Commission treat an industry modification of a voluntary standard upon which it has relied?

As to the first question, it is my conclusion that the phrase "has relied under section 9" means precisely what it says. Section 9 addresses three distinct forms of Commission action that can be affected by Commission reliance upon a voluntary standard: The termination of a rulemaking proceeding; the revocation of a consumer product safety rule; and, the denial of a petition. When the Commission takes any of these actions, explicitly based upon its reliance on a voluntary consumer product safety standard, a possible reporting requirement is triggered. The statute could not be any more clear on this point.

Despite my strong objections to the contrary, however, the Commission voted 2-1 today to eliminate any application of this provision to the denial of petitions. The basis for my dissenting vote on this motion is as follows:

While each of these three rulemaking procedures are addressed somewhat differently under section 9, it is clear that, since the Commission must make identical findings in each case in order to rely upon a voluntary standard, the new clause covers each of these procedures.

Thus, while the term "rely" is not expressly used in the subsection that addresses petitions, the Commission would still be explicitly relying upon a voluntary standard in such cases where it chooses to deny a petition because it finds that an existing voluntary standard adequately addresses an alleged risk and there is likely to be substantial compliance with this standard. Apparently, a majority of the Commission disagreed with this interpretation.

My interpretation is reinforced by the use of the phrase "has relied under section 9" in the amended section 15(b)(1) itself. Clearly, this clause, in itself, is the source of the Commission's legal authority to rely upon a voluntary standard, and generate a reporting requirement, in the context of section 9. Any additional reference to reliance within section 9 itself is merely duplicative. My colleagues appear to have missed the authoritative impact of this language in the 1990 Amendments. Its effect is to overcome any ambiguity that might otherwise have resulted from the failure of section 9(i) to explicitly use the term "relied upon".

Indeed, the term relied upon is also omitted from section 9(h), with respect to the revocation of an existing rule. In fact, section 9(h) does not reference deferral to a voluntary standard at all. This leads to the ludicrous conclusion that Congress only intended to apply this provision to the termination of an ANPR. If that were the case, the statute could have readily expressed this limitation. But it did not. Rather, it used the more expansive clause: "has relied under section 9." The only logical conclusion is that this provision is intended to cover each of the rulemaking procedures contained within section 9 -- including the denial of a petition.

Some commenters have suggested that creating a reporting requirement as a result of the Commission's denying a petition, could work an unfair hardship upon firms. Whether or not this is so, however, that is the law. Nonetheless, in order to reasonably address this fairness issue, I believe that it was appropriate for the interpretive rule to be modified to assure parties that all "procedural safeguards", including a Federal Register notice, shall be observed in order to mitigate any such unintended results.

On a related point, I believe that the CPSC is abundantly clear that, in denying a petition based upon its reliance upon a voluntary standard, the Commission makes no formal determination as to whether there is any "unreasonable risk" associated with the product. The only findings that the Commission makes in this context, under section 9(i), are: (1) That the voluntary standard is in existence at the time; (2) That it is "likely to result in the elimination or adequate reduction of the risk of injury identified in the petition", and; (3) That there is a likelihood of substantial compliance. The second element simply does not require a finding of an "unreasonable risk" -- merely that the identified "risk of injury" be reduced or eliminated.

On the other hand, section 9 does not address, either explicitly or implicitly, a Commission decision not to commence a rulemaking. Since this activity is not covered "under section 9", such a determination, by itself, does not generate a reporting requirement; although, of course, there may be independent grounds for a firm to file a report.

The second question is more straight forward and, in fact, has already been addressed by the Commission. The Commission properly decided that the only fair and objective way to determine whether it has relied upon a voluntary standard is based upon whether the Commission does so explicitly in a clear and unambiguous manner. It would be too speculative merely to infer Commission reliance implicitly based upon a review of the record.

As to the third issue, there has been considerable discussion as to whether this reliance provision has retroactive application, and this too was the subject of a motion today. However, whatever confusion there might previously been in this context, this matter has been clarified by the final interpretive rule which states: "A firm must report under this section if it has distributed in commerce, subsequent to the effective date of these amendments (November 17, 1990), a product that does not conform to a voluntary standard ... relied upon by the Commission since August 13, 1981."

The motion offered today would have eliminated any retroactive application of these amendments. This would have been redundant. I voted against the motion and it failed by a 2-1 vote.

It is my position -- in accordance with a long established principle of statutory construction -- that the enforcement of a law ought to be prospective. That is the case here. The law only applies to conduct -- or, in this case, products manufactured -- "subsequent to the effective date" of these amendments. The fact that the statute references voluntary standards previously relied upon by the Commission simply does not render this into a retroactive reporting obligation.

By way of illustration, this is no different than State X passing a criminal law, which now construes as being a felony certain conduct previously treated by State X -- for many years - - as a mere misdemeanor. Of course, State X can not bring felony charges against anyone under this law based upon their past conduct. It is limited to bringing a felony prosecution only for prospective violations of the law.

The fact that State X references an old misdemeanor statute, similar to the fact that the Commission has relied upon a voluntary standard in the past, does not create any ex post facto application. There are no questions of fairness raised. The new law merely uses as a point of reference something addressed differently in the past. This is commonly done. As noted -- and cited -- in the preamble to this interpretive rule: "A statute is not rendered retroactive merely because its action draws upon antecedent facts for its operation." Critical is the fact that the new statute itself only applies prospectively to subsequent conduct.

Thus, a firm, categorically, does not assume any new obligations with regard to any products manufactured and distributed prior to the effective date of these amendments. This, of course, would be unfair and violative of procedural due process. The amendment, by its terms, gives fair notice to any subject firm, with regard to any new products manufactured and distributed in commerce -- but only prospectively.

Finally, the question arises as to the status of a relied upon voluntary standard that subsequently is modified? As a matter of sound public policy, I do not believe that such reliance should be automatically transferred to the modified version of a voluntary standard -- if there has been a substantive modification. However, section 7(b)(2) of the CPSA requires that the Commission monitor compliance with voluntary standards. Such monitoring efforts will place the Commission in a position to review proposed modifications and allow it to determine, in a timely fashion, whether to transfer its reliance on the modified standard or continue to rely upon the original version. Clearly, however, the Commission need only review substantive changes affecting product safety and not technical or administrative revisions.

## 2. SIGNIFICANCE OF AN ADVERSE JUDGEMENT IN A SINGLE LAWSUIT

The 1990 Amendments do not create an independent reporting requirement specifically based upon an adverse judgement in a single lawsuit. There can be no dispute on this matter. Such an interpretation would be contrary to the clear legislative history of these amendments. Indeed, such a reporting requirement was rejected by Congress. The new section 37 reporting requirements were adopted as a substitute.

Nonetheless, common sense dictates that such an adverse verdict may in fact be at least an indication that a "substantial product hazard" exists. While it will not trigger a per se reporting requirement, as a practical matter, the Staff is likely to "attach considerable significance" to such a verdict. Thus, as a matter of fairness to firms subject to these reporting requirements, I agree that the interpretive rules should give notice to the public that the Staff may "attach considerable significance" to such an occurrence.

### 3. IMPACT OF THE AMENDMENTS UPON THE "TRANSFERRED ACTS"

It was originally proposed that a subject firm must report if it obtains information which reasonably supports the conclusion that its product violates a standard or ban promulgated under any one of the so-called "transferred acts" -- the FHSA, PPPA and RSA.

There is simply no statutory basis for such an interpretation. The 1990 Amendments apply exclusively to the CPSA and do not reference any of the "transferred acts". Had Congress intended to cover violations of any of the "transferred acts", it could have done so explicitly.

Nonetheless, this is another area in which, as a practical matter, the Staff is likely to review for section 15 reporting purposes, with particular scrutiny, any such substantive violation. Therefore, I agree that, as a matter of fairness, the public ought to be placed on notice that the staff "shall attach considerable significance" to such violations.

### 4. THE INTERPRETATION OF A "SERIOUS INJURY"

The final section 15 issue to be resolved relates to the interpretation of the term "serious injury", as used in the new subsection 15(b)(3). The earlier proposal -- consisting of a list of enumerated examples of a "serious injury" -- contained a number of ambiguities. The version agreed to by the Commission today is both more precise and indicates that these illustrations simply raise a rebuttable presumption that there is a "serious injury". I find this to be a satisfactory construction.

In addition to these section 15 interpretive rule issues, a number of issues involving the section 37 interpretive rules were resolved today. The new section 37 establishes an independent reporting requirement, that both supplements section 15 and encourages more timely reporting of possible substantial product hazards. Its authors, however, left little legislative history and presented the Commission with some tough decisions. My interpretation of these provisions are addressed separately below.

## 1. DEFINITION OF A "GRIEVOUS BODILY INJURY"

Section 37 requires that a manufacturer file a report: "If a particular model of a consumer product is the subject of at least 3 civil actions ... for death or grievous bodily injury ...", resulting in either a settlement or an adverse judgement against the manufacturer during a statutorily defined period. In defining "grievous bodily injury", the statute breaks this term down into nine, broad "categories of injury".

The Staff, in attempting to provide a more meaningful interpretation of these discrete categories, has suggested illustrative language drawn from the insurance industry. The statutory definition does require some clarification. However, while the Staff's proposal does tend to more tangibly illustrate these categories, I am concerned that it may go beyond a mere interpretation and suggest a substitute definition.

I am willing, however, to adopt the Staff's recommendation to publish this new interpretation of grievous bodily injury as a separate Federal Register notice to solicit public commentary. I would hope that this process can be completed expeditiously.

## 2. DEFINITION OF "PARTICULAR MODEL"

The other term requiring additional clarification is a "particular model" of a consumer product. The statute provides a definition which enumerates six characteristics to help identify whether a particular model is "distinctive". Left unanswered is the question: Distinctive from whose perspective?

The Staff recommends that an objective, reasonable person test be utilized to address this issue and that the perspective referenced be that of a "manufacturer acting in accordance with the customs and practices of the trade of which it is a member." I agree. I believe that such an objective test is the most rational method of determining whether a product is a "particular model".

## 3. REPORTING "ALLEGATIONS" OF GRIEVOUS BODILY INJURY

A number of commenters objected to the statutory requirement of reporting mere allegations of grievous bodily injury. They were concerned that such a requirement may result in the reporting of nuisance suits and unsubstantiated claims. Nonetheless, the statute is most explicit on this point. Of course, the law allows a manufacturer to deny such allegations and to submit "other information" as well.

The statute further requires that such an allegation identify the specific "category of injury". The interpretive rule adopted today illuminates this feature of the reporting

requirement. It raises a presumption that an allegation of a grievous bodily injury in either an original or amended complaint is reportable. However, should the allegation not adequately describe an applicable "category of injury", this presumption may be rebutted by looking to additional evidence gathered during discovery.

I would emphasize, however, given the clear Congressional intent that section 37 present an automatic reporting requirement, that probing into such extraneous evidentiary material is neither an exception to the rule nor a reporting "loophole", and has a very limited application.

#### 4. REPORTING OBLIGATIONS OF COMPONENT MANUFACTURERS

I agree with the Staff's interpretation of the section 37 reporting requirement with respect to manufacturer's of component parts. Component parts must be treated as separate and independent products for section 37 reporting purposes. This is wholly consistent with the statutory definition of a "consumer product" -- at section 3(a)(1) -- which provides that this term "means any article, or component thereof ...." There really is no legitimate, alternative interpretation.

#### 5. OCCUPATIONAL INJURIES

I agree with Staff that a law suit judgement involving a consumer product is still reportable under section 37, even where the injury or death occurred in an occupational setting. The critical issue here is whether the product causing injury is a consumer product, as defined under the CPSA, and not who was using it nor the circumstances under which the injury occurred.

The interpretive rule, however, "exempts" the reporting of certain occupationally-related asbestos injuries, as a matter of Commission discretion. I agree that because of the unique characteristics of on-going asbestos litigation and the limited value of such information, that this is the most prudent course of action to follow. Of course the Commission may choose to extend such a limited "exemption" to other products, similarly involved in mass tort litigation -- particularly if they produce chronic injuries or illnesses manifested after a long latency period.

#### 6. CONFIDENTIALITY

Finally, I am pleased with the way in which the final interpretive rule addresses the question of confidentiality. While the new amendments provide explicit disclosure exemptions for certain required information, the final rule clarifies that in order to encourage reporting, and as a matter of fairness, other reported information will be reviewed in accordance with the CPSA's Section 6(b) clearance procedures.

By promulgating these final interpretive rules, the Commission has endeavored to provide clear guidance to industry as to its reporting obligations. I believe that this is so overriding a responsibility of the Commission that, despite my strenuous objections to the motion relating to petitions, I still elected to vote for publication of these important rules.

Overall, I believe that these rules have addressed, in a fair manner, the many constructive public comments submitted to us. I anticipate that these statutory revisions will soon result in a substantial increase in timely reporting. It is my intent to assure that these rules, and the underlying statutes, are rigorously enforced by this Commission in order to fulfill our mandate to protect the American consumer from unsafe products.