U.S. CONSUMER PRODUCT SAFETY COMMISSION
Washington, DC 20207

MINUTES OF COMMISSION MEETING
March 7, 2003
4330 East West Highway
Bethesda, Maryland

Chairman Hal Stratton convened the March 7, 2003, meeting of the U. S. Consumer Product Safety Commission in open session. Commissioner Mary Sheila Gall and Commissioner Thomas H. Moore were present.

AGENDA ITEM: Petition CP 01-1 Requesting a Rule Requiring Product Registration Cards with Every Product Intended for Children

The Commission considered a staff recommendation to defer a decision on the petition until staff has completed the recall effectiveness project and will be better able to evaluate the potential effectiveness of product registration cards.

The Commission was briefed on this matter by the staff at the Commission meeting of February 21, 2003. (Ref: staff briefing package dated January 17, 2003.) At the February 21, 2003 meeting, the Commission also heard presentations from the petitioner, the Consumer Federation of America, and seven other organizations, industry representatives and individuals who had previously submitted written comments regarding the petition. The Commission further offered questions and discussed the issues with each presenter.

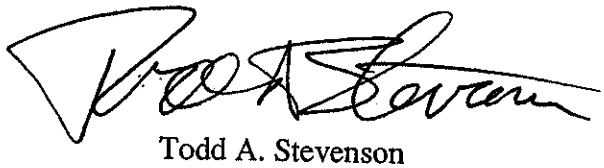
On the motion of Commissioner Moore with Commissioner Gall seconding and after discussion, the Commission voted (2-1) not to grant the petition CP 01-1 and move to expand the scope and direct the staff to prepare an Advance Notice of Proposed Rulemaking that would consider the full range of issues and options encompassed by the term "recall effectiveness" and not merely the limited issues presented by the proposal for product registration cards for children's products. Chairman Stratton and Commissioner Gall voted not to approve the motion to grant the petition. Commissioner Moore voted to approve the motion.

On motion of Commissioner Gall with Commissioner Moore seconding and after discussion, the Commission voted (2-1) to deny the petition CP 01-1 by the Consumer Federation of America requesting that the Commission begin rulemaking procedures to require manufacturers, distributors, retailers and importers to include product registration cards with children's products. Chairman Stratton and Commissioner Gall voted to approve the motion to deny the petition. Commissioner Moore voted not to approve the motion.

Chairman Stratton, Commissioner Gall and Commissioner Moore filed separate statements concerning their votes on the petition concerning product registration cards, copies attached.

There being no further business on the agenda, Chairman Stratton adjourned the meeting.

For the Commission:



Todd A. Stevenson
Secretary to the Commission

Attachments

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, DC 20207

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Chairman

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STATEMENT OF CHAIRMAN HAL STRATTON REGARDING PETITION NUMBER CP 01-1, A PETITION CONCERNING PRODUCT REGISTRATION CARDS

The petition filed in this matter is, in my opinion, directed toward a very worthy goal, which I believe is shared by all members of the U.S. Consumer Product Safety Commission ("Commission"). This goal is the improvement of the effectiveness of the Commission's recall process under the Consumer Product Safety Act (CPSA). The Commission is engaged in a comprehensive effort to evaluate its recall process and, based upon the results of this evaluation, make improvements which will enhance its effectiveness.

The petition in this proceeding does not cover or embrace the broad perspective of the Commission's desire to comprehensively examine all potential areas to improve recall effectiveness.[1] Further, I do not believe the petition is specific enough to meet the requirements of Section 9(c) of the CPSA, 15 U.S.C. §2058(c), to support an Advanced Notice of Proposed Rule Making at this time. Fortunately, the procedure sought to be invoked by the petition is not necessary for the Commission to achieve its goal of moving toward better recall effectiveness. The Commission and staff will consider product registration cards along with all other ideas and proposals in its project to significantly improve the effectiveness of the Commission's recall process. The goal of the project, as more fully explained below, is to find something that actually works.

I voted to deny this petition after having considered several factors including the Commission's authority under the CPSA to promulgate such a rule, the broad and indefinite scope of the petition, the likely costs associated with product registration cards, the potential effectiveness of the proposed rule on recalls, and the need to consider product registration cards within the broader context of recall effectiveness.

[1] I note in this regard that it is the Commission staff's recommendation that we not move forward and grant the petition, but rather that we defer it. This indicates the staff does not believe we need to move forward in this proceeding to further our goal of improving recall effectiveness, and the Commission clearly has the power to move forward with an Advanced Notice of Proposed Rule Making on its own motion at the proper time.

I will address a number of the issues in this matter which I consider most important and most helpful to our project on recall effectiveness.

The Commission's Authority

The CFA petition raises the question of whether the Commission has the authority under Section 16(b) of the CPSA, 15 U.S.C. §2065(b), to require the type of record keeping requested in the petition. The Commission has never promulgated a rule providing for such a requirement, nor has any court ruled on the question. Without specifically deciding this issue in this matter, I assume the Commission does have this authority under the CPSA for purposes of my vote in this matter.

The Scope of the Petition

The petition before the Commission requests that "all manufacturers (or distributors, retailers, or importers) of products intended for children" be required to provide a product registration card. If interpreted broadly, such a rule would encompass a wide variety of products from giveaway toys from fast food restaurants to children's clothing, bedding, art supplies, and toys, which are generally manufactured for children. It might also encompass products that may be used by both children and adults, such as televisions, computers, radios, furniture, kitchen products, and practically any other product. Also, "children" is not defined in the petition.

The many types of products encompassed by the petition have significantly differing useful product lives. Some will last for years; others will be thrown away after their first use. Other products, such as cribs, may be passed from person to person, or given to a thrift store, and the original owner will not know who possesses the product. A one-size-fits-all rule as contemplated by the petition to cover such a broad scope of products is not practicable. A more targeted approach directed to products to be affected could have been more helpful in our effort to find meaningful ways to increase product recall effectiveness. I do not believe the indefinite and overly broad scope of the petition, which the petitioner admits needs considerable study and revision, to be helpful in moving the Commission toward that goal.

The Cost of the Petition Proposal

The Commission Economic Analysis staff provided estimates regarding the costs of certain aspects of the product registration card proposal. However, a more comprehensive analysis would be required under the provisions of the CPSA to promulgate such a rule. Our staff will conduct such an analysis in their study. We should look to find methods of improving recall effectiveness by using resources in a manner which would provide the greatest benefits to consumers.

Improving Recall Effectiveness

I also believe more research is required to better understand consumer activity and whether consumers would return the proposed project registration cards. The evidence presented at the briefing meeting in this matter was not sufficient or comprehensive enough to be persuasive. In general, I am inclined toward the staff's argument that the rate of return on product registration cards will likely be a function of a balance in the consumer's mind among a variety of factors, including time, convenience, effort, and perception of risk. Our staff will be directed to collect all of the data possible on this issue.

I also have serious concerns regarding the petitioner's request to maintain the data for such long periods, considering our mobile society, varying product lifecycles, and other factors which could negate the usefulness of the data. It is clear to me that a 20-year record keeping requirement is too long for many products, particularly products that have a very short useful product life. Further, I agree that the value of the information will diminish with each year. It seems to me that a record keeping period of the effective life of the product or x-number of years, whichever is shorter, would be the correct concept. I cannot see the logic of keeping records which are kept for the purpose of recalling products many years after the products have been used up and discarded.

While the product registration card studies considered by staff and commenters are helpful, they do not provide near the justification necessary to support a rule as broad as that requested by the petitioner without further data.

The Commission's Existing Recall Effectiveness Efforts

The petition comes before the Commission during ongoing comprehensive research on the issue of Recall Effectiveness. Recall effectiveness is a priority for this Commission. We are dedicating significant resources and staff time in an effort to better understand consumer activity, best practices, and ultimately, how the Commission could improve the recall process to improve effectiveness. The Commission's concerted effort includes a comprehensive literature search, and this spring, the Commission will convene a recall effectiveness roundtable that will include CPSC staff, consumer advocates, members of industry, marketing professionals, social scientists, as well as members of academia.[2] In addition, we are examining how recall effectiveness should be measured, and what measures, or combination of measures, will achieve maximum results.

[2] The Recall Effectiveness Roundtable is tentatively scheduled for May 15, 2003.

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, DC 20207

STATEMENT OF THE HONORABLE MARY SHEILA GALL ON VOTE TO DENY PETITION FOR RULE REQUIRING PRODUCT REGISTRATION CARDS

March 7, 2003

Today I voted to deny the petition submitted by the Consumer Federation of America requesting that the Commission require manufacturers, distributors, retailers or importers of children's products to include a product registration card (PRC) with their products. I voted to deny the petition for three reasons. First, a PRC would not materially improve the ability of the Commission and of manufacturers, distributors and retailers to recall defective products, and would certainly not be worth the costs that it would entail. Second, the Commission lacks the legal authority to require the PRC requested by the petitioners, at least for the broad category of products specified in the petition. Third, any rule requiring a PRC for such a broad category of products would likely violate the equal protection clause of the Constitution. Since I find the petition to be fundamentally flawed, I have decided that it should be denied, rather than merely deferred. I strongly support the ongoing effort of the staff to enhance recall effectiveness, and I recognize that PRCs may be helpful items for manufacturers to include for certain classes of consumer products.

Ineffectiveness of Proposed Rule to Improve Product Recalls

Utility of Database

PRC Return Rates

The petition submitted by CFA suggests the Commission should issue a rule requiring product registration cards *with every product intended for children*. It asks that the Commission require that these records be kept for 20 years or the useful life of the product, whichever is longer. None of the evidence presented to the Commission shows that such a requirement would materially improve the ability of manufacturers, private labelers, or importers to recall defective products at some point in the future.

The utility of a product registration card depends, first and foremost, on the successful completion and return of the card to the manufacturer. The most helpful evidence of registration card return rates available to the Commission is a study conducted by the National Highway Traffic Safety Administration (NHTSA) on the return rates and recall history of child safety seats for use in automobiles. It is virtually inconceivable that any Commission-mandated program of PRCs could exceed the rate experience by the manufacturers of child safety seats. Child safety seats are an explicit safety item; they have no other function than to restrain a child in the event

of an automobile accident. Moreover, automobile accidents are a common and well-recognized hazard of modern life. Finally, NHTSA regulations require that the postage-prepaid card contain no marketing questions and that it be placed where the consumer cannot help but notice it when the consumer uses the seat.

On October 2002, NHTSA issued a study detailing the effectiveness of its child safety seat registration program. This study showed that a requirement that manufacturers include a product registration card with child safety seats was associated with increasing registration from an average of approximately 3% to an average of approximately 27%. The increase in car seats returned for repair when recalled, however, increased less—from 13.8% to 21.5%. These low response rates for the cards and even lower return rates were associated with a product which has an explicit safety function. With such low response and return rates involved with a relatively expensive *safety-related* product, it is very likely that the return and response rates associated with a less expensive, *non-safety related* product would be even lower.

Pilot studies of card return rates conducted by manufacturers of products subject to the jurisdiction of the Commission show rates of card return at about the same rate as that shown in the NHTSA study. The most extensive pilot program measuring return rates of PRCs was conducted by Toro, and involved PRCs for leaf blowers. Toro experienced a PRC return rate that averaged about 7%. Significantly, these cards contained no marketing information and were postage-prepaid. There is little more that could be done to facilitate return of the cards. The results experienced by Toro are consistent with results submitted to the Commission by Equifax, which showed PRC return rates ranging from 38% for an $800 refrigerator to 3-9% for low-priced appliances. Mattel also ran a limited pilot program of PRCs for its Power Wheels line of motorized toys and achieved a return rate of 30%. While this return rate appears impressive on its face, particular circumstances probably resulted in an abnormally high return rate. The item in question was a high-end, relatively expensive toy that had been subject to recent highly publicized recalls. Moreover, Mattel sent out only 5,000 PRCs when a normal test distribution for such cards, according to Equifax, is 10,000 PRCs. Mattel, in fact, found the results so disappointing that it abandoned the pilot project.

Utility of Information Contained in Returned PRCs

The low-response rate is not the only factor limiting the utility of the database. Address changes and the disposal of products contribute to making the data less and less useful over time. As the Commission's Directorate for Economic Analysis stated, "[t]he benefits of maintaining the data will decrease with each additional year." Census studies indicate that 40 million people change address annually in the United States, and the "average" person moves once about every 5-6 years. The utility of a PRC database is further limited by the fact that children's products are often sold by the original consumers at thrift stores, yard sales, and so on. The information on the cards would be useless in notifying those consumers who purchased the product second-hand. The NHTSA study referred to in the preceding section found that the usefulness of the database maintained for child safety seats had *declined* to 10-13% after only three years.

In contrast to the minimal benefit associated with maintenance of a PRC database, the costs associated with generating PRCs and maintaining a PRC database would likely be substantial. The report from the Commission's Directorate for Economic Analysis projects a cost of between 32 and 80 cents per card for producing the cards, inserting them in the product packages, and performing data entry. The report finds that the total cost of the petition's

proposal "may very well be in the hundreds of millions of dollars annually." In addition, the cost per card would increase if the manufacturers were required to pre-label the cards with the name and model number of the product. Thus, the petition's requirement of maintaining the records for the longer of 20 years or the useful life of the product would impose an expense on the manufacturer with very little benefit, and a benefit that would decrease with each year.

Logistic and Enforcement Uncertainty

Not only is maintaining a database of questionable utility, it is fraught with logistical uncertainty. For example, would the manufacturer be responsible for keeping the PRC information current and, if so, how would such a task be accomplished? Would the rule specify a particular form or manner in which the cards must be stored, and, if so, would this necessitate that the CPSC issue regulations detailing such specifications? NHTSA regulations for child safety seats require that registration information be placed on the seat itself and NHTSA provides a registration form for child safety seats on its own website. Would Commission PRC regulations have similar requirements and would the Commission offer a similar service?

The enforcement issues are similarly unanswered and equally problematic. Again, what would constitute adequate recordkeeping? How would an enforcer determine whether all cards returned to the manufacturer were in fact being stored? Would the manufacturer be subjected to random inspections by the CPSC? Finally, what would be the resulting penalty if a manufacturer were found to have violated the requirement?

Legal Authority

Many commentators on the petition challenged the legal authority of the Commission to issue a rule requiring PRCs for a product category as broad as that of "children's products." The Commission's Office of General Counsel (OGC), however, adopted the view that the Commission does have the authority under Section 16(b) of the Consumer Product Safety Act (CPSA) to adopt a rule as broad as that requested by the petitioner. I am, however, unpersuaded by OGC's reasoning and do not believe the Commission has the legal authority to issue regulations of the scope requested by the petitioner.

Consumer Product Safety and Hazardous Substance Regulations

Both the CPSA and FHSA have provisions that give the Commission the authority to set "consumer product safety rules" or to set regulations for "hazardous substances." Both the CPSA and the FHSA contain elaborate requirements (three-stage rulemaking) and findings that must be made in order to impose regulations. If the Commission follows the rule-promulgation requirements and makes the findings set forth in the CPSA or the FHSA, it could adopt a requirement for a PRC on a product-by-product basis. The Commission's authority to require PRC for broad categories of products is, however, much more tenuous.

Administrative Regulations

In addition to its authority to promulgate product safety regulations, Congress has delegated to the Commission the authority to promulgate regulations that can best be characterized as administrative, that is, regulations designed to facilitate administration of the

rest of the statutes. The OGC has cited CPSA Section 16(b) as authority for the Commission to issue a regulation, following the procedures of the Administrative Procedures Act, requiring PRCs for the broad category of products requested by the petitioners. I find that neither the plain meaning of this section, nor the legislative history of the CPSA, gives any meaningful support for the proposition that the Commission has the requested authority.

Plain Meaning of the Statute

If a statute's meaning is clear on its face, then no further interpretation or construction is necessary. Neither the plain meaning of the CPSA nor the FHSA gives the Commission authority to take the action requested by the petitioners.

Consumer Product Safety Act

Section 16(b) of the CPSA provides, in pertinent part:

> Every person who is a manufacturer, private labeler, or distributor of a consumer product shall establish and maintain such records, make such reports, and provide such information as the Commission may, by rule, reasonably require for the purposes of implementing this Act, or to determine compliance with rules or orders prescribed by this Act.

This statute gives the Commission authority to require that manufacturers, private labelers and distributors: (1) maintain records; (2) make reports; and (3) provide information. A PRC is obviously not a record nor is it a report. A PRC does provide information *about and to a consumer*, but the statute is best interpreted as giving the Commission authority to provide information *to the Commission.*

Black's Law Dictionary defines record as: "A written account of some act, transaction, or instrument, drawn up, under authority of law, by a proper officer, and designed to remain as a memorial or permanent evidence of the matters to which it relates." Similarly, *Websters 3d International Dictionary* defines record as: "[a] piece of writing that recounts or attests to something." A PRC is clearly neither of these things. It is a piece of paper sent to the consumer, which may or may not be returned. If it is not returned, and the clear experience of most manufacturers who have placed PRCs with products is that most PRCs will never be returned, then there is no record. Recordkeeping authority cannot be authority to require actions that depend on the response of numerous other persons to generate the records.

Black's Law Dictionary defines report as: "An official or formal statement of facts or proceedings." Similarly, *Websters 3d International Dictionary* defines report as "something that gives information, usually a detailed account or statement." To the extent a "report" is a statement of details, a PRC is even less a report than it is a record, for the reasons set forth in the preceding paragraph. To the extent that a PRC is merely something that gives information, the discussion in the subsequent paragraph demonstrates that Congress's intent was that the Commission's authority extend only to requiring manufacturers, private labelers and importers to furnish information to the Commission itself.

The purpose of a PRC is to provide information about consumers to manufacturers by the consumers themselves. But the Commission has no authority to require consumers to fill out and return PRCs, or to otherwise identify themselves to manufacturers, private labelers and distributors. A PRC does provide a limited amount of information *to* a consumer: that the manufacturer is keeping some sort of record of persons that return the PRC and that the information provided by that consumer in the PRC will become a part of that database. A very expansive interpretation of the authority to "provide information" might lead to a conclusion that the Commission has the authority to require PRCs because it is information provided to a consumer. (A similar argument could also be made to try and justify a PRC under the Commission's authority to require manufacturers, private labelers and importers to make reports.) I do not believe, however, that such far-reaching interpretations are justified, for two reasons.

First, when Congress gave the Commission explicit authority to require manufacturers to provide information to consumers, it did so only after requiring the Commission to make specific findings. For example, Section 15(c) of the CPSA gives the Commission the authority to require manufacturers, distributors and retailers to mail notice to persons to whom the person required to give notice knows such product was delivered or sold. But to require the mailing of such notice, the Commission must first make a finding that the product in question represents a "substantial product hazard" within the meaning of CPSA Section 15(a) and that notification is required to adequately protect the public from the substantial product hazard. Similarly, CPSA Section 27(e) gives the Commission the authority to require manufacturers to provide notification of performance and technical data to prospective purchasers and to first purchasers, but it must do so by rule. Thus, when Congress authorized the Commission to order manufacturers, distributors and retailers to communicate directly with persons who had purchased their products, it mentioned the authority explicitly, and specified the conditions under which it could be exercised with great specificity. I find it highly implausible that Congress could have intended a general grant of administrative authority to "provide information," as blanket authority to require widespread communication with consumers in the absence of either the findings of substantial product hazard or a consumer product safety rule.

The second reason why the grant of authority to provide information is not authority to require PRCs is that the words "provide such information" follow references to reports and records. Reports or records maintained by manufacturers, private labelers or distributors would be of extremely limited use to ordinary consumers. The most plausible interpretation of the "provide such information" authority is that it grants the Commission the power to require manufacturers, private labelers or distributors to provide information *to the Commission itself.* The Commission certainly can use the records, reports and other information that a manufacturer, private labeler or distributor furnishes to determine if there is a substantial product hazard and the appropriate remedy for that hazard. Section 27(b)(1) of the CPSA gives the Commission the authority to require persons to make reports and answer questions, and CPSA Section 27(b)(3) gives the Commission subpoena power to require the production of documentary evidence. Both these sections bolster the argument that the Commission's authority under CPSA Section 16(b) is limited to reports, records and information that will be of

utility to the Commission itself, and is not a wide-ranging grant of authority to require manufacturers, private labelers and distributors to communicate with consumers through PRCs.

The final reason why I reject Section 16(b) as authority for the Commission to require the placement of PRCs in consumer products is its "bootstrapping" aspect. Put most fundamentally, the argument for Section 16(b) authority is that because the Commission can require manufacturers, private labelers and distributors to maintain records, make reports and provide information, it has implicit authority to require that manufacturers, private labelers and distributors *undertake activities* that create records, reports or information, whether or not the manufacturers, private labelers and distributors would have undertaken the activity in the absence of the Commission regulation. I simply reject such an expansive interpretation of a section that, on its face, is a grant of simple administrative authority.

Federal Hazardous Substances Act

If the Commission's authority to require PRCs under the plain meaning of the CPSA is highly tenuous, it is simply non-existent under the FHSA. Section 10(a) of the FHSA grants the Commission the "authority to promulgate regulations for the efficient enforcement of this Act." For all the reasons set forth in the preceding discussion, there is simply no way that "efficient enforcement" of the FHSA can be bootstrapped into authority to require a widespread and far-reaching program of PRCs. The lack of authority under the FHSA is a particularly difficult hurdle for the petition in question, since the Commission regulates children's products under the authority of FHSA Section 2(f)(1)(D).

Legislative History

The preceding sections of this statement have shown that the plain meaning of CPSA Section 16(b) does not confer upon the Commission the authority to require manufacturers, private labelers or distributors to include PRCs with their products. There is, therefore, no *need* to resort to legislative history to interpret the statute. The legislative history that exists, however, demonstrates that Congress considered, *and explicitly rejected*, precisely the authority that the petitioners ask the Commission to assert.

The Text of the Senate Bill

The Senate version of the bill that eventually became the CPSA did contain a section that explicitly authorized the Commission to promulgate regulations to require manufacturers, importers, distributors, dealers and consumers to follow procedures to secure and maintain lists of first purchasers for the use of manufacturers and importers. But even this Senate version of the bill did not grant authority as expansive as that now claimed for CPSA Section 16(b). The authority conferred by the Senate bill was limited to "consumer products for which consumer product safety standards have been promulgated" (regulated products). It also required that the Commission consider a number of factors in deciding whether the maintenance of a list of first purchasers was justified: (1) severity of the injury that would result if a consumer product did not comply with a consumer product safety standard; (2) the likelihood that a product would not conform to a consumer product safety standard; and (3) the burden imposed by the requirement

that the manufacturer or importer maintain the lists of first purchasers. Thus, even if the Senate version of the bill creating the CPSA had become the law, the Commission's authority would have been limited to regulated products and would have required explicit findings of severity of injury, likelihood of noncompliance and burden of maintenance. This is much more constrained authority than that claimed for CPSA Section 16(b) and certainly much more limited than that which would be required to issue regulations such as those requested by the petition.

But the argument that the Senate bill confers authority such as that now claimed for CPSA Section 16(b) is even weaker than it appears. The Senate bill also had a section similar to that of existing CPSA Section 16(b). The drafters of the Senate bill, therefore, included *both* an "administrative authority" section *and* a section explicitly giving the Commission authority to require the maintenance of lists of first purchasers. Evidently the drafters of the Senate bill found that the administrative authority conferred by what became Section 16(b) was *insufficient* to confer authority to maintain lists of first purchasers; otherwise, why have a separate section conferring that authority?

The Conference Result

Whatever the Senate bill meant is moot, because the specific authority to require maintenance of a list of first purchasers was removed in the House-Senate conference that produced the CPSA. Courts using legislative history to interpret statutes usually assume that the adopted version was chosen for substantive reasons. In this case the most plausible reason why the House-Senate conference adopted a version of the bill without the "list of first purchaser authority" contained in the Senate bill was that it *did not want the Commission to have the authority conferred by that section of the Senate bill.*

The Office of General Counsel, however, rejected this most plausible explanation for why the final version of the CPSA lacked the "list of first purchaser authority" contained in the Senate bill. It contends that Congress somehow meant to confer *even greater authority* on the Commission. I find no authority cited for the general proposition that the rejection of a limited amount of authority implies the grant of even greater authority, nor do I expect that any such authority exists.

The second reason that I find the OGC position unpersuasive is that the differences between the House and Senate version of the recordkeeping portions of the bill did not deal with maintaining lists of first purchasers. The Senate bill's recordkeeping provisions were broader than the House bill's in that they extended to retailers, but more limited in that they pertained only to regulated products. The House version excluded retailers but gave the Commission authority to promulgate recordkeeping requirements for manufacturers, private labelers and distributors of non-regulated products. There was no explanation of why the conferees chose the House version, although the House Committee Report accompanying the House bill noted an explicit objection to requiring retailers to keep records, make reports, or provide information by Commission order. The notion that the House-Senate conferees intended, by adopting the House version of recordkeeping authority, to incorporate another authority contained in an entirely separate section of a Senate bill that was not adopted, and to do so without any explanation, or even noting that they were doing so, borders on the incredible.

The final reason that I reject the OGC position is that I do not find the statement of Senator Moss to be very good authority as to the meaning of Section 16(b). It is true that Senator Moss stated that CPSA Section 16(b) did contain the authority to require maintenance of lists of first purchasers. But *Senator* Moss was undoubtedly a proponent of the *Senate* version of the bill. It is significant that OGC cites nothing in the Statement of Managers resembling Senator Moss's interpretation of CPSA Section 16(b). It is an accepted principle of using legislative history in statutory interpretation that the characterizations of a law's meaning by those legislators whose language was dropped are not persuasive. Put more bluntly, the losers do not get to write persuasive legislative history. I suspect even Senator Moss realized that the CPSA did not have the authority that he had hoped to give to the Commission. He stated that it was "his hope" that the Commission would look to the guidelines set forth in the Senate bill to determine which manufacturers, private labelers or distributors should be required to maintain first purchaser information. "Hope" is not the term that legislators typically use when they are explaining what they think the "law" is.

There is no legislative history on point concerning the Commission's authority under FHSA Section 10(a) and, as explained previously, its plain meaning cannot be interpreted to confer upon the Commission the authority to require manufacturers, private labelers, or distributors to include PRCs with their products. Similarly, there is no authority under the CPSA 16(b) to require *retailers* even to maintain records, make reports and provide information.

Constitutional Implications

As the preceding section has made clear, the Commission does not have the authority under CPSA Section 16(b) or FHSA Section 10(a) to promulgate a rule requiring manufacturers, private labelers or importers to maintain lists of first purchasers for children's products. Even if these statutes could be tortured to grant the Commission such authority, a regulation requiring maintenance of lists of first purchasers of children's products would be subject to a significant challenge under the U.S. Constitution. Persons subject to the regulations of the Commission are entitled to "due process of law" within the meaning of the Fifth Amendment to the Constitution, and that phrase has been construed to mean equal protection of the laws.

Courts reviewing health and safety regulations such as those promulgated and enforced by the Commission traditionally show great deference to the decisions of the administrative agency, and will sustain regulations applicable to some members of the regulated community and not to others as long as the distinction has a rational basis. I am, however, extremely skeptical that the scope of the regulation requested by the petitioners (children's products) has even a rational basis. I know of no evidence that children's products are more dangerous than other products (particularly tools such as chain saws or power nailers, motorized vehicles such as all-terrain vehicles, or explosives such as fireworks). Nor do I find the recall history of children's products persuasive evidence of a rational basis, since the number of recalls may not be at all disproportionate to the numbers and types of children's products distributed. Thus a regulation as broad as that requested by the Commission would raise significant equal protection issues, and I am very skeptical that the Commission could develop a record sufficient to establish even a rational basis for such a regulation.

Further Commission Action

In 2001 the Commission directed the staff to begin a project to evaluate recall effectiveness. That project has been ongoing and has involved a literature search by a contractor and several meetings in which aspects of recall effectiveness have been discussed. There will be further meetings this year and I anticipate that the staff will have a series of recommendations to enhance recall effectiveness in 2004. As part of that effort, the staff has been examining and evaluating mechanisms through which manufacturers can communicate with consumers in the event of a recall, including PRCs. One company, Toro, continues its pilot project to evaluate what type of PRC yields the greatest response and the results of this pilot project will be a part of the staff project. Many manufacturers presently insert PRCs with their products and the results of the staff project will be available to them so that they can evaluate their PRC programs. But it is abundantly clear that the Commission's existing legal authority and the known effectiveness of PRCs will not sustain even the commencement of regulations requiring them.

The Commission staff recommended that the Commission defer action on the petition to await results of the ongoing project to evaluate recall effectiveness. While I understand the basis for the staff recommendation, I find that the petition is so fundamentally flawed that there is simply no basis for further consideration. The staff's recall effectiveness project should be allowed to go forward without the necessity to develop a record to rule on this petition at a later time.

On June 19, 2001 the Commission staff submitted a briefing package to the Commission recommending that the Commission promulgate an Advance Notice of Proposed Rulemaking (ANPR) that would require manufacturers, private labelers and importers of both children's products and of small countertop appliances to insert PRCs with their products. For the reasons set forth in these views on the merits of the petition, of the Commission's legal authority to promulgate such regulations, and of the probable Constitutional invalidity of such regulations, the staff recommendation should be rejected and no such ANPR should be issued.

Conclusion

Enhancing recall effectiveness is one of the greatest challenges faced by the Commission. Effective recalls require integration of consumer notification, motivation and logistics. Unhappily, there are no easy solutions and it is both tragic and frustrating when a previously recalled product injures or kills a consumer. But the temptation to seize on easy-sounding, but ineffective remedies, such as mandatory PRCs, must be rejected, and the Commission must do the hard work to develop programs that truly do remove defective products from consumers' hands.

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WASHINGTON, DC 20207

SUMMARY STATEMENT OF THE HONORABLE MARY SHEILA GALL ON VOTE TO DENY PETITION FOR RULE REQUIRING PRODUCT REGISTRATION CARDS

March 7, 2003

Today I voted to deny the petition submitted by the Consumer Federation of America requesting that the Commission require manufacturers, distributors, retailers or importers of children's products to include a product registration card (PRC) with their products. There are three grounds on which I base my decision to deny the petition. Following is a summary of these grounds; a more detailed explanation is provided in my full statement.

First, a PRC would not materially improve the ability of the Commission and of manufacturers, distributors and retailers to recall defective products, and would certainly not be worth the costs that it would entail. Studies have shown that the return rates on product registration cards, even for expensive safety-related products, are low. In contrast, the costs of generating the cards and maintaining them in a database would likely be substantial.

Second, neither the plain meaning of the Consumer Product Safety Act (CPSA) nor the Federal Hazardous Substances Act (FHSA) provides the Commission with the legal authority to require the maintenance of a PRC database as requested by the petitioners. Furthermore, the legislative history of the CPSA demonstrates that Congress considered, *and explicitly rejected,* precisely the authority that the petitioners ask the Commission to assert.

Third, any rule requiring a PRC for such a broad category of products would likely violate the equal protection clause of the Constitution. Specifically, there is no rational basis for singling out children's products as products requiring PRCs, since there is no evidence that children's products are any more dangerous than other products.

Since I find the petition to be fundamentally flawed, I have decided that it should be denied, rather than merely deferred. I strongly support the ongoing effort of the staff to enhance recall effectiveness, and I recognize that PRCs may be helpful items for manufacturers to include for certain classes of consumer products.

MOTION OF COMMISSIONER GALL

The Commission deny petition CP 01-1 by the Consumer Federation of America, requesting that the Commission begin rulemaking procedures to require manufacturers, distributors retailers of importers to include product registration cards with children's products.

UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, DC 20207

STATEMENT OF THE HONORABLE THOMAS H. MOORE
On Petition CP 01-1 Requesting that the Commission Issue a Rule Requiring Product Registration Cards with Every Product Intended for Children
March 7, 2003

Today I offered a motion to grant the petition of the Consumer Federation of America as a vehicle for a formal, comprehensive review of recall effectiveness at this agency. That motion was defeated. I then voted against a motion to deny the petition. That motion was adopted. While I am disappointed that we have not begun the formal process that I believe is necessary to give this issue the prominence it deserves, I believe that my fellow Commissioners are also serious in wanting to address the issues raised by our staff in the briefing package.

There are enough legitimate questions surrounding the best method for determining what constitutes an effective recall in any particular case to merit careful review before we make assumptions about the present recall system or about a possibly more effective future one. I view an ANPR as a fact-finding step. It may lead to a full-blown rulemaking proceeding, or it may not. However, the answers we might have gotten through the ANPR process to the questions staff posed in their recent briefing package could have helped determine what future steps are necessary.

There are many types of products, many ways of notifying consumers about recalls and many reasons why consumers who have received notice of a recall fail to respond to it. Certainly we should examine the petitioner's proposal regarding children's products. The recent study by the National Highway Traffic Safety Administration should provide us with many insights into the effectiveness of a product registration card proposal. But, again, I think that it is important to look at the larger picture before we focus on the particular. An ANPR would help us achieve that focus.

Notwithstanding today's vote, the Commission staff is planning a recall effectiveness forum later this year. This forum will bring in many of the people who have already presented specific, discrete issues, such as product registration cards and direct notification of credit card customers, together with others who have information to share of a broader nature. If we had issued an Advance Notice of Proposed Rulemaking (ANPR), it could have helped to define the scope of that discussion and given the forum more visibility and perhaps more credibility than similar forums have had in the past.

At this stage, it is unclear what might flow from the upcoming forum. The issuance of an ANPR (or even a Notice of Proposed Rulemaking) is still a possibility. However, deferring or denying action on the petition, at this time, could send the wrong signal, even though we intend that staff will continue to work on this issue. I fear that if the recall effectiveness issue is kept at the informal project level that it may be overwhelmed by projects having more formal standing. For this reason I think it is important to put it in a procedural framework now where it will get the visibility and funding it deserves.

Everyone who spoke at the briefing recognized the need for attention to improved recall effectiveness. Industry has offered its help and I look forward to working with them. I know they realize that having the most effective and efficient recall procedure works to their benefit as well as to that of the consumer. I thank the petitioner and our Compliance staff for raising this issue. The proposal put forth by the Compliance staff in June 2001 should also be incorporated into any future proceeding on recall effectiveness.

MOTION BY COMMISSIONER MOORE:

I move to grant petition CP 01-1 and I also move to expand its scope and direct the staff to prepare an Advance Notice of Proposed Rulemaking that would consider the full range of issues and options encompassed by the term "recall effectiveness" and not merely the limited issues presented by the proposal for product registration cards for children's products.

MOORE DISCUSSION ON HIS MOTION:

I view an ANPR as a fact-finding step. It may lead to a full-blown rulemaking proceeding, or it may not. But an ANPR will provide answers to the questions the staff has posed in this recent briefing package and will help determine what future steps are necessary.

Deferring action on the petition sends the wrong signal, even though we intend that staff will continue to work on this issue. I have supported the staff's recall effectiveness project, but I fear if it is kept at the informal project level

that it may be overwhelmed by projects having more formal standing. For this reason I think it is important to put it in a framework where it will get the visibility and funding it deserves.

My motion recognizes that there are many types of products, many ways of notifying consumers about recalls and many reasons why consumers who have received notice of a recall fail to respond to it. Certainly we will examine the petitioner's proposal with regard to children's products. The recent study by the National Highway Traffic Safety Administration should provide us with many insights into the effectiveness of a product registration card proposal. But I think it is important to look at the larger picture before we focus on the particular. An ANPR will help us achieve that focus.

Everyone who spoke at the briefing a couple of weeks ago recognized the need for attention to improved recall effectiveness. Industry has offered its help and I look forward to working with them. I know they realize that having the most effective and efficient recall procedure works to their benefit as well as to that of the consumer. I

thank the petitioner and our Compliance staff for raising this issue. The proposal put forth by the Compliance staff in June 2001 should also be incorporated into this proceeding.