Federal Consumer Protection and the Toy Industry: The Dilemma of Legislative Exclusion

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FEDERAL CONSUMER PROTECTION AND THE TOY INDUSTRY: THE DILEMMA OF LEGISLATIVE EXCLUSION

Toys are big business in America. Like other industries, the toy manufacturers have become increasingly concerned with problems of product safety and consumer protection. Unlike most other industries, however, the toy industry is subject to regulation by the Federal government which differs from that applied to other industries. The toy industry has been excluded from regulation under the provisions of the new and significant Consumer Product Safety Act [hereinafter cited as CPSA]. This exclusion should be a matter of great public and legislative concern. Toys are found in most, if not all, American households. Children are much more susceptible than adults to product-related injuries as they are unable to detect product hazards and defects and are therefore less able to escape harm. Public policy generally dictates that society do all it can to protect children from their defective playthings.

The American toy industry, in its present large corporate form, started to develop around 1950. Before then, it was only a small industry depending heavily on imported products. During World War II, national grocery and variety chain stores found that their regular stock line was affected, often drastically, by wartime shortages. As a last resort in an effort to keep retail stores stocked with consumer goods, the chain stores turned to toys. Following the war, the domestic toy industry regularly supplied these stores, while also beginning to manufacture more and import less.2

The toy industry currently merchandises goods worth approximately, at wholesale prices, $2,652,000,000 yearly.3 The huge

3. This figure includes the manufacture of toys, games, and Christmas decorations, but excludes such items as bicycles. Ernst and Ernst, unpublished study available at headquarters of the Toy Manufacturers of America, 200 Fifth Avenue, New York, New York 10010.
industry produces approximately 150,000 different toy products. The largest domestic toy manufacturer, Mattel, has annual toy sales of over $300,000,000. The recent trend in the industry reveals that toy companies are steadily being acquired by large national companies such as General Mills, Quaker Oats, Nabisco, Consolidated Foods, and the Columbia Broadcasting System. Of the 900 domestic toy manufacturers, 250 are members of the Toy Manufacturers of America [hereinafter cited as T.M.A.], a voluntary trade association. Among other functions, the T.M.A. represents the Industry at Congressional hearings concerning toy or product safety, as well as lobbies for the toy industry, generally. The 250 member manufacturers account for 85% of the toy sales in this country.

This article will explore how and why an industry of this magnitude was excluded from coverage under the Consumer Product Safety Act and what effect this exclusion has on consumer safety. It will look at the history and present status of federal regulation of the toy industry and conclude with a recommendation for a system more equitable to both consumer and manufacturer.

I. HISTORY AND DEVELOPMENT OF PRESENT REGULATION

A. Federal Hazardous Substances Labeling Act

The legislation under which the toy industry is presently regulated, originated as the Federal Hazardous Substances Labeling Act [hereinafter cited as FHSLA]. The FHSLA was designed to protect consumers by providing uniform requirements for adequate cautionary labeling of packages containing hazardous substances. A hazardous substance was defined as any substance or mixture of substances which was toxic, corrosive,
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flammmable, or was an irritant, or a strong sensitizer, or which generated pressure through decomposition, heat, or other means. Substances which fell into the definition of “hazardous substance” had to have the capacity to cause substantial personal injury or illness during or as a proximate result of any customary or reasonably foreseeable handling or use including reasonably foreseeable ingestion by children.8

Labels, which under the FHSLA had to be affixed to packages containing “hazardous substances”, had to convey certain cautionary information.9 Although toys were not specifically mentioned in the FHSLA, those containing hazardous substances, as defined in the Act, were included within the scope of the statute.

B. Child Protection Act of 1966

During the six years following the enactment of the FHSLA, Congress realized10 that the imposition of a warning requirement for product packages had not eliminated most of the product-related tragedies and that more stringent regulations were necessary. Accordingly, the Child Protection Act of 196611 [hereinafter cited as CPA] was enacted as an amendment to the FHSLA.12 The CPA mandated two essential changes. First, coverage was extended to include unpackaged as well as packaged hazardous household substances.13 Thus, a label had to be displayed either on the package, as under the FHSLA, or directly on the article itself. The second major change from FHSLA standards authorized the Secretary of Health, Education and Welfare [hereinafter cited as Secretary] to ban the sale of toys or other children’s articles which contained any hazardous substances.14 Previously, the Act had not provided such a banning provision.

14. Child Protection Act of 1966, §3(a)(q)(1), Pub. L. No. 89-756, 80 Stat. 1303 amending 15 U.S.C. §1261 (1960). The Secretary was also empowered under this section to exempt from this regulatory measure any articles, such as chemistry sets, in which hazardous substances were an intrinsic component of their functional purpose.
The CPA, while increasing the scope of federal involvement in product safety, did not provide the needed force to cope with the national consumer product safety problem, a problem that was receiving increased media and public attention. The inefficacy of the CPA stemmed from the limited definition of "hazardous substance" which had been adopted under the FHSLA and continued unaltered under the CPA. Under this definition the FHSLA as amended by the CPA, did not regulate the electrical, mechanical, or thermal hazards which commonly caused injuries from toys.

C. National Commission on Product Safety

Aware of the inefficacy of this previous consumer product legislation, Congress established the National Commission on Product Safety\[footnote reference\] [hereinafter cited as the Commission]. They created the Commission in the hope that it would solve the dilemma of the consumer's needs vis-a-vis the needs of manufacturers. Consumers required protection against unreasonable risk of bodily harm from products, while manufacturers needed a reasonable degree of uniformity in standards, as well as economic feasibility in the application of these standards. The Commission, whose members were appointed by President Lyndon B. Johnson on March 27, 1968, was charged with conducting: \[footnote reference\]

[A] comprehensive study and investigation of the scope and adequacy of measures now employed to protect consumers against unreasonable risk of injuries which may be caused by hazardous household products . . . .

This study was limited, however, by Section 6 of the joint resolution creating the Commission which defined the term "household product" to exclude products which were subject to regulation under the Federal Hazardous Substances Act and other product and substance safety legislation. Since toys were regulated under the FHSA, it would appear that an in-depth study of these products, was unauthorized.\[footnote reference\]

After conducting hearings,\[footnote reference\] the Commission, in 1969, pub-
lished an interim report confirming the general belief that existing legislation was not adequately protecting the public. The report found that self-regulation by industry was ineffective since manufacturers might subordinate safety factors to cost and marketing considerations. In addition, management was lax in seeking injury statistics on which to base the design changes which could be instituted to reduce unreasonable hazards. Therefore, the Commission recommended, as an interim measure, the enactment of the Child Protection and Toy Safety Act of 1969 [hereinafter cited as the Act of 1969 as an amendment to the Federal Hazardous Substances Act.]

The 1969 Amendment, in addition to covering the hazards enumerated above, expanded the categories of dangers against which children had to be protected, so as to include electrical, mechanical, and thermal hazards. The other important provisions of the Act of 1969 will be discussed in conjunction with a review of the Consumer Product Safety Act, infra.

The Commission issued its final report in June 1970. Confirming their earlier observation that self-regulation by trade as-

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20. Id. at 15.
21. Id. at 26.
(t) 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 electric shock.
(s) An article may be determined to present a mechanical hazard if, in normal use or when subjected to reasonably foreseeable damage or abuse, its design or manufacture presents an unreasonable risk of personal injury or illness (1) from fracture, fragmentation, or disassembly of the article, (2) from propulsion of the article (or any part or accessory thereof), (3) from points or other protrusions, surfaces, edges, openings, or closures, (4) from moving parts, (5) from lack or insufficiency of controls to reduce or stop motion, (6) as a result of self-adhering characteristics of the article, (7) because the article (or any part or accessory thereof) may be aspirated or ingested, (8) because of instability, or (9) because of any other aspect of the article's design or manufacture.
(r) An article may be determined to present a thermal hazard if, in normal use or when subjected to reasonably foreseeable damage or abuse, its design or manufacture presents an unreasonable risk of personal injury or illness because of heat as from heated parts, substances, or surfaces.
associations was "legally unenforceable and patently inadequate," the Commission noted that existing federal regulations consisted of a series of isolated acts solely concerned with specific and narrowly defined hazards. No agency, the report declared, possessed general authority to require that manufacturers conform to minimum product safety standards. Additionally, there existed no regulatory machinery with the power to enjoin manufacturers from marketing products unreasonably dangerous for public use. The Commission, seeking to remedy the deficiencies in product safety regulation which its investigation had disclosed, recommended the enactment of a comprehensive Consumer Product Safety Act, the purpose of which would be:

(1) To protect the public against unreasonable product hazards [affecting] their health and safety;
(2) To assist consumers in evaluating the comparative safety of consumer products;
(3) To aid manufacturers of consumer products by encouraging industry to develop uniform safety standards for consumer products and by minimizing conflicting state and local regulations [in instances where federal preemption did not apply];
(4) To promote research and investigation into the causes and prevention of product-related deaths and injuries.

The remarks of the Commission in its final report and in the proposed act reveal that it fully intended that the toy industry be included under the new legislation. The Commission noted that:

Statutory law has been no more successful than the common law in reducing undue risks in toys. The Federal Hazardous Substances Act, as amended by the Child Protection and Toy Safety Act of 1969, gives the Food and Drug Administration of the Department of Health, Education and Welfare authority to declare toys and other articles intended for children to be banned hazardous substances. But in our Interim Report we

26. Id., ¶402 at 2618.
27. Id.
28. Id.
29. Id. at 2799, ¶417 at 2801. The most important provisions of the proposed Act included those to create an independent federal regulatory agency, to be known as the Consumer Product Safety Commission, which would be given the authority to devise regulations, to develop mandatory safety standards, and to seek court orders to enjoin the marketing of products creating unreasonable risks of injury. Id. at 2802-2813.
30. Id. at 2802-2803.
31. Id., ¶403 at 2648-2649.
characterized the amendment as a "standby" measure only, adding we were not then "prepared...to endorse the processes, enforcement procedures, or underlying philosophy of the Federal Hazardous Substances Act." The Act does not provide for mandatory standards of safety for toys or for proscriptive restraint of hazards before toys are marketed.

The final report further observed: 32

Toys as a product category included a significant number of unreasonable hazards when we filed our Interim Report in February 1969. Our investigators found in December 1969 that neither the interest created by congressional hearings nor passage of the Child Protection and Toy Safety Act had significantly reduced the hazards...

The inadequacy of all-or-nothing banning provisions of the Federal Hazardous Substances Act... leads us to conclude that children will continue to be exposed to unreasonably hazardous toys unless regulatory methods are improved.

The Commission, thus, clearly believed that new consumer product safety legislation should extend to the toy industry which the FHSA had not been able to regulate adequately. Thus, in proposing the new legislation, although it specifically excluded from the definition of "consumer product" some products which were already covered under existing regulations, 33 the Commission did not exclude products regulated under the FHSA.

D. Proposed Consumer Product Safety Bills

Soon after the Commission presented its proposals, consumer product safety bills were introduced into Congress. The first bills, which followed the Commission's recommendation that existing consumer product safety legislation be replaced by a new act, were amended in committee to delete certain existing acts from the coverage of the proposed legislation. First, Senate Bill S.3419, 34 which followed the recommendation of the Commission, was introduced. This bill would have repealed various consumer safety laws, including the FHSA, and replaced them with a single comprehensive consumer product safety law. 35 To avoid any gap in coverage between preexisting consumer protection programs

32. Id. at 2650.
33. Id., ¶417 at 2831.
34. S. 3419 was an original bill which was reported in lieu of the previously introduced bills S.983 and S.1797.
and the new ones, orders or regulations promulgated before or under the old acts would remain in force until amended or superseded by the authority of the Commissioner of Product Safety, whose office was created by the enactment.

The Senate Labor Committee, however, amended proposed bill S.3419 so as to transfer the functions of the Secretary of Health, Education and Welfare under the FHSA, as well as under several other acts, to the new commission. Through this amendment, the FHSA was preserved in full force albeit under the auspices of the new product safety commission. Products previously regulated under the FHSA would continue to be thus regulated. The rationale for this amendment was that the framework of existing statutes had continued utility and should be preserved rather than be re-created in new legislation.

The House Commerce Committee proceeded to follow the Senate Labor Committee’s approach. In its bill, the Secretary’s functions under the FHSA and several other acts were transferred to the new agency as in the Senate version. The bill further provided that a hazard which was associated with a consumer product and which could either be prevented or reduced to an acceptable degree under the FHSA would be regulated by the new commission only in accordance with that Act.

The Joint House-Senate Conference Committee, seeking to respond to the various objections from the two legislative bodies, adopted the amended provision but noted:

"... In determining whether a risk of injury can be reduced to a sufficient extent under one of the Acts referred to in this section, it is anticipated that the Commission will consider all aspects of the risk, together with the remedial powers available to it under both the bill and the [other acts]."

These provisions for the transfer of the Secretary’s functions under the FHSA, as well as the basis upon which the existing acts would be administered, were adopted in the final version of the

37. Id. at 4593. The Committee did suggest however, that after the new agency had substantial experience, repeal of all or part of the existing Statutes should be considered.
38. House Commerce Committee, H.R. Rep. No. 92-1153, 92d Cong., 2d Sess., 30(a) and (b) (1972). This report accompanied H.R. 15003, which was subsequently approved by the House as S.3419, and became the basis for the law which was ultimately enacted.
39. Id. §30(c).
Consumer Product Safety Act. Thus the toy industry was effectively excluded from the new legislation and would continue to be regulated under the FHSA.

The toy industry had actively supported the enactment of the Senate Commerce Committee's version of the bill rather than the labor committee's since that version was comprehensive and specified that all consumer product industries were to be regulated in accordance with the provisions promulgated by the new commission. However, this prospect apparently alarmed the textile and chemical industries which had been previously regulated under the FHSA, the Poison Prevention Packaging Act of 1970 and the Flammable Fabrics Act. Accustomed to regulation under those acts, these industries were wary of the possible extension of controls which could be exerted over them under the new legislation. Their subsequently successful lobbying campaign led the Senate conferees at the behest of the House conferees, to accept the latter's version. Thus the toy industry, which was originally one of the primary targets of the new legislation, was still controlled by the FHSA.

II. EFFECT OF THE EXCLUSION ON THE TOY INDUSTRY

A. Preemption Clause

The exclusion of the toy industry from the CPSA creates two crucial problems for the industry. First, it must operate without a comprehensive preemption clause and second, it is left without the protection of certain beneficial procedures provided in the new Act.

The CPSA has a broad preemption clause, the purpose of which is to prevent conflicts between state and local regulations and the new federal standards. This clause provides that upon the promulgation of a federal standard, no state or local jurisdiction may continue to maintain and enforce statutes and rules concerning the preempted subject unless its enactments are identical to

41. 15 U.S.C. §2079 (a) and (d) (1972).
44. These events were related to the author in several interviews between April, 1973, and January, 1974 with Aaron Locker, chief counsel for the T.M.A., who was present in Washington on T.M.A. business during this period. He stated: "My observations as to the lobby effort by representatives of the chemical and textile industries were confirmed in my subsequent discussions with staff members and aides of the committees who were responsible for recommending various versions of the bill."
the federal requirements. A state or any of its political subdivisions may receive an exemption only through a Consumer Product Safety Commission [hereinafter cited as CPSC] ruling that the proposed non-federal standard or regulation: 46

(i) imposes a higher level of performance than the federal standard,
(ii) is required by compelling local conditions, and
(iii) does not unduly burden interstate commerce.

The House Committee report indicates that the preemption clause is to be all inclusive: 47

It is intended that the Federal authority—once exercised—occupy the field and broadly preempt State authority to regulate the same product safety hazards. Accordingly, the Federal preemption is intended to extend not only to State authority to set standards on labeling requirements, but also to prevent States from acting to ban products which conform to applicable Federal safety standards, where the purpose of the ban is to protect the public from the same product hazard.

The preemption clause is made all the more inclusive because of the definition given the term “commerce”. “Commerce” means trade, traffic, commerce, or transportation

(A) between a place in a State and any place outside thereof, or
(B) which affects trade, traffic, commerce, or transportation described in subparagraph (A). (emphasis added) 48

Comments by the House Committee on Interstate and Foreign Trade indicate that they intended the term “commerce” to encompass even those articles which were manufactured and distributed solely within one State: 49

The Committee’s decision to extend the reach of this bill to hazards associated with products the distribution or use of which affects commerce has two bases: First, that effective enforcement of consumer product safety standards would be impracticable if the standards applied only to products in inter-

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state commerce; and second, that the very substantial economic effects of accidents involving consumer products are by themselves sufficient to justify Federal intervention without regard to whether the particular product crosses State lines.

Therefore, since the CPSC is empowered to promulgate consumer product safety rules for products which are or will be distributed in commerce,\(^\text{50}\) (rules being either standards or orders to ban,\(^\text{51}\)) it would appear that the new agency could promulgate standards concerning products manufactured and distributed solely within one state. The preemption clause would therefore apply to rules regulating these purely intrastate products.\(^\text{52}\)

Instead of a comprehensive preemptive clause, similar to the CPSA provision, the FHSA preemptive clause only dictates that local laws providing for precautionary labeling are superseded by the act.\(^\text{53}\) Since the toy industry is regulated under the limited preemptive clause of the FHSA, every state and political subdivision may enact and enforce their own regulations concerning toy products. The toy industry views the lack of uniformity in regulation as an economically impossible situation for manufacturers who, if compelled to produce different models for localities with varying standards, must pass on the additional cost to their customers. The Commission was aware of the problems with which an industry operating without a preemptive clause would be confronted. They stated in their final report,\(^\text{54}\) “Varying local regulation of consumer products for a national market often causes insurmountable difficulty for manufacturers.”\(^\text{55}\) The Commission which recognized the problems created by the absence of

\(^{52}\) The view that the Consumer Product Safety Commission could regulate intrastate products, and that these regulations would preempt any state and local rules concerned with the same product hazards, was confirmed in a telephone interview with an attorney in the General Counsel’s Office of the Consumer Product Safety Commission in Washington, D.C., on January 30, 1974. The official, who requested anonymity, pointed out that it is almost impossible to have an intrastate product which does not affect interstate commerce since, for example, products manufactured wholly within one state commonly contain components manufactured outside of that state.

\(^{54}\) CCH CONSUMER PROD. SAFETY GUIDE ¶409 (1972).
a preemption clause could not have intended to deprive the toy industry of such an essential provision.

B. Procedures

The CPSA and the FHSA, as well as having disparate preemption clauses, have differing requirements both for promulgating rules and for reviewing these rules. Under the CPSA, consumer product safety rules must be established pursuant to 5 U.S.C. 553, except that the CPSC must give interested parties an opportunity for oral argument. Rules promulgated under the FHSA must be in accordance with 5 U.S.C. 553 or with 21 U.S.C. 371(e), both of which leave the availability of oral presentations to the discretion of the Secretary.

The two acts also have different procedures for banning hazardous substances. The CPSC must, prior to promulgating such a rule, make specific findings. These findings relate to such matters as the degree and nature of the risk involved, the number and classes of products subject to the rule, the public's need for these products, as well as the effect of such a rule on utility, cost, and availability of the items. Furthermore, if these rules are judicially reviewed, each finding must be supported by substantial evidence on the record taken as a whole. The imposition of the substantial evidence rule on review is an unusual measure. Senator Moss explained it stating, "This is a departure from the normal standard of review in recognition of the importance of [Consumer Product Safety] commission decisions to the public health and safety, as well as to the industries involved."

The FHSA's procedure for banning products differs drastically from that of the CPSA. Under the FHSA, a toy may be banned by publication of the proposed regulation in the Federal Register, followed by the opportunity for interested parties to submit written arguments with or without oral argument as men-

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56. 5 U.S.C. §553 (1966) requires that notice of the proposed banning be published in the Federal Register. Interested parties may submit written statements although the Secretary, at his discretion, may permit oral presentations. The final order of the Secretary must then be published.


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tioned above. The final order must be published. Findings need not be made as under the CPSA. If judicial review follows the banning, the rule does not have to be shown to be supported by substantial evidence.

Furthermore, the CPSA provides against immediate bannings while the FHSA does not. The CPSA provides that a product can only be banned if the CPSC finds that it presents an unreasonable risk of injury such that no feasible consumer product safety standard would provide adequate protection. [emphasis added]. Under the FHSA, any toy or other article intended for use by children which is, or contains, a hazardous substance in such a manner as to be susceptible of access by a child to whom such a toy or other article is entrusted, is automatically deemed a banned hazardous substance. The FHSA completely overlooks the possibility that a safety standard might provide the necessary protection for the public, thereby eliminating the need for a banning order. If a toy can be made safe through requiring compliance with product standards, there is no reason to ban it from the market. If it cannot be made adequately safe, it would be banned under the CPSA as well as under the FHSA. Further, if a toy presents an imminent hazard, the CPSC could go to court directly to secure an immediate seizure order. Thus the CPSA would provide as effective protection against toys pre-

63. 15 U.S.C. §1262(e)(3)(C) (1970). The Secretary's determination will not be set aside unless it is found to be:
   (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
   (B) contrary to constitutional right, power, privilege, or immunity;
   (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
   (D) without observance of procedure required by law;
   (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [title 5] or otherwise reviewed on the record of an agency hearing provided by statute; or
   (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

While this Comment is primarily concerned with the legislative history, operational effect, and functional implications of the various acts on the toy industry, it is apparent that constitutional issues are also present. Of sufficient complexity to warrant treatment in a separate article, these questions revolve around the possible denial to the toy industry of procedural due process and substantive equal protection under the provisions of the 14th Amendment. To date, the toy industry has not, through litigation, challenged the constitutionality of its exclusion from the CPSA coverage.

senting imminent hazards as that afforded by the FHSA where such toys are deemed banned hazardous substances.\(^7\)

### III. Effect of the Exclusion on the Consumer

The exclusion of the toy industry from the CPSA, in addition to impeding the operations of the Industry, also handicaps the consumer who is denied the protection of the broader opportunities for participation, as well as the expanded remedies and civil and criminal penalties provided in the CPSA.

The consumer has a much broader opportunity to participate in the proceedings authorized under the CPSA than he has under the FHSA. Under the CPSA, a consumer, or a consumer organization, can petition the CPSC for the issuance, amendment or revocation of a product safety rule.\(^8\) If the CPSC denies this petition, the consumer may commence a civil action to compel the CPSC to initiate a proceeding to take the requested action.\(^9\) In addition to the above procedure, the consumer is given the opportunity to intervene in certain hearings. He is afforded this option before the CPSC determines that a product presents a substantial product hazard\(^10\) and before hearings on whether notification is necessary in order to adequately protect the public.\(^11\)

A consumer, consumer organization, or other interested party must also be given an opportunity for a hearing prior to the time that the CPSC orders a manufacturer, distributor, or retailer to repair the defect constituting a substantial product hazard, to

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The CPSA and the FHSA, although potentially equally effective in dealing with products which present imminent hazards, operate with different procedural requirements. Under the CPSA, 15 U.S.C. §2061 (1972), the Commission must file an action in the appropriate district court to have the item declared an imminently hazardous product. The Court may then grant the temporary or permanent relief necessary to protect the public from the hazard. Under the FHSA, 15 U.S.C. §1261(q)(2) (1970), there is an administrative ban of imminently hazardous products. The Secretary publishes notice of his finding that the product is imminently hazardous in the Federal Register. The item is then considered a banned hazardous substance pending the proceedings necessary to issue a banning regulation.


70. 15 U.S.C. §2064(a) (1972):

For purposes of this section the term 'substantial product hazard' means—

(1) a failure to comply with an applicable consumer product safety rule which creates a substantial risk of injury to the public, or

(2) a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public.

replace such a product, or to refund the purchase price of the product.°

Under the FHSA there is only one situation in which a consumer may intervene. He may petition the United States Court of Appeals for review of an order of the Secretary of HEW which adversely affects the petitioner.°

The CPSA, in addition to allowing a wide variety of opportunities for consumer intervention in its proceedings, contains much broader remedial powers to protect the consumer than those found in the FHSA. The CPSA requires that a manufacturer, distributor, or retailer, who learns that a product contains a defect which could create a substantial product hazard must notify the public of such defect. Furthermore, the CPSC may order the manufacturer to elect one of the following actions to remedy the situation:°

1. Bring the product into conformity with the applicable safety standard
2. Replace the product
3. Refund the purchase price of the product

Failure to comply with these provisions would constitute a prohibited act subjecting the violator to civil and criminal sanctions.

The remedial provisions of the FHSA are limited to seizure and condemnation. Repurchase of banned substances is also required by the FHSA, although the Act does not provide any sanctions against manufacturers, distributors, or dealers who fail to repurchase the banned products.

The CPSA and the FHSA also differ substantially as to their civil and criminal penalties. The CPSA provides that any person who knowingly commits a prohibited act is subject to a civil fine of not more than $2,000 for each violation. The CPSC may also impose multiple fines for a related series of violations, the fines not to exceed $500,000.° The FHSA, on the other hand, does not provide for the imposition of any civil penalties.

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The CPSA's criminal sanctions are also more expansive than the FHSA's. Under the CPSA, any person who knowingly commits a prohibited act, after receiving notice of non-compliance from the CPSC, may be fined up to $50,000 or imprisoned for not more than one year, or both.80 Individual directors, officers, and agents are personally liable if they knowingly and willfully authorize, order, or perform any of the prohibited acts while having knowledge of the notice of noncompliance received by the corporation.81 The FHSA provides a maximum criminal penalty of not more than $3,000, or imprisonment for not more than one year, or both.82 However, there is no provision for individual liability of corporate directors, officers, or agents.83

CONCLUSION

The CPSC recently rejected the T.M.A.'s petition requesting regulation of their industry, with regard to the risks of injury associated with toys, in accordance with CPSA provisions rather than continuing to apply the FHSA.84 The Commission reasoned that although the CPSA might prove to be more efficient than the FHSA in individual cases, there was not sufficient evidence to permit the CPSC "to make the statutory determination that the risks of injury from all categories of toys could not be eliminated or reduced to a sufficient extent by action under the Federal Hazardous Substances Act."85 [emphasis added]

The Commission ought to reconsider its decision and comply with the T.M.A.'s request. A determination by the CPSC that the CPSA should regulate the nationwide, high volume, and economically important toy industry would serve the dual purpose of more effectively protecting the consumer while giving the manufacturers a more economically realistic and viable basis for producing items that are sold in countless outlets throughout the nation.

As is clear by the fact that the T.M.A. petitioned the CPSC for a change, the toy industry desires and needs to be protected

83. However, under the Food, Drug, and Cosmetic Act, 21 U.S.C. §301 et seq., §333, upon which the FHSA is patterned, courts have pierced the corporate veil and imprisoned individual officers. See: United States v. Dotterweich, 320 U.S. 277 (1943). Thus the possibility exists that courts may take the same approach under the provisions of the FHSA.
84. CCH CONSUMER PROD. SAFETY GUIDE ¶41,200 (1973).
85. Id.
by the all-inclusive federal preemption clause of the CPSA as well as by that Act's procedural regulations. No valid reason can be or has been advanced for imposing upon toy manufacturers the specter of conflicting state regulation in an industry which is so heavily involved in interstate commerce. The consumer too would benefit from the application of the CPSA to the toy industry. The expanded remedies and the opportunities for consumer participation afforded by the Act protect the consumer and also, by the nature of their operation, tend to hold manufacturers to a higher standard of care and accountability.

It is possible that the CPSC will find it advantageous to apply the CPSA's provisions to the toy industry on a piecemeal and case by case basis. Indeed, there is evidence that such selective application of the CPSA to products not heretofore covered by that Act is already occurring. The CPSC, in January, 1974, issued a final regulation which applied the CPSA's repurchase provisions to all products regulated under the FHSA. The CPSC further extended its authority over consumer products regulated by acts other than the CPSA, in February, 1974 when it issued a final regulation dealing with §2064(b) of the CPSA. This provision requires manufacturers, distributors and retailers to notify the CPSC of products which contain defects which create or could create substantial product hazards. The regulation not only expanded the type and amount of information which must be provided in order to comply with the provision, but also extended the coverage of this section to include products regulated outside of the CPSA, including those regulated under the FHSA. These two regulations create an aura of uncertainty. As a result, the toy industry is in a state of confusion as to under which Act and what circumstances they will be regulated.

89. The author's belief that selective application of the CPSA provisions, a procedure which is against public policy since it permits an agency to do on an ad hoc basis what it declines to do openly, is contemplated by the CPSC, was confirmed in an interview on January 24, 1974 with the Acting Director of the New York area office of the CPSC. The author was told that the CPSC contemplates regulating products covered by the FHSA in accordance with either the provisions of the FHSA or the CPSA—whichever proves more efficient. The author finds this position untenable in that it allows the CPSC to do indirectly what it has refused to do directly—that is, to regulate the toy industry under the CPSA. The Commission contends that it is precluded from regulating the toy industry under the CPSA unless it can be proven that the risk of injury from all categories of toys...
If the CPSC will not reverse its stand, public policy requires no less than that Congress amend the CPSA to effect the change.

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can not be eliminated or reduced to a sufficient extent under the FHSA. Yet, it intends to, and has actually begun to, adopt and enforce provisions of the CPSA which it believes will more effectively regulate the toy industry, while denying the industry the benefits it seeks under the other provisions of the CPSA.