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What You Can't Have Won't Hurt You - The Real Safety Objective of the Firearms Safety and Consumer Protection Act

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WHAT YOU CAN'T HAVE WON'T HURT YOU! THE REAL
SAFETY OBJECTIVE OF THE FIREARMS SAFETY AND
CONSUMER PROTECTION ACT

DENNIS B. WILSON¹

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I. INTRODUCTION

Federal safety regulations for articles sold to the general public have been a feature of U.S. law for about the last century. There is Federal government safety regulation of aircraft, automobiles, food, drugs, cosmetics, hazardous and toxic substances, and consumer products.² Yet firearms have been subject to only limited Federal safety regulation. This omission is surprising, since the potential of firearms to injure or kill humans is obvious. Many firearms sold to the general public are marketed for purposes of hunting or various forms of formal or informal target shooting. Yet any firearm that can kill an animal can also seriously injure or kill *homo sapiens*. Moreover, many handguns are marketed with the specific goal of enabling users to defend themselves against human adversaries, and this goal requires at least the plausible threat to injure or kill. Human nature and carelessness being what they are, it is evident that firearms may end up injuring or killing persons unintended by the shooter, including the shooter. In spite of these risks, there has been little federal safety regulation of firearms.

The issue of federal safety regulations for firearms is complicated by the vigorous debate over the desirability of private firearms ownership. One side of the debate questions the legitimacy of private firearms ownership, or at least believes that such ownership should be subject to the grant of specific authority by the government (e.g., licenses or permits). The other side contends that private firearms ownership has a long tradition in the United States, is supported by the U.S. Constitution and many state constitutions, and either does not harm or may actually improve public safety. This debate has been going on for a long time and shows no sign of abating anytime soon. Proposals to regulate the safety of firearms tend to be

²Aircraft safety is governed by the Federal Aviation Act of 1958, Pub. L. 85-726, 72 Stat. 731, Aug. 23, 1958, now codified at 49 U.S.C. §§ 44701-44672 (2003). The safety of food, drugs and cosmetics is governed by the Federal Food, Drug and Cosmetic Act, June 25, 1938, ch. 675, 52 Stat. 1040, codified at 21 U.S.C. §§ 301-397 (1999). The safety of automobiles is governed by the National Highway Traffic Safety Administration Authorization Act of 1991, Pub. L. 102-240, Title II, Part B, Dec. 18, 1999, 105 Stat. 2081, codified at 49 U.S.C. §§ 30101-30308 (2003). The safety of herbicides and pesticides is governed by the Federal Insecticide, Fungicide and Rodenticide Act, June 25, 1947, ch. 125, 61 Stat. 163, presently codified at 7 U.S.C. §§ 136-136y (2003). The safety of household chemicals and children's toys is governed by the Federal Hazardous Substances Act, Pub. L. 86-613, 74 Stat. 372, July 12, 1960, 15 U.S.C. §§ 1261-1278 (2000). The safety of consumer products in general is governed by the Consumer Product Safety Act, Pub. L. 92-573, 86 Stat. 1207, October 27, 1972, 15 U.S.C. §§ 2051-2084.

evaluated in light of how they might affect the private ownership of firearms.³ Advocates of private firearms ownership are generally suspicious of proposals to subject firearms to safety regulation. Firearms, they point out, have inherent risks and their criminal misuse is by far the greater problem. Subjecting firearms to safety regulation would mean giving some authority the power to ban firearms with certain characteristics deemed to be “unsafe,” and this power could be used to ban firearms that advocates of private firearms ownership believe are legitimate for private persons to own.⁴ Persons favoring safety regulation of firearms, on the other hand, point out that most other items of commerce are subject to safety regulation, yet those products remain in the marketplace. Such persons point to the tragic accidents involving firearms, especially accidents involving children. They also point to the presence or absence of various devices or features designed to enhance the safety of firearms.⁵ Reasonable people, they contend, should be able to understand that the safety regulation of firearms might prevent some of these accidents. Resistance to safety regulations on the part of advocates of firearms private ownership, in this view, causes needless deaths and injuries based on unfounded fears that safety regulation will lead to prohibition.

This article examines an aspect of the debate described above. It begins by describing the federal firearms safety regulation that does exist and explaining the reason that there is relatively little federal firearms safety regulation. It will then examine one legislative proposal to subject firearms to federal safety regulation, the Firearms Safety and Consumer Protection Act of 2003 (Firearms Safety Act)⁶ and compare it with the law that has been applied to seek to ensure the safety of other consumer products for over thirty years, the Consumer Product Safety Act (CPSA)⁷.

³Such an evaluation is explicit in the second part of this article. *See infra* notes 88 through 289, and accompanying text.

⁴David B. Kopel, *Treating Guns Like Consumer Products*, 148 U. PA. L. REV. 1213, 1242-46 (2000); David B. Kopel & Tim Wheeler, *Guns v. Teddy Bears*, NATIONAL REVIEW ONLINE, Jan. 13, 2004, at <http://www.nationalreview.com/kopel/wheeler-Kopel200401130846.asp>. *Gun Violence Folly*, WASHINGTON TIMES, Aug. 7, 2003 at A18 (Commenting specifically on the Firearms Safety and Consumer Protection Act of 2003, H.R. 2403, 108th Cong. (2003)).

⁵For example, in introducing the Firearms Safety and Consumer Protection Act of 2003 (S.1224), Senator Jon Corzine referred to magazine disconnectors and loaded chamber indicators as safety features that he believed to be desirable requirements for firearms. “Corzine, Kennedy Call for Gun Safety,” Press Release dated June 10, 2003. Website of the Honorable Jon Corzine. Consumer Federation of America has also advocated magazine disconnectors and loaded chamber indicators for handguns, as well as “safety locks” to make guns child-resistant. It has criticized the design of the old model Ruger Blackhawk single-action revolver as dangerous, as well as design characteristics of certain Remington Model 700 bolt action rifles. Consumer Federation of America has, however, mixed its safety message with complaints that some guns are unsafe because they are too concealable, too large and powerful and resemble military weapons too closely. Consumer Federation of America, *Health and Safety Standards for Everyday Products and Safety Standards that Could be Applied to Guns*, <http://www.consumerfed.org/products/pdf>.

⁶H.R.2403, 108th Cong. (2003) introduced by Rep. Patrick Kennedy (D-R.I.). The companion senate bill was introduced by Senator Jon Corzine (D-N.J.).

⁷Pub. L.92-573; 88 Stat.1207, Oct. 27, 1972, 15 U.S.C. §§ 2051-2084 (2000).

That comparison will demonstrate that the genuine objective of the Firearms Safety Act has little to do with the safety of firearms in the hands of consumers, but is merely an excuse to hand virtually unlimited power over the firearms industry, and possibly some authority over firearms owners, to the Attorney General. Advocates of private firearms ownership are, therefore, quite justified to be suspicious of legislative proposals purporting to regulate the safety of firearms.

II. A HISTORICAL PERSPECTIVE

A. SAAMI, Points and Criminal Misuse

Congress clearly possesses the constitutional authority to regulate commerce in firearms.⁸ Since Congress has the power to regulate commerce in firearms, it also has the power to limit commerce in firearms that pose some sort of safety problems. Congress has, in fact, shown interest in firearms safety. There were safety problems with firearms, especially during the transition that firearms underwent in the late 19th and early 20th century from propellants based on black powder to those based on smokeless powders. Smokeless powders subjected firearms to greater pressures than those to which they had been previously been subjected, and attempts to fire cartridges filled with smokeless powder in firearms designed to withstand only the pressure limitations of black powder could destroy or seriously damage the gun, and injure or even kill the shooter.⁹ Using smokeless powder in a muzzle-loading firearm stressed only for black powder almost invariably led to similar disastrous results.

To address these problems, Congress asked the manufacturers of firearms in 1926 to form an association to establish standards that would protect shooters by standardizing the pressures that cartridges could generate and the pressures that the firearms designed to use them could withstand. The manufacturers responded by forming the Sporting Arms and Ammunition Manufacturers Institute (SAAMI), which develops and publishes the standards to which firearms should be manufactured. SAAMI is recognized by the American National Standards Institute (ANSI) as the association responsible for establishing the system of voluntary standards for firearms. This system of SAAMI standards and proofing¹⁰ by

⁸U.S. CONST., art. 1, § 8, cl. 2 authorizes Congress to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Congress’s power to regulate commerce in firearms has been upheld explicitly. *United States v. Fancher*, 323 F. Supp. 1069, 1071-1072 (D.S.D. 1970); *United States v. Gross*, 313 F. Supp. 1330, 1332-1333 (S.D. Ind. 1970), *aff’d*, 451 F.2d 1355 (7th Cir. 1971). Laws purporting to regulate commerce in firearms have been overturned where the law had nothing to do with commerce in firearms (*United States v. Lopez*, 514 U.S. 549, 559-64, (1995), or attempted to conscript local law enforcement officials in a federal regulatory program (*McGee v. United States*, 863 F. Supp. 321, 326-27 (1994), *aff’d*, 79 F.3d 452, 459-62 (5th Cir. 1996), *cert. denied*, 521 U.S. 1118 (1997), but upheld where the connection to interstate commerce could be demonstrated (*United States v. Wilson*, 159 F.3d 280, 285-87 (7th Cir. 1998), *cert. denied*, 527 U.S. 1023 (1999)).

⁹For a discussion of some of the problems associated with smokeless powder, see W.W. GREENER, *THE GUN AND ITS DEVELOPMENT* 568-77 (1910).

¹⁰Proofing is a process by which a firearm is subjected to charge of propellant powder considerably in excess of that likely to be encountered in ordinary service. In the United

manufacturers or proof houses has largely eliminated the problem of firearms experiencing mechanical failures so severe that they risk endangering the shooter or bystanders.¹¹

The congressional request that led to the creation of SAAMI has not been the only federal legislative foray into safety. The Gun Control Act of 1968¹² generally prohibited the Secretary of the Treasury from authorizing the importation of firearms into the United States.¹³ The Act did create four categories of firearms that the Secretary must authorize for importation.¹⁴ One of those categories is a firearm that is generally recognized as particularly suitable for or readily adaptable to sporting purposes.¹⁵ The Act did not, however, define the term “sporting purpose.” In response to report language recommending that the Secretary of the Treasury establish an advisory council, the Secretary created the Firearms Evaluation Panel, an advisory group composed of representatives of the military, law enforcement, and the firearms communities. On the basis of those recommendations, the Bureau of Alcohol, Firearms and Tobacco¹⁶ developed a system of “points” for handguns.¹⁷ Guns with certain characteristics or features are awarded a certain number of points. In order to qualify for importation, a firearm must have a minimum number of points.¹⁸ While many of the points are awarded for features that bear no relation to safety (e.g., adjustable sights, target grips or target triggers), there are points awarded for certain safety features, apparently on the theory that “sporting purposes” meant “safer.” Automatic pistols, for example, must have a “positive manual safety device.” Such pistols also receive points for a locked breech mechanism, a loaded chamber indicator, a grip safety, a magazine safety, a firing pin block or lock, an

States manufacturers generally do their own proofing. In Europe the process is carried out by independent proof houses. SAAMI glossary *proof test* and *definitive proof* cartridge, at www.saami.org. *Sporting Arms and Ammunition Manufacturers' Institute, Inc., official website of Sporting Arms & Ammunition Manufacturers' Institute*, at <http://www.SAAMI.org> (last modified Sept. 30, 2004).

¹¹Website of the Sporting Arms and Ammunition Manufacturers Institute (SAAMI), www.saami.org. Like other private standards setting bodies, the government has no formal oversight of SAAMI activities.

¹²Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, (1968).

¹³18 U.S.C. § 922(1) (2000).

¹⁴Most of the following discussion of the action of the Department of the Treasury in implementing the “sporting purposes” exception is found in *Springfield Inc. v. Buckles*, 116 F.Supp.2d 85, 88-90 (D.D.C. 2000), *aff'd*, 292 F.3d 813 (D.C. Cir. 2002).

¹⁵18 U.S.C. § 925(d)(3) (2000).

¹⁶Since January 24, 2003 the Bureau of Alcohol, Tobacco and Firearms (BATF) is the Bureau of Alcohol, Tobacco, Firearms and Explosives and is located within the Department of Justice. Homeland Security Act of 2002 § 1111; Pub. L. 107-296, 116 Stat. 2135, Nov. 25, 2002, 6 U.S.C. § 531 (2003).

¹⁷Sporting purposes criteria for rifles and shotguns center around their similarity to military weapons. See *Springfield Inc.*, *supra* at 89-90.

¹⁸The point system is contained in a Bureau of Alcohol, Tobacco, Firearms and Explosives form labeled “Factoring Criteria for Weapons.”

external hammer and double action.¹⁹ Revolvers, by contrast, must pass a “Safety Test,” in which the hammer is retracted (automatically in the case of a double-action revolver and manually in the case of a single-action revolver) so that the firing pin does not rest on the primer of the cartridge. The safety device must withstand the impact of the weight of the revolver dropping from a distance of three feet onto the hammer spur itself. Both automatic pistols and revolvers receive extra points for frames constructed of either investment cast or forged steel, or of investment cast or forged HTS alloy, which enable the handgun to withstand greater pressures.

The point system caused some changes in imported handgun designs in order to pass the safety test. For example, some single-action revolvers based on the design of the Colt Model 1873 Single Action Army revolver were fitted with an extended base pin that could be slid rearward to block the fall of the hammer.²⁰ When applied, this safety mechanism rendered accidental discharges resulting from a blow to the external hammer impossible, and the revolver could pass the safety test.²¹ Another effect of the imposition of the system on imports was to stimulate the domestic production of such handguns, since the “point system” did not apply to firearms manufactured in the U.S.²²

¹⁹For readers unacquainted with firearms terminology, a locked breach mechanism means that the barrel is physically connected to some other portion of the pistol, usually the slide, for a portion of its travel during recoil. A “straight blow-back action,” by contrast, relies only on the inertia of the breechblock and the force of the spring to prevent the opening of the action prematurely when the gun is discharged. Guns using low-power cartridges (.22 Long Rifle, .25 ACP, .32 ACP, and .380 ACP) are usually straight blow-back, while those using higher-power cartridges (9mm Parabellum, .38 Super ACP and .45 ACP) usually incorporate a locked breech design. A loaded chamber indicator provides the shooter with a visual or tactile indicator that a cartridge is in the chamber. A grip safety is a device that must be depressed by the shooter’s hand position in order for the weapon to fire. A magazine safety prevents the gun from firing if the magazine is not inserted in the magazine well, even if a cartridge is in the chamber. A firing pin block or lock is a device that interposes itself to prevent the firing pin from reaching the primer of a cartridge in the chamber except through the normal firing process. An external hammer is a hammer that is visible to the shooter and tells the shooter visually whether or not the weapon is cocked. “Double-action” means a pistol that can either be cocked with the trigger or with the shooter’s thumb. These definitions can be found in the glossary section on the SAAMI website, www.saami.org. Whether all of these features actually improve handgun safety is a matter of debate among shooters and gun designers. For an example of a critique of the double-action feature of automatic pistols, see JEFF COOPER, COOPER ON HANDGUNS 65 (1974); GREGORY MORRISON, THE MODERN TECHNIQUE OF THE PISTOL 81-82 (1991).

²⁰Hammerli, a Swiss manufacturer of handguns, adopted such a system. COOPER, *supra* note 19, at 159.

²¹The Colt Model 1873 Single Action Army was designed for the hammer to rest on an empty chamber, in which case there is no cartridge for the hammer to strike even if it is itself struck. *Id.* Some shooters suffered accidental discharges and were injured, either because they did not know of this recommended carrying practice, or choose to disregard it. A similar system was used on the Ruger old model Blackhawk revolvers.

²²The 1968 law originally allowed the importation of parts for such guns, meaning that they could be assembled in the U.S. This provision was eliminated in 1986 by the Firearm Owner’s Protection Act, Pub. L. 99-308, May 19, 1986, 100 Stat. 449, 18 U.S.C. § 921(a)(29)(B) (2000). The legislative history is discussed in House Report No. 99-495, 4

The point system administered by the BATFE does show that a regulatory system for firearms that includes a safety component can be run for a number of years without having a prohibitory effect. Foreign manufacturers continue to import pistols and revolvers and the point system has not been modified to require so many safety features or to add other “sporting purpose” requirements so as to become a *de facto* ban on handgun importation. The BATF point system, however, applies only to imported firearms. Consumers who wish to do so may purchase firearms manufactured in the U.S. to which the point system does not apply and manufacturers who wish to avoid subjecting their firearms to the point system may arrange to have them manufactured in the U.S. Any attempt, therefore, to use the point system to achieve a prohibitory effect would have little effect other than probably to raise prices of domestically manufactured firearms in the absence of foreign competition. In addition, the point system has never been subjected to any real objective scrutiny. In theory, imported handguns subjected to the point system ought to be safer than domestically-produced handguns that do not have to meet its requirements. But there is no indication that domestically-produced handguns are involved in a disproportionate number of accidental shootings than imported handguns.²³ So the “point system” continues to be applied, and versions of it are generally the basis for state regulations of firearm, especially handgun, safety.²⁴

In addition to the limited federal legislative forays into firearms safety, there has been extensive federal legislation concerning firearms and the firearms industry, having as its objective the limiting of the criminal misuse of firearms. The Bureau of Alcohol, Tobacco, Firearms and Explosives administers the Federal laws concerning firearms.²⁵ A full discussion of all the laws and regulations concerning commerce in firearms is beyond the scope of this article,²⁶ but a brief summary follows. Firearms’

U.S. Code Cong. & Admin. News 1327, 1328, 1350 (1986). The change in the law led to the manufacture in the U.S. of small inexpensive .22 revolvers and .25 automatics, by companies such as Raven Arms, Davis Industries and Lorcin Engineering and Jennings Firearms. John Mintz, *Producing the Street Handguns of Choice is Mostly a Family Affair; Jennings Pistols are Inexpensive, Popular*, WASH. POST, Jan. 16, 1994. Manufacturers who continued to import into the U.S. modified the designs of their automatic pistols to acquire the necessary number of points. COOPER, *supra* note 19, at 172-73.

²³A literature search conducted by the author revealed no report comparing the involvement of imported handguns versus domestically-produced handguns in firearms accident and a conversation with an official of the Firearms Technology Branch at the BATFE disclosed that he knew of no such comparison and that BATFE had never sought to make one. Such a comparison would be difficult to make since it would have to involve a statistically valid survey of accidental handgun discharges in which the imported versus domestically-produced origin of the gun involved in the accident were known.

²⁴*See infra*, notes 114-116, and accompanying text.

²⁵*About ATF, Mission*, <http://atf.gov/about/mission.htm>.

²⁶For a discussion of the system of Federal regulation of commerce in firearms, see A. Braga, ET AL., *The Illegal Supply of Firearms*, 29 CRIME & JUSTICE 319, 321-24 (2002); Keersten Heskin, *Easier to Obtain than a Driver's License*, 46 FLA. L. REV. 805, 817-25 (1994); Harold Hurd, *A Reexamination of the Firearms Regulation Debate and Its Consequences*, 36 WASHBURN L.J. 196, 214-16 (1997). The Supreme Court has referred to the firearms industry as a “pervasively regulated business.” *United States v. Biswell*, 406 U.S. 311, 316 (1972).

manufacturers, importers and dealers must all obtain federal licenses.²⁷ The sale of certain types of firearms and ammunition is severely restricted: short-barreled shotguns and rifles, machine guns, and armor-piercing ammunition.²⁸ The sale of certain types of firearms is specifically permitted.²⁹ All firearms must have serial numbers.³⁰

B. The Consumer Product Safety Commission Becomes Involved

1. “Banning Bullets”

The issue of federal safety regulations for firearms arose again at the creation of the Consumer Product Safety Commission. When the bill that eventually became the CPSA was considered on the floor of the House of Representatives an amendment was offered that would have extended the definition of “consumer product” to include firearms and ammunition.³¹ The advocates of the amendment stated that firearms were associated with approximately 150,000 accidental injuries every year and that a federal safety agency concerned with consumer product safety ought to have the authority to investigate and possibly regulate the hazards associated with firearms.³² Opponents of the amendment, on the other hand, reasoned that the Commission might use product safety regulations as a way of establishing “gun control” through administrative action rather than legislation.³³ The House considered but rejected the amendment by a voice vote.³⁴ Thus the argument that the benefits of federal firearms safety regulation were outweighed by the risks of “gun control” through administrative action date from the outset of the formation of the Commission.

Despite this seemingly clear direction to stay away from regulation of firearms *and* ammunition, the Commission did become involved in controversies associated with the regulation of *ammunition*. One of the laws that Congress gave the

²⁷18 U.S.C. §§ 922-923 (2000).

²⁸The sale of armor-piercing ammunition is limited by 18 U.S.C. § 922(a)(7) (2000). The sale of short-barreled rifles and shotguns and machine guns is limited by 18 U.S.C. § 922(a)(4) (2000). The sale of semi-automatic assault weapons was formerly limited by 18 U.S.C. § 922(v)(1) (expired Sept. 13, 2004).

²⁹The firearms contained in Appendix A are specifically found *not* to be semi-automatic assault weapons. By implication, therefore, they *may be* manufactured and sold to the general public. 18 U.S.C. § 922 (v)(1), app. A (2000). Note that the statute banning semi-automatic assault weapons expired by its own terms on Sept. 12, 2004.

³⁰18 U.S.C. § 922(k).

³¹118 Cong. Rec. 31406, September 20, 1972.

³²*Id.* Remarks of Rep. Bingham.

³³*Id.* 31406-07. Remarks of Reps. Wiggins and Randall.

³⁴*Id.* Section 3(a)(1)(E) of the CPSA, 15 U.S.C. § 2052(a)(1)(E)(2000), excludes from the definition of “consumer product”, “any article which, if sold by the manufacturer, producer, or importer, would be subject to the tax imposed by Section 4181 of the Internal Revenue Code of 1954 [a 10% excise tax on pistols and revolvers and an excise tax of 11% on other firearms and ammunition] . . . or any component of such article.”

Commission the authority to administer was the Federal Hazardous Substances Act (FHSA).³⁵ Not long after the Commission began operation, Chairman Richard Simpson stated that while firearms were exempted from the Commission's jurisdiction under the CPSA, the Commission "could probably ban bullets" by virtue of its authority under the FHSA.³⁶ In response to a letter inquiring about the Chairman's remarks, the Commission's Office of the General Counsel replied that small arms ammunition was a "hazardous substance" within the meaning of Sections 2(f)(1)(A)(vi) and 2(q)(1)(B) of the FHSA.³⁷ The FHSA permits the sale of hazardous substances as long as they are properly labeled.³⁸ But the Office of the General Counsel letter also contained an ominous reference to a "banned hazardous substance,"³⁹ which cannot be sold to consumers regardless of the labeling. The opinion did state that "*to date*, no *ordinary* ammunition has been determined to be a banned hazardous substance" (emphasis added), but it did not state what it considered to be "ordinary" ammunition.⁴⁰

This interpretation of the FHSA left the Commission just one "finding" away from banning firearms ammunition, a development that would eliminate the utility of

³⁵Pub. L. 86-613; 74 stat. 372, July 12, 1960, codified at 15 U.S.C. §§ 1261-1278 (2000). Section 30(a) of the Consumer Product Safety Act (15 U.S.C. § 2079(a) (2000)) transferred authority to administer the FHSA to the Commission. Prior to the establishment of the Commission, the FHSA had been administered by the Food and Drug Administration.

³⁶The statement was made during a talk before the 4th Annual Product Liability Prevention Conference and was referred to in a letter from the Commission General Counsel Michael Brown to Neal Knox, dated December 20, 1973 and also to Russell I. Jenkins, dated January 2, 1974. The Chairman's remarks appear not to have addressed the issue of the exclusion of ammunition from the definition of consumer product within the meaning of the CPSA.

³⁷15 U.S.C. § 1261(f)(1)(A)(vi), (q)(1)(B) (2000). Section 1261 (f)(1)(A)(vi) identifies as a hazardous substance "any substance or mixture of substances which . . . generates pressure through decomposition, heat, or other means, if such substance or mixture of substances may cause substantial personal injury . . . during or as a proximate result of any customary or reasonably foreseeable handling or use."

³⁸If an item is a hazardous substance it must bear a label that meets the requirements of FHSA § 2(p)(1)-(2), 15 U.S.C. § 1261(p)(1)-(2) (2000), or it is considered a misbranded hazardous substance. It is unlawful to introduce or to deliver for introduction into interstate commerce a misbranded hazardous substance. *Id.* § 4(a); 15 U.S.C. § 1263(a) (2000).

³⁹A banned hazardous substance is defined, by FHSA § 2(q)(1)(B), 15 U.S.C. § 1261(q)(1)(B) (2000) as "any hazardous substance intended, or packaged in a form suitable for use in the household, which [the Commission] by regulation classifies as a 'banned hazardous substance' on the basis of a finding that, notwithstanding such cautionary labeling as is or may be required under this Act for that substance, the degree or nature of the hazard involved in the presence or use of such substance in households is such that the objective of the protection of the public health and safety can be adequately served only by keeping such substance, when so intended or packaged, out of the channels of interstate commerce. Exemptions were required for chemical sets and common fireworks. *Id.* Section 4(a) of the FHSA, 15 U.S.C. § 1263(a) makes it unlawful to introduce, or to deliver for introduction into interstate commerce any banned hazardous substance.

⁴⁰Letters from Commission's General Counsel Michael Brown to Neal Knox (Dec. 20, 1973) and to Russell I. Jenkins (Jan. 2, 1974).

firearms. The Commission, however, never sought to declare small arm ammunition to be a banned hazardous substance, and contented itself with labeling requirements.⁴¹ There was, however, an effort to change that situation within less than six months. Citizens for Hand Gun Control, a group advocating increasing the restrictions on private ownership of handguns, petitioned the Commission on June 22, 1974, asking it to ban the sale, distribution, and manufacture of handgun ammunition as a banned hazardous substance under the FHSA.⁴² The Commission decided, however, that the requested ban on handgun ammunition would constitute a ban on handguns themselves. The Commission, therefore, denied the petition, reasoning that Congress, by expressly excluding firearms and ammunition from the definition of “consumer product” had not conferred the authority on the Commission even to consider such a petition.⁴³ The plaintiffs sought judicial review of the Commission’s decision and asked the court, *inter alia*, for a declaratory judgment that the Commission did have the authority to declare handgun ammunition to be a banned hazardous substance, and to prohibit its manufacture, sale and distribution except for use by the military, police, security guards and licensed pistol-shooting clubs.⁴⁴ The reviewing court held that the Commission had erred in dismissing the petition. The court reasoned that, while Congress had specifically denied the Commission jurisdiction over firearms and ammunition in passing the CPSA, Congress had never amended the FHSA to make it clear that the Commission had no jurisdiction over ammunition under that statute.⁴⁵ The court, therefore, ordered the Commission to consider the merits of the petition, although it noted that even the petitioners considered it unlikely that the Commission would grant the requested relief because of the extensive findings that would be required to support the selective ban.⁴⁶ The Commission then began soliciting comments on the petition.⁴⁷

Before the Commission could get very far in the court-ordered regulatory proceeding, however, Congress intervened. Section 3 of the Consumer Product Safety Commission Improvement Act of 1976⁴⁸ made a technical change in the

⁴¹The labeling requirements were found in 16 CFR § 1500.83(a)(6) (1974). They included the common or usual name of the ammunition in the container, a statement, “Warning—Keep Out of the Reach of Children,” and the name and place of business of the manufacturer, packer, or seller or distributor. Sen. Rep. No. 91-251 at 6 (1975), accompanying S.644.

⁴²Committee for Hand Gun Control, Inc. v. Consumer Product Safety Comm., 388 F. Supp. 216, 217 (D.C. Cir. 1974).

⁴³The denial of the petition by the Commission occurred on September 5, 1974. Commission Press Release #75-016, (Feb. 14, 1975).

⁴⁴Committee for Hand Gun Control, Inc., *supra* at 219. While such exceptions were probably concessions to political reality, any ban the Commission could have imposed on handgun ammunition would have been limited to “its presence or use in households,” by the terms of the FHSA. Banning handgun ammunition in households would, of course, have been a regulatory decision with enormous consequences.

⁴⁵*Id.* at 218.

⁴⁶*Id.* at 220-21.

⁴⁷“Petition on Handgun Ammunition Published in Federal Register,” Commission Press Release #75-016 (Feb. 14, 1975).

⁴⁸Pub. L. 94-248, 90 Stat. 503, May 11, 1976.

CPSA, so as to make it clear that the Commission had no authority under the FHSA to regulate either firearms or ammunition.⁴⁹ In case the Commission remained in any doubt about its lack of authority over firearms and ammunition, Section 3(e) of the 1976 law stated explicitly: “The Consumer Product Safety Commission shall make no ruling or order that restricts the manufacture or sale of firearms, firearms ammunition, or components of firearms ammunition, including black powder or gunpowder for firearms.” The legislative history of Section 3 of the 1976 law made clear that Congress intended to nullify the decision of the district court in the *Committee for Hand Gun Control* case.⁵⁰ One sponsor of the bill stated explicitly that Congress had never intended to give the Commission the authority to regulate firearms and ammunition, and described the amendment to the CPSA as “a major victory for those Americans who believe in the Constitutional right to bear arms.”⁵¹ The Commission repealed its labeling regulations for small arms ammunition in the aftermath of the 1976 amendments to the CPSA.⁵² That legislation is the last word from Congress on the Commission’s lack of authority to regulate firearms and ammunition. Congressional hostility to Commission involvement with guns has been so profound that jurisdiction over the requirements for the markings on *toy guns* was given to the Department of Commerce, not the Commission,⁵³ even though the Commission regulates all other toys.⁵⁴

2. Recent Activities

The Commission has had very little occasion to contemplate the nature or extent of the exclusion of firearms and ammunition from its jurisdiction. The Commission has asserted jurisdiction over air guns, and has cooperated with manufacturers to

⁴⁹A sentence was added to CPSA § 3(a)(1) (15 U.S.C. § 2052(a)(1)(2000)) that stated: “Except for the regulation of [fireworks and components] the Commission shall have no authority under the functions transferred pursuant to Section 30 of this Act [including the transfer of the authority to administer the FHSA] to regulate any product or article described in subparagraph (E) of this paragraph [firearms and ammunition] . . .” The exclusion also included antique firearms supplies.

⁵⁰S. Rep. No. 94-251, (1975) at 2, 6 accompanying S. 644; H.R. No. 94-1022 at 15-16.

⁵¹S. Rep. No. 94-251, (1975) at 41 (noting the separate views of Senator Moss).

⁵²44 Fed. Reg. 42677-78 (July 13, 1979).

⁵³15 U.S.C. § 5001(b)(1) (2002) requires a blaze orange plug be inserted into the barrel of a toy, look-alike or imitation firearm. Placing the authority to regulate toy, look-alike and imitation firearms in the Department of Commerce and not the Commission was at the insistence of the Honorable John D. Dingell (D-MI), who was then the Chairman of the House Committee on Energy and Commerce. Personal recollection of the author, who was a counsel for the Republican Members of the Energy and Commerce Committee at the time; *see also* Letter from the Honorable John D. Dingell, Ranking Democratic Member, Committee on Energy and Commerce, U.S. House of Representatives to the Honorable Ann W. Brown, Chairman, U.S. Consumer Product Safety Commission, concerning markings on toy guns. (“Dingell to Brown letter”) (Aug. 8, 1995) (on file with the author).

⁵⁴FHSA § 2(f)(1)(D) (15 U.S.C. § 1261(f)(1)(D) (2000) includes in the definition of “hazardous substance,” “any toy or other article intended for use by children which the [Commission] by regulation determines, in accordance with Section 3(e) of this Act, presents an electrical, mechanical, or thermal hazard.”

conduct several recalls of such guns.⁵⁵ One of the Commission's most controversial cases involved Daisy Model 856 and 880 air rifles.⁵⁶ The Commission has also conducted recalls of equipment associated with shooting and hunting,⁵⁷ and a Commission regulation on child-resistant packaging for hydrocarbons applies to gun cleaning solvents,⁵⁸ but none of these recalls or regulations was intended to reduce the chance of an injury or death resulting from the accidental discharge of a firearm. When Ann Brown became Chairman of the Commission in 1994, there were some indications that she would push for statutory amendments to give the Commission jurisdiction over firearms, but the election of a Republican majority to Congress in 1994 made such a development very unlikely.⁵⁹ Chairman Brown even tried to take

⁵⁵The Commission has conducted several recalls of air guns in cooperation with manufacturers. "CPSC, Crosman Corporation Announce Recall of Air Rifles," Press Release #04-001 (Oct. 2, 2003); "CPSC and Gamo USA Announce Recall of BB Air Pistols," Press Release #97-140 (June 9, 1997); "Benjamin-Sheridan Corp. Recalls Co2 and Pneumatic Airguns," Press Release 92-140 (Sept. 23, 1992); "CO2 Pistol Modification Announced by Smith & Wesson and Daisy," Commission Press Release #83-066 (Dec. 1983); "Daisy BB Guns Recalled," Press Release #79-104 (Apr. 2, 1979).

⁵⁶Complaint, *In the Matter of Daisy Manufacturing Co.*, CPSC Docket No. 02-2, Oct. 30, 2001. See also, "Statement of the Honorable Mary Sheila Gall in Opposition to Issuance of Administrative Complaint Against Daisy Manufacturing Company," attachment to Commission Press Release #02-029, "CPSC Files Lawsuit Against Daisy Manufacturing Co. To Recall Two Models of Daisy's Powerline Airguns Due To Defects" (Oct. 30, 2001). J. Norell, *BB Guns & Gun Control ABCs*, AMERICAN RIFLEMAN, Jan. 2002 at 40, 41, 81; W. LaPierre, *Standing Guard*, AMERICAN RIFLEMAN, Jan. 2002 at p.12, Jan. 2002. "CPSC, Daisy Manufacturing Co. Settle Lawsuit Concerning Powerline Airguns," Commission Press Release #04-033 (Nov. 14, 2003); "Daisy Manufacturing Company, Provisional Acceptance of Settlement Agreement and Order," 68 *Fed. Reg.* 68876-68878, (Dec. 10, 2003). The Commission's decision was changed by the parents of a young man injured by the discharge of a Daisy Air rifle, however, the case was dismissed. *Mahoney v. CPSC*, No. 04-1833, 2004 U.S. Dist. Lexis 19647 (2004). See generally *Triggering Liability: Teenage Shooting Opens a Window on Safety Agency*, WALL ST. J., Apr., 29, 2004 at A.1, A.6.

⁵⁷The Commission participated with the manufacturer to recall a holster with a strap associated with the accidental discharge of Glock Series 17 and Series 19 handguns when the user inserted them into the holster. "CPSC, First Samco Inc. Announce Recall to Replace Gun Holsters," Commission Press Release #04-155, (June 9, 2004). The Commission has been involved in the recalls of a tumbler that cleans empty cartridge cases ("brass") prior to the reloading of these cases. "CPSC, Midway Arms Announce Recall of Tumblers," Commission Press Release #98-088 (Mar. 27, 1998). The Commission has also been involved in the recalls of a number of hunting tree stands and some tree stand accessories. CPSC, API Outdoors Announce Recall of Hunting Treestands," Commission Press Release #03-027 (Oct. 30, 2002).

⁵⁸Commission regulations under the FHSA require that some gun cleaning solvents be packaged in child-resistant packaging. "Household Products Containing Hydrocarbons," Final Rules, 66 *Fed. Reg.* 53951, 53952 (Oct. 25, 2001).

⁵⁹The author was told in the summer of 1995 by a member of Chairman Brown's immediate staff that members of Chairman Brown's staff had been in touch with the leadership of the National Rifle Association (NRA). Reportedly this involved at least one meeting between the staff member, the Commission's General Counsel and the Commission's Director of Congressional Relations. The NRA leadership was reportedly not receptive to the overtures to give the Commission jurisdiction over firearms.

steps to change the markings on toy guns, a product over which Congress, as noted earlier, had given jurisdiction to the Department of Commerce.⁶⁰

The Commission did confront the jurisdictional issue indirectly when it began to deal with perceived problems in gun safety locks in 2000. Gun locks are devices designed to be attached to firearms, particularly handguns, to prevent their accidental discharge.⁶¹ Commission General Counsel Michael Solender stated⁶² that gun locks were not “component parts” of pistols, revolvers, or firearms within the meaning of the pertinent regulations⁶³ of the Bureau of Alcohol, Tobacco and Firearms (BATF). The Commission counsel’s opinion referred to BATF regulations that required that a component part ordinarily be attached to a firearm during use.⁶⁴ Solender reasoned that firearm locking devices were sold with the specific intent of preventing the firearm from discharging and must be removed in order for the firearm to be used. Therefore, such devices could not be components of a firearm that would be attached during use.⁶⁵ The Commission cooperated with manufacturers of firearm locks in

⁶⁰The author attended a meeting on July 27, 1995 between representatives of the Law Enforcement Alliance, Chairman Brown and other Commission staff concerning marking on toy guns. The meeting was listed as being with Strombecker Corporation, the Office of Chairman Brown and the Commission’s Office of Congressional Relations on July 27, 1995. A further meeting on the toy gun issues took place on November 17, 1995 between Chairman Brown and representatives of Strombecker Corporation. *1995 Annual Report to Congress, United States Consumer Product Safety Commission* p. C-21. See also, Dingell to Brown Letter, *infra* note 53.

⁶¹For example, Master Lock sells Number 90 and Number 94 padlocks for firearm triggers. The National Shooting Sports Foundation sponsors a “Childsafe” program, which provides consumers with a free cable lock for firearms. www.projectchildsafes.org. In general such locks are designed to prevent access to firearms by children, although the amount of resistance that such locks must offer to a person seeking to remove them and gain access to a firearm has been the subject of debate within the voluntary standards setting process and California gun lock regulations. The characterization of the ASTM process is based on the author’s personal conversation with Commission staff who are participating in the voluntary standards setting process. See also, *Safety Standards Sought After Gun Locks Fail Test*, WASH. POST, Feb. 7, 2001 at A1 and A10. The California firearm lock requirements are found at Code of California Regulations Title 11, Division 1, Chapter 12.6, effective February 1, 2001.

⁶²Opinion of Michael S. Solender, General Counsel, U.S. Consumer Product Safety Commission, “Commission Jurisdiction over Separate Firearm Trigger Locks” (July 12, 2000) [hereinafter “Solender Trigger Lock Opinion”].

⁶³27 C.F.R. Part 53 (1999) (as cited in the Solender Trigger Lock Opinion).

⁶⁴27 C.F.R. § 53.61(b)(2) (1999) (as cited in the Solender Trigger Lock Opinion).

⁶⁵Solender Trigger Lock Opinion, p.3. The Solender Trigger Lock Opinion is well reasoned, but it is *possible* to argue that a firearm lock is a component because it interacts with the firearm mechanism to prevent operation in a manner similar to a mechanical safety incorporated into the firearm. No manufacturer or distributor of such locks has, however, attempted to make such an argument and doing so would probably subject such a lock to an 11% excise tax as a “firearm.” The Solender Trigger Lock Opinion similarly did not deal with the jurisdictional issue of “smart gun technology,” which operates to prevent firing unless the mechanism is itself manipulated or the gun itself recognizes that the operator is authorized to fire it. See, M. Kasindorf & G. Fields, *Reluctant industry pursues ‘smart’ guns*, USA TODAY, Apr. 27, 2000 at 1A, 10A. Some officials at the Bureau of Alcohol, Firearms and Tobacco

announcing three recalls,⁶⁶ and Commission staff is presently participating in two ASTM⁶⁷ subcommittees devoted to writing standards for firearms locking devices and firearm security storage containers.⁶⁸

This historical retrospective demonstrates quite clearly that Congress has chosen to rely principally on voluntary efforts within the private sector to ensure the reasonable safety of firearms. There has been considerable legislation concerning commerce in firearms, but Congress has, with limited exceptions, not legislated in the area of firearms safety. It has not done so because of fears that regulation in the name of safety could be used to ban or severely restrict commerce in firearms, which do have inherent safety risks. Congress has acted swiftly and decisively when it appeared that the agency charged with consumer product safety might try, or be forced, to exercise that authority in the area of firearms. Yet Congress has also permitted a system of imported handgun regulation that includes safety components as part of a “sporting purpose” test where that system was limited to imported firearms and where it has not been administered with the effect of seeking to prohibit firearm imports.

III. THE FIREARMS SAFETY AND CONSUMER PROTECTION ACT OF 2003

Not all Members of Congress have agreed with the general “hands-off” approach that Congress has taken towards firearms safety regulation as an institution. Senator Jon Corzine (D-N.J.) is the principal sponsor of the Firearms Safety Act, along with Representative Patrick Kennedy (D-R.I.) in the House of Representative. In a joint press release Senator Corzine and Representative Kennedy stated that they had introduced the Firearms Safety Act “to apply to firearms health and safety standards

reportedly expressed the view that the Commission should have jurisdiction over such systems, but that has never been the official view of the BATF and the Commission has not sought any explicit regulatory authority for such “smart gun technology.” Personal recollection of the author, who was Senior Legal Counsel to Commissioner Mary Sheila Gall at the time.

⁶⁶“CPSC, Sturm, Ruger & Company, Inc. Announce Recall to Replace Padlocks and Cable Gun Locks,” CPSC Press Release #01-148 (May 9, 2001); “CPSC, National Shooting Sports Foundation Announce Recall to Replace Project HomeSafe Gun Locks,” CPSC Press Release #01-078 (Feb. 7, 2001); “CPSC, Master Lock Co. Announce Recall to Replace Gun Locks,” CPSC Press Release #00-149 (July 24, 2000).

⁶⁷ASTM International (formerly the American Society for Testing and Materials) is one of a number of U.S. organizations that coordinate the development of voluntary standards through a consensus process.

⁶⁸ASTM Subcommittee F.15.53 is considering the standard for non-integral firearm locking devices (limited to cable and trigger locks), and ASTM Subcommittee F.15.55 is considering the standard for firearm security containers (gun lock boxes). Legislation has been introduced to require the Commission to promulgate *mandatory* requirements for firearm locking devices. *E.g.*, H.R. 1962, introduced on May 6, 2003 by Rep. Elliot Engel (D-N.Y.); S.866, introduced on April 10, 2003 by Sen. Herbert Kohl, (D.-Wisc.). That legislation has never been the subject of a hearing or a markup. The State of California has mandatory state requirements for firearm locking devices. CAL. PENAL CODE § 12088.2. California Department of Justice Regulations, chap. 12.6, §§ 977.10—977.90.

similar to those that apply to virtually all other products sold in America.”⁶⁹ Senator Corzine stated that poorly manufactured, cheap quality guns pose a threat and that there was no regulatory mechanism to recall defective guns or require warning labels. He gave specific examples of magazine disconnectors and loaded chamber indicators⁷⁰ as safety features that he believed would make firearms less likely to be involved in an accident. The press release also claimed that firearms manufacturers have made guns more likely to be used in crime and more deadly, citing concealability, large ammunition capacity and “larger, more lethal ammunition.”⁷¹ The sponsors claimed that the bill had the support of more than one hundred twenty national, state and local organizations.

The Firearms Safety Act contains a number of provisions. It delegates to the Attorney General both the authority and the duty to promulgate regulations governing the design, manufacture, and performance of, and commerce in, firearms products.⁷² Firearm products are very broadly defined and include firearms, firearm parts, nonpowder firearms (e.g., air rifles and BB guns) and ammunition.⁷³ Proposed regulations must be made final within 120 days and the Attorney General must consider petitions to issue, amend or repeal regulations.⁷⁴

The Firearms Safety Act gives the Attorney General the authority to enforce the regulations. The Attorney General may prohibit the manufacture, sale or transfer of a firearm product that has been manufactured, imported, transferred, or distributed in violation of a regulation.⁷⁵ In addition, the Attorney General may order manufacturers and dealers to provide notice to the public, or to repair, replace, refund the purchase price, or otherwise recall a firearm product that the Attorney General finds poses an unreasonable risk of injury to the public, does not comply with a regulation, or is defective.⁷⁶ The Attorney General is given the extraordinary authority to issue an order prohibiting the manufacture, importation, transfer, distribution or export of a firearm product “if the Attorney General determines that the exercise of other authority under this Act would not be sufficient to prevent the [firearm] product from posing an unreasonable risk of injury to the public.”⁷⁷ The Attorney General has the authority to impose both civil and criminal penalties for violations of the Act or regulations, to seek injunctive enforcement of the Act, and to bring an action to restrain the distribution of “imminently hazardous firearms.”⁷⁸

⁶⁹“Corzine, Kennedy Call for Gun Safety,” Press Release (June 10, 2003). Website of the Honorable Jon Corzine at <http://corzine.senate.gov>.

⁷⁰For a discussion of the technical aspects of these safety features, *supra* note 19.

⁷¹“Corzine, Kennedy Call for Gun Safety,” *supra* note 69.

⁷²S.1224, 108th Cong. § 101(a) (2003).

⁷³*Id.* at § 3(a)(3).

⁷⁴*Id.* at § 101(b).

⁷⁵*Id.* at § 102(a).

⁷⁶*Id.* at § 102(b).

⁷⁷*Id.* at § 102(c).

⁷⁸*Id.* at §§ 301-303, 351.

Manufacturers of firearm products must test those products to determine whether they conform to the pertinent regulations, certify that conformity, and inform the Attorney General whenever they intend to manufacture a new “type” of firearm product.⁷⁹ Firearm products must be accompanied by detailed labels.⁸⁰ Commerce in firearm products that do not conform to regulations or are in violation of an Attorney General order is prohibited, as is stockpiling of firearm products in the interval between the time a regulation is promulgated, and the time that it takes effect.⁸¹

The Firearms Safety Act creates a private action for damages for persons “aggrieved” by violations of the Act, or regulations or orders promulgated under it.⁸² The Act also provides for private enforcement by any “interested person.”⁸³ Compliance with the Act or with regulations or orders promulgated under its authority is not a defense in an action brought under State law, and the failure of the Attorney General to take an action is not admissible in any civil action involving the liability of a firearms manufacturer or dealer.⁸⁴

There are, finally, a number of miscellaneous, but not unimportant sections of the Firearms Safety Act. The Act has no preemptive effect and states and localities are free to maintain their own firearm safety laws and regulations, as long as they are more restrictive than those of the Attorney General.⁸⁵ Agencies of states, their political subdivisions, the Federal Government itself, and officers and employees of those agencies acting in their official capacities are exempt from the prohibitions of the Act.⁸⁶ Finally, the Attorney General must collect certain information about firearm-related deaths and injuries and about the firearms industry, make that information available, and make an annual report to Congress.⁸⁷

IV. COMPARING THE FIREARMS SAFETY ACT AND THE CONSUMER PRODUCT SAFETY ACT

A. *Justification*

This next section compares the sections of the Firearms Safety Act and the CPSA that share common topics and issues. Comparing the Firearms Safety Act to the CPSA as administered by the Commission is a useful exercise.⁸⁸ The CPSA and its

⁷⁹*Id.* at § 201(a) and (b).

⁸⁰*Id.* at § 201(c).

⁸¹*Id.* at §§ 201(e)-(g).

⁸²*Id.* at § 304.

⁸³*Id.* at § 305.

⁸⁴*Id.* at § 306.

⁸⁵*Id.* at § 502.

⁸⁶*Id.* at § 202.

⁸⁷S.1224, §§ 401 and 402.

⁸⁸There is no reason why one could not compare the Firearms Safety Act with the regulatory statutes and schemes for products such as automobiles, pharmaceuticals and pesticides, and perhaps such comparisons would be useful. Nevertheless, most persons and groups favoring safety regulation of firearms compare firearms to products regulated by the

administration by the Commission have been generally supported for over thirty years by the public, Congress, the regulated community and the advocacy groups that are interested in and seek to influence Commission activities. The Commission certainly has been criticized for doing too little to protect the consumer and too much to harass industry.⁸⁹ But some objective evidence suggests that the Commission has done a reasonably good job of administering the CPSA to protect the public against the risks that Congress has instructed the Commission to address.

The first piece of evidence is that Congress has not seen fit to change the CPSA since 1990.⁹⁰ Congressional committees have held hearings on the reauthorization and oversight of the Commission⁹¹, but these hearings have resulted in movement of legislation in only one case: S.1261, which the Senate passed on August 26, 2003.

Commission. Consumer Federation of America, for example, mentions Federal safety regulations for refrigerators and freezers, cribs, children's sleepwear, meat and poultry, and automobiles in endorsing the Firearms Safety and Consumer Protection Act. Consumer Fed'n of Am., Health and Safety Standards for Everyday Products and Safety Standards That Could be Applied to Guns, *available at* <http://www.consumerfed.org/products.pdf> The first four products mentioned are subject to regulations by the Commission. Another organization, "Regulateguns.org" mentions that the Commission has the authority to regulate 15,000 consumer products, but not firearms, *at* <http://www.regulateguns.org/default.asp> By contrast, the Violence Policy Center has opposed Commission regulation of firearms in favor of safety regulation by the Bureau of Alcohol, Firearms, Tobacco and Explosives, but the basis for the opposition is the regulatory process which the Commission must use. "The Treasury Department is Better Equipped than the Consumer Product Safety Commission to Regulate the Gun Industry" *at* http://www.vpc.org/fact_sht/treascp.htm

⁸⁹A criticism that the Commission is relatively ineffective to alleviate product hazards is contained in MARLA FELCHER, *IT'S NO ACCIDENT, HOW CORPORATIONS SELL DANGEROUS PRODUCTS*, 119-39, 154-199 (2001). A criticism that the Commission harasses the regulated community is contained in THOMAS HOLT, *THE RISE OF THE NANNY STATE, HOW CONSUMER ADVOCATES TRY TO RUN OUR LIVES*, x-xiv, 54-55 (1995).

⁹⁰The last reauthorization of the Commission was the Consumer Product Safety Improvement Act of 1990, Pub. L. No. 101-608, 104 Stat. 3110 (1990). Subsequent legislation has imposed labeling requirements for toys, games, marbles and small balls. Child Safety Protection Act, Pub. L. No. 102-267, 108 Stat. 722 (1994), 15 U.S.C. § 1278 (2000). This legislation was passed in response to the decision of the Commission not to proceed with rulemaking on this very subject, so it might be read as a congressional disagreement with the decision of the Commission. There were, however, intervening events. Connecticut passed its own labeling legislation and the U.S. Court of Appeals for the Second Circuit upheld it against a challenge from the toy industry. The toy industry supported the legislation because it feared inconsistent state requirements and had a special section inserted governing the preemptive effect of the legislation. H.R. REP. NO. 103-500 at 10-11 (1994).

⁹¹*Consumer Product Safety Commission*, Hearing Before the Subcommittee on Consumer Affairs, Foreign Commerce and Tourism of the Committee on Commerce, Science and Transportation, *Consumer Product Safety Commission Reauthorization: S. No. 104-570 Before the Subcommittee on Consumer Affairs, Foreign Commerce and Tourism, Committee on Commerce, Science and Transportation*, 104th Cong. (1996). *Reauthorization of the Consumer Product Safety Commission: H.R. No. 10554 Before the Subcommittee on Telecommunications, Trade and Consumer Protection, Committee on Commerce*, 105th Cong. (1997); *Consumer Safety Initiatives: Protecting the Vulnerable: H. R. Rep. 106-130 Before the Subcommittee on Telecommunications, Trade and Consumer Protection, Committee on Commerce*, 106th Cong. (2000).

Aside from technical changes pertaining to titles of certain officers of the Commission and changes in the numbers of authorized employees and the authorization levels, the bill made only two changes. It authorized the Commission itself to conduct the steps of a certain recalls if the company itself were financially unable to do so, and increased substantially the limits of civil penalties that the Commission is authorized to collect.⁹² Both of these changes could easily be read as votes of confidence in the Commission's ability to conduct recalls and to fine companies that commit violations of the CPSA. It is true that the money appropriated for the Commission has required the Commission to reduce the level of its staff by about ten percent since 1990.⁹³ This diminution in staff levels, however, probably better reflects the priority of the Commission in the overall scheme of the federal government, and not specific dissatisfaction with the Commission or the statutes that it administers.

In addition to general Congressional acceptance of the legitimacy of Commission operations, the Office of Management and Budget's Performance Assessment Rating Tool awarded the Commission a relatively high (83 percent) assessment among the 20 percent of Federal programs rated for fiscal year 2003.⁹⁴ The Commission itself has described its own accomplishments,⁹⁵ although those claims might be dismissed as self-serving. It is, therefore, probably fair to compare the Commission's statutory structure and authority with those of the Firearms Safety Act.

A conclusion that the Commission has done a good job overall of regulating the safety of consumer products is, however, not necessarily an argument for subjecting firearms to safety regulation by the Commission.⁹⁶ The historical retrospective in the preceding section has shown the political difficulties that such a grant of regulatory authority would face. If those obstacles were somehow overcome, the Commission would still face a substantial number of technical difficulties in deciding whether, and to what extent, it should regulate firearms safety. The simplest way of possibly subjecting firearms to federal safety regulation would be to repeal the existing exemption to the definition of "consumer product" in the CPSA.⁹⁷ Such repeal would, in and of itself, not require the Commission to promulgate regulations, since there are many consumer products for which the Commission has no regulations, but over which, nevertheless, it does exercise jurisdiction.⁹⁸ The Commission would

⁹²S.1261 108th Cong. §§ 5 and 6, (2003).

⁹³*U.S. Consumer Product Safety Commission 2005 Performance Budget*, Feb. 2004, p. vi.

⁹⁴*Id.* at iv.

⁹⁵*Id.* at iv, v, xiv-xvii.

⁹⁶Some advocates of the Firearms Safety Act have argued specifically against subjecting firearms to the jurisdiction of the Commission. See "The Treasury Department is Better Equipped than the Consumer Product Safety Commission to Regulate the Gun Industry," Violence Policy Center Fact Sheet endorsing Firearms Safety and Consumer Protection Act, S.534 and H.R. 920 at http://www.vpc.org/fact_sht/trascp.htm.

⁹⁷An example of this approach was S.1190 106th Cong. (1999), introduced by Senator Jack Reed (D-R.I.). The bill modified the definition of "consumer product" in the CPSA so that it would include firearms and ammunition.

⁹⁸The Commission estimates that there are approximately 15,000 products within its jurisdiction. *U.S. Consumer Product Safety Commission 2002 Annual Performance Report*, p.

have to consider whether regulations on firearms were justified in light of the resources available to the Commission,⁹⁹ the lives saved and injuries prevented that such regulations might achieve,¹⁰⁰ the likelihood that the Commission could make the findings required by the CPSA or FHSA,¹⁰¹ and other priorities that the Commission has established or will establish.¹⁰² When readers examine the detailed findings that the Commission must make to justify regulations and recalls, they will gain an appreciation of the technical difficulty that the Commission would face in attempting to regulate firearms under the CPSA.

ii. The Commission has regulations governing 283 products under all of the acts that it administers. In addition to the CPSA and the FHSA, which have been previously mentioned, the Commission administers the Flammable Fabrics Act, Pub. L. No. 83-88, 67 Stat. 111 (June 30, 1953), 15 U.S.C. §§ 1191-1204 (2000), the Poison Prevention Packaging Act, Pub. L. No. 91-601, 84 Stat. 1670 (Dec. 30, 1970), 15 U.S.C. §§ 1471-1476 (2000), the Refrigerator Safety Act, Pub. L. No. 84-930, 70 Stat. 953 (Aug. 2, 1956) (15 U.S.C. §§ 1211-1214 (2000)), and the Child Safety Protection Act, *supra* note 90.

⁹⁹The Commission Fiscal Year 2004 appropriation was \$60 million, which funded 471 full-time equivalent employees for the Commission. Consolidated Appropriations Act, Pub. L. No. 108-199, Div. G, Title III, "Consumer Product Safety Commission," (Jan. 23, 2004). That amount, however, was subject to an across-the-board reduction of 0.59%, (U.S. House of Representatives Committee on Appropriations, "House Passes FY04 Consolidated Appropriations,") leaving \$59.6 million. The request in the President's Budget for the Commission for Fiscal Year 2005 is \$62.7 million. *U.S. Consumer Product Safety Commission 2005 Performance Budget*, February 2004, p. ii.

¹⁰⁰According to the National Center for Health Statistics, in 2000 a total of 28,663 persons died from firearms injuries in the United States. Firearm accidents and firearm injuries of undetermined origin accounted for 776 and 230 of the deaths, respectively. *National Vital Statistics Report*, Vol. 50, No. 15, September 16, 2002. That same year, the Centers for Disease Control and Prevention's National Center for Injury Prevention and Control reported that there were an estimated 75,685 firearm gunshot injuries, of which 23,237 were deemed to be unintentional. In 2002 those figures were 58,841 and 17,579 respectively. <http://webappa.cdc.gov/cgi-bin/broker.exe>. Not all of the deaths and injuries determined to have been associated with the accidental discharge or firearms would have been prevented by regulations. For example, hunting accidents in which the shooter intended the discharge because he mistakenly believed to victim to be a game animal could not be prevented by regulations governing the weapon, since the shooter intended that it fire. Seeking to determine whether lives would be saved and, if so, in what numbers, by any particular regulation or combination of regulations would be a major task confronting the Commission.

¹⁰¹For a discussion of the findings that the Commission must make to support regulations, see *infra* notes 140 -156 and accompanying text.

¹⁰²The latest Strategic Plan of the Commission establishes results-oriented goals in three areas: (1) reduce the rate of death from fire related causes by 20% from 1998 to 2013; (2) reduce the rate of death from carbon monoxide poisoning by 20% by 2013; and (3) reduce the rate of swimming pool and other at-home drownings of children under 5 by 10% by 2013. There are other service quality and customer satisfaction goals. *Strategic Plan, U.S. Consumer Product Safety Commission*, September 2003, pp. 13, 21, 27, 35, and 39.

B. Point by Point Comparison

1. Overview

This section compares the CPSA and the Firearms Safety Act on a number of key points:

1. The official responsible for the interpretation and enforcement;
2. The stated objectives;
3. The procedures and findings required for rulemaking, with special attention to the role of voluntary standards and the preemptive effect of Federal regulations;
4. The criteria of, procedures required and remedies available for recalls;
5. Other remedies available to the respective enforcing officials;
6. Information gathering and reporting requirements;
7. Civil and criminal penalties;
8. The applicability of laws, regulations and orders to government entities and government officials;
9. Testing, certification, labeling, and prior notice;
10. Disclosure of information to the public;
11. Private enforcement and remedies;

After describing the similarities and differences for each comparison, the article discusses the probable effect of and the possible motives that the sponsors of the Firearms Safety Act had for differences. Any discussion of motive naturally involves subjective evaluation. Where the sponsors of the bill addressed a point in their statements in support of the legislation, the statement's content is assumed to be the motive. Silence on the part of the sponsors presents a problem. For such differences the author assessed whether there could be any safety advantage in the provision and also whether and to what extent the provision could impede commerce in firearms.¹⁰³ If there was no expressed or obvious safety advantage to the

¹⁰³Neither Senator Corzine nor Representative Kennedy have been favorable to private firearms ownership. For example, Senator Corzine introduced legislation that would deny the Department of Justice funds to advocate a view that the Second Amendment to the Constitution protects an individual right to keep and bear arms, as opposed to a collective right. *Corzine Bill Would Disarm Gun Crusade: Prohibits Use of Taxpayer Dollars to Misrepresent Long-Settled Meaning of the Second Amendment*, Press Release of the Hon. Jon Corzine, (Feb. 12, 2003) at http://corzine.senate.gov/press_office/record.cfm?id=190296. See also, *Corzine Blasts Ashcroft For Overshooting on Right To Bear Arms*, Press Release of the Hon. Jon Corzine, May 8, 2002, http://corzine.senate.gov/press_office/record.cfm?id=186701. In the case of Representative Kennedy, his website cites statistics purporting to establish that “[G]uns kept in the home are 43 times more likely to kill a family member or friend than to kill in self-defense,” and “[T]he presence of a gun in the home triples the homicide in that home. . .” Such rhetoric, aside from the logic problems (guns have no family members nor do inanimate objects defend themselves, and a phrase such as “triples the homicide in that home” makes no sense whatsoever), indicates that Representative Kennedy is no friend of private firearms ownership. His website goes on to mention that, in addition to his sponsorship of the Firearms Safety Act, Representative Kennedy is a primary sponsor of The Gun Buyback Partnership Grant, H.R. 278, 107th Cong. (2001) and touts his participation in gun “buyback” programs. Finally, Representative Kennedy’s website mentions in participation in the “Million Mom March,” and his co-sponsorship of legislation that he claims will strengthen enforcement of existing gun laws at <http://www.house.gov/patrickkennedy>

provision, as measured by its similarity to the Consumer Product Safety Act, and if the effect of the provision could be a significant impediment to commerce in firearms, the author assumed that the latter effect was the motive of the sponsors. If, of course, there are genuine safety advantages or other unidentified motives the sponsors or the supporters of this legislation are free to identify them. A genuine debate on the best mechanism to increase public safety with firearms is always welcome.

2. *The Responsible Official*

The Firearms Safety Act assigns the responsibility for firearms safety to the Attorney General. The selection of the Attorney General as the person (and the Department of Justice as the institution) to both develop the regulations for and to enforce the Firearms Safety Act reflects an obvious policy choice on the part of the sponsors of the Firearms Safety Act, with significant policy implications. The Commission is very different from an office such as that of the Attorney General. For one thing it is a *Commission*; a majority of Commissioners must agree in order for the Commission to take action.¹⁰⁴ The necessity to obtain a majority provides some assurance that both regulatory and enforcement decisions will be thoroughly considered. The Commission is also an independent regulatory Commission.¹⁰⁵ Although this status has been subject to different interpretations,¹⁰⁶ it seems almost unquestionable that the Commission is subject to less direct political interference than is the office of the Attorney General. The Attorney General may be removed from his office at will by the President.¹⁰⁷ In the case of the Commission, however,

/issues/law_enforcement.html. In light of such positions, this author has no reluctance to characterize either Senator Corzine or Representative Kennedy as hostile to private firearms ownership.

¹⁰⁴Section 4 (a) of the CPSA, 15 U.S.C. § 2053(a) (2004) establishes the Commission as a five member Commission although it has been operating with only three members since the mid-1980s for budgetary reasons. The Chairman of the Commission is the principal executive officer of the Commission and exercises all the executive and administrative functions of the Commission. Even these functions are, however governed by general policies of the Commission. CPSA § 4(f), 15 U.S.C. § 2053 (f) (2000). Commission regulations concerning meetings are set forth at 16 C.F.R. Part 1013 (2003), Commission regulations concerning adjudications are set forth at 16 C.F.R. Part 1025 (2003), Commission regulations concerning petitions are set forth at 16 C.F.R. Part 1051 (2003) and Commission regulations concerning oral presentations are set forth at 16 C.F.R. Part 1052 (2003).

¹⁰⁵Section 4 of the CPSA 15 U.S.C. § 2053(a) (2004) creates the Commission as an independent regulatory Commission.

¹⁰⁶For discussions of how executive orders pertain to independent agencies, see Seven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation* 70 U. CHICAGO L. REV. 821 (2003); Robert Hahn & Cass Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489 (2002).

¹⁰⁷U.S. Const. Art. 2, § 2, cl. 2 provides that the President shall nominate, and by and with the Advice and Consent of the Senate, shall appoint officers of the United States. This authority has been construed to authorize the removal of such officers. *Bailey v. Richardson*, 182 F.2d 46, 51 (D.C. Cir. 1950), *aff'd*, 341 U.S. 918, 918 (1950); *Correa Velez v. DeJesus Schuf*, 396 F. Supp. 1256, 1259-60 (D.P.R. 1975).

only the Chairman may be removed by the President without cause from the office of Chairman.¹⁰⁸ Commissioners serving their seven-year terms may only be removed by the President for neglect of duty or malfeasance in office, but for no other cause.¹⁰⁹ Moreover, in the case of the Commission, there is an explicitly partisan division within the Commission: only three of its members may be affiliated with the same political party.¹¹⁰ All of these characteristics of the Commission serve to insulate it somewhat from partisan political pressures and help to ensure that regulations and enforcement decisions reflect a genuine desire to address a product safety problem. Almost none of these constraints apply to the Attorney General. While these characteristics make it more likely that the Attorney General will be responsive to the will of the President, it is also likely that regulations and enforcement decisions made by the Attorney General will be less likely to reflect the competing points of view that are inherent in a multi-member body such as the Commission.

The sponsors of the Firearms Safety Act probably assigned regulatory and enforcement responsibility to the Attorney General because the BATFE now resides within the Department of Justice.¹¹¹ The BATFE has engaged in some degree of firearms regulation since the passage of the National Firearms Act,¹¹² and has administered a system of review of imported handguns that includes some safety-related components.¹¹³ Another reason for choosing the U.S. Attorney General may have been the example of the actions of state attorney generals in promulgating regulations governing the safety of the firearms. The Attorney General in the State of Massachusetts promulgated such regulations under a general authority to protect consumers.¹¹⁴ There were subsequent legislative activities to codify the regulations

¹⁰⁸*Memorandum to Senate Committee on Commerce, Science, and Transportation from Morton Rosenberg, Specialist in American Public Law, American Law Division re: Power of the President to Remove the Chair of the Consumer Product Safety Commission*, Congressional Research Service, August 1, 2001. (On file with the author) A Chairman removed from the office of Chairman may continue to serve as a Commissioner for the balance of his or her statutorily-determined term.

¹⁰⁹CPSA § 4 (a), 15 U.S.C. § 2053(a) (2000).

¹¹⁰CPSA § 4 (c), 15 U.S.C. § 2053(c) (2000). Since the Commission has had only three commissioners since the mid-1980s, in practice this requirement has meant that only two commissioners may be affiliated with the same political party.

¹¹¹Versions of the bill in previous Congresses assigned the responsibility for administration and enforcement to the Department of the Treasury. S.330 and H.R. 671, introduced in the 107th Congress by Senator Torricelli (D-NY) and Representative Kennedy (D-RI) and S.534 and H.R. 920, introduced in the 106th Congress by the same two members.

¹¹²National Firearms Act, 48 Stat. at L. 1236, Chap. 757, June 26, 1934, 26 U.S.C. § 5849 (2004).

¹¹³For a discussion of the safety implications of the “point system,” *see supra* notes 16 – 24 and accompanying text.

¹¹⁴In October 1997 the Attorney General of the State of Massachusetts issued handgun safety regulations under the authority of the Massachusetts Consumer Protection Act, MASS. GEN. LAWS Ch. 93A (essentially a deceptive practices act statute). The authority and the specific regulations were challenged in court and their validity upheld. The regulations are codified at 501 CMR Part 16.

of the Massachusetts Attorney General.¹¹⁵ The California Department of Justice also has regulations governing firearms that include some safety considerations.¹¹⁶ The final reason for assigning the responsibility for firearms safety regulation to the Attorney General is probably a general feeling that firearms regulation is a matter for the police, and the Attorney General clearly has a law enforcement role.¹¹⁷ The choice of the Attorney General as the responsible official by the sponsors of the Firearms Safety Act probably indicates that they do not consider firearms safety an issue separate and apart from that of the criminal misuse of firearms.¹¹⁸

3. Objectives

Most of the objectives of the Firearms Safety Act and the CPSA are similar. One objective appears in the Firearms Safety Act but not in the CPSA. There is also a difference in an objective that appears in both the Firearms Safety Act and the CPSA. These differences indicate the intent of the sponsors of the Firearms Safety Act to limit commerce in firearms. The objectives of the CPSA are as follows:¹¹⁹

1. Protect the public against the unreasonable risk of injury associated with consumer products;
2. Assist consumers in evaluating the comparative safety of consumer products;
3. Develop uniform safety standards for consumer products and minimize conflicting State and local regulations; and,
4. Promote research and investigation into the causes and prevention of product-related deaths, illnesses and injuries.

The objectives of the Firearms Safety Act track these four CPSA objectives, but with one significant change and one significant addition. The Firearms Safety Act states as among its objectives:¹²⁰

¹¹⁵*Mass. Gen. L.* Ch. 140. The Attorney General regulations include three product requirements not contained in the laws: child-safety features, loaded chamber indicators and magazine safety disconnects for self-loading handguns, and tamper-resistant serial numbers. 940 CMR 16.03 and 16.05(2)-(4).

¹¹⁶CAL. CODE REGS. title 11, § 968.43 (2004).

¹¹⁷Several of the alleged “defects” of firearms cited in the press release announcing the introduction of the legislation (e.g., easy concealability, greater magazine capacity, and more powerful ammunition) were so labeled because they “make firearms more likely to be used in crimes and more deadly if they are.” “Corzine, Kennedy Call For Gun Safety,” *supra*. If reducing crime is one of the objectives of the Firearms Safety Act, assigning the responsibility for enforcement to the Attorney General is logical.

¹¹⁸Senator Corzine’s press release announcing the introduction of the Firearms Safety Act states that “In recent years, firearm manufacturers have taken a number of steps to make firearms more likely to be used in crimes, and more deadly if they are. Many guns are being produced to be easily concealable, to fire more rounds without reloading and to fire larger, more lethal ammunition.” “Corzine, Kennedy Call For Gun Safety,” *supra*.

¹¹⁹CPSA § 2 (b)(1)-(4), 15 U.S.C. §2051(b)(1)-(4) (2000).

¹²⁰S.1224, § 2(1)-(5).

1. Protect the public against the unreasonable risk of death and injury associated with firearms and related products;
2. Develop safety standards for firearms and related products;
3. Assist consumers in evaluating the comparative safety of firearms and related products;
4. Promote research and investigation into the causes and prevention of firearm-related deaths and injuries; and
5. Restrict the availability of weapons that pose an unreasonable risk of death or injury.

Objective number two differs significantly from its counterpart in the CPSA. The CPSA objective states not only that the Commission should develop safety standards for consumer products, but that it should seek to minimize conflicting state and local regulations. The Firearms Safety Act has no similar objective and, as will be seen when the preemption sections of the CPSA and the Firearms Safety Act are compared,¹²¹ it explicitly does not limit the effect of State and local firearms safety regulation, as long as such regulation is more stringent than the regulations developed under the Firearms Safety Act. Another objective appears in the Firearms Safety Act that is absent from the CPSA: restricting the availability of weapons that pose an unreasonable risk of death and injury.¹²² While the provisions of the CPSA and the powers available to the Commission certainly imply that it will have the effect of restricting the availability of consumer products that pose an unreasonable risk of death or injury, it is significant that Congress did not state such an objective in the original authorizing legislation, nor has it seen fit to amend the CPSA to state such an objective in the over thirty years in which the Commission has operated. The decision of the sponsors of the Firearms Safety Act to confer no preemptive effect for the Attorney General's safety regulations, and to state an express objective of limiting commerce in firearms, demonstrates a probable objective beyond mere safety: limiting commerce in firearms.

4. Rulemaking

Central to the authority granted to the Commission by the CPSA and to the Attorney General by the Firearms Safety Act is the authority to promulgate enforceable rules governing the products within their respective jurisdiction. But there the similarities largely end. The Commission's authority, while considerable, is constrained by the form that regulations may take, by the procedures that the Commission must follow, and by the findings that the Commission must make in order to support regulations. By contrast, the authority granted to the Attorney General by the Firearms Safety Act is very wide and its exercise is not subject to any specific procedures. It requires no specific findings. The lack of any regulatory process similar to that of the CPSA indicates again the probable intent of the sponsors of the Firearms Safety Act that its authority be used wherever possible to restrict commerce in firearms.

¹²¹See *infra* notes 172 – 179 and accompanying text.

¹²²S.1224, § 2(5).

a. Necessity to Promulgate Regulations

One major difference between the CPSA and the Firearms Safety Act is immediately apparent: the Attorney General *must* promulgate regulations governing firearms safety,¹²³ while the Commission *may* promulgate consumer product safety standards.¹²⁴ Since the Commission has an estimated 15,000 products under its jurisdiction,¹²⁵ it would obviously be extraordinarily difficult for it to promulgate regulations for even a small fraction of those products. The fact that the Commission has jurisdiction over so many products is among the reasons that the Commission has set priorities¹²⁶ and established procedures for deciding upon which products it should focus in its rulemaking and enforcement activities.¹²⁷ No such dilemmas confront the Attorney General, at least in theory. The Firearms Safety Act *requires* safety rules for all firearms and firearm products and these regulations *must* cover the design, manufacture and performance of firearms and firearm products.¹²⁸ Although the Firearms Safety Act does not specify the priorities for rulemaking, presumably the Attorney General would focus rulemaking efforts on those firearm and firearm products that the Attorney General believed posed the greatest hazards to consumers.¹²⁹ In any event, given the wide variety of firearms, ammunition, associated products, and the variations in commerce in all of them, the Attorney General will have a full program of regulation to undertake in the event that some version of the Firearms Safety Act becomes law. The fact that the Firearms Safety

¹²³S.1224, § 101(a).

¹²⁴CPSA § 7(a), 15 U.S.C. §2056(a).

¹²⁵U.S. Consumer Product Safety Commission *2002 Annual Performance Report* p. ii.

¹²⁶*See supra* note 102, for a discussion of the strategic goals that the Commission has set in its Fiscal Year 2004 Strategic Plan.

¹²⁷The Commission's policy on establishing priorities for Commission action is set forth in 16 CFR § 1009.8 (2003). The seven criteria cited in the regulation are: frequency and severity of injuries, causality of injuries, chronic illness and future injuries, cost and benefit of Commission action, unforeseen nature of the risk, vulnerability of the population at risk, and probability of exposure to the hazard.

¹²⁸Firearm not only means the normal sense of the word as a device that uses the combustion of a chemical propellant to impart velocity to a projectile, but also air rifles S.1224, § 3(a)(7). The term "nonpowder firearm" is an oxymoron, since a firearm uses combustion to initiate the flight of a ballistic missile. SAAMI glossary of firearms terms at www.saami.org. "Firearm product" includes not only firearms, but also firearm parts, ammunition, and locking devices designed to prevent the accidental discharge of a firearm. S.1224, § 3(a)(2), (3). S.1224 would clearly subject air rifles and firearm locking devices to the jurisdiction of the Department of Justice and probably remove those items from the jurisdiction of the Commission.

¹²⁹Handguns are generally regarded as posing the greatest safety risk, since they are easier to point and more commonly left loaded because of their intended use of self-defense. The examples of safety features cited by the sponsors of S.1224 (e.g., magazine disconnectors or safeties and loaded chamber indicators) are much more common features of handguns than of rifles or shotguns. Other characteristics cited in the press release (concealability, large magazine capacity and greater power) are also related more to handguns than to rifles and shotguns. "Corzine, Kennedy Call for Gun Safety, *supra*."

Act *requires* regulations for firearms, while the CPSA has been in force for over thirty years with no requirement for regulations for consumer products¹³⁰ is another example that the probable intent of the sponsors is to limit commerce in firearms under the pretense of safety.

b. Form of the Regulations

Regulations for consumer products promulgated by the Commission must be in the form of a performance standard, in the form of warnings and instructions, or some combination of these.¹³¹ By implication, therefore, the Commission may not promulgate a consumer product safety that contains design or material requirements; the regulation must consist of a test that the consumer product must pass, possibly coupled with warnings and instructions on the product's label or packaging inserts, or possibly on the product itself. This requirement represents a change from the original CPSA and reflects Congress's desire that the Commission not be too prescriptive in its consumer product safety regulations.¹³²

That provision of the CPSA contrasts dramatically with the requirement of the Firearms Safety Act that the Attorney General prescribe regulations not only for the performance of firearms, but also for their design and manufacture, and for commerce in firearms.¹³³ The Attorney General would become a virtual "firearms czar," able to specify every aspect of how firearms are designed and manufactured, how they perform and where and how they are sold. In light of the fact that the Commission has operated for over twenty years with a requirement that it limit itself to specifying consumer product performance in safety regulations, the delegation of such broad power over firearms to the Attorney General indicates yet again the intent of the sponsors of the Firearms Safety Act that that power be used to limit commerce in firearms to the greatest extent possible.

¹³⁰Over the course of the existence of the Commission, Congress has acted occasionally to require regulations for or to ban outright certain products: butyl nitrate (Pub. L. 100-690, § 2404, Nov. 18, 1988, 15 U.S.C. § 2057(a) (2000)), isopropyl nitrates and other nitrates (Pub. L. 101-647, Tit. XXIII, § 3202 Nov 29, 1990, 15 U.S.C. § 2057(b) (2000)), walk-behind power lawn mowers (Pub. L. No. 97-35, § 1212, 95 Stat. 724 (1981), lawn darts (Pub. L. 100-613, 102 Stat. 3183 (1988)), automatic garage door openers (Pub. L. 101-608, § 203, 104 Stat. 3110 (1990), 15 U.S.C. § 2056), bicycle helmets (Pub. L. 103-267, § 205, 108 Stat. 722 (1994), 15 U.S.C. § 6004), and lead-lined water coolers (Pub. L. 100-572, § 1462, 42 U.S.C. § 300j-22 (2000)). Given the vast number of products within the Commission's jurisdiction, this represents a surprisingly small number of products for which Congress has decided that there *must* be regulations. There has also been proposed legislation to require additional mandatory product safety regulations for infants and toddlers products, but such legislation has yet to have even been the subject of a hearing. "Infant and Toddler Durable Product Safety Act," H.R. 2911, 108th Cong. (2003).

¹³¹CPSA § 7(a), 15 U.S.C. § 2056(a).

¹³²Congress removed the Commission's option to specify design requirements by the passage of the Consumer Product Safety Amendments of 1981, Pub. L. No. 97-35, title XII, Subtitle A, 95 Stat. 703 (1981).

¹³³S.1224, § 101(a).

c. Procedure to Promulgate and Findings Required to Support Regulations

The intent of the sponsors of the Firearms Safety Act to grant the maximum authority possible to the Attorney General becomes starkly apparent in examining the Act's regulatory procedures and required findings. The Firearms Safety Act specifies no procedure for the Attorney General to follow to issue regulations under its authority. The Administrative Procedure Act (APA)¹³⁴ would, by the terms of the APA, require rulemaking carried out under the authority of the Firearms Safety Act to be conducted under the APA's general notice and comment procedure.¹³⁵ Judicial review of the Attorney General's firearms regulations would be under the "arbitrary, capricious and abuse of discretion" standard.¹³⁶ The only findings that the Attorney General must make to support the regulations that are issued are that they are reasonably necessary to reduce or prevent unreasonable risk of injury resulting from the use of firearms and firearm products.¹³⁷ The fact that only 120 days may elapse between the time that the Attorney General proposes regulations under the Firearms Safety Act and the time that they must be issued in final form¹³⁸ indicates that almost all of the work in developing a regulation will have to be done *before* the public is informed of what the proposed regulations will say.¹³⁹

In contrast to the very basic procedures required for rulemaking implied by the Firearms Safety Act, the procedures required by the CPSA to promulgate a consumer product standard and the findings necessary to support that standard are more complicated and more detailed. The Commission commences rulemaking under the CPSA with an advance notice of proposed rulemaking (ANPR) which must:¹⁴⁰

¹³⁴Administrative Procedures Act, Pub. L. § 89 332, 60 Stat. 237 (1946), *amended by* 80 Stat. 378 (1966), 81 Stat. 54 (1967), 88 Stat. 1561 (1974), 90 Stat. 1241 (1976).

¹³⁵Administrative Procedure Act § 553, 5 U.S.C. §553 (2000). The constitutional requirement that no person be deprived of life, liberty or property without due process of law (U.S. Const. Amend. V) would also require regular procedures for rulemaking, but they would not exceed those required by the Administrative Procedures Act. *Sierra Club v. Costle*, 657 F.2d 298, 392-93 (D.C. Cir. 1981). The Firearms Safety Act would also be subject to some government-wide statutory and executive order requirements for rulemaking. *See infra* notes 152 and 153 and accompanying text.

¹³⁶Administrative Procedure Act § 706(2)(A), 5 U.S.C. § 706(2)(A)(2000).

¹³⁷S.1224 § 101(a).

¹³⁸S.1224 § 101(b).

¹³⁹By contrast, approximately twenty months elapsed between the time that the Commission first proposed regulations for dive sticks and the time that those regulations were issued in final form. 66 Fed. Reg. 13645-13652, (March 7, 2001). In the case of infant beanbag cushions, the time elapsed was also twenty months. 57 Fed. Reg. 27912-27916 (June 23, 1992). Both of these were relatively simple products and the rulemakings were relatively straightforward. Rulemaking for complex hazards may take a great deal of time. For example, the Commission commenced rulemaking on the hazard of small open-flame ignition of upholstered furniture in 1994. After approximately nine years of work on the subject the Commission voted to reissue its advance notice of proposed rulemaking to include the hazard of smoldering (cigarette) ignition of upholstered furniture. 68 Fed. Reg. 60629, 60629-32 (Oct. 23, 2003).

¹⁴⁰CPSA § 9(a)(1)-(6), 15 U.S.C. § 2058(a)(1)-(6) (2000).

1. Identify the product and the nature of the risk associated with the product;
2. Include a summary of each of the regulatory alternatives that the Commission is considering, including voluntary standards;¹⁴¹
3. Include relevant existing standards and the reasons why the Commission believes that they may not eliminate or adequately reduce the risk of injury;
4. Invite the submission of comments concerning the risk of injury, the regulatory alternatives being considered and other possible alternatives for addressing the risk;
5. Invite the submission of an existing standard or portion of a standard as a proposed mandatory standard; and
6. Invite the submission of an intention and plan to develop a voluntary standard to address the risk of injury.

When the Commission moves beyond the stage of the ANPR, it continues rulemaking by the preparation of a notice of proposed rulemaking (NPR).¹⁴² The findings required by an NPR are so specific and detailed that they are referred to as a preliminary regulatory analysis.¹⁴³

1. A preliminary description of the potential costs and benefits of the proposed rule, including costs and benefits difficult to quantify monetarily and who would likely receive the benefits and who would likely bear the costs¹⁴⁴;

¹⁴¹For a discussion of the Commission's consideration of voluntary standards, see *infra* notes 167 – 169 and accompanying text.

¹⁴²CPSA § 9(c), 15 U.S.C. §2058(c).

¹⁴³CPSA § 9(c)(1)-(4), 15 U.S.C. §2058(c)(1)-(4) (2000).

¹⁴⁴The Commission's economic staff generally follows the procedures laid out in Office of Management and Budget Circular No. A-4 ("Regulatory Analysis," September 17, 2003) when conducting cost-benefit analysis. (Circular A-4 is a 48 page document, so the discussion that follows is obviously only a summary.) (The Commission staff is not *required* to follow these procedures, since Executive Order 12866 explicitly exempts independent regulatory commissions such as the Commission from its requirements, one of which is Circular No. A-4. Insofar, however, as Circular No. A-4 reflects basic principles of economic analysis, the Commission staff usually chooses to follow it.) Commission staff usually begins the technical part of a cost-benefit analysis by estimating a baseline annual risk for the product being regulated. This baseline risk represents the risk before any regulation is developed and provides a reference point for comparisons with regulatory alternatives. Estimating this baseline annual risk requires information on the number of product-related injuries and deaths and estimates of the number of products in use. Information on injuries and deaths is usually provided by the Commission's Directorate for Epidemiology. Estimates of the number of products in use are sometimes available from published government data or trade sources, or the Commission may use its own Product Population Model to estimate the number of products in use. The baseline annual risk is then monetized to estimate the annual societal costs associated with the risk. The costs of nonfatal injuries are based on the Commission's Injury Cost Model. The costs of fatal injuries are based on estimates of the economic value of a statistical life from the economic literature. The monetized values of the nonfatal and fatal injury costs are combined to produce an overall monetized estimate of the risks involving the use of the product under consideration. These annual costs are aggregated over the years the product in question is expected to remain in use. The costs accruing in future years are

2. A discussion of why a standard submitted to the Commission in response to the ANPR was not published in whole or in part as the proposed rule;
3. A discussion of why the Commission believes that a voluntary standard will not, within a reasonable time, eliminate or adequately reduce the risk of injury; and
4. A description of reasonable alternatives to the proposed rule, with a cost benefit analysis of each alternative, and an explanation of why the alternatives should not be published as a proposed rule.

The Commission must make even more findings and conduct even more analyses before it may promulgate a final rule. It must consider “relevant available product data, including the results of research, development, testing and investigation activities.”¹⁴⁵ It must also consider and make findings concerning the following:¹⁴⁶

1. The degree and nature of the risk of injury the rule seeks to eliminate or to reduce;
2. The approximate number of consumer products or types or classes of consumer products to be covered by the rule;
3. Why the public needs the consumer products covered by the rule and the probable effect that the rule will have on the utility, cost or availability of those consumer products; and
4. How to achieve the rule’s¹⁴⁷ objective while minimizing adverse effects on competition, and also minimizing the disruption or dislocation of manufacturing and other commercial practices consistent with safety.

But the Commission’s task is still not finished. It must take the findings that have just been described immediately above and prepare a final regulatory analysis, putting the factors considered in the preliminary regulatory analysis in final form.¹⁴⁸

discounted to reflect the time preferences of society (usually a discount rate of both three and seven percent). The aggregate present value of the societal costs is often calculated on a “per product in use” basis. This value represents the maximum per unit benefit of a regulation if the regulation were 100% effective in preventing injuries and deaths addressed by the regulation. The actual benefit depends upon the effectiveness of the regulation in reducing the baseline risks. The Commission staff then considers how much the regulation would cost and how effective it would be in reducing the baseline risk. The staff may conduct an analysis of how the product would have to be changed to meet the regulatory requirements and then estimate the costs of the engineering changes. The staff may derive an estimate based on discussions with industry or engineering experts. Once the costs are estimated, they can be compared directly to the expected benefit in the cost benefit analysis. The staff usually evaluates several alternatives for each regulation and recommends the alternative that maximizes net benefits. The cost-benefit analysis includes a sensitivity analysis that shows how the results change if different assumptions were used. No two Commission cost-benefit analyses are the same, and there are some data that are difficult to find or to estimate.

¹⁴⁵CPSA § 9(e), 15 U.S.C. §2058(e).

¹⁴⁶CPSA § 9(f)(1)(A)-(D), 15 U.S.C. § 2058(f)(1)(A)-(D)(2000).

¹⁴⁷CPSA § 9(f)(1)(D), 15 U.S.C. § 2058(f)(1)(D)(2000) uses the term “order,” but in the context of the subsection it is clear that the requirement applies to the consumer product safety rule being promulgated.

¹⁴⁸CPSA § 9(f)(2)(A)-(C), 15 U.S.C. § 2058(f)(2)(A)-(C)(2000). For a recitation of the factors of a preliminary regulatory analysis, see *supra* note 143 and accompanying text.

The Commission must also make the following findings and include them in the rule:¹⁴⁹

1. The rule is reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with the consumer product subject to the rule;
2. The rule is in the public interest;
3. If the rule creates a banned hazardous product,¹⁵⁰ why no feasible safety standard would protect the public adequately;
4. If there is a voluntary standard covering the risk of injury covered by the mandatory standard, compliance with the voluntary standard would not be likely to eliminate or adequately reduce the risk of injury, or it is unlikely that there will be substantial compliance with the voluntary standard;¹⁵¹
5. The benefits of the rule bear a reasonable relationship to its costs; and,
6. The rule imposes the least burdensome requirement which prevents or adequately reduces the risk of injury that the rule is designed to address.

In addition to these requirements of the CPSA, the Commission is subject to some government-wide requirements relating to the effect that a rule will have on small business entities and on other government entities,¹⁵² and to other government-wide statutory rulemaking requirements.¹⁵³ The Commission must find that it is in the public interest for the effective date of the rule to be greater than 180 days or less than 30 days after promulgation,¹⁵⁴ and it may limit stockpiling.¹⁵⁵ Product safety

¹⁴⁹CPSA § 9(f)(3)(A)-(F), 15 U.S.C. § 2058(f)(3)(A)-(F)(2000).

¹⁵⁰The Commission may declare a product to be a banned hazardous product if it finds that no feasible consumer product safety standard would protect the public from the unreasonable risk of injury associated with the use of the product. CPSA § 8, 15 U.S.C. § 2057 (2000).

¹⁵¹The requirement to defer to voluntary standards is one of the most central features of rulemaking under the CPSA. For a discussion of the circumstances under which the Commission must defer to voluntary standards, see *infra* notes 167 – 169, and accompanying text.

¹⁵²Section 602 of the Regulatory Flexibility Act (5 U.S.C. § 602) requires all Federal agencies to publish a regulatory agenda in the Federal Register two times a year, and to consider in their rulemakings the effect that the rules will have on small businesses and on other governmental entities. Additionally, Executive Order 12866, issued on September 30, 1993, requires all agencies, including independent agencies such as the Commission, to publish an agenda of regulatory actions expected to be under development or review by the agency during the next twelve months.

¹⁵³If the Commission is promulgating a “major rule” within the meaning of Congressional Review Act, Pub. L. 104-121, Tit. II, § 251, March 24, 1996, 110 Stat. 868, 5 U.S.C. §§ 801-808 (2000), which is defined as having an overall annual impact on the economy of \$100 million or more, the Commission must obtain OMB’s concurrence on whether it is a major rule, and it must then transmit the rule to the General Accounting Office for its review and possible repeal by Congress. To date, the Commission has promulgated no such rule, but the pending rulemaking pertaining to the flammability of upholstered furniture will probably meet that criteria. The Commission is also subject to the National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1990), but has made a general finding that consumer product safety rules have no significant environmental impacts. 16 CFR Part 1021 (2003).

¹⁵⁴CPSA § 9(g)(1), 15 U.S.C. § 2058(g)(1)(2000).

¹⁵⁵CPSA § 9(g)(2), 15 U.S.C. § 2058(g)(2)(2000).

rules are subject to judicial review by a Court of Appeals and may involve additional data, views and arguments presented to the Commission. To sustain the rule, the reviewing court must make an affirmative determination that the Commission's findings are supported by substantial evidence on the record taken as a whole.¹⁵⁶

The contrast between the simple procedure and very elementary findings that the Firearms Safety Act requires and the elaborate procedures and detailed findings required by the CPSA could hardly be more dramatic. The contrast is even more compelling, moreover, because of the fact that the Firearms Safety Act requires rulemaking on a technically complex product where the social costs and benefits are controversial.¹⁵⁷ The failure of the sponsors of the Firearms Safety Act to use even some of the procedures that the Commission has used with reasonable success for at least twenty years, demonstrates that the intent of the bill lies more in the suppression of commerce in firearms than in making firearms safer.

The Firearms Safety Act contains one truly extraordinary grant of authority to the Attorney General. Section 102(c) of the Firearms Safety Act authorizes the Attorney General to prohibit the manufacture, importation, transfer, distribution or export¹⁵⁸ of a firearm product by order if the Attorney General determines that "the exercise of other authority under this Act would not be sufficient to prevent the product from posing an unreasonable risk of injury to the public." This section is unusual on a number of grounds. First, it appears in the same section of the Firearms Safety Act as does the Attorney General's authority to order recalls and not in the rulemaking section.¹⁵⁹ It is not, therefore, clear whether the Attorney General is required to follow any rulemaking procedures whatsoever before exercising this authority. If rulemaking procedures under the Administrative Procedure Act are not required by this section, it is easy to imagine the Attorney General using it to circumvent the necessity of determining that the order was "reasonably necessary," which is the other part of the findings required for rulemaking by the Firearms Safety Act.¹⁶⁰

¹⁵⁶CPSA § 11(a)-(c), 15 U.S.C. § 2060(a)-(c)(2000).

¹⁵⁷JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS* 97-116 (2d ed. 2000). Mr. Lott estimates the savings in lives and injuries from laws permitting the lawful carry of concealed handguns. See also Joyce Lee Malcolm, *Gun Control's Twisted Outcome*, REASON, Nov. 2002 at 20, 20-25.

¹⁵⁸How the export of a firearm *from* the U.S. could constitute a threat to the safety of firearms' users *within* the U.S. is not a subject that the proponents of S.1224 have chosen to explain. Section 18(a) of the CPSA, 15 U.S.C. § 2067(a)(2000) provides explicitly that it does not apply to exports unless the Commission makes an affirmative finding that the product is in fact distributed in the U.S., or that even its export presents an unreasonable risk of injury to consumer within the U.S., A grant of authority over exports is, of course, entirely consistent with a goal of S.1224 to hand as much authority as possible over firearms to the Attorney General.

¹⁵⁹The recall provisions of the Firearms Safety Act appear in S.1224 §102(a), (b), and are discussed in greater detail *infra* notes 186 – 188 and accompanying text.

¹⁶⁰S.1224, § 101(a). Examples of the situations under which advocates of the bill believe that the authority might be exercised are "trigger activators that allow semi-automatic firearms to mimic the fully automatic fire of a machine gun," and "specific firearms proven to be disproportionately associated with homicide, suicide or involved in unintentional injuries." Consumer Federation of America, *Health and Safety Standards for Everyday Products and Safety Standards That Could be Applied to Guns* (June 10, 2003) available at

Second, there is nothing resembling this authority in the CPSA or in any of the other acts administered by the Commission. The exercise of such largely standardless authority, especially in the absence of any type of notice and comment rulemaking, would probably test the limits of the Constitutional right to due process of law.¹⁶¹ It would also test the limits of Congress's ability to delegate its authority to regulate interstate commerce to an administrative agency.¹⁶² Finally, the section grants *affirmative* authority by virtue of its implied or express *absence* in other parts of a statute, standing on its head the normal rule that a delegation of authority, even though it may be implicit, must still be tied to some affirmative grant of authority.¹⁶³ All of these observations support further the premise that the objective of the Firearms Safety Act is not safety, but rather the granting to an executive branch official of the maximum authority possible to regulate the firearms industry and suppress commerce in firearms.

d. Deferral to Voluntary Standards

Yet another stark contrast between the Firearms Safety Act and the CPSA is their respective treatment of voluntary standards.¹⁶⁴ The approach taken by the Firearms Safety Act is simple: the Attorney General is to promulgate mandatory regulations¹⁶⁵ and there is to be no deferral to voluntary standards. Presumably the Attorney General could consider the existence and content of voluntary standards in deciding the content of mandatory standards, but there is certainly no requirement to do so.

<http://www.consumerfed.org/products.pdf>. Since homicide and suicide are volitional acts having little or nothing to do with the safety of a firearm the prohibitive intent of this section is clear, at least as evidenced by the statements of some of its advocates.

¹⁶¹Depending on the nature of the order issued by the Attorney General under the authority of this section, it might violate the Constitutional prohibition against deprivation of life, liberty or property without due process of law, U.S. CONST., amend. V or against a bill of attainder or ex post facto law U.S. CONST., art. I, § 9, cl. 3.

¹⁶²*See* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935), in which the Supreme Court held unconstitutional a delegation of authority to the President to prohibit the transportation of oil produced in excess of the amount permitted by State laws or regulations, and, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) which held unconstitutional a delegation of authority to the President to approve codes of fair competition. The rationale of both these cases has been called into doubt, United States v. Frank, 864 F.2d 992 (3d Cir. 1988), but they remain good law. A challenge to an order issued by the Attorney General under the authority of this section would be especially interesting because it concerns a product ("arms") given special mention by the Constitution. U.S. CONST. amend. II.

¹⁶³The normal rule of delegation of authority to administrative agencies is that it must be expressed or implied by *positive* law. J.G. SUTHERLAND, STATUTES & STATUTORY CONSTRUCTION §§ 65:1-2 (3d ed. 2001). In a delegation of administrative authority the legislature must define: (1) what is to be done; (2) the instrumentality which is to accomplish it; and (3) the scope of the instrumentality's authority by prescribing reasonable administrative standards. *Id.* § 4:2. Section 102(c) of the Firearms Safety Act contains very little resembling reasonable administrative standards to guide the Attorney General.

¹⁶⁴The term "voluntary standard" is somewhat ambiguous. For a discussion of what it means in the context of the CPSA and FHSA, see *infra* note 167 and accompanying text.

¹⁶⁵S.1224, § 101(a).

As noted in the previous section,¹⁶⁶ the Commission is required at numerous points in the rulemaking process to conduct analyses and make findings about the existence and effectiveness of voluntary standards.¹⁶⁷ When the Commission finds that there is a voluntary standard that would eliminate or adequately reduce the risk of injury, and if the Commission finds that it is likely that there will be substantial compliance with the voluntary standard, the Commission is legally disabled from promulgating its own mandatory standard.¹⁶⁸ The Commission may not promulgate a mandatory standard if it makes those findings, even if there was no voluntary standard when the Commission began its own rulemaking. The prohibition against mandatory standards also applies even if the voluntary standard to which the Commission defers was developed and adopted in response to the Commission's own rulemaking, a not uncommon occurrence. The requirement that the Commission defer to standards developed by private standards setting organizations has the effect of giving the private sector the ability to pre-empt Commission mandatory regulation by responding to a problem itself.¹⁶⁹

¹⁶⁶See *supra* notes 140-156 and accompanying text.

¹⁶⁷The term "voluntary standard" is not defined by either the CPSA or the FHSA. CPSA § 9(b)(2), 15 U.S.C. § 2058(b)(2) (2000), in defining the effective date of a voluntary standard, refers to final approval of the organization or other person which developed the standard. In practice, voluntary standards mean standards set by private standards-setting organizations, such as the American National Standards Institute (ANSI), ASTM International (formerly the American Society for Testing and Materials) and Underwriters Laboratories (UL). These organizations operate largely through a consensus process in which Commission staff participate as non-voting members of various committees and subcommittees when safety is involved. The standards-setting process is very competitive and U.S. standards-setting organizations compete vigorously with their European counterparts.

¹⁶⁸CPSA § 7(b)(1), 15 U.S.C. § 2056(b)(1) (2000). The subject of when a voluntary standard would eliminate or adequately reduce the risk of an injury addressed by the standard, and when it was likely that there would be substantial compliance with a voluntary standard was discussed in greatest detail in connection with the Commission's adoption of voluntary standards covering bunk beds. Memorandum dated December 16, 1998 from Commission General Counsel Jeffrey S. Bromme re: Bunk Beds—Notice of Proposed Rulemaking—Legal Memorandum, pp. 3-5, 13-23. Statements of the Honorable Thomas H. Moore and Mary Sheila Gall dated December 2, 1999 on publication of a final rule addressing entrapment of children in bunk beds.

¹⁶⁹The ability of private standards setting bodies to react to Commission rulemaking was shown best in the examples of chain saws, all-terrain vehicles and baby walkers. In all three cases the Commission began rulemaking but terminated it after the Commission found that the voluntary standards would be adequate to adequately reduce the risk of injury and that there would be substantial compliance with the voluntary standards. For baby walkers, see 67 *Fed. Reg.* 31165, 31165-66 (2002); for ATVs, see 56 *Fed. Reg.* 47166, 47168-70 (1991); and for chain saws, see 50 *Fed. Reg.* 35241, 35241-35243 (1985). Another case in which the industry has clearly responded to Commission rulemaking is the safety regulation of infant cribs. The Commission published an ANPR on December 16, 1996, 61 *Fed. Reg.* 65996 (1996), that specified performance tests designed to assure that crib slats would not disengage from the side panels. The industry responded by developing a voluntary standard concerning that risk ("Specification for Full Size Baby Cribs (ASTM F1169-99)). At the present time the Commission staff is monitoring the adequacy of and conformance with that voluntary standard before making further recommendations concerning the pending rulemaking. Yet another example is the issue of baby bath seats. The Commission published an ANPR on October 1,

The fact that the Firearms Safety Act contains no requirement that the Attorney General defer to voluntary standards developed by private standards setting organizations is especially significant since a well-developed body of voluntary standards and a system for considering changes to those standards already exist. As mentioned earlier,¹⁷⁰ SAAMI, has developed a large body of voluntary standards and a system accredited by ANSI for considering and making changes to those voluntary standards. According to both SAAMI and ANSI policy, every five years the SAAMI standards must be revised or reaffirmed through a canvassing process that includes government agencies such as the Federal Bureau of Investigation and the U.S. Customs Service, non-SAAMI member companies and interested parties, such as the U.S. National Institute of Standards and Technology. Changes to standards must also be made by the same canvass process. The U.S. military, the Federal Bureau of Investigation and many other state and local agencies frequently require that their suppliers manufacture to SAAMI specifications.¹⁷¹ The fact that the sponsors of the Firearms Safety Act required the Attorney General to promulgate mandatory standards, rather than incorporating the system of consideration of and deferral to voluntary standards used by the Commission successfully for over twenty years, demonstrates again that the real intention of the Firearms Safety Act is not firearm safety, but handing virtually plenary power over the firearms industry to an Executive Branch official.

e. Preemption of State and Local Regulations

Yet another demonstration of the intent of the sponsors of the Firearms Safety Act that it be used as much as possible to harass and cripple the firearms industry lies in the fact that it does nothing to minimize state and local firearms safety regulation that might conflict with regulations issued under the Firearms Safety Act, or with each other. The Firearms Safety Act provides that it has no preemptive effect for any state or local law, unless the state or local law is inconsistent with any provision of the Firearms Safety Act.¹⁷² The Firearms Safety Act, however, goes on to state that a state or local law is not inconsistent if it is of greater scope or imposes a

2001, 66 *Fed. Reg.* 39692 (2001), that specified performance tests designed to reduce the possibility that an infant would drown while being bathed in such a device. The Commission followed that decision with a subsequent decision on December 29, 2003 to publish an NPR specifying a rule, 68 *Fed. Reg.* 74878 (2003). The industry responded by developing a voluntary standard (ASTM F 1967-04). The Commission is presently evaluating whether and to what extent it may defer to that voluntary standard, or whether it should promulgate a mandatory standard.

¹⁷⁰See *supra* note 10, 11 accompanying text, for a discussion of the background for the creation of SAAMI.

¹⁷¹*Sporting Arms and Ammunition Manufacturers' Institute, Inc., official website of Sporting Arms & Ammunition Manufacturers' Institute, at <http://www.saami.org> (last modified Sept. 30, 2004).*

¹⁷²S.1224 § 502(a). The section is oddly worded in that it refers to “conduct” with respect to a firearms product. Many state and even federal laws make conduct with a firearm criminal, regardless of whether the firearm involved is “safe” or not. One wonders whether the sponsors of the Firearms Safety Act intended to confer such wide powers on the Attorney General that the regulations would cover many common criminal acts (e.g., robbery, aggravated assault) that often involve firearms.

penalty of greater severity than the prohibitions or penalties imposed by the Act.¹⁷³ The effect of this lack of preemption is obvious. Not only will the firearms industry find itself subject to plenary control by the Federal Attorney General, it will also find itself subject to state legislatures, state administrative agencies, and local governments imposing more stringent requirements. The firearms industry potentially gets the worst of both worlds: one Federal “gorilla” imposing a nationwide set of requirements, and dozens of State “monkeys” all imposing their own inconsistent requirements.¹⁷⁴

The contrast between the approach taken by the Firearms Safety Act and the CPSA to preemption is dramatic. As mentioned earlier, minimizing the possibility of conflict between state and local safety regulations for consumer products was one of the reasons that Congress gave for passing the CPSA.¹⁷⁵ A mandatory consumer product safety standard explicitly preempts any inconsistent state or local laws or regulations that deal with the same risk of injury.¹⁷⁶ There are two exceptions, but they are limited in scope. A state or local government may set safety standards that result in a higher level of protection from a risk of injury when the consumer product in question is for the use of that government itself.¹⁷⁷ For example, a state government might prescribe a different standard for walk-behind lawn mowers when state employees will be using the mowers to cut the grass. The second exception requires a state or local government to apply to the Commission itself for a rule allowing an exception. The Commission may allow the exception only if it finds that the proposed state or local requirement provides a significantly higher degree of protection from the risk of injury than does the Commission’s own rule, and that the different requirement does not unduly burden interstate commerce.¹⁷⁸ These two requirements are so difficult to meet (and probably inherently contradictory) that the

¹⁷³S.1224 § 502(b).

¹⁷⁴During his service with the House Energy and Commerce Committee and with the Commission, the author has frequently heard representatives of industries regulated by the Commission state in support of Commission regulations that they would prefer to deal with one Federal “gorilla” rather than dozens of state “monkeys.”

¹⁷⁵See *supra* note 119, and accompany text.

¹⁷⁶CPSA § 26(a), 15 U.S.C. §2075(a). Not all claims of preemption are sustained. *E.g.*, *Chem. Specialty Mfrs Ass’n v. Allenby*, 958 F.2d 941, 949-50 (9th Cir. 1992), *cert. denied*, 504 U.S. 825, 113 S. Ct. 80, 121 L.Ed.2d 44 (1992) (holding that California Proposition 65 was not preempted by the FHSA); *Accord*, *People ex re. Lungren v. Cotter & Co.*, 53 Cal. App.4th 1373, 1392-93, 62 Cal Rptr.2d 368, 381-82 (Cal. App. 1 Dist. 1997) (characterizing a Commission Office of the General Counsel opinion that the FHSA did preempt Proposition 65 as “clearly erroneous”), *cert. denied*, 522 U.S. 1015 (1997), *rehearing denied*, 522 U.S. 1099 (1998). The preemptive effect of a statute administered by the Commission (in this case the FLAMMABLE FABRICS ACT, Pub. L. 83-88, 67 Stat. 111, June 30, 1953, as amended, codified at 15 U.S.C. 1191-1204 (2000)), and the Commission’s regulations pertaining to the flammability of mattresses, 16 C.F.R. §§ 1632.1-1632.63 (2003), may be tested shortly by California Technical Bulletin 603, also pertaining the flammability of mattresses. California Technical Bulletin 603 become effective on January 1, 2005.

¹⁷⁷CPSA § 26(b), 15 U.S.C. §2075(b).

¹⁷⁸CPSA §26(c), 15 U.S.C. §2075(c). Commission regulations governing such applications are set forth in 16 C.F.R. §§ 1061.1 – 1061.12 (2003).

Commission has never granted such an exemption, and applications are almost never submitted.¹⁷⁹

The inconsistency of the Firearms Safety Act with the CPSA on the issue of preemption reveals once again that the sponsors of the Firearms Safety Act had much more than safety on their minds. In contrast to a system of preemption that has worked well for over thirty years for consumer products, the sponsors of the Firearms Safety Act chose a completely different approach that subjects the firearms industry to the maximum possible inconsistency between the federal and state systems. It is hard to justify why a firearm that is adequately safe according to federal regulations in one state is not safe in another state just because that other state has adopted a more stringent set of safety regulations. If, however, the objective is maximum harassment of the firearms industry, leaving state and local governments free to impose inconsistent regulations makes a good deal of sense.

5. Recalls and Enforcement

Unenforced regulations are of only hortatory effect, a fact recognized by the Firearms Safety Act and the CPSA. But, as was the case with rulemaking, the recall authority granted to the Attorney General by the Firearms Safety Act is wider and its exercise is subject to fewer restrictions than that exercised by the Commission. Such more far reaching authority is also consistent with an objective of granting the Attorney General more power than is truly necessary to achieve any safety effect in the case of firearms.

a. Prospective Violations

The Firearms Safety Act authorizes the Attorney General to issue certain types of orders in certain circumstances. The Attorney General may issue an order prohibiting the manufacture, sale or transfer of a firearm product, which the Attorney General finds has been manufactured, imported, transferred or distributed in violation of a regulation prescribed under the Act.¹⁸⁰ This authority also extends to instances where the Attorney General finds that there is an intent to import, transfer or distribute a firearm product in violation of the regulations.¹⁸¹ Not surprisingly, the Firearms Safety Act gives no guidance about how the Attorney General would establish intent. There is no comparable grant of authority to the Commission under the CPSA. While it is certainly unlawful to manufacture for sale, distribute or import a consumer product that violates an applicable consumer product safety

¹⁷⁹The Commission has received only one application under CPSA § 26(c). In 1981 the Commission adopted a consumer product safety standard for unvented gas-fired space heaters. The Commission received twenty-three applications from state and local governments asking for exemptions from the standard. In response the Commission deferred a decision on the applications and began a rulemaking to revoke its own mandatory standard, citing the effectiveness of a voluntary standard developed by the American Gas Association and ANSI. "Commission Votes on Safety Standard," Commission Press Release #83-031, June 1, 1983. The mandatory standard was eventually revoked. "CPSC Revokes Its Mandatory Standard for Unvented Gas-Fired Space Heaters," Commission Press Release #84-051, August 16, 1984.

¹⁸⁰S.1224, § 102(a).

¹⁸¹S.1224, § 102(a).

standard, or which has been declared to be a banned hazardous product,¹⁸² the Commission's remedy would be to proceed in court to obtain an injunction to restrain persons from distributing the products in question,¹⁸³ or to work with the Custom's Service to refuse entry to imported products.¹⁸⁴ The sponsors of the Firearms Safety Act used the concept of "prior restraint" to grant more authority to the Attorney General than Congress has granted to the Commission.

b. Recalls

Criteria

Not all problems with products are discovered before distribution. One of the most important sources of authority that an agency concerned with products can exercise is an ability to force some entity in the chain of distribution to notify consumers that there is a problem with a product and to take some other action.¹⁸⁵ Both the Firearms Safety Act and the CPSA confer recall authority, although, as has been the case with every other provision of the Firearms Safety Act, the authority that it grants is broader and more standardless than that granted by the CPSA.

The Firearms Safety Act empowers the Attorney General to issue a recall order if the Attorney General finds that the firearm product poses an unreasonable risk of injury to the public, does not comply with a regulation prescribed under the Act or is defective.¹⁸⁶ The second of these three tests is relatively straight-forward: the failure to conform to a regulation. The other two are, however, more amorphous and subject to interpretation. The first test, "poses an unreasonable risk of injury to the public," appears to replicate the criteria that the Attorney General is instructed to use to promulgate regulations in the first place.¹⁸⁷ If the regulations, once promulgated, do not cover the purported risk, how could the Attorney General plausibly argue that a particular characteristic now poses an unreasonable risk of injury to the public? It is not unusual for manufacturers to take regulations into account when they design and manufacture products, and regulators usually take into account potential variations in a product when they write regulations. If the Attorney General believes that a particular firearm characteristic constitutes an unreasonable risk to the public after the regulations are in force, the proper response should be to seek amendments to the regulations, subject to notice and comment rulemaking. The existence of

¹⁸²CPSA § 19(a)(1)-(2), 15 U.S.C. § 2068(a)(1)-(2) (2000).

¹⁸³CPSA § 22(a)(1)-(3), 15 U.S.C. § 2071(a)(1)-(3)(2000). Such products are subject to condemnation in U.S. district court. *Id.* at § 22(b)(1)-(2), 15 U.S.C. § 2071(b)(1)-(2) (2000).

¹⁸⁴CPSA § 17(a), 15 U.S.C. § 2066(a) (2000).

¹⁸⁵Other Federal agencies dealing with products have the ability to force recalls: the National Highway Traffic Safety Administration (automobiles and associated equipment), the U.S. Coast Guard (boats and associated equipment), the Food and Drug Administration (food, drugs, medical devices, vaccines, blood and plasma products, cosmetics, pet and veterinary products), the U.S. Department of Agriculture (meat, poultry products, eggs) and the U.S. Environmental Protection Agency (pesticides, fungicides, rodenticides and vehicle emissions). <http://www.recalls.gov>.

¹⁸⁶S.1224, § 102(b).

¹⁸⁷S. 1224, § 101(a) says that the regulations must be reasonably necessary to reduce or prevent unreasonable risk of injury.

recall authority tied only to a finding of unreasonable risk, of course, makes such an exercise unnecessary. It is totally consistent with the sponsors' evident objective of giving as much authority as possible over the firearms industry to the Attorney General. Exactly the same comments apply to the third circumstance (defective) under which the Attorney General may order a recall. The Firearms Safety Act provides no definition of the term "defective," and it is difficult to imagine how a firearm product could conform to regulations but nevertheless be defective.¹⁸⁸ Like the rest of the recall authority of the Firearms Safety Act, amorphous criteria for ordering recalls is perfectly consistent with the objective of constituting the Attorney General as a "firearms czar," even if it has little to do with safety.

All of the three tests under the Firearms Safety Act lack other requirements that the Commission must establish in order to recall a consumer product under its CPSA authority. The Commission may order a recall if it finds that a product represents a "substantial product hazard."¹⁸⁹ By contrast, rulemaking requires only a finding of unreasonable risk.¹⁹⁰ The use of a different standard to establish when the Commission may order a recall than when it may engage in rulemaking,¹⁹¹ indicates that Congress believed that a different level of hazard was required for the Commission to order a recall, a distinction in which the sponsors of the Firearms Safety Act took no evident interest. In order to make a determination that a product constitutes a substantial product hazard, the Commission must make a number of findings. It must first find that the product in question either fails to comply with an applicable consumer product safety standard, *or* is defective.¹⁹² After having made one of those findings, the Commission must make the *further* finding that the failure to comply with the standard, or the defect, creates a substantial risk of injury to the public.¹⁹³ Alternative one of the first part of the requirement is relatively straightforward, although always subject to questions of proof; either the product conforms to an applicable consumer product safety standard or the product does not. The second alternative is more subjective, since the CPSA provides no definition of the term "defective."¹⁹⁴ If there is a voluntary standard, the Commission's task is almost as easy as if there were a mandatory standard; in practice the Commission need only prove the existence of the voluntary standard and that the product fails to conform to

¹⁸⁸BLACK'S LAW DICTIONARY 506 (4th ed. 1968) defines defective as "lacking in some particular which is essential to the completeness, legal sufficiency or security of the object spoken of." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 345 (1969) defines defective as "lacking perfection; having a defect; faulty."

¹⁸⁹CPSA § 2064(c)-(d) 345 (1969), 15 U.S.C. § 2064(c)-(d) (2000).

¹⁹⁰CPSA § 9(f)(3), 15 U.S.C. § 2058(f)(3) (2000).

¹⁹¹The criteria which the Commission must use for rulemaking is discussed *supra* notes 140 – 156 and accompanying text. The basic criterion is that the rule must be reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with a product.

¹⁹²CPSA § 151(a), 15 U.S.C. § 2064(a) (2000).

¹⁹³*Id.*

¹⁹⁴For common definitions of the term "defective" see *supra* note 188. Commission regulations also define defect as a flaw, fault, or irregularity that causes weakness, failure or inadequacy in form or function, and contain a further discussion and examples of defects. 16 C.F.R. § 1115.4 (2003).

it in a manner that impacts safety.¹⁹⁵ If there is no pertinent voluntary standard that applies to the product, the Commission's task is more difficult, since it must prove that the product fails to conform to some requirement that adversely impacts safety.¹⁹⁶ The CPSA's second requirement for the Commission to order a recall, "creates a substantial risk of injury to the public," also creates some difficulty for the Commission, although at least the CPSA gives some guidance¹⁹⁷ about the criteria that the Commission should consider in making its determination: pattern of defect, number of defective products distributed in commerce, the severity of the risk, or otherwise.¹⁹⁸ The CPSA, therefore, establishes a much higher threshold of product hazard to justify a recall than does the Firearms Safety Act.

Procedure for Ordering Recalls

Basic due process requires that some type of procedure be followed before a public official can issue an order compelling a private person to take action. The Firearms Safety Act takes a minimalist approach to procedures that must be followed

¹⁹⁵The Commission has no mandatory standards for hair dryers, but it has conducted 26 recalls of hair dryers since May 21, 1979 based on failures to conform with Underwriters Laboratories *Household Electric Personal Grooming Appliances (UL 589)* standard. *See, e.g.*, "CPSC, Light Distribution Inc. Announce Recall of Hair Dryers," *CPSC Recall Alert*, March 9, 2004; "CPSC, Fromm International-Solis® USA Announce Recall of Hair Dryers," *Commission Press Release #04-080*, February 10, 2004; "CPSC, Remington Products Co., LLC Announce Recall of Hairdryers," *Commission Press Release #01-111*, Mar. 21, 2001. Similarly, the Commission's mandatory standards for cigarette lighters cover only child-resistance, (16 C.F.R. §§ 1210.1—1210.20 (2003)), but the Commission has conducted recalls based on lighters failure to comply with ASTM F-400. *See, e.g.*, "CPSC, Halpern Import Co. Announce Recall of Cigarette Lighters," *Commission Press Release #00-189*, September 28, 2000; "CPSC, Shine International Trading Co. Inc. Announce Recall of Cigarette Lighters," *Commission Press Release #00-005*, October 14, 1999 (the recall also involved failure to comply with mandatory child-resistance requirements); "CPSC And New York Lighter Announce Cigarette Lighter Recall," *Commission Press Release #96-024*, November 17, 1995. Finally, the Commission has no mandatory standards for carbon monoxide detectors, but it has conducted a number of recalls for failures to comply with Underwriters Laboratories Standard 2034. "CPSC, Kidde Safety Announce Recall of Carbon Monoxide Alarms," *Commission Press Release #99-082*, March 19, 1999; "CPSC Warns of Failures with Home Gas Sentry Carbon Monoxide Detectors distributed by Staley Solar & Stove," *Commission Press Release #96-181*, August 6, 1996; "CPSC Warns Of Failures With Sinostone Carbon Monoxide Detectors," *Commission Press Release #96-061*, January 19, 1996. There is no example of a manufacturer contending seriously that the failure to conform materially to a safety-related portion of a voluntary standard did not constitute a defect.

¹⁹⁶The best example of the difficulties that the Commission can face when it brings a case not based on a failure to conform to a mandatory or voluntary standard is *In re Daisy Manufacturing Company*. *See note 56 supra*.

¹⁹⁷The criteria for determining "substantial risk of injury to the public" technically appears only in connection with a product defect, CPSA § 15(a)(2), 15 U.S.C. § 2064(a)(2)(2000) and not in connection with a failure to conform with a mandatory standard § 15(a)(1), 15 U.S.C. § 2064(a)(1) (2000), but there is no prohibition against using such criteria and, in practice, the Commission applies the same criteria to both circumstances in determining whether there is a substantial risk of injury to the public.

¹⁹⁸CPSA § 15(a)(2), 15 U.S.C. § 2064(a)(2) (2000).

for the Attorney General to issue a recall order: there are none.¹⁹⁹ As in rulemaking, the Constitutional requirement of due process coupled with the Administrative Procedure Act would require that the Attorney General provide some type of hearing before issuing a recall order.²⁰⁰ It is instructive, however, that the sponsors of the Firearms Safety Act did not even bother to refer to the Administrative Procedure Act and require that the minimum requirements of due process be followed before the Attorney General could order an action that might prove financially ruinous to a firearms manufacturer or dealer. By contrast, the CPSA specifies that the Commission must follow the Administrative Procedure Act and hold a hearing before it may order a recall.²⁰¹ The failure of the Firearms Safety Act to even mention the Administrative Procedure Act is, of course, completely consistent with a goal of providing the Attorney General with as much authority and as little accountability as possible vis-à-vis firearms industry.

Recall Remedies

Once an agency has found that there is a product defect that presents some sort of hazard to the public, it must also decide what the manufacturer, other entities in the chain of distribution, and the agency itself ought to do about it. Many of the remedies contained in the CPSA and the Firearms Safety Act are similar, but where they differ, the Firearms Safety Act confers more authority and grants greater discretion to the Attorney General than the CPSA grants to the Commission.

Notice

The first option is simply to warn the public against the hazard. Both the Firearms Safety Act and the CPSA empower the Attorney General and the Commission, respectively to require manufacturers and other persons in the chain of distribution to provide notice,²⁰² although the CPSA requires that the Commission make a further finding that such notification is in the public interest.²⁰³ The CPSA is also more specific about the ways that notice may be provided:²⁰⁴

1. Public notice (generally a press release but on some occasions by paid advertising);²⁰⁵

¹⁹⁹S.1224 § 102(b) states merely that the “Attorney General may issue an order requiring the manufacturer of, and any dealer in, a firearm product to” take steps associated with a recall. For a description of those steps, see *infra* notes 202-219 and accompanying text.

²⁰⁰U.S. CONST. amend. V, provides that “No person . . . shall be deprived of life, liberty, or property, without due process of law The ADMINISTRATIVE PROCEDURES ACT §§ 554, 556-57, 5 U.S.C. § 554, 556-57 (2000) sets forth the required procedures for adjudications.

²⁰¹CPSA § 15(c), (d), (f), 15 U.S.C. § 2064(c), (d), (f) (2000). The Commission’s regulations for the conduct of such hearings are set forth in 16 C.F.R. §§ 1025.1—1025.68 (2003).

²⁰²S.1224 § 102(b), CPSA § 15(c) 15 U.S.C. § 2064(c) (2000).

²⁰³CPSA § 15 (c), 15 U.S.C. § 2064(c) (2000).

²⁰⁴CPSA § 15(c)(1)-(3), 15 U.S.C. §§ 2064(c)(1)-(3). These mechanisms of notice are not set forth by way of limitation and the Commission now generally requires that manufacturers with sites on the world-wide web post notice of their recalls for a time on that site.

²⁰⁵Most of the Commission’s recalls that are negotiated voluntarily with the manufacturers are accompanied by press releases. One example of paid advertising was the settlement of the all-terrain vehicle litigation. See *United States v. American Honda*, Civil Action No. 87-3525,

2. Notice mailed to manufacturers, distributors or retailers,²⁰⁶ and
3. Notice mailed to each person to whom the product was delivered or sold.²⁰⁷

Repair, Replace, Refund

Both the Firearms Safety Act and the CPSA recognize that simple notice to consumers of a safety problem may be inadequate to protect the public. Both the Act and the CPSA, therefore, empower the Attorney General and the Commission respectively to compel manufacturers and other entities in the chain of distribution to take further actions. There are, however, significant differences between the Act and the CPSA that, not surprisingly, operate to the disadvantage of the firearms industry.

In addition to the authority to compel a manufacturer or a dealer to give notice of a safety problem, the Firearms Safety Act authorizes the Attorney General to order a manufacturer or dealer to do the following:²⁰⁸

1. Bring the firearm into conformity with pertinent regulations;
2. Repair the firearm;
3. Replace the firearm with a complying like or equivalent product;
4. Refund the purchase price, less an amount based on reasonable use if the firearm is over one year old;
5. Recall the firearm; or
6. Submit to the Attorney General a plan to implement an action ordered by the Attorney General.

These remedies under the Firearms Safety Act track the remedies available to the Commission under the CPSA:²⁰⁹

1. Repair the defect or bring the product into conformity with an applicable consumer product safety rule;
2. Replace the product with a like or equivalent product that does not contain the defect or which conforms to an applicable consumer product safety rule; or

(D.D.C. April 28, 1988); another example was the second recall of certain General Electric dishwashers agreed to in 2001. CPSC No. RP990036 General Electric Appliances Division, *Amendment to Settlement Agreement*, § 2(v), Dec. 12, 2000.

²⁰⁶It is hard to imagine the circumstances under which notice would have to be mailed to the manufacturer of a product, since the manufacturer is almost always in charge of the recall. Notifying distributors and retailers is, however, essential to removing recalled products from the chain of distribution.

²⁰⁷This remedy is limited to those circumstances in which a manufacturer, distributor or retailer knows the addresses of the purchasers. This knowledge may be high in the case of mail order or Internet sales, but may be almost nonexistent in the case of sales of inexpensive items by retailers.

²⁰⁸S.1224 § 102(b). The remedies are phrased in the disjunctive, but since the last remedy requires a plan for implementing “any action” required by an Attorney General’s order, it appears that the sponsors of the Firearms Safety Act probably intended for the Attorney General to have the authority to fashion an order including one or more of the specified remedies. Moreover, virtually any of the other remedies described in the Firearms Safety Act would necessarily involve notice. S.1224, § 102(b)(1).

²⁰⁹CPSA § 15(d)(1)-(2), 15 U.S.C. §§ 2064(d)(1)-(3) (2000).

3. Refund the purchase price of the product, less a reasonable allowance for use if the product has been in the possession of the consumer for one year or longer.

The remedies available to the Attorney General under the Firearms Safety Act include one remedy not normally available to the Commission²¹⁰: the “recall” of a firearm from the stream of commerce.²¹¹ What the sponsors of S.1224 believe to be a “recall” that would not involve the repair or replacement of, or a refund for, the firearm is not apparent from either the text of the Act (since recall is not a defined term) or their statements in introducing the bill. Its use, however, may empower the Attorney General to devise some sort of remedy above and beyond the remedies available to the Commission when it seeks to recall defective products. One possibility might be a recall that imposes some charge to consumers. The CPSA specifically states that no charge shall be made to any person, other than a manufacturer, distributor, or retailer, who takes advantage of a remedy under a recall order and that such persons are entitled to reimbursement for reasonable and foreseeable expenses.²¹² The lack of such a section in the Firearms Safety Act creates the possibility that the Attorney General might order a recall that imposes some costs on consumers. Since consumers in this case are firearms owners, the fact that they might have to pay something for the privilege of having their gun recalled probably did not trouble the sponsors of the Firearms Safety Act at all.

In addition to granting the Attorney General an authority that is beyond those granted in the CPSA, the Firearms Safety Act also omits one important protection granted to manufacturers, distributors and retailers by the CPSA. The person to whom an order under Section 15 of the CPSA is addressed may elect the remedy: repair the product, replace the product, or refund the purchase price.²¹³ The lack of

²¹⁰The recall remedy is available to a district court when the Commission has brought an action seeking to declare a product an “imminently hazardous consumer product.” CPSA § 12(b)(1), 15 U.S.C. § 2061(b)(1) (2000). No case law explaining the difference between a “recall” and the ordinary “repair, replace and refund” remedies of the CPSA has been developed. For a discussion of the circumstances under which the Commission can seek to have a product declared imminently hazardous, see *infra* notes 220-225, and accompanying text.

²¹¹The Firearms Safety Act also has a remedy of bringing the firearm into conformance with pertinent regulations. S.1224 § 102(b)(2). The sponsors do not explain just how this remedy would differ from a repair remedy, and it raises the possibility that the Firearms Safety Act could be interpreted to require retroactive changes to firearms even in the absence of a defect requiring a repair.

²¹²CPSA § 15(e)(1), 15 U.S.C. § 2064(e)(1)(2000). The Commission did agree to a recall in the case of dishwashers manufactured by General Electric in which consumers received a rebate against the purchase of a new dishwasher. Consumers obviously had to pay the balance of the price of the new dishwasher. Commission Press Release #00-006 “*CPSC, GE Announce Recall of Dishwashers*” (Oct. 18, 1999). That recall was, however, later modified to give consumers the option to rewire their existing dishwashers at no charge. “*CPSC and GE Announce Free Repair Supplement of Rebate Program for Recalled Dishwashers: Recalled Units Still Being Used, Creating Risk of Fire*” Commission Press Release #01-054 (Dec. 14, 2000).

²¹³CPSA § 15(d). 15 U.S.C. § 2064(d)(2000). The Commission does have the authority to require that a person subject to a recall order to submit a plan acceptable to the Commission

such a right of election could lead, for example, to an Attorney General's order that a manufacturer conduct a very expensive repair on older model firearms, when refund would be a more economically rational solution. It might also result in an order requiring replacement when a simple repair would be adequate for safety. An Attorney General not well disposed to the private ownership of firearms would have every incentive to order refunds (which require the return of the product to claim the refund) with the least allowance possible for "reasonable use." Such refunds would have the effect of removing as many firearms as possible from private ownership. They would also give firearms owners a substantial financial incentive to return the firearm, with the cost borne by the recalling manufacturer. The manufacturer on the receiving end of such an order would have only a claim of lack of constitutional due process upon which to base a challenge to the order. As in so many other aspects, the Firearms Safety Act gives the Attorney General significantly more power over the firearms' industry than the CPSA gives the Commission over consumer products.

It is also possible that the Firearms Safety Act might be interpreted to extend even to sales of recalled firearms in the hands of private persons, a remedy the CPSA does not make available to the Commission. Section 201(f) of the Firearms Safety Act makes it illegal for any *person* to offer for sale or distribute in commerce a firearm product that does not conform to the regulations prescribed by the Attorney General, or in violation of *an order issued under the authority* of the Act (emphasis added). Insofar as the Firearms Safety Act seeks to make illegal the sale or transfer of a firearm that does not conform to regulations, it is similar to the provisions of the CPSA.²¹⁴ The situation may, however, be different in the case of products and

describing how it will carry out the remedy that it has elected. *Id.* The Commission may also reopen a case if it finds that the execution of the remedy is not protecting the public adequately. 16 C.F.R. § 1025.58 (2003). The Commission exercised this authority when it found that not enough consumers were taking advantage of a rebate option offered by General Electric for some defective dishwashers. A subsequent recall by General Electric offered consumers the option of rewiring the control panel to eliminate the hazard. "*CPSC and GE Announce Free Repair Supplement of Rebate Program for Recalled Dishwashers: Recalled Units Still Being Used, Creating Risk of Fire*" Commission Press Release #01-054 (Dec. 14, 2000). There was also a discussion at the hearing on the Commission's Fiscal Year 2003 Appropriation of the circumstances under which the Commission could reopen an investigation. *Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations for 2003: Hearings Before A Subcommittee of the Committee on Appropriations, House of Representatives, Part 2, 107th CONG., 676-78, 686 (2002)*. There have been legislative proposals to eliminate this election of remedies. (*e.g.*, H.R. 4586, 105th CONG. 2000). But none of them have been the subject of even congressional subcommittee consideration. See Jayne O'Donnell, Tougher Product Safety Bill Offered, *USA TODAY*, May 12, 2000, at A1; Statement of the Honorable Mary Sheila Gall in Opposition to the Consumer Product Safety Commission Enhanced Enforcement Act of 2000 (May 12, 2000) (on file with author and with the Secretary of the Commission.).

²¹⁴CPSA § 19(a)(1) and (2) 15 U.S.C. § 2068(a)(1)-(2)(2000) makes it unlawful for any person to offer for sale or distribute in commerce any consumer product that does not conform to an applicable consumer product safety standard or which has been declared to be a banned hazardous product. The Commission has never sought to collect a civil penalty from a private person based on a single sale of product that did not conform to a mandatory standard or was a banned hazardous product. Even in the case of manufacturers, distributors and private labelers, establishing a violation of the CPSA requires a showing of actual knowledge that the product did not conform, or a notice from the Commission that distribution would be a

firearms that have been the subject of recalls. It is not unlawful for a private person to sell or otherwise transfer a consumer product that is the subject of a recall order of the Commission.²¹⁵ The Commission has, in fact, devoted considerable attention to try and remove recalled products from the hands of private individuals.²¹⁶ Likewise the authority of the Attorney General to conduct ordinary recalls is limited to orders directed to manufacturers and dealers.²¹⁷ The extraordinary authority conferred by Section 102(c) of the Firearms Safety Act²¹⁸ is, however, not limited to manufacturers and dealers. The Attorney General might issue an order forbidding any “transfer or distribution” of a firearm under the authority of this section, including transfers between private individuals.²¹⁹ The possibility of making otherwise lawful sales of firearms between private individuals illegal by means of an *order*, rather than by legislation or even regulation, is yet one more example of the extreme measures that the sponsors of the Firearms Safety Act went to give the

violation. CPSA §§ 19(a)(1), (2), and 20(a)(1), (2) CPSA § 19(a)(5), 15 U.S.C. §§ 2068(a)(1),(2) and 2069(a)(1), (2)(2000).

²¹⁵CPSA § 19(a)(5), 15 U.S.C. § 2068(a)(5) makes it unlawful to fail to comply with an order issued under Section 15(c) or (d) of the CPSA. Those subsections, however, authorize the Commission to issue orders only to manufacturers, distributors and retailers.

²¹⁶The Commission hired a contractor to study the literature on recall effectiveness. *Recall Effectiveness Research: A Review and Summary of the Literature on Consumer Motivation and Behavior*, CPSC Order No. CPSC-F-02-1391, Contract Number GS232F97804, July 2003. The Commission also held three public meetings on recall effectiveness. *Summary of CPSC Recall Effectiveness Meeting #1, “Motivating Consumers to Respond to Recalls,”* May 15, 2003; *Summary of CPSC Recall Effectiveness Meeting #2, “New Tools for Recall Effectiveness,”* July 25, 2003. The third meeting was held on September 9, 2003 and dealt with the measurement of the effectiveness of recalls. A summary of all three meetings is presently being prepared. Despite these efforts to improve recall effectiveness, items that have been the subject of recalls have also been associated with deaths after the recall has been announced. *Recent Death Prompts Search for Recalled Play Yards/Cribs, Baby Trend Launches New Effort to Find Those Still in Use*, Commission Press Release #01-094 (Feb. 28, 2001). Even products that have been banned both by statute and by regulations for relatively long periods of time can continue to be associated with injuries. For example, lawn darts were banned by Congress in 1988. Pub. L. 100-613, 102 Stat. 3183, Nov. 5, 1988, (requiring Consumer Products Safety Commission to revoke a previous exemption from its general ban of sharp pointed toys that had permitted the sale of lawn darts and other sharp-pointed toy exceptions). The Commission implemented the law through regulations. 16 CFR §§ 1306.1-1306.5 (2003). Yet injuries associated with the use of lawn darts continue almost fifteen years after the ban. “Youth feels ‘pretty good’ after yard-dart injury,” SOUTH BEND TRIBUNE, August 14, 2003.

²¹⁷S.1224 § 102(b). The authority of a court entering an order in cases involving imminently hazardous firearms is similarly limited to manufacturers and dealers. S.1224, § 303. For a discussion of how the Firearms Safety Act and the CPSA treat imminently hazardous firearms and products respectively, see fn. 220 through 227 and accompanying text, *infra*.

²¹⁸For a discussion of the procedural and substantive difficulties associated with this section see *supra* notes 158 – 163 and accompanying text.

²¹⁹Presumably the order would be phrased so as to permit a transfer to the manufacturer or dealer for purposes of implementing a repair, replace, refund or recall order, although there is no explicit requirement in the subsection that it do so.

Attorney General plenary authority over the firearms industry and even over private citizens who own firearms.

c. Expedited Procedures

Both the Firearms Safety Act and the CPSA recognize that the ordinary processes of recall may be inadequate to protect the public and both provide for expedited procedures. The standard to implement such expedited procedures is, however, much less under the Firearms Safety Act than it is under the CPSA. Section 12 of the CPSA²²⁰ authorizes the Commission to proceed in U.S. district court against “imminently hazardous consumer products.” Such products are defined as products which present an imminent and unreasonable risk of death, serious illness or severe personal injury.²²¹ If the Commission can establish that a product is an imminent hazard, the U.S. district court may order temporary or permanent relief as may be necessary to protect the public from the risk. This relief may include the seizure of the product, notice to the public, recall, the repair or replacement of, or refund for, the product.²²² The Commission must, however, begin rulemaking to establish regulations for products that are the subject of an imminently hazardous product action.²²³ In addition to its authority to proceed against imminently hazardous products, the Commission has the authority to apply to a U.S. district court to restrain distribution of a product when the Commission has filed an administrative complaint seeking to declare the product a substantial product hazard.²²⁴ Such an action, however, grants the court authority only to restrain distribution of the product and does not include the authority to order notice, repair, replacement or refund. Moreover, a preliminary injunction granted by the court may last only so long as the administrative proceeding seeking to declare the product a substantial product hazard continues.²²⁵

Like the CPSA, the Firearms Safety Act contemplates the possibility of expedited enforcement procedures. Section 303 of the Act gives the Attorney General the authority to bring an action in U.S. district court to restrain the manufacture, distribution, transfer, import or export of an imminently hazardous firearm product. This is similar to the authority that the court has under Section 15(g) of the CPSA, but is not as far reaching as the authority granted to the court under Section 12. The threshold to obtain expedited relief is, however, much lower in the case of the Firearms Safety Act than the CPSA. An “imminently hazardous firearm product” means only that a firearm poses an unreasonable risk of injury to the public and that “time is of the essence.”²²⁶ “Unreasonable risk of injury” is, of course, precisely the

²²⁰15 U.S.C. § 2061.

²²¹CPSA § 12(a), 15 U.S.C. § 2061(a).

²²²CPSA § 12(b)(1), 15 U.S.C. § 2061(b)(1)(2000). The term “recall” is not defined in the CPSA. The other remedies clearly track those available to the Commission. CPSA §15(c) and (d), 15 U.S.C. § 2064(c)-(d).

²²³CPSA § 12(a), 15 U.S.C. § 2061(a).

²²⁴CPSA § 15(g)(1), 15 U.S.C. § 2064(g)(1).

²²⁵CPSA § 15(g), 15 U.S.C. § 2064(g).

²²⁶S.1224 § 3(a)(6).

standard that the Attorney General applies both for rulemaking and for “ordinary” recalls.²²⁷ In light of the very minimal due process requirements contained in other sections of the Firearms Safety Act, the imminent hazard proceeding authority seems likely to be used simply when the Attorney General is in a hurry. Nor is there any requirement in the Firearms Safety Act that the Attorney General begin a rulemaking proceeding concerning the type of firearm products that were the subject of the imminent hazard proceeding. Since one objective of the Firearms Safety Act is most likely the removal of as many firearms as possible from commerce and private ownership, the sponsors evidently felt no need for there to be some regulations permitting the sale of some reasonably safe version of the firearm products that were the subject of the imminent hazard proceeding.

6. Penalties

Both the CPSA and the Firearms Safety Act recognize that members of the regulated community may not always comply with the law and that penalties may need to be imposed. There are, however, differences in the circumstances under which penalties may be imposed, and those differences make it more likely that members of the firearms industry will be subjected to penalties than will industries regulated by the Commission. The CPSA contains both civil and criminal penalties.²²⁸ Persons who sell, offer for sale, distribute in commerce or import consumer products that do not comply with a consumer product safety standard, or which are banned hazardous products are subject to civil penalties.²²⁹ These civil penalties, may, however, be imposed only in cases where the manufacturer, distributor or private labeler of the product had actual knowledge that the distribution was a violation, or if that person had received notice from the Commission that the distribution would be a violation.²³⁰ Imposition of a criminal penalty requires both a knowing and willful violation, coupled with receipt of notice of noncompliance from the Commission.²³¹ In contrast to the civil penalty provisions of the CPSA, the Firearms Safety Act contains no scienter requirement at all for the imposition of a civil penalty.²³² The apparent imposition of strict liability is yet another example of the intent of the sponsors of the Firearms Safety Act to subject the firearms industry to the maximum amount of government authority. The Firearms Safety Act’s imposition of criminal penalties more closely tracks that of the CPSA in that it requires that notice from the Attorney General be received. Even here the scienter requirement is “knowingly,” rather than the higher “willfully” standard contained in

²²⁷For a discussion of the standards used for regulations and for recalls, see *supra* notes 134 – 139 and 186 – 188, and accompanying text.

²²⁸Civil and criminal penalties are set forth in CPSA §§ 20, 21, 15 U.S.C. §§ 2069-2070.

²²⁹CPSA §§ 19(a)(1), (2), 20(a)(1), 15 U.S.C. §§ 2068(a)(1), (2), 2069(a)(1). These are not the only grounds for which the Commission can assess a civil penalty under the CPSA. *See* CPSA § 19(a)(3)-(11), 15 U.S.C. § 2068(a)(3)-(11).

²³⁰CPSA § 20(a)(2)(A)-(B), 15 U.S.C. § 2069(a)(2)(A)-(B).

²³¹CPSA § 21(a), 15 U.S.C. § 2070(a).

²³²S.1224 § 301(a)(1).

the CPSA,²³³ a minor, yet telling, example of the evident intent of the Firearms Safety Act sponsors to be as harsh as possible on the firearms industry.

7. Reporting

In addition to conferring on the Commission the authority to recall products, CPSA Section 15(b)²³⁴ imposes a major reporting obligation on the regulated community. Manufacturers, distributors and retailers of consumer products must report to the Commission when they “obtain information which reasonably supports the conclusion” that such product:²³⁵

1. Fails to comply with an applicable consumer product safety standard;
2. Fails to comply with a voluntary standard in reliance upon which the Commission has terminated rulemaking;
3. Creates a defect which could create a substantial product hazard; or
4. Creates an unreasonable risk of serious injury or death.

Manufacturers, distributors and retailers are excused from making such reports only when they have “actual knowledge that the Commission has been adequately informed” of the defect, the failure to comply, or the risk.²³⁶ The Commission has developed interpretive regulations to assist manufacturers, distributors and retailers to understand their reporting obligations,²³⁷ and many of the civil penalty cases in which the Commission has obtained a judgment or which have been settled have been for violations of this reporting requirement.²³⁸ In addition to the reporting requirement of Section 15(b), Section 37 of the CPSA²³⁹ creates an obligation under certain circumstances for manufacturers to report product liability lawsuits involving death or grievous bodily injury that have been settled or which have been the subject of a judgment for the plaintiff.²⁴⁰

²³³S.1224 § 351.

²³⁴15 U.S.C. § 2064(b).

²³⁵CPSA § 15(b)(1)-(3), 15 U.S.C. § 2064(b)(1)-(3).

²³⁶CPSA § 15(b), 15 U.S.C. § 2064(b).

²³⁷16 C.F.R. §§ 1115.1-1115.15 (2003).

²³⁸The Commission obtained summary judgment for failure to report incidents of an exploding juicer in *United States v. Mirama Enterprises, Inc.*, 185 F. Supp. 2d 1148, 1158-59 (C.D. Cal. 2002), resulting in a civil penalty assessment of \$300,000. In fiscal year 2002 the Commission obtained negotiated civil penalties, consent decrees or judgments for failure to make required reports in six cases, resulting in civil penalties of \$2.975 million. Negotiated civil penalties, consent decrees and judgments in all regulated products cases also numbered six cases, but resulted in penalties of \$895,000. U.S. Consumer Product Safety Commission, 2002 Annual Report to Congress (2000). European safety agencies are beginning to impose a reporting requirement. See *European Manufacturers Required to Report Hazardous Products Under New EU Rules*, 32 *Prod. Safety & Liab. Rep. (BNA)* 71, 85 (2004). “German Product Safety Law ‘Raises Bar’ For Reporting Potential Safety Hazards,” 32 *Prod. Safety & Liab. Rep. (BNA)* 71, 86 (2004).

²³⁹15 U.S.C. § 2084 (2000).

²⁴⁰Section 37 of the CPSA creates a complicated system of reporting in which three or more product liability judgments or settlements concerning a particular model of consumer product must be reported when they occur within two years. The two year “clock” began

The Firearms Safety Act creates no similar obligation for manufacturers or dealers to disclose failures to conform to regulations, other safety problems, or court judgments or settlements to the Attorney General. This is one of the few instances in which the CPSA is actually more severe on industry than is the Firearms Safety Act. Perhaps the sponsors of the Firearms Safety Act simply overlooked these obligations of the CPSA when they drafted their own bill. One other, more plausible, explanation is that, since the real objective of the Firearms Safety Act is to subject the firearms industry to as much government control as possible, reporting of genuine safety concerns by a manufacturer or dealer was of no interest to the sponsors of the Act.

8. Applicability to Governments

Federal, state and local governmental entities purchase and use consumer products. Many governmental entities also purchase and issue firearms as weapons for law enforcement personnel.²⁴¹ Government entities have a considerable interest in preserving the safety of their employees, both for public efficiency and humanitarian reasons; therefore they have an interest in purchasing and using only safe consumer products and safe firearms. The approach taken by the CPSA and the Firearms Safety Act towards governmental entities is, however, fundamentally different.

Section 26(b) of the CPSA²⁴² contains a limited exemption for states and their political subdivisions. Such entities may have safety requirements that are inconsistent with a consumer product safety standard if the requirement is for the use of the state or the political subdivision *and* it provides a *higher* degree of protection than does the Commission-issued standard (emphasis added). This section provides an option for state and local governments when they play the role of consumers: they are free to choose a product that is safer than the minimum requirements set by a consumer product safety standard.²⁴³ Since states and local governments may set

January 1, 1991 and is “reset” on January 1 of odd-numbered years. For example, the time period that began running on January 1, 2003 ended on December 31, 2004. On January 1, 2005, another two year time period began running.

²⁴¹While most firearms are carried by local police, state police and federal police such as the Federal Bureau of Investigation or Secret Service, many persons might be surprised to learn the number of Federal agencies that have some persons authorized to carry firearms (E.g., Department of Agriculture employees engaged in animal quarantine (7 U.S.C. § 2274 (2000)), officers or employees of the Department of the Interior within areas of the National Park System (16 U.S.C. § 1a-6(b)(1) (2000)), special agents and law enforcement officers of the Forest Service (16 U.S.C. § 559(e)(1) (2000)), law enforcement officers of the Environmental Protection Agency (18 U.S.C. § 3063(a)(1) (2000)), officers and contractors of the Atomic Energy Commission (now Nuclear Regulatory Commission) (42 U.S.C. §2201(k) (2000)), officers and employees of the National Aeronautics and Space Administration (42 U.S.C. § 2456 (2000)), and employees and contractors of the Department of Energy guarding the Strategic Petroleum Reserve (42 U.S.C. § 7270a(1) (2000)). *See generally*, Dave Kopel & Robert Racansky, Day-Dream Believers (2002) available at <http://www.nationalreview.com/kopel/kopel073002.asp>.

²⁴²15 U.S.C. § 2075(b) (2000).

purchase requirements by some type of regulation or specification, this section of the CPSA allows them to avoid the technical charge that their acquisition regulation is preempted by the Federal standard.

The Firearms Safety Act, by contrast, takes a completely different approach to state and local government purchases of firearms. Section 202 of the Act states simply that the prohibitions of Section 201 do not apply to any department or agency of the United States, of a state, of a political subdivision of a state, or to any official conduct of an officer or employee of such a department or agency. Governmental entities and their officers are not prohibited from taking the following activities forbidden to ordinary firearms' consumers:

1. Importing or exporting firearm products that are not accompanied by a certificate stating that the firearms product conform to applicable regulations;²⁴⁴
2. Manufacturing, offering for sale, distributing in commerce and importing or exporting firearms products that are not in conformity with regulations prescribed under the Act, or which violate an order issued under the authority of the Act;²⁴⁵ or
3. Manufacturing, purchasing or importing a firearm product after a date that a regulation is prescribed under the Act, at a rate significantly greater than the rate at which the government entity manufactured, purchased or imported the product during a "base period" that the Attorney General specified by regulation (stockpiling).²⁴⁶

Despite the convoluted phrasing of the exemption,²⁴⁷ its intent is easily discernible: government entities may purchase firearm products that do not comply with the mandatory regulations specified by the Attorney General, or which have been recalled by the Attorney General, or which may even have been the subject of an imminently hazardous firearm product proceeding. Just why the sponsors of the Firearms "Safety" Act would want to permit access to "unsafe" firearms by law enforcement personnel is mysterious if the true objective of the Act is safety.²⁴⁸ Since other portions of this article have made it clear that the genuine objective of the Firearms Safety Act is to hand plenary authority over the firearms industry to the Attorney General, it is perfectly consistent to exempt governmental entities and their

²⁴³For example, a state might want to purchase walk-behind lawn mowers for use by state employees with guards that prevent entry by probes even smaller than those required by the Commission's regulations. 16 C.F.R. § 1205.4 (2003). Such a guard would provide more protection from inadvertent contact between the blade and the operator's hands and feet.

²⁴⁴S.1224 § 201(e).

²⁴⁵S.1224 § 201(f).

²⁴⁶S.1224 § 201(g).

²⁴⁷The scope of the exemption is not precisely clear since S.1224, § 201(a), (b), (c), and (d) apply to manufacturers, dealers and importers. These activities are usually carried on by contractors for the government. The exemptions of S.1224, § 201(e), (f), and (g) apply to persons, which would include government entities in their role as firearms consumers.

²⁴⁸Since many police officers take their firearms home with them, the exemption would have the effect of putting not only the government officials, but also their families (and especially children) at risk if the true objective of the Act were safety.

officials from the prohibitions. After all, what concern do the sponsors of the Firearms Safety Act have about concealability, large ammunition capacity and larger, more lethal ammunition, if weapons with these characteristics are to be in the hands of politically-reliable police or regulatory authorities? And what need do such persons have for magazine disconnectors and loaded chamber indicators, which the sponsors of the Firearms Safety Act believe must be present in firearms sold to the general public? The attitude of the sponsors of the Firearms Safety Act is, not surprisingly, fully consistent with many other restrictions on firearms ownership that apply to mere private citizens, but not to the exalted officials of government.²⁴⁹

9. Testing, Certification, Labeling and Prior Notice

Both the CPSA and the Firearms Safety Act contain sections concerning testing, certification and labeling of consumer products and firearm products respectively. The CPSA requires that manufacturers and private labelers of consumer products that are subject to mandatory standards provide a certification that the product conforms to the standard.²⁵⁰ Section 201(a) of the Firearms Safety Act creates a similar obligation on the part of manufacturers to test and certify that their firearm products conform to the regulations promulgated by the Attorney General.²⁵¹ The labeling requirements also resemble each other.²⁵² The Firearms Safety Act,

²⁴⁹A complete discussion of law enforcement exemptions to gun laws applicable to the general public is beyond the scope of this article. A few examples will suffice. The Federal ban on “assault weapons,” did not apply to law enforcement personnel. 18 U.S.C. § 922(v)(4) (2000). Maryland law requiring personalized handgun technology does not apply to law enforcement personnel. *MD Code Public Safety* § 5-132(b)(1) (2003). Massachusetts’ requirements that sales of firearms and large capacity weapons must be accompanied by a safety device do not apply to weapons distributed to officers of a law enforcement agencies, (*Mass. Gen. Law. c. 140, § 131K*) (2004)), nor do its prohibitions on large capacity weapons (*id.* § 131(a)). Illinois exempts peace officers from the requirement to obtain a firearms owner identification card. 720 ILCS 5/24-2(a)(1). California waiting periods and requirements for handgun safety certification do not apply to peace officers. West’s Ann. Cal. Penal Code S12078(a)(1) and (2) (2004). For a critique of such exemptions, see D. Kopel and R. Racansky, “Day-Dream Believers: A law that antigun folks would die for,” *supra*, and J. Snyder, “A Nation of Cowards,” 113 *The Public Interest* 40, 46-48 (1993).

²⁵⁰CPSA § 14(a)(1), 15 U.S.C. § 2063(a)(1) (2000). Commission regulations generally specify the testing that is required for the manufacturer to certify that it meets the requirements of a consumer product safety standard. CPSA § 14(b), 15 U.S.C. § 2063(b) (2000). For example, 16 C.F.R. §§ 1204.11—1204.17 (2003) contain the certification and production testing requirements for omnidirectional citizens band base station antennas, and §§ 1205.30 – 1205.36 (2003) contain the certification, production testing and labeling requirements for walk-behind lawn mowers.

²⁵¹In the case of consumer products the manufacturer’s certification need only be delivered as far as the retailer. CPSA § 14(a)(1), 15 U.S.C. § 2063(a)(1) (2000). In the case of firearms products the certification must be to each person to whom the product is distributed. S.1224, §§ 201(a)(3), (c)(5).

²⁵²CPSA § 14(c) 15 U.S.C. § 2063(c) (2000) authorizes the Commission to require a label containing: (1) the date and place of manufacture; (2) a suitable identification of the manufacturer; and (3) a certification that the consumer product meets all applicable consumer product safety standards. S.1224, § 201(c) requires: (1) name and address of the manufacturer; (2) name and address of the importer; (3) model number of the firearm product

however, contains a requirement that a manufacturer provide notice to the Attorney General that the manufacturer intends to manufacture a new type of firearm product and a description of the product,²⁵³ a requirement that has no corresponding section in the CPSA. Since “firearm product” includes a great number of products,²⁵⁴ yet with no definition of “type”, the requirement to give notice to the Attorney General might be construed to be virtually any modification of a manufacturer’s product line. The potential for civil penalty actions for failure to report whatever the Attorney General later deemed to be a new “type” of firearm product are clear, and probably something the Act’s sponsors welcomed.

10. Information Disclosure to the Public

Providing information to the public about safety hazards and how to use products safely is one of the ways that any governmental agency concerned with safety seeks to fulfill its mission. Both the CPSA and the Firearms Safety Act charge the Commission and the Attorney General, respectively, with educating the public about the hazards associated with the use of consumer products and firearms respectively.²⁵⁵ Both the Commission and the Attorney General are subject to the Freedom of Information Act (FOIA).²⁵⁶ The CPSA, however, contains a specific exception to FOIA that protects members of the regulated community from

and date of manufacture; (4) a specification of regulations applicable to the firearm product; and (5) the required certificate.

²⁵³S.1224, § 201(b).

²⁵⁴“Firearm product” includes firearm, firearm part, nonpowder firearm and ammunition. S.1224, § 3(a)(3).

²⁵⁵CPSA § 2(b)(2), 15 U.S.C. § 2051(b)(2) (2000) states explicitly that one of the purposes of the CPSA is “to assist consumers in evaluating the comparative safety of consumer products.” In addition, CPSA § 5(a)(1)-(4), 15 U.S.C. § 2054(a)(1-4) (2000), requires the Commission specifically to (1) maintain an Injury Information Clearinghouse to collect, investigate, analyze and disseminate injury data and information; (2) conduct studies and investigations of deaths, injuries and diseases resulting from accidents involving consumer products; (3) assist private-public organizations to develop safety standards; (4) assist private and public organizations in the development of safety standards. S.1224, § 401(a) similarly requires the Attorney General to coordinate with the Secretary of Health and Human Services to collect, investigate, analyze and share with other government agencies the circumstances of deaths and injury associated with firearms, and to conduct studies of the costs and losses resulting from firearm-related deaths and injuries. In addition, the Attorney General is required to research and study the safety of firearm products and how to improve that safety. *Id.* at § 401(b)(2). The results of these studies are to be made available to the public. *Id.* at § 401(c). Whether or not the Attorney General would conduct information and education campaigns on the safe use of firearms seems problematic given the general orientation of the Firearms Safety Act against the firearms industry and the private ownership of firearms, coupled with the other responsibilities of the Attorney General and the Department of Justice.

²⁵⁶Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966), *codified by* Pub. L. No. 90-23 (1967) at 5 U.S.C. § 552 (2000). A discussion of FOIA is beyond the scope of this article. In general FOIA creates an obligation for a Federal agency to disclose information that it has at the request of the public, unless a specific exemption exists authorizing it not to disclose the information. The Commission’s regulations pertaining to FOIA are contained in 16 CFR §§ 1015.1—1015.19 (2003).

premature disclosures of information about the safety of their products that might prove damaging in the marketplace. Section 6(b) of the CPSA²⁵⁷ requires the Commission to perform a number of steps before it can release information about product safety that would permit the public to readily ascertain the manufacturer or private labeler to which the information pertains:²⁵⁸

1. the Commission must give the manufacturer or private labeler thirty days notice of its intent to release the information and also give the manufacturer or private labeler an opportunity to comment on the proposed release;
2. the Commission must take reasonable steps to assure that the information that it proposes to release is accurate, including procedures to ensure such accuracy, and to determine that disclosure is fair under the circumstances and reasonably related to effectuating the purposes of the CPSA;
3. if the Commission does release the information it must, at the request of the manufacturer or private labeler, include the comments or other information submitted by the manufacturer or private labeler in response to the information that the Commission proposes to release;
4. if the manufacturer or private labeler objects to the release of all or a portion of the information the Commission must notify the manufacturer or private labeler of its intent and give the manufacturer or private labeler ten days notice;
5. if the Commission gives the manufacturer or private labeler the notice required above, the manufacturer or private labeler may bring an action in U.S. district court to enjoin the Commission from releasing the information.

There are a number of exceptions to the elaborate procedures set forth above; mostly relating to situations in which the Commission has already taken action concerning a product.²⁵⁹ There are also requirements for retractions in the event that the Commission finds it has made a mistake in a previous release.²⁶⁰ These restrictions on the Commission's ability to release information have been criticized²⁶¹ and have

²⁵⁷15 U.S.C. § 2055(b) (2000). Section 6(a) of the CPSA, 15 U.S.C. § 2055(a) (2000), contains a separate exemption for trade secret or confidential business information.

²⁵⁸CPSA § 6(b)(1)-(3), 15 U.S.C. §2055(b)(1)-(3), (6) (2000). Section 6(b) of the CPSA applies to FOIA requests. *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 US 102, 108-111 (1980).

²⁵⁹CPSA § 6(b)(4), (5), 15 U.S.C. § 2055(6)(b)(4), (5) (2000).

²⁶⁰CPSA § 6(b)(7), 15 U.S.C. § 2055(b)(7) (2000).

²⁶¹CPSA § 6(b)(7). MARLA FELCHER, *supra* note 89, at 121-23, 190-93. Some consumer groups have advocated the outright repeal of the CPSA § 6(b). *See*, Submitted testimony, p. 4 of Rachel Weintraub, Assistant General Counsel, Consumer Federation of America and submitted testimony pp. 10-14 of R. David Pittle, Senior Vice President for Technical Policy, Consumers Union, before the Subcommittee on Consumer Affairs and Product Safety of the Senate Committee on Commerce, Science and Transportation, June 17, 2003. [The bound version of the transcript of the hearing has yet to be made available by the Government Printing Office.] *See also*, "Consumers Bombarded with Information, But Still Uninformed, CU Head Says," 32 *Product Safety & Liability* 271 (2004), quoting James Guest, Executive Director of Consumers Union as advocating removal of the restrictions of CPSA Section 6(b).

been the subjects of proposed legislation to reduce the protections available to manufacturers.²⁶² But they have endured unchanged for over twenty years against such challenges and have become part of the consumer product safety “landscape.”

The approach of the Firearms Safety Act towards information disclosure is, not surprisingly, different from that of the CPSA. Section 401(b) of the Act requires the Attorney General to collect and maintain current production and sales figures for licensed manufacturers of firearms and break those production and sales figures down by the model, caliber, and type of firearm produced by the manufacturer including a list of the serial numbers of such firearms. (The reason why such records contribute to safety is mysterious, but not inconsistent with an agenda of maximizing the authority of the Attorney General over the firearms industry.) The Firearms Safety Act not only contains nothing resembling the protections of CPSA Section 6(b), but affirmatively requires the Attorney General to make public the information collected by this section.²⁶³ The obvious potential of such public release of information to harm the competitive prospects of firearms manufacturers²⁶⁴ probably did not trouble the sponsors of the Firearms Safety Act in the slightest.

11. Private Enforcement and Remedies

Both the CPSA and the Firearms Safety Act specify what effect actions taken or not taken under both acts will have on civil actions for damages. Both the CPSA and the Firearms Safety Act also provide for enforcement by persons other than the Commission and the Attorney General, respectively. As is the case with so much else in the Firearms Safety Act, its provisions are much more onerous to the regulated community than are similar sections of the CPSA.

The CPSA states that compliance with consumer product safety standards, or with other Commission orders or rules, does not relieve a person from liability at common law or under a state statute.²⁶⁵ Moreover, the failure of the Commission to take any action or commence a proceeding under the CPSA is not admissible in litigation at common law or under a state statute that relates to that consumer product.²⁶⁶ The Firearms Safety Act has a similar section on civil liability,²⁶⁷ but it also contains a separate section that gives any person “aggrieved” by any violation of the Act or the regulations specified by it to bring an action in U.S. district court for damages, including consequential damages.²⁶⁸ The Act does not define the term

²⁶²The Consumer Product Safety Improvement Act of 1987, H.R. 3343, 100th Cong. 1st Sess. sponsored by Representative James Florio (D-N.J.) contained a change in Section 6(b) that would have permitted the Commission to have released information subject to the disclosure restrictions of that section as long as the Commission accompanied the release with a disclaimer.

²⁶³S.1224, § 401(c).

²⁶⁴It is not clear whether the general statutory prohibition on release of private trade secret information codified in 18 U.S.C. § 1905 (2000) would be applicable to the Firearms Safety Act.

²⁶⁵CPSA § 25(a), 15 U.S.C. § 2074(a) (2000).

²⁶⁶CPSA § 251(b), 15 U.S.C. § 2074(b) (2000).

²⁶⁷S.1224, § 306.

²⁶⁸S.1224, § 304.

“aggrieved,” evidently leaving it to case law to sort out which private citizens will be permitted to harass the firearms industry under the Act, but it does give the court the discretion to award a prevailing plaintiff (although not a prevailing defendant) reasonable attorney’s fees.²⁶⁹ It also makes clear that its remedy is in addition to any remedy provided by common law or under Federal or State law,²⁷⁰ including presumably the separate right that the Firearms Safety Act gives “interested persons” to bring actions to enforce the Firearms Safety Act themselves.²⁷¹ Since civil actions seeking to impose liability on the firearms industry or individual firearm manufacturers have become one mechanism by which anti-gun groups have sought to cripple the firearms industry,²⁷² the Firearms Safety Act would give such plaintiffs one more count to state in their complaints.

The CPSA explicitly permits interested persons (including individuals, nonprofit, business and other entities) to bring actions to enforce consumer product safety rules or an order issued by the Commission under CPSA Section 15, and authorizes the court to award reasonable attorney’s and expert witness fees.²⁷³ The Firearms Safety Act has a similar section.²⁷⁴ The CPSA, however, permits such private enforcement only where the Commission or the Attorney General has failed to exercise a “right of first refusal” after notice given by the prospective plaintiff.²⁷⁵ For the reader who has not already guessed it, the Firearms Safety Act contains no such limitation.²⁷⁶ The failure to give the Attorney General a right to take over such actions raises the possibility that the Firearms Safety Act will be enforced in inconsistent ways in different judicial districts and circuits, and would make Attorney General opinions interpreting the Act and regulations under it of much less influence. Inconsistent

²⁶⁹S.1224, § 304(a). One obvious interpretation of the word “aggrieved” would be a person injured by the discharge of a firearm that the plaintiff alleges is not in conformance with regulations or somehow violated a recall order.

²⁷⁰S.1224, § 304(b).

²⁷¹S.1224, § 305. For a discussion of the Firearms Safety Act’s right of private enforcement, see *infra* notes 274, 276 and accompanying text.

²⁷²Examples of such suits, generally brought on some type of a nuisance theory by either a private association or by a governmental entity include *New York v. Beretta U.S.A. Corp.*, No. 00 CV 3641, E.D.N.Y. (2004) (as described in 32 P.S.L.R. 380-81 (2004)); *NAACP v. Accusport Corp.*, 226 F. Supp. 2d 391-396 (E.D.N.Y. 2002); *City of Chicago v. Beretta U.S.A. Corp.*, 785 N.E.2d 16, 20-22 (Ill App. 1st Dist. 2002); *Young v. Bryco Arms*, 765 N.E. 2d 1 6-9 (Ill. App. 1st Dist. 2001); *King v. Smith & Wesson Corp.*, 801 N.E.2, 193-195 1222, 1228 (Ind. 2002); *Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2 at 192 (N.Y.A.D. 1st Dept (2003); *James v. Arms Tech., Inc.*, 359 N.J. Super. 291, 303-05 (N.J. Super. A. D. 2003); *D.C. v. Beretta U.S.A. Corp.*, No. 03-CV-24, (D.C. App. 2004), as described in 32 P.S.L.R. 464, 464-65 (2004), 84 A.2d 1127. Some plaintiffs have dropped lawsuits after having commenced them. S. Harris, “Cincinnati Drops Suit Against Gun Industry; Suit Deemed Unwinnable and Wasteful, 31 P.S.L.R., 427, 427-28 (2003).

²⁷³CPSA § 24, 15 U.S.C. § 2073 (2000).

²⁷⁴S.1224, § 305.

²⁷⁵CPSA § 24, 15 U.S.C. § 2073 (2000).

²⁷⁶S.1224, § 305(a).

interpretations of the Act that work to the disadvantage of the firearms industry are, of course, likely one happy byproduct of its operation in the eyes of its sponsors.

V. SUMMARY

The true objective of the Firearms Safety Act is increasingly apparent when one compares it to a law that, whatever its flaws, has been reasonably successful in reducing the number of deaths and injuries associated with consumer products. To summarize the most important findings:

1. The Firearms Safety Act assigns its entire regulatory program to a single law enforcement official rather than to a regulatory commission.
2. The Firearms Safety Act does nothing to harmonize any conflicting state safety regulations and even promotes inconsistent regulation.
3. Rulemaking under the Firearms Safety Act is conducted under the most basic notice and comment with a preposterously short time period between proposed rules and final rules.
4. Regulations contemplated by the Firearms Safety Act are extremely prescriptive, leaving the firearms industry the least room for innovation.
5. There is no requirement that the Attorney General even consider, let alone defer to, voluntary standards, despite the fact that SAAMI has developed a detailed set of such standards at the request of Congress for three-quarters of a century.
6. The Firearms Safety Act confers extraordinary authority on the Attorney General through a delegation of authority by negative implication that leaves the Attorney General free to do almost anything he or she pleases in the name of firearm safety.
7. There is no procedure specified in the Firearms Safety Act for recalls and the election of remedies section central to the recall structure of the CPSA does not exist.
8. The level of hazard that justifies regulations, recalls and expedited "imminent hazard" proceedings under the Firearms Safety Act are difficult to distinguish, raising the question of why the Attorney General would seek to publish regulations at all and not just proceed with a series of imminent hazard and recall actions.
9. The Firearms Safety Act completely exempts governments and governmental officials from its application, an almost inconceivable exemption if the true objective of the Firearms Safety Act is safe firearms.
10. The Firearms Safety Act creates an entirely new private cause of action for persons "aggrieved" by violations of the Act, and also allows for private enforcement without any sort of right on the part of even the Attorney General to take over cases to try and have some type of consistent interpretation.

Supporters of the Firearms Safety Act seek to make a virtue out of the loose to non-existent procedures and standards of that Act. In arguing that the Commission should not have jurisdiction over firearms safety, and the Department of the Treasury (which would now be the Department of Justice because of the transfer of BATFE to

the Department of Justice) should have, the Violence Policy Center notes the follow aspects of Commission procedure and findings:²⁷⁷

1. the necessity for the Commission to issue an Advance Notice of Proposed Rulemaking;
2. the necessity for the Commission to defer to voluntary standards in certain cases;
3. the necessity for the Commission to conduct cost-benefit analysis as part of two of its three stages of rulemaking;
4. the restrictions imposed by CPSA Section 6(b) on the release of information by the Commission.

There are two assumptions implicit in the arguments of the Violence Policy Center. The first is that firearms regulations are unlikely to be justified if the Commission conducted the types of analysis required by the CPSA, but which the Violence Policy Center believes to be unwarranted. The second is that extensive analysis is not justified, because firearms are so much more dangerous than other consumer products that standards of regulation that apply to consumer products ought not to be applied to firearms. It is, of course, just as plausible to contend that the political significance of firearms as weapons (“arms” in the language of the Second Amendment) is sufficiently great that the government should be particularly scrupulous about any regulation purporting to be for the purpose of safety regulation; hence it is *especially* important that any safety regulation be subject to the requirements of the CPSA.

The Commission has, in any event, had experience in dealing with products that pose safety hazards of the magnitude of firearms. As noted earlier in this article, there is no doubt that firearms can be dangerous. In 2000 there were 776 deaths from accidental discharge of firearms, and an additional 230 deaths from the discharge of firearms where the intent could not be determined.²⁷⁸ The number of deaths from the accidental discharge of firearms could, therefore, be as high as 1006, although a more reasonable estimate is 783.²⁷⁹ There were an additional 23,237 nonfatal injuries that year associated with unintentional firearms discharges.²⁸⁰ There are an estimated 200 million firearms in the United States, including 65-70 million

²⁷⁷Violence Policy Center, “The Treasury Department is Better Equipped than the Consumer Product Safety Commission to Regulate the Gun Industry,” http://www.vpc.org/fact_sht/treascp.htm.

²⁷⁸National Center for Health Statistics, *National Vital Statistics Report*, Vol. 50, No. 15, p. 69 (2002).

²⁷⁹Normal Commission practice is to allocate unknown causes in the same percentage as known causes. In this case, since the overwhelming percentage of deaths from firearm discharges are suicide and homicide, only a few of the unknown causes would likely be from accidental discharge.

²⁸⁰Centers for Disease Control, National Center for Injury Prevention and Control, “Unintentional Firearm Gunshot Nonfatal Injuries and Rates per 100,000” <http://webappa.cdc.gov/cgi-bin/broker.exe>. That number dropped to 17,579 in 2002, the last year for which injury figures are available. (Death data typically lags two years behind injury data because of different methods of collection.)

handguns. Between 60 and 65 million Americans own firearms, of which 30-35 million own handguns.²⁸¹

Although the number of deaths and injuries associated with firearms are significant, they are not so high as to be outside the realm of the risk of death and injury that the Commission faces in other products. For example, the Commission staff estimates that there were 634 deaths and 110,100 injuries associated with the use of all-terrain vehicles (ATVs) in 2001. (In 2002 the number of estimated injuries climbed to 113,900).²⁸² The Commission estimates that there are approximately 5.6 million ATVs in use.²⁸³ Another product associated with large numbers of deaths and injuries is the ignition of upholstered furniture. The Commission staff estimates that in 1998 (the last year for which data are available) there were 420 deaths and 1,080 injuries associated with the 6,200 fires in upholstered furniture started by either small open flames or smoldering cigarettes. The Commission staff also estimates that there are approximately 400 million pieces of upholstered furniture in the U.S.²⁸⁴ The figures for ATVs and upholstered furniture demonstrate that the Commission is experienced in examining risks of the magnitude posed by the accidental discharge of firearms.²⁸⁵ The most plausible explanation, therefore, for reticence of the advocates of the Firearms Safety Act to entrust firearms safety regulation to the Commission is their fear that the procedures that the Commission must follow and the findings that the Commission is required to make would not support the onerousness of regulation that they would like to impose on the firearms industry.

²⁸¹National Rifle Association Firearms Fact Sheet 2004, citing Bureau of Alcohol, Tobacco, Firearms and Explosives. <http://www.nraila.org/Issues/FactSheets/Read.aspx?ID=83>.

²⁸²U.S. Consumer Product Safety Commission, "Annual Report: All-Terrain Vehicles (ATV)-Related Deaths and Injuries," October 24, 2003, pp. 4-6. (on file with U.S. Consumer Products Safety Commission).

²⁸³U.S. Consumer Product Safety Commission, *All-Terrain Vehicle 2001 Injury & Exposure Studies* (January 2003).

²⁸⁴68 Fed. Reg. 60629, 60630-31 (2003).

²⁸⁵In the case of upholstered furniture the Commission began a rulemaking proceeding in 1994 designed to cover the hazard of small open-flame ignition. 59 Fed. Reg. 30735 (1994). In 1994 the Commission decided to defer action on the hazard of smoldering (cigarette) ignition to evaluate the results of an industry voluntary standard. *Id.* In 2003 the Commission amended its original advance notice of proposed rulemaking to include both the hazards of small open-flame ignition and smoldering (cigarette) ignition. 68 Fed. Reg. 60629, 60680-31. The situation is more complicated in the case of ATVs. The Commission terminated rulemaking in 1991 in reliance on the consent decrees reached in 1988 with major distributors of ATVs. When those consent decrees expired in 1998 the Commission negotiated voluntary undertakings with the distributors and manufacturers. In 2002 the Commission was petitioned by Consumer Federation of America to undertake additional rulemaking on ATVs. The Commission has yet to act on that petition.

V. CONCLUSION

Congress has historically left firearms safety to a combination of voluntary standards and the civil tort system.²⁸⁶ Efforts to subject firearms and ammunition to regulations developed and enforced by an administrative agency have met with Congressional resistance, except for the “point system” that has been administered by the BATFE for imported handguns since 1968. This is, in one sense, surprising, because the public has generally become increasingly risk averse since the 1960’s. Firearms certainly pose a risk, from accidental discharges, suicide, and criminal misuse. But the U.S. tradition of private firearms ownership²⁸⁷ supported and protected by an effective lobbying organization has successfully resisted placing firearms in the category of consumer products subject to safety regulation. This resistance has been bolstered by declining injury and death rates due to accidental firearms discharges for the past seventy years.²⁸⁸

Proposed legislation such as the Firearms Safety Act starkly illustrates the point of the somewhat tongue-in-cheek title of this article. The proponents of the Firearms Safety Act seem persuaded that the “safest” firearm is one in hands other than those of a private citizen consumer.²⁸⁹ Granting the Attorney General virtually plenary authority over the firearms industry can limit consumer choice in firearms and may substantially increase both the economic and “hassle-factor” cost of owning firearms. But, in the point of view of the proponents of this legislation, that is as it should be. Firearms confer capabilities on their users, to the extent of their skill with the firearm

²⁸⁶There have been attempts to change the civil tort system to prevent certain types of suits against the firearms industry. On April 9, 2003 the House of Representatives passed the Lawful Commerce in Firearms Act, H.R. 1036. Cong. Rec. H.2995-2998 (2003). On March 2, 2004 the Senate rejected the bill (S.1805), after an amendment was added to it extending the ban on military look-alike firearms (“assault weapons”). *U.S. Senate Roll Call Votes 108th Congress-2nd Session*, “On passage of S.1805 as amended: Bill Defeated.”

²⁸⁷For a discussion of the origins and history of the American tradition of private firearms ownership, see DAVID KOPEL, *THE SAMURAI, THE MOUNTIE AND THE COWBOY* 303-73 (1992). For a discussion of the constitutional basis for private firearms ownership, see STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED, THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 55-88 and 99-154 (1994).

²⁸⁸Since 1930 the annual number of accidental deaths associated with firearms use has decreased 75%. Among children, fatal firearms accidents have decreased 91% since 1975. The per capita rate of accidental deaths associated with firearms use has declined 91% since its all time high in 1904. *National Rifle Association-Institute for Legislative Action 2004 Firearms Facts*. [Http://www.nraila.org/Issues/FactSheets/Read.aspx?ID=83](http://www.nraila.org/Issues/FactSheets/Read.aspx?ID=83), citing National Center for Health Statistics and National Safety Council. For a recitation of the latest numbers of deaths and injuries associated with the use of firearms, see *supra* notes 278 – 280 and accompanying text.

²⁸⁹Ironically, the point of view of the proponents of the Firearms Safety Act is best summarized by an author who strongly favors the private ownership of firearms. Lt. Col. Jeff Cooper (USMC-Ret.) stated: “[i]f a person felt that safety were the first consideration in handling weapons, he would never handle one. . .” COOPER, *supra* note 19, at 84. Col. Cooper continues his sentence, however: “[a]nd thus achieve the dubious felicity of placing himself in greater danger from his foes than from his own weapons.” *Id.* The proponents of the Firearms Safety Act have no doubts about the felicity of consumers deprived of firearms in the name of safety.

and their judgment in using it. The proponents of the Firearms Safety Act do not trust ordinary private citizen consumers to use firearms either skillfully or wisely; hence they are better off, “safer,” if you like, without those instruments. Persons who hold a higher opinion of the levels of skill and judgment of their fellow citizens ought to recognize, and to oppose, legislation such as the Firearms Safety Act, as “gun control,” with a different title.