DOCUMENT RESUME

06267 - [B1586606] RELEASED

The Consumer Product Safety Commission Should Act More Promptly To Protect the Public from Hazardous Products. HRD-78-122; B-139310. June 1, 1978. Released June 13, 1978. 36 pp. + 3 appendices (4 pp.).

Report to Rep. Henry A. Waxman; Rep. John E. Moss; by Elmer B. Staats, Comptroller General.

Issue Area: Consumer and Worker Protection: Identification of Hazardous Consumer Products (909).
Contact: Human Resources Div.
Budget Function: Health: Prevention and Control of Health Problems (553).
Organization Concerned: Consumer Product Safety Commission.
Congressional Relevance: Rep. Henry A. Waxman; Rep. John E. Moss.
Authority: Federal Hazardous Substances Act, as amended (15 U.S.C. 1261). Consumer Product Safety Act, as amended (15 U.S.C. 2051). Flammable Fabrics Act, as amended (15 U.S.C. 1191). Poison Prevention Packaging Act of 1970 (15 U.S.C. 1471). Refrigerator Safety Act. 15 U.S.C. 1211. 5 U.S.C. 554. =16 C.F.R. 1500. =16 C.F.R. 1505. =16 C.F.R. 1110. =16 C.F.R. 1116.

The Consumer Product Safety Act provides that, if the Consumer Product Safety Commission determines after an administrative hearing that a product presents a substantial hazard, it may order a manufacturer, distributor, or retailer to give public notice of the defect, repair the defect, replace the product, or refund the purchase price. Findings/Conclusions: The Commission has been slow in identifying hazardous products and in alerting the public of their dangers. For example, after the Commission identified a potentially hazardous smoke detector, it was not prompt in alerting the public, it was slow in evaluating the seriousness of the hazard, and it did not follow its own procedures by effectively monitoring the recall. Other banned products were not promptly repurchased and remained in consumers' hands or were available for sale to the public. Some products containing asbestos were allowed to stay on the market longer than they should have because of the Commission's policy at the time to direct resources towards acute rather than chronic hazards, its decision not to classify a consumer complaint as a petition, and its failure to act promptly on an internal memorandum discussing asbestos hazards and recommending a ban on the products. Recommendations: The Commission should revise its procedures to provide for the prompt analysis of product samples and prompt notification to firms whose products are banned and should more actively monitor the repurchase of banned products. The Congress should amend the Federal Hazardous Substances Act to provide that violations to repurchase provisions are a prohibited act subject to penalties, and the

Commission should be given the additional authority to assess civil money penalties for violations of the act. (Author/HTW)

6404

REPORT BY THE

RELEASED

Comptroller General

OF THE UNITED STATES

The Consumer Product Safety Commission Should Act More Promptly To Protect The Public From Hazardous Products

The Consumer Product Safety Commission has been slow in identifying hazardous products and alerting the public of their dangers. Recalls have not been successful.

GAO recommends that the Commission establish procedures to provide for the prompt

--analysis of products thought to be hazardous and

--notification of firms whose products are banned under the Federal Hazardous Substances Act.

GAO also recommends that the Commission monitor firms' recalls and repurchases of banned products.

HRD-78-122

JUNE 1, 1978

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-139310

The Honorable Henry A. Waxman
The Honorable John E. Moss
House of Representatives

This is our report on Consumer Product Safety Commission actions regarding the recall and repurchase of certain products hazardous to the public and the banning of some consumer products containing asbestos. Our review was made pursuant to your joint request of March 29, 1977.

In accordance with your request, we did not take the additional time to obtain written agency comments. The matters covered in the report, however, were discussed with agency officials and their comments are incorporated where appropriate.

As arranged by your offices, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of the report. At that time we will send copies to interested parties and make copies available to others upon request.

Comptroller General
of the United States

COMPTROLLER GENERAL'S REPORT TO THE HONORABLE JOHN E. MOSS AND HENRY A. WAXMAN HOUSE OF REPRESENTATIVES

THE CONSUMER PRODUCT SAFETY COMMISSION SHOULD ACT MORE PROMPTLY TO PROTECT THE PUBLIC FROM HAZARDOUS PRODUCTS

D I G E S T

The Consumer Product Safety Act provides that if the Commission determines after an administrative hearing that a product presents a substantial hazard, it may, in the public interest, order a manufacturer, distributor, or retailer to give public notice of the defect, repair the defect, replace the product, or refund the purchase price.

After the Commission identified a potential hazardous smoke detector, it

--was not prompt in alerting the public to the hazard,

--took an inordinate amount of time to evaluate the seriousness of the hazard, and

--did not follow its own procedures by effectively monitoring the recall.

Other banned products were not promptly repurchased. They remained in consumers' hands and were available for sale to the public. For example, some products containing asbestos were allowed to stay on the market longer than they should have because of the Commission's (1) policy at the time to direct its resources towards acute (short-term) hazards rather than chronic hazards such as asbestos, (2) decision not to classify a letter from a consumer complaining about a product containing asbestos to be a petition, and (3) failure to promptly act on an internal memorandum discussing the hazards associated with consumer products containing asbestos and recommending the Commission ban them. (See p. 34.)

GAO recommends that the Commission revise its procedures to provide for the prompt analysis of product samples, and the prompt notification to firms whose products are banned. (See p. 22.) Also, GAO recommends that the Commission more actively monitor the repurchase of banned products by firms that manufacture, distribute, and sell them. (See pp. 13 and 22.)

GAO also recommends that the Congress amend the Federal Hazardous Substances Act to provide that

--violations to the act's repurchase provisions be made a prohibited act and subject to penalties and

--the Commission be given the additional authority to assess civil money penalties for violations of the act. (See p. 22.)

Although GAO did not obtain written agency comments, Commission representatives said they agreed with GAO's recommendations. Their comments are included in the report, as appropriate. (See pp. 13, 22, and 35.)

Contents

ABBREVIATIONS

CPS Act	Consumer Product Safety Act
FDA	Food and Drug Administration
FHS Act	Federal Hazardous Substances Act
FTC	Federal Trade Commission
GAO	General Accounting Office
NBS	National Bureau of Standards
OSHA	Occupational Safety and Health Administration

GLOSSARY

Asbestos	A group of mineral fibers composed of hydrated silicates, oxygen, hydrogen, and other elements such as sodium, iron, magnesium, and calcium in diverse combinations, including: amosite chrysotile, crocidolite, anthophyllite asbestos, actinolite asbestos, and tremolite asbestos.
Emberizing material	An asbestos-containing material generally packed in an "emberizing" kit to be placed under artificial logs in gas-burning fireplace systems or in artificial fireplaces for decorative purposes. The product is also glued to artificial logs, either at a factory or by a consumer using an emberizing kit. (Synthetic logs manufactured of cellulosic products which are consumed by flames are not included in this definition. Electric artificial logs and artificial ash beds used in electric fireplaces, which do not contain respirable free-form asbestos are not included in this definition.)
Free-form asbestos	That which is not bound, or otherwise "locked-in" to a product by resins or other bonding agents or which can readily become airborne with any reasonably foreseeable use.
Intentionally added asbestos	Asbestos which is (1) added deliberately as a product ingredient intended to impart specific characteristics or (2) contained in the final product as the result of knowingly using a raw material containing asbestos. Whenever a manufacturer finds out that the finished product contains asbestos, the manufacturer will be considered as knowingly using a raw material containing asbestos, unless the manufacturer takes steps to reduce the asbestos to the maximum extent feasible.

Patching compounds	Mixtures of talc, pigments, clays, casein, ground marble, mica or other similar materials and a binding material such as asbestos which are sold in a dry form ready to be mixed with water, or such combinations in ready-mix paste forms.

CHAPTER 1

INTRODUCTION

On March 29, 1977, Congressmen John E. Moss and Henry A. Waxman requested that we review Consumer Product Safety Commission activities related to certain products it had banned, and the effectiveness of the Commission's repurchase program under the Federal Hazardous Substances Act, as amended (15 U.S.C. 1261, et seq. (1976)). In subsequent discussions with the Congressmen's offices, we agreed to determine:

--Why the Commission did not act more promptly to ensure that a hazardous smoke detector was recalled and consumers refunded their purchase price.

--How effectively the Commission was recalling products that it had banned under the Federal Hazardous Substances Act (FHS Act).

--Why the Commission did not act more promptly to ban the use of asbestos in certain consumer products.

CONSUMER PRODUCT SAFETY COMMISSION RESPONSIBILITIES

The Commission was established by the Consumer Product Safety Act, as amended (15 U.S.C. 2051, et seq. (1976)), and became operational in May 1973. In addition to administering that act, the Commission was assigned responsibility for four laws previously administered by other agencies--the FHS Act; the Flammable Fabrics Act, as amended (15 U.S.C. 1191); the Poison Prevention Packaging Act of 1970 (15 U.S.C. 1471); and the Act of August 2, 1956 (Refrigerator Safety Act) (15 U.S.C. 1211).

Under the Consumer Product Safety Act (CPS Act), the Commission can establish safety requirements, ban products for which standards will not otherwise protect consumers, and order the recall, repurchase, and repair of hazardous products. The FHS Act contains similar provisions and requirements.

The Commission's primary purpose is to protect the public from unreasonable risks of injury from consumer products--which are generally defined as any article for sale to a consumer for use in or around a household, a school, in recreation, or otherwise. The Commission estimates that more than 10,000 consumer products and more than 2.5 million manufacturers, importers, distributors, and retailers are subject to its regulatory authority.

The Commission has five Commissioners appointed by the President with the advice and consent of the Senate. The President designates one of the Commissioners as Chairman, who serves as the principal executive officer. The Executive Director, appointed by the Chairman with the other Commissioners' approval, is responsible to the Chairman for directing the Commission's operations.

SCOPE OF REVIEW

We made our review at Commission headquarters in Washington, D.C., and Bethesda, Maryland, and at its area offices in Atlanta, Georgia, and Chicago, Illinois. We reviewed applicable legislation, legislative history, policies, regulations, and procedures; interviewed Commission representatives; and examined pertinent records. We also interviewed representatives of BRK Electronics, Inc., the manufacturer of smoke detectors discussed in this report.

CHAPTER 2

THE COMMISSION WAS NOT TIMELY IN PROTECTING CONSUMERS FROM HAZARDOUS SMOKE DETECTORS

The Commission first became aware of a possible hazard with some models of BRK Electronics' smoke detectors in February 1976. However, a case 1/ was not opened until August 1976, while the Commission awaited the results of a technical analysis of the product.

Delays were also encountered while representatives of the Commission and BRK prepared a joint press release notifying the public of the hazard. The press release was issued in January 1977, 5 months after the Commission concluded that the smoke detectors could create a substantial hazard and almost 1 year after the Commission first learned of the problem.

SUBSTANTIAL HAZARD PROGRAM

Subsection 15(a) of the CPS Act defines a substantial product hazard as a

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

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

The Commission's Division of Product Defect Correction, which reports to the Associate Executive Director for Compliance and Enforcement, administers the substantial product hazard program. The Product Defect Division receives reports of potential product defects, performs and coordinates necessary technical evaluations, negotiates agreements with firms for corrective action, monitors corrective action, and forwards recommendations to close substantial product hazard

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1/A case is opened when the Commission is informed or has knowledge of a product hazard that could create a substantial product hazard, and closed when the Commission determines there is no substantial hazard, or the hazard no longer exists.

cases to the Commission. Other Commission bureaus assist the Product Defect Division as needed, and the Commission's 13 area offices perform inspections and have primary responsibility for monitoring firms' actions to correct defective products.

Substantial product hazard cases are opened in two ways: voluntarily by industry in response to the reporting provisions in the act, or by the Product Defect Division when it receives information from other sources, such as accident investigations and consumer complaints, about consumer products which it determines could create a substantial product hazard.

The CPS Act requires industry to notify the Commission immediately after concluding that a substantial product hazard could exist. This requirement applies to consumer products under the CPS Act and the four transferred acts.

The Commission may seek civil or criminal penalties when it finds that someone did not immediately report a product that does not comply with a safety standard, or that contains a defect that could create a substantial product hazard. Civil money penalties, not to exceed $2,000 for each violation--$500,000 maximum for a series of related violations--can be imposed against anyone who knowingly violates the law. Criminal penalties can be sought against those knowingly and willfully violating this section of the law, and include a fine not to exceed $50,000 and/or up to 1 year imprisonment.

If the Commission determines, after providing an opportunity for a hearing in accordance with section 554 of title 5 of the United States Code, that a product presents a substantial hazard and that corrective action is required to adequately protect the public from such hazards, it may order the manufacturer, distributor, or retailer to give public notice (such as issuing a press release) about the product, and when in the public interest, it may order a firm to repair or replace the product, or refund the purchase price, whichever action the firm elects.

Although the law gives the Commission authority to order corrective action, the Commission believes that the most expeditious method of preventing a substantial risk of injury to the public is to encourage voluntary correction of the defective products. Therefore, the Product Defect Division handles most product defect notices by negotiating voluntary (nonenforceable) corrective agreements with firms.

INITIAL AWARENESS OF HAZARDOUS SMOKE DETECTORS

The Commission first learned of a possible hazard connected with some models of BRK smoke detectors in a February 13, 1976, letter from the National Bureau of Standards (NBS). NBS said it received a telephone call from the Bureau of Prisons' Safety Administrator on February 5 indicating that six BRK smoke detectors in three separate installations had caught fire. On February 11 the Bureau of Prisons called NBS again to report additional failures. NBS also received a call on February 13 from the National Fire Prevention and Control Administration concerning a similar failure of a BRK smoke detector in a private residence in Columbus, Ohio. At this point, NBS alerted the Commission to the problem.

NBS told the Commission that the smoke detectors could pose a fire hazard if installed on a combustible ceiling surface. NBS also said that it appeared that a substantial hazard existed with this product and that appropriate action should be taken. However, the Commission did not open a substantial hazard case at that time.

Commission officials in the Directorate for Engineering and Science and the Product Defect Correction Division told us that the February 13, 1976, letter from NBS was not sufficient to open a case. They said that it would have been inappropriate to do so without performing tests to determine the exact cause of the problem. An Engineering and Science official said that although the initial notice came from a reliable source (i.e., NBS), it was not supported by adequate testing. The Product Defect Division Director said the Division's policy is not to open a case unless it has strong evidence that a substantial hazard exists. In the case of BRK smoke detectors, the Director told us that the NBS letter alone was not sufficient evidence to open a case.

COMMISSION BEGINS INVESTIGATION

On March 23, 1976, the Commission notified BRK that it had begun an investigation to identify the reason for its smoke detector failures, and to assess the potential hazard to consumers.

Commission inspectors visited the firm on March 26, 1976, to review consumer complaint files and to collect samples of the detectors for analysis. BRK told the Commission during the inspection that of approximately 110,000 smoke detectors of the models under investigation (subsequent inspections found the total to be about 116,000 smoke detectors), 161 units had been returned because of some problem.

The Commission examined some of the complaint correspondence kept by BRK, and found two letters relating to a fire problem. One letter indicated that five units had been returned to BRK, four because resistors had burned. The other letter involved a wall-mounted detector which caught fire and fell to the floor and burned the carpet.

During the inspection, BRK did not permit the Commission to review its Customer Service Reject Analysis--a form that summarizes BRK's analysis of each smoke detector returned and the problem(s) associated with it--because BRK considered the analysis to be confidential. Although the Product Defect Division Director told us that the Commission believed it had sufficient reason to ask NBS to study the problem with the smoke detectors, it did not have sufficient evidence to open a case at that time.

WAITING FOR NBS TEST RESULTS DELAYS CASE OPENING

On April 29, 1976, the Commission issued a work order to NBS to perform a technical analysis of the potential fire hazards posed by the failure of the BRK smoke detectors. The Commission has an interagency work agreement with NBS to perform such tasks. Samples of the smoke detectors were furnished to NBS for testing.

During the course of the technical analysis, NBS continued to receive reports of additional failures of the BRK smoke detectors. In light of this, NBS sent an interim report to the Commission on June 18, 1976, describing the magnitude of the problem.

The interim report stated that NBS was having no success in causing the detector's resistor to fail under lab conditions. (The burning out of a particular resistor was believed to be the cause of the problem.) NBS stated that these resistors had been failing in installed detectors. In all cases, the failure of the resistor resulted in an inoperative detector.

NBS reported that although it was determining whether the failure of the resistor could start a fire of nearby combustibles (i.e., ceiling, walls, flooring), there may be a more important immediate problem: a resistor failure results in an inoperative smoke detector which defeats the purpose of the life safety device and constitutes a serious situation requiring remedy.

NBS's interim report listed 24 reported failures of BRK smoke detectors, and said that each day additional reports were received. It also reported that the Washington State Fire Marshal was so unhappy with these detectors and with BRK's lack of response to the problem, that he was seeking to ban BRK from selling its detectors in the State of Washington. (Although NBS was still conducting its analysis for the Commission, on June 23, 1976, BRK began a limited recall of its smoke detectors in Washington and Oregon.)

The Commission and NBS met on June 29, 1976, to discuss the interim report. At that time the Commission requested NBS to prepare a detailed technical report of its investigation results. The Commission said that after receiving the detailed technical analysis, it would determine what further steps should be taken with regard to the problem.

The Commission received NBS's final technical report on August 19, 1976. The Commission's Directorate for Engineering and Science agreed with the NBS conclusions that the failure of the smoke detector could, in some cases (1) produce a self-contained fire (fire inside the smoke detector) and (2) give consumers a false sense of protection.

On August 24, 1976, the Commission notified BRK that it had (1) tentatively concluded that certain smoke detector models contained a defect which could create a substantial product hazard and (2) opened a substantial product hazard case in the company's name. The Commission gave BRK 15 days to develop an outline of the corrective action it planned to take to eliminate the risk of injury associated with the smoke detectors. The Commission told BRK that its corrective action plan should specify how it plans to notify the public of the product hazard.

DELAYS IN ISSUING PRESS RELEASE

Shortly after the Commission opened the substantial hazard case, BRK began drafting a press release to give public notice of the defect and details of the product recall. Since the press release was an important part of the corrective action planned by BRK, the Commission staff was reluctant to submit other aspects of BRK's plan for Commission approval without the press release.

On September 20, 1976, the Commission contacted BRK and asked about the press release. BRK said it had intended to release it in about 1 week. The Commission and BRK, however, agreed that a joint (BRK-Commission) release would be more effective than a unilateral release. The Commission offered its services in structuring the release.

On October 4, 1976, the Commission again contacted BRK concerning the press release. BRK said it was having a problem with respect to the timing of the release. BRK smoke detectors were also sold by three private label companies, 1/ and the firms wanted more time to arrange the recall procedures with BRK for detectors with their "private label." BRK told the Commission that all plans should be completed and the release ready to be issued by November 1, 1976. The Commission told BRK to send it the draft press release that week so the Commission could review and prepare the release for publication when the time came.

On October 15, 1976, the Commission had not yet received the draft press release, and it told BRK that it was important to have the draft release by October 22 so that it would have adequate time to review it.

BRK called the Commission on October 22, 1976, and said the draft release would be forwarded the next week. BRK said the time period for release centered around the completion of negotiations with the three private label companies. BRK said the companies should be ready within 30 days and at that time the press release could go out.

Another month passed and the Commission contacted BRK on November 22, 1976. BRK said the press release was being held up because some of the private label companies were wondering whether the release should be made by BRK mentioning all names or whether individual releases on the part of the private label companies should be made. At this time, the Commission's Product Defect staff told BRK that it was going to forward BRK's corrective action plan to the Commission, and recommend that it be accepted contingent upon the receipt and release of an adequate press release. The staff told BRK that it would take approximately 3 weeks for the recommendation to reach the Commission, and if the Product Defect Division had not received a draft of the press release by that time, it would recommend that the Commission start action against BRK under section 15(f) of the Consumer Product Safety Act: conduct a hearing to obtain a formal order requiring BRK to give public notice of the defect and to require appropriate recall action. Up to this point, the Commission had encouraged voluntary cooperation with BRK which is its usual method of handling substantial product hazard cases.

1/Firms for which BRK manufactured smoke detectors, and the firms' label were attached.

On December 13, 1976, the Commission received the draft press release from BRK. The Commission modified the draft to reduce its length, and returned it to BRK for release. On January 3, 1977, BRK said it had a slight problem with one of the private label companies and a minor modification to the release was necessary. In addition, BRK was having a problem getting a separate telephone line connected for the recall. BRK told the Commission that the telephone company would have the separate line ready within 2 weeks.

On January 25, 1977, the joint press release was finally issued. Two days later the Commission accepted BRK's corrective action plan. Although Commission regulations require the staff to forward proposed corrective action plans to the Commission for approval within 30 days from the date the case was opened (16 C.F.R. 1116.7), this case took 134 days to reach the Commission.

LIMITED EFFORT TO MONITOR RECALL

BRK's corrective action plan incorporated two basic approaches:

--Using BRK's distribution network to identify consumers. BRK was to use location fact sheets to notify (by registered mail) companies which it knew bought smoke detectors and make arrangements for their repair or replacement at no cost to the owner.

--Using the joint press release to alert purchasers for which BRK did not have a name and address, and requesting them to contact BRK.

BRK's recall efforts, however, began several months before its corrective action plan was approved by the Commission. In June 1976 BRK initiated recalls in Washington and Oregon, and by August 29, 1976, BRK had mailed out recall letters to all its distributors in which it asked them to (1) determine the number of defective units received, (2) contact their customers and ask them to return a location fact sheet showing where each smoke detector was installed, and (3) return a customer list for later contacts.

Starting in September 1976, BRK sent recall letters to each customer whose name was supplied by one of its distributors. The letter asked each customer to fill out a location fact sheet. Commission officials did not know how many of these letters were sent out or how many customers replied with the location sheets. On April 1, 1977, BRK again sent recall instructions by certified mail to all those distributors who had not responded to the first letter.

The Commission's Chicago Area Office is responsible for monitoring the firm's corrective action. In early May 1977, we contacted the area office to determine what it was doing to monitor BRK's recall. With the exception of three visits to the firm in September and December 1976 and April 1977, the only monitoring the Commission performed was to log in BRK's progress reports. These periodic reports consist of a cumulative record of smoke detectors returned under the recall program and the number of replacement units shipped out.

According to Commission procedures, substantial hazard recalls should be evaluated through spot-checks. The purpose of this procedure is to determine if consumers are receiving the benefit of the recall. The procedure states that to ensure adequate protection, spot-checks must verify that the recall notice from the manufacturer has been translated into remedial action at the consumer level.

The area office discovered during the April 1977 inspection that 400 of BRK's 600 distributors never responded to the original recall letter. This was the area office's first knowledge of the response rate. When asked why the area office did not attempt to determine the response rate sooner, an area office official told us that the area office was waiting for the press release to be issued. As a result, almost 8 months had passed before the Commission knew that two-thirds of BRK's distributors never responded to the recall.

On May 24, 1977, the Chicago Area Office issued instructions to the other area offices requesting them to perform spot-checks at 20 different distributors. For each distributor, the area offices were to perform spot-checks at two of its installers/contractors--firms that installed smoke detectors in homes--to verify that they were making consumers aware of the recall.

Although these spot-checks were given "priority" status, in July 1977 the Chicago Area Office reported to headquarters that spot-checks had been performed at only 10 distributors and 16 installers/contractors. Of these, the 10 distributors and 12 installers/contractors knew of the recall. The area office reported that the recall may be failing because only 2 of the installers/contractors had made an effort to contact consumers who had purchased smoke detectors from them.

In April 1978 we again contacted the Chicago Area Office to see what it was doing to monitor the recall, and to determine the results of the remaining spot-checks. The area office had not tabulated the results, and had to tabulate

them at our request. Area office representatives said they contacted 9 of the remaining 10 distributors and found that BRK had notified them of the recall. However, only five distributors either notified their installers/contractors of the recall, or provided this information to BRK so it could notify them of the recall. The area offices inspected seven installers/contractors and found that they all knew of the recall; however, only four notified their customers or provided customer lists to BRK. An area office official said that only nine customer spot checks were made and only three customer lists were provided to the Commission.

Installers/contractors told Commission inspectors that more effort was not made to recall the smoke detectors because they did not have an accurate record of who bought them, and they were unwilling to spend the time reviewing their records to identify purchasers.

In August 1977, the Commission and BRK issued another press release in an effort to reach consumers who purchased the BRK smoke detector. In November 1977, BRK made another attempt to contact the approximately 200 distributors that had not responded to its previous contacts. BRK told us that as of April 1978, all but 32 firms had responded to its contacts. In May 1978, BRK was still communicating with the firms to obtain the necessary information to follow up.

A major part of BRK's recall program was directed at mobil home manufacturers that installed about 10,000 of the potentially hazardous smoke detectors. As part of its corrective action plan, BRK attempted to reach, through a direct mailing, distributors and owners of mobil homes that had the smoke detectors installed. Although BRK had identified the names of its dealers and consumers, it was not successful in locating smoke detector purchasers because dealers did not have adequate records and purchasers moved, or could not be located.

Because the direct mailing to mobil home distributors and owners failed to result in many smoke detectors being returned, in September 1977 BRK started sending information packets to about 20,500 mobil home park managers. These packets advised the managers and home owners of the recall, and offered a $3.00 fee for each smoke detector returned to BRK. As of May 1978, a BRK official told us that only 35 smoke detectors had been returned for the $3.00.

Although BRK's corrective action plan specified that BRK was to contact mobil home park managers, it was at BRK's

initiative that it offered $3.00 for each smoke detector returned. BRK took other actions that were not spelled out in its corrective action plan to facilitate the repurchase of its smoke detectors.

BRK also contacted the State fire marshals in all 50 States to alert them to the potential hazards associated with the smoke detectors. And BRK disseminated printed materials to various trade journals for publication, such as the National Burglar and Fire Alarm Association, the International Conference of Building Officials, and the Fire Marshals Association of North America.

Figures reported by BRK as of March 31, 1978, showed that 43,339 units--about 37 percent--of the approximately 116,000 defective smoke detectors had been returned. A Commission representative said this recall was one of the most intensive recalls conducted by a manufacturer for a consumer product under the Commission's jurisdiction.

OUR PREVIOUS REPORT ON THE SUBSTANTIAL HAZARD PROGRAM

Many of the problems the Commission experienced with the recall of BRK's smoke detectors were similar to the problems we addressed in our report entitled "The Consumer Product Safety Commission Has No Assurance That Product Defects Are Being Reported And Corrected" (HRD-78-48, Feb. 14, 1978). We reported that the Commission

--failed to process substantial hazard cases within the 30 days as specified in Commission regulations,

--encountered delays in issuing press releases to alert consumers to possible hazards, and

--was not aggressively monitoring firms' corrective action plans.

We recommended, among other things, that the Commission:

--Better define the criteria for identifying substantial product hazards.

--Revise its procedures to provide a reasonable period of time to review and forward substantial hazard cases to the Commission.

--More actively keep track of firms' corrective actions to remove substantial hazards from the market.

The Commission said our report was basically accurate in its analysis of problems, deficiencies, and accomplishments of the Commission in implementing the substantial hazard program. The Commission said that it had already made changes to this program, and had begun to carry out most of our recommendations.

CONCLUSIONS

The Commission was slow in verifying and dealing with the hazards identified with BRK's smoke detectors, was not timely in opening a substantial product hazard case, and did not promptly issue a press release notifying the public of the hazard. Also, the Commission did not follow its established procedures and actively monitor BRK's corrective action to determine if BRK was progressing satisfactorily.

Although BRK complied with the corrective action plan and took additional steps to recall the hazardous smoke detectors, only 37 percent of the units had been returned as of March 31, 1978. If the Commission acted faster in opening the substantial product hazard case, in issuing the press release, and in performing spot-check inspections, the recall of BRK's smoke detectors might have been more successful.

RECOMMENDATIONS TO THE COMMISSION

We recommend that the Commission:

--Be more prompt in opening substantial product hazard cases and obtaining approval of corrective action plans.

--Promptly issue notices to alert the public to substantial product hazards when a bilateral notice cannot be completed within a reasonable time.

--Be more aggressive in monitoring firms' corrective actions to remove substantial product hazards from the market.

COMMISSION STAFF COMMENTS

In discussing a draft of this report with Commission representatives, they said the procedures in use when the BRK smoke detector case was first brought to the Commission's attention would not permit the staff to open a case without more analysis. The procedures have been revised, and now cases of a similar nature would be promptly opened and needed analysis would follow.

The Commission also said that it is changing and revising its procedures and is addressing the problems and recommendations contained in this report.

CHAPTER 3

THE COMMISSION NEEDS TO ENSURE THAT BANNED PRODUCTS ARE REPURCHASED

Most consumer products banned and subject to repurchase under the Federal Hazardous Substances Act were not being recalled, and continued to be in the possession of consumers and available for sale. The Commission was not timely in analyzing product samples and notifying firms when their products were banned and repurchase required. In most instances in which firms were required to repurchase banned products, firms were not removing such products from sale, and the Commission was not monitoring these firms' corrective actions.

REQUIREMENTS TO REPURCHASE F ODUCTS BANNED UNDER THE FHS ACT

The FHS Act provides that any product declared a banned hazardous substance (banned product) is to be repurchased. Section 15 requires manufacturers, distributors, and dealers (including retailers) to repurchase banned products from purchasers. The act does not give the Commission discretion in determining whether to require the repurchase of a product after it has been banned.

The Commission issued regulations (16 C.F.R. 1500.202) specifying the procedures firms are to follow in repurchasing banned products. The regulations require manufacturers to inform their customers of the repurchase, and distributors to inform their customers (retailers) that a product is banned and subject to repurchase. Retailers are responsible for (1) removing banned products from their shelves and (2) posting signs in their stores to alert customers that a product is banned and that it can be returned to the store for a refund. These signs are to be prominently displayed and must point out that the product is a banned hazardous product, that it is subject to repurchase, and specify how customers may be refunded the purchase price. These signs are to be in the store for 120 days.

The FHS Act defines a "banned hazardous substance" as any

--toy or other article intended for use by children which is or contains a hazardous substance 1/ or

--hazardous substance which is intended or packaged in a form suitable for use in the household and which can not be made safe with precautionary labeling.

We found that the Commission had conducted recall programs for 28 products that were banned under the FHS Act during the 12-month period ending March 1, 1977. The 28 products were banned for violating four different sections of the regulations. (See app. II.)

Commission records did not show the number of products which were manufactured and subject to recall in all 28 cases, nor did the Commission know the number of units that had been repurchased as of May 1, 1978. We were not able to determine the number of products that were subject to recall in all 26 cases or the number of products repurchased.

Although the FHS Act requires the repurchase of banned products, it does not contain any penalties (such as fine and/or imprisonment) for violations of this section of the law. The only remedies available to the Commission against a firm failing to repurchase a banned product are to (1) ask a U.S. district court to issue an injunction against the firm or (2) seize the banned products.

BANNED PRODUCTS SUBJECT TO REPURCHASE WERE NOT PROMPTLY IDENTIFIED

We found incidents in which the Commission (1) was not timely in analyzing product samples to determine whether a product was banned and (2) had not promptly notified firms that their products were banned and subject to repurchase.

1/The definition of a "hazardous substance" includes (1) any substance or mixture of substances which is toxic, corrosive, an irritant, a strong sensitizer, flammable or combustible, or generates a pressure through decomposition, heat, or other means; if it may cause substantial personal injury or illness during or as a proximate result of any customary or reasonably forseeable handling or use; (2) any substances which the Commission finds, by regulation, meet the requirments of (1) above; and (3) any toy or other article intended for use by children which the Commission determines by regulation presents an electrical, mechanical, or thermal hazard.

In one case we reviewed, the Commission identified a firm that was selling paint that contained more lead than was permitted by regulation (16 C.F.R. 1500.17(a)(6)). An inspector obtained a sample from the manufacturer in April 1975 as part of a Commission-wide survey to test compliance with the lead-in-paint regulation. Because the survey included about 500 samples, the Commission waited until it had completed the survey before analyzing the sample to verify the lead content. The sample was not analyzed until October 1975.

Commission representatives said that the lead-in-paint survey was not designed to collect formal samples--samples that are controlled when they are collected and analyzed so that they could be used in an administrative or litigative proceeding against the manufacturer. The survey was conducted to determine whether manufacturers were following the lead-in-paint regulation. If the survey sample analyses identified violative products, the Commission would perform another inspection, collect another sample, and conduct further sample analyses before it could initiate action against the firm.

The Commission said it analyzed these samples in a group because it costs less than analyzing samples individually. The sample showed that the lead contained in the paint exceeded the permissable level. The paint was considered a banned product.

After Commission headquarters reviewed the case and sample results, it made the area office aware of the violative product in November 1975. The area office did not tell the manufacturer of the sample results until January 13, 1976--8 months after the sample was collected. At that time an area office investigator obtained additional samples for analysis.

The second sample was analyzed and found to contain lead in excess of the permissable level. The Commission formally notified the firm on March 19, 1976, that its paint contained too much lead and that it was a banned product and subject to repurchase. In April 1976--about 11 months after the Commission obtained the first sample--the manufacturer mailed recall notifications to its customers.

BANNED PRODUCTS WERE NOT ALWAYS REPURCHASED

The FHS Act requires manufacturers, distributors, and dealers to repurchase banned products from their customers. Commission regulations specify the steps firms should take

to notify their customers (1) of banned products, (2) that products are being recalled, and (3) that the purchase price will be refunded.

The Commission's Directorate for Compliance and Enforcement is responsible for product repurchase activities. The Directorate is to

--keep a log of the status of recalls based on information submitted by the area offices,

--control all documents forwarded to headquarters,

--keep statistics of banned product recalls,

--insure that recall activities are performed in accordance with Commission guidelines, and

--coordinate recalls and take the necessary action to avoid duplicative efforts.

The Commission's 13 area offices are responsible for identifying products subject to recall, obtaining samples for analysis, performing inspections and checks to ensure that recalls are progressing satisfactorily, recommending legal action needed to enforce repurchase, and recommending that cases be closed.

In the 28 recall cases we reviewed, we found instances in which:

--Commission recalls were not ensuring that banned products were taken off the market and repurchased. For instance, in three recalls only 11,426 of over 133,497 units (8.5 percent) were repurchased; in one recall only a minimal number of units were repurchased (the Commission did not know the number); and in the other recall no units were repurchased.

--The Directorate for Compliance and Enforcement was not actively monitoring the performance of Commission repurchase programs. For instance, the Directorate did not know the status of all banned product recalls and it did not know how well area offices were monitoring such recalls.

--The Commission's product recall procedures (Commission Order 9010.34) which did not clearly define the duties and responsibilities of its headquarters and area office staffs, were not being consistently implemented. For instance, the order appeared to leave it up to the area offices whether they should prepare monthly progress reports, and it did not clearly state whether the area offices were to close repurchase cases or if they were to recommend case closures to the Directorate. As a result, several area offices were reporting to headquarters the results of their recalls monthly, others only when the recall was completed. Some area offices recommend that headquarters close repurchase cases, whereas other area offices closed their cases.

--Area offices were not performing inspections and effectiveness checks to ensure that firms were repurchasing banned products.

--Manufacturers were not promptly notifying customers (distributors) when one of their products was banned and subject to repurchase.

--Commission inspectors found retailers not posting signs, taking banned products off their shelves, and repurchasing them from customers after receiving notification that a product had been banned.

Commission representatives said that there were several reasons why some banned products were not repurchased.

1. Although manufacturers and distributors may notify retailers that a product is banned and that they are to post signs, take the product off their shelves, and initiate repurchase of the products, retailers do not always follow these directions. In many instances, the only way the Commission can ensure that retailers are repurchasing banned products is to inspect them. There are too many retailers in the country for the Commission to inspect, and therefore, some banned products continue to be available for sale and are not being repurchased.

2. Consumers appear to have a reluctance to return a banned product and obtain a refund or replacement.

3. Some products are banned because they do not meet a regulation because of some "technicality." For instance, in one case a portable phonograph was banned because the

electric cord was about nine inches shorter than that specified in Commission regulations (16 C.F.R. 1505.5 (e)(5)). Some Commission representatives said that they do not believe this type of a case is as significant and deserves the same type of priority as other recalls. In some instances, neither the Commission nor industry actively pursue the recall and repurchase of this type of banned product.

4. The Commission does not actively enforce the repurchase of products banned under the FHS Act. Because the act does not provide criminal or civil money penalties for failing to repurchase a banned product, the Commission has little clout to enforce the act's repurchase requirements. Also, the Commission is reluctant to seek court injunctions because of the difficulties in specifying and identifying firms to the Department of Justice, and Justice's hesitation in handling such cases. The Commission does not consider product seizure a viable enforcement tool because the quantity of banned products at any one firm is generally small.

NEED TO AMEND THE FEDERAL HAZARDOUS SUBSTANCES ACT

The FHS Act does not provide the Commission a tool for assessing or seeking penalties against firms and persons who violated the law's repurchase requirements.

The Commission's enforcement of the FHS Act's repurchase requirements could be strengthened if (1) violations of section 15 of the FHS Act (repurchase requirements) were made a prohibited act and subject to penalties under the act and (2) the Commission were given authority to assess civil money penalties for such violations.

Violations to the FHS Act's repurchase requirements are not prohibited acts, and therefore, the law contains no penalties for such violations. Although the Commission can seek the criminal prosecution of those selling banned products, it cannot seek such penalties for firms violating the law's repurchase requirements. For instance, the Commission cannot seek penalties against firms who do not post the required repurchase signs. Without such signs being posted, customers who may have purchased a banned product may not have an opportunity to know that it was banned and that it now may be returned and the purchase price refunded.

This can be illustrated in one repurchase case we reviewed. Both the manufacturer and its distributors met the requirements of the Federal Hazardous Substances Act's repurchase requirements--they notified their customers that a product was banned, and that they were refunding the purchase price for the products being recalled. However, Commission inspectors found an instance in which a retailer had not posted the required signs and continued to sell banned products (they had not taken them off their shelves).

When the Commission finds a firm failing to repurchase a banned product or failing to post the required repurchase signs, it can ask a U.S. district court (1) to order the firm to repurchase banned products and post the signs or (2) order the seizure of banned products offered for sale. The Commission does not, in all repurchase cases, believe these are viable enforcement tools because (1) both the Department of Justice and U.S. district courts are reluctant to grant injunctions against some firms violating a safety requirement when there may be hundreds of others similary violating the requirement and (2) the small quantity of banned products found in any one store generally makes a product seizure impractical.

Also, as we reported in our report entitled "Better Enforcement of Safety Requirements Needed by the Consumer Product Safety Commission" (HRD-76-148, July 26, 1976), the Department of Justice is reluctant to seek criminal prosecution of firms and persons for what it believes are de minimis 1/ violations to the FHS Act. As a result, firms the Commission found selling banned products generally were not penalized for violating the law. In the July 1976 report, we recommended that the Congress give the Commission the authority to assess civil money penalties for violations of safety requirements issued under the FHS Act. Such civil money penalties could also be an effective tool available to the Commission for enforcing the FHS Act's repurchase requirements.

CONCLUSIONS

The Commission has not given the recall of products under the Federal Hazardous Substances Act sufficient priority. The Commission needs to revise its procedures to provide for the prompt analysis of product samples and the timely notification to firms whose products are found to be banned.

1/A violation that was a minor breach of the law or safety requirements.

Commission recalls under the FHS Act have not been adequately carried out:

--Commission headquarters has not adequately monitored and overseen the recall program.

--Commission area offices have not been actively monitoring the recalls of firms who sold banned products.

--Many firms have not been complying with the law's repurchase requirements.

Also, because violations to the FHS Act's repurchase provision (section 15) are not a prohibited act, and most violations are de minimus, the Commission has not been able to effectively enforce the repurchase of banned products. If violations to the act's repurchase provision were made a prohibited act, and the FHS Act was amended to give the Commission authority to assess civil money penalties, the Commission would be better prepared to more effectively enforce the repurchase requirement.

RECOMMENDATIONS TO THE COMMISION

We recommend that the Commission revise its procedures to provide for (1) the prompt analysis of products thought to be hazardous and (2) the timely notification of firms whose products are banned under the FHS Act.

We recommend also that the Commission improve its monitoring of firms' recall and repurchase of banned products.

RECOMMENDATIONS TO THE CONGRESS

We recommend that the Congress amend the Federal Hazardous Substances Act to provide

--that violations to section 15 of the act be made a prohibited act and subject to penalties under the act and

--the Commission authority to assess civil money penalties for violations of that act.

COMMISSION STAFF COMMENTS

Commission representatives said that most banned products are not repurchased because many of the products are of small

dollar value and many have been manufactured, sold, and used before the repurchase started. Therefore, they are not available for recall.

Commission representatives agreed that the Commission's FHS Act repurchase program had not operated well during the 12 months in which we performed our work. They said that the procedures were not adequate for the program, and at times the procedures were not being properly implemented. They also believed that the problems we discussed in the report no longer exist, and that the procedures are being revised and should clear up the problems we identified.

The staff said that seizure is an enforcement tool that the Commission has used a few times. They said that the Commission generally waits until it has a "good case" before it seeks an injunction or seizure. Commission representatives agreed that the changes to the FHS Act we are recommending would be useful to the Commission.

CHAPTER 4

THE COMMISSION WAS NOT TIMELY IN BANNING CERTAIN CONSUMER PRODUCTS CONTAINING ASBESTOS

The Commission first became aware of asbestos hazards shortly after it started operations in May 1973. However, it did not deal with asbestos at that time because its policy was to emphasize immediate or short term hazards rather than chronic or long term hazards such as those associated with asbestos. The adverse health effects associated with inhaling asbestos fibers are considered chronic because they are not generally detectable as a disease for a number of years after exposure.

Although aware of the hazards associated with products containing asbestos, the Commission did not regulate such products until after it received several petitions. The Commission proposed banning two products containing free-form asbestos--patching compounds, and emberizing materials (referred to herein as artificial fireplace ash)--in April 1977, however the ban was not issued until December 1977 and it did not require the recall of products previously sold to consumers.

IDENTIFYING ASBESTOS HAZ

There is a certain amount of asbestos fiber in the air and everyone is exposed to it. However, identifying asbestos fiber is difficult because the state of the art is not sufficiently developed and researchers can not get repetitive nor precise results from their analysis of air samples.

Data on the health hazards of asbestos have been available for many years. Cases of asbestosis--an irreversible disease of the lungs--were reported in asbestos workers in the early 1900s. Asbestosis was the first disease definitely linked to asbestos exposure. Asbestosis is a pulmonary disease which results in lung scarring and respiratory disability and, in some cases, death.

In the mid-1950s medical studies linked asbestos exposure to various forms of cancer, and some researchers now consider cancer the prime health hazard associated with asbestos. Asbestos-induced cancer was not discussed earlier because it was not known to exist--it is difficult to identify,

and asbestosis and asbestos-associated lung cancer usually appear at least 20 years, and mesothelioma at least 30 years, after exposure to asbestos.

The Commission said that there is no agreement among experts as to what, if any, level of exposure to free-form asbestos is safe for humans. This has made it difficult for the Commission to regulate asbestos in consumer products. Some experts believe that it would be acceptable for the Commission to use the Occupational Safety and Health Administration's (OSHA) standard; 1/ however, others argue that any asbestos is bad and that there is no acceptable level. As of January 31, 1978, no known animal experimental studies established a safe level of exposure to asbestos. Without such studies, the Commission believes that any standard on asbestos exposure it would develop would be arbitrary and probably be subject to legal challenge.

Other agencies' regulation of asbestos

In 1972 the Food and Drug Administration (FDA), which administered the FHS Act before it was transferred to the Commission, banned asbestos in garments used by the general public. FDA formed an ad hoc committee to review the use of asbestos in garments, and concluded that asbestos was unnecessary and should not be used in garments. Accordingly, FDA banned asbestos in garments for general use (16 C.F.R. 1500.17 (a)(7)). In a separate action, FDA also banned the use of asbestos in various types of medical devices.

Effective July 1972, OSHA issued standards protecting workers from the occupational exposure to asbestos. The standards defined the amount of asbestos that workers can be exposed to (1) over a period of time and (2) at one period of "peak" exposure. These standards were subsequently tightened in July 1976. On October 9, 1975, OSHA defined asbestos by the size and shape of its fiber. 2/

1/OSHA prohibits the use of asbestos if the average exposure to asbestos fiber over an 8-hour day exceeds the standard which is two asbestos fibers of over five microns in length per cubic centimeter of air.

2/There is no agreement on how to define asbestos fiber; it is defined in various ways, including its size, shape, toxicity, and mineral content.

The Environmental Protection Agency regulates the amount of free-form asbestos released into the atmosphere. Its standards limit the amount of asbestos in spray-on insulation and fire-proofing materials. The Federal Trade Commission (FTC) has also been involved with labeling products to warn the public about asbestos hazards.

In April 1978, the Secretary of the Department of Health, Education, and Welfare alerted the public to the hazards associated with asbestos. Although the warning was directed specifically to workers, the Secretary's actions pointed out the Federal Government's concern for the seriousness of the hazards associated with asbestos.

The Commission said that given the ubiquitous nature of asbestos it does not want to ban all consumer products in which a trace of asbestos is found. Rather it wants to (1) ban products containing intentionally added free-form asbestos and (2) develop and set criteria for defining asbestos contamination in consumer products.

COMMISSION'S EARLY ACTION REGARDING ASBESTOS

On June 13, 1974, the Commission said that it had primary jurisdiction over all consumer products containing asbestos. This was in response to a 1973 FTC request about the Commission's jurisdiction over asbestos and the priority it was going to receive. The Commission also told FTC that it placed a moderate to high priority on asbestos matters, and that it would handle asbestos on a case-by-case basis rather than take a generic regulatory action. However, the Commission did little work on asbestos until after several petitions were received in 1976 and 1977 (see p. 28).

The Director of the Commission's Bureau of Biomedical Sciences said that it would be much easier for the Commission to regulate asbestos on a case-by-case basis (e.g., ban one product at a time) because a generic regulation would require a more complex set of standards. Also, developing a generic regulation was beyond the state of the art because there was no agreement in the medical community as to the level of asbestos exposure that was safe for humans. He said that further tests would be needed to determine the amount of free-form asbestos in each product, and that it would be several years before this information would be available to the Commission for developing a generic regulation. He said that enforcing a generic ban would be difficult, expensive, and time consuming.

The Commission staff was aware of the adverse health effects associated with inhaling asbestos fibers when preparing the response to FTC; however, the Commission's policy was to direct its resources to acute rather than chronic hazards. This policy remained in effect until the present chairman assumed his position in June 1976.

Complaints about asbestos

In the latter part of 1973, the Commission received a letter from a county health department complaining about the use of free-form asbestos in artificial fireplace ash. The Commission verified that asbestos was used in making the product, but found that neither the materials used in the product, nor the sale of the product involved interstate transactions. Therefore, the fireplace ash was not under Commission jurisdiction. Also, in April 1975 the Commission staff concluded that free-form asbestos in fireplace ash was an unwarranted use of asbestos, but that this use did not represent a substantial hazard to consumers and took no further action. Another possible reason this matter was not pursued further was that the Commission's policy at that time was to direct its resources to acute hazards.

In November 1975, the Commission received another letter in which a consumer complained about the use of asbestos in artificial fireplace ash. In this case, the Commission verified that an interstate transaction had occurred, but took no further action because (1) its review of the complainant's allegation could not be substantiated and (2) it considered the letter to be a complaint, not a petition.

Although the consumer intended the letter to be a petition (to ban asbestos in fireplace ash), the Commission said, it did not meet the technical requirements of a petition. Therefore, the Commission was not required to act on the letter in the same manner as it would if it were a petition. Subsequent to this complaint, the Commission issued regulations specifying what constitutes a petition (16 C.F.R. 1110). The Commission reversed itself in April 1977 and said the letter was a petition. (See p. 31).

Because of publicity generated by this case and the growing public interest in hazards associated with the use of asbestos in consumer products, in March 1976 the Commission's Deputy Executive Director directed the Bureau of Biomedical Sciences to review the background information on asbestos. In April 1976 the Bureau recommended that the Commission ban the use of all free-form asbestos in consumer products. This

recommendation was based primarily on a literature search of research performed on asbestos workers, and not consumers' use of products containing asbestos. However, this recommendation was not transmitted to the Commissioners until about a month before their action in April 1977. (See p. 31.)

The Biomedical Sciences' Director indicated that the staff was recommending a change from the case-by-case approach that was advocated in 1974 to a broader generic ban on the use of asbestos. However, the Commission did not change its policy at that time, and it continued to address asbestos hazards on a case-by-case basis.

COMMISSION PETITIONED TO BAN CERTAIN ASBESTOS-CONTAINING PRODUCTS

Although the Commission was aware of the hazards associated with the use of free-form asbestos in consumer products since 1973, it took no action to regulate such products until after it became aware of the public's concern about asbestos in consumer products, and as it started to respond to several petitions. The Commission received petitions in July 1976, February 1977, and April 1977 to ban certain consumer products that contained free-form asbestos.

Petition A

On July 15, 1976, the National Resources Defense Council, Inc., petitioned the Commission to declare consumer patching compounds containing asbestos a banned hazardous substance under the FHS Act. As a banned hazardous substance, patching compounds would be banned from future sale, and manufacturers, distributors, and retailers would be required to repurchase those products from persons to whom they were sold.

The petition contained information on the volume of retail sales of patching compounds, test results showing the amount of free-form asbestos fiber in a home after using patching compounds containing asbestos, adverse health effects following exposure to asbestos, and results of epidemiological studies which showed that asbestos is a carcinogen.

The petition was reviewed by various Commission divisions and bureaus. The Bureau of Biomedical Science agreed with the basic premise of the petition and said that the literature search which led to its April 1976 recommendations (see p. 27) was sufficient to demonstrate the problems with asbestos,

and that further biological tests would not be necessary because the adverse effects of exposure to asbestos is clear and irrefutible. The Bureau said that some chemical analyses would be needed to identify products containing free-form asbestos.

The Bureau of Economic Analysis questioned the validity of some projections that the petitioner made about the volume of sales of patching compounds. Industry-supplied data that the Bureau used showed that asbestos was being phased out of patching compounds. The Bureau also said:

> "The longer it takes to promulgate a ban and/or repurchase, the smaller the economic effect on the industry will be. A ban would have a relatively greater effect on producers who have not developed suitable substitutes, and, therefore, are still selling primarily asbestos-containing compounds. We would expect that a ban on asbestos in the kinds and sizes of patching compounds customarily intended for sale to consumers (i.e., under 1 gallon or under 5 lbs) would not be burdensome to the producing industry, given an appropriate effective date. If all asbestos-containing patching compounds available to consumers were banned, however, the impact would depend on the extent to which industrial products not generally intended for sale to consumers must be removed from retail distribution channels. The Asbestos Information Association contends that a large number of brands could be affected, and that the adverse effect on the industrial segment of the market would be "serious." Some compounds would undoubtedly have to be reformulated at some increased cost for accelerated development of asbestos substitutes. At the present stage of technology, some potential decreased utility to end users might also result until those substitutes are perfected." (Underlining added.)

The Office of the Medical Director approved banning patching compounds containing asbestos, and said that necessary action should be taken to preclude consumers' continued exposure to such patching compounds. The Medical Director stated:

> "It is necessary to point out that because of the wide range of individual susceptibility to carcinogenic substances the 'threshold' or 'no

effect' level may not be applicable. For example, a level of a carcinogen may exist below which it would not cause cancer in one person, however, others in the population may develop cancer at a level considerably below this and possibly approaching zero. To the best of our knowledge, a 'no effect' level has not been demonstrated for asbestos."

The Bureau of Compliance said that if patching compounds were banned as requested by the petitioner, the cost of enforcing the ban would be high for both the Commission and industry. The Bureau suggested that if the Commission issued a ban, it be on future production; thereby eliminating the need to purge existing stocks in the marketplace.

The Bureau of Compliance also pointed out that given the ubiquitous nature of asbestos, it would be virtually impossible for firms to comply with a ban of products containing any free-form asbestos. Therefore, the Bureau suggested that the Commission define a specific level of free-form asbestos that, when contained in patching compounds, would cause them to be banned.

The Office of General Counsel, commenting on the petition and the staff's proposed ban, said the staff had not shown how much asbestos was in patching compounds used by consumers, or how much asbestos could be released in the air during use. It also pointed out that although the petition dealt only with patching compounds, the Commission may wish to consider other substances containing asbestos, such as fake fireplace ash, when taking regulatory action.

The staff considered the above mentioned comments when it forwarded the petition and its recommendation to ban asbestos-containing patching compounds to the Commissioners on March 29, 1977.

Petition B

On February 11, 1977, the Commission received a petition from the Health Research Group requesting it to ban, under the FHS Act, dry-wall patching compound and other consumer products containing tremolite asbestos in dry form. Basically the petition requested the Commission to take the same action asked in petition A.

Petition B was submitted after OSHA told a firm producing tremolite talc in January 1977 that it could no longer certify that its talc did not contain asbestos. OSHA's action was taken after it received information from the National Institute for Occupational Safety and Health showing that the firm's workers were experiencing significantly higher rates of respiratory disease and lung cancer than other firms in the industry.

The Commission's Office of General Counsel, after discussing the petition with the petitioner, received permission to join this petition with petition A because they both dealt with free-form asbestos.

Petition C

On April 15, 1977, the Commission received a joint letter from the person who sent the November 1975 complaint about asbestos used in fireplace ash (see p. 27), and the Environmental Defense Fund, petitioning the Commission to (1) ban fireplace ash as requested in the November 1975 complaint, (2) alert homeowners to the hazards associated with such fireplace ash, and (3) initiate a recall of fireplace ash.

The Commission's Office of General Counsel agreed that the November 1975 letter was a petition under the FHS Act, and that the Commission would have to rule on whether to ban fireplace ash containing asbestos. However, the General Counsel said alerting homeowners to the hazards and recalling fireplace ash were not individually petitionable under the FHS Act because they were not separate actions that the Commission could take under that act.

COMMISSION BANS CERTAIN PRODUCTS CONTAINING ASBESTOS

The Commission decided to take action on all the petitions at the same time. On April 29, 1977, the Commission accepted the petitions under the CPS Act, not the FHS Act under which they were submitted. Also at this meeting, the Commission proposed to ban, under the CPS Act, two products containing free-form asbestos--patching compounds and fireplace ash.

The Commission had several opinions regarding how it could regulate free-form asbestos in consumer products. It could immediately ban it, issue a standard establishing a safe level, or it could require product labeling. For instance, the FHS Act contains a provision for the interim banning of

potential hazardous substances if they are found to pose an imminent hazard to the public's health. The Commission may ban such a hazardous substance immediately and then complete the formal proceedings to prove or disprove the hazard. After the formal proceeding the product can be permanently banned or the ban can be withdrawn. The Commission could, therefore, declare asbestos-containing products to be an imminent hazard, ban them, and make them subject to repurchase while it completed formal rulemaking proceedings.

The regulatory option the Commission took was to ban free-form asbestos in the two products under the CPS Act. Section 8 of that act provides that the Commission may propose and issue, in accordance with procedures specified in the act, a safety rule declaring the product a banned hazardous product when it finds:

> "(1) a consumer product is being, or will be, distributed in commerce and such consumer product presents an unreasonable risk of injury; and
>
> (2) no feasible consumer product safety standard under this Act would adequately protect the public from the unreasonable risk of injury associated with such product,* * *."

Because the Commission proceeded under the CPS Act rather than the FHS Act, the ban would not affect items in consumers hands because banning a product under the CPS Act does not require firms to repurchase banned products that were sold before the date the ban became effective. The repurchase and recall of products banned under the CPS Act applies only to those products introduced into interstate commerce or sold after the ban's effective date. Had the Commission banned the asbestos-containing products under the FHS Act, repurchase would have been required for all products in consumers' hands and in the market chain. The Commission said it chose to ban the products under the CPS Act because it takes less time to issue a final banning regulation under that act than the FHS Act.

On July 29, 1977, the Commission proposed regulations that would ban patching compounds used by consumers and fireplace ash that contained free-form asbestos. The proposed regulation was published in the Federal Register for comment. After considering comments made by interested parties, on November 9, 1977, the staff submitted a draft regulation to the Commissioners that would have banned the use of asbestos in the two products, however, the effective dates would not have been the same. The staff recommended that the ban

on asbestos used in fireplace ash be effective the day the ban was to be issued, and that the ban on patching compounds containing asbestos be made effective 30 days after the ban's issue date.

The staff recommended that the Commission not ban patching compounds which had traces of asbestos as a contaminate because of the ubiquitous nature of asbestos. The staff recommended that free-form asbestos be banned in patching compounds in which (1) it was intentionally added or (2) asbestos contamination exceeded 1 asbestos fiber (five microns or longer) per thousand fibers.

The Bureau of Economic Analysis concluded that banning the sale of patching compounds containing asbestos 30 days after the final standard was published in the Federal Register would not allow firms to sell most of the patching compounds in their inventories, and to allow small firms time to reformulate their products. Therefore, the Bureau recommended that the Commission ban the manufacture and sale of patching compounds 180 days after publication in the Federal Register to permit firms to clear most patching compounds from their inventories.

The Bureau of Economic Analysis separately submitted its economic impact statement on the proposed ban to the Commission on November 17, 1977. It basically agreed with the staff's recommendation that asbestos used in fireplace ash be banned immediately, but it had some different views on how and when asbestos-containing patching compounds should be banned.

The Bureau said that although the 1 asbestos fiber per thousand fibers provision of the recommended standard was feasible and could be tested, this standard could lead to a ban of all existing patching compounds and cause a great deal of confusion in the industry. It also said that there was uncertainty in industry over the reliability of the tests. For example, the definition of fiber including asbestos fibers is not clear and could lead to inaccurate sample analyses and the inadvertent marketing of banned products.

The Bureau also said that costs to conduct the tests are high. For instance, a full complement of tests could cost up to $300 for each sample if done by independent laboratories. Also, firms developing an in-house testing capability may find it too expensive and they may cease producing patching compounds rather than comply with the standard. Therefore, the Bureau suggested that the Commission ban only patching compounds that contained intentionally added asbestos.

The final banning regulations were published in the Federal Register on December 15, 1977. The Commission banned:

1. Patching compounds containing free-form asbestos that were manufactured or initially introduced into commerce on or after January 16, 1978.

2. Patching compounds containing free-form asbestos, no matter when manufactured or introduced into commerce, effective June 12, 1978.

3. Artificial emberizing materials containing free-form asbestos that were in commerce on or after December 15, 1977.

Had the Commission acted under the FHS Act, its banning action could have been more immediate. The Commission could have more quickly banned the asbestos containing products had it determined that the products were "imminently hazardous." In such cases, the Commission could have administratively banned the products while the formal proceedings continued. Acting under the FHS Act, the ban could have been issued months sooner.

CONCLUSION

The Commission's banning of certain asbestos-containing consumer products under the CPS Act was not as timely or as effective as it could have been if the Commission had banned these products as imminently hazardous under the FHS Act. Acting under the CPS Act resulted in hazardous asbestos-containing products not being recalled and remaining in consumers hands. Also, because the Commission chose to ban the products under the CPS Act, these hazardous products were not banned for several months after the Commission decided to ban them in April 1977. The Commission's decision to use the CPS Act was based on its belief that this action would be faster than the FHS Act, and that this action would not unduly burden manufacturers, distributors, and retailers with costly product recalls.

Other factors contributing to the Commission not taking action faster included its policy of not addressing chronic hazards, its decision to classify a letter alerting it to asbestos hazards a "complaint" instead of a petition, and its failure to act on an internal memorandum in which the staff recommended action against consumer products containing asbestos.

The Commission has revised its policy in which it addresses consumer products which may contain either acute or chronic hazards. It has also developed procedures specifying the criteria it considers regarding petitions. These actions should contribute to improving the Commission's handling of petitions for hazardous products.

COMMISSION STAFF COMMENTS

Commission representatives said that several circumstances contributed to the Commission's not dealing with asbestos earlier. Free-form asbestos, as it relates to chronic, long term hazards contributing to diseases like cancer, is time consuming to test and evaluate in its use in consumer products. Most of the problems attributed to asbestos involve workers, but little is known about asbestos in consumer products.

Also, there were several different petitions asking the Commission to take regulatory action against consumer products containing free-form asbestos. The Commission had to review, evaluate, and respond to each petition, which also contributed to the time it took the Commission to act.

Commission representatives said that part of the Commission's responsibilities was to determine the cost and utility of proposed regulatory action. The staff attempted to look at all aspects of the proposed ban, including the need for the product, alternatives available, and the economic effects of the ban.

Commission representatives said that the Commission did not attempt to declare the two asbestos-containing products imminent hazards because such action did not appear appropriate. The manufacture of fireplace ash had stopped, and the Commission was concerned about the repeated handling of the free-form asbestos ash if it was recalled (e.g., consumers would return it to retailers, retailers to distributors, etc.). The Commission decided to ban further manufacture and sale of the ash, and concentrate on helping consumers safely dispose of any ash they had.

The Commission did not declare patching compounds that contained asbestos an imminent hazard for several reasons. From a practical standpoint, asbestos is difficult to identify in patching compounds, and much of what was manufactured had been sold and had been used by consumers. An imminent hazard would have been extremely difficult to enforce, because asbestos was not generally identified on patching compound containers, and manufacturers did not always know when they

used it. Also, if the Commission declared patching compounds an imminent hazard, it would have been required by the FHS Act to start a formal proceeding to ban the products. In the long run, the Commission believed that banning the products under the procedures specified in the CPS Act was faster than taking similar action under the FHS Act.

APPENDIX I

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Congress of the United States

House of Representatives

Washington, D.C. 20515

HENRY A. WAXMAN
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COMMITTEES
INTERSTATE AND FOREIGN COMMERCE
SCIENCE AND TECHNOLOGY

BURT MARGOLIN
ADMINISTRATIVE ASSISTANT

BRUCE WOLPE
LEGISLATIVE ASSISTANT

March 29, 1977

Mr. Elmer B. Staats
Comptroller General
General Accounting Office
441 G Street
Washington, D.C. 20548

Dear Mr. Staats:

It has come to our attention that the Consumer Product Safety Commission has received evidence that Tris Phosphate, a chemical used in children's clothing, and selected smoke detectors manufactured by BRK Electronics Co. of Aurora, Illinois may present a hazard to public safety. In addition, complaints have been made about various commercial products using asbestos, including artificial fireplace ash. To our knowledge, action assessing the extent of the dangers and the seeking of remedial action through recall or required labeling has been dilatory.

In light of growing public interest in the competence of regulatory agencies to effectively respond to hazardous substances and products in the marketplace, we seek answers to the following questions.

1) When did the Commission first become aware of the potential dangers and hazards that might result from continued use of the above mentioned products?

2) How long did it take for the Commission to take specific, positive, preventive action in the public interest to remove these items from the market or to make the public aware of the hazard?

2a) What recommendations have been made by the Commission's Bureau of Biomedical Science on these products?

3) How has the Commission acted in similar instances?

4) In cases where hazardous products have been banned, in which specific instances did the Commission allow the industry time to dispose to the public of its warehouse stocks?

5) Assess the effectiveness of the Commission's implementation of recall efforts with respect to banned or hazardous products.

APPENDIX I

6) Suggest recommendations for more effective enforcement if warranted.

A swift response would be greatly appreciated. Thank you in advance for your cooperation.

With best wishes,

Sincerely,

John E. Moss
Member of Congress

Henry A. Waxman
Member of Congress

APPENDIX II

CONSUMER PRODUCTS SUBJECT TO REPURCHASE UNDER THE FEDERAL HAZARDOUS SUBSTANCES ACT

CASES OPENED--MARCH 1, 1976 THROUGH MARCH 1, 1977

Product and and regulation under which it was banned	Case	Amount produced	Estimated amount subject to repurchase (note a)	Amount repurchased
Lead in Paint 16 C.F.R. 1500.17(a)(6)i(B)	A	1,897 cases	Less than 1,897 cases	1,431 cases
	B	3,497 cases	Less than 3,497 cases	5,92 cases
	C	Approx. 7,500 cases	Less than 7,500 cases	144 cases
	D	3,360 cases	Less than 3,360 cases	Unknown
	E	3,397 cases	Less than 3,397 cases	240 cases
	F	750-1,500 gal.	550 gal.	25-35 gal.
	G	100 gal.	100 gal.	b/100 gal.
	H	100 gal.	100 gal.	70 gal.
	I	3,434 gal.	350 gal.	c/895 gal.
	J	Unknown	Unknown	None
	K	45,305 units	45,305 units	739 units
	L	4,066 gal.	Less than 100 gal.	c/265 gal.
	M	150,000	Several thousand	26,000
	N	750 gal.	75 gal.	c/170 gal.
	O (note d)	Unknown	Unknown	6 qts.
	P			
	Q	1,250 gal.	Est. 5%	318 gal.
	R	237 units	237 units	e/118 units
	S	5,000 cases	1,000 cases	Unknown
	T	2,168 gal. 1,193 qts.	1,429 gal. 274 qts.	570 gal. 185 qts.
Vinyl Chloride Monomer 16 C.F.R. 1500.17 (a)(10)	A	67 mil. cans	Less than 67 mil. cans	183,000 cans
	B	10 mil. cans	Less than 10 mil. cans	26,000 cans
	C	(note f)		
Electrically operated toys 16 C.F.R. 1500.18 (b)(1)	A	812 units	780 units	770 units
	B	9,000 units	9,000 units	2,200 units
	C	60,030 units	42,492 units	2,600 units
	D	45,700 units	45,700 units	8,087 units
Benzene 16 C.F.R. 1500.14 (a) (13)	A	64, 972 doz.	Unknown	11,281 gross

a/Units that did not meet the regulation.

b/Includes some products that did not violate the regulations.

c/The units subject to repurchase were underestimated.

d/The Commission combined these two cases for the same manufacturer.

e/Units repurchased were understated; manufacturers records not complete.

f/Manufacturer refused to give information to the Commission and subsequently obtained a U.S. district court order staying the ban.

PRINCIPAL OFFICIALS OF THE CONSUMER PRODUCT SAFETY COMMISSION RESPONSIBLE FOR ADMINISTERING ACTIVITIES DISCUSSED IN THIS REPORT

	Tenure of office	
	From	To
COMMISSIONERS:		
S. John Byington, Chairman	June 1976	Present
Barbara H. Franklin	May 1973	Present
R. David Pittle	Oct. 1973	Present
Susan B. King	Mar. 1978	Present
Edith B. Sloan	Mar. 1978	Present
Thaddeus A. Garrett, Jr.	Jan. 1977	Oct. 1977
Lawrence M. Kushner	May 1973	Oct. 1977
Richard O. Simpson, Chairman	May 1973	June 1976
Constance B. Newman	May 1973	Feb. 1976
EXECUTIVE DIRECTOR:		
Michael A. Brown	Aug. 1977	Present
Michael A. Brown (acting)	Nov. 1976	Aug. 1977
Vacant	June 1976	Nov. 1976
Stanley R. Parent (acting)	Jan. 1975	June 1976
Frederick E. Barrett (acting)	May 1974	Jan. 1975
Albert S. Dimcoff (acting)	Apr. 1974	May 1974
Frederick E. Barrett (acting)	Dec. 1973	Apr. 1974
John W. Locke (acting)	May 1973	Nov. 1973

(10712)