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EARLY ALTERNATIVE DISPUTE RESOLUTION IN A FEDERAL ADMINISTRATIVE AGENCY CONTEXT: EXPERIMENTATION WITH THE OFFEROR PROCESS AT THE CONSUMER PRODUCT SAFETY COMMISSION

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During the 1980s Alternative Dispute Resolution (ADR) has come of age.¹ Much experimentation with consensual decisional processes has been conducted in the context of federal administrative agency proceedings. The Administrative Conference of the United States (ACUS) has stamped its imprimatur on the concept of ADR, the Environmental Protection Agency has negotiated successfully several rulemakings, and a plethora of additional agencies have implemented, are experimenting with, or are contemplating the application of, consensual decisional processes. The efficacy of ADR remains controversial and debate continues over how best to implement consensual procedures, while much agency experimentation has

* Professor of Law, University of Montana. Thanks to Barry Boyer, Tom Huff, Bill Luneburg, Bill Rossbach, Peggy Sanner and Roy Schotland for valuable suggestions, all who so generously offered opinions on the offeror process, and the Harris Trust for generous, continuing support. Errors that remain are mine.

1. For definitions of ADR, see Leiberman & Henry, *Lessons From the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424 (1986). For definitions of ADR, and helpful compilations of mechanisms available, in a federal administrative agency context, see Administrative Conference of the United States (ACUS) Recommendation 86-3, 51 Fed. Reg. 25,641, 25,643-45 (1986) (codified at 1 C.F.R. § 305.86-3 (1987)). These mechanisms are discussed thoroughly in P. Harter, *Points on A Continuum: Dispute Resolution Procedures and the Administrative Process* (1986), a report prepared by the ACUS and on which its Recommendation is premised. Cf. Harter, *The Role of Courts in Regulatory Negotiation—A Response to Judge Wald*, 11 COLUM. J. ENV'T. L. 51, 69 (1986) (and sources cited therein); Susskind & McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133, 165 (1985) (and sources cited therein) (examples of widespread application of ADR, especially in administrative context). See generally G. BINGHAM, *RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE* (1985) (survey of ADR in environmental context). For representative views that capture the controversial nature of ADR, see Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 684 (1986); McThenia & Shaffer, *For Reconciliation*, 94 YALE L.J. 1660 (1985); Fiss, *Out of Eden*, 94 YALE L.J. 1669 (1985); Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984). Numerous decisional mechanisms could be used as a paradigm, but regulatory negotiation is employed in this Article for several reasons. It has been the subject of much successful experimentation, close evaluation, and careful data collection, while it is typical of, and fungible with, numerous other decisional processes. For a recent evaluation of four negotiated rulemakings that have been completed, see Perritt, *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations By the Administrative Conference of the United States*, 74 GEO. L.J. 1625 (1986). For compilations of other past, ongoing and contemplated negotiated rulemakings, see *id.* at 1682-88; Administrative Conference of the United States, 1 Admin. Conf. News 8 (1987).

proceeded slowly by trial and error pursuant to certain suggested conditions. These considerations make it important not only to analyze current exploratory efforts but also to evaluate precursors of mechanisms currently undergoing experimentation. One of the most significant of these forerunners with which the Consumer Product Safety Commission (CPSC) experimented in the 1970s was the offeror process, an innovative administrative procedure in which extra-agency entities developed proposed consumer product safety standards. Now that dispute resolution approaches similar to the offeror process are being applied widely, it is important to explore the offeror process to ascertain how experience with it informs present experimentation.²

The first part of this paper discusses the origins and development of the offeror procedure, especially its institution and implementation at the CPSC. The next section analyzes the quality and effect on decisional processes of funded citizen participation in the seven offeror proceedings conducted by that agency. The third segment draws conclusions about the reimbursed involvement and about the offeror process from the Commission's experience. The last portion affords suggestions for future experimentation with participant compensation and with successors of the offeror mechanism.

I. ORIGINS AND DEVELOPMENT OF THE OFFEROR PROCEDURE

A. *Origins and Nascent Development*

The origins and early development of the offeror process warrant only cursory treatment.³ During 1967, Congress created the National Commis-

2. I recently analyzed funded public participation in proceedings of the Consumer Product Safety Commission. See Tobias, *Of Great Expectations and Mismatched Compensation: Government Sponsored Public Participation In Proceedings Of The Consumer Product Safety Commission*, 64 WASH. U.L.Q. (1986). "Reimbursement," "compensation" and "funding" are used synonymously in this Article to mean voluntary payment from agency resources for expenses incurred by public participants in administrative proceedings. "Public" and "citizen" are employed interchangeably to mean "nonindustry." The terms "involvement," "participation" and "activity" are used synonymously to mean input intended to contribute to resolution of issues in proceedings. "Efficacy" and "effectiveness" are employed interchangeably to describe the impact public participation has on agency decisionmaking. When collecting data for the evaluation mentioned above, I also assembled considerable information on citizen participation in the offeror process. The material gathered on compensated participation in offeror initiatives was not reported principally because the funded involvement differs in certain respects from the reimbursed activity examined earlier and partly because the offeror proceedings were broadly condemned as a failed experiment, and the procedure was abolished.

3. Others have treated competently these matters. See Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 GEO. WASH. L. REV. 32 (1982) (evaluation of offeror process, CPSC, and CPSC's legislation and procedures on which I rely substantially in this article); see also Scalia & Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 U.C.L.A. L. REV. 899 (1973)

sion on Product Safety (NCPS), which was to analyze thoroughly consumer product hazards and determine whether new protections were needed to reduce harm attributable to consumer products.⁴ The National Commission undertook a comprehensive assessment and published a Final Report in 1970. NCPS concluded that unreasonable product hazards unduly endangered consumers and found that existing measures, such as federal and state legislation, producer self-regulation and common law tort causes of action, were inadequate.⁵ Thus, the NCPS suggested that Congress establish a new governmental entity and endow it with substantial authority, the most relevant of which would be the power to promulgate industry-wide consumer product safety standards. Moreover, the statute which the National Commission recommended that Congress enact included a specific provision for the offeror process.⁶

B. Legislation

In 1972, Congress adopted the suggestion of the NCPS, making the offeror mechanism a centerpiece of the Consumer Product Safety Act (CPSA), which created the Consumer Product Safety Commission and granted it comprehensive authority to regulate consumer products.⁷ The offeror process was a novel two-step procedure for CPSC promulgation of mandatory safety standards. When the agency found that compulsory controls were necessary to protect the public from risks posed by consumer products, the CPSC issued a Notice of Proceeding (NOP) inviting extra-Commission entities to suggest existing requirements or to offer to develop new ones.⁸ Offerors might be individual citizens; public interest organizations, such as the National Consumers League (NCL); voluntary standards writing organizations, such as the American Society for Testing and Materials (ASTM); industry trade associations, such as the Outdoor Power Equipment Institute (OPEI); or manufacturers, distributors or retailers of

(another helpful early assessment of same considerations); *Special Issue: The Consumer Product Safety Commission*, 43 GEO. WASH. L. REV. 1001 (1975) (same); Perritt, *supra* note 1, at 1630-36 (origins and development of analogous concept of negotiated rulemaking); cf. Tobias, *Of Public Funds and Public Participation: Resolving the Issue of Agency Authority to Reimburse Public Participants in Administrative Proceedings*, 82 COLUM. L. REV. 906, 907-18 (1982) (origins and development of funded public participation).

4. See Joint Resolution to Establish a National Commission on Product Safety, Pub. L. No. 90-146, 81 Stat. 466, 470 (1967). See generally Scalia & Goodman, *supra* note 3, at 900; Schwartz, *supra* note 3, at 36 (discussions of National Commission's creation).

5. See National Comm'n on Prod. Safety, Final Report Presented to the President and Congress 1-3 (1970). See generally Scalia & Goodman, *supra* note 3, at 900-01; Schwartz, *supra* note 3, at 36-41 (discussions of National Commission's work).

6. See Schwartz, *supra* note 3, at 41-42, 57-58. "But it was not given careful consideration." *Id.* at 57 n.176.

7. See Scalia & Goodman, *supra* note 3, at 901-16; Schwartz, *supra* note 3, at 42-45, 57-58.

8. See Scalia & Goodman, *supra* note 3, at 907; Schwartz, *supra* note 3, at 59.

the product considered to present risk to the public.⁹ Interested entities were afforded thirty days in which to submit proposals,¹⁰ and the CPSC had to choose at least one applicant unless extant safety standards were deemed sufficient to protect the public.¹¹ Moreover, the agency could "agree to contribute to the offeror's cost" in developing proposed requirements.¹² Those individuals or groups selected by the CPSC as offerors had to provide opportunities for involvement of "interested persons (including representatives of consumers and consumer organizations)" in standard development.¹³ The CPSC, however, left to Commission judgment the specifics of nonindustry participation¹⁴ and was silent about reimbursement for such activity.¹⁵ Congress was nearly as cryptic about the role the legislative branch envisioned for the agency while the proposed standard was being developed.¹⁶ Offerors were given 150 days from issuance of the NOP to tender recommendations.¹⁷

Upon receipt of an offeror's submission, the CPSC had sixty days to terminate the initiative or to issue a proposed consumer product safety standard.¹⁸ If the Commission decided to proceed, the agency published a proposed safety standard which might include all or none of the offeror's suggestions.¹⁹ Issuance of the proposal triggered the second phase of the offeror process that essentially was to follow the informal rulemaking requirements imposed under the Administrative Procedure Act.²⁰

Dissatisfaction with the offeror process, articulated by numerous individuals and entities that participated in or were familiar with the seven proceedings which the CPSC conducted, led Congress to amend the procedure during 1978.²¹ However, the offeror process was not employed subsequently, and Congress eliminated it in 1981 while providing for

9. See Schwartz, *supra* note 3, at 59; *cf. id.* at 58; Scalia & Goodman, *supra* note 3, at 913-15 (discussion of special provision for offeror that is manufacturer, distributor or retailer).

10. See 15 U.S.C. § 2056(b)(4) (Supp. II 1972) (repealed 1981).

11. See *id.* § 2056(c)-(d) (repealed 1981); Scalia & Goodman, *supra* note 3, at 907.

12. 15 U.S.C. § 2056(d)(2) (1976) (repealed 1981). See generally Scalia & Goodman, *supra* note 3, at 907, 911; Schwartz, *supra* note 3, at 58 (background discussion of possible agency contribution to offeror's cost).

13. 15 U.S.C. § 2056(d)(3)(B) (1976) (repealed 1981).

14. Schwartz, *supra* note 3, at 60. See generally Scalia & Goodman, *supra* note 3, at 911-13 (background discussion of CPSC's leaving to CPSC judgment specifics of public participation).

15. See Schwartz, *supra* note 3, at 60. See generally *infra* note 28 and accompanying text (discussion of CPSC's silence regarding reimbursement for public participation).

16. See Schwartz, *supra* note 3, at 60.

17. See 15 U.S.C. § 2056(b) (Supp. II 1972) (repealed 1981).

18. See Schwartz, *supra* note 3, at 60; Scalia & Goodman, *supra* note 3, at 916.

19. See Schwartz, *supra* note 3, at 60; Scalia & Goodman, *supra* note 3, at 908.

20. See Schwartz, *supra* note 3, at 60.

21. See Tobias, *supra* note 2, at n.79 (discussion of dissatisfaction with the offeror process); Pub. L. No. 95-631, § 3(a), 92 Stat. 3742, 3742-43 (1978) (repealed 1981) (the 1978 amendment).

Commission compensation of those that help the agency develop compulsory standards.²²

C. CPSC Implementation

From 1974 until 1977, the CPSC paid entities that functioned as offerors and individual members of the public who assisted the offerors in developing proposed consumer product safety standards governing hazards associated with seven consumer products.²³ The offerors were two voluntary standards writing organizations, two consumer groups and three industry-oriented entities.²⁴ The individual citizens who aided the offerors primarily were representatives of regulated interests,²⁵ although a number of the persons, including technical consumers and "lay" consumers or product users, were not associated with industry.²⁶ The seven products were architectural glass, power lawn mowers, matchbooks, swimming pool slides, television receivers (TVR), miniature Christmas tree lights (MCTL) and public playground equipment. The decision whether to pay individuals more than out-of-pocket costs was controversial.²⁷ Thus, additional expenses, such as lost wages, were covered in one proceeding, while negative resolution of the issue led the CPSC to reject an application submitted by a consumer organization which wished to serve as the offeror in a second

22. See Pub. L. No. 97-35, § 1203, 95 Stat. 703, 704-13 (1981), codified at 15 U.S.C. § 2056(a) (Supp. V 1981) (1981 abolition legislation); 15 U.S.C. § 2054(a)(4) (Supp. V 1981 (funding provision); see also Tobias, *supra* note 2, at notes 91-92 and accompanying text (fiscal constraints imposed by decreased CPSC budget well may explain failure to invoke specific funding authority). See generally Klayman, *Standard Setting Under the Consumer Product Safety Amendments of 1981—A Shift in Regulatory Philosophy*, 51 GEO. WASH. L. REV. 96, 110 (1982) (analysis of 1981 amendment to CPSA). The only other federal legislation which provides for an offeror-like process is the Medical Device Amendments of 1976. See 21 U.S.C. § 360d(c)(1) (1976). For an analysis of the legislative provision that compares it to CPSC's offeror process and which indicates that the Food and Drug Administration has been reluctant to apply the offeror-like mechanism, see Schwartz, *Performance Standards Under the Medical Device Amendments: A Flawed Process in Need of Reform*, 39 FOOD DRUG COSM. L.J. 318 (1984).

23. The public playground equipment proceeding, which CPSC designated a "quasi-offeror" proceeding, is considered an offeror proceeding in this Article. The chainsaw proceeding which might be considered a "quasi-offeror" proceeding is not so treated here. See generally Tobias, *supra* note 2, at § II.B.7. (analysis of chainsaw proceeding).

24. The offerors were respectively ASTM and Underwriters Laboratory (UL), NCL and Consumers Union (CU), and the Consumer Safety Glazing Committee (CSGC), the National Swimming Pool Institute (NSPI) now re-named the National Spa and Pool Institute and the National Recreation and Parks Association (NRPA).

25. The percentage of citizen representatives varied but usually comprised at least one-third and often as much as two-thirds of the groups which developed the proposed standards.

26. The technical consumers included engineers and physicians. The "lay" consumers included consumer advocates and homemakers.

27. See Note, *Inside the Proposed Standard for Architectural Glass: An Outward Look at Consumer Participation in the CPSA's Offeror Process*, 43 GEO. WASH. L. REV. 1078, 1175-96 (1975).

initiative.²⁸ Widespread criticism of the offeror process prompted Congress to amend the mechanism in 1978; however, the agency did not employ the procedure thereafter, and it was abolished three years later.²⁹

D. Prior Studies

There are several analyses of the offeror process, but none evaluates closely the efficacy or quality of funded participation or operation of the mechanism itself in all of the CPSC's proceedings. During 1974 and 1975, a law student conducted a general examination of the architectural glazing initiative.³⁰ The next year, the Commission's Office of Program Planning and Evaluation (OPPE) analyzed the efforts of the agency and of offerors—not of individual citizens—and certain implications of the procedure, in the first four matters.³¹ A 1977 study undertaken by the Comptroller General³² and a 1978 Congressional report focused almost exclusively on the CPSC's institution and management of the offeror process and the difficulties that the agency encountered in its implementation.³³ There is much Congressional testimony about the procedure and the seven proceedings.³⁴ During 1981, a consultant for the Administrative Conference of the United States (ACUS) completed a thoroughgoing evaluation of the work of the CPSC and the offeror as well as the process in the lawn mower initiative while summarily assessing these considerations in several other proceedings and the efforts of individuals in the lawn mower matter.³⁵

In sum, several hundred individuals and organizations helped develop proposed consumer product safety standards in seven offeror initiatives of the Consumer Product Safety Commission. But neither the offeror

28. See 43 Fed. Reg. 19, 136 (1978) (discussion of the first proceeding which was MCTL); Schwartz, *supra* note 3, at 66-68 (same); see also Note, *supra* note 27, at 1175-96 (discussion of the second proceeding which was architectural glass). For full discussion of how individuals and entities involved in proposed standard development, indicating most pertinently that no public money was paid to employees of product manufacturers, see *infra*, note 63.

29. See *supra* notes 21-22 and accompanying text.

30. See Note, *supra* note 27.

31. See OFFICE OF PROGRAM PLANNING AND EVALUATION, CPSC, EVALUATION OF OFFEROR PROCESS (Nov. 5, 1976) [hereinafter OPPE REPORT].

32. COMPTROLLER GEN. OF THE U.S., THE CONSUMER PRODUCT SAFETY COMMISSION NEEDS TO ISSUE SAFETY STANDARDS FASTER (Dec. 12, 1977) [hereinafter GAO STUDY].

33. See H.R. REP. No. 1164, 95th Cong., 2d Sess., reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 9434, 9452 [hereinafter HOUSE OFFEROR REPORT].

34. See, e.g., CPSC Oversight: Hearings Before the Subcomm. on Oversight and Investigation of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 1st Sess. 1 (1977) [hereinafter 1977 House Oversight Hearings].

35. See Schwartz, *supra* note 3. Cf. Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Health and Safety*, 56 TEX. L. REV. 1329, 1399-1416 (1978) (ACUS consultant's evaluation of CPSC and offeror work in several proceedings in context of broader study); Meeting on Consumer Participation in Section 7 Proceedings, Washington, D.C. (Aug. 6, 1975) [hereinafter Consumer Participation Meeting] (participants' observations on consumer involvement in first offeror proceedings).

mechanism nor much of this involvement has been analyzed carefully. Thus, it is important to evaluate rigorously the offeror process as well as contributions of citizens and offerors.

II. ASSESSMENT OF OFFEROR PROCEEDINGS AT THE CONSUMER PRODUCT SAFETY COMMISSION

A. Methodology

It is difficult to analyze the CPSC's offeror initiatives. But the problems that I confronted in conducting the evaluation which follows and their resolution need be recounted only briefly here, principally because the methodology applied is similar in most significant respects to that I have employed before.³⁶

Several reasons underlie the decision to assess the Commission's offeror process.³⁷ Most importantly, the nature of offeror and citizen involvement in the development of proposed consumer product safety standards and the character of the offeror procedure meant public participation in the process and the device itself could be contrasted meaningfully with citizen activity in other proceedings³⁸ and with more recently created decisional mechanisms, thus affording instructive insights for future experimentation.³⁹ The agency's experience with the offeror procedure provided numerous additional benefits. For example, there were few enough initiatives to permit detailed examination, but a sufficient number to allow effective comparison. However, analysis of experimentation at the CPSC did involve disadvantages and trade-offs.⁴⁰

The contributions of individuals and offerors, primarily to development of proposed standards but also to agency decisionmaking, will be considered input and evaluated in terms of efficacy and quality.⁴¹ "Efficacy," which is employed synonymously with effectiveness and impact, asks whether the contributions of citizens and offerors had a salutary effect on decisional processes—both proposed standard development and subsequent Commission consideration.⁴² "Quality," which is less stringent

36. See Tobias, *supra* note 2, at § II.A. One important difference is that I am analyzing the offeror process itself.

37. See Tobias, *supra* note 2, at § II.A.1. (discussion of advantages afforded by single agency analysis, especially at CPSC).

38. See *id.* at § I.A.4., § B.2. (discussion of other funded citizen activity).

39. See *supra* note 2; *infra*, §§ III., IV.

40. For example, most of the proceedings commenced more than a decade ago.

41. It is important to remember that there were two decisional processes: proposed standard development for which offerors had ultimate responsibility and CPSC consideration of the results of that effort over which the agency had authority.

42. For example, did input force decisionmakers to treat more constructively questions at issue. See Tobias, *supra* note 2, at § II.A.2.a. (more discussion of this term and other definitional approaches and difficulties); *id.* at § II.A.2.b. (discussion of difficulties entailed in measuring efficacy). These are exacerbated by the factors mentioned, *supra* note 41.

and more subjective than efficacy, is nearly as important and as difficult to define. Quality considers how good the input was, implicating the validity of the views advanced and how they were advocated.⁴³

In consulting sources of data on the input of individuals and offerors in the offeror process and on the offeror procedure itself, I attempted to consider, assemble and report as much information as practicable and, when limitations were encountered, to be as representative as possible. The potential sources were the studies mentioned above, twenty Congressional hearings, the CPSC "files" and approximately one thousand persons familiar with the offeror process.⁴⁴ I read all of the studies and hearings and relevant material listed in the index to each file.⁴⁵ Every pertinent reference to effectiveness or quality or to the offeror process that I found in these sources, notwithstanding reliability, is reported below.⁴⁶ Because so many people were familiar with the offeror proceedings, but most of the persons also had an interest in the initiatives and in the perceived efficacy and quality of citizen and offeror input, I sought the perspectives of a substantial, roughly equivalent number of people drawn from the three principal classifications of informed protagonists—CPSC, commercial and nonregulated interests.⁴⁷ The views were solicited by telephone, and those interviewed were asked the nature of their interest and their opinions of efficacy and quality and of the offeror procedure.⁴⁸ The data gleaned, regardless of dependability, are paraphrased or reported verbatim below.

I relied upon the material assembled to reach conclusions regarding the effectiveness and the quality of individual and offeror input.⁴⁹ For each of the offeror initiatives, I reviewed all of the information collected.⁵⁰ First, I tried to formulate preliminary judgments by considering citizen

43. See Tobias, *supra* note 2, at § II.A.2.a. (more discussion of this term).

44. See *supra* notes 30-33, 35 and accompanying text (relating to studies); *supra* note 34 and accompanying text (relating to hearings). The files that contain most of the data collected by CPSC are available at its Office of the Secretary (OS), 5401 Westbard, Bethesda, MD. See generally Tobias, *supra* note 2, at § II.A.2.c. (relating to persons familiar with the process).

45. Whole files were not read because some were 20,000 pages and the endeavor did not seem cost-beneficial.

46. See *infra*, § II.B. of this Article. This provides important advantages, such as transmission of raw data, free of value choices. See Tobias, *supra* note 2, at n.127 (listing other advantages).

47. The crucial difficulty was how to maximize accuracy in terms of familiarity and potential prejudice. The approach attempts to guard against bias by offering some statistical validity and opportunities to contrast views articulated. See generally Tobias, *supra* note 2, at n.132; *id.* at n.131 (discussion of the protagonists).

48. See *id.* at notes 133-36 and accompanying text (for more discussion of telephone interviewing).

49. See *infra*, § III.A. of this Article; Tobias, *supra* note 2, at n.137-47 and accompanying text (more discussion of difficulties entailed in reaching such conclusions).

50. This included data reported below and that not reported, such as legal questions at issue.

and offeror contributions and that material which offered no explicit opinion regarding the impact or quality of the input.⁵¹ I then reviewed every opinion of the efficacy and quality of input, attempting to accord the opinion weight, premised on accuracy in terms of sources' objectivity and knowledge, using a number of factors.⁵² The values initially assigned were modified as indicated in reaching final determinations.⁵³

Moreover, I formulated conclusions about the offeror process. I reconsidered views expressed about that procedure by the sources mentioned above to ascertain whether the process itself had important implications for the perceived efficacy and quality of offeror and citizen involvement in it.⁵⁴ These perspectives also were consulted in assessing the effectiveness of the process as a technique for developing standards, for making decisions and for resolving disputes, especially in contrast with other intra- and extra-agency mechanisms for doing so, as well as in determining if lessons gleaned from the offeror experience might inform experimentation with more recently created approaches.⁵⁵

The methodological complications examined above are the most significant and problematic. Nonetheless, numerous additional difficulties, a number of which already were alluded to, attend attempts at "rigorous" assessment.⁵⁶ For instance, the question of priorities implicates matters such as the breadth and depth of evaluation. I tried to examine as stringently as possible as much offeror and citizen input throughout as much of the entire process as was feasible.⁵⁷ Correspondingly, certain aspects of the analysis are limited by practical factors. One important factor is when to assess.⁵⁸ Now that Congress has abolished the offeror process and some time has passed since most proceedings were conducted, it might not seem propitious to evaluate them. Ironically, passage of time, which yields a number of advantages—such as increased detachment—and other considerations, actually mean that today is quite appropriate. Indeed, revitalization of the offeror process, in the form of such widely heralded mechanisms as regulatory negotiation, makes the present auspicious, especially given the need for analysis that could facilitate improvement of

51. This was never conclusive partly because there was so much input.

52. These included theoretical, intangible and more pragmatic factors. See Tobias, *supra* note 2, at n.141-43 and accompanying text.

53. Here I used the concepts of balance and consensus, more qualitative, subjective factors and gestalt judgments. See *id.* at n.144-47 and accompanying text.

54. See *infra*, § III.A.2. of this Article.

55. See *infra*, §§ III.A.2.-3.; III.B.; IV. of this Article.

56. See Tobias, *supra* note 2, at § II.A.3. (listing additional complications); *id.* at § IV. (discussion of certain considerations entailed in rigorous analysis).

57. I attempted to accord each of the seven proceedings roughly equal treatment. But I did make certain choices guided by factors such as relative significance of funded input to the proceeding in which it occurred.

58. See Tobias, *supra* note 2, at notes 149-52 and accompanying text (more discussion of the timing issue).

the newer devices currently undergoing widespread experimentation.⁵⁹ Additional problems impede rigorous assessment, particularly the type of evaluation that I have recommended elsewhere for persons undertaking studies in the future.⁶⁰ However, all analyses have their limits, while the determination to assess the offeror process is reasonable, especially in light of ongoing and future work with similar techniques and their apparent promise.⁶¹

B. Proceeding—Specific Assessment

For all of the offeror proceedings, which are considered chronologically, I include descriptive evaluations of the initiatives and verbatim or paraphrased opinions,⁶² and my assessments, of the efficacy and quality of government sponsored public involvement. The contributions of individual citizens and of offerors,⁶³ principally to proposed standard development but secondarily to Commission decisionmaking, will be treated as input and analyzed in terms of effectiveness and quality.

1. Architectural Glazing

In August, 1974, the CPSC selected the Consumer Safety Glazing Committee (CSGC) as the offeror to develop requirements for treating hazards associated with architectural glass.⁶⁴ The Committee, a "group of industry, labor and general interest groups" formed to lobby for state model safety glazing legislation, had petitioned the CPSC to adopt a mandatory standard in June, 1973.⁶⁵ But the CSGC was chosen only after the organization revised its original application and agency negotiations

59. See *supra*, notes 1-2.

60. See Tobias, *supra* note 2, at n.156 (sources cited define the problems); *id.* at § IV. (defining the prescriptions).

61. It also is realistic and worthwhile to evaluate funded involvement in the process and to collect systematically data on compensated activity, especially for purposes of comparison with other such activity and related mechanisms. See generally *id.* at notes 158-60 and accompanying text.

62. To preserve the confidentiality of CPSC officials, compensated entities, and people I interviewed, most persons whose opinions are reported are identified by numbers for each initiative. This journal's editors are relying upon me to verify the opinions. Most interviews were held in 1983 and 1984. Inquiries as to sources should be directed to me.

63. Most citizens were not paid directly by the agency but by offerors from CPSC lump sum payments to them or from offerors' resources. I believe that no employees of product manufacturers were paid any public money. The input of individuals, however funded out of public money, is evaluated below. Cf. Schwartz, *supra* note 3, at 64 n.223 (amounts CPSC paid offerors).

64. See 41 Fed. Reg. 6178, 6178 (1976); cf. *id.* at 6178-79; OPPE REPORT, *supra* note 31, at D-1 to D-9 (discussions of proceeding); Note, *supra* note 27 (same, focusing on consumer participation).

65. 41 Fed. Reg. 6178, 6178 (1976). Cf. Schwartz, *supra* note 3, at 56 n.168; Note, *supra* note 27, at 1173-76 (discussion of CSGC and members' interests in standard development and CSGC's prior efforts in area).

with another entity, the National Consumers League, reached an impasse over the issue of financing non-commercial involvement in proposed standard development.⁶⁶ Funded citizens comprised approximately one-third of the people who worked with the CSGC.⁶⁷ The offeror was granted one time extension⁶⁸ and submitted its recommendations to the CPSC during January, 1975.⁶⁹ Commission staff modified considerably the suggestions proffered by the CSGC,⁷⁰ and the agency published a proposed rule in February, 1976.⁷¹ Eleven months later, the CPSC issued a final regulation said to resemble, but lack the clarity of, a voluntary standard which the Commission already had found deficient.⁷² There is widespread agreement that this was one of the least successful offeror initiatives;⁷³ the rule did not completely withstand judicial scrutiny⁷⁴ and has been revised continually.⁷⁵

Many have criticized the efforts of the CSGC. The Chairman of the National Commission on Product Safety accused the offeror of tendering a "weaker standard than that proposed by the voluntary sector [, affording] less protection to the consumer than he could have had at no cost."⁷⁶

66. See Note, *supra* note 27, at 1175-96 (discussion of CSGC's selection); see also *Hearings on Regulatory Reform Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 2d Sess., Vol. IV, 342-64 (1976) [hereinafter *Regulatory Reform Hearings*] (Commissioners' Opinions on negotiations with National Consumers League).

67. See Note, *supra* note 27, at 1196-1202 (discussion of the consumers, their selection, backgrounds and participation).

68. See 40 Fed. Reg. 10, 227 (1975). See generally Note, *supra* note 27, at 1204-05 (discussion of time extension).

69. See Current Report, 3 Prod. Safety & Liab. Rep. (BNA) 100, 100 (Jan. 31, 1975).

70. See 42 Fed. Reg. 6178, 6178-87 (1976); Schwartz, *supra* note 3, at 88 n.419 and accompanying text.

71. See 41 Fed. Reg. 6178, 6181-87 (1976); cf. *id.* at 6178-87 (discussion of some CPSC modifications in CSGC's recommendations).

72. See 42 Fed. Reg. 1428, 1441 (1977), codified at 16 C.F.R. §§ 1201.1-1201.7 (1983) (final rule); cf. *Hearings on Dep't of Housing and Urban Dev.—Indep. Agencies Appropriations for 1980 Before the Subcomm. on HUD—Indep. Agencies of the Senate Appropriations Comm.*, 96th Cong., 1st Sess., pt. 1, 82 (1979) [hereafter *1980 Senate Appropriations Hearings*] (statement of Senator Proxmire); Telephone interviews (TIs) with industry representatives 1, 2 (final rule's unclear nature).

73. See, e.g., *1980 Senate Appropriations Hearings*, *supra* note 72, at 82-84 (statement of Senator Proxmire); *1977 House Oversight Hearings*, *supra* note 34, at 285 (statement of Comm'r Pittle); Pittle, *The Restricted Regulator*, 12 TRIAL 18, 27 (May 1976); TIs, *supra* note 72.

74. See *ASG Indus., Inc. v. CPSC*, 593 F.2d 1323, 1337 (D.C. Cir.), cert. denied, 444 U.S. 864 (1979).

75. See, e.g., 45 Fed. Reg. 57,383, 57,383 (1980); 43 Fed. Reg. 57,244, 57,594 (1978). See generally *CPSC Reauthorization: Hearings on H.R. 2271 and H.R. 2201 Before the Subcomm. on Health and the Env't of the House Comm. on Energy and Commerce*, 97th Cong., 1st Sess. 345-46 (1981) [hereinafter *H.R. 2271 Hearings*] (statement of Acting Chairman Statler). Indeed, these revisions have continued until quite recently. See, e.g., 49 Fed. Reg. 15,256, 15,256 (1984); 48 Fed. Reg. 20,762, 20,762 (1983).

76. Comment from Arnold Elkind to CPSC, reprinted in Current Report, 3 Prod.

Employees of the CPSC with line responsibility for reviewing the CSGC's submission expressed concern that it was not as technically accurate as feasible or as responsible as possible to requirements in the agency's NOP.⁷⁷ The authors of the OPPE Report and numerous additional personnel at the CPSC agreed with one Commissioner that the offeror's suggestions were "nothing more than 'warmed over' versions of voluntary standards previously determined to be inadequate by the Commission," so that agency staff had to revise substantially the recommendations.⁷⁸ Moreover, a CPSC medical officer said that the submission provided by the CSGC lacked scientific support and that the offeror never correlated the "human factors" in glass injuries,⁷⁹ while the agency's Project Monitor asserted that many CSGC members desired regulation for commercial reasons and that the offeror "pulled the wool over the eyes of" the reimbursed individuals.⁸⁰

In fairness to the CSGC, although the staff of the CPSC criticized strongly, and altered significantly the CSGC's proposal, the offeror's suggestion differed minimally from the agency's final rule.⁸¹ Perhaps most telling was the Commissioners' decision to discontinue consideration of the risks presented by windows,⁸² even though a principal criticism of the CSGC was the offeror's failure to treat these dangers.⁸³ Moreover, much responsibility for perceived deficiencies in CSGC's performance can be assigned to the CPSC. Two Commissioners admitted that the instructions initially provided the Committee might have been unclear.⁸⁴ The CPSC broadly defined the hazards to be addressed, and there were no readily

Safety & Liab. Rep. (BNA) 57, 57 (Jan. 17, 1975) and in Note, *supra* note 27, at 1204 n.180.

77. See OPPE REPORT, *supra* note 31, at 6-11, D-8; GAO STUDY, *supra* note 32, at 24; Note, *supra* note 27, at 1204-05 n.182-83; accord *Hearings on S.644 and S.1000 Before the Subcomm. for Consumers of the Senate Comm. on Commerce*, 94th Cong., 1st Sess. 92 (1975) [hereinafter *S.644 Hearings*] (statement of David Swankin).

78. See OPPE REPORT, *supra* note 31, at 3-7; TIs with CPSC employees 1-3; see also Pittle, *supra* note 73, at 17,18 (relating to Commissioner's views); *Implementation of the CPSA: Hearings Before the Subcomm. for Consumers of the Senate Comm. on Commerce, Science and Transp.*, 95th Cong., 1st Sess. 127 (Apr. 1977) [hereinafter *Apr. 1977 Senate Oversight Hearings*] (same); *Regulatory Reform Hearings*, *supra* note 66, at 34 (statements of Comm'r Pittle).

79. An important "human factor" was failure to see a glass door. TI with CPSC employee 1, *supra* note 78. Cf. OPPE REPORT, *supra* note 31, at 6-11 (CSGC assertion that relationship between certain hazards and human-glass impacts was developed by offeror, but CPSC evaluators' assertion that relationship based on insufficient data and deficient engineering analysis).

80. TI with CPSC employee 2, *supra* note 78.

81. See 42 Fed. Reg. 1428, 1428 (1977); TI with industry representative 1, *supra* note 72; TI with CPSC employee 2, *supra* note 78.

82. See GAO STUDY, *supra* note 32, at 24; 41 Fed. Reg. 6178, 6178 (1976); OPPE REPORT, *supra* note 31, at 3-7.

83. See *supra* notes 70-71.

84. See *S.644 Hearings*, *supra* note 77, at 250-52 (statements of Chairman Simpson and Comm'r Newman).

available remedies for some of the risks presented.⁸⁵ Indeed, the offeror claimed that a reasonable standard could have been promulgated three years earlier had the CPSC restricted standard development to the issues identified in the petition submitted originally by the CSGC.⁸⁶ Insufficient injury data existed which meant that the offeror had to spend resources developing and assembling information.⁸⁷ The agency afforded little guidance, assuming a "hands-off" approach throughout the proposed standard development process,⁸⁸ but severely criticized the end product tendered by the CSGC when the CPSC may have lacked the requisite expertise to assess it.⁸⁹ Of course, much of the difficulty experienced may be attributable to the fact that the architectural glazing proceeding was the first initiative in which the agency was experimenting with an entirely new administrative procedure.

Moreover, some assessments of CSGC were positive. Several CPSC employees were impressed more favorably by the offeror. One staff member thought that the CSGC "assembled a number of fairly good ideas, worked well with building code groups," and developed a high quality standard.⁹⁰ Another agency official believed that the offeror's prior experience with state legislatures enabled it to run a "pretty smooth operation" but imposed certain constraints,⁹¹ while a third staffer said that CSGC's "work was generally okay."⁹² Finally, manufacturing represen-

85. See Schwartz, *supra* note 3, at 65 n.231 and accompanying text; *Hearings on Dep't of Housing and Urban Dev.—Indep. Agencies Appropriations for 1978 Before the Subcomm. on HUD—Indep. Agencies of the Senate Comm. on Appropriations*, 95th Cong., 1st Sess., pt. 2, 1707 (1977) [hereinafter *1978 Senate Appropriations Hearings*]; GAO STUDY, *supra* note 32, at 24-25; OPPE REPORT, *supra* note 31, at 3-7.

86. See OPPE REPORT, *supra* note 31, at 3-7.

87. See Schwartz, *supra* note 3, at 65 n.233; GAO STUDY, *supra* note 32, at 32; OPPE REPORT, *supra* note 31, at 3-13.

88. TI with industry representative 3; TI with CPSC employee 4; Schwartz, *supra* note 3, at 64 n.228; *Apr. 1977 Senate Oversight Hearings*, *supra* note 78, at 125, 127 (statements of Comm'rs Kushner and Pittle).

89. TIs with industry representative 2, *supra* note 72; TI with industry representative 3, *supra* note 88. The first person interviewed added that the need "to educate CPSC personnel and public participants" meant standard development consumed "twice as much time as it would have without them" and that the "standard which CPSC came up with was awful [principally] because it did not listen to industry." *Id.*; cf. TI with industry representative 5 (much initial staff turnover, much unsubstantiated CPSC criticism of CSGC's work, and "Commissioners need to put fingerprints" on standard created delay). Other industry representatives echoed these, and voiced additional criticisms, of CPSC's performance; accord OPPE REPORT, *supra* note 31, at 4-5, 6-11 to 6-13; Note, *supra* note 27, at 1199-1200.

90. TI with CPSC employee 5.

91. TI with CPSC employee 6. The official added that the prior experience enabled CSGC's members to ascertain precisely the impact of specific requirement's imposition and meant accommodations reached earlier affected standard development; that "there was a lot of floundering at the beginning;" and that "marketing people and attorneys" who represented CSGC members were "not in touch with fairly common research data and techniques." *Id.*

92. TI with CPSC employee 4, *supra* note 88.

tatives have been comparatively positive. One industry employee observed that the CSGC "did the best job that it could given its working relationship with the Commission,"⁹³ and a second representative of producers stated that the "offeror process yielded reasonable results and was fair and well run [, affording] the public ample opportunity to participate."⁹⁴

Compensated individuals' input is difficult to analyze, but their contributions were variable. Because citizens "did not act in concert," an extra-agency evaluator had problems assessing their "impact on the final result."⁹⁵ The Project Monitor for the CPSC remarked that "consumer participation was valuable"⁹⁶ and that "technical experts actually exerted considerable influence at meetings"⁹⁷ but that citizens were "probably disadvantaged by lack of organization" and that a "stronger standard might have resulted had the consumer interest been articulated by skilled consumer advocates."⁹⁸ The monitor also found that the CSGC may have deceived technical and lay individuals;⁹⁹ technical people "did not have glass expertise" and lay consumers were not helpful because they "lacked the technical know-how to cut through manufacturers' representations."¹⁰⁰ Another CPSC officer believed that citizens "asked reasonable questions, were quite perceptive and caught on quickly," although members of the public were unfamiliar with the technology.¹⁰¹ But a third Commission employee thought that the consumer involvement in the architectural glazing proceeding was not a "terribly good example of public participation."¹⁰²

Numerous industry-oriented observers were critical. The first project manager for the CSGC considered citizens a "hindrance," facetiously

93. TI with industry representative 3, *supra* note 88. CPSC failed to "participate as much as it should have in the overall process" and to provide sufficient data while remaining too "aloof." *Id.*

94. TI with industry representative 5, *supra* note 89. The representative added "three people in a room could have drafted as fair a standard in a day and a half" but the person thought that the process was necessary for insuring public confidence and industry compliance while suggesting that existing standards should "serve as a model for CPSC." *Id.*

95. Note, *supra* note 27, at 1199 n.161 and accompanying text. "If the consumers had organized . . . their influence might have been greater." *Id.* at 1200 n.168. *See id.* at 1196-1202 (additional observations).

96. Note, *supra* note 27, at 1205 n.184.

97. *Id.* at 1200 n.167.

98. *See id.* at text accompanying note 167 (appearance of first observation); *id.* at 1205 n.184 (appearance of second observation). The observer also "characterized the consumer participants as primarily another set of people with brains, and not necessarily representative of a specific point of view" and "described the consumers' responsibilities as injecting a nontechnical viewpoint into the development of the safety glazing standard and ensuring the openness, and, therefore, the credibility of the proceedings." *Id.* at 1200 n.167.

99. TI, with CPSC employee 2, *supra* note 78.

100. *Id.*

101. TI with CPSC employee 6, *supra* note 91.

102. TI with CPSC employee 5, *supra* note 90.

remarking that they were so effective that he resigned.¹⁰³ A second person associated with manufacturers found that consumer involvement essentially was "detrimental to arriving at a good, workable standard expeditiously," because of the time devoted necessarily to educating lay people.¹⁰⁴ A lawyer who challenged the glass rule in court claimed that individuals lacked the "technical background to be any real help in developing a standard that was very technical."¹⁰⁵ A fourth observer said that a "number of consumers clearly never understood what was going on" but "others took the time to investigate, became very knowledgeable and did an excellent job once they got over the original education hurdle."¹⁰⁶ Additional manufacturing representatives were more positive. Counsel for the CSGC stated that citizens "were dedicated, contributed substantially and became very conversant with the product and articulate about modes of injury."¹⁰⁷ One industry employee commented that individuals brought to discussions "much practical insight" that producers even lacked and "questioned more data than anyone else,"¹⁰⁸ while a second manufacturing representative found "really refreshing the different viewpoint and interplay" provided by the public.¹⁰⁹ An evaluator not aligned with commercial interests asserted that "industry representatives generally were impressed with the consumers, noting that they often helped resolve conflicts between industry members."¹¹⁰ Nonetheless, few persons associated with producers whom I interviewed mentioned the second factor.

In response to a questionnaire distributed by the assessor mentioned immediately above, most funded individuals said that citizens "represented a unique viewpoint," frequently helping to settle manufacturer infighting.¹¹¹ "Each person felt that he or she had influenced significantly the course of the development proceeding."¹¹² However, a number of these

103. TI with industry representative 1, *supra* note 72.

104. TI with industry representative 2, *supra* note 72. The representative added that the "administrative committee spent most of its time educating the lay people [who were five years behind the industry] so that they would make the right decisions," and that standard development "took twice as long" because of public participation. *Id.*

105. TI with industry representative 4.

106. TI with industry representative 5, *supra* note 89. The representative added that "none of the consumers knew anything initially about the problem or the process," that much time was consumed "bringing them up to speed," and that citizens "were at a disadvantage all along" with industry but "did an excellent job for the limited experience and information they had at the time." *Id.*

107. TI with industry representative 6. The representative added that citizens were "pretty sophisticated and not dependent on manufacturers, did their homework," attempted to learn as much as possible about the glass industry and attended all meetings. *Id.*

108. TI with industry representative 3, *supra* note 88. The representative added that the consumers' "realism" pleasantly surprised him and others, and that "public participation was absolutely essential" and should be integral to future, similar endeavors. *Id.*

109. TI with industry representative 7.

110. Note, *supra* note 27, at 1200.

111. *Id.* at 1202.

112. *Id.*

people were much less "satisfied with their performance and influence" than participants in the subsequent proceeding involving matchbooks where citizens were more organized.¹¹³ Moreover, some thought that "consumers had not greatly influenced the final standard" but these observers offered no explanation for this view.¹¹⁴ Reimbursed parties also provided their impressions in an August, 1975 meeting convened by the Commissioners to evaluate the effectiveness of citizen participation in the initial four offeror proceedings and the efficacy of the process itself. Many funded citizens believed that individuals were disadvantaged vis-a-vis manufacturers and, thus, had to rely on them for technical expertise and data.¹¹⁵ But lay participants were less troubled about this than technically proficient citizens.¹¹⁶ One such person, an architect who was familiar with glass production, needed 90 days to understand the vocabulary and found that most consumers lacked the "technical skills to even argue some" questions until the very end of the process, citing as an example data that were available to industry at the onset which individuals acquired in the fifth month after wasting sixty days arguing over issues which the data clearly resolved.¹¹⁷ A second technical person observed that he "was hunting for information, working and pushing and prying here and there in the industry to get what information" he could during the project's early phase.¹¹⁸ Several others thought that citizens had little impact,¹¹⁹ while nearly everyone reiterated criticisms relating to the CPSC¹²⁰ and the dearth of time provided for completion of the work.¹²¹

2. Power Lawn Mowers

In September, 1974, the CPSC chose Consumers Union (CU), a nonprofit "consumer product evaluation and consumer advocacy organization," to devise requirements for risks presented by power lawn mowers.¹²² CU was selected, after agreeing to certain agency suggestions regarding public participation.¹²³ The Commission chose the group over the Outdoor Power Equipment Institute (OPEI), a trade association which had peti-

113. *Id.* at 1209 n.199 and accompanying text.

114. *Id.* at 1202.

115. See Consumer Participation Meeting, *supra* note 35.

116. See, e.g., *id.* at 25,26. Perhaps lay participants had less appreciation of the problems.

117. See *id.* at 51.

118. See *id.* at 99.

119. See, e.g., *id.* at 97, 131.

120. See, e.g., *id.* at 98, 173.

121. See, e.g., *id.* at 51-52, 145.

122. See 39 Fed. Reg. 37,803, 37,803 (1974); OPPE REPORT, *supra* note 31, at D-29; Schwartz, *supra* note 3, at 79; cf. Schwartz, *supra* note 3, at 77-95; OPPE REPORT, *supra* at D-28-39 (discussions of proceeding).

123. See Schwartz, *supra* note 3, at 79-80 (discussion of CU's modifications, at CPSC behest, in the consumer participation provisions of its offer); OPPE REPORT, *supra* note 31, at D-29-30 (same); Note, *supra* note 27, at 1207-08 (same).

tioned CPSC to commence the proceeding in August, 1973.¹²⁴ CU appointed twenty-four manufacturing and twenty-one consumer representatives to eight subcommittees.¹²⁵ Nonetheless, there was much disparity between industry and citizen involvement, a discrepancy that was exacerbated over time as requirements to be imposed on manufacturers appeared to be crystallizing and more producers came to appreciate their potential import and as a decreasing number of individuals could afford to participate.¹²⁶

Over twenty meetings were held in the initial two months of what became a very complex project,¹²⁷ and CU wrote four drafts before tendering its suggestions to the CPSC in July, 1975.¹²⁸ The agency reviewed and revised the recommendations over a twenty-two month period, intensively analyzing them,¹²⁹ developing different or novel requirements, and assessing input of diverse entities.¹³⁰ In May, 1977, CPSC issued a comprehensive proposed standard that deleted some suggestions made by CU and modified many other offeror recommendations.¹³¹ The agency document received 117 comments¹³² and was criticized severely by interests as disparate as the OPEI, which asserted that the proposal ratified the "least desirable aspects" of CU's submission while adopting—without "support or guidance—new and untried requirements"¹³³ and CU, which found its

124. See Schwartz, *supra* note 3, at 56 n.168 and accompanying text (discussion of the proceeding's background and OPEI's commencement of it); OPPE REPORT, *supra* note 31, at D-28-29 (same); 39 Fed. Reg. 37,803, 37,803 (1974) (same); cf. Schwartz, *supra* at 78-80 (discussion of controversial selection process); OPPE REPORT, *supra* at D-29-30 (same); Note, *supra* note 27, at 1208 n.192 (same).

125. See OPPE REPORT, *supra* note 31, at D-31; *id.* at D-30 to 32 (discussion of the structure, function, and workings of these subcommittees and initiation of standard development); Schwartz, *supra* note 3, at 80-82 (same).

126. See Schwartz, *supra* note 3, at 82; OPPE REPORT, *supra* note 31, at D-31; cf. *infra* note 173 and accompanying text ("95 percent of the opinions expressed at committee meetings were controlled or dominated by industry people").

127. See Schwartz, *supra* note 3, at 81.

128. See *id.* at 81-2; Hamilton, *supra* note 35, at 1413 n.280; cf. Schwartz, *supra*, note 3, at 81-82 (discussion of drafts' formulation); *id.* at 83-85 (concise summary of CU's proposal).

129. See Schwartz, *supra* note 3, at 85-87.

130. See 1977 House Oversight Hearings, *supra* note 34, at 353 (statement of Professor Hamilton) (relating to developing standards); OPEI Position Paper on CPSC Proposed Mandatory Safety Standard for Power Lawn Mowers (Staff Draft #4 Mar. 3, 1977), reprinted in *id.* [hereinafter OPEI Position Paper] (same); cf. Hamilton, *supra* note 35, at 1413 n.280; Schwartz, *supra* note 3, at 87-88 (discussions of position paper). CPSC's "initial in-depth review of the offeror's proposal and the subsequent development of numerous new or different requirements [consumed] more time than expected, due to the number, complexity, and controversial nature of the standard's requirements." Schwartz, *supra* at 88. See *id.* at 86, 88 (relating to assessing input); cf. *id.* at 85-89 (discussion of evaluation phase).

131. See 42 Fed. Reg. 23,052, 23,052-72 (1977); cf. Schwartz, *supra* note 3, at 87-88 (concise summary of proposed regulation and comparison of it with CU's suggestions).

132. See 42 Fed. Reg. 34,892 (1977); Schwartz, *supra* note 3, at 89 n.425 and accompanying text.

133. See OPEI Position Paper, *supra* note 130, at 3.

work so altered that it sought compensation to comment.¹³⁴ A Commission hearing on the proposal was held in June, 1977, and three people involved in the proposed standard development stage were funded to speak.¹³⁵ During review of public comment, the CPSC staff found that the input raised 700 issues, recognized that the endeavor "had become unmanageable," and recommended that its scope be circumscribed sharply.¹³⁶ The Commissioners agreed with the staff suggestion,¹³⁷ solicited written input on narrower requirements,¹³⁸ and conducted a December, 1978, hearing which one citizen was paid to attend.¹³⁹ The CPSC held many open meetings on its revised standard during the next two months¹⁴⁰ and promulgated a final rule in February, 1979, that differed significantly from its proposal and included few of CU's original ideas.¹⁴¹ Although the Commission regulation survived judicial challenge,¹⁴² Congress postponed its effective date and instructed the CPSC to implement a suggestion unsuccessfully championed by industry throughout the lawn mower initiative.¹⁴³

This was the longest, most difficult, offeror proceeding as well as the one in which the CPSC attempted to regulate the most complex product.

[I]ntroduction of a novel foot probe' allegedly had 'neither the endorsement of CU nor . . . any industry verified grounding in population statistics or modes of operator behavior [while a] new thrown objects test [allegedly departed] in material ways from the recommendations of the Commission's own contractor. . . .

Id.

134. See Hamilton, *supra* note 35, at 1413 n.280; Schwartz, *supra* note 3, at 88 n.417, 89 n.422 and accompanying text; see also 42 Fed. Reg. 34,892, 34,892-93 (1977).

135. See 42 Fed. Reg. 34,892, 34,893 (1977); Schwartz, *supra* note 3, at 89; *Hearings on Dep't of Housing and Urban Dev.—Indep. Agencies Appropriations for 1979 Before the Subcomm. on HUD—Indep. Agencies of the Senate Comm. on Appropriations, 95th Cong., 2d Sess., pt. 2, 264 (1978) [hereinafter 1979 Senate Appropriations Hearings]*.

136. See Schwartz, *supra* note 3, at 89-90. CPSC staff recommended that the scope be narrowed to the blade-contact hazard. *Id.* at 89.

137. See *id.* at 89-90; see also 43 Fed. Reg. 24,697, 23,697-98 (1978).

138. See Schwartz, *supra* note 3, at 90; see also 43 Fed. Reg. 51,038, 51,038 (1978).

139. See Schwartz, *supra* note 3, at 90; see also 43 Fed. Reg. 55,771, 55,772 (1978).

140. See Schwartz, *supra* note 3, at 90.

141. See 44 Fed. Reg. 9990, 9990-10,037 (1979). Compare *id.* with 42 Fed. Reg. 23,052, 23,052-72 (1977) and the concise summary of CU's recommendations in Schwartz, *supra* note 3, at 83-85. Cf. Schwartz, *supra*, at 90-92 (discussion of final rule and comparison with CPSC's proposal and CU's recommendations).

142. See *Southland Mower Co. v. CPSC*, 619 F.2d 499, 526 (5th Cir. 1980). The Fifth Circuit in *Southland Mower* held only that "part of the standard requiring the discharge-chute area of power lawn mowers to pass a foot-probe test" was unsupported by substantial evidence. *Id.* at 510. See generally Schwartz, *supra* note 3, at 92-93; Klayman, *supra* note 22, at 107-08 (more discussion of final standard and court challenge).

143. See Dep't of Housing and Urban Dev.—Indep. Agencies Appropriations Act, Pub. L. No. 96-526, 94 Stat. 3044, 3050 (1980) (relating to congressional postponement); cf. *Hearings on Dep't of Housing and Urban Dev.—Indep. Agencies of the House Appropriations Comm., 97th Cong., 1st Sess., pt. 4, 809 (1981) [hereinafter 1982 House Appropriations Hearings]* (statement of Rep. Boland) (postponement premised on industry production cycle). See Schwartz, *supra* note 3, at 93-94 nn.477-78 and accompanying text (sources cited discuss congressional instruction); cf. *id.* at 94 (subsequent history).

The initiative was plagued by every problem that afflicted the other proceedings and a number of its own, especially constant disagreement over the technological feasibility of proposals; incessant, vigorous opposition engendered by the cost of recommended remedies; and the virtual impossibility of securing consensus between the "consumer-oriented offeror" and the industry, which were "poles apart on fundamental issues."¹⁴⁴

Agency personnel accorded the offeror's work considerable, but qualified, praise. Several made general laudatory comments, saying that CU was "incredibly effective" in that the offeror "got pretty much what it wanted;"¹⁴⁵ "did an excellent job;"¹⁴⁶ and was "technically qualified to run" the project as well as "was very knowledgeable about lawn mowers."¹⁴⁷

Others associated with the Commission have been more specific. The preliminary staff evaluation stated that CU's "standard and accompanying documents appeared" responsive to the CPSC's requirements, and that CU treated "all hazards listed in the NOP, essentially addressed all inadequacies in existing standards," and provided all necessary documents.¹⁴⁸ But the offeror's submission also was so complex that the staff requested more time to analyze the material tendered.¹⁴⁹

An agency official found that CU did "one of the best jobs of seeing the problem and correcting it [, producing] a very good package and technical rationale," assuming that the offeror's view of risk was accurate.¹⁵⁰ The Project Monitor for the Commission was "very impressed with the technical unfolding of the effort" and observed that the offeror effectively managed the endeavor, assembled "very savvy technical people," promoted "good technical interchange" and coordinated new testing.¹⁵¹ However, the agency official thought that CU's "staff was 'drifting' and 'planning poorly' "at first but "solved many of its organizational

144. *See id.* at 95. It also could be argued that CPSC created more problems than it remedied. *See, e.g., infra* notes 158-62 and accompanying text.

145. TI with CPSC employee 1.

146. TI with CPSC employee 2.

147. TI with CPSC employee 3.

148. OPPE REPORT, *supra* note 31, at D-36. CU "addressed all hazards listed in the NOP, essentially addressed all inadequacies in existing standards as listed in the NOP [, and] provided all documents required or promised." *Id.*; accord Schwartz, *supra* note 3, at 83 & 85.

149. *See* Schwartz, *supra* note 3, at 85.

150. TI with CPSC employee 4. The official added that CU did a "pretty straightforward job of seeing the problem and correcting it as best it could [but] later most of the civilized world saw the world differently than CU had, so maybe CU saw it wrong" and that many deficiencies in the offeror process make it very unfair to judge funded participation on the basis of offerors' work products. *Id.*

151. TI with CPSC employee 5. "Old enemies cooperated under the aegis of CU to develop a new test method for evaluating thrown objects" and a "good deal of what was in the proposed and final standard was what CU wanted." *Id.*

problems, "received greater industry cooperation, and" made substantial progress" subsequently.¹⁵² The monitor also believed that the offeror "tried to do too much by treating all possible risks,"¹⁵³ even though he acknowledged that "CU probably would have done a better job if the CPSC had initially focused the hazards."¹⁵⁴ Another staffer commented that the offeror's standard was "not totally adequate to address the issues [and] did not push industry enough,"¹⁵⁵ while a medical officer said that CU treated "major safety facets," although the CPSC had to do some "fine tuning and a lot of independent research."¹⁵⁶

The study conducted by the OPPE stated that all risks were treated by the offeror but that large inefficient meetings hindered early progress of proposed standard development and that there was insufficient information flow among subcommittees as well as participatory imbalance.¹⁵⁷ The report also blamed the CPSC for some perceived deficiencies in the standard development effort. The agency asked CU to address too many hazards, especially ones for which there was limited documentable data on injuries, while the CPSC failed to specify risks to be treated and possible ways of handling them, to consider comprehensively existing data and voluntary standards, and to provide clear guidance on citizen involvement.¹⁵⁸

Four Commissioners identified these and the CPSC's "inadequate front end analysis" and "hands-off" approach to, and adversarial relationship with, offerors as "major problems which plagued the offeror process" initially.¹⁵⁹ One Chairman acknowledged that the Commissioners bit "off more than we could reasonably chew in a reasonable time and [often were] gagging on the magnitude of" the lawn mower project,¹⁶⁰ while another agency head testified that the CPSC first tried "to build the perfect power mower" but finally addressed the "most important

152. See Note, *supra* note 27, at 1208 n.192. An extra-agency evaluator who interviewed the project monitor said that "much of CU's early difficulty was due to industry's refusal to cooperate fully with the CU staff." *Id.*

153. TI with CPSC employee 5, *supra* note 151.

154. *Id.*; accord *infra* notes 160-62 and accompanying text.

155. TI with CPSC employee 6.

156. TI with CPSC employee 7.

157. See OPPE REPORT, *supra* note 31, at D-31-32 & 36.

158. See *id.* at 3-3, 3-22; 4-3 to 4-4, 4-22; 13-1-2.

159. See *Reauthorization of CPSC: Hearings Before the Subcomm. for Consumers of the Senate Comm. on Commerce, Science, and Transp.*, 95th Cong., 2d Sess. 199-201, 208 (1978) [hereinafter *S.2796 Hearings*] (statement of Chairman Byington); *Hearings on Dep't of Housing and Urban Dev.—Indep. Agencies Appropriations for 1978 Before the Subcomm. on HUD—Indep. Agencies of the House Appropriations Comm.*, 95th Cong., 1st Sess., pt. 4, 113-20 (1977) [hereinafter *1978 House Appropriations Hearings*] (statements of Byington, Comm'rs Kushner, Franklin & Pittle).

160. *Hearings on Dep't of Housing and Urban Dev.—Indep. Agencies Appropriations for 1979 Before the Subcomm. on HUD—Indep. Agencies of the House Appropriations Comm.*, 95th Cong., 2d Sess., pt. 3, 461 (1978) [hereinafter *1979 House Appropriations Hearings*] (statement of Chairman Byington).

single hazard.”¹⁶¹ Indeed, continual narrowing of the initiative’s scope may well attest to deficiencies in agency management.¹⁶²

The Commissioners have said little about the work of CU. One Chairman characterized the offeror’s suggestions as “regulatory overkill,” due to the cost of a mechanism that CU recommended and the inclusion in the offeror’s submission of noise requirements absent supporting data.¹⁶³ A second chairman added that CU covered many risks so that CPSC had to “define and narrow down the specific hazards” to be treated.¹⁶⁴ Finally, most of these assessors and others recognized that the statutory time allotted for proposed standard development was woefully insufficient.¹⁶⁵

Several reimbursed individuals who possessed technical expertise praised CU while criticizing agency management and industry recalcitrance. One of the technical experts remarked that the “offeror’s work was generally very good,” that the CPSC staff believed that it was “really not supposed to actively participate,” and that “manufacturers fought regulation tooth and nail.”¹⁶⁶ A physician agreed that the people and entities involved in proposed standard development would debate for hours and need guidance which CPSC monitors refused to provide and that industry retained much expertise and data “subsequently used to oppose the standard.”¹⁶⁷ A mechanical engineer said that CU’s manager “did an outstanding job of pulling everything together,” in light of the CPSC’s inexperience, “hands-off” posture, and failure to secure necessary material as well as producers’ refusal to supply such data or to cooperate in other ways.¹⁶⁸ Another person with technical skills was amazed that CU could provide any documentation and stated that the offeror “did a reasonably good job,” given the substantial “organization industry had, and money it spent, to block standard development at every avenue” and agency inability to “match producers’ firepower or stonewalling.”¹⁶⁹ A fifth person thought

161. 1980 Senate Appropriations Hearings, *supra* note 72, at 55 (statement of Chairman King).

162. Continual narrowing has been traced most comprehensively in Schwartz, *supra* note 3, at 85-92.

163. See S.644 Hearings, *supra* note 77, at 251 (statement of Chairman Simpson).

164. See S.2796 Hearings, *supra* note 159, at 200 (statement of Chairman Byington).

165. See, e.g., *id.* at 208 (same); GAO STUDY, *supra* note 32, at App. I, p. 41 (CPSC Response to GAO Study); House Offeror Report, *supra* note 33, at 7; cf. S. 2796 Hearings, *supra*, note 159, at 21-22 (statement of Robert Goldstone); Schwartz, *supra* note 3, at 95 (statutory preference for performance, rather than design, requirements caused delay).

166. TI with funded participant 1.

167. See S.2796 Hearings, *supra* note 159, at 29, 33 (statement of Robert Goldstone).

168. TI with funded participant 2. The party identified the difficulty of securing necessary data from industry as a “significant handicap” for technical consumers and CU and added that the “proceeding should be put in context” as one of the first in which CPSC was experimenting with the innovative offeror process.

169. TI with funded participant 3. The party said that CU deserved a “B” grade for its efforts; that the “amount of organization which industry had, and the amount of money it spent, to fight the effort were beyond comprehension,” and that a number of the CPSC technical people were the “least qualified.” *Id.*

that CU tendered an "excellent proposal which treated all hazards" and that its decisional process was "reasonably fair."¹⁷⁰

Three CU employees concurred in some of the observations afforded by the technical consumers. The Project Director found that the hardest risks "to justify and remedy" were those documented least by the CPSC,¹⁷¹ which supplied in-depth investigations supporting half the hazards and no record of noise injuries;¹⁷² that "ninety-five percent of the opinions expressed at committee meetings were controlled" by representatives of producers, some of whom continuously opposed provisions designed to "reduce blade stopping time;" and that the offeror's proposal was "necessarily a compromise with industry."¹⁷³ A second official employed by CU admitted that the offeror experienced difficulty securing industry cooperation¹⁷⁴ and agency data.¹⁷⁵ The officer also claimed that the CPSC afforded inadequate guidance and that its statute provided insufficient time for proposed standard development.¹⁷⁶ But the individual described the effort as a learning process because for the first time many people, "with very different interests, had to . . . hammer out a standard."¹⁷⁷ A third employee of the offeror conceded that CU may have provided too many options and reiterated that the CPSC could have better managed the endeavor and that the agency offered too little guidance, especially regarding the Commissioners' expectations.¹⁷⁸

Many industry representatives criticized CU's efforts and CPSC's administration, albeit for numerous reasons different than those enumerated above.¹⁷⁹ Those involved in lawn mower production evinced concern principally about agency failure to consider adequately voluntary standards, to discuss constructively possible requirements, and to educate suf-

170. TI with funded participant 4. The party added that CU's standard had "maybe even been too broad." *Id.*

171. See OPPE REPORT, *supra* note 31, at 3-3 to 3-4.

172. See *id.*; TI with Bertram Strauss, CU Project Director.

173. See Deposition of Bertram Strauss, p. 209 (source of the material in the first quotation), *Greenwood v. McDonough Power Equip.*, 437 F. Supp. 707 (D. Kan. 1977), *reprinted in* Schroer & Wulz, *Lawn Mower Makers Shortcut Safety*, 16 TRIAL 46, 48 (Nov. 1980) (same). Strauss TI, *supra* note 172 (source of the material in the second and third quotation).

174. See *CPSA Amendments: Hearings Before the Subcomm. on Consumer Protection and Fin. of the House Comm. On Interstate and Foreign Commerce*, 94th Cong., 1st Sess. 99 (1975) [hereinafter *1975 House CPSA Hearings*] (statement of Peter Schuck). *But see id.* at 106 (statement of Stanley Groner); *infra* text accompanying note 198 (industry did cooperate).

175. See *S.644 Hearings*, *supra* note 77, at 24 (statement of Peter Schuck).

176. See Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L. J. 1, 62 n.341 (1982); *1975 House CPSA Hearings*, *supra* note 174, at 95 (statement of Peter Schuck); accord *S.644 Hearings*, *supra* note 77, at 24 (same).

177. See *1975 House CPSA Hearings*, *supra* note 174, at 88, 92.

178. See *S.2796 Hearings*, *supra* note 159, at 37, 43-47 (statement of Mark Silbergeld).

179. See, e.g., *supra* notes 158-61, 166-69 and accompanying text.

ficiently the Commissioners and staff.¹⁸⁰ In interviews and Congressional hearings, the Executive Director of the OPEI and others did recite the litany of deficiencies in the OPPE study;¹⁸¹ identify as important, CPSC failure to conduct necessary analyses before commencing, and to provide CU proper direction during, the proposed standard development process;¹⁸² charge that agency staff preferred to monitor passively standard development;¹⁸³ and acknowledge that the time provided was inadequate.¹⁸⁴ Moreover, several employees of producers were realistic about the constraints imposed on CU,¹⁸⁵ although a few of these representatives suggested that the offeror be judged by the number of its recommendations which were included in the final Commission rule.¹⁸⁶ Nonetheless, the OPEI official and numerous representatives of manufacturing interests did criticize CU in many ways. The offeror was said to lack the requisite experience with lawn mowers, standard writing and product design¹⁸⁷ as well as to have preconceptions and biases.¹⁸⁸ Representatives of producers

180. See *1977 House Oversight Hearings*, *supra* note 34, at 255 (statement of Dennis Dix) (relating to the first criticism); TI with Dennis Dix, OPEI Executive Director (May 16, 1984) (same); TIs with industry representatives 1,2 (same); *H.R. 2271 Hearings*, *supra* note 75, at 543 (statement of Dennis Dix) (relating to the second criticism); *CPSC Reauthorization: Hearings Before the Subcomm. for Consumers of the Senate Comm. on Commerce, Science and Transp.*, 97th Cong., 1st Sess. 107, 137 (1981) [hereinafter *1981 Senate Reauthorization Hearings*] (statement of Dennis Dix) (same); *1981 Senate Reauthorization Hearings*, *supra*, at 107 (relating to the third criticism); Dix TI, *supra* (same); TI with industry representative 3 (same).

181. See *1977 House Oversight Hearings*, *supra* note 34, at 255-56 (statement of Dennis Dix); *accord id.* at 259 (statement of OPEI General Counsel Mac Dunaway); TIs with several additional industry representatives.

182. *1977 House Oversight Hearings*, *supra* note 34, at 256-57 (statement of Dennis Dix); *accord* Dix TI, *supra* note 180; TI with industry representative 4; TIs with several additional industry representatives.

183. See *1977 House Oversight Hearings*, *supra* note 34, at 255 (statement of Dennis Dix); TIs with several additional industry representatives. See *generally supra* note 180 (citations to Dix statements for second proposition).

184. See Dix TI, *supra* note 180; *Implementation of the CPSCA; Hearings Before the Subcomm. for Consumers of the Senate Comm. on Commerce, Science, and Transp.*, 95th Cong., 1st Sess. 61 (Oct. 1977) [hereinafter *Oct. 1977 Senate Oversight Hearings*] (statement of Philip Knox); TI with industry representative 5; TIs with several additional industry representatives. OPEI's Executive Director also testified that CPSC seemed "locked in" to a particular solution and that a "revolutionary concept of standard-development with much apparent promise ha[d] been persistently abused and undermined by the Commission in the most conspicuous manner." *1977 House Oversight Hearings*, *supra* note 34, at 256. See *supra* note 180 (citations to Dix statements for second proposition).

185. See, e.g., TI with industry representative 3, *supra* note 180; TI with industry representative 4, *supra* note 182; TI with industry representative 6.

186. See, e.g., TI with industry representative 1, *supra* note 180; TI with industry representative 7.

187. See TI with industry representatives 1-3, *supra* note 181; TI with industry representative 7, *supra* note 186; TI with industry representative 8.

188. See TI with industry representative 4, *supra* note 182; TI with industry representative 7, *supra* note 186; TI with industry representative 9; Knox statement, *supra* note 184.

also criticized CU for failing to manage properly the project, establish priorities, treat the principal hazard, perform technical work, listen to industry, consider either operator behavior, consumer acceptance or needs, or test or verify the restrictions the offeror proposed.¹⁸⁹ CU as well allegedly submitted suggestions which were too design-oriented¹⁹⁰ and that might have impugned the integrity of the product.¹⁹¹ Industry's views were epitomized by several representatives' characterization of CU as a "publishing house, not a manufacturer of lawn mowers."¹⁹²

Outside assessors have confirmed much that is said above. The Comptroller reported that the CPSC did not adequately inform CU about technical support that should have been included in its recommendations or monitor the offeror's progress, much less initiate corrective action during proposed standard development when it appeared that CU was proceeding improperly.¹⁹³ Professor Schwartz thought that CU had preconceptions about potential solutions which were "too strong for the Commissioners," while she identified deficiencies in the proposed standard development process that the offeror might have remedied but rarely blamed CU for them.¹⁹⁴ The professor also found that CPSC's NOP "included almost all conceivable mower-related hazards," neither ranking them nor setting priorities, so that CU apparently was to treat each

189. See, e.g., TI with industry representative 7, *supra* note 186 (relating to organization and management); TI with industry representative 8, *supra* note 187 (same); TI with industry representative 8, *supra* (relating to priority setting and identifying and treating principal hazard); TI with industry representative 7, *supra* (relating to technical work); TI with industry representative 9, *supra* note 188 (same); Dix TI, *supra* note 180 (relating listening to manufacturers); TI with industry representative 7, *supra* (same); *A Mower Safety Code with Sharper Edge*, BUS. WEEK 17 (Aug. 11, 1975) (statement of David McLaughlin, former President, Toro Co.) (same); Dix TI, *supra* (relating to consideration of operator behavior, consumer acceptance and needs); TI with industry representative 6, *supra* note (same); TIs with industry representatives 1, 3, *supra* (same); TI with industry representative 2, *supra* note 180 (relating to testing and verifying).

190. Dix TI, *supra* note 180; TI with industry representative 1, *supra* note 180; TI with industry representative 9, *supra* note 188. See generally Schwartz, *supra* note 3, at 92-93.

191. Dix TI, *supra* note 180; TI with industry representative 1, *supra* note 180; TI with industry representative 8, *supra* note 187; TI with industry representative 9, *supra* note 188. Numerous other persons whom I interviewed concurred in a number of these criticisms. Moreover, nearly everyone whom I interviewed offered additional specific criticisms that were not mentioned by anyone else.

192. Remarks to that effect were made by numerous industry representatives.

193. GAO STUDY, *supra* note 32, at 9-10. The Comptroller General did not assess CU's work.

194. See TI with Teresa Schwartz (May 2, 1984) (relating to preconceptions). Professor Schwartz found standard development complicated by the CPSC's requirements regarding extensive public participation, substantial evidence and performance standards. See Schwartz, *supra* note 3, at 95; cf. *id.* at 62-68, 73-95 (comprehensive analysis of complications she identified); *id.* at 79-95 (comprehensive analysis of CU's role). But cf. 1981 Senate Reauthorization Hearings, *supra* note 180, at 246 (statement of Lester Lave) (CPSC analysis "much better than anything in the past" and certainly "very helpful in arriving at the kind of standards they had").

equally, and these difficulties came "home to roost in the evaluation phase."¹⁹⁵ Nonetheless, the analyst concluded that the time required for standard development did "not seem so unreasonable," because private standards writing organizations normally take several years to complete comparable projects.¹⁹⁶ Professor Hamilton testified that the CPSC considered CU's submission unsatisfactory, authorized additional costly standard development work, rewrote the standard tendered by the offeror and issued a proposal quite different from it¹⁹⁷ but remarked that deficiencies were not attributable to inadequate procedures, as "there was extensive cooperation from producers [and] extensive inputs from all interested groups."¹⁹⁸

Given the complications that attended this initiative, work performed by CU appears creditable. Moreover, the problems which did arise can be ascribed at least as much to CPSC inexperience, industry recalcitrance and the difficulties inherent in experimenting with complex, untested administrative procedures as to offeror deficiencies.

Appraisals of the input provided by reimbursed individuals were mixed. A CPSC employee stated that disparities of perspective between funded members of the public and manufacturers made the proceeding "murder to live through" and that some citizens helped create an "abrasive atmosphere."¹⁹⁹ The officer remarked that one technical person "was a very vocal, active consumer representative" and much that the individual wanted was included in the final agency rule.²⁰⁰ That official's views were shared by additional Commission staffers,²⁰¹ one of whom also thought that numerous citizens "contributed significantly," specifically identifying three others who were very diligent and offered valuable input.²⁰² The Project Monitor for the CPSC observed that "overall public participation was helpful," that CU received "skilled nonindustry technical help," and that people possessing such expertise made important contributions and generally were more effective than lay consumers, who were a "little impres-

195. See Schwartz, *supra* note 3, at 78, 89; *cf. id.* at 62-68, 77-95 (comprehensive analysis of CPSC's role).

196. Schwartz, *supra* note 3, at 95.

197. See 1977 House Oversight Hearings, *supra* note 34, at 349, 351, 355 (statement of Professor Hamilton).

198. See *id.* at 351.

199. TI with CPSC employee 1.

200. *Id.*

201. One said he "played a very important role, was very hard working and tenacious and made sure his fairly reasonable points got across." TI with CPSC employee 2.

202. TI with CPSC employee 3. The official thought the person above "worked tirelessly to insure consumers were afforded protections CU intended to provide;" that a second person "for little money did a hell of a lot of work," especially on thrown objects testing," and that a CPSC consultant's later research "would not have gotten far without his work;" that a third individual "built and maintained, a constituency for lawnmower standards [by] illustrating the human tragedy associated with blade contact;" and that a fourth citizen "provided an important balance to industry participants" when voting. *Id.*

sionable."²⁰³ The monitor added, however, that lay consumers were "extremely useful in warning and labeling issues," helping everyone appreciate how users handle lawn mowers.²⁰⁴ Another CPSC officer believed that citizens "managed to be on a par with, and had as much influence as, industry."²⁰⁵

The Project Director for CU said that individuals made helpful contributions, imposing more safety requirements than manufacturers; that those who had "never used mowers" offered "some pretty good input," and that one technical person "worked tremendously and contributed substantially," but the CU employee found that some individuals stopped participating, were "leeches" or "had a financial interest."²⁰⁶ The Project Director's assistant stated that "consumer participation was quite good" and that certain recommendations made by citizens appeared in the proposal that CU submitted to the CPSC while a few of the suggestions remained in the final rule.²⁰⁷ The assistant acknowledged that there was some turnover among the funded individuals involved in proposed standard development but contended that it "was not a problem in terms of continuity."²⁰⁸

Compensated parties who had technical expertise found that public involvement was effective and of high quality. One of these reimbursed people characterized funded participation as a "good use of taxpayer money that let the agency hear what the average person thought and provided alternative viewpoints backed up by the hard data on which CPSC decisions are based," thus helping it "do a better job."²⁰⁹ A second individual with technical skills claimed that "some of the really major inputs and most significant suggestions came from completely nontechnical people," whose adversarial questioning forced others to think.²¹⁰ He added that those persons with technical experience worked for much "less than their normal rates [and were] pretty well qualified academically but may have lacked practical background;" one of the individuals was "very vocal, understood the political process, and provided beneficial input" and two other technical people "participated in testing that helped develop

203. TI with CPSC employee 4.

204. *Cf. id.* ("consumer sounding board" convened to address controversial CU recommendation on "dead man" controls less "useful than other consumer participation"). See generally Schwartz, *supra* note 3, at 86 n.391 and accompanying text (discussion of consumer sounding board).

205. TI with CPSC employee 5.

206. TI with Bertram Strauss (May 2, 1984).

207. TI with George Papritz (Apr. 4, 1984). The CU official cited a consumer's "suggestion that lawnmowers not be activated when in reverse, [which] was included in CU's proposal and remained in the final standard." *Id.*

208. *Id.* But see *infra* note 232 and accompanying text.

209. TI with funded participant 1, *supra* note 166. *Cf. id.* (funding "very good use of taxpayer money").

210. TI with funded participant 3, *supra* note 169.

a stopping time based on human factors.”²¹¹ A third person possessing technical expertise found that “public participation was helpful and meaningful” and that some lay consumer “input was very valuable,” citing as examples their contributions to development of product warnings and successful challenges to industry contentions that proposed requirements could not be met.²¹² But the technical expert cautioned that these participants need help in understanding technical issues and with that assistance they “can be very effective and afford insights that engineers just do not have.”²¹³ Another citizen with technical training said that individuals had “significant impact but not uniformly” because of their inability to “spend the time necessary” or to “offer substantive counter-arguments,” and the person recounted difficulties that he encountered in attempting to “secure meaningful data with which to oppose industry contentions or help non-technical participants,” problems that led to “unjustifiable compromise on numerical limitations,” omission of potential requirements and occasional “shooting from the hip.”²¹⁴ Similarly, a reimbursed doctor asserted that technically-oriented consumers could not obtain necessary information, so that they had “no way of verifying” essential technical data supplied by producers but had to “accept it on faith [or] go to extremes to find otherwise.”²¹⁵ The physician attributed these difficulties partly to resource disparities between full-time, salaried industry representatives and part-time, underpaid citizens.²¹⁶

Quite a few funded participants who did not have technical skills agreed with the last statement, and some of these persons concurred in numerous views of the technical consumers.²¹⁷ One concern voiced by several lay participants was a feeling of inferiority vis-a-vis employees of manufacturers who had been involved actively in mower design for many years.²¹⁸ A reimbursed nontechnical individual did say that citizens were “very active, were listened to and won some issues.”²¹⁹

Industry-oriented observers were less complimentary. One stated that a compensated engineer “made a very good contribution,” especially in thrown objects testing, and that “his data were used in developing CU’s standard.”²²⁰ A second person employed by a producer expressed “high regard for technical public participants,” indicating that they and manu-

211. *Id.*

212. TI with funded participant 4, *supra* note 170.

213. *Id.*

214. TI with funded participant 2, *supra* note 168.

215. Consumer Participation Meeting, *supra* note 35, at 91, *reprinted in Regulatory Reform Hearings, supra* note 66, at 35-36 (statement of Robert Goldstone).

216. *Id.*; accord Consumer Participation Meeting, *supra* note 35, at 90.

217. *See, e.g.,* Consumer Participation Meeting, *supra* note 35, at 59, 135-37, 139.

218. *See id.* at 97-98, 136.

219. *Id.* at 117.

220. TI with industry representative 3, *supra* note 180.

facturing representatives respected and understood each other,²²¹ and thought that there were many "good ordinary consumers who spent time" educating themselves, who helped "technical people get a better perspective" by requiring explanations and who "did an excellent job" with editorial projects.²²² Another industry employee found "great value in having product users who could see the practical problems associated with the concepts being put forth" and exercised a "lot of common sense."²²³

But some of these evaluators and numerous others involved in lawn mower manufacturing contended that few of the citizens were as neutral or as competent as they might have been. Those consumers who claimed to possess technical proficiency were said to be promoting their economic self-interest either as potential expert witnesses in products liability litigation²²⁴ or as developers of potential solutions to mower hazards²²⁵ or to have limited understanding of the product.²²⁶ Some lay consumers allegedly were biased because they knew people injured in lawn mower accidents.²²⁷ Correspondingly, a number of nontechnical citizens were said to have contributed nothing,²²⁸ delayed progress by asking irrelevant questions or by seeking too many explanations,²²⁹ attended meetings irregularly, or ceased participating when the work became too complex or the cost of involvement became too great, or they lost interest or believed that everything possible in terms of improved product safety had been accomplished.²³⁰

Few extra-agency evaluators have assessed the contributions of reimbursed consumers. Professor Schwartz said that CU's bias made it "difficult to judge individuals' influence" and that resource discrepancies between the industry and citizens, who could not "hire consultants or

221. TI with industry representative 4, *supra* note 182; TIs with several other industry representatives.

222. TI with industry representative 4, *supra* note 182.

223. TI with industry representative 2, *supra* note 180; *accord* TIs with other industry representatives. Many thought that neutral, competent consumers could contribute to standard development but emphasized the difficulty of securing such persons.

224. A number of technical public participants have testified as experts.

225. I could identify only one technical participant who possibly had some interest by virtue of his appearance in Congressional hearings on behalf of a licensor of lawn mower safety devices. *See S.2796 Hearings, supra* note 159, at 20. But so many industry representatives alluded to persons with such interests that there may well have been numerous others. *See, e.g., Dix TI, supra* note 180; TI with industry representative 3, *supra* note 180.

226. *See, e.g., TI with industry representative 2, supra* note 180. University professors were particularly the object of criticism of this participant and several other industry representatives.

227. *See, e.g., TI with industry representative 8, supra* note 187.

228. *See, e.g., TI with industry representative 1, supra* note 180. Homemakers were especially the object of scorn of this participant and several other industry representatives.

229. *See, e.g., Dix TI, supra* note 180; TI with industry representative 6, *supra* note 185.

230. *See, e.g., Dix TI, supra* note 180; TI with industry representative 4, *supra* note 182; TI industry representative 6, *supra* note 185.

research and testing experts," meant that the consumers "had to accept 'on faith' basic technical information that industry participants supplied."²³¹ Moreover, she found that the involvement of individuals lacked the continuity of producers and decreased over time, thus requiring recruitment of "new consumer participants [which was] "very inefficient."²³²

The effectiveness and quality of compensated input subsequent to proposed standard development also were mixed.²³³ In the agency's 1977 hearing, a lay consumer depended primarily on anecdotes and personal opinion to advocate product controls whose cost she could not say purchasers would accept and which requirements were rejected in the CPSC's proposed and final regulations.²³⁴ The Commissioners asked the individual "few questions because [her] points" had "been before the Commission" for a considerable period of time.²³⁵ A funded engineer provided what can be characterized fairly as a "wandering monologue," which the CPSC afforded little treatment in its proposal.²³⁶ Another individual who possessed technical expertise criticized the agency's decision to delete from the Commission's proposal injury-reducing requirements, included in CU's submission and for which technology was available, while the technical witness identified certain deficiencies in testing conducted by the Commission's consultant.²³⁷ In the 1978 agency meeting, the person argued that brake clutches would improve safety substantially and that the mechanisms were available theoretically and could be applied practically to mowers, using testing he had performed to challenge industry contentions regarding reliability.²³⁸ And, in 1979, the CPSC specifically relied on the witness' opinion in finding that the brake clutch device was safe and reliable.²³⁹

3. Matchbooks

In October, 1974, the American Society for Testing and Materials (ASTM), a nonprofit corporation which develops "standards on characteristics and performance of materials, products, systems, and services,"

231. See Schwartz TI, *supra* note 194 (material in the first quotation); Schwartz, *supra* note 3, at 82 n.356 (material in the remainder). See generally *supra* notes 215-16 and accompanying text.

232. Schwartz TI, *supra* note 194; Schwartz, *supra* note 3, at 82. *But cf. supra* text accompanying note 208 (consumer turnover not a problem in terms of continuity). See generally OPPE REPORT, *supra* note 31, at D-31 (discussion of turnover).

233. See Transcript in re Oral Presentation of Data, Views, and Arguments on Proposed Standards for Power Lawn Mowers, Washington, D.C. (June 13, 1977) [hereinafter *1977 Transcript*]; Transcript of Public Meeting on Power Lawn Mower Brake/Clutch Reliability, Bethesda, Md. (Dec. 12, 1978) [hereinafter *1978 Transcript*].

234. See *1977 Transcript*, *supra* note 233, at 121-29.

235. See *id.* at 129 (statement of Comm'r Kushner).

236. See *id.* at 237-57.

237. See *id.* at 132-57.

238. See *1978 Transcript*, *supra* note 233, at 63-79.

239. See 44 Fed. Reg. 9989, 10,012 (1979).

was selected by the CPSC to write requirements associated with match-books.²⁴⁰ The ASTM sought help from the National Consumer's League (NCL) in facilitating public involvement and agreed to pay for expenses incurred by citizens.²⁴¹ The NCL assembled a "consumer caucus" which had expert consultants, and it produced a position paper that served as the starting point for much of the proposed standard development effort.²⁴² On the twelve days that ASTM held meetings, fifteen consumers, who constituted more than half of the offeror's working group, caucused separately to analyze technical issues and to ascertain areas of agreement and compromise among themselves and others involved in proposed standard development.²⁴³ ASTM's proposal which was drafted by consensus, included numerous ideas suggested by the consumer caucus and was tendered on time in February, 1975.²⁴⁴ The staff of the CPSC rejected and modified some of the offeror's recommendations²⁴⁵ and the Commis-

240. See Regulations Governing ASTM Committees: Society Scope (Sept. 1973), reprinted in Note, *supra* note 27, at 1179 n.38 (discussion of ASTM's description); 40 Fed. Reg. 1298, 1298-99 (1975) (relating to ASTM's selection); cf. *Hearings on Dep't of Housing and Urban Dev.—Indep. Agencies Appropriations for 1976 Before the Subcomm. on HUD—Indep. Agencies of the Senate Comm. on Appropriations*, 94th Cong., 1st Sess. pt. 2, 905 (1975) [hereinafter *1976 Senate Appropriations Hearings*] (only other offer "received from Computerized Biomechanical Analysis, Inc., a research laboratory"). See OPPE REPORT, *supra* note 31, at D-20 (only comprehensive offer from ASTM, and it was selected to be the offeror); *id.* at D-20, D-21 & D-21-27 (discussion of the proceeding's background, the structure of ASTM's working organization and the proceeding's development phase); cf. 39 Fed. Reg. 32,050, 32,051-52 (1974) (NOP). See Hamilton, *supra* note 35, at 1338-39, 1338-45, 1412-16 (helpful discussion of ASTM, similar voluntary standards writing organizations, the work of ASTM and other such organizations as offerors and the role of nongovernmental standards in the development of mandatory federal health and safety standards).

241. See Note, *supra* note 27, at 1193 n.123 & 1208 n.193; *1977 House Oversight Hearings*, *supra* note 34, at 260 (statement of David Swankin); cf. Note, *supra* note 27, at 1208 n.193 (although some consumer participants "were not compensated and others received only travel expenses, several were paid fees," as were a few ASTM technical experts); *infra* note 396 (description of NCL, which was offeror in the miniature Christmas tree lights proceeding). Ironically, ASTM and NCL were unsuccessful offeror applicants in architectural glazing. See Hamilton *supra* note 35, at 1413 n.282. And had NCL been successful, it would have selected ASTM "to manage and house the project." Note, *supra* note 27, at 1179. Cf. *S.644 Hearings*, *supra* note 77, at 91-92; *The Consumer Product Testing Act: Hearings Before the Subcomm. for Consumers of the Senate Commerce Comm. on S.643*, 94th Cong., 1st Sess. 89-90 (1975) [hereinafter *S.643 Hearings*] (statement of David Swankin) (discussion, not provided in text below, by NCL's project director of NCL's participation).

242. See *S.643 Hearings*, *supra* note 241, at 89; *S.644 Hearings*, *supra* note 77, at 91-92; cf. Hamilton, *supra* note 35, at 1416 (more than majority of ASTM committee was consumers).

243. See Note, *supra* note 27, at 1193 n.123; *S.643 Hearings*, *supra* note 241, at 88-89 (statement of David Swankin); *S.644 Hearings*, *supra* note 77, at 92 (same); Hamilton, *supra* note 35, at 1416.

244. See *S.643 Hearings*, *supra* note 241, at 89 (statement of David Swankin); *S.644 Hearings*, *supra* note 77, at 92 (same); cf. *1977 House Oversight Hearings*, *supra* note 34, at 352-53 (statement of Professor Hamilton) (discussion of "consensus process").

245. See OPPE REPORT, *supra* note 31, at D-22; cf. *1977 House Oversight Hearings*,

sioners were quite critical of the material submitted, even requesting that the ASTM supplement its work by preparing a narrative technical rationale.²⁴⁶ Nonetheless, in April, 1976, the CPSC promulgated a proposed regulation that incorporated most of the offeror's suggestions,²⁴⁷ while several stringent provisions included in that proposal by the Commissioners and recommended by ASTM were omitted from the May, 1977, final rule,²⁴⁸ so that it resembled a preexisting voluntary standard issued by the ASTM.²⁴⁹ These machinations suggest that the need for mandatory controls might have been debatable.²⁵⁰ The agency regulation may have lacked substantiation and major provisions of the rule were invalidated because they were not supported by substantial evidence.²⁵¹

supra note 34, at 353 (statement of Professor Hamilton) (ASTM's submission stringent, including controversial burn time requirement industry opposed). See OPPE REPORT, *supra* note 31, at D-26-27 (comprehensive list of staff criticisms, including deficiencies as to supporting justification, testing and risk to children); accord 1977 House Oversight Hearings, *supra* at 331 (statement of Allan Saeks). But cf. OPPE REPORT, *supra* at D-24 (ASTM submission directly addressed all NOP hazards except risks to children which ASTM claimed were addressed indirectly); S.644 Hearings, *supra* note 77, at 125 (statement of William Cavanaugh) (ASTM submitted complete record and documentation).

246. See *infra* notes 255, 257 and accompanying text; 41 Fed. Reg. 14,112, 14,117-20 (1976) (modification of ASTM submission in CPSC proposed rule). But cf. *infra* text accompanying note 247 (proposal incorporated most ASTM recommendations).

247. See OPPE REPORT, *supra* note 31, at D-22; 41 Fed. Reg. 14,113, 14,114-15 (1976). CPSC's proposal "adopted most of the ASTM proposed standard but added novel and complex provisions relating to child-proof covers." Hamilton, *supra* note 35, at 1414.

248. See 42 Fed. Reg. 22,656, 22,660-65 (1977). The most notable omission the Commissioners included was the proposal on child-proof covers. See *id.* at 22,660; *Authorizations and Other Amendments to the CPSA: Hearings on H.R. 10,819 Before the Subcomm. on Consumer Protection and Fin. of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 2d Sess. 58 (1978) [hereinafter H.R. 10,819 Hearings]* (statement of Comm'r Franklin). The most notable omission ASTM recommended was that the burn time proposal be deleted because of CPSC questions about technical feasibility and manufacturer ability to satisfy it and industry opposition. See 42 Fed. Reg. 22,656, 22,660-61 (1977); Harter, *supra* note 176, at 95 n.526; 1977 House Oversight Hearings, *supra* note 34, at 353 (statement of Professor Hamilton); Hamilton, *supra* note 35, at 1414 n.286, 1416; cf. *id.* at 1414 (CPSC proposal received many adverse comments). See generally Harter, *supra* at 94-95.

249. See Hamilton, *supra* note 35, at 1414; 1977 House Oversight Hearings, *supra* note 34, at 353-354 (statement of Professor Hamilton); TI with CPSC employee 1; cf. *infra* note 251 and accompanying text (resemblance may have been even closer after standard's major provisions were judicially invalidated).

250. This was true of other products chosen for regulation. See, e.g., *infra* notes 319, 362-63 and accompanying text.

251. See *supra* notes 245-46 and accompanying text (relating to substantiation); 1977 House Oversight Hearings, *supra* note 34, at 354 (colloquy between Rep. Eckhardt and Professor Hamilton) (same); H.R. 10,819 Hearings, *supra* note 248, at 58 (statement of Rep. Eckhardt) (same); accord TIs with several CPSC employees; see also D.D. Bean and Sons Co. v. CPSC, 574 F.2d 643, 650-51 (1st Cir. 1978) (relating to invalidation). In D.D. Bean, the First Circuit invalidated the performance requirements but sustained the general or design requirements. CPSC subsequently deleted the standard's invalidated portions and proceeded with enforcement mechanisms. See Hearings on Dep't of Housing and Urban Dev.—Indep. Agencies Appropriations for 1980 Before the Subcomm. on HUD—Indep.

Appraisals by the CPSC of the ASTM were positive and realistic. One Commissioner testified that a "totally unexpected, useful and novel approach was stimulated by the offeror."²⁵² A Chairman said that ASTM developed a "pretty good standard," given the constraints.²⁵³ The Chairman admitted, however, that the CPSC "did a disservice to" ASTM by requiring compliance with the ninety-day limitation to test the law²⁵⁴ and that the offeror may have failed to address adequately child-resistant packaging, despite pursuing an approach that was "completely consistent" with resolution of the issue.²⁵⁵ Although another Commissioner acknowledged that the ASTM's submission was "innovative" and "suffered from the extreme haste of [meeting] the statutory deadline,"²⁵⁶ he said that the CPSC consumed 524 days essentially putting it "in a form that made sense, had a technical rationale, and could be defended in court."²⁵⁷

One agency staffer thought that ASTM tendered a product which the offeror believed was responsive to CPSC instructions, but the submission evoked "such stiff industry opposition" that much of it was rejected and unfairly discredited.²⁵⁸ A second Commission employee found that "ASTM had a lot of technical competence" and that the offeror "did a good job" of assembling an "extremely good group of consumers" in a way that afforded them focus and organization, thus enhancing their efficacy, as well as of completing so expeditiously a "task of that size, considering the obstacles" created principally by agency monitors who provided insufficient ground work, afforded little guidance, and even refused to answer questions.²⁵⁹ Similarly, the Report prepared by the OPPE observed that the ASTM's submission addressed all hazards in the agency NOP except risk to children, which was treated indirectly and that ASTM's proposal included deficiencies, most of which were attributable to inade-

Agencies of the House Appropriations Comm., 96th Cong., 2d Sess., pt. 1, at 417-18 (1979) [hereinafter *1980 House Appropriations Hearings*] (statement of CPSC General Counsel Andrew Krulwich); 42 Fed. Reg. 53,709 (1977) (same); cf. TIs with several CPSC employees (remaining requirements are virtually worthless and cost alone prevented repeal). See generally *infra* note 328.

252. See *H.R. 10,819 Hearings*, *supra* note 248, at 58 (statement of Comm'r Franklin).

253. *Regulatory Reform Hearings*, *supra* note 66, at 34; *1977 House Oversight Hearings*, *supra* note 34, at 251.

254. See *Hearings on Dep't of Housing and Urban Dev.—Indep. Agencies Appropriations for 1976 Before the Subcomm. on HUD—Indep. Agencies of the House Appropriations Comm.*, 94th Cong., 1st Sess., pt. 4, 372 (1975) [hereinafter *1976 House Appropriations Hearings*].

255. See *S.644 Hearings*, *supra* note 77, at 249-50, 252-53.

256. See *1978 House Appropriations Hearings*, *supra* note 159, at 118; *1977 House Oversight Hearings*, *supra* note 34, at 251 (statements of Comm'r Pittle).

257. See *supra*, note 256 (two sources cited).

258. TI with CPSC employee 2. The official explained that the Commissioners, especially Chairman Simpson, initially desired stringent controls and that ASTM "listened carefully" producing requirements that it believed were responsive. *Id.*

259. TI with CPSC employee 3.

quate CPSC monitoring.²⁶⁰ Although Commission staff responsible for analyzing the material tendered by the ASTM recommended many changes,²⁶¹ a number of these suggested alterations were rejected in the final rule which incorporated numerous ideas provided by the offeror.²⁶²

Two industry representatives found that the ASTM "did an excellent job" in preparing the standard, in meeting the needs of the CPSC, in managing the project—especially the committee system²⁶³—and in persuading the Justice Department to relent on a longstanding antitrust consent decree, which enabled producers to discuss technology and conduct round robin testing.²⁶⁴ A third person affiliated with manufacturing believed that lifting the decree was all ASTM had achieved,²⁶⁵ while a fourth such individual thought the offeror's work was "not very professional."²⁶⁶ Although few aligned with industry mentioned the CPSC, a fifth representative of producers found that agency staff were good, fair and available when needed.²⁶⁷

The Managing Director of ASTM testified that the offeror's submission would have reduced significantly matchbook hazards and that ASTM provided the Commission with complete supporting documentation and a comprehensive record.²⁶⁸ The offeror's Managing Director admitted, however, that ASTM tendered the standard after attaining an "achievable threshold," while indicating areas for future work²⁶⁹ and that time constraints could have caused "management and technical errors," did create "bad group dynamics," and made proposed standard development very expensive.²⁷⁰ He also suggested that the CPSC afford offerors more guidance, especially initial hazard analysis, and praised agency staff for "outstanding cooperation."²⁷¹ The person responsible for managing the contributions made by the NCL thought that some offeror "work was

260. See OPPE REPORT, *supra* note 31, at 3-5, 3-8, 3-9; *cf. id.* at 3-5; Schwartz, *supra* note 3, at 65 n.232 and accompanying text (for three hazards in NOP, CPSC "had so little injury evidence" as to make their existence questionable).

261. See *supra* note 245 and accompanying text.

262. See *supra* notes 247-49 and accompanying text.

263. TIs with industry representatives 1,2.

264. See TI with industry representative 1, *supra* note 263.

265. See TI with industry representative 3.

266. See TI with industry representative 4.

267. TI with industry representative 5.

268. See S.644 Hearings, *supra* note 77, at 121 (statement of William Cavanaugh) (appearance of first claim); *id.* at 125 (appearance of second claim).

269. See *id.* at 121; accord OPPE REPORT, *supra* note 31, at D-22; 1976 House Appropriations Hearings, *supra* note 254, at 372 (statement of Chairman Simpson). But ASTM also asked CPSC to "publish the submitted standard as an interim measure," suggesting many areas for fruitful research. See OPPE REPORT, *supra* note 31, at D-22; accord S.644 Hearings, *supra* note 77, at 121; 1976 House Appropriations Hearings, *supra* at 372 (statement of Chairman Simpson).

270. See S.643 Hearings, *supra* note 241, at 115; S.644 Hearings, *supra* note 77, at 121-22 (statements of William Cavanaugh).

271. See S.644 Hearings, *supra* note 77, at 122-23.

very good" and that other work, "ASTM's science and economics," for instance, was not.²⁷² But the manager found that "overall it did a good job" given this industry's peculiarities, ASTM's inexperience in writing technical rationales to support standards and agency staff's "silent monitoring."²⁷³

Citizens' assessment of the offeror generally were complimentary. Two individuals believed that ASTM "did a good job," tendering "quite thorough" requirements,²⁷⁴ "creating and organizing procedures" and "balancing industry and consumers."²⁷⁵ But two other citizen participants found the atmosphere more antagonistic than adversarial,²⁷⁶ and a fifth person said that manufacturers often "held back economic data."²⁷⁷

Outside evaluations of the ASTM differed. Professor Hamilton found that the possibility of industry vetoing requirements developed in the manner that these were did not materialize²⁷⁸ and ascribed ASTM's timely completion of proposed standard development to the "reservoir of technical knowledge and skill in its membership."²⁷⁹ Professor Schwartz stated that the CPSC "substantially revised" the offeror's suggestions, partly because of agency mistakes,²⁸⁰ while the Comptroller General said that "statutory time frames" precluded ASTM completion of "certain desirable technical work."²⁸¹

It is important to remember that the ASTM operated under severe constraints.²⁸² The temporal restriction and the difficulty of quickly drafting a proposed standard were significant complications.²⁸³ The CPSC first failed to specify all risks and to provide adequate hazard data, so that the offeror

272. See TI with David Swankin [hereinafter Swankin TI I].

273. See TI with David Swankin [hereinafter Swankin TI II]. ASTM's submission "was done like a voluntary standards organization and so lacked a rationale" and CPSC employees "sat back during standard development," later criticizing the submission. *Id.*; cf. *infra* notes 289-292 and accompanying text (industry's peculiarities).

274. See TIs with funded participants 1, 2.

275. See *id.*

276. See TIs with funded participants 3, 4.

277. See TI with funded participant 5.

278. See Hamilton, *supra* note 35, at 1416.

279. *Id.*

280. See Schwartz, *supra* note 3, at 88.

281. See GAO STUDY, *supra* note 32, at 41.

282. Cf. Schwartz, *supra* note 3, at 94 (first four offeror proceedings begun within five month period, so CPSC "did not learn of its mistakes in one project in time to avoid them in another").

283. See *supra* notes 254-56 and accompanying text. ASTM completed the project in 92 days. See *Apr. 1977 Senate Oversight Hearings*, *supra* note 78, at 28 (statement of William Cavanaugh); cf. *S.644 Hearings*, *supra* note 77, at 121 (same); *1978 House Appropriations Hearings*, *supra* note 159, at 118 (statement of Comm'r Pittle) (timely completion due to ASTM's wish to ascertain whether its procedures were adequately responsive). In fairness, timely completion may well have compromised the quality of ASTM's submission.

“had to initiate and develop its own risk analysis.”²⁸⁴ As to some hazards the Commission identified, there were minimal supporting data; indeed, for three hazards there was “so little evidence of injury as to make” their existence questionable.²⁸⁵ Other hazards could not be treated rapidly or remedied cheaply.²⁸⁶ Deficient agency guidance also hindered expeditious development of the proposed standard.²⁸⁷ Moreover, conflicts between consumers and manufacturers created difficulty.²⁸⁸ Furthermore, the peculiarities of the industry created complications. The industry consisted of one major company, and this factor “severely limited” the availability of data.²⁸⁹ The manufacturers also lacked “analytical expertise and testing facilities” which the ASTM needed because it “had no competence in matchbook technology.”²⁹⁰ The industry as well was under a consent decree that complicated data gathering and communications²⁹¹ and was producing a commodity which was not amenable to economical standardization.²⁹² In short, given the constraints, especially as to time, the ASTM performed competently, completing proposed standard development more expeditiously than other offerors.²⁹³

Citizen involvement received mixed reviews, particularly from agency employees. One staffer found the caucus was an “extremely good group [with] focus and organization which contributed a great deal” and helped individuals be more effective than in other proceedings.²⁹⁴ The evaluator observed that each citizen worked very hard, although the effort expended was not necessarily “seen in the final product,” while the assessor stated that some consumers were excellent arbitrators, such as a public relations specialist who “could get agreement between conflicting groups” and a retired engineer who insured that “technical work approached reality.”²⁹⁵ A second Commission employee thought that many individuals “could not understand their suggestions’ economic implications” or appreciate the

284. *S.644 Hearings*, *supra* note 77, at 122 (statement of William Cavanaugh); *accord*, OPPE REPORT, *supra* note 31, at 3-13; Schwartz, *supra* note 3, at 65 n.233.

285. *See supra*, note 260.

286. *See* Schwartz, *supra* note 3, at 64-65; *infra* note 292 and accompanying text.

287. Many have recognized that CPSC assumed a hands off approach. *See, e.g., H.R. 10819 Hearings*, *supra* note 248, at 58 (statement of Comm’r Franklin); *S.644 Hearings*, *supra* note 77, at 123 (statement of William Cavanaugh); *supra* note 260 and accompanying text. *But cf. S.644 Hearings*, at 122-23 (CPSC staff praised for cooperation).

288. *See, e.g.,* TI with industry representative 3, *supra* note 265; *supra* notes 276-77 and accompanying text.

289. Swankin TI I, *supra* note 272 (“If you took out Diamond Match Company, the industry was comprised of small companies that did not even have economic divisions”).

290. *See* OPPE REPORT, *supra* note 31, at 4-11; *S.643 Hearings*, *supra* note 241, at 116 (statement of William Cavanaugh); *cf.* OPPE REPORT, *supra*, at 4-13, 6-6 (industry’s technically unsophisticated nature partly responsible for inadequate ASTM technical support).

291. *See supra* note 264 and accompanying text.

292. *See* Swankin TI I, *supra* note 272.

293. *See supra* note 283.

294. TI with CPSC employee 3, *supra* note 259.

295. *Id.*

"finer technical points" involved in potential regulation of matchbooks, although these were "not very complex."²⁹⁶ A third staffer said that "caucus members did a lousy job" because they demanded increased stringency in terms of proposed controls without supplying support for more rigorous requirements.²⁹⁷

The Project Manager for the ASTM found citizen activity "quite significant," emphasizing that consumers had much "experience, made matchbook injuries more real" and required ASTM and industry to propose a more stringent standard than they would have.²⁹⁸ The Project Manager also described as "exactly the kind of input we wanted" one party's "statewide survey of fire marshals;" the contribution provided a "tremendous amount of information" that would otherwise have cost "thousands of dollars and many hours of time."²⁹⁹ But he did admit that individuals were more helpful in pointing out, rather than solving, technical problems.³⁰⁰

The Managing Director for the ASTM described consumers as "very heroic people," who "quickly learned" matchbook technology.³⁰¹ The NCL's manager said that public involvement was "pretty good and better than any" which had occurred previously at the CPSC,³⁰² and that citizens used critical questioning techniques characteristic of good investigative reporting.³⁰³ Moreover, this evaluator asserted that the consumer caucus document, which was prepared "after seven weeks of discussion and study and before any" effort was undertaken to draft a proposed standard, served as the point of departure for much subsequent work, requiring industry for the first time to justify why it could not comply with consumer requests,³⁰⁴ as well as the source of much which the CPSC "finally adopted in its regulation."³⁰⁵

One extra-agency assessor found that most caucus members were not "technically knowledgeable" and that those who were more well versed in

296. TI with CPSC employee 4.

297. TI with CPSC employee 5. The individual recited the oft-told story in the text accompanying note 316, *infra*.

298. TI with Bernard Corrigan. Examples he cited were the message and burn-time requirements. CPSC staff found that the former would "have severe economic effects and provide little benefit" and the Commissioners "excluded them from the proposed standards." OPPE REPORT, *supra* note 31, at D-26.

299. OPPE REPORT, *supra* note 31, at D-26.

300. *Id.*

301. See S.644 Hearings, *supra* note 77, at 122-23, 125; S.643 Hearings, *supra* note 241, at 115 (statements of William Cavanaugh).

302. Swankin TI I, *supra* note 272.

303. *Id.*

304. See *id.*; S.643 Hearings, *supra* note 241, at 89 (statement of David Swankin). For example, "technical backup" enabled consumers to evaluate independently manufacturers' contention that "certain chemicals would create a serious toxicity problem." S.643 Hearings, at 90.

305. See S.644 Hearings, *supra* note 77, at 92; Swankin TI I, *supra* note 273; cf. S.643 Hearings, *supra* note 241, at 88-90; S.644 Hearings, *supra* at 91-92, 95-96 (additional discussion by Swankin of consumer involvement).

the technical aspects of matchbook regulation, or were more forceful, could have dominated the remainder.³⁰⁶ The individual also contended that citizens were responsible for a controversial requirement included in the ASTM's submission that ultimately was rejected by the CPSC.³⁰⁷ Another outside evaluator considered the caucus position paper "very worthwhile [and] a good precedent for consumer participation in standard-making."³⁰⁸

Many industry observers were less positive. Several found that citizens, while well-intentioned, knew little about the product or its manufacture and lacked appreciation for the difficulty of complying with restrictions that they voted to impose.³⁰⁹ Some of these analysts and others thought that consumers were too partial, premising their decisions on emotions or idealism,³¹⁰ and that the caucus encouraged "bloc voting," which did not always reflect the technical merits of the questions at issue.³¹¹

Funded citizens were "much more satisfied with their performance and influence than" those reimbursed participants who were involved in the architectural glazing proceeding.³¹² Many of the individuals believed that consumers were very effective, claiming that they "dragged industry into the twentieth century"³¹³ and ultimately had more impact than manufacturers.³¹⁴ But these observers and others acknowledged that citizens sometimes agreed to propositions which were not premised on adequate technical data.³¹⁵ Indeed, the matchbook initiative may be epitomized by the oft-recounted story of voting on "burn-times of eight, twelve, fifteen and twenty seconds," when there had been no "showing of impact of burn time variances on reduction of injuries."³¹⁶

4. Swimming Pool Slides

In January, 1975, the CPSC selected the National Swimming Pool Institute (NSPI) to draft a standard governing swimming pool slides.³¹⁷ The

306. See Hamilton, *supra* note 35, at 1416.

307. See *id.* at 1414, 1416. He was speaking of the burn time requirement.

308. The outside assessor was Arnold Elkind, chair of the NCPS. See *S.644 Hearings, supra* note 77, at 92. It is important to remember the constraints under which consumers labored. See, e.g., *id.* at 122-23; *S.643 Hearings, supra* note 241, at 115 (statements of William Cavanaugh).

309. See, e.g., TIs with industry representatives 1, 2, *supra* note 263; TI with industry representative 6.

310. See, e.g., TIs with industry representatives 4, 5, *supra* notes 266-67.

311. See, e.g., TIs with industry representatives 1, 2, *supra* note 263; TI with industry representative 3, *supra* note 265.

312. Note, *supra* note 27, at 1209 text accompanying n.199. This observation seems premised primarily upon the fact that consumers worked much less "in concert" in the glass, than in the matchbook, proceeding. See *id.* at 1199, 1209 n.199.

313. Consumer Participation Meeting, *supra* note 35, at 104.

314. See, e.g., *id.* at 104-05, 115, 117.

315. See, e.g., *id.* at 84.

316. See Memorandum to Commissioners, "A Constructive Criticism of § 7 Proceedings," at 5, from funded participant 6.

317. See 40 Fed. Reg. 3311, (1975).

Institute was the unanimous choice of neither the agency staff nor the Commissioners³¹⁸ and there apparently was marginal need for regulation, given limited use of the product and the injuries attributable to it.³¹⁹ The proceeding was initiated by NSPI, a trade association of "1750 firms representing builders, manufacturers, and suppliers, architects, engineers, public officials and others allied with the swimming pool" industry and by Aqua Slide and Dive (Aqua), which as the producer of ninety-five percent of slides "had a substantial interest."³²⁰ Several consumers helped develop the package that the NSPI proffered to the CPSC in May.³²¹ The agency staff were concerned about, and were instructed to revise, certain aspects of the submission.³²² Moreover, the Commissioners hired a consultant to supply economic data which were believed necessary.³²³ In September, the CPSC published a proposal that changed the NSPI's installation requirements to recommendations because of jurisdictional concerns.³²⁴ That alteration prompted the Project Manager for NSPI to question seriously the effort's value in reducing injuries.³²⁵ A final rule, similar to the Institute's submission, was issued by the Commission in January, 1976.³²⁶ Many

318. See OPPE REPORT, *supra* note 31, at D-12. CPSC rejected two prior NSPI offers because the offers were "inadequately responsive" to CPSC offeror regulations and NSPI relied too substantially on extant engineering data, made insufficient provision for public involvement, and requested too large a contribution from CPSC for administrative costs. *Id.* See 39 Fed. Reg. 37,804, 37,804 (1974); cf. 1976 Senate Appropriations Hearings, *supra* note 240, at 905 (Nova University only other applicant).

319. See GAO STUDY, *supra* note 32, at 23-24; Hearings on Dep't of Housing and Urban Dev.—*Indep. Agencies Appropriations for 1977 Before the Subcomm. on HUD—Indep. Agencies of the House Appropriations Comm.*, 94th Cong., 2d Sess., pt. 1 at 13 [hereinafter 1977 House Appropriations Hearings] (statement of CPSC Chairman Simpson) (1976); Hearings on Dep't of Housing and Urban Dev.—*Indep. Agencies Appropriations for 1977 Before the Subcomm. on HUD—Indep. Agencies of the Senate Appropriations Comm.*, 94th Cong., 2d Sess., pt. 3, 13 [hereinafter 1977 Senate Appropriations Hearings] (statement of Linda Hudek) (1976). *But cf. id.*; Schwartz, *supra* note 3, at 50-51 n.125-26 and accompanying text (Commissioners believed CPSCA mandated proceeding's initiation). See Aqua Slide 'N' Dive Corp. v. CPSC, 569 F.2d 831, 835-38 (5th Cir. 1978) (discussion of the proceeding's background); OPPE REPORT, *supra* note 31, at D-10 to D-19 (same); 40 Fed. Reg. 42,562, 42,562-63 (1975) (same).

320. See OPPE REPORT, *supra* note 31, at D-12 (NSPI's description); Aqua Slide 'N' Dive Corp. v. CPSC, 569 F.2d 831, 835-36 (5th Cir. 1978) (proceeding's initiation and Aqua's description).

321. See Aqua Slide 'N' Dive Corp., 569 F.2d at 836 (descriptions of the committee's composition and the structure of its working organization); OPPE REPORT, *supra* note 31, at D-12 to D-14 (same); OPPE REPORT, *supra* at D-15, D-16 (list of NSPI's "achievements" and a summary of its recommendations by hazard area).

322. See *infra* notes 329, 332 and accompanying text. *But cf. infra* notes 326, 332-33 and accompanying text (NSPI submission responsive to NOP and CPSC staff modified little and final rule included most recommendations).

323. See OPPE REPORT, *supra* note 31, at D-15-16.

324. See 40 Fed. Reg. 42,562, 42,572 (1975). See generally OPPE REPORT, *supra* note 31, at 3-9 to 3-10; D-18 to D-19.

325. OPPE REPORT, *supra* note 31, at 3-10.

326. See 41 Fed. Reg. 2742, (1975). "The final standard . . . was essentially the same as the proposed standard." OPPE REPORT, *supra* note 31, at 6-1.

familiar with the pool slides initiative find this the "least productive agency proceeding:"³²⁷ it was long and diverted scarce CPSC resources while the standard may have lacked technical substantiation and was partially overturned in court.³²⁸

Analyses of the NSPI's work were checkered. A Commissioner said that the offeror's proposal resembled a voluntary standard that previously had been rejected, thus necessitating significant revision.³²⁹ Moreover, a consultant did have to be retained. One staffer for the CPSC was "not very impressed" with the technical competence displayed by NSPI.³³⁰ A second agency employee found that the proposed standard development effort was run poorly—especially in terms of the choice of citizens—and was dominated by industry, yielding requirements favorable to Aqua Slide and Dive.³³¹

Those Commission staffers who reviewed NSPI's submission "raised serious doubts concerning" the technical validity and the enforcement potential of the proposal but said that it responded to the NOP, addressed indicated hazards and defects in voluntary standards, and included a technical rationale and necessary economic data.³³² Moreover, these evaluators minimally altered the offeror's document.³³³

An agency doctor thought that the NSPI "did as well as possible," given the difficulties inherent in quickly identifying and solving the problem and recent creation of the CPSC and the offeror procedure.³³⁴ Another Commission employee believed that NSPI did an "extremely good job" of "managing the process" and of assembling qualified consumers and that

327. *Regulatory Reform Hearings*, *supra* note 66, at 7; *1977 Senate Appropriations Hearings*, *supra* note 319 at 12 (statements of Chairman Simpson). Many others have agreed. *See, e.g., 1977 Senate Appropriations Hearings*, *supra*, at 67-68 (statement of Senator Proxmire); Schwartz, *supra* note 3, at 50-52.

328. The petition was submitted in May, 1973, and the final standard was issued in January, 1976. OPPE REPORT, *supra* note 31, at D-10, D-17. CPSC paid NSPI only \$14,000 to develop the standard. *See id.* at 4-30. But Aqua Slide 'N' Dive may have contributed as much as \$300,000. *See id.* Moreover, standard development "consumed untold Commission resources." Schwartz, *supra* note 3, at 50. *See Aqua Slide 'N' Dive Corp. v. CPSC*, 569 F.2d 831, 842-44 (5th Cir. 1978) (discussing lack of substantiation and partial overturning); *cf.* 43 Fed. Reg. 58,813, 58,813 (1978) (rescission of provisions court overturned). For subsequent history of pool slide regulation, see Schwartz, *supra* note 3, at 51 n.130 and accompanying text; 9 Prod. Safety & Liab. Rep. (BNA) 491, 529-30 (1981); *CPSC Reauthorization: Hearings Before the Subcomm. on Health and the Env't of the House Comm. on Energy and Commerce*, 99th Cong., 1st Sess. 76, 121-22 (1985).

329. *See Regulatory Reform Hearings*, *supra* note 66, at 34; *1977 House Oversight Hearings*, *supra* note 34, at 251 (statements of Comm'r Pittle). *See generally* Dissenting Opinion of Comm'r Pittle (Dec., 1975) (Commissioner's initial opposition to commencing offeror proceeding).

330. TI with CPSC employee 1.

331. TI with CPSC employee 2.

332. *See OPPE REPORT*, *supra* note 31, at D-17.

333. *See id.*; accord notes 324-26 and accompanying text.

334. TI with CPSC employee 3.

its engineering consultant avoided numerous pitfalls encountered in other offeror proceedings.³³⁵ The OPPE study echoed much of the complimentary commentary, particularly regarding project administration by the NSPI and its consultant's input.³³⁶

The consultant's manager found that there was little nonproductive antagonism between industry representatives and citizens, that the process was "professional, wide open" and responsive to consumers, and that the committee's small size and careful selection facilitated "smooth, efficient development."³³⁷ A committee member associated with manufacturing concurred, adding that "everything was done right, no time pressure existed, information from everywhere" was gathered and the manager "rebuked participants when they swayed to industry."³³⁸ The Deputy Chairman of the Human Factors and Behavioral Department of the Naval Research Institute, who served as a staffer on the committee, said that the committee "pretty unanimously" believed that the standard was "fair" and was the "best" attainable from available data while he found that NSPI was "very well organized."³³⁹ A citizen stated that the Project Director for the NSPI was "very valuable," explaining data so that all involved understood the information, and that the offeror's leadership and the committee's "structure, membership selection and size" enabled consumers to be effective.³⁴⁰

Extra-agency evaluations were mixed. Senator Proxmire found NSPI's solution so obvious that any school child could have duplicated it in an hour.³⁴¹ Professor Schwartz, in denominating this initiative the "pool slide fiasco,"³⁴² apparently considered it one of the least successful proceedings.³⁴³ But the ACUS consultant added that swimming pool slides often are cited "as an example of Commission failure,"³⁴⁴ which seems to be her principal focus of concern.

Many observers of the initiative find that the CPSC was responsible for much perceived inadequacy in NSPI's work. Because the agency supplied insufficient injury data, the NSPI had to undertake additional testing but could not determine the precise cause of human injuries, so that its submission included requirements "supported by technical judgments instead of injury or laboratory data."³⁴⁵ Several Commissioners admitted that the

335. TI with CPSC employee 4.

336. See OPPE REPORT, *supra* note 31, at D-15 to 17.

337. TI with Robert Weiner.

338. TI with industry representative 1.

339. TI with T.E. Berghage.

340. TI with funded participant 1.

341. See 1977 Senate Appropriations Hearings, *supra* note 319, at 67-68.

342. See Schwartz, *supra* note 3, at 49.

343. See *id.* at 49-52.

344. Schwartz, *supra* note 3, at 51.

345. GAO STUDY, *supra* note 32, at 11, 24. This necessitated an additional CPSC study. *Id.* at 11. Cf. Schwartz, *supra* note 3, at 65 (CPSC required NSPI to treat a "number of hazards for which it had insufficient data on how product-related injuries had occurred"). *But cf.* GAO STUDY, *supra* at 42 (CPSC supplied NSPI some accident reports and intended that NSPI determine causality by applying its expertise).

CPSC may have defined the project too broadly and might have provided inadequate guidance.³⁴⁶ Moreover, the Commissioners allegedly made last-minute changes in the final regulation and deleted requirements agreed on by the NSPI and agency staff without notifying the Institute.³⁴⁷ NSPI also was hampered because it was working at the edge of state-of-the-art³⁴⁸ and with an industry dominated by one producer.³⁴⁹ Furthermore, the rule adopted by the Commission did include most of the offeror's recommendations.³⁵⁰ In short, the NSPI performed rather well, given the constraints.

The CPSC has praised the work of citizens. A Chairman made complimentary comments about public activity, describing the proceeding as a "conscientious effort."³⁵¹ One employee found that the consumers were an "extremely good group, some of whom were specialized or had long experience running pools," and that a few were "quite articulate about" slide hazards.³⁵² A physician said that citizens were less helpful in providing technical input than in securing "consumer reaction to options," in estimating consumer acceptability or in expediting the process.³⁵³ A third staffer believed that public "participation was very good," because all cooperated,³⁵⁴ but a fourth employee thought that those "selected had no particular advocacy skills or ideas to contribute and were swamped."³⁵⁵

The manager for NSPI's consultant was enthusiastic about consumer input, mentioning a pool owner "who asked the right questions" and

346. See *H.R. 10,819 Hearings*, *supra* note 248, at 58, 66 (statements of Comm'r Franklin, Chairman Byington); accord Schwartz, *supra* note 3, at 65 n.229 and accompanying text. *But cf.* 1977 House Oversight Hearings, *supra* note 34, at 272 (statement of Comm'r Pittle) (CPSC guidance increased with each offeror proceeding); GAO STUDY, *supra* note 32, at 42 (CPSC belief that NSPI expertise and creativity could be inhibited by active CPSC direction).

347. See TIs with CPSC employees 1, 2, *supra* notes 330-31; OPPE REPORT, *supra* note 31, at 3-9 to 10, D-18 to 19. NSPI initially learned about the two principal areas—jurisdiction and labels—of Commissioner concern when CPSC's proposal was published. See OPPE REPORT, *supra* note 31, at D-18. The OPPE REPORT and CPSC employees indicate that the jurisdiction question surfaced at the last minute because of an inadvertent oversight, but some modifications in NSPI's submission resulted from unwarranted Commissioner "tinkering," especially with labeling and warning requirements assembled by NSPI and CPSC staff. *Cf.* Aqua Slide 'N' Dive Corp. v. CPSC, 569 F.2d 831, 840-43 (5th Cir. 1978) (sign requirements' invalidation).

348. Two complex problems were identifying precisely how, as a biomechanical matter, serious injuries occurred and how, as a technological and "human factors" matter, they could be remedied most effectively. See TIs with CPSC employees 1, 3, *supra* notes 330, 334.

349. See *supra* note 320 and accompanying text.

350. See *supra* note 326 and accompanying text.

351. See 1977 Senate Appropriations Hearings, *supra* note 319, at 68 (statement of Chairman Simpson).

352. TI with CPSC employee 2, *supra* note 331. The individual added that NSPI developed a "better product than ASTM" partly because "votes only were taken on proposals the consultant assembled." *Id.* *But cf.* TI with CPSC employee 1, *supra* note 330 (ASTM/NCL "consumer caucus far superior" to pool slides consumers).

353. TI with CPSC employee 3, *supra* note 334.

354. TI with CPSC employee 4, *supra* note 335.

355. TI with CPSC employee 5.

refused to accept anyone's response unless she understood it.³⁵⁶ The Technical Director for NSPI said that citizens afforded an "excellent third view," asked "embarrassing questions worth answering," and "infiltrated all activity, offering perspectives not clouded by technical bias," thereby successfully urging the rejection on practical grounds of unwarranted technical requirements proposed by technical experts.³⁵⁷ The Naval Institute employee found that all of the consumers "had some association with pools" and "were helpful in working through the process," while a "doctor provided good information on slide injuries, water depth and forces" and a "YMCA representative offered data on the controversial issue of water depth."³⁵⁸ One citizen believed that the public had "considerable input" and "significant impact."³⁵⁹

5. Television Receivers

In June, 1975, the CPSC chose Underwriters Laboratories (UL), a "voluntary standards development group that conducts public safety testing,"³⁶⁰ to write requirements for risks associated with television receivers (TVR).³⁶¹ The need for regulation was debatable, given available injury data³⁶² and the potential for voluntary compliance.³⁶³ UL had great difficulty retaining citizens, especially "use and technically oriented consumers," who were paid only out-of-pocket expenses.³⁶⁴ But many individuals, who comprised one-third of the working group,³⁶⁵ helped UL to formulate recommendations which required four drafts, using a consensus approach.³⁶⁶ The suggestions, that included a technical rationale and a cost-benefit analysis, were tendered to the agency in July, 1976.³⁶⁷ Initial evaluation by the CPSC revealed the need for additional public input before a proposal could be

356. See Weiner TI, *supra* note 337.

357. TI with Larry Paulick.

358. Berghage TI, *supra* note 339.

359. TI with funded participant 1, *supra* note 340.

360. See Hoffman & Farr, *Television Receivers: The UL Experience*, ASTM STANDARDIZATION NEWS 20, (May 1977); *cf.* 1976 Senate Appropriations Hearings, *supra* note 240, at 906 (George Washington University also an applicant).

361. See 40 Fed. Reg. 24,043, 24,043-44 (1975).

362. See H.R. 2271 Hearings, *supra* note 75, at 820 (UL statement); Oct. 1977 Senate Oversight Hearings, *supra* note 184, at 62 (statement of Philip Knox); Comment, *The Consumer Product Safety Commission: In Search of a Regulatory Pattern*, 12 COLUM. J. L. & Soc. PROBS. 393, 437-40 (1976).

363. See Comment, *supra* note 362, at 439. The OPPE REPORT, *supra* note 31, at D-44, included no case study for television receivers. *Cf.* 40 Fed. Reg. 8,592, 8,593-94 (1975); Hoffman & Farr, *supra* note 360 (discussions of proceeding's background and of consumer participation by UL's project manager and participation's coordinator).

364. See Hoffman & Farr, *supra* note 360, at 20-21.

365. See *id.* at 21, 24; Hamilton, *supra* note 35, at 1414-16.

366. See 40 Fed. Reg. 24,043, 23,044 (1975) (discussion of the effort's organization and work); Hoffman & Farr, *supra* note 360 (same).

367. See 41 Fed. Reg. 51,055, 51,056 (1976).

issued.³⁶⁸ Moreover, in early 1977, the agency claimed that UL had "provided many specifications for components and design criteria," rather than a performance-oriented standard, as expected.³⁶⁹ But, during October, 1977, the Commissioners reviewed the public comments solicited earlier, certain improvements in voluntary requirements governing television receivers, and data indicating that product-related injuries had decreased.³⁷⁰ Finally, in November, the Commissioners terminated consideration of mandatory controls for the principal hazards thought to be posed by television receivers, finding that voluntary standards adopted by UL and followed by industry were being "progressively upgraded" and that there had been an "apparent decline in TV safety-related incident data."³⁷¹

Opinions of the work performed by UL were widely divergent. The Commissioners were not very satisfied. When UL seemed to be departing from CPSC's original guidance and appeared unresponsive to subsequent agency importuning,³⁷² the offeror was summoned to a Commissioners' meeting at which the offeror was informed that it was proceeding improperly.³⁷³ Although UL agreed to comply with the instructions given, its submission still did not conform to the expectations of the CPSC.³⁷⁴ One agency Chairman said that deficiencies in UL's package required CPSC to solicit additional public input,³⁷⁵ while a Commissioner attributed this need to the "voluminous" nature of the "material which was little more than a collection of standards previously developed."³⁷⁶ But another Chairman and a second Commissioner admitted that the product was complex and unamenable to compulsory controls,³⁷⁷ and the latter officer and an additional

368. See *id.* at 51,055; 1978 House Appropriations Hearings, *supra* note 159, at 112-114 (statements of Chairman Byington and Comm'rs Kushner, Pittle and Franklin).

369. See [1975-77 Transfer Binder] Cons. Prod. Safety Guide (CCH) 43,348, at 43,348. See generally 1977 House Oversight Hearings, *supra* note 34, at 353 (statement of Professor Hamilton).

370. See 42 Fed. Reg. 57,335, 57,336 (1977).

371. See 42 Fed. Reg. 57,335, 57,336 (1977). Consideration of mandatory requirements for mechanical, shock and explosion hazards was terminated and consideration of fire hazards was extended to April, 1979. *Id.*; cf. 44 Fed. Reg. 44,206, 44,208 (1979) (termination of consideration of fire hazards). In 1979, Chairman King said that industry compliance with UL's voluntary standard may have been the "reason for a substantial decrease in fires caused by televisions." 1980 Senate Appropriations Hearings, *supra* note 72, at 16; accord H.R. 2271 Hearings, *supra* note 75, at 821 (statement of UL).

372. See OPPE STUDY, *supra* note 31, at 43; 1978 House Appropriations Hearings, *supra* note 159, at 115-16; 1977 House Oversight Hearings, *supra* note 34, at 285; Apr. 1977 Senate Oversight Hearings, *supra* note 78, at 127 (statements of Comm'r Pittle).

373. See 1978 House Appropriations Hearings, *supra* note 159, at 113 (statement of Comm'r Pittle).

374. *Id.* at 112-14.

375. See *id.* (statement of Chairman Byington).

376. See *id.* (statement of Comm'r Pittle).

377. See 1977 House Appropriations Hearings, *supra* note 319, at 27 (statement of Chairman Simpson); 1978 House Appropriations Hearings, *supra* note 159, at 128 (statement of Comm'r Franklin).

Commissioner said that the CPSC may have provided inadequate guidance, particularly initially.³⁷⁸

Agency staff were less critical and even complimentary. One employee found that "UL did a superior job," improving voluntary standards and securing industry compliance, ascertaining from injury severity and frequency that television receivers did not pose "unreasonable risk," and persuading the Commissioners that mandatory requirements were unnecessary.³⁷⁹ A second staff member thought that the "drafting process was good" and that "UL served as a catalyst" by not waiting for CPSC to act, by upgrading its existing standard with "ninety percent of the requirements proposed" and by convincing the Commissioners to reject compulsory controls.³⁸⁰ A third employee believed that "UL did a more decent job than some offerors but was industry oriented" and selected citizens who lacked advocacy skills or technical expertise.³⁸¹

A doctor and an attorney who participated actively in several agency proceedings said that television receivers was a "fiasco," primarily because UL agreed to defer to CPSC's decision that the product presented unreasonable risk but challenged that determination, once selected as the offeror.³⁸² UL asserted that "ninety-seven percent of the 'mandatory' requirements" adopted during proposed standard development were included in its standard with which industry complied; that injuries attributable to television receivers have plummeted; and that consumers have "reasonable safety [with] minimum regulatory expense and irritation."³⁸³

But UL and many others have indicated that the CPSC may be responsible for perceived deficiencies in the offeror's endeavors. The agency's original risk assessment and concomitant determination that mandatory controls were necessary might have been inaccurate,³⁸⁴ and CPSC may have furnished insufficient initial guidance.³⁸⁵ Commission incident data also complicated work. Television receivers were said to be improperly blamed for many accidents, so that "committee members had to decide" which

378. See *1978 House Appropriations Hearings*, *supra* note 159, at 113-14 (statements of Comm'rs Kushner and Franklin).

379. TI with CPSC employee 1. The individual added that UL "taught him a lot as a young CPSC manager, especially about playing fast and loose with data." *Id.*

380. TI with CPSC employee 2.

381. TI with CPSC employee 3.

382. See *S.2796 Hearings*, *supra* note 159, at 23 (statement of Robert Goldstone); *S.644 Hearings*, *supra* note 77, at 92 (statement of David Swankin).

383. See *H.R. 2271 Hearings*, *supra* note 75, at 820-21 (UL statement); TI with CPSC employee 2, *supra* note 380.

384. See *supra* note 362 and accompanying text; *S.2796 Hearings*, *supra* note 159, at 153 (statement of Baron Whitaker). *But cf.* *1980 Senate Appropriations Hearings*, *supra* note 72, at 16 (statement of Chairman King); *1979 House Appropriations Hearings*, *supra* note 160, at 46 (statement of Michael Brown) (CPSC initiation of proceeding prompted industry voluntary standard work).

385. See *supra* note 378 and accompanying text.

data were germane and what "problems would be approached, and how."³⁸⁶ There was as well too little time for proposed standard development; indeed, UL was granted an extension, due to expanding "need for extensive testing and evaluation, late availability of much subpoenaed data and time needed to analyze it, and increasing standard complexity."³⁸⁷ In short, UL's work seemed respectable in light of the limitations.

CPSC assessments of citizens were positive. One official said that they made "substantial contributions," especially affording the "new dimension of end users saying that mandatory standards were unnecessary" and that UL's approach was more cost effective.³⁸⁸ A Commission lawyer found that many individuals were "helpful and knowledgeable,"³⁸⁹ while a technical expert believed that several electrical engineering professors were "quite valuable in key areas."³⁹⁰

The Project Manager for UL said consumers voted to inform the agency that television receivers posed no unreasonable risk and that mandatory controls were unnecessary, input which influenced the final decision of the CPSC.³⁹¹ The Project Manager observed that technical citizens "served as a balance to manufacturers."³⁹² "Use-oriented consumers [related] experiences with, or opinions about, [product hazards] and use and care instructions," while explaining "how consumers actually use TVs."³⁹³ Some lay participants made "many contributions to the technical discussions" but others "felt unable to vote on certain technical issues."³⁹⁴ In sum, the official found that each individual "had a unique place," that they provided balance which "was of utmost importance," and that citizen activity was "excellent."³⁹⁵

6. Miniature Christmas Tree Lights

In June, 1977, NCL, a nonprofit consumer advocacy organization, was selected by the CPSC to developed requirements for hazards the agency believed were associated with miniature Christmas tree lights (MCTL).³⁹⁶

386. Hoffman & Farr, *supra* note 360, at 21; *accord* Comment, *supra* note 362, at 438-39.

387. See GAO STUDY, *supra* note 32, at 41; 1977 House Appropriations Hearings, *supra* note 319, at 27 (statement of Chairman Simpson); 40 Fed. Reg. 51,222, 51,223 (1975).

388. TI with CPSC employee 2, *supra* note 380.

389. TI with CPSC employee 3, *supra* note 381.

390. TI with CPSC employee 4.

391. See TI with David Hoffman, UL project manager for TVRs.

392. See Hoffman & Farr, *supra* note 360, at 23.

393. *Id.* at 24.

394. *Id.* The latter lacked technical experience. *Id.* Cf. TIs with CPSC employees 1, 2, *supra* notes 380-81 (speculation that lay consumers could become confused or could become dependent on others when considering complex technical issues).

395. See Hoffman & Farr, *supra* note 360, at 21-22, 24.

396. See 42 Fed. Reg. 33,359, 33,361 (1977); *cf.* Note, *supra* note 27, at 1177 n.26 (NCL description); Schwartz, *supra* note 3, at 66-88 (summary of proceeding); 43 Fed. Reg. 19, 136-37 (1978) (discussion of proceeding's background). There is no MCTL case study because the OPPE REPORT issued before the MCTLs proceeding was completed.

The necessity for regulation apparently was questionable, given the potential for voluntary compliance³⁹⁷ as well as the small risk posed by, and the number of injuries attributable to, the product.³⁹⁸ This was the last offeror initiative, and CPSC drew upon prior experience and recommendations of the OPPE and of the NCL to revise substantially the agency's role: "The Commission limited the hazards . . . to the two most serious ones [The NOP] [1] included an extensive discussion of the strengths and weaknesses of existing standards [and] [2] announced the availability of [data] responsive to the notice [and of CPSC funding for] consumer participants. . . ." ³⁹⁹ Numerous citizens, including several "well-trained consumer advocates," were paid to participate.⁴⁰⁰ They formed a caucus for purposes of communication and reinforcement, and the caucus had access to engineers, economists and behavioral scientists as well as laboratory facilities, so that proposals aired during proposed standard development could be assessed.⁴⁰¹ In November, NCL proffered its suggestions to the Commission.⁴⁰² The CPSC staff analyzed the recommendations, conducted more tests to ascertain the efficacy of some restrictions in addressing hazards,⁴⁰³ and prepared labeling because only general directions were provided by the offeror.⁴⁰⁴ The Commissioners then reviewed NCL's submission, decided that some modifications in it and certain additional requirements were needed, made the requisite changes and issued a proposal in May, 1978.⁴⁰⁵ Thereafter, major

397. See *H.R. 10,819 Hearings*, *supra* note 248, at 149 (statement of Aaron Locker); *1978 Senate Appropriations Hearings*, *supra* note 85, at 1702-03 (statement of Senator Proxmire). *But cf. id.* (statement of Chairman Byington) (CPSC commenced proceeding because voluntary compliance inadequate, ad hoc enforcement inefficient, lawsuit); *accord* as to second, *1979 House Appropriations Hearings*, *supra* note 160, at 466 (statements of Comm'rs Franklin, Pittle).

398. See *H.R. 10,819 Hearings*, *supra* note 248, at 149 (statement of Aaron Locker); *1978 Senate Appropriations Hearings*, *supra* note 85, at 1702-03 (statement of Senator Proxmire); *infra* note 429.

399. *S.2796 Hearings*, *supra* note 159, at 200-02 (statement of Chairman Byington); *accord 1977 House Oversight Hearings*, *supra* note 34, at 251, 263-64 (statements of Comm'r Pittle, David Swankin); *Apr. 1977 Senate Oversight Hearings*, *supra* note 78, at 126 (statement of Comm'r Kushner).

400. See *1977 House Oversight Hearings*, *supra* note 34, at 263 (statement of David Swankin).

401. See *id.*; *S.2796 Hearings*, *supra* note 159, at 201 (statement of Chairman Byington); *cf. id.* at 200-03; *1977 House Oversight Hearings*, *supra* note 34, at 263-65 (discussions of work's organization and consumer activity).

402. See 42 Fed. Reg. 19,136, 19,137 (1977) (discussion of suggestions).

403. *Id.* at 19,137; *accord* TI with CPSC employee 1. One concern was a sophisticated, but unrefined, methodology developed by NCL which was recognized as needing more work when submitted. See *1979 House Appropriations Hearings*, *supra* note 160 at 465-67 (statements of Chairman Byington, Comm'rs Franklin & Pittle); *cf. id.* at 466 (statement of Comm'r Franklin) (delay was fault of offeror process not of NCL).

404. See *1979 Senate Appropriations Hearings*, *supra* note 135, at 262 (statement of Chairman Byington); 43 Fed. Reg. 19,136, 19,137 (1978).

405. See 43 Fed. Reg. 19,136, 19,137 (1978) (discussion of changes); Hamilton, *supra* note 35, at 1415-16 (NCL draft was "much closer to CPSC's views" but it still was revised by CPSC).

industry groups—UL, representing domestic producers, and the National Ornament and Electric Lights Association (NOEL), representing importing interests—upgraded voluntary standards to satisfy strictures in the agency proposal.⁴⁰⁶ The CPSC terminated the initiative, once persuaded that industry would comply.⁴⁰⁷ Thus, although the miniature Christmas tree lights initiative was touted as the most successful proceeding, its outcome was similar to the television receivers matter.⁴⁰⁸

CPSC personnel generally found NCL to be quite competent. A Chairman said that its submission “was probably the most all-inclusive” standard tendered by any offeror and that proposed standard development had been much less costly and resource-intensive than if done in-house; that NCL’s “experience and managerial skill [and] astute examination” of past weaknesses led to “highly effective management [and] an outstanding effort;” and that the offeror assured that all views were considered fully and that agency staff actively were involved the entire time, defending their ideas “in an open forum consisting of industry, consumers and experts.”⁴⁰⁹ The Chairman did admit, however, that the manager of NCL’s endeavor understood the process and that the product was relatively simple, so that cumulative experience and existing standards facilitated work.⁴¹⁰

A Commissioner found that NCL’s submission was “one of the finest,” including several “state-of-the-art provisions” and some novel ones which were “completely justified.”⁴¹¹ But the official observed that the CPSC revised the offeror process and its role; the agency provided more “front-end” analysis, especially by narrowing the “number and scope of hazards,” greater data on solutions, expanded citizen funding and enhanced staff participation.⁴¹² Moreover, the official claimed that Commission staff spent much time working on NCL’s suggestions⁴¹³ and that the proceeding still

406. See 46 Fed. Reg. 17,788, 17,789 (1981); *H.R. 2271 Hearings*, *supra* note 75, at 339 (statement of Acting Chairman Statler); *1980 Senate Appropriations Hearings*, *supra* note 72, at 16, 57-58 (statement of Chairman King); Schwartz, *supra* note 3, at 67 n.245 and accompanying text.

407. See, e.g., *S.2796 Hearings*, *supra* note 159, at 200-02 (statement of Chairman Byington); *1979 House Appropriations Hearings*, *supra* note 3, at 66-68; *cf. supra* note 399 and accompanying text (reasons why MCTL proceeding successful).

408. See 46 Fed. Reg. 45,940, 45,941 (1981); *supra* note 371 and accompanying text. See generally *National Ornament & Elec. Lights Ass’n v. CPSC*, 526 F.2d 1368, 1373 (2d Cir. 1975) (judicial rejection of challenge to CPSC information campaign on MCTLS).

409. See *S.2796 Hearings*, *supra* note 159, at 200-02 (statement of Chairman Byington). *But cf.* TI with CPSC employee 1, *supra* note 403 (standard development consumed “more staff time than if developed in-house”).

410. See *S.2796 Hearings*, *supra* note 159, at 200-08 (statement of Chairman Byington).

411. See *H.R. 10,819 Hearings*, *supra* note 248, at 67; *1979 House Appropriations Hearings*, *supra* note 160, and 467 (statements of Commissioner Pittle).

412. See *H.R. 10,819 Hearings*, *supra* note 248, at 67; *1979 House Appropriations Hearings*, *supra* note 160, at 467 (statements of Commissioner Pittle).

413. See *1979 House Appropriations Hearings*, *supra* note 160, at 467; *1977 House Oversight Hearings*, *supra* note 34, at 251; *H.R. 10,819 Hearings*, *supra* note 248, at 61.

was lengthy.⁴¹⁴ The Commissioner added that the initiative was "quite unique"—MCTLs were simple, posing easily remedied risks; intra-industry competition meant that issues were "clearly defined and technically supported;" the manager for the NCL had years of experience;⁴¹⁵ and the CPSC did so much initial research that it could have completed the work more expeditiously.⁴¹⁶ Two other Commissioners waxed eloquent in Congressional testimony about the enhanced quality of standard development in this proceeding but the officials were speaking less to the efforts of NCL, than to CPSC improvements.⁴¹⁷

Agency staff were less positive. One employee found that standard development was more "administratively successful" and was characterized by "hot and heavy debate and healthy exchanges,"⁴¹⁸ while a second staffer thought that the MSTL proceeding was "one of the better initiatives."⁴¹⁹ Another employee said that the NCL "did the best job" possible, given the new procedure, but that some material the offeror tendered was revised and that the project could have been finished more quickly in-house.⁴²⁰ A fourth staff member believed that NCL organized citizens well, "helping them articulate their views and not letting them be pushed around," but prepared recommendations that were too complex and hired consultants who seemed unable to draft effective requirements.⁴²¹

The manager for the NCL claimed that this was the "most successful proceeding," describing proposed standard development as "quick, efficient, supported and open-ended."⁴²² Moreover, the offeror instituted a novel, two-tiered standard writing system, joining "technical and scientific models of peer review with legal principles of appellate review," whereby the review panel attended technical meetings to "understand what their decisionmaking was about."⁴²³ The manager added that NCL organized the citizens into a caucus and provided them testing facilities;⁴²⁴ promoted "real interchange" among the caucus, industry representatives and CPSC; maximized the

414. See *H.R. 10,819 Hearings*, *supra* note 248, at 67; *1979 House Appropriations Hearings*, *supra* note 160, at 467.

415. See *H.R. 10,819 Hearings*, *supra* note 248, at 61; *1977 House Oversight Hearings*, *supra* note 34, at 252.

416. See *1977 House Oversight Hearings*, *supra* note 34, at 252.

417. See, e.g., *Apr. 1977 Senate Oversight Hearings*, *supra* note 78, at 126 (statement of Comm'r Kushner); *1979 House Appropriations Hearings*, *supra* note 160, at 466; *H.R. 10,819 Hearings*, *supra* note 248 at 58 (statements of Comm'r Franklin).

418. TI with CPSC employee 1, *supra* note 403.

419. TI with CPSC employee 2.

420. TI with CPSC employee 3.

421. TI with CPSC employee 4.

422. See Swankin TIs, *supra* notes 272, 273. The individual added that if all of the proceedings had functioned as smoothly as this one, the procedure might still be in use. Swankin TI I, *supra* note 272.

423. See Swankin TIs, *supra* notes 272, 273.

424. See Swankin TI I, *supra* note 272; *1977 House Oversight Hearings*, *supra* note 34, at 263.

perspectives expressed and their consideration in decisionmaking; encouraged agency staff involvement, thus expediting later Commission review; and facilitated work by dismissing irrelevant questions.⁴²⁵

The Executive Vice-President of the NCL said that the offeror "spared a lot of ill will" and saved the CPSC much time, umpiring "industry squabbling" and affording expert technical help as well as a forum where "importers, U.L., retailers, and everyone who wanted" could participate, the problems of small and large firms, importers and testing laboratories might be aired and documented, and minority ideas could be registered so "all thought they had fair hearings."⁴²⁶ NCL also brought "divergent viewpoints in before the fact" and gave CPSC a "variety of recommendations [and a] complete record," which was documented thoroughly, so that the Commission could make an "informed choice between alternatives."⁴²⁷

A lawyer for the NOEL stated that there already were "two existing voluntary standards" so that the NCL could "develop an amalgam."⁴²⁸ Although producers generally felt that they were listened to and that many decisions made during the proposed standard development process were sound and in consumers' interest,⁴²⁹ industry opposed mandatory controls as unnecessary.⁴³⁰ Nevertheless, manufacturers were able to quantify the safety of miniature Christmas tree lights and to develop a standard that was acceptable to the "most critical engineers" at the National Bureau of Standards (NBS) in eight months.⁴³¹

Outside evaluators find that miniature Christmas tree lights was one of the most productive offeror proceedings but not due exclusively to the efforts of the NCL. Professor Schwartz thought that the proposed standard development stage was successful because NCL possessed experience that it had gleaned from participating in the matchbooks initiative and had a "skilled manager who worked well with diverse interest groups and hired consultants with strong technical expertise."⁴³² Nonetheless, she also ascribed success to improved CPSC procedures; the simple nature of the product; extant voluntary requirements that were a good starting point; and the interests of manufacturers who were "motivated to find" a voluntary solution.⁴³³ Professor Hamilton believed that the proposed standard development effort was more successful in that the draft tendered by the offeror

425. See 1977 House Oversight Hearings, *supra* note 34, at 260-68, 272, 287.

426. See 1981 Senate Reauthorization Hearings, *supra* note 180, at 81; H.R. 2271 Hearings, *supra* note 75, at 80 (statements of Sandra Willett).

427. See 1981 Senate Reauthorization Hearings, *supra* note 180, at 81.

428. TI with Aaron Locker.

429. The lawyer claimed "there were 17 incidents associated with the product in the year prior to commencement of the proceeding." *Id.*

430. H.R. 10,819 Hearings, *supra* note 248, at 149.

431. Locker TI, *supra* note 428.

432. Schwartz, *supra* note 3, at 67.

433. See *id.*; at 67-68.

was closer to agency views of what was appropriate but the evaluator ascribed the perceived "improvement" principally to initial CPSC work, while observing that NCL's submission still had to be revised.⁴³⁴ One citizen who had been involved in other agency initiatives said that the NCL "produced a reasonable standard on schedule" because the offeror was "dedicated to making the process work," never disputing the Commission's original unreasonable risk determination, and because the CPSC provided guidance, consumer funding and technical assistance.⁴³⁵ A second member of the public found that this effort was more efficient because agency "staff were intimately involved," answering questions throughout proposed standard development.⁴³⁶

Appraisals of citizens were less complimentary. A Chairman considered them "outstandingly qualified, interested and dependable," describing their input as "consistent, well-documented, intensive and material to the standard's outcome."⁴³⁷ The Program Manager for the CPSC thought that a "lot of effort went into getting consumers up to speed," but that they "added nothing new."⁴³⁸ A second staffer found that citizens "made points effectively and supported them,"⁴³⁹ while a third employee believed that they had "pretty good labeling suggestions" but offered little on very technical issues.⁴⁴⁰

The manager for the NCL said that consumers "created new end product testing" and even joined "industry to fight staff when it second guessed technical aspects" of the offeror's submission.⁴⁴¹ An NCL officer thought that citizens mastered "technical aspects of the subject" and made "substantial contributions to a traditionally narrow field," forcing industry to explain technical factors.⁴⁴² One consultant for the NCL claimed that several recalcitrant consumers could have "wrecked the project" but proved helpful once they were "confronted by engineers and asked to cooperate."⁴⁴³ The attorney for the NOEL believed that those who contributed most worked for UL or industry and that lay consumers could not appreciate technical issues implicated "in developing electrical standards."⁴⁴⁴ A doctor added that participant funding enabled citizens to be effective.⁴⁴⁵

434. See Hamilton, *supra* note 35, at 1415-16.

435. TI with funded participant 1.

436. TI with funded participant 2.

437. See S.2796 Hearings, *supra* note 159, at 200-08 (statement of Chairman Byington).

438. TI with CPSC employee 2, *supra* note 419.

439. See TI with CPSC employee 3, *supra* note 420.

440. See TI with CPSC employee 4, *supra* note 421.

441. Swankin TI, *supra* note 272.

442. See 1977 House Oversight Hearings, *supra* note 34, at 343 (statement of Sandra Willett).

443. Weiner TI, *supra* note 337.

444. See Locker TI, *supra* note 428.

445. See S.2796 Hearings, *supra* note 159, at 29, 33 (statement of Robert Goldstone).

7. Public Playground Equipment

In August, 1975, the National Recreation and Parks Association (NRPA) was chosen by the CPSC to develop standards for public playground equipment.⁴⁴⁶ There apparently was questionable need for mandatory controls, given the source of most injuries ascribed to the equipment and the difficulties entailed in treating them with compulsory requirements.⁴⁴⁷ CPSC informed NRPA shortly after the offeror was selected that the agency probably lacked "jurisdiction over" surfaces underlying public playground equipment.⁴⁴⁸ The NRPA, a "non-profit, public interest, research and educational organization" had worked on "somewhat technical standards for recreational facilities" but had been only a commentator on earlier industry efforts to formulate voluntary requirements.⁴⁴⁹ Moreover, NRPA was chosen despite reservations expressed by several CPSC bureaus about the offeror's abilities, concerns which neither were resolved by proposed standard development's inception nor communicated to NRPA.⁴⁵⁰ Many citizens assisted the NRPA, while five were on the development committee.⁴⁵¹ The offeror experienced difficulties in commencing and managing the process and met with agency staff about the problems.⁴⁵² The Commissioners told the offeror that it was proceeding incorrectly and threatened to terminate NRPA but permitted the offeror to continue work which it completed in May, 1976.⁴⁵³ However, some difficulties anticipated by CPSC apparently materialized because it found that NRPA's technical rationale and test methods posed problems and the agency had to ask the NBS to undertake

446. See 40 Fed. Reg. 10,706, 10,707 (1975); *cf. id.* at 10,706-07 (discussion of decision not to rely upon CPSA but rather Federal Hazardous Substances Act and "offeror-like" procedures). See 40 Fed. Reg. 33,703, 33,704 (1975) (relating to NRPA's selection); *cf.* OPPE REPORT, *supra* note 31, at D-40 (Unimat Industries, a producer, also was an applicant); *id.* at D-40 to D-43; 40 Fed. Reg. 10,706, 10,706-09 (1975); 44 Fed. Reg. 57,352, 57,352-53 (1979) (discussion of proceeding's background).

447. See *infra* notes 457, 459, 484-85 and accompanying text.

448. See OPPE REPORT, *supra* note 31, at 3-10.

449. See *id.* at D-40 to D-41.

450. See *id.* at D-41 to D-42, 4-12. One bureau "found NRPA's offer marginally acceptable" and requested more procedural specificity; a second bureau "had many reservations and conditions of acceptance," finding the offer insufficiently specific about technical and management experience, work descriptions, responsibility for execution and test development and procedures; and a third bureau expressed "concern that the development schedule was too crowded" and "found the technical plan unacceptable" because it inadequately discussed procedures, personnel and working groups' operation. *Id.* at D-41 to D-42.

451. See 40 Fed. Reg. 33,703, 33,703 (1975); *cf. id.* at 33,703-04; OPPE REPORT, *supra* note 31, at D-43 to 43 (discussion of committee composition and work's organization).

452. See OPPE REPORT, *supra* note 31, at 5-6 to 5-7.

453. See 1978 House Appropriations Hearings, *supra* note 159, at 116 (relating to threatening termination); 1977 Oversight Hearings, *supra* note 79, at 286 (statements of Comm'r Pittle) (same); OPPE REPORT, *supra* note 31, at 5-7 (December, 1975, CPSC determination of inadequate offeror performance); 44 Fed. Reg. 57,352, 57,353 (1979) (relating to work's completion).

“technical work needed to revise” the offeror’s submission.⁴⁵⁴ The CPSC then held several public meetings in which it funded a “consumer long active in” the field of public playground equipment and injuries to children.⁴⁵⁵ In early 1979, NBS completed three reports which included safety guidelines and data on surfaces beneath public playground equipment.⁴⁵⁶ The CPSC then concluded that “what could be mandated [legally] was being done.”⁴⁵⁷ In October, 1979, the Commissioners announced that they would publish the NBS documents as guidance for producers, buyers and the public⁴⁵⁸ because compulsory controls alone could not treat adequately public playground equipment injuries, especially the large number attributable to surfaces underlying the equipment.⁴⁵⁹ The agency solicited public comment on the substance of the NBS reports and on the advisability of issuing them as guidelines, paying seven entities to offer their viewpoints.⁴⁶⁰ The CPSC used the input received to revise the NBS documents and published them as guidelines,⁴⁶¹ thus eschewing mandatory controls, the attempted development of which had cost 800,000 dollars.⁴⁶² Unsuccessful suit challenging issuance of the reports as guidelines ended one of the most frustrating initiatives,⁴⁶³ an endeavor which ironically may have improved the safety of public playground equipment.⁴⁶⁴

Many have criticized the efforts of the NRPA. One staffer for the CPSC found that NRPA was “consistently confused,” that its proposed

454. See 44 Fed. Reg. 57,352, 57,353 (1979); cf. OPPE REPORT, *supra* note 31, at 4-13 (bureau concerns seemed to become realities).

455. See 1979 Senate Appropriations Hearings, *supra* note 135, at 264. The consumer had been involved in the proposed standard development phase.

456. See 44 Fed. Reg. 57,352, 57,352-53 (1979); cf. *id.* at 57,353-54 (discussion of reports).

457. TI with CPSC employee 1.

458. See 44 Fed. Reg. 57,352, 57,353 (1979).

459. See *id.* at 57,352-53. Many have identified surfaces onto which children fall as an important source of playground injuries. See, e.g., TI with CPSC employee 1, *supra* note 457; TI with CPSC employee 2; TIs with funded participants 1, 2; TI with Robert Beuchner, NRPA Project Director. Cf. S.2796 Hearings, *supra* note 159, at 53 (Office of General Counsel opinion that CPSC could require negative surfaces labeling).

460. See 44 Fed. Reg. 57,352, 57,353-55 (1979). The seven included NRPA and funded participant 2, *supra* note 459.

461. See 1982 House Appropriations Hearings, *supra* note 143, at 837 (statement of Acting Chairman Statler); cf. H.R. 2271 Hearings, *supra* note 75, at 837-72 (reprinted reports).

462. From fiscal 1975 to 1979, CPSC “spent \$832,000 to develop a mandatory safety standard for public playground equipment.” 1982 House Appropriations Hearings, *supra* note 143, at 837 (statement of Acting Chairman Statler).

463. See Howell Playground Equipment Co. v. CPSC, No. 91-2071, Slip op. (7th Cir., Apr. 10, 1981) (plaintiffs’ contention that issuance of reports as guidance would deprive them of liberty or property was rejected); cf. TI with CPSC employee 3; OPPE REPORT, *supra* note 31, at 3-10 to 3-11 (frustration).

464. See TI with CPSC employee 2, *supra* note 459 (“No one makes public playground equipment without following the guidelines”); cf. Hearings on Dep’t of Housing and Urban Dev.—Indep. Agencies Appropriations for 1984 Before the Subcomm. for HUD—Indep. Agencies of the House Appropriations Comm., 98th Cong., 1st Sess., pt. 1, 59 (1983) [hereinafter 1984 House Appropriations Hearings] (CPSC assertion that handbooks apparently contributed to improved playground safety).

standard development consumed the most time, and that its "work was the most marginal."⁴⁶⁵ Another agency employee said that "what emerged were totally unworkable untested ideas which failed to address real injury possibilities," ascribing these phenomena to NRPA's lack of technical proficiency, industry and consumer recalcitrance, and CPSC deficiencies.⁴⁶⁶ A third staff member stated that the "initial submission was revised almost one hundred percent;" the offeror's proposal included many technical requirements, especially numerical limitations, which were not substantiated, "well developed, or defined," thus necessitating NBS testing to identify "justifiable tolerance levels and to supply supporting rationales."⁴⁶⁷ An employee of the NBS agreed that little technical data underlie many requirements recommended by the NRPA so NBS "ran tests and performed additional work to support" some of the requirements suggested and revised others.⁴⁶⁸

Concerns about the dearth of substantiation were echoed by additional people and entities,⁴⁶⁹ and by the Commissioners who also questioned the "validity, repeatability, and reproductibility" of NRPA testing.⁴⁷⁰ The NRPA experienced difficulty commencing work and securing committee decisions and often consulted agency staff about administrative and technical deficiencies.⁴⁷¹ The Commissioners informed the offeror that it was proceeding improperly;⁴⁷² threatened to terminate NRPA if it failed to expedite work;⁴⁷³ seriously considered terminating the offeror or having CPSC monitors conduct meetings while instructing them to "act almost as a co-chairman;"⁴⁷⁴ and issued a "determination of inadequate performance."⁴⁷⁵ The NRPA promised to follow the Commissioners' instructions when notified of perceived deficiencies in its performance but disregarded these instructions, tendering a submission which was not very helpful to the agency in treating the risks associated with public playground equipment.⁴⁷⁶ Even the Project Manager for the NRPA, in compiling a list of "lessons learned," enumerated

465. TI with CPSC employee 3, *supra* note 463. The individual also recognized "it was an awfully ambitious effort."

466. TI with CPSC employee 2, *supra* note 459.

467. TI with CPSC employee 3, *supra* note 463.

468. See TI with NBS employee 1.

469. See, e.g., TI with CPSC employee 3, *supra* note 463; OPPE REPORT, *supra* note 31, at 5-6.

470. See 44 Fed. Reg. 57,352, 57,352 (1979).

471. See OPPE REPORT, *supra* note 31, at 5-6 to 5-7. The "meetings did not have a strong impact because the offeror-manager expressed surprise at the Commission's determination of inadequate performance." *Id.* at 5-7.

472. See 1978 House Appropriations Hearings, *supra* note 159, at 166; 1977 House Oversight Hearings, *supra* note 34, at 286 (statements of Comm'r Pittle).

473. See *supra* note 453 (listing of pertinent sources).

474. See 1978 House Appropriations Hearings, *supra* note 159, at 116; 1977 House Oversight Hearings, *supra* note 34, at 286 (statements of Comm'r Pittle).

475. See OPPE REPORT, *supra* note 31, at 5-7.

476. 1977 House Oversight Hearings, *supra* note 34, at 286 (statement of Comm'r Pittle).

many that might have facilitated proposed standard development.⁴⁷⁷ An industry employee said that the offeror "needed a standard writer and realized that it lacked" the requisite expertise.⁴⁷⁸ A funded citizen asserted that NRPA was "very biased," assembling a standard development committee comprised of half as many consumers as "industry-oriented" people so that the "bloc" created opposed imposition of any safety requirements.⁴⁷⁹

Some observers, however, were more positive. One trade association representative found that the NRPA "did a pretty good job completing an overwhelming task."⁴⁸⁰ A Commission staffer thought the offeror "did an extremely good job," organized and focused work, minimized adversarial relationships, and assembled valuable data from many disciplines, such as that on child psychology and physiology.⁴⁸¹

Much that happened during proposed standard development may have been beyond NRPA's control but within CPSC's power. The breadth of the charge given the offeror might have doomed the effort from the outset.⁴⁸² Moreover, the tardy jurisdictional decision made by the Commission additionally complicated a complex project and alienated participants, eliminating from consideration what was later determined to be the major source of injuries—surfaces beneath the equipment.⁴⁸³ The expectation that the NRPA would develop a satisfactory mandatory solution may have been unrealistic, in light of subsequent inability of the NBS and the CPSC to do so⁴⁸⁴ as well as agency admissions that many injuries could not be treated with compulsory controls.⁴⁸⁵ NRPA was selected, although several Commission bureaus evinced doubts about the offeror's competence, while agency staff apparently supplied deficient data which delayed work, seemingly provided little guidance, allegedly prejudged the outcome and even might have lost interest once it became clear that the NRPA was having difficulty and that no easy solution existed.⁴⁸⁶ The NRPA had to "start from scratch," as

477. See OPPE REPORT, *supra* note 31, at 4-13.

478. TI with industry representative 1.

479. TI with funded participant 1, *supra* note 459; S.2796 Hearings, *supra* note 159, at 52-55 (statement of Theodora Sweeney). The individual added that NRPA's selection meant that the "die was already cast for the defeat of the consumer interest." *Id.* at 52. Moreover, she observed that industry successfully blocked mandatory standard issuance. TI with funded participant 1, *supra* note 459.

480. TI with industry representative 1.

481. TI with CPSC employee 1, *supra* note 457. The individual also said that the development committee believed "something needed fixing but was unsure how to do it" and tried to remedy everything which slowed the proposed standard development effort. *Id.*

482. See TI with CPSC Employee 2, *supra* note 459; 40 Fed. Reg. 10,706, 10,706 (1975) (appearance in the NOP of CPSC's charge to NRPA).

483. See OPPE REPORT, *supra* note 31, at 3-10.

484. See *supra* notes 454, 456-59, 462 and accompanying text; cf. Beuchner TI, *supra* note 459 (CPSC and NBS not much more successful); TI with CPSC employee 1, *supra* note 457 (NRPA undertook "awfully ambitious effort").

485. See 44 Fed. Reg. 57,352, 57,352-53 (1979).

486. See *supra* note 450 and accompanying text (relating to NRPA's selection); OPPE

there were few accident studies or hazard analyses, and was required to treat an apparently unsolvable problem.⁴⁸⁷

A number of these difficulties may have been exacerbated by citizens, although many evaluators agreed that "taxpayers got their money's worth." The analysts said that consumers improved safety; worked very hard; educated themselves, learning all that was possible about the issues and developing reasonable solutions; provided necessary balance, challenging industry and keeping it honest; identified important questions for discussion; afforded new, keener insights, such as reminders about the terrible nature of children's injuries; and promoted the articulation of technical rationales.⁴⁸⁸ But even the positive tone of this commentary must be qualified because some citizens so distrusted industry that they slowed work or were ineffective; were disconcerting or disruptive; lacked proficiency in technical areas or the ability to provide substantiation for their perspectives or the controls imposed; or had little effect on CPSC's ultimate decision.⁴⁸⁹ Moreover, other evaluators believed that certain consumers were unable to overcome biases, were so critical that they had no impact, were deliberately obstructive, or were merely promoting personal or political interests or were fighting among themselves for power.⁴⁹⁰

Some of these criticisms seem applicable to the person funded to participate in the public meetings. A Commission staffer described the individual as a "thorn in the proceedings, who established herself as consumer adversary" and who summarily rejected as premised on "ulterior motives" proposals offered by industry and others.⁴⁹¹ An industry attorney said that the "art of compromise was almost totally alien" to the consumer who was so critical that the person was "totally ineffective."⁴⁹² Although these assessments appear to implicate style, the CPSC adopted few of the advocate's substantive suggestions. However, several seem valid or were addressed: agency staff found that the consumer raised "legitimate concerns about some" provisions in the material submitted by the NRPA but that

REPORT, *supra* note 31. The assertions as to staff were gleaned principally from interviewing those familiar with the proceeding and partially from the OPPE REPORT. See OPPE REPORT, *supra*.

487. See OPPE REPORT, *supra* note 31 (assertions were gleaned principally from interviewing those familiar with the proceeding and partially from the OPPE REPORT).

488. These assertions were gleaned from interviewing those familiar with the proceeding, but funded participants were impressed more favorably than CPSC employees who were impressed more favorably than industry representatives.

489. These assertions were gleaned from interviewing those familiar with the proceeding. The degree of favorable impression observed, however, is similar here, although CPSC employees were more critical. See *supra* note 488 (discussion of favorable impressions).

490. These criticisms came principally from industry representatives, but some were made by CPSC employees. Several people whom I interviewed claimed some consumers thought that all manufacturers were "out to kill children" while some manufacturers thought that all consumers were "out to destroy industry."

491. See TI with CPSC employee 3, *supra* note 463.

492. See TI with industry representative 2.

the solutions offered "severely underestimated" cost, were "subjective" and lacked supporting test data.⁴⁹³ Moreover, the individual contended that the input provided caused the Commission's "general counsel to study" the possibility of labeling and that the official adopted the views offered.⁴⁹⁴

The funded public comments on the NBS reports generally seem to have been better. Two agency staffers who analyzed the submissions said that numerous ideas proffered were considered seriously and that several recommendations strongly influenced CPSC resolution of questions at issue or actually were included in the guidelines ultimately published.⁴⁹⁵ A "constructive suggestion used in preparing the handbooks" was that "technical data for manufacturers" appear in a section separate from that providing practical material for consumers.⁴⁹⁶ One agency employee thought that a few of the compensated submissions did not significantly help the CPSC in revising the NBS documents, but the staffer assigned "high ratings to some," especially for "keen insights on the real world of children's play that regulators as manipulators of magic numbers" lack.⁴⁹⁷ A technical expert from the NBS found that some comments were "very valid and worth addressing" and that others were "anecdotal and not too relevant."⁴⁹⁸ A third Commission employee agreed, adding that "those paid the most did not submit the best comments,"⁴⁹⁹ while a fourth agency staff member said the input "essentially repeated earlier suggestions."⁵⁰⁰ My reading confirms these evaluations: two reimbursed comments were uncritical; three compensated submissions were premised more on anecdotes and personal opinions than on data; three were extensive; and two were sophisticated.⁵⁰¹

III. CONCLUSIONS FROM CONSUMER PRODUCT SAFETY COMMISSION EXPERIMENTATION WITH THE OFFEROR PROCESS

A. *Specific Conclusions*

1. Benefits and Disadvantages of Government Sponsored Public Participation

Government supported nonindustry participation in the offeror initiatives conducted by the CPSC had numerous salutary effects throughout

493. See CPSC Memorandum from Terry Rogers to Elaine Besson (Mar. 16, 1978).

494. See TI with funded participant 1, *supra* note 459; *cf. id.* (consumer developed much valuable data). See generally CPSC Memorandum, *supra* note 493 (more discussion of consumer's input).

495. See TI with CPSC employee 3, *supra* note 463; TI with CPSC employee 4.

496. See CPSC Memorandum from Terry Rogers to Elaine Besson (Dec. 18, 1980).

497. TI with CPSC employee 1, *supra* note 457.

498. TI with NBS employee 1, *supra* note 468.

499. See TI with CPSC employee 5.

500. See TI with CPSC employee 2, *supra* note 459.

501. See comments available in CPSC files.

proposed standard development and Commission decisional processes.⁵⁰² For instance, reimbursed individuals and entities fashioned felicitous frameworks for decisionmaking at the commencement of the processes and thereafter offered novel information or new perspectives on questions already in dispute, and many of these contributions were relied upon by decisionmakers in resolving issues or in supporting determinations reached.⁵⁰³ Moreover, the quality of compensated involvement could fairly be characterized as respectable.⁵⁰⁴ For example, much of the input was accurate while most of the ideas asserted were advocated effectively.⁵⁰⁵ Participant funding also afforded a number of advantages which pertain less closely to decisionmaking processes. Reimbursement promoted participation by individuals and organizations whose interests theretofore had been underrepresented, if championed at all; remedied an imbalance in information and views presented to those involved in proposed standard development and ultimately to the Commission; and was rather inexpensive, especially in contrast to other devices for securing the requisite input on which decisions are premised.⁵⁰⁶

However, compensated participation also was inefficacious, having detrimental or minimal effect on decisional processes; lacked quality; and had deleterious ramifications related less directly to decisionmaking.⁵⁰⁷ Funded contributions were repetitive, incorrect or unsubstantiated, which could have the significant harmful implication of delay. Certain reimbursed people and entities lacked the ability to articulate fairly or clearly their views, and a few simply did not have negotiating skills. Government funding occasionally failed to facilitate participation by individuals or groups that previously had not been involved in decisional processes or to alter meaningfully the imbalance in data and perspectives conveyed to decisionmakers or the composition of participants in decisional processes.⁵⁰⁸

502. The benefits and disadvantages that follow constitute a cursory and selective, although representative, summary of the proceeding—specific assessment in § II.B. which derives examples from the analysis. As in that evaluation, the focus is on the proposed standard development phase even though much said also applies to the second, intra-agency stage of standard development.

503. There obviously are many other advantages. See Tobias, *supra* note 2, at § III.A.1. (listing number of other advantages, most of which apply to the offeror proceedings); Tobias, *supra* note 3, at § IV.A. (same).

504. Quality and efficacy are not completely distinct concepts. Cf. *supra* notes 42-43 and accompanying text (description of both).

505. See Tobias, *supra* note 2, at § III.A.1. (listing other examples, most of which apply to the offeror initiatives).

506. See *id.* (other benefits, most of which apply to the offeror proceedings); *id.* at n.357 (more discussion of relative expense in an analogous context). Indeed, so little was paid those funded in the offeror process that the value of their input may have been jeopardized. See notes 27-28 and accompanying text. *But cf. infra* note 513 and accompanying text (offeror process costly).

507. Numerous disadvantages were essentially the opposites of the advantages.

508. See Tobias, *supra* note 2, at § III.A.1. (listing other disadvantages, most of which apply to the offeror initiatives); Tobias, *supra* note 3, at § IV.B. (same).

Nonetheless, most of these difficulties can be treated or at least their worst aspects can be ameliorated.⁵⁰⁹ But a few of the problems may not be amenable to solution or they could be the fixed costs of an otherwise worthwhile enterprise.⁵¹⁰ Perhaps most interesting was that the efficacy and quality of compensated involvement were so respectable, given the considerable constraints imposed, especially by the offeror process itself.

2. The Offeror Process and Its Implications for Government Sponsored Public Participation

a. Benefits and Disadvantages of the Offeror Process

The offeror process afforded some advantages as a mechanism for standard setting. For instance, it was rather expeditious, particularly in comparison to other techniques for developing standards.⁵¹¹ Indeed, there may have been a few situations in which the procedure could have been applied effectively, although at considerable expense and no more efficiently than had the CPSC undertaken the work.⁵¹²

But the offeror process also had numerous detrimental implications, such as excessive complexity and high cost,⁵¹³ and the device did not function very well as a mechanism for making decisions or resolving disputes. Indeed, there is widespread agreement among individuals and entities familiar with the offeror process that it generally was ineffective. This view is reinforced partly by the fact that no mandatory requirements resulted from half of the standard development proceedings and the compulsory controls developed in the remaining initiatives were somehow undone as well as by the ultimate demise of the procedure itself. There are numerous reasons why the process failed to work well, for which all involved with the mechanism bear some responsibility.

Congress created a new agency and assigned it many tasks, one of which was to promulgate consumer product safety standards that had been drafted in proposed form pursuant to an unprecedented administrative procedure.⁵¹⁴ The legislative branch afforded the CPSC little guidance on

509. For instance, decisionmaker need and participant capability can be better matched. See Tobias, *supra* note 3, at § IV.C. (listing other examples).

510. See *id.* at 951 (it is very difficult to prescribe and apply eligibility criteria for selecting funding applicants); *id.* at 950-52 (listing other problems associated with compensation); Tobias, *supra* note 2, at § III.A.2.-3. (discussion of funded participation's "relative and comparative value" and a "contextual analysis of efficacy," both of which essentially are applicable to the offeror proceedings).

511. Cf. Schwartz, *supra* note 3, at 95 (CPSC completion of lawn mower standard in less than five years reasonable in comparison to time required by private standards—writing entities).

512. See *id.* at 66-68.

513. See *id.* at 62-68, 75, 94-95.

514. See Scalia & Goodman, *supra* note 3 (comprehensive treatment of other tasks assigned CPSC); Schwartz, *supra* note 3 (same).

how the novel mechanism might be implemented. But Congress imposed a number of onerous requirements upon Commission use of the offeror process as well as time frames for satisfaction of those requirements which were woefully unrealistic in light of prior experience with standard development.⁵¹⁵ In fact, the process prescribed by statute may have been ill-conceived, particularly insofar as it contemplated that an extra-agency entity could write promptly mandatory consumer product safety standards that would educate, would be reviewed expeditiously by, and would be acceptable to, CPSC staff; would satisfy the legislative commands; and would accommodate the political and policy preferences of the Commissioners.⁵¹⁶

The young agency, hampered by all of the difficulties that invariably accompany the creation and nascent operation of a new governmental unit—such as implementing its organic statute⁵¹⁷—admirably attempted to institute the offeror scheme but understandably proceeded by trial and error and made numerous initial mistakes. The CPSC decided to develop mandatory consumer product safety standards for several products as to which compulsory requirements were marginally necessary because the products posed insignificant risk, were amenable to treatment through voluntary controls, or were not within Commission jurisdiction. Correspondingly, the CPSC chose to develop mandatory standards for other products that were complicated or presented hazards which were difficult to remedy with compulsory requirements.

The agency also instituted ineffective procedures for selecting offerors and chose entities that lacked adequate resources, expertise or detachment, especially from regulated interests. Moreover, the CPSC paid only out-of-pocket expenses to individual members of the public and rarely supplied them with independent technical assistance. Furthermore, the agency afforded deficient guidance throughout standard development processes.

At the outset, for example, the Commission failed to circumscribe standard development by limiting the number of hazards to be addressed or by setting priorities among them and required offerors to treat risks that were unsolvable or as to which there was little documentable evidence of injury.⁵¹⁸ After work commenced, for instance, agency staff were not involved actively and even had adversary relationships with offerors; refused to provide necessary data in the possession of the CPSC or to secure such information from industry; and failed to answer questions or to facilitate communications with the Commissioners respecting their expectations.

515. See Schwartz, *supra* note 3, at 64, 95 (relating to time frames). Typical onerous requirements were that standards be performance-oriented “whenever feasible” and be supported by substantial evidence and that opportunities be provided for extensive extra-Commission involvement.

516. See *infra* note 523 and accompanying text.

517. See Schwartz, *supra* note 3, at 76 (“A new agency like the CPSC has to establish itself, set its priorities, test its statute, and experiment with its enforcement tools”).

518. CPSC also failed to assess the risks to be treated, promising solutions to the risks or the potential for voluntary compliance.

Many of these problems subsequently plagued the CPSC, which consumed twice as much time reviewing and revising offeror submissions as had been required to prepare them and severely criticized the materials tendered. The CPSC as well felt compelled to contract for expensive new studies and testing, to substitute Commission judgment for the offeror on appropriate levels of safety, essentially to replicate the proposed standard development process, and to revise significantly the proposed recommendations of offerors. In fairness, a substantial number of the offeror proceedings commenced within the same five-month period, so that the CPSC "did not learn of its mistakes in one project in time to avoid them in another."⁵¹⁹

Additional individuals and entities involved in the offeror process also were responsible for the way in which it functioned. Manufacturing representatives initiated some proceedings principally for reasons of commercial advantage and then pursued those economic interests throughout the standard development processes. In other offeror initiatives, representatives of producers could have influenced unduly certain offerors; did oppose vigorously the imposition of requirements; dominated the proposed standard development effort; and fought among themselves, and with all the other participants, especially over the competitive implications of particular solutions. Offerors may have lacked the requisite resources or expertise to accomplish their difficult missions; might have managed improperly standard development; and could have selected incorrectly, and supported inadequately, citizen participants. Moreover, offerors may have been unable to generate original, or other important, data or to secure much information from industry or the agency; did disregard CPSC instructions; tendered packages which were unresponsive, incomplete, or disorganized; or proposed controls that were deficient in several ways.⁵²⁰ A number of these difficulties delayed offeror drafting of proposed standards and agency promulgation of regulations, necessitating much additional CPSC work, substantial revision of offeror submissions and even replication of proposed standard development. Individual citizens exhibited certain inadequacies of offerors and some weaknesses of their own but were most deficient in technical areas.⁵²¹

Thus, the Commission's experience with the offeror process is replete with contradictions. The offeror procedure was ineffective in part because it failed to satisfy a number of the same conditions that underlie the successful application of newer decisional processes.⁵²² Moreover, the defects

519. Schwartz, *supra* note 3, at 94.

520. The proposals submitted resembled voluntary controls already rejected, were unfinished, were inadequately supported or were too general, ambitious or design-oriented, or would have favored specific commercial concerns or provided insufficient injury protection.

521. Some lacked negotiating skills and a few even were recalcitrant.

522. CPSC often did precisely the opposite of what the conditions indicated, but occasionally was simply "off." See *infra* notes 538-41 and accompanying text (listing numerous conditions).

of the offeror mechanism appeared so intrinsic and so intractable—while entities responsible for the procedure apparently did so little to remedy, and even exacerbated, those inherent problems as well as created so many additional difficulties—that the process could not be made to work well.

b. Implications of the Offeror Process for Government Sponsored Public Participation

The considerations in the sentence immediately above illustrate that the offeror process itself may have had important deleterious ramifications for the perceived efficacy and quality of compensated citizen involvement in it, consequences which funded individuals and entities effectively were powerless to control. Indeed, such public participation may have been compromised or even overshadowed. For instance, Congress characterized the CPSC's imposition on the agency of "conflicting responsibilities"—first, to weigh heavily the offeror judgments reflected in proposals submitted, and second, to insure the adequacy of standards promulgated—as a "serious flaw" and "one of the principal impediments to the Commission's standard setting efforts."⁵²³ Those statutory mandates significantly undermined any potential impact that citizen input might have had because the CPSC discharged the second obligation by substantially modifying offeror recommendations, substituting agency judgment and disregarding nonindustry contributions. Accordingly, reimbursed public involvement appeared less efficacious than it actually could have been for reasons beyond the control of those compensated.⁵²⁴

In short, there are numerous explanations why the offeror process worked badly, for which all involved with the procedure have certain responsibilities. Moreover, that process had important detrimental implications for funded participation's perceived effectiveness and quality which reimbursed parties essentially had little power to affect. Most importantly, however, experience with the offeror procedure and compensated involvement in the offeror proceedings provides valuable perspectives on future experimentation.

3. Lessons

CPSC's experience with the offeror process, therefore, yields a number of instructive and unanticipated insights. Most significantly, experimentation at the Commission illustrates that nonregulated individuals and entities can have salutary effects on decisionmaking and that consensual decisional processes have considerable promise as applied in the administrative agency context. The experiment also offers helpful suggestions about situations in which it is most likely that nonindustry interests will enhance decisional

523. See *House Offeror Report*, *supra* note 33, at 7-8.

524. See *id.* at 6-88. Of course, the activity could have appeared less efficacious for other reasons attributable to the offeror process or to exogenous factors, like pressure from Congress.

processes and that deployment of consensual mechanisms will be successful. Decisional processes most probably will be improved when those responsible for decisions are very receptive to, and have considerable need for, non-commercial input and the individuals and entities contributing that input have substantial ability to fulfill such decisionmaker need. However, compensation adequate to allow meaningful public participation must be supplied, while decisionmaking may be influenced by factors extrinsic to the citizen involvement funded, such as Congressional intervention, or even by the decisional technique itself. Correspondingly, consensual decisional processes are most likely to function effectively when certain conditions are satisfied, as examined below.⁵²⁵

Implementation of the offeror procedure principally by the Commission and secondarily by offerors confirms most of these propositions. With respect to reimbursed non-regulated participation, the CPSC and offerors failed to tailor the needs of decisionmakers to the abilities of those reimbursed. When technical skill was required, offerors which lacked the requisite expertise or user consumers were chosen, and when conciliators were indicated, recalcitrant individuals were chosen. When the needs of decisionmakers were matched more precisely with the capabilities of those involved in the offeror proceedings, funding sufficient to permit effective participation was not always provided. Compensation also was paid in circumstances in which public input was not needed or was unlikely to be considered or there was little prospect of affecting decisional processes.⁵²⁶ Accordingly, Commission experimentation teaches that program administration is important to the success of reimbursed citizen involvement.

Concomitantly, the experience at the CPSC testifies to the essential workability of consensual decisional processes when applied in the administrative sphere while affording instructive insights, albeit by negative implication, on suitable conditions for the employment of consensual mechanisms. The Commission used the offeror procedure in a number of contexts when its application was inadvisable or perhaps unwarranted. For example, the agency employed the offeror process when no regulation, much less mandatory control, was necessary or could be imposed feasibly or invoked the offeror procedure when petitioned to do so by certain segments of a particular industry that desired regulation for reasons of competitive advantage, not safety. Even in circumstances which appeared more conducive to the application of consensual decisional processes, however, the offeror procedure was structured less carefully than it might have been. For instance, the number of participants was too large to permit meaningful

525. See *infra* notes 538-41 and accompanying text.

526. See *supra* text accompanying note 523 (identifying "fundamental flaw"). The "fundamental flaw" Congress identified meant that there was little prospect of affecting CPSC decisionmaking. Deficiencies in CPSC administration of funding in the offeror process were quite similar to those evidenced in experimentation with funding outside the offeror process. See Tobias, *supra* note 2, at § III.A.4.

exchange or the Commission refused to provide guidance when the need for it was imperative. Thus, CPSC experimentation illustrates that consensual decisional processes should be employed selectively and once chosen, structured with careful attention to certain details if consensual techniques are to be applied successfully.⁵²⁷ The offeror procedure also was costly, even though subsequent experimentation with its successors seems inexpensive, especially in contrast to other mechanisms for developing standards, for acquiring decisionmaking input, and for resolving disputes.⁵²⁸

The Commission's experience instructs as well that a newly-created unit of government, plagued by all of the complications inherent in becoming established, is not the best governmental entity to experiment with a unique procedure for developing standards or with a nascent technique for promoting public involvement in that process like participant compensation. Therefore, the CPSC probably was an inauspicious choice both for testing the offeror mechanism and the reimbursement concept. However, if another substantial participant funding effort—that conducted by the Federal Trade Commission—could be described similarly,⁵²⁹ while the offeror process could be made to work only in a small number of situations and even then at considerable cost, perhaps both participant reimbursement and the offeror procedure were deficient in certain respects. These considerations and numerous factors examined already suggest that Congressional abolition of the offeror mechanism may have been indicated. Thus, in light of the problems encountered in making the process function effectively, the expense incident to doing so, and determinations respecting allocation of limited resources, the legislative action appears reasonable.⁵³⁰

B. General Conclusions

Compensated noncommercial involvement in Commission offeror initiatives was valuable enough to justify revitalization of the reimbursement

527. See *infra* notes 538-41 and accompanying text (number of conditions that may be important to success).

528. See *supra* note 513 (relating to the offeror mechanism); ACUS Recommendation 86-3, 51 Fed. Reg. 25,641, 25,643 (1986) (codified at 1 C.F.R. § 305.86-3 (1987)) (preamble). Harter, *supra* note 176, at 56 (relating to the apparently inexpensive nature of its successors); cf. ACUS Recommendation 85-5, 50 Fed. Reg. 52,893, 52,895 (1985) (codified at 1 C.F.R. § 305.85-5 (1987)) (preamble) (ACUS belief that, although aspects of negotiated rulemakings may entail some short-term additional costs, those costs are more than offset by potential long-range savings); Susskind & McMahon, *supra* note 1, at 152, 163 (EPA "negotiated rulemaking appeared to produce more legitimate outcomes at a lower cost than usual" but "too few data available to calculate formally the cost-effectiveness of negotiated rulemaking").

529. Boyer, *Funding Public Participation in Agency Proceedings: The Federal Trade Commission Experience*, 70 GEO. L. J. 51, 140 (1981) ("The FTC of the 1970's, in many respects, was a particularly unfortunate time and place to experiment with direct funding for public participation").

530. Much that offeror experimentation teaches is not novel or unanticipated but even this is valuable insofar as it reaffirms what had been reported before. See *infra* note 540 and accompanying text (relating to the offeror process, for example, agency involvement must be planned carefully); Tobias, *supra* note 2, at note 368 (relating to participant funding).

concept and ongoing work in appropriate circumstances at the CPSC and at additional units of government. Funded participation actually was quite beneficial, considering all of the limitations imposed, particularly by the offeror process. Similarly, that novel procedure operated rather respectably, in light of the formidable obstacles to success, thereby testifying to the inherent workability and considerable promise of consensual decisional processes, even in their earliest, least refined conceptualizations. Therefore, it is unnecessary to ascertain whether the offeror process should be reinstated because continuing experimentation with successors such as regulatory negotiation ought to suffice.

IV. SUGGESTIONS FOR FUTURE EXPERIMENTATION

Participant reimbursement is one condition that will be important to the successful application of consensual decisional processes in certain contexts.⁵³¹ I have offered already numerous prescriptions for experimentation with compensation.⁵³² Accordingly, the recommendation summarizing the suggestions made only needs to be stated here: "Participant funding should be revived and rigorously evaluated, other mechanisms for rectifying the imbalance in input and improving decisionmaking should be explored and analyzed, and the cost and efficacy of these alternatives should be compared."⁵³³

Vigorous experimentation with successors of the offeror process should continue and ought to be assessed closely, alternative techniques for enhancing decisionmaking and for resolving disputes should be explored and evaluated, and the expense and effectiveness of the mechanism ought to be contrasted. Experimentation, which emphasizes diversity and flexibility, should proceed selectively at the Commission and at additional governmental entities in circumstances in which consensual procedures have functioned well, appeared to have potential or have not been tried.⁵³⁴

531. For example, in regulatory negotiations, individual citizens or "public interest group" representatives that participate probably will require resource support so that they can be effective. See Harter, *supra* note 176, at 55-57; Susskind & McMahon, *supra* note 1, at 160-61. Indeed, ACUS twice has recognized the need for such support and recommended that provision be made for it. See ACUS Recommendation 85-5, 50 Fed. Reg. 52,893, 52,896 (1985) (codified at 1 C.F.R. § 305.85-5 (1987)) (paragraph 9); ACUS Recommendation 82-4, 47 Fed. Reg. 30,708, 30,710 (1982) (codified at 1 C.F.R. § 305.82-4 (1987)) (paragraph 9).

532. See Tobias, *supra* note 2, at § IV.; *cf.* Tobias, *supra* note 3, at § IV. (earlier prescriptions).

533. Tobias, *supra* note 2, at text accompanying note 380. See *supra* note 531 (ACUS twice recognized need for resource support for public participation in negotiated rulemakings and recommended that provisions be made for such support).

534. For instance, work with regulatory negotiation should continue at the Environmental Protection Agency, because the agency has experimented successfully with the mechanism and its experience can save expense, such as start-up costs. See *Perritt*, *supra* note 1, at 1674-82; Susskind & McMahon, *supra* note 1; see also *supra* note 1 (compilations of agencies that have negotiated rulemakings completed, ongoing or contemplated and of mechanisms available in federal administrative agency context).

The experimentation ought to be planned carefully. Agencies should study consensual mechanisms and attempt to designate situations in which their use would be most effective, although this exercise necessarily will require case-by-case consideration of the constellation of variables present in specific instances.⁵³⁵ Many units of government currently possess sufficient authority and have adequate resources to initiate most types of experimentation.⁵³⁶ Nevertheless, agencies contemplating application of consensual decisional techniques may want to assess their circumstances and if deficiencies are discovered the governmental entities should request the necessary authorization and appropriations from Congress.⁵³⁷ Agencies should implement efforts that maximize the potential for flexible experimentation, are administered carefully and capitalize on experience at the Commission with the offeror process, albeit by negative inference, or at other agencies with similar devices.

Previous experience with consensual decisional processes, especially regulatory negotiation, indicates that their employment is more likely to be successful when certain conditions are satisfied although situation-specific analysis will be necessary. Nevertheless, it is possible to identify many conditions that will apply in most instances. The number of affected interests participating ought to be circumscribed, none should possess so much power that it can control the outcome, and all interests should be committed to the process, believing that they stand to benefit.⁵³⁸ The issues in dispute

535. Of course, this complicates planning. See *infra* notes 538-41 and accompanying text (numerous relevant variables); see also ACUS Recommendation 86-3, 51 Fed. Reg. 25,641, 25,643 (1986) (codified at 1 C.F.R. § 305.86-3 (1987)) (preamble); ACUS Recommendation 85-5, 50 Fed. Reg. 52,893, 52,895 (codified at 1 C.F.R. § 305.85-5 (1987) (preamble) (discussions of need for, and difficulties entailed in, case-by-case consideration).

536. See Harter, *supra* note 176, at 12, 22, 107-09, 112-13 (helpful background discussion of agency power to conduct negotiated rulemakings); Susskind & McMahon, *supra* note 1, at 157-59 (same); cf. Perritt, *supra* note 1, at 1629 (finding extant agency authority sufficient to conduct negotiated rulemakings); ACUS Recommendation 86-3, 51 Fed. Reg. 25,641, 25,643-45 (1986) (codified at 1 C.F.R. § 305.86-3 (1987) (recognizing extant agency authority sufficient to initiate experimentation with certain other types of ADR); Tobias, *supra* note 3, at § III.A. (sufficient implied agency authority to fund public participants).

537. Congress should be receptive to such requests given the successful, cost effective nature of experimentation to date. Comprehensive legislation has not been enacted, although ACUS has recommended that Congress "facilitate the regulatory negotiation process by passing legislation." ACUS Recommendation 82-4, 47 Fed. Reg. 30,708, 30,709 (1982) (codified at 1 C.F.R. § 305.82-4 (1987)) (paragraph 2). See Perritt, *supra* note 1, at 1629 (cautioning against Congressional amendment of the Administrative Procedure Act because of potential flexibility loss and of Federal Advisory Committee Act because unnecessary although recommending that General Services Administration amend regulations to clarify uncertainty regarding advisory committees and ADR); see also ACUS Recommendation 86-3, 51 Fed. Reg. 25,641, 25,643-45 (1986) (codified at 1 C.F.R. § 305.86-3 (1987)) (recognizing necessity for Congress to authorize experimentation with certain types of ADR and so recommending).

538. See ACUS Recommendation 82-4, 47 Fed. Reg. 30,708, 30,709 (1982) (codified at 1 C.F.R. § 305.82-4 (1987)) (paragraphs 4(c), (e) and (f)); Harter, *supra* note 176, at 45-49, 51-52; Perritt, *supra* note 1, at 1643-44. Susskind and McMahon agree with the last proposition in the text. See Susskind & McMahon, *supra* note 1, at 157. But they disagree with the first

ought to be "ripe for decision" and should be sufficiently numerous and different to allow trading, while disposition of the questions should not be governed by basic research and resolution of the issues cannot demand compromise by participants on core principles.⁵³⁹ Those involved should anticipate that a decision will be imposed externally, if they do not agree, and participants ought to have a "reasonable expectation" that the agency will be involved and receptive to the accommodation reached.⁵⁴⁰ These conditions also may have important components, such as provision of funding for nonregulated interests that participate. Finally, it is important to recognize that the requirements enumerated may vary, and that other conditions may apply, in any given context.⁵⁴¹

two propositions. *See id.* at 153-56. I rely most substantially here and in the remainder of this paragraph on Harter and Perritt, *supra* and on ACUS Recommendations 82-4 and 85-5 premised respectively on Harter and Perritt, but Susskind and McMahon are very helpful. Of course, much said about the offeror process in this article also applies. For example, the infighting among manufacturers in an industry observed in several offeror proceedings prefigures Professor Perritt's statement that the "most difficult challenge to a negotiated agreement involves not the process at the negotiating table but the process of resolving intraconstituency disagreements away from the table." Perritt, *supra* at 1715; *cf.* ACUS Recommendation 85-5, 50 Fed. Reg. 52,893, 52,895 (1986) (codified at 1 C.F.R. § 305.85-5 (1987)) (paragraph 7) (recognizing need to "address internal disagreements within a particular constituency").

539. *See* ACUS Recommendation 82-4, 47 Fed. Reg. 30,708, 30,709 (1982) (codified at 1 C.F.R. § 305.82-4 (1987)) (paragraphs 4(a), (b) and (d)); Harter, *supra* note 176, at 47-52, Perritt, *supra* note 1, at 1643-44. Susskind & McMahon essentially agree with the last three propositions. *See* Susskind & McMahon, *supra* note 1, at 152, 160-61. But they disagree with the first proposition. *See id.* at 156-57.

540. *See* ACUS Recommendation 85-5, 50 Fed. Reg. 52,893, 52,895 (1985) (codified at 1 C.F.R. § 305.85-5 (1987)) (paragraphs 1 and 2); ACUS Recommendation 82-4, 47 Fed. Reg. 30,708, 30,709-10 (1982) (codified at 1 C.F.R. § 305.82-4 (1987)) (paragraphs 4(a), 4(g) and 8); Harter, *supra* note 176, at 47-48, 51-52, 57-67; Perritt, *supra* note 1, at 1711-13. Susskind & McMahon agree with the second proposition. *See* Susskind & McMahon, *supra* note 1, at 157-63. But they found participant willingness to negotiate energetically and in good faith as significant as deadlines. *See id.* at 157. *See also* Perritt, *supra* at 1629 ("most important insight" gleaned from analyzing completed negotiated rulemakings was that agency sponsoring negotiations should participate).

541. The conditions enumerated in the paragraph in the text are drawn principally from experience with negotiated rulemakings. The evaluator of four completed negotiated rulemakings has offered the following cogent admonitions:

It is important to view both the 1982 and the 1985 [negotiated rulemaking] recommendations of the ACUS as a guide to issues to be considered rather than a formula to be followed. Negotiation is intrinsically a process that cannot be specified entirely in advance. Accordingly, what will 'work' in a particular case depends on the number of factors: substantive issues, perception of the agency's position by affected parties, relationships among the parties, authority of party representatives in the negotiations, negotiating style of the representatives, divergence of views within each constituency represented, and skill of agency personnel and mediators. Some of these variables almost certainly will change several times during the negotiations. An agency cannot expect that the pattern followed successfully by another agency, or even by itself on another issue, can be transplanted without modification to another negotiation.

Perritt, *supra* note 1, at 1629 (citation omitted); *accord*, ACUS Recommendation 85-5, 50

Congress could institute the recommendations above. It can analyze prior experimentation with consensual techniques, delineate appropriate circumstances for future work in substantive statutes and make available sufficient money for experimentation through appropriations measures. Should Congress decide not to enact authorizing legislation, agencies currently possess the requisite power to continue experimenting selectively with consensual decisional procedures.⁵⁴²

The experimentation that is conducted ought to be assessed "rigorously" by an expert evaluator who is not affiliated with the agency.⁵⁴³ An attempt then should be undertaken to reach more definitive judgments than before regarding the effectiveness of consensual decisional processes and the optimal conditions for their application. Finally, the efficacy and cost of these mechanisms should be contrasted with other measures employed to improve decisionmaking and resolve disputes.

CONCLUSION

Consumer Product Safety Commission experimentation with the offeror process and with funded nonindustry participation in that procedure is very informative. Compensated citizen involvement was sufficiently worthwhile to support additional experimentation in appropriately tailored contexts. The offeror process did not work particularly well. The experience of the CPSC, however, does afford numerous valuable insights for successful, future experimentation with the successors of the offeror procedure which appears to be promising mechanisms for enhancing decisional processes and for facilitating dispute resolution in the modern administrative state.

Fed. Reg. 52,893, 52,895 (1985) (codified at 1 C.F.R. § 305.85-5 (1987)) (preamble). Of course, these admonitions apply equally to experimentation with other consensual decisional processes as well as to decisions to employ particular procedures in specific contexts. See ACUS Recommendation 86-3, 51 Fed. Reg. 25,641, 25,643 (1986) (codified at 1 C.F.R. § 305.86-3 (1987)) (preamble). For comprehensive catalogs of conditions and their components as well as helpful guidance for agency implementation of consensual processes, see ACUS Recommendation 86-3, *supra*, at 25,643-45; ACUS Recommendation 85-5, *supra*, at 52,895-96; ACUS Recommendation 82-4, 47 Fed. Reg. 30,708, 30,708-10 (codified at 1 C.F.R. § 305.82-4 (1987)); Perritt, *supra*, at 1708-17; Harter, *supra* note 176.

542. See *supra* notes 536-537 (discussions of agency power and advisability of Congressional implementation). Courts should not invalidate such exercise of authority unless it clearly is in excess of agency statutory power. See also ACUS Recommendation 86-3, 51 Fed. Reg. 25,641, 25,643 (1986) (codified at 1 C.F.R. § 305.86-3 (1987)) (Congress and courts should not inhibit agency uses of ADR by requiring formality where inappropriate).

543. See Susskind & McMahon, *supra* note 1, at 140-42 (helpful discussion of evaluation); Harter & Eads, *Policy Instruments, Institutions and Objectives: An Analytical Framework for Assessing "Alternatives" to Regulation*, 37 ADMIN. L. REV. 221 (1985) (broader, theoretical discussion of techniques); see also ACUS Recommendation 86-3, 51 Fed. Reg. 25,641, 25,643 (1986) (codified at 1 C.F.R. § 305.86-3 (1987)) (preamble) (recognizing increasing use of ADR and recommending supplementation with further empirical research).