

GREAT EXPECTATIONS AND MISMATCHED COMPENSATION: GOVERNMENT SPONSORED PUBLIC PARTICIPATION IN PROCEEDINGS OF THE CONSUMER PRODUCT SAFETY COMMISSION

CARL TOBIAS*

During the last twenty years, numerous proposals for enhancing the quality of federal administrative agency decisionmaking have been offered, but few actually were implemented. One controversial approach, with which fourteen agencies experimented, has been the reimbursement of non-regulated individuals and organizations for the costs of their involvement in administrative proceedings.¹ A principal purpose of that public funding was to improve agency decisionmaking by rectifying the participatory imbalance between regulated parties and non-commercial interests involved in administrative initiatives; however, little of the government-supported citizen activity that occurred has been analyzed. Participant compensation effectively has been discontinued and most agency proceedings in which there was reimbursed public involvement have been completed.² But before the memories of persons familiar with funded activity fade and additional sources of information are lost, it is appropri-

* Professor of Law, University of Montana. Thanks to Barry Boyer, Bari Burke, Ernest Gellhorn, Tom Huff, Bill Luneburg, Dick Merrill, Bill Rossbach, Peggy Sanner and Roy Schotland for their valuable suggestions and to George Ball, Beverly Barnett, and Jeff Befort for their helpful research assistance. Thanks also to the Harris Trust for generous, continuing support and to Beth Stevenson for indefatigable typing. Thanks as well to all who so generously expressed their opinions of funded public participation. I am responsible for any errors that remain.

1. The terms "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. The words "public" and "citizen" are employed interchangeably to mean "non-industry." The terms "involvement," "participation" and "activity" are used synonymously to mean input intended to contribute to the resolution of issues in proceedings. "Efficacy" and "effectiveness" are employed interchangeably to describe the impact public participation has on agency decisionmaking.

2. I have ascribed discontinuation to "judicial interpretation, antiregulatory reaction, budget-cutting, and bureaucratic caution." 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, 955 (1982). Although citizen funding was not discontinued officially by many agencies until 1982 and several still are authorized to provide compensation, it was effectively discontinued with the advent of the present Administration. See *infra* notes 46-49 and accompanying text.

ate to evaluate some compensated participation to ascertain its quality and how the involvement affected government decisional processes. One way of accomplishing this is to examine reimbursed citizen activity in initiatives conducted by the Consumer Product Safety Commission (CPSC). That agency paid many individuals and groups involved in numerous proceedings during a nine-year period to perform a number of tasks in diverse contexts.³

The initial section of this Article describes the origins and development of participant funding, focusing on the Consumer Product Safety Commission's institution and implementation of the compensation concept. The second part of the Article assesses the quality, and the impact on administrative decisionmaking, of the reimbursed public involvement that occurred at the Commission. The third portion draws conclusions about funded activity in agency matters from the CPSC's experience, and the final section offers suggestions for future experimentation.

I. ORIGINS AND DEVELOPMENT OF PARTICIPANT REIMBURSEMENT

A. *Government-wide Participant Reimbursement*

1. *Origins and Early Development*

The background of the compensation idea need only be examined briefly in this Article.⁴ The conventional wisdom for some time has been that an important deficiency in administrative decisionmaking is bias toward interests regulated by the government.⁵ This phenomenon has been explained in numerous ways; theories of "client capture," "revolving doors" between regulated industry and regulating agency, conflict avoidance, and overly general congressional delegations are but a few.⁶ Many

3. See *infra* text accompanying notes 68-99.

4. Others have competently treated the difficulties that the funding concept was designed to remedy. See Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393 (1981); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975); Note, *Federal Agency Assistance to Impecunious Intervenors*, 88 HARV. L. REV. 1815 (1975). Cf. Tobias, *supra* note 2, at § 1 (additional discussion of concept's origins and implementation). See generally J. FREEDMAN, *CRISIS AND LEGITIMACY* (1978); Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 507 (1985); Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986) (discussions of ferment in administrative law relevant to rise of compensation).

5. See, e.g., the sources cited *supra* note 4; Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359 (1972); Lazarus & Onek, *The Regulators and the People*, 57 VA. L. REV. 1069 (1971) and the sources cited therein.

6. These theories and other explanations for industry-oriented decisionmaking are explored in Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*,

critiques of the administrative process, however, mention the participatory discrepancy in agency proceedings between regulated parties and non-commercial interests.⁷ Because the information on which administrative officials premise their determinations is submitted principally by regulated entities, agency choices predictably reflect the perspectives of industry interests.⁸ A primary reason for the disparities in involvement and input of non-commercial and regulated parties is the substantial expense of participation in administrative initiatives.⁹ The view thus evolved that if the public could enhance agency decisionmaking by providing more balanced involvement and data, but was stymied by resource deficiencies, the government should encourage non-commercial participation by affording economic assistance.¹⁰ Citizen funding was one response to these considerations.¹¹

60 GEO. L.J. 525, 527-30 (1972); Lazarus & Onek, *supra* note 5, at 1092-94; Stewart, *supra* note 4, at 1681-89, 1713-15; Note, *supra* note 4, at 1815-17.

7. This difficulty has been examined thoroughly in Cramton, *supra* note 6; Gellhorn, *supra* note 5; Stewart, *supra* note 4. It is important to remember that imbalanced involvement is one theory among many espoused to explain why agency decisionmaking reflects the views of the industry being regulated. There also are numerous explanations for other deficiencies in the broader administrative process. Moreover, public participation is only a "process" solution to what some critics view as the more fundamental ills of administrative government. See Sax, *The (Unhappy) Truth About NEPA*, 26 OKLA. L. REV. 239 (1973); Stewart, *supra* note 4.

8. See Cramton, *supra* note 6, at 529-30; Tobias, *supra* note 2, at 908.

9. See 3 SENATE COMM. ON GOVERNMENTAL AFFAIRS, STUDY ON FEDERAL REGULATION: PUBLIC PARTICIPATION IN REGULATORY AGENCY PROCEEDINGS, 95th Cong., 1st Sess. vii (1977) [hereinafter cited as PUBLIC PARTICIPATION STUDY]; cf. Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1006 (D.C. Cir. 1966) (costs will limit number of intervenors). For cost estimates, see PUBLIC PARTICIPATION STUDY, at 17-22; Cramton, *supra* note 6, at 538; Gellhorn, *supra*, note 5, at 389-96.

10. See, e.g., PUBLIC PARTICIPATION STUDY, *supra* note 9, at chs. 1, 2, 7; *Public Participation in Federal Agency Proceedings Act of 1977: Hearings on S. 270 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977) [hereinafter cited as *S. 270 Hearings*]; *Public Participation in Federal Agency Proceedings: Hearings on S. 2715 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 94th Cong., 2d Sess. (1976) [hereinafter cited as *S. 2715 Hearings*].

11. Of course, numerous additional solutions have been proposed to the problem of participatory imbalance and to other difficulties that plague administrative decisionmaking and government. Some are explored in the sources cited *supra* notes 4, 5, 7 and S. REP. NO. 94-863, 94th Cong., 2d Sess. 3 (1976). For recent expositions, see A Symposium on Administrative Law, *The Uneasy Constitutional Status of the Administrative Agencies*, 36 AM. U.L. REV. No. 2 (1987); Stewart, *Reconstitutive Law*, 46 MD. L. REV. 86 (1986). Moreover, the account in this paragraph is premised on an "interest representation" model of the administrative process propounded most comprehensively in Stewart, *supra* note 4. Models are matters for ongoing debate. See, e.g., Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207 (1984); Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 281-92 (1986). Cf. Cass,

In 1969, the Administrative Conference of the United States (ACUS) and the Federal Trade Commission (FTC) explored ideas which were the conceptual predecessors of participant reimbursement. After studying the involvement of indigent people in federal rulemaking, the Administrative Conference recommended that agencies compensate such individuals for the personal expenditures and lost wages they incurred when participating in administrative hearings and that Congress provide the requisite resources for this activity.¹² The Federal Trade Commission examined funding in the context of extending financial assistance to impecunious respondents charged in unfair practice proceedings.¹³ During 1970, the FTC continued to wrestle with the reimbursement concept,¹⁴ and two commentators analyzed the possibility of government sponsorship of public involvement and found that participant funding warranted additional exploration.¹⁵ In 1971, the members of the Administrative Conference supported the expansion of citizens' rights to participate in agency initiatives but rejected a recommendation that contemplated practical implementation of reimbursement.¹⁶ Moreover, the FTC commissioners, who strongly disagreed about the legality and advisability of compensation asked the Comptroller General of the United States whether the agency possessed sufficient authority to pay fees and costs incurred by indigent respondents and impecunious intervenors.¹⁷ When

Models of Administrative Action, 72 VA. L. REV. 363 (1986); Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1495-99 (1983) (analysis of models).

12. See Administrative Conf. of the United States, *Representation of the Poor in Agency Rulemaking of Direct Consequence to Them* in 1 AD. CONF. U.S. RECOMMENDATIONS & REP. 1968-1970, at 71 (1970) (recommendation No. 5). ACUS premised its recommendation on a report prepared for it by Professor Bonfield. See Bonfield, *Representation for the Poor in Federal Rulemaking*, 67 MICH. L. REV. 511, 556 (1969).

13. See *American Chinchilla Corp.*, 76 F.T.C. 1016, 1037-38 (1969).

14. For a comprehensive examination of the FTC's travails, see Boyer, *Funding Public Participation in Agency Proceedings: The Federal Trade Commission Experience*, 70 GEO. L.J. 51, 53-54 n.12 (1981).

15. See Lazarus & Onek, *supra* note 5, at 1098-1103.

16. See Administrative Conf. of the United States, *Public Participation in Administrative Proceedings* in 2 AD. CONF. U.S. RECOMMENDATIONS & REP. 1970-1972, at 376 (1971) (recommendation No. 28).

17. See *In re Firestone Tire and Rubber Co.*, 78 F.T.C. 1572, 1573 (1971) (interlocutory order); Letter from Miles W. Kirkpatrick, Chairman, FTC, to Elmer B. Staats, Comptroller General (Mar. 17, 1971). "The Comptroller General is the head of the General Accounting Office (GAO), an independent agency within the legislative branch created as a fiscal watchdog of the agencies," who is authorized to issue opinions about agency power to spend appropriated money. Tobias, *supra* note 2, at 912 n.52. Cf. *id.* (additional discussion of Comptroller and official's responsibilities). The terms "power" and "authority" are used interchangeably in this Article to describe the means by which

the financial officer answered the next year that such activity “would constitute a proper exercise of administrative discretion,”¹⁸ the Federal Trade Commission relied upon its implied power to fund participant involvement in one agency proceeding.¹⁹

2. *Decisions of the Comptroller General*

The Comptroller General subsequently reaffirmed the view on reimbursement authority first enunciated in the decision issued at the behest of the FTC, and in a number of rulings, the fiscal official ultimately held that ten additional governmental entities, including the Consumer Product Safety Commission, had implied compensation power and recognized that many other units of government might possess the requisite authority.²⁰ The Comptroller General determined that funding would be appropriate when an agency ascertained that a participant’s proposed input could “reasonably be expected to contribute substantially to a full and fair determination of the issues before it” and “lack of financial resources on the part of the person involved would preclude participation without reimbursement.”²¹ These opinions of the Comptroller General influenced the decisions of numerous governmental entities which employed implied power to fund members of the public involved in administrative proceedings.²²

3. *Congressional Activity*

In the 1970’s, Congress specifically empowered several agencies to reimburse citizens in certain contexts.²³ The 1972 Consumer Product Safety Act creating the Consumer Product Safety Commission provided for a type of participant compensation.²⁴ During 1975, Congress authorized funding by the FTC in hybrid rulemakings conducted under the

agencies justify funding public participants. *Cf.* Tobias, *supra* note 2 (more discussion of agency authority).

18. See Letter from Elmer B. Staats, Comptroller General, to Miles W. Kirkpatrick, Chairman, FTC (Aug. 10, 1972), reprinted in *S. 2715 Hearings*, *supra* note 10, at 281.

19. See *In re Firestone Tire & Rubber Co.*, 81 F.T.C. 1032 (1972).

20. For a discussion of the Comptroller’s opinions, see Tobias, *supra* note 2, at § I.C.2.

21. Letter from R.F. Keller, Deputy Comptroller General, to Rep. John E. Moss, Chairman, Oversight and Investigations Subcommittee, Committee on Interstate and Foreign Commerce (May 10, 1976), reprinted in *S. 270 Hearings*, *supra* note 10, at 428.

22. See, e.g., 44 Fed. Reg. 17,507 (1979); *id.* at 23,046, 70,743.

23. It is important to remember the difference between specific and implied compensation authority. See Tobias, *supra* note 2, at 906 n.1.

24. See 15 U.S.C. § 2056(d)(2) (1976).

Magnuson-Moss Federal Trade Commission legislation.²⁵ In 1976, the legislature provided for compensation by the Environmental Protection Agency (EPA) in the Toxic Substances Control Act.²⁶ During 1977, the legislative branch granted the Department of State (DOS) power to reimburse.²⁷ In 1978, Congress allowed the Federal Energy Regulatory Commission (FERC) to fund in the Department of Energy reorganization legislation.²⁸ During 1980, Congress passed the Equal Access to Justice Act which provided on an experimental basis for the recovery of expenses by interests such as small businesses that prevailed against agencies in adversarial adjudicatory matters, and in 1985, the legislature gave that effort permanent status.²⁹ Since 1975, members of Congress have introduced substantive proposals permitting or prohibiting government-wide participant reimbursement, but none of the bills has passed.³⁰ Although Congress occasionally employs the appropriations process to inform agencies that they may pay for citizen involvement,³¹ the legislative branch more frequently relies upon the process to instruct governmental entities that compensation is improper.³²

4. *Agency and Presidential Activity*

Since 1969, approximately twenty units of government have expressed interest in funding, while fourteen actually have exercised specific or implied power to reimburse members of the public involved in their proceedings. Five administrative agencies compensated non-commercial parties in single initiatives.³³ The Civil Aeronautics Board (CAB)

25. 15 U.S.C. § 57a(h) (1976).

26. 15 U.S.C. § 2605(c)(4) (1976).

27. 22 U.S.C. § 2692 (Supp. III 1979).

28. 16 U.S.C. § 825q-1 (Supp. III 1979).

29. See Equal Access to Justice Act, Pub. L. No. 96-481, §§ 201-208, 94 Stat. 2312, 2325-30 (1980); cf. Dods & Kennedy, *The Equal Access to Justice Act*, 50 UMKC L. REV. 48 (1981); Robertson & Fowler, *Recovering Attorneys' Fees from the Government Under the Equal Access to Justice Act*, 56 *Tul. L. Rev.* 903 (1982) (analysis of legislation). In August 1985, Congress amended and made permanent what it described as a three-year experiment. See Equal Access to Justice Act, Extension and Amendment, Pub. L. No. 99-80, 99 Stat. 183 (1985).

30. For a discussion of these legislative proposals, see Tobias, *supra* note 2, at 917-18. For a discussion of additional significant Congressional activity in the authorization process, see *id.* at 914-18.

31. For a discussion of this legislative activity, see *id.* at 914-17.

32. For a discussion of this legislative activity, see *id.* at 914-17.

33. The five agencies are the Environmental Protection Agency, the Federal Aviation Administration, the Department of Health and Human Services, the Department of Housing and Urban Development and the Department of Agriculture. See OFFICE OF TOXIC SUBSTANCES, U.S. ENVI-

funded non-industry interests in two instances, and the Department of Energy (DOE) and the Food and Drug Administration (FDA) did so in three.³⁴ The National Oceanic and Atmospheric Administration (NOAA) of the Commerce Department reimbursed citizen participants in three proceedings involving marine sanctuaries and three rulemakings.³⁵ The National Commission on Air Quality (NCAQ) paid the expenses of members of the public who attended ten workshops and a number of meetings held in regional study areas.³⁶ The State Department compensated individuals to serve as private-sector advisers on United States delegations to fifteen sessions in which international commodity and civil aviation agreements were negotiated,³⁷ as well as to attend nine meetings of the Department's Advisory Committee on International Investment, Technology and Development, several intra-agency meetings and a "consumer affairs seminar."³⁸ The National Highway Traffic Safety Administration (NHTSA) of the Department of Transportation (DOT) reimbursed many non-regulated people and groups in fourteen initiatives, most of which pertained to standard-setting.³⁹ The Federal Trade Commission relied upon explicit statutory au-

RONMENTAL PROTECTION AGENCY, PCB PUBLIC PARTICIPATION PILOT SUMMARY (1978) (EPA); *S. 270 Hearings*, *supra* note 10, at 94-95 (statement of Department of Transportation Secretary Coleman) (Federal Aviation Administration); 45 Fed. Reg. 83, 171 (1980) (Department of Health and Human Services); *Regulatory Reform Hearings on S. 104, S. 262, S. 299, S. 755 & S. 1251 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess., pt. 2, at 173 (1979) (statement of Mass. Lieutenant Governor Thomas O'Neill, III) (Department of Housing and Urban Development) [hereinafter cited as *S. 104 Hearings*]; *Chamber of Commerce v. United States Dep't of Agriculture*, 459 F. Supp. 216 (D.D.C. 1978) (United States Department of Agriculture). For discussion of agency and presidential activity, see Tobias *supra* note 2, at 910-12. Copies of all agency documents cited in this Article should be available in the agencies' files.

34. See ROBARDS, CIVIL AERONAUTICS BOARD COMPENSATED PUBLIC PARTICIPATION PROGRAM EVALUATION (Sept. 15, 1980) (CAB); Letter from J. Dexter Peach, Director, Energy and Minerals Divisions, GAO, to Rep. David A. Stockman (Oct. 2, 1978) (DOE) [hereinafter cited as Peach Letter]; SMITH, PRELIMINARY ASSESSMENT OF THE FDA'S PILOT PUBLIC REIMBURSEMENT PROGRAM (1980) (FDA) [hereinafter cited as FDA STUDY].

35. See Memorandum from Phyllis Jackson, Staff Attorney, NOAA Office of General Counsel, to Eldon Greenberg, NOAA General Counsel (Jan. 28, 1982); 47 Fed. Reg. 9820, 9861 (1982).

36. See 45 Fed. Reg. 98 (1980). Clean Air Act Amendments, 1977, Pub. L. No. 95-95, § 323j, 91 Stat. 685, 785-88 (1977).

37. See DOS Memoranda on Biden Funding (1981-1984). Coffee and tin are examples of the commodities.

38. See *id.*

39. See DOT DEMONSTRATION PROGRAM TO PROVIDE FINANCIAL ASSISTANCE TO PARTICIPANTS IN ADMINISTRATIVE PROCEEDINGS: NHTSA EVALUATIONS AND RECOMMENDATIONS (1977).

thority to compensate a large number of non-commercial parties in eighteen hybrid rulemakings and upon implied power to fund one entity in another proceeding.⁴⁰

From 1974 until 1980, several additional units of government evinced interest in reimbursing non-industry participants but never actually did so.⁴¹ The Federal Communications Commission (FCC), the Department of the Interior, the Nuclear Regulatory Commission (NRC), and the National Telecommunication and Information Administration of the Commerce Department issued proposals or Notices of Inquiry seeking public comment on the possible institution of compensation efforts,⁴² but none of these agencies in fact created a program or funded any member of the public.⁴³ The Department of Agriculture (USDA), the Department of Commerce, the Department of Energy, the Department of Health and Human Services (HHS), the Department of Housing and Urban Development (HUD) and the Department of Transportation also considered department-wide reimbursement.⁴⁴ But only their constituent agencies, such as the National Highway Traffic Safety Administration of the Department of Transportation, paid participants in specific initiatives.⁴⁵

Thus, while nearly twenty governmental entities have evidenced interest in citizen compensation since 1969, only fourteen have funded non-commercial individuals or organizations. Before 1977 some reimbursement was paid on an ad hoc basis pursuant to implied power. Of the agencies employing such authority, the Civil Aeronautics Board sus-

40. See RULEMAKING UNDER THE MAGNUSON-MOSS WARRANTY—FEDERAL TRADE COMMISSION IMPROVEMENT ACT (June 1979) (explicit funding authority); *supra* note 19 and accompanying text (implied funding authority).

41. Other agencies undoubtedly were interested but never formally indicated so. *Cf.* Peach Letter, *supra* note 34 (indication of Federal Deposit Insurance Corporation interest but no agency money expended on funding).

42. For discussion of consideration accorded to participant funding by all these agencies, except the Department of the Interior, see Tobias, *supra* note 2, at 910-12. *Cf.* 43 Fed. Reg. 12,339 (1978) (Interior).

43. The FCC did issue a regulation that afforded procedural help to impecunious participants in its proceedings. See 41 Fed. Reg. 53,019 (1976).

44. These assertions are based on telephone interviews with agency employees who considered department-wide funding; on actual consideration of funding by multiple constituents of the agencies, see, e.g., *supra* notes 35, 42 and accompanying text (Commerce Department consideration); and on payments made by each agency's constituents, see *infra* note 45 and accompanying text. *Cf.* 44 Fed. Reg. 65,278 (1979) (DOE); 45 Fed. Reg. 14,068 (1980) (HUD); 42 Fed. Reg. 2863 (1977) (NHTSA) (Federal Register documents indicating interest).

45. See *supra* notes 33 (USDA and HUD), 34 (DOE), 35 (Commerce), 33, 34 (HHS), 33, 39 (DOT).

pended its endeavor in 1980,⁴⁶ and the Consumer Product Safety Commission, the Food and Drug Administration, the National Highway Traffic Safety Administration, the National Oceanic and Atmospheric Administration and the Department of Agriculture discontinued operations in 1982, "influenced by the adverse political climate and by doubts about the scope of their power."⁴⁷ Of those agencies with specific authority, the Consumer Product Safety Commission has paid no one since 1982; the Environmental Protection Agency and the Federal Energy Regulatory Commission have been admonished annually for a number of years by appropriations committees that they are not to do so; and the FTC ceased requesting money for funding in its budget after 1980. Thus, the State Department is the only entity currently operating a program, albeit a limited one. Some participant reimbursement occurred during the Republican administrations of Presidents Nixon, Ford and Reagan. President Ford warmly supported, and even promoted, broadened non-industry involvement in agency initiatives.⁴⁸ But an overwhelming majority of funding activity undertaken by the federal government transpired during the Democratic administration of President Carter. Carter was the only President to explicitly endorse compensation, recognizing the "need for public participation funding and [strongly encouraging each] agency with the requisite authority to institute a public participation funding program."⁴⁹

5. *Judicial Decisions*

In numerous opinions, judges have mentioned the reimbursement idea;⁵⁰ however, there have been only four cases challenging agency power to compensate non-commercial interests. When the Chamber of Commerce attacked the validity of Department of Energy funding under implied authority, the District of Columbia district and circuit courts refused to address the substantive issue.⁵¹ But in three cases, courts did

46. See 45 Fed. Reg. 29,035 (1980).

47. Tobias, *supra* note 2, at 912 n.51. *Cf. id.* (citations for all agencies except NHTSA); 47 Fed. Reg. 29,678 (1982) (NHTSA).

48. As to President Ford's support, see 41 Fed. Reg. 42,761 (1976).

49. See Memorandum for Heads of Executive Departments and Agencies from President Carter, May 16, 1979, 1 Public Papers of the President, Jimmy Carter, 1979, at 867. *Cf.* Exec. Order No. 12,044 (1978); 43 Fed. Reg. 12,661 (1978) (Carter endorsements, and promotion, of expanded public participation).

50. See cases listed in Tobias, *supra* note 2, at 918 n.98. For discussion of agency compensation authority, see Tobias, *supra* note 2.

51. The circuit opinion, *Chamber of Commerce v. Dep't of Energy*, 627 F.2d 289, 291 (D.C.

reach the merits of agency authority to fund, and a number of federal judges resolved the question quite differently.⁵² During 1977, the sharply split Second Circuit, sitting en banc, denied requests by intervenors in a Federal Power Commission licensing matter who asked the court to order that the Commission pay the intervenors' costs.⁵³ In 1978, a District of Columbia district court judge determined that the Department of Agriculture had implied authority to compensate a public interest group for assessing the economic impact of a Department proposal.⁵⁴ Moreover, during 1981, a divided Fourth Circuit panel ruled that the Food and Drug Administration lacked implied funding power.⁵⁵

6. *Prior Studies of Reimbursed Participation*

The quality of compensated non-commercial involvement and the impact that the activity has had upon administrative decisionmaking are exceedingly difficult to analyze.⁵⁶ It is entirely predictable, therefore, that no thoroughgoing examination of the quality or efficacy of funded participation has been performed.

Reimbursed involvement at five agencies has not been evaluated.⁵⁷ The Department of State and the National Oceanic and Atmospheric Administration compiled lists of the initiatives in which they compensated participants.⁵⁸ Six governmental entities, including the Consumer Product Safety Commission, have used employees to conduct assessments.⁵⁹ But the self-studies are not critical and are vulnerable to challenge, partly because they apparently were intended to serve principally as advocacy documents for persuading Congress of the worth of funding. The self-studies also are terse; none assesses reimbursed activity at other

Cir. 1980) cites the unreported district court opinion of Judge June Green, No. 78-1543, Memo. Op. at 2 (D.D.C. Dec. 19, 1978).

52. For discussion of the cases, see Tobias, *supra* note 2, at § II.

53. *See* Greene County Planning Board v. FPC, 559 F.2d 1227 (2d Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

54. *See* Chamber of Commerce v. United States Dep't of Agriculture, 459 F. Supp. 216 (D.D.C. 1978).

55. *See* Pacific Legal Found. v. Goyan, 664 F.2d 1221 (4th Cir. 1981).

56. *See infra* § II.A. of this Article.

57. These are FAA, HHS, HUD, NCAQ, and USDA.

58. *See supra* notes 37 (DOS), 35 (NOAA).

59. *See supra* notes 33 (EPA), 34 (CAB, FDA), 39 (NHTSA), 40 (FTC); Memorandum: Funding Under 1980 Public Participation Program (not including § 7 (1980) (CPSC) [hereinafter cited as CPSC Study].

governmental units.⁶⁰ Independent evaluations commissioned by the Consumer Product Safety Commission, Department of Energy and the Nuclear Regulatory Commission when considering the institution of funding did not analyze quality or efficacy.⁶¹

There are a few extra-agency evaluations of reimbursed participation. An Administrative Conference consultant rigorously assessed compensated involvement in the Federal Trade Commission's ophthalmic-goods rulemaking.⁶² One law student analyzed funded input in a Department of Energy hearing,⁶³ and two law students examined the Consumer Product Safety Commission's asbestos rulemaking,⁶⁴ a National Highway Traffic Safety Administration public meeting, and a National Oceanic and Atmospheric Administration proceeding while incorporating by reference the above evaluations of the Federal Trade Commission and the Department of Energy.⁶⁵ When analyzing agency reimbursement authority, I scrutinized some compensated participation.⁶⁶ There is much testimony before congressional authorization and appropriations committees about funded citizen activity. Although many witnesses have offered general or anecdotal observations, a number have extolled or castigated reimbursed involvement in such categorical or unsubstantiated ways that the testimony seems principally to reflect personal political

60. The FDA STUDY, *supra* note 34, at chs. 6-7, alludes to compensated involvement at other agencies but only incorporates what is said in the intra-agency evaluations listed *supra* note 59 and does not purport to be a government-wide analysis.

61. See BOASBERG, HEWES, KLORES & KASS, REPORT TO THE NUCLEAR REGULATORY COMMISSION ON POLICY ISSUES RAISED BY INTERVENOR REQUESTS FOR FINANCIAL ASSISTANCE IN NRC PROCEEDINGS (1975), reprinted in *S. 2715 Hearings*, *supra* note 10, at 331-469 [hereinafter cited as NRC REPORT]; CHASEN & STEIN, REPORT TO THE CONSUMER PRODUCT SAFETY COMMISSION ON CPSC'S OFFICE OF PUBLIC PARTICIPATION AND FINANCIAL COMPENSATION PROGRAM (1977) [hereinafter cited as CPSC EXTERNAL STUDY]; ENERGY POLICY TASK FORCE, FUNDING PUBLIC PARTICIPATION IN DEPARTMENT OF ENERGY PROCEEDINGS (1978).

62. See B. BOYER, COMPENSATING PUBLIC PARTICIPANTS IN ADMINISTRATIVE RULEMAKING: THE FEDERAL TRADE COMMISSION EXPERIENCE 97 (1980); Boyer, *supra* note 14 (shorter version); American Optometric Ass'n v. FTC, 626 F.2d 896 (D.C. Cir. 1980); 40 Fed. Reg. 39,901 (1975); 42 Fed. Reg. 41,651 (1977) (judicial challenge to, and Federal Register documents on, ophthalmic goods rulemaking).

63. See Noble, Evaluation of Energy Policy Task Force Role in DOE Hearings (May 1979) (unpublished paper prepared for Professor Roy Schotland, Georgetown University Law Center).

64. See Stellato & Wright, *An Evaluation of Agency Programs for the Reimbursement of Participation in Rulemaking Proceedings* (May 1981) (unpublished paper prepared for Professor Roy Schotland, Georgetown University Law Center).

65. See Stellato & Wright, *supra* note 64.

66. See Tobias, *supra* note 2, at § 4.

perspectives on the advisability of compensation.⁶⁷

Therefore, evaluators have carefully analyzed a portion of the funded public participation which occurred. The vast majority of that compensated involvement, however, has not even been examined, and much of that studied was not assessed as rigorously as possible. Moreover, there has been little effort to analyze comprehensively reimbursed activity at a single agency, much less at the multiple entity or government-wide level. In sum, many agencies have paid parties to participate in administrative initiatives. Much of that compensated activity occurred at the Consumer Product Safety Commission and is described thoroughly below.

B. Participant Reimbursement At The Consumer Product Safety Commission

The Consumer Product Safety Commission was not involved in the earliest development of the participant funding concept because the agency was only established in 1972.⁶⁸ Moreover, the commissioners never sought the Comptroller General's views on compensation authority, few references to that power appear in the Comptroller's opinions, and the CPSC's reimbursement authority was not challenged in the courts. Nonetheless, Congress has provided for certain types of participant funding in the agency's substantive legislation and frequently has instructed the Commission on compensation, while the CPSC experimented actively with the reimbursement idea throughout the initial decade of its existence.

1. Congressional Activity

The agency's organic statute specifically prescribed a kind of funding in the "offeror" process, a unique administrative procedure whereby extra-Commission entities developed proposed consumer product safety

67. See, e.g., *Public Participation in Agency Proceedings: Hearings on H.R. 3361 and Related Bills Before the Subcomm. on Administrative Law and Government Relations of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977) [hereinafter cited as *H.R. 3361 Hearings*]; S. 270, S. 2715 Hearings, *supra* note 10; S. 104 Hearings, *supra* note 33.

68. See Consumer Product Safety Act, Pub. L. No. 92-573, 86 Stat. 1207 (1972). Cf. Scalia & Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 U.C.L.A. L. REV. 899 (1973); *Special Issue: The Consumer Product Safety Commission*, 43 GEO. WASH. L. REV. No. 4 (1975) (discussion of CPSC, its substance, procedure and legislation); Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 GEO. WASH. L. REV. 32, 35-45 (1982) (discussion of CPSC's establishment).

standards.⁶⁹ However, the offeror process proved unworkable. Congress amended the procedure in 1978, but then abolished it during 1981 and provided for reimbursement of parties who assist the Consumer Product Safety Commission in drafting mandatory standards.⁷⁰ Congress, in 1980, admonished the agency not to fund under implied authority.⁷¹ The prohibition resulted from a misunderstanding about EPA compensation.⁷² When the legislative branch precluded the Environmental Protection Agency from compensating, Congress also proscribed reimbursement by other agencies, namely, the Consumer Product Safety Commission and the Department of Housing and Urban Development, included in the same appropriations statute.⁷³ That bar on agency funding has been renewed annually.⁷⁴

2. Agency Activity

The legislation creating the Consumer Product Safety Commission expressly provided for a type of participant compensation. Between 1974 and 1977, the agency relied upon that grant to reimburse entities that served as offerors and individual citizens who worked with them to develop standards for hazards associated with seven products.⁷⁵ Because Commission provision of more than out-of-pocket expenses was contro-

69. See 15 U.S.C. § 2056(d)(2) (1976). Cf. Schwartz, *supra* note 68; sources cited *infra* note 99 (discussions of offeror process).

70. The 1978 amendment is at Pub. L. No. 95-631, § 3(a), 92 Stat. 3742, 3743 (repealed 1981). Cf. H.R. REP. NO. 1164, 95th Cong., 2d Sess. (1978), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 9434 (reasons for amendment) [hereinafter cited as HOUSE OFFEROR REPORT]. The 1981 abolition legislation is at 15 U.S.C. § 2056(a) (Supp. V 1981). The funding provision is at 15 U.S.C. § 2054(a)(4) (Supp. V 1981). Cf. Klayman, *Standard Setting Under the Consumer Product Safety Act Amendments of 1981—A Shift in Regulatory Philosophy*, 51 GEO. WASH. L. REV. 96 (1982) (discussion of 1981 legislation).

71. See Department of Housing and Urban Development-Independent Agencies Appropriations Act, 1981, Pub. L. No. 96-526, § 410, 94 Stat. 3044, 3065 (1980).

72. Telephone interview with staff member 1, House Appropriations Committee, Subcommittee on HUD-Independent Agencies (Jan. 28, 1985). Cf. Tobias, *supra* note 2, at 916 n.82 (discussion of misunderstanding and machinations attending congressional decision).

73. Congress' decision as to agencies other than the EPA apparently was not premised on conscious determinations about the efficacy or quality of funded participation at the agencies.

74. See, e.g., Department of Housing and Urban Development-Independent Agencies Appropriations Act, 1986, Pub. L. No. 99-160, § 410, 99 Stat. 909 (1985); Department of Housing and Urban Development-Independent Agencies Appropriations Act, 1985, Pub. L. No. 98-371, § 410, 98 Stat. 1213 (1984).

75. The public playground equipment proceeding, designated a "quasi-offeror" initiative by the CPSC, is considered an offeror proceeding in this Article. The chain saw proceeding, which arguably could be considered a "quasi-offeror" initiative, is not treated as an offeror proceeding.

versial,⁷⁶ the Consumer Product Safety Commission paid other costs, such as lost wages, in only one initiative.⁷⁷ Moreover, negative resolution of the question was dispositive of offeror selection in another agency matter.⁷⁸ Dissatisfaction with the offeror process, voiced by nearly everyone involved in the seven proceedings, prompted Congress to modify the procedure in 1978, but it was not used thereafter.⁷⁹ In 1981, Congress abolished the mechanism while prescribing a form of funding which has never been invoked.

Between 1974 and 1978, the Consumer Product Safety Commission exercised implied power on an ad hoc basis to compensate participants in several initiatives.⁸⁰ During 1974, when contemplating fireworks regulation, the agency reimbursed a lawyer for expenses incurred in two hearings. The next year, the commissioners authorized attorneys' fees for indigent respondents in an enforcement proceeding, but settlement vitiated the need for funding. In 1976, the Consumer Product Safety Commission provided compensation for a lawyer and a consumer advocate who attended an agency meeting on toy safety. During 1977, the agency reimbursed an individual for testifying in public hearings to consider imposition of a ban on asbestos patching compounds and to examine amendment of regulations covering sleepwear for children. Similarly, in March 1978, the Commission funded three people who addressed the advisability of banning unvented gas space heaters.

During April 1976, five public interest groups requested that the Consumer Product Safety Commission promulgate rules prescribing citizen

76. See Note, *Inside the Proposed Standard for Architectural Glass: An Outward Look at Consumer Participation In The CPSC's Offeror Process*, 43 GEO. WASH. L. REV. 1173, 1173-96 (1975).

77. The proceeding concerned miniature Christmas tree lights. Cf. 43 Fed. Reg. 19, 136 (1978); Schwartz, *supra* note 68, at 66-68 (discussion of controversy).

78. See Note, *supra* note 76, at 1175-96.

79. The offeror process was widely acknowledged to be unworkable. See, e.g., Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 60-61 (1982) (offeror program a "disastrous failure," which "by all accounts . . . did not work well"); Schwartz, *supra* note 68, at 62-68 (documenting difficulties experienced in implementing offeror process); *CPSC Oversight: Hearings Before the Subcomm. on Oversight and Investigation of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 1st Sess. 350 (1977) (no one, including CPSC staff, offerors and trade associations, was very happy, while offerors privately expressed frustration, if not outrage, with offeror process) (statement of Professor Hamilton) [hereinafter cited as *1977 House Oversight Hearings*]; HOUSE OFFEROR REPORT, *supra* note 70 (Congressional criticism of offeror process); telephone interview with John McLaughlin, Counsel, Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce (Jan. 28, 1985) (nobody, including offerors and CPSC attorneys and staff, "had anything good to say" when Congress considered abolition).

80. See 42 Fed. Reg. 15,711 (1977).

reimbursement.⁸¹ In November, the Commission responded by granting the petition and contracting for an independent study of the concept.⁸² During March 1977, the Consumer Product Safety Commission relied upon implied power to propose a demonstration compensation program applicable to informal rulemaking.⁸³ In May 1978, however, the agency adopted an "interim" rule and announced it would entertain case-by-case applications for initiatives not included therein.⁸⁴ Thereafter, the Consumer Product Safety Commission reimbursed many parties to perform a number of tasks.

During June 1978, the Commission agreed to work with the Chain Saw Manufacturers Association (CSMA) on a consumer product safety standard for chain saws. The contract between the Consumer Product Safety Commission and the Chain Saw Manufacturers Association provided for public involvement and agency payment of "certain consumer representatives," so the CSMA and citizens who assisted the Association could be viewed as funded participants. The Commission paid one person for speaking at a December 1978 meeting held to ascertain the perspectives of manufacturers and others on the hazards of cigarette ignition of upholstered furniture. During late 1979, three consumer groups were reimbursed for responding to an Advance Notice of Proposed Rulemaking seeking information on consumer products containing asbestos and potential schemes for regulating its sources. In the winter of 1979-1980, the Consumer Product Safety Commission compensated numerous persons who testified on possible health effects from exposure to urea formaldehyde foam insulation (UFFI). Between 1980 and 1982, the Commission funded seven individuals to aid the agency's technical staff in developing a citizens band (CB) omnidirectional antenna standard.

In January 1977, the commissioners voted to create an Office of Public Participation. The principal responsibility of the Office was to manage the reimbursement effort instituted pursuant to implied authority.⁸⁵ Because the Consumer Product Safety Commission and the Civil Service Commission (CSC) disagreed over specifics relating to the director of the unit, such as the government service rating to be assigned that individ-

81. *See id.*

82. *See id.*; CPSC EXTERNAL STUDY, *supra* note 61.

83. *See* 42 Fed. Reg. 15,711 (1977).

84. *See* 43 Fed. Reg. 23,560 (1978).

85. *See id.*; 42 Fed. Reg. 15,711, 15,715-16 (1977).

ual,⁸⁶ the Office did not become fully operational until shortly before Congress effectively ended compensation at the Commission by proscribing funding under implied power.⁸⁷ That prohibition has been repeated yearly since 1980,⁸⁸ and in 1982, the agency suspended the effort initiated under implied authority.⁸⁹ Congress also substantially decreased the Consumer Product Safety Commission's budget in 1981⁹⁰ and has increased minimally the appropriation since that time.⁹¹ The fiscal constraints thus imposed may well have eliminated anyway the compensation program initiated under implied power, and the financial strictures may explain the agency's failure to invoke the funding authority specifically granted in 1981.⁹²

3. *Prior Studies*

There have been quite a few assessments of compensated citizen involvement at the Consumer Product Safety Commission; however, none has closely analyzed the effectiveness of reimbursed activity in all the proceedings. The external study commissioned by the Consumer Product Safety Commission did not treat quality or impact.⁹³ A 1976 Comptroller General's report mentioned the slow pace of agency work on toy hazards.⁹⁴ Two law students only evaluated the quality and efficacy of three groups' written comments in the asbestos rulemaking.⁹⁵ The Consumer Product Safety Commission's internal assessment selectively examined compensated participation in several initiatives where it seemed

86. See 43 Fed. Reg. 23,560 (1978) (rank to be assigned director); *cf.* CPSC Public Participation File (discussion of CPSC-CSC disagreements).

87. The Office became fully operational in October 1979. Congress ended compensation a year later. See 126 CONG. REC. S13084 (daily ed. Sept. 22, 1980).

88. See *supra* note 74 and accompanying text.

89. See 47 Fed. Reg. 12,789 (1982).

90. Compare Department of Housing and Urban Development-Independent Agencies Appropriations Act, 1982, Pub. L. No. 97-101, 95 Stat. 1417, 1423 (1981) (\$33 million appropriation) with Department of Housing and Urban Development-Independent Agencies Appropriations Act, 1981, Pub. L. No. 96-526, 94 Stat. 3044, 3050 (\$43 million appropriation).

91. The budget was \$33 million in 1982, \$35 million in 1983, and \$36 million in 1984 and 1985. See Department of Housing and Urban Development-Independent Agencies Appropriations Acts, 1983, 1984, 1985, and 1986, Pub. L. Nos. 97-272; 98-45; 98-371; and 99-160; 96 Stat. 1160, 1166; 97 Stat. 219, 225; 98 Stat. 1213, 1221; and 99 Stat. 909, 915.

92. See *supra* notes 70-74, 83-84, 87-89 and accompanying text.

93. See CPSC EXTERNAL STUDY, *supra* note 61; *supra* note 82 and accompanying text.

94. See REPORT TO THE CONGRESS BY THE COMPTROLLER GEN., BETTER ENFORCEMENT OF SAFETY REQUIREMENTS NEEDED BY THE CPSC, H.R. DOC. NO. 76-148, 94th Cong., 2d Sess. 11-13, 19-20 (1976) [hereinafter cited as COMPTROLLER'S REPORT].

95. See *Stellato & Wright*, *supra* note 64, at 18-21.

helpful,⁹⁶ but the report was prepared chiefly as an advocacy document.⁹⁷ I have even more selectively attempted to analyze funded involvement.⁹⁸ Moreover, there is surprisingly little Congressional testimony, especially in contrast to that regarding reimbursed activity at the Federal Trade Commission and the National Highway Traffic Safety Administration which operated the two other most ambitious compensation programs in government.⁹⁹

In sum, fourteen agencies have exercised specific or implied power to underwrite participation of approximately 500 non-commercial individuals and groups in approximately 100 administrative proceedings since 1972. The Consumer Product Safety Commission reimbursed many of these parties for performing numerous functions in eleven initiatives held between 1974 and 1982. Little of this government-supported activity has been evaluated carefully. It is appropriate, therefore, to attempt to assess rigorously the quality and impact on Commission decisionmaking of funded involvement in CPSC matters. That effort is undertaken in the next part of this Article.

96. See CPSC Study, *supra* note 59.

97. See *supra* text between notes 59 and 60. Cf. Tobias, *supra* note 2, at 945 (less documentation of negative funding experience, "because agencies, seeking to secure continued congressional support, have no interest in emphasizing program shortfalls").

98. See *id.* at § IV.A.

99. See, e.g., *S. 104 Hearings*, *supra* note 33; *H.R. 3361 Hearings*, *supra* note 67. There is, however, much indirect testimony on funded participation at the CPSC provided in the context of reauthorization, oversight or appropriations hearings. See, e.g., *1977 House Oversight Hearings*, *supra* note 79.

There are also evaluations of the offeror process. See Note, *supra* note 76 (architectural glazing); OFFICE OF PROGRAM PLANNING AND EVALUATION, CPSC, EVALUATION OF OFFEROR PROCESS (Nov. 5, 1976) (CPSC, offeror work in first four proceedings); COMPTROLLER GEN. OF THE U.S., THE CONSUMER PRODUCT SAFETY COMMISSION NEEDS TO ISSUE SAFETY STANDARDS FASTER (Dec. 12, 1977) (CPSC management of process); HOUSE OFFEROR REPORT, *supra* note 70 (same); *1977 House Oversight Hearings*, *supra* note 79 (Congressional testimony on process and seven proceedings); Schwartz, *supra* note 68 (ACUS consultant's comprehensive evaluation of the CPSC, offeror work in lawn mower proceeding and summary analysis of citizen, offeror work in several others). Cf. Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 TEX. L. REV. 1329 (1978) (ACUS consultant's evaluation of the CPSC, offeror work in several proceedings in context of broader study); Meeting on Consumer Participation in Section 7 Proceedings, Washington, D.C. (Aug. 6, 1975) (participants' observations on consumer involvement in first offeror proceedings).

II. ANALYSIS OF THE QUALITY AND EFFICACY OF REIMBURSED PUBLIC PARTICIPATION IN PROCEEDINGS OF THE CONSUMER PRODUCT SAFETY COMMISSION

A. *A Word About Methodology*

Evaluation of the quality and effectiveness of government sponsored non-industry participation is problematic. The principal difficulties encountered in performing this study and the treatment of those complications are examined in the following discussion of the methodology.¹⁰⁰

1. *What to Analyze*

I chose to evaluate reimbursed involvement at the Consumer Product Safety Commission for a number of reasons.¹⁰¹ Single agency analysis afforded important benefits, such as permitting in-depth investigation of funded participation throughout the decisional process in numerous initiatives. Moreover, such analysis enabled me to acquire sufficient famili-

100. The methodology is different in several important respects from, although similar in some ways to, the approach I used previously. The approach I employed in the past is explained in Tobias, *supra* note 2, at § IV. Although I concluded that participant funding was consistent with agencies' substantive legislative mandates, the approach was selective, because I sought examples of funded participation's efficacy that would illustrate whether it was consistent with statutory mandates. The analysis, therefore, focused on compensated involvement that was particularly effective or ineffective; I eschewed reliance upon activity in the "middle range," which, of course, comprises the vast majority of funded participation. *See supra* notes 66, 98 and accompanying text. The construct I used was a chronological composite of the decisional process for the most comprehensive proceedings in which funded participation occurred. In the evaluation below, I have attempted to assess as much compensated activity as possible, regardless of its efficacy, throughout as much of the decisional processes as possible in all proceedings of one agency. *Cf. infra* remainder of § II.A. of this Article (comparing and contrasting of methodologies employed and discussion of approach used here). As before, I rely substantially upon Boyer, *supra* notes 14, 62; Rosenbaum, *Policy Impacts, National Symposium on Citizen Participation* (Feb. 4, 1980), in *CITIZEN PARTICIPATION: MODELS AND METHODS OF EVALUATION* 30 (N. Rosenbaum ed. 1980) (published by Center for Responsive Governance); Rosener, *Citizen Participation: Can We Measure Its Effectiveness?*, 38 *PUB. AD. REV.* 457 (1978).

101. The input of individuals and the submissions of offerors in the seven offeror proceedings could be considered funded activity, and evaluated, in this Article. But I rejected this possibility principally because the input differs significantly from the compensated participation analyzed. *See supra* notes 69-70, 75-79 and accompanying text. I also rejected at the outset the ideal approach—an evaluation of all funded activity that occurred. *See supra* §§ I.A.4; I.B.2 of this Article. The sheer magnitude of that task was overwhelming; resource and time constraints currently preclude conducting a government-wide assessment with sufficient stringency to make it worthwhile. *See supra* § I.A.4 of this Article (magnitude evidenced by 14 agencies, 500 funded participants, 100 proceedings); Tobias, *supra* note 2, at 941 n.204 (cost estimates for conducting analyses); remainder of § II.A of this Article (stringency). *Cf. supra* note 62 and accompanying text (ACUS consultant in four-year FTC study rigorously evaluated funded participation in one proceeding).

arity with a specific governmental entity to draw relatively informed conclusions about the reimbursed activity assessed.¹⁰² But this approach did have disadvantages and involve trade-offs.¹⁰³ Thus, although evaluation of compensated involvement at one agency is not ideal, it seemed preferable.¹⁰⁴

I selected the Consumer Product Safety Commission because its funding experience offered numerous special benefits. The agency paid a broad variety of participants¹⁰⁵ to perform many tasks¹⁰⁶ in diverse administrative contexts¹⁰⁷ and experimented with the reimbursement concept over a lengthy, continuous period.¹⁰⁸ Moreover, the Consumer Product Safety Commission had comprehensive, accessible data on initiatives in which compensated activity occurred,¹⁰⁹ had responsive employees¹¹⁰ and had received considerable assessment.¹¹¹ The Commis-

102. It is very difficult to become familiar with an agency's peculiarities of form and substance such as statutory schemes, perspectives on compensation, operating procedures and data retrieval systems, especially so as to formulate perceptive judgments. *See infra* § II.A.2.b of this Article. Moreover, single agency analysis avoids, or at least minimizes the significance of, certain problems entailed in evaluating multiple governmental components, such as ascertaining which funded activity to analyze. *See infra* note 103.

103. For example, there are certain ways that funded activity at a particular unit could serve as a microcosm for government-wide compensated participation. Such analysis, however, may not necessarily yield telling insights about inter-agency, much less intra-governmental, quality or efficacy. Indeed, achieving "representativeness" is difficult with any selective approach. *See supra* note 100. Although the CPSC's experience with funded participation may not be representative of government-wide funded activity, the decision to study one agency does afford the advantage of close evaluation of all compensated involvement that occurred there as well as other benefits. *See infra* notes 105-12 and accompanying text.

104. *See infra* notes 156-60 and accompanying text.

105. For example, the CPSC funded individual lay and technical participants, including homemakers, students, physicians, engineers; trade associations; and national consumer groups.

106. For example, participants developed mandatory standards, submitted written comments on CPSC proposals, conducted product testing and consumer surveys, and testified about their experiences using products.

107. These included notice-comment rulemakings, quasi-adjudicatory proceedings, and public hearings.

108. The CPSC experimented for nine years, most of its existence. As to all the footnotes in this sentence, *see supra* § I.B.2 and *infra* § II.B of this Article.

109. *See infra* § II.A.2.c of this Article. The CPSC had data both on the proceedings and on the participation.

110. Employees were responsive both to requests for data and their opinions of quality and efficacy. This was especially true of those in the Office of the Secretary (OS), who maintain the CPSC's files and the Office of Public Participation. Those familiar with substantive initiatives in which funded activity occurred also were very cooperative.

111. *See supra* § I.B.3 of this Article.

sion also provided certain less important advantages.¹¹² However, the agency did not surpass all governmental components in every respect.¹¹³ Nevertheless, the CPSC afforded a number of benefits and posed no more problems than any other single agency, thus making it an appropriate choice for evaluation.

2. *How to Analyze*

a. *Definition of Terms*

Effectiveness, impact, and efficacy, words used interchangeably, can be defined in several ways. The idea of "winning," which emphasizes the relationship between funded entities' views and administrative decisions, entails numerous pragmatic difficulties.¹¹⁴ A less extreme approach, and the one employed here, is to consider whether reimbursed activity beneficially affected the decisional process.¹¹⁵ For instance, did the funded input require agency officials to treat constructively questions at issue, even if specific suggestions were not included in their ultimate choices? The technique is workable and fair and affords perspectives on compensated involvement throughout the decisionmaking process, rather than emphasizing end results. It is also a moderate, yet sufficiently demanding, approach that requires less than a cause-effect relationship, as does "winning," but more than quality performance. Quality, the idea of how good the funded participation was, is insufficiently rigorous and too subjective to serve as the sole measure.¹¹⁶ The factors considered do not denigrate quality; quality is simply another valuable analytical parameter which will be used.¹¹⁷ Quality is as problematic as efficacy but it impli-

112. For example, CPSC employees seemed to have more accurate recollections of funded activity than those at other agencies. *Cf. supra* note 109 and accompanying text (CPSC data thorough and accessible). CPSC funding activity also was somewhat less "politically volatile." *See, e.g.,* Boyer, *supra* note 14 (FTC).

113. For instance the FTC spent "as much as \$500,000 for fees and expenses in one year," Tobias, *supra* note 2, at 953 n.271, and may have been analyzed more rigorously, *cf. supra* note 62 and accompanying text (rigorous analysis); 45 Fed. Reg. 2307 (1980) (ACUS recommendation on FTC funding); *supra* note 40 (intra-agency analysis). Similarly, the NHTSA's compensation program was nearly as ambitious as the CPSC's. *See supra* note 39 and accompanying text. Moreover, some of the CPSC's funded activity happened more than 10 years ago.

114. It is difficult to ascertain the views of funded parties, their reasons for adopting these views, and the effects of their advocacy upon the final agency determinations. For helpful treatment, see B. BOYER, *supra* note 62, at 133-34, 138.

115. I used a similar approach in another study. *See* Tobias, *supra* note 2, at 940 n.202.

116. Quality lacks rigor, because it does not necessarily account for the effect of funded input on the decisional process. *See* B. BOYER, *supra* note 62, at 136.

117. *See infra* §§ II.B; III.A.1, 2 of this Article.

cates the “substantive validity of the positions advocated” and how they were asserted.¹¹⁸

b. Measurement of Impact

A related complication is the measurement of impact, especially the causal relationship between reimbursed activity and administrative determination. An important difficulty is discerning exactly what positions compensated parties were espousing.¹¹⁹ Even if the perspectives could be identified conclusively, and were reflected in the agency judgment, it would be impossible to ascertain definitively whether the input influenced the choice. “For example, the ultimate administrative determination might be attributable to the advocacy of other participants or to factors unrelated to the record made.”¹²⁰

c. Sources

There are several complex questions regarding sources of information on the quality and efficacy of funded involvement. I attempted to examine, collect, and report as much material as practicable and to be representative where constraints existed. I initially identified potential data sources, finding fifteen studies, forty congressional hearings,¹²¹ Consumer Product Safety Commission “files,”¹²² and several thousand people familiar with the reimbursed activity.¹²³ Because the studies were few and brief and the testimony seemed important, I read each study and hearing. I read the index to every file, and, whenever I located a reference related to compensated participation, I examined the document.¹²⁴ All relevant allusions to quality or efficacy in studies, hearings, or files, regardless of

118. See B. BOYER, *supra* note 62, at 136.

119. For a helpful analysis of the problem, see *id.* at 133-34, 138.

120. Tobias, *supra* note 2, at 941 n.203. Cf. B. BOYER, *supra* note 62, at 134-36; Rosenbaum, *supra* note 100, at 46-47 (additional treatment of cause-effect).

121. As to the studies, all of which are less than 150 pages, see *supra* § I.B.3 of this Article. The hearings consist principally of House and Senate appropriations, reauthorization, and oversight hearings. See, e.g., *1977 House Oversight Hearings*, *supra* note 79.

122. These files, which appear to include nearly all data gathered by the CPSC, are available at the CPSC's Office of Secretary, 5401 Westbard, Bethesda, Md.

123. This is a crude, but conservative, estimate based on all the work I performed. See *infra* notes 128-35 and accompanying text.

124. I did not read entire files, because some included 15,000 pages, and the effort did not appear cost-beneficial. Cf. B. BOYER, *supra* note 62, at 133 (opinions of informed observers may be best available data); telephone interview with Barry B. Boyer (Nov. 24, 1981) (interviews generally more valuable than record examination).

reliability, are reported in the next subsection of this Article.¹²⁵ This approach affords many benefits, such as the transmission of considerable raw data, free of value choices.¹²⁶ But concerns about the dependability of the material required consideration of the other principal data source.¹²⁷

Treating individuals familiar with funded involvement was more problematic. One complication is the large number who appeared sufficiently knowledgeable to offer plausible opinions. Therefore, a selective approach was indicated.¹²⁸ Another difficulty is that nearly everyone familiar with reimbursed participation had some stake in the outcome of the proceeding in which that activity occurred and, concomitantly, in the perceived quality and efficacy of such involvement.¹²⁹ I addressed this difficulty with a methodology premised on balance in terms of perspectives and numbers, soliciting the opinions of a large, equal number of people from the three major categories of knowledgeable protagonists: agency, regulated and non-commercial interests.¹³⁰ The approach is

125. See *infra* § II.B of this Article.

126. I tried to serve as a conduit, so that readers could use the data reported in § II.B of this Article to draw conclusions as I did in § III of this Article. Examination of all this data affords obvious benefits, such as informing my judgments about issues in proceedings and, ultimately, about efficacy. Reading in the files what funded parties said or wrote offered special advantages in terms of accuracy. Indeed, the actual input often was "strikingly different" from the impressions gleaned from "reviewing secondary sources [and] interviewing observers." See *infra* text between notes 378 and 379.

127. One such concern was the considerable potential for bias. See, e.g., *supra* notes 59-60, 67 and accompanying text. This, and other concerns, meant that the material could not be relied upon exclusively.

128. As to numbers, see *supra* text accompanying note 123. Even if I could have interviewed all potential sources, other constraints, such as space limitations and reader interest, would have precluded the reproduction of all such interviews.

129. Thus, the fundamental problems are to secure maximum accuracy in terms of knowledge and to minimize potential bias.

130. There were obviously others, such as members of Congress. Moreover, interests within each of the three major categories could not always be "pigeonholed." But I was able to identify four principal groups of people affiliated with the CPSC: (1) technical staff with substantive responsibility for proceedings; (2) personnel responsible for the participant funding program; (3) attorneys responsible for proceedings or the compensation effort; and (4) the commissioners.

I found the people in the first and third groups to be the most reliable, although the need of all these sources to defend the decisions reached in the proceedings could have skewed their views on funded involvement. However, that consideration and the other possibilities for bias are tempered because nearly all the initiatives have been completed, the compensation endeavor has been discontinued, and many agency personnel are no longer associated with the CPSC.

The second primary category consisted of lawyers and technical experts employed by three major categories of representatives from regulated industry: (1) large manufacturers; (2) small businesses; and (3) trade associations. Their roles as proponents of positions different from, and frequently

meant to provide assurance against error attributable to lack of objectivity by affording certain statistical validity and opportunities for comparing the ideas expressed.¹³¹

I conducted the interviews as follows. I gleaned sources primarily from the Consumer Product Safety Commission files and those individuals contacted.¹³² I sought views by telephone—I identified myself, explained what I was doing, asked the nature of sources' involvement in the agency's initiatives and their opinions of the funded input's quality and impact, and recorded what was said.¹³³ In reporting the information, I reproduced verbatim or paraphrased below all pertinent references, regardless of apparent reliability. This methodology provided certain advantages, especially the promise of accuracy. The approach did not eliminate bias or unfamiliarity, but rather acknowledged the existence of those factors and attempted to allow for them.¹³⁴ The technique also permitted me to assemble inexpensively much raw data, while it afforded me the advantages of oral communication.¹³⁵ Moreover, the methodology facilitated transmission of that material, which, when considered in conjunction with the approach's explanation, should enable readers to formulate their own judgments regarding accuracy.

A final vexing problem was how to use this information to draw con-

adverse to, the views of funded parties and their perception that those receiving reimbursement lacked technical expertise and unnecessarily delayed proceedings made the manufacturers representatives seem less objective than might have been appropriate.

Non-funded and reimbursed individuals and consumer group representatives who had experience using the product or technical or legal expertise comprised the third principal category. For obvious reasons, compensated participants might evaluate funded activity more positively than they should. Even uncompensated participants, however, could be similarly disposed, given the congruence between their views and the perspectives of those who were reimbursed on the desirability of compensation and on the substantive issues.

131. The approach affords opportunities for comparison across, and within, the three categories mentioned and two disciplines—technical and legal. Moreover, the approach facilitates detection of error attributable to lack of knowledge. I also sought the views of some funded non-technical participants involved in most proceedings and as many commissioners as feasible, even though these observers might have lacked sufficient detachment or knowledge. I did so, because (1) they are so integral, as actual compensated participants, or ultimate decisionmakers, to this assessment; and (2) any prejudice or unfamiliarity can be detected in several ways. See *infra* notes 141-44.

132. Of course, given the large number of potential sources, see *supra* note 123 and accompanying text, those contacted had to be "cut off" at some point. This was done pursuant to the guidance in the paragraph immediately above.

133. Quality and efficacy were defined as above *supra* notes 115-18 and accompanying text.

134. See *supra* notes 127-31; *infra* notes 137-46 and accompanying text.

135. See *infra* notes 149-51 and accompanying text. One obvious benefit is the ability to clarify ideas expressed.

clusions about quality and efficacy.¹³⁶ For each proceeding, I reviewed all the data accumulated.¹³⁷ I began with the compensated input¹³⁸ and attempted to reach a preliminary determination by considering it and all data not directly expressing opinions. This exercise rarely yielded dispositive conclusions,¹³⁹ but it did help me make determinations by informing my assessments of the opinions that I examined next. I read all opinions of quality and impact and attempted to assign them values based on accuracy, in terms of objectivity and knowledge. I employed several considerations. One factor involved a "theoretical" judgment, premised on the source's ability to inspire trust.¹⁴⁰ Another set of considerations was "intangible," such as my sense of a source's perceptivity.¹⁴¹ I also relied upon other, more pragmatic, factors. I compared the opinions with data that did not express views and contrasted the opinions across, and within, each category and subcategory of the studies, hearings, files and interviews.¹⁴² I adjusted the "scores" assigned initially when the information considered as a whole warranted modification. One device used was the concept of balance.¹⁴³ A second, less exact mechanism was consensus, especially that not attributable to community of interest.¹⁴⁴ Because this methodology was imprecise and had other

136. See *infra* § III of this Article.

137. This includes data reported in the next subsection and that gathered but not reported, such as information on the underlying substantive issues. See *infra* § III of this Article.

138. The written comments submitted in several rulemakings provide an example. Most of the funded input is in the CPSC's files. See *supra* notes 122, 124 and accompanying text.

139. Dispositive conclusions were possible in some situations. For example, such conclusions could be drawn if the preamble to a CPSC regulation stated that funded input actually had affected a specific decision.

140. Sources inspired trust, either by virtue of perceived capacity for detachment in terms of neutrality or independence, as manifested by the absence of any stake in the funded activity, or knowledge in terms of insight, as evidenced by proximity to the initiative.

141. This sense of a source's perceptivity, as well as reliability, was derived from interviewing several hundred people and from working with CPSC employees for 15 months. For example, I found peculiarly trustworthy sources to be former CPSC staff who are now employed by those regulated.

142. For instance, reimbursed individuals' actual testimony during several public meetings was quite different from observers' later impressions of it. See, e.g., *infra* § II.B.5, 8. I found this a surprisingly helpful "check." See *supra* note 126. Although actual funded input is the classic example, I also relied on material in CPSC files and additional sources like Federal Register preambles.

143. For example, views of funded citizens and industry representatives originally given low values because of potential for bias were upgraded if the detrimental aspects of the views could have been minimized by offsetting the opinions or comparing and contrasting them with perspectives of ostensibly neutral observers, like CPSC technical staff. See *supra* note 130 and accompanying text.

144. For instance, when several industry employees, two funded parties, three staffers, one commissioner, and an extra-agency evaluator agreed, their views received greater weight than each

limitations,¹⁴⁵ I attempted to refine the ratings by applying more qualitative, subjective factors, such as my perception of the dynamics that operated in particular proceedings.¹⁴⁶ Finally, I made “gestalt” judgments formed while engaging in the entire enterprise.

This approach afforded considerable assurance of accuracy. The technique offered some mathematical certainty and objectivity but permitted the exercise of discretion and a certain amount of subjectivity. Moreover, this methodology had many elements which served as checks and balances.

3. *Miscellaneous Considerations*

The methodological difficulties examined seem most important and problematic. But there are others, most of which were mentioned. Three significant, related ones—when and where to assess and who should analyze—warrant more theoretical, and less textual, treatment because they are limited severely by real pragmatic constraints. Thus, they will be explored briefly here and below.¹⁴⁷

The timing of evaluation involves several difficult issues. Now that funding effectively has been discontinued and considerable time has passed since much reimbursed participation occurred, it may seem inappropriate to assess the activity. But these factors, and others, actually make the present a good time.¹⁴⁸ A question implicating similar issues is

would have received individually. Of course, this idea implicates the concept of balance, *see supra* note 143 and accompanying text, and could skew results if not numerically similar, *see supra* note 130 and accompanying text.

145. For example, it lacks statistical validity and certain advantages that more “rigorous” evaluation would afford. *See infra* § IV of this Article.

146. For example, if an industry were divided over a CPSC proposal, specific producers might view funded activity differently than they would if they were united. *See, e.g., infra* § II.B.7 of this Article.

147. The crucial pragmatic constraint is that little now can be done to alter their treatment. *Cf. infra* § IV of this Article (future possibilities).

148. The recent suspension of citizen funding, which always was controversial, and even has been described as “politically volatile,” *see Harter, supra* note 79, at 56; *accord Boyer, supra* note 14, should mean that current analysis would be attended less by political pressures and ought to permit calmer reflection, by eliminating temporal constraints and by making reimbursed involvement much less of a “moving target.” Passage of time is a mixed blessing. Some proceedings in which compensated activity occurred were completed only recently. For earlier ones, I found that temporal distance yielded considerable objectivity, memories of persons familiar with funded participation remained surprisingly accurate, and most relevant data remained readily accessible. There was, of course, some loss of accuracy, both in terms of memory lapses and data availability, which contemporaneous evaluation would have minimized. The most obvious memory lapses were revealed by the discrepancies between certain observers’ recollections of funded input and its actual nature. *See*

where to evaluate. When the compensated input was an oral contribution, being present would have offered benefits, like securing impressions of credibility.¹⁴⁹ However such attendance would have been prohibitively expensive,¹⁵⁰ and it did not happen and cannot occur now. What is possible and seems next best is the approach used here.¹⁵¹ A third question is who should perform the assessment. That person ought to possess (1) sufficient familiarity with the funding concept and techniques of analysis, agency initiatives in which reimbursed participation occurred, and the Consumer Product Safety Commission and (2) adequate detachment to render the most accurate account. Although many, especially people affiliated with the Commission, know more about the agency than I do,¹⁵² I have worked on the compensation idea for a decade.¹⁵³ Accordingly, the reader can weigh my familiarity with funding and the CPSC as well as my potential for bias.

Another issue involves priorities, especially depth, breadth, scope, and detail of analysis. I attempted to assess as much compensated participation, as rigorously as I could, employing the touchstone of accuracy. But I did make the choices above. I also made judgments about the relative

supra note 126. But the "checks" enumerated above compensated for most of these. Moreover, most of the data gathered at the CPSC seem essentially intact. *See supra* note 109 and accompanying text. Furthermore, that type of analysis was a luxury which could rarely be afforded, and was infrequently performed, even at the apogee of funding activity, and obviously cannot be done now. Thus, on balance, the present appears to be a reasonably appropriate time.

149. Another advantage would be the opportunity to secure impressions of the dynamics generally operating. Both examples implicate issues similar to appellate court or agency treatment of fact-finding performed by trial judges, juries, or ALJs. *See* K. DAVIS, ADMINISTRATIVE LAW TREATISE, §§ 29.22, 29.26 (1984); W. PROSSER & P. KEETON, HANDBOOK ON TORTS, § 37 (5th ed. 1984).

150. For example, the chain saw proceeding involved many meetings held in numerous cities. *See infra* § II.B.7 of this Article. *Cf. supra* note 101 (cost estimates of evaluating funded activity).

151. That is to read what actually was said as well as to interview those people who said it and anyone else who could provide an accurate account of the funded involvement. Locus also was important to conducting interviews. *See supra* notes 128-33 and accompanying text. Interviewing analysts of compensated participation in person, like personal observation of oral input in proceedings, affords certain advantages, such as increased ability to render credibility judgments, but the cost is substantial. Therefore, because interviewing by telephone affords numerous benefits similar to in-person interviews, and the additional advantages of securing more opinions and cost efficiency, it seemed preferable.

152. A number, however, might lack the requisite objectivity. *See supra* note 130. Thus, an extra-agency evaluator, but one sufficiently familiar with the CPSC funded involvement, appeared preferable.

153. I did so in part as an FDA consultant, in which capacity I had some responsibility for implementing the funding program now discontinued. *See supra* notes 47, 55 and accompanying text.

significance of reimbursed activity at the CPSC, guided by considerations, such as how important the involvement was to the proceeding in which it occurred or how representative that participation was vis-a-vis other activity at the Commission or additional agencies.¹⁵⁴

There are numerous other complications that impair stringent evaluation.¹⁵⁵ Although I recognize the methodology used here does not satisfy all the standards of "rigor" I prescribe in the final section of this Article for those conducting future analyses, "every study has its limits—and this one is no exception."¹⁵⁶ The decision to assess all of the compensated involvement at the Consumer Product Safety Commission is defensible and realistic, given present resource constraints, the dearth of reliable scrutiny to date, and the current availability of relevant information.¹⁵⁷ It is also important to begin systematically (1) gathering data on funded participation before it becomes less accessible or is forgotten, lost or destroyed and (2) analyzing the material assembled to ascertain whether more conclusive determinations about quality and efficacy can be reached.¹⁵⁸ This study is a start; I invite and challenge others to criticize it and to (1) evaluate reimbursed activity at the remaining units of government, (2) contrast those agencies' experiences, (3) attempt to draw the

154. For example, five minutes of funded testimony in the upholstered-furniture proceeding, which was begun in 1977 and is ongoing, warranted, and was accorded, less scrutiny than other CPSC funded activity. See *infra* § II.B.8 of this Article.

155. For helpful treatment of many such complications, see B. BOYER, *supra* note 62, at 134-38; Rosenbaum, *supra* note 100; Rosener, *supra* note 100. Cf. *infra* § IV of this Article (suggestions for future evaluation).

156. See Gellhorn, *supra* note 5, at 362 n.15.

157. The data, while becoming increasingly difficult to secure, remain sufficient to permit more rigorous analysis than has been undertaken thus far. The assessment of the CPSC also yielded interesting insights as to reimbursed and unfunded public participation at other governmental entities, the advisability of discontinuing the CPSC's program, the CPSC's decisionmaking and the broader administrative process, the Commission itself, and techniques for evaluating compensated activity. For a discussion of reimbursed and unfunded participation, see Tobias, *supra* note 2, at 945 n.288 and accompanying text. Conclusions regarding most of these ideas are in §§ III.A.4, IV of this Article.

158. Funded activity may have numerous impacts that pertain less directly to the decisional process, such as increased public confidence in agency decisions. See Furrow, *Governing Science: Public Risks and Private Remedies*, 131 U. PA. L. REV. 1403, 1422-24 (1983). Although these impacts are important, their thorough consideration is beyond the scope of this paper. Cf. PUBLIC PARTICIPATION STUDY, *supra* note 9; NRC REPORT, *supra* note 61; Boyer, *supra* note 14; Cramton, *supra* note 6; Gellhorn, *supra* note 5; Note, *supra* note 4 (discussion of many impacts). Of course, administration of funding programs is also important. But the ACUS, Professor Boyer and I have concluded that the difficulties are not so problematic as to prohibit funding. See 1 C.F.R. § 305.79-5 (1987); B. BOYER, *supra* note 62, at 113-14; Tobias, *supra* note 2, at 952. Cf. *infra* § III.A.4 of this Article (suggestions for program administration).

increasingly definitive judgments regarding quality and impact that aggregate assessment should permit,¹⁵⁹ and (4) improve evaluative techniques.¹⁶⁰

B. *Proceeding-Specific Analysis*

For each initiative in which compensated involvement occurred, there will be a descriptive analysis of the proceeding as well as verbatim or paraphrased opinions, and my conclusions, about quality or efficacy. For ease of analysis, the funded activity essentially will be examined chronologically.

1. *Fireworks*

In May 1974, the Consumer Product Safety Commission, under authority transferred to it by the Federal Hazardous Substances Act (FHSA), announced its intention to adopt a 1973 proposal of the FDA imposing restrictions on fireworks.¹⁶¹ Objections by members of the industry and the state of Hawaii postponed the date on which the proposed controls were to have become effective while triggering additional agency consideration of potential regulation.¹⁶² Public hearings before an Administrative Law Judge (ALJ), who was the initial decisionmaker, were

159. The study does not purport to resolve the issue of funded participation's effect on administrative decisionmaking. Insofar as available evidence permits, however, I attempt to draw more definitive judgments than those found in past studies.

160. See *infra* § IV of this Article. Of course, the reader who lacks the time or interest to read all the data reported next may read it selectively or read the conclusions I draw in § III. The selective reader might read about one, or several, proceedings, choosing different types. For a discussion of the difficulties entailed in reading some or no data, see *supra* notes 100, 102-03, 125-26 and accompanying text.

To preserve, insofar as possible, the confidentiality of the CPSC, its members and staff, funded participants and the other people whom I interviewed, I identified most of those people only by numerical designations. This journal's editors have relied upon me to verify the accuracy of information reported below. Most interviews were conducted during 1983 and 1984. Any inquiries regarding the sources should be directed to me. Copies of all non-confidential sources cited in the Article are in the CPSC's files or other public documents.

161. See 39 Fed. Reg. 17,435 (1974); 15 U.S.C. § 2079(a) (1982) (§ 30(a) of CPSA) (FHSA authority). Cf. 39 Fed. Reg. 17,435-44 (prior history of fireworks regulation, CPSC modification of FDA's proposal in light of public comment, and restrictions CPSC intended to impose).

162. See *id.* at 25,473. Postponement and additional consideration were mandated by 21 U.S.C. § 371(e) (1976) because the CPSC intended to impose a ban under the FHSA. Cf. 41 Fed. Reg. 9512-23 (1976); Feinberg, *Consumer Product Safety: The Current Record of Administrative Interpretation*, 37 FED. B. J. 56, 64-66 (1978) (discussion of these requirements and proceeding's background).

to be held in Washington, D.C.,¹⁶³ but, when sessions also were scheduled for Kansas City, Missouri, and Honolulu, Hawaii, the commissioners authorized the ALJ to fund the rule's proponents should their involvement be necessary to secure an adequate record.¹⁶⁴ The Administrative Law Judge then awarded compensation to the counsel for the Health Research Group (HRG), the selected representative of a conglomerate of public interest organizations, which included entities such as the National Society for the Prevention of Blindness.¹⁶⁵ The most controversial question at issue in the proceeding was whether fireworks should be banned. The interests represented by the Health Research Group favored stringent controls, arguing for the imposition of a ban on all fireworks products, but submitted evidence supporting strict regulation if proscription were deemed unacceptable. The position of the Consumer Product Safety Commission, participating as a party in the initiative, was more moderate and closer to the perspective of the regulated industry, although the agency advocated a ban on firecrackers.¹⁶⁶ After hearing twenty-one days of testimony, the Administrative Law Judge issued summary conclusions and a narrative decision in April 1975.¹⁶⁷ The commissioners modified many of the determinations made by the Administrative Law Judge and published a tentative order in March 1976¹⁶⁸ and a final rule in June.¹⁶⁹ That final regulation, which included a compromise on the ban question resembling the views espoused by the CPSC during the hearing,¹⁷⁰ was sustained on appeal.¹⁷¹

One lawyer responsible for the agency's case said that, although it was difficult to document the cause-and-effect contribution of the Health Re-

163. See 39 Fed. Reg. 36,041 (1974); FEDERAL REGULATION AND REGULATORY REFORM, H. Doc. No. 34 (13187-3), 95th Cong., 1st Sess. 221 (1977).

164. See sources cited *supra* note 163.

165. See 41 Fed. Reg. 9512, 9513 (1976). Conglomerate members also included the American Public Health Association and many others, most of which are listed at *id.*

166. See *id.* at 9512-23; telephone interviews with CPSC employee 1; David Masselli, HRG counsel. See generally Feinberg, *supra* note 162, at 64-65 (more background discussion).

167. See 41 Fed. Reg. 9512, 9514 (1976). Cf. Feinberg, *supra* note 162, at 65 (additional discussion of proceeding).

168. See 41 Fed. Reg. 9512 *et seq.* (1976).

169. See *id.* at 22,931 (codified at 16 C.F.R. § 1507). Cf. Feinberg, *supra* note 162, at 65-66 (additional discussion of proceeding).

170. See telephone interviews, *supra* note 166.

171. See *National Society for the Prevention of Blindness v. CPSC*, 566 F.2d 798 (D.C. Cir. 1977), *cert. denied sub nom. Hawaii v. CPSC*, 435 U.S. 943 (1978). Cf. 42 Fed. Reg. 34,873 (1977) (substance of unreported opinion above); see generally *id.* 41 Fed. Reg. 22,931-33 (1976); Feinberg, *supra* note 162, at 66 (additional discussion of proceeding).

search Group,¹⁷² he was impressed by the entity's input. The attorney for the Health Research Group was intelligent and aggressive, submitted substantiated information that would not otherwise have been available, and made thorough, effective factual presentations and legal arguments. That input, which required consideration of new ideas, kept the Commission "staff honest and on its toes," forcing them to rely less on industry, provided evidence to support more stringent controls than might have been imposed and improved the administrative record.¹⁷³ Co-counsel for the Consumer Product Safety Commission thought that the lawyer for the Health Research Group "did an excellent job to the extent he participated," conducting "some extremely effective cross-examination."¹⁷⁴ The author of the fireworks opinion issued by the agency agreed with both attorneys, adding that the work of the funded counsel "had a big impact on how the case proceeded" and led to a "more balanced result that was a reasonable solution," albeit more moderate than the position championed.¹⁷⁵ Two agency technical people were "quite favorably impressed," finding the HRG's lawyer "effective in promoting his cause" and cross-examining witnesses, although one said all his contentions were not adopted and the other was unsure of his "effect on the case."¹⁷⁶ The Administrative Law Judge was "not very impressed," stating that the attorney "did very little, consumed a lot of time, presented no affirmative case, and simply cross-examined."¹⁷⁷ Counsel for the Health Research Group explained that he had argued that his client was not obligated by the statute to "put on a case which led to friction with the

172. The individual had difficulty for many reasons discussed *supra* § II.A of this Article, adding it "would take three months to piece together" the entity's input, an admonition that led me to interview numerous individuals familiar with the proceeding.

173. See telephone interview with CPSC employee 1, *supra* note 166. The individual also contrasted this funded input with other funded input, which was characterized as duplicative and unsubstantiated, adding the CPSC "got its money's worth." *Id.* Cf. *infra* notes 174-77 and accompanying text (numerous CPSC employees agreed with much he said and other specific ideas).

174. Telephone interview with CPSC employee 2.

175. Telephone interview with CPSC employee 3. The ALJ was a "very activist judge who was influenced by people who put on pitches, [*i.e.*], fireworks types." *Id.*

176. Telephone interviews with CPSC employees, 4, 5. The first individual also said that the CPSC's "regulation was pretty effective," as fireworks injuries decreased from 11,400 in 1976 to 8,000 in 1984, while consumption increased 50%. He added, however, that Chinese producers improved the manufacture of 50 mg. firecrackers so they would provide a report two-thirds as loud as those banned, thus partially defeating the CPSC's intent, and concluded that there "still is a problem with illegal and bootlegged fireworks, especially M-80's." *Id.* See *infra* text accompanying note 181.

177. Telephone interview with Paul Pfeiffer.

ALJ.”¹⁷⁸ The lawyer added that the Health Research Group found the Commission’s proposal weak in several respects, but the entity at least wanted to ensure the adoption of the Consumer Product Safety Commission’s proposal.¹⁷⁹ He asserted that the HRG’s advocacy of positions more extreme than those of other parties protected the CPSC’s approach.¹⁸⁰ The attorney did not claim that the fireworks problem was solved, or that the Health Research Group “played a major role,” but he asserted that the “post-1975 legal fireworks world is very different,” because most injuries today are from illegal M-80’s.¹⁸¹ The rule, unlike many regulations adopted then, also withstood judicial challenge. Moreover, funded participation was a “taxpayers’ bargain,” as the counsel for the Health Research Group worked “1000 hours at two dollars per hour.”¹⁸²

2. *Carpet Flammability Enforcement Proceeding*

In 1975, the Consumer Product Safety Commission agreed to pay two respondents charged with violating carpet flammability standards, should the Administrative Law Judge find that continued prosecution was warranted and that those accused were indigent.¹⁸³ But the need for funding was obviated when the ALJ determined that pursuit of the matter would not serve the public interest because the respondents had declared bankruptcy and no longer held managerial positions in the industry, while prosecution would have yielded only a marginal benefit, even if successful.¹⁸⁴

3. *Toy Safety Public Meeting*

In May 1973, the authority to regulate toy safety was transferred to the Consumer Product Safety Commission from the Food and Drug Administration, which had issued a proposal governing dangers posed to

178. Telephone interview with David Masselli, *supra* note 166.

179. *Id.*

180. *Id.* Cf. B. BOYER, *supra* note 62, at 132-38 (when participants’ positions premised on strategic considerations, it is difficult to ascertain actual views, much less cause-effect relationship between them and decisionmaking).

181. Telephone interview with David Masselli, *supra* note 166.

182. *Id.*

183. See Order Authorizing Assignment of Counsel For Individual Respondents Alvin L. Couch and Power W. Bethea if Justified by Their Indigency Claim, *In re* Esquire Carpet Mills, Inc., F.T.C. Docket No. 8913 (1975).

184. See *id.*

children by small parts during the preceding February.¹⁸⁵ In January 1975, the Commission proposed rules on hazards presented by sharp edges and sharp points.¹⁸⁶ Because the Consumer Product Safety Commission wished to acquire the "broadest perspectives" in pursuing solutions to the risks involved, the agency held a public meeting in October 1976 to solicit consumer views on potential regulation.¹⁸⁷ The possibility of Commission regulation had proceeded slowly because of difficulties in using generic requirements, defining sharp edges and points, and developing testing procedures.¹⁸⁸ Two citizens received funding. The Consumer Product Safety Commission revised the small-parts proposal in 1978 and finalized it in 1979, while the sharp edges and points proposals have not become final.¹⁸⁹

One person attended the session but said nothing, and the other commented throughout.¹⁹⁰ An agency lawyer who was present said that the participating citizen added "zero."¹⁹¹ Counsel for the Toy Manufacturers of America, Inc. (TMA), who also attended, found that the individual was "vitriolic, extremely critical of all that was done and ineffective."¹⁹² Although the Commission's Project Manager described the participant's recommendation that the CPSC "start off subjectively" in treating balloons¹⁹³ as a "good suggestion," the "kind of thing" for

185. See 38 Fed. Reg. 2179 (1973). Cf. *Toy Manufacturers of America, Inc. v. CPSC*, 630 F.2d 70, 72-73 (2d Cir. 1980); *infra* notes 187-88 and accompanying text (discussion of toy safety regulation background).

186. See 40 Fed. Reg. 1488 (1975).

187. See Transcript, *In re Toy Safety Meeting*, at 3, Bethesda, Md. (Oct. 19, 1976) (statement of Albert Dimcoff, CPSC Acting Executive Director).

188. For an analysis of CPSC toy regulation, resulting in recommendations that the CPSC "promptly issue (1) toy safety requirements that adequately define the hazards associated with toys, and (2) test procedures," see COMPTROLLER'S REPORT, *supra* note 94, at 11-13, 19-20. Cf. *Compliance and Enforcement Efforts of CPSC: Hearings Before the Subcomm. for Consumers of the Senate Commerce Comm.*, 94th Cong., 2d Sess. 34 (1976); Transcript, *Toy Safety Meeting*, *supra* note 187, at 5, 35 (CPSC explanations of difficulties in regulating toys) (statement of John Preston, CPSC Toy Regulation Project Manager); 40 Fed. Reg. 1488-89, 1491-92 (1975); 44 Fed. Reg. 34,892-93 (1979) (CPSC toy regulation efforts before meeting); *id.* at 34,892 *et seq.*; 43 Fed. Reg. 12,636 *et seq.* (1978) (efforts after meeting).

189. See 43 Fed. Reg. 12,636; 44 Fed. Reg. 34,892 (1979), *codified at* 16 C.F.R. § 1501 (1987). Cf. *Toy Manufacturers of America, Inc. v. CPSC*, 630 F.2d 70 (2d Cir. 1980) (unsuccessful industry trade association judicial challenge to small parts regulation).

190. See Transcript, *Toy Safety Meeting*, *supra* note 187.

191. Telephone interview with CPSC employee 1.

192. See telephone interview with industry representative 1.

193. See Transcript, *Toy Safety Meeting*, *supra* note 187, at 33-34 (statement of funded participant 2).

which the agency was looking, and an idea “from the outside world [answering] some of our problems,”¹⁹⁴ even it was ultimately rejected.¹⁹⁵ My reading of the participant’s input and comparison of it with the Commission’s resolution of toy-safety issues confirms the above assessments and indicates that much contributed by the consumer advocate was not very analytical or effective and that some was explicitly rejected.¹⁹⁶ In fairness, the citizen contended that the “deck was stacked against public involvement,” that the Chairman of the Consumer Product Safety Commission “did not want to rock industry’s boat,” that the attorney for the Toy Manufacturers of America was the “synthesis of a lobbyist whose primary concern was toy interests,” and that the producers “were not interested in her help.”¹⁹⁷ Moreover, it is unrealistic to expect that a single party’s input would affect a six-year decisional process.¹⁹⁸

4. *Asbestos Patching Compounds*

In July 1977, the Consumer Product Safety Commission proposed banning asbestos-containing patching compounds (APC) because the agency believed that cancer resulted from inhaling asbestos fibers released during application.¹⁹⁹ In an August hearing, three non-industry participants and four producers offered specific testimony.²⁰⁰ Two of the industry members had discontinued manufacturing APC and another, Union Carbide, vigorously opposed the proposal.²⁰¹ An environmental consultant who had helped two public interest groups petition the Commission on this issue was paid to testify.²⁰² In December, the agency banned asbestos patching compounds.²⁰³

An appraisal of the effect of funded input is complicated by the diffi-

194. *See id.* (statement of John Preston).

195. *See* 16 C.F.R. § 1501.3(a) (1987) (balloons’ exemption from CPSC regulation covering small parts).

196. *Compare* comments of funded participant 2 in Transcript, Toy Safety Meeting, *supra* note 187, with last two Federal Register documents cited *supra* note 188.

197. Telephone interview with funded participant 2.

198. Indeed, the Child Protection and Toy Safety Act, Pub. L. No. 91-113, 83 Stat. 187, passed in 1969 and the small parts rule, 16 C.F.R. § 1501, issued in 1979. *Cf. supra* § II.A of this Article (difficulty of assessing such impact).

199. *See* 42 Fed. Reg. 38,783 (1977). *Cf. id.*; 42 Fed. Reg. 63,354 (1977) (discussion of proceeding’s background).

200. *See* Transcript, Asbestos Patching Compounds, Bethesda, Md. (August 15, 1977).

201. *Id.*

202. *See* telephone interview with funded participant. The two groups were the Environmental Defense Fund (EDF) and the Natural Resources Defense Council (NRDC).

203. *See* 42 Fed. Reg. 63,354 (1977).

culty of estimating one person's impact in a single hearing, when the Consumer Product Safety Commission seemed predisposed to finalizing the proposal, only one producer strongly opposed it, and no specific testimony was mentioned in the preamble to the ban. The citizen's presentation seemed more general, historical, anecdotal, and disorganized than necessary. He only addressed the proposal's substance when admonished by the Chairman of the Commission to "get to the two hazards which" were the subject of the meeting and when he was later instructed to summarize.²⁰⁴ But the Consumer Product Safety Commission implemented the action the reimbursed individual urged and the agency adopted some of his specific ideas, such as rejection of a Union Carbide solution.²⁰⁵ A staffer thought that the compensated party was "very effective" and that he provided much helpful written and oral support for the ban.²⁰⁶ The paid participant said that he "got much in the record" to assure that the ban "was not overturned."²⁰⁷ That effort apparently succeeded because the Commission decision to ban was not challenged.

5. *Children's Sleepwear*

In October 1977, the Consumer Product Safety Commission proposed to amend flammability standards for children's sleepwear by deleting restrictions governing residual flame time (RFT), exempting small garments, and revising trim-testing methods.²⁰⁸ The principal purpose of the Commission proposal was to minimize flame-retardant chemicals in the clothing while maintaining adequate fire protection.²⁰⁹ Fifteen parties, one of whom was funded, spoke at a November public meeting.²¹⁰ The agency analyzed the oral testimony and 200 written comments. The Consumer Product Safety Commission omitted the RFT constraints and modified the trim-testing techniques in February 1978.²¹¹

204. For the citizen's presentation, see Transcript, Asbestos Patching Compounds, *supra* note 200, at 154-75. *Cf. id.* at 162, 175 (Chairman Simpson's admonition and instructions).

205. See 42 Fed. Reg. 63,354, 63,357, 63,361 (1977) (taking the action urged and rejecting Union Carbide's solution); *cf.* Transcript, Asbestos Patching Compounds, *supra* note 200 (funded participant's testimony).

206. See telephone interview with CPSC employee 1.

207. See telephone interview with funded participant, *supra* note 202.

208. See 42 Fed. Reg. 56,568 (1977). *Cf. id.* at 56,568-69 (discussion of proceeding's background).

209. See *id.*

210. See Transcript, Public Meeting on Proposed Amendments to Standards for Flammability of Children's Sleepwear, Bethesda, Md. (Nov. 16, 1977).

211. See 43 Fed. Reg. 4849 (1978), *codified at* 16 C.F.R. § 1615 (1987).

It is more problematic to evaluate this consumer's input than the contributions analyzed in the two proceedings discussed immediately above. The citizen was one of 200 commenters, none of whom was mentioned in the preamble to the final rule. Many people, including producers, agreed with the funded individual and favored the proposal. The Consumer Product Safety Commission appeared predisposed to amend the proposal, as evidenced by the rapid way in which the agency reviewed the public input and finalized the rule. The compensated participant seemed unconcerned about possible fire risk, supplied no data for assertions on possible injuries to children or buyers' needs, was redundant, and added little not provided by many others.²¹² However, the Commission Chairman said that the Consumer Product Safety Commission was "seriously considering" ideas on maximizing consumer choice offered by the reimbursed party, while a Commissioner praised the individual for her candor and for affording a "direct public" perspective that the agency did not always receive.²¹³

6. Unvented Gas Space Heaters

In the mid-1970's, the Consumer Product Safety Commission investigated the risks of carbon monoxide poisoning associated with unvented, gas-fired space heaters (UGSH).²¹⁴ The agency's preliminary inquiry indicated that the space heaters were important heating sources in several regions of the country, but that they posed unreasonable danger against which no feasible standard could protect.²¹⁵ Thus, the Consumer Product Safety Commission proposed a ban on the space heaters in February 1978, held regional hearings on the proposal during March, and funded three citizens in two meetings.²¹⁶ The Commission learned in one of these sessions about an oxygen-depletion safety (ODS) shutoff system employed abroad and then explored the feasibility of applying the ODS shutoff system in the United States, finding the concept workable.²¹⁷ The

212. See Transcript, Flammability of Children's Sleepwear, *supra* note 210, at 95-117. An important complication was that many manufacturers favored the amendments.

213. See *id.* at 115, 116 (statements of Chairman Simpson, Commissioner Franklin).

214. See 45 Fed. Reg. 61, 880-81 (1980). *Cf. id.* (discussion of proceeding's background prior to issuance of final rule).

215. See 43 Fed. Reg. 6235, 6238 (1978). The largest region was the South.

216. The notice proposing a ban and announcing the regional hearings in Washington, D.C., Dallas and Miami appears in *id.* at 11,731. The CPSC funded one citizen in Washington and two in Dallas. Telephone interview with Patricia Chisley, CPSC Office of Secretary.

217. See *infra* note 220 and accompanying text (CPSC learning of the ODS system); *infra* text

Consumer Product Safety Commission relied on its findings and the heaters' wide use to issue a September 1980 rule that withdrew the ban and required the ODS system for new heaters.²¹⁸

In the first session, two commissioners lauded the citizen for supplying "very important input" and "good information to know" about the effect of a ban and other data every commissioner "wanted to hear more about," some of which "just struck" one of them.²¹⁹ An agency Chairman said that the paid participants represented the elderly, the poor and students who strongly opposed a ban because unvented, gas-fired space heaters provided necessary heat for them. She stated that the Consumer Product Safety Commission later explored existing European devices and decided to rescind the proposal and develop a standard. The Chairman added that funded "participation had a very significant impact on [CPSC] progress on" the ban issue, while compensation permitted the CPSC to "hear from actual consumers, not just industry," and to gather important data on use patterns and product maintenance.²²⁰ An agency staffer agreed, claiming users' economic views were helpful and probably had changed one "Commissioner's mind on going to a standard."²²¹ The CPSC's self-study said that the compensated input, which indicated that a ban might eliminate a major source of heating in the South and lead to the use of more dangerous mechanisms, influenced the final decision.²²² But other staffers and observers thought the reimbursed public contributions less valuable, finding them anecdotal, emotional, or unsupported by technical data.²²³ Moreover, information on the ODS system supplied by unfunded parties was more influential.²²⁴ My reading of the testimony

accompanying notes 218, 224; 45 Fed. Reg. 61,880 (1980) (CPSC exploration and findings on workability of the ODS system).

218. 45 Fed. Reg. 61,880 (1980); cf. 49 Fed. Reg. 46,108 (1984) (rule revocation because voluntary compliance).

219. See Transcript, Public Meeting on Unvented Gas Space Heaters, at 70-72, 75, Washington, D.C. (Mar. 6, 1978) (statements of Commissioners Pittle, Franklin). Cf. *id.* at 66 (funded participant's claim that ban could lead to use of more dangerous devices). Accord CPSC Study, *supra* note 59, at 3; telephone interview with CPSC employee 1.

220. See telephone interview with Susan King, CPSC Chairman; *Hearings on HUD—Independent Agencies Appropriations for 1980 Before the Subcomm. on HUD—Independent Agencies of the Senate Appropriations Comm.*, 96th Cong., 1st Sess., pt. 1, at 90 (1979) (statement of Chairman King).

221. See telephone interview with CPSC employee 2.

222. See CPSC Study, *supra* note 59, at 3. Accord telephone interview with CPSC employee 1, *supra* note 219.

223. See telephone interview with CPSC employees 3, 4, 5; industry representatives 1, 2.

224. Those unfunded were employees of Irish and Spanish producers whose testimony is in the

indicates that Commission officials who were favorably impressed overestimated the impact of compensated parties. The citizens at the second meeting made few new substantive contributions. One of the participants supported the ban with little apparent appreciation of its economic effects, while the other individual only spoke generally to the economic and safety issues.²²⁵ The input provided by the person in the first session, while more specific and helpful, was less relevant than it might have been.²²⁶

7. Chain Saws

In June 1978, the Consumer Product Safety Commission and the Chain Saw Manufacturers Association agreed to work on a voluntary standard to minimize chain saw injuries, which principally resulted from "kickback."²²⁷ Because the contract between the Consumer Product Safety Commission and the Chain Saw Manufacturers Association provided for consumer involvement and agency funding, it is possible to view the Association and citizens as reimbursed parties.²²⁸ But it is very

Transcript, Unvented Gas Space Heaters, *supra* note 219, at 32-58. Cf. telephone interview with CPSC employee 1, *supra* note 219 (influence). See generally *Consumer Product Safety Amendments of 1983: Hearings on H.R. 2367 Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. 407 (1983) (statement of Commissioner Zagoria) [hereinafter cited as *H.R. 2367 Hearings*]; *supra* text accompanying notes 217, 220 (mention of influence). See also 45 Fed. Reg. 3762, 61,880, 61,881, 61,886 (1980); 44 Fed. Reg. 18,516 (1979); 43 Fed. Reg. 29,011, 55,772 (1978) (discussions of proceeding).

225. See Transcript, Public Meeting on Unvented Gas Space Heaters, at 30-34, 83-92 Dallas, Tex. (Mar. 28, 1978) (statements of funded participants 2, 3).

226. See Transcript, Unvented Gas Space Heaters, *supra* note 219, at 59-75 (statements of funded participant 1). As to overestimation, only one commissioner attended both hearings, many years have passed, and some officials may have been referring to unfunded parties.

227. See *CPSC Reauthorization: Hearings Before the Subcomm. for Consumers of the Senate Comm. on Commerce, Science and Transportation*, 98th Cong., 1st Sess. 131 (1983) (statement of CSMA) [hereinafter cited as *1983 Senate Reauthorization Hearings*]; 43 Fed. Reg. 26,103. The CSMA is a trade association that represents most producers. Compare *CPSC Reauthorization: Hearings Before the Subcomm. For Consumers of the Senate Comm. on Commerce, Science and Transportation*, 97th Cong., 1st Sess. 150 (1981) (statement of Donald Purcell, CSMA President) [hereinafter cited as *1981 Senate Reauthorization Hearings*] with *CPSC Reauthorization: Hearings on H.R. 2271 and H.R. 2201 Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 97th Cong., 1st Sess. 443 (1981) (CPSC response to Purcell testimony) (differing views of prior industry voluntary efforts) [hereinafter cited as *H.R. 2271 Hearings*]. Cf. *id.* at 552-77; *1981 Senate Reauthorization Hearings*, *supra* at 151-55; *1983 Senate Reauthorization Hearings*, *supra* at 131-35 (statements of Donald Purcell); 46 Fed. Reg. 26,262-64 (1981); 45 Fed. Reg. 62,392-93 (1980); 43 Fed. Reg. 26,103 (1978) (discussions of proceeding).

228. See Agreement to Jointly Develop a Voluntary Safety Standard for Chain Saws Between Chain Saw Manufacturers Association and U.S. Consumer Product Safety Commission, Article V

difficult to assess the impact of the CSMA on consumers as intra-industry feuding prevented satisfactory completion of the project.²²⁹ Although the endeavor seemed to be progressing productively, albeit slowly, before unraveling,²³⁰ the Commission apparently failed to capitalize on the effort expended when the project might have been salvaged. The initiative eventually degenerated into name-calling between the Consumer Product Safety Commission and the Chain Saw Manufacturers Association.²³¹ Thus, eight years after being petitioned to write mandatory controls, and six years after the joint endeavor aborted,²³² the Commission accepted voluntary requirements proposed by the industry which are similar to those developed in the project.²³³ This agency decision ended an unfortunate effort in which there was much blame to share. The endeavor was pursued at a cost of more than \$1,000,000 to manufacturers of chain saws, at the expense of more than \$500,000 to the Commission and at great cost to the public in terms of injuries and deaths attributable to failure to improve safety and increased product costs.²³⁴

(June 1, 1978), reprinted in *H.R. 2271 Hearings*, *supra* note 227, at 599, 607. Cf. Agreement *supra*; 1981 Senate Reauthorization Hearings, *supra* note 227, at 152 (statement of Donald Purcell); 43 Fed. Reg. 26,104 (1978) (discussion of work's organization and consumers).

229. It is difficult to ascertain precisely what happened, but I believe the conclusions offered, which reflect composite assessments drawn from interviewing many familiar with the project, accurately identify the principal protagonists and the major areas of controversy. Accord 1981 Senate Reauthorization Hearings, *supra* note 227, at 4, 276 (statements of General Counsel Krulwich; Commissioner Zagoria). Compare *H.R. 2271 Hearings*, *supra* note 227, at 407-08 (statement of Commissioner Pittle), and at 444 (CPSC response to Purcell testimony) with *id.* at 750-51 (representative conflicting impressions of what happened) (statement of Donald Purcell).

230. See, e.g., *H.R. 2271 Hearings*, *supra* note 227, at 750-51; telephone interviews with CPSC employees 1, 2; funded participants 1, 2.

231. See telephone interviews with CPSC employee 2, funded participant 1, *supra* note 230 (CPSC failure); *What Can Sway CPSC Is Shown in King's Views*, Product Safety Letter at 3 (Jan. 26, 1981); *Chain Saw Makers Blast CPSC*, Product Safety Letter at 4 (Feb. 9, 1981), reprinted in *pertinent part* in Harter, *supra* note 79, at 62 nn.345-46 and accompanying text (name-calling). The CPSC reportedly asserted that the CSMA was "comprised of macho manufacturers who stonewalled the agency," while the CSMA reportedly "responded that the problem lay in 'the ineptitude, bias and mismanagement casually dispensed' by the agency's staff." *Id.*

232. See 43 Fed. Reg. 26,103 (1978) (petition). Cf. 45 Fed. Reg. 62,392 (1980) (endeavor's December 1979 abortion); 46 Fed. Reg. 26,262 (1981); 47 Fed. Reg. 19,369 (1982); 1983 Senate Reauthorization Hearings, *supra* note 227, at 17, 131-34 (statements of Commissioner Zagoria, CSMA President Donald Purcell); *Hearings on HUD—Independent Agencies Appropriations for 1984 Before the Subcomm. for HUD—Independent Agencies of the House Appropriations Comm.*, 98th Cong. 1st Sess., pt. 1, at 2, 22 (1983) (statement of Chairman Stoerts) [hereinafter cited as 1984 House Appropriations Hearings]; *infra* note 233 and accompanying text (CPSC efforts after endeavor's abortion).

233. See 50 Fed. Reg. 35,241 (1985).

234. See *H.R. 2271 Hearings*, *supra* note 227, at 751 ("Industry conservatively expended \$1.2

The sources interviewed gave mixed appraisals of the Chain Saw Manufacturers Association. The CSMA President stated that the work was “characterized by complete openness and active participation by government, consumer and industry representatives,” producers “candidly shared their expertise” with everyone, and those involved developed an “extremely sophisticated approach to measuring kickback” and engaged in the most “comprehensive attempt to deal with chainsaw kickback anywhere in the world.”²³⁵ A funded technical expert found that the CSMA’s “basic methodology, approach, and technical input were excellent.”²³⁶ He said that the Chain Saw Manufacturers Association did a “nice job of coordinating the effort” and of avoiding adversary confrontations.²³⁷ The technical person also reported that the project had been “proceeding extremely well” to a balanced, feasible solution when the endeavor “blew apart” and that it could have been saved but that “common sense did not prevail,” adding that the effort was not wasted, because it generated valuable data for later standard work by the Commission and the industry.²³⁸ An extra-agency evaluator concurred, but wondered if voluntary endeavors would have moved faster had the Consumer Product Safety Commission begun mandatory standard development earlier.²³⁹ An agency employee thought that the Chain Saw Manufacturers Association produced a “piece of work way ahead of its time” but “failed to seize the initiative” and provided “spotty project

million to \$1.5 million” on the project) (statement of Donald Purcell); *Hearings on HUD—Independent Agencies Appropriations for 1982 Before the Subcomm. on HUD—Independent Agencies of the House Comm. on Appropriations*, 97th Cong., 1st Sess., pt. 4, at 839 (1981) (noting that the CPSC spent approximately \$500,000) (statement of Acting Chairman Statler) [hereinafter cited as *1982 House Appropriations Hearings*]. Cf. *H.R. 2271 Hearings*, *supra* note 227, at 751 (CSMA \$600,000 estimate). Costs to the public also include taxpayer dollars the CPSC spent. Cf. 50 Fed. Reg. 35,241 (1985); *1984 House Appropriations Hearings*, *supra* note 232, at 2-3 (statement of Chairman Stoerts); *1983 Senate Reauthorization Hearings*, *supra* note 227, at 134-35 (discussion of injuries CPSC estimates at 123,000 annually) (statement of Donald Purcell). *But cf. id.* (CSMA criticism of estimate).

235. See *1981 Senate Reauthorization Hearings*, *supra* note 227, at 152; *H.R. 2271 Hearings*, *supra* note 227, at 557, 751 (statements of Donald Purcell).

236. See telephone interview with funded participant 1, *supra* note 220.

237. *Id.* *But cf. infra* notes 251-55 and accompanying text (industry division and recalcitrance complicated effort).

238. See telephone interview with funded participant 1, *supra* note 230 (quotations). *Accord 1982 House Appropriations Hearings*, *supra* note 234, at 557-58, 751 (statement of Donald Purcell); telephone interview with funded participant 3. See telephone interview with funded participant 1, *supra* note 230 (valuable data generation). *Accord 1984 House Appropriations Hearings*, *supra* note 232, at 406-07 (statement of Commissioner Zagoria); *1981 Senate Reauthorization Hearings*, *supra* note 227, at 152 (statement of Donald Purcell).

239. See Schwartz, *supra* note 68, at 70 n.272.

management."²⁴⁰ He and others believed that the CSMA and the Commission neglected to save the effort once it began deteriorating.²⁴¹

The Consumer Product Safety Commission said that "much sound engineering and analytical work" was performed before the project's expiration date but that "no requirements were drafted by the committees."²⁴² Commission staff who evaluated the "'discussion draft,' consisting of performance requirements for chain saws and backup documentation," tendered by the CSMA and represented as "both 'a final standard and a rationale,'" ²⁴³ identified many deficiencies in the materials proffered and expressed "serious doubts that the standard as submitted would reduce injuries."²⁴⁴

The Program Manager of the Consumer Product Safety Commission said that the Chain Saw Manufacturers Association's submission was a "draft," and by its "own admission incomplete," which was "written by the CSMA without input from" consumers, agency staff or the Standard Review Board.²⁴⁵ The Board rejected the CSMA's submission because it lacked "a sound technical basis" and because it was developed outside the 1978 contract, which fact undermined its independence.²⁴⁶

One Commissioner found that the Consumer Product Safety Commission "had to start over in the mandatory route" because the submission included some requirements validating current chain saws and no proposals for change while lacking a thorough technical rationale.²⁴⁷ The deficiencies above, and the Chain Saw Manufacturers Association's failure to fulfill its contract, underlay the Commission's decision to eschew

240. See telephone interview with CPSC employee 2, *supra* note 230.

241. See *id.*; telephone interviews with funded participants 1, 2, *supra* note 230.

242. See 45 Fed. Reg. 62,392-93 (1980).

243. See *id.* at 62,393.

244. The quoted language appears, and the specific deficiencies are listed, in *id.* at 62,393. Cf. 46 Fed. Reg. 26,262, 26,269-70 (1981) (more discussion of deficiencies).

245. Telephone interview with CPSC employee 1, *supra* note 230.

246. *Id.*

247. See 1982 House Appropriations Hearings, *supra* note 234, at 570; H.R. 2271 Hearings, *supra* note 227, at 408 (statements of Commissioner Pittle). The Commissioner also appeared prescient because, when the CSMA-CPSC contract was being negotiated, he had evinced concern about the CSMA's ability to develop satisfactory requirements in time. The Commissioner was also concerned about the time that would be lost were the project to abort. See CPSC Decision on Petition for Promulgation of a Consumer Product Safety Standard to Reduce Chain Saw Kickback, Doc. No. 77-10, 15-19 (Apr. 27, 1978) (Commissioner Pittle, dissenting), reprinted in pertinent part in Schwartz, *supra* note 68, at 70 n.272. But cf. H.R. 2271 Hearings, *supra* note 227, at 33 (commissioners believed voluntary approach quicker but may have allotted insufficient time) (statements of Chairman King).

reliance on the CSMA's voluntary process to protect the public.²⁴⁸ The Consumer Product Safety Commission's Acting Chairman summarized the sentiments of the commissioners and agency staff when he testified that an "18-month cooperative effort with the chainsaw industry unfortunately failed to produce a voluntary standard which could be expected to substantially reduce injuries."²⁴⁹

In fairness, many difficulties attended this endeavor. A Chairman observed that the industry did "not speak with one voice,"²⁵⁰ and one Commissioner thought that producers disagreed substantially over how to achieve safety.²⁵¹ Another Commissioner described the industry as "very competitive with a lot of members who" believed that their solution was best.²⁵² A third Commissioner and the general counsel of the Consumer Product Safety Commission thought that it was very difficult to develop voluntary controls because the largest manufacturer strongly opposed the technical approach of the Chain Saw Manufacturers Association, the organization created to represent most of the producers.²⁵³ Two other commissioners believed that the industry was recalcitrant at certain junctures of the work, while one found that the effort's "total openness" was responsible for its "glacial pace, for much public posturing and little candor," and for stilted exchanges, distrust, and reluctance to disclose needed data on sales, marketing plans and technological advances.²⁵⁴ The Consumer Product Safety Commission also failed to facilitate work by providing adequate technical assistance, sufficient

248. See 45 Fed. Reg. 62,392, 62,393 (1980).

249. See *H.R. 2271 Hearings*, *supra* note 227, at 340 (statement of Acting Chairman Statler).

250. See *id.* at 36 (statement of Chairman King).

251. See *1983 Senate Reauthorization Hearings*, *supra* note 227, at 17; *1984 House Appropriations Hearings*, *supra* note 232, at 24 (statements of Commissioner Zagoria).

252. See *Hearings on HUD-Independent Agencies Appropriations for 1983 Before the Subcomm. on HUD-Independent Agencies of the House Comm. on Appropriations*, 97th Cong., 2d Sess., pt. 1, at 570 (1982) (statement of Commissioner Pittle) [hereinafter cited as *1983 House Appropriations Hearings*].

253. See *1981 Senate Reauthorization Hearings*, *supra* note 227, at 4, 276 (statements of Commissioner Zagoria, General Counsel Krulwich). Accord telephone interview with funded participant 2, *supra* note 230. Cf. *H.R. 2271 Hearings*, *supra* note 227, at 405 (CSMA had to represent larger producers that committed resources to safety and other producers lacking resources) (statement of Acting Chairman Statler).

254. See *1984 House Appropriation Hearings*, *supra* note 232, at 23; *1983 House Appropriations Hearings*, *supra* note 252, at 571 (two believed industry recalcitrant) (statements of Commissioners Statler, Sloan). Accord *H.R. 2271 Hearings*, *supra* note 227, at 443 (CPSC response to Purcell testimony). See Statler, *Let the Sunshine In*, 67 A.B.A. J. 573, 574 (1981) (one critical of "total openness").

communication among commissioners, agency staff and the industry, and effective management, especially in salvaging the effort.²⁵⁵

Although the project's abortive nature complicates analysis of citizen input, many praised it. The Chain Saw Manufacturers Association's President said that the consumers were "intelligent, hard working and very dedicated," offering much "excellent input" that contributed greatly to subsequent voluntary work.²⁵⁶ One committee head found "very valuable" the perspectives of those "in the field."²⁵⁷ A second committee head thought the non-commercial participants "put in endless hours of hard work and demonstrated a high degree of creativity with willingness to consider different viewpoints."²⁵⁸ The Program Manager of the Consumer Product Safety Commission could "not praise the public enough for dedication, very, very high quality work," and for producing a "splendid record" and perceptively analyzing considerable data to "arrive at sensible conclusions."²⁵⁹ An individual with technical expertise, who believed himself a "devil's advocate" although he apparently was a very effective conciliator, found contributions by several citizens to be "extremely helpful and exceedingly valuable."²⁶⁰ Another consumer was described by a citizen as an "aggressive, feisty, gadfly" who was most effective in "asking tough technical questions" of industry engineers and

255. Numerous industry representatives have said that much time was consumed educating CPSC employees. See, e.g., *H.R. 2271 Hearings*, *supra* note 227, at 557 (statement of Donald Purcell); telephone interviews with industry representatives. But others involved agreed. See, e.g., telephone interviews with funded participants, 1, 2, *supra* note 230. CPSC employee 2, *supra* note 230, also said that the commissioners were unaware of potential solutions being discussed by staff and that they rejected a promising staff-industry agreement in Spring, 1980. The CSMA's President asserted that CPSC staff had supported much in the CSMA's initial submission and most of its subsequent efforts and had worked well with the CSMA from 1981 until 1983, although the relationship of "policymakers" with the CSMA remained "somewhat ambiguous." See *H.R. 2271 Hearings*, *supra* note 227, at 751; *1983 Senate Reauthorization Hearings*, *supra* note 227, at 132-33. *But cf. supra* text accompanying note 244 (staff criticisms of CSMA submission); *1981 Senate Reauthorization Hearings*, *supra* note 227, at 169 (CPSC fully cooperated with industry) (statement of David Swankin).

256. See telephone interview with Donald Purcell, CSMA President.

257. See Transcript, Standard Review Board Meeting, at 36, Bethesda, Md. (Nov. 30, 1979) (statement of Jack Ehlen).

258. See *id.* at 5 (statement of Ralph Lombard). An industry representative found that one citizen was "marginally helpful in examining the CPSC in-depth investigations" and that another "had good ideas" but ultimately "delivered little." *Id.*

259. Telephone interview with CPSC employee number 1, *supra* note 230.

260. See telephone interview with funded participant 1, *supra* note 230. The individual said the citizen mentioned *infra* notes 261-63 and accompanying text "represented a viewpoint valuable to have." *Id.* Cf. Transcript, Standard Review Board Meeting, *supra* note 257, at 4, 11 (examples of conciliatory role).

agency staff.²⁶¹ One Consumer Product Safety Commission employee described the same consumer as “very hard working and tenacious.”²⁶² A second staffer, however, thought that the individual held “troublesome preconceptions” and that he was “part of the problem.”²⁶³

8. Upholstered Furniture

In September 1977, the Consumer Product Safety Commission made a preliminary finding that a mandatory standard was necessary to protect the public against risks from cigarette ignition of upholstered furniture.²⁶⁴ Because the Commission was uncertain about how to treat the hazards, the agency held a public meeting in December 1978 to ascertain the views of the public and of manufacturers on possible approaches to risks posed by upholstered furniture.²⁶⁵ The CPSC provided funding for one consumer who advocated compulsory controls,²⁶⁶ which producers opposed. Industry representatives submitted “considerable new data” on voluntary compliance, which apparently influenced the agency.²⁶⁷ Primarily because of the industry’s fragmented character, however, the initiative became lengthy and complex.²⁶⁸ The Consumer Product Safety Commission explored many approaches, but the Upholstered Furniture Action Council’s (UFAC) offer to institute a “voluntary action program”

261. Telephone interview with funded participant 2, *supra* note 230.

262. Telephone interview with CPSC employee 3.

263. See telephone interview with CPSC employee 2, *supra* note 230. The staffer added that producers “played off citizens in a highly competitive dog fight between industry members.” *Id.* Cf. telephone interview with Susan King, *supra* note 220 (project “went through so many iterations” she could not “remember how useful” funded participation was).

264. See 43 Fed. Reg. 56,256 (1978). CPSC asserts that “24,500 upholstered furniture fires caused by smoldering cigarettes kill 1200 people” annually. *H.R. 2367 Hearings*, *supra* note 224, at 315. Cf. *Hearings on HUD-Independent Agencies Appropriations for 1987 Before the Subcomm. on HUD-Independent Agencies of the House Comm. on Appropriations*, 99th Cong., 2d Sess., pt. 1, at 606 (1986) (800-900 fatalities in 1985) (statement of Commissioner Statler) [hereinafter cited as *1987 House Appropriations Hearings*]; *H.R. 2271 Hearings*, *supra* note 227, at 159-74 (statement of William Stevens); Letter from Upholstered Furniture Action Council (UFAC) to CPSC (Jan. 6, 1981), reprinted in *1981 Senate Reauthorization Hearings*, *supra* note 227, at 164; 43 Fed. Reg. 56, 256-57 (1978) (discussions of proceeding).

265. See 43 Fed. Reg. 56,256 (1978); Transcript, Meeting on Upholstered Furniture Flammability, at 2, Washington, D.C. (Dec. 20, 1978) (meeting and purposes) (statement of Chairman King).

266. See Transcript, Meeting on Upholstered Furniture Flammability, *supra* note 265, at 235-50. Cf. *infra* notes 277-82 and accompanying text (more discussion of consumer’s input).

267. The quoted characterization is Chairman King’s. See *1981 Senate Reauthorization Hearings*, *supra* note 227, at 26. Cf. Transcript, Upholstered Furniture Flammability, *supra* note 259 (industry testimony).

268. See UFAC Letter, *supra* note 264; telephone interview with CPSC employee 1.

so impressed the commissioners that in November 1979 they postponed agency proposal of mandatory requirements.²⁶⁹ Indeed, the CPSC has acquiesced in the voluntary endeavor ever since. In October 1981, the commissioners unanimously voted to have the agency staff discontinue compulsory standard development and work with the UFAC until evaluation of its project indicated a need for binding controls.²⁷⁰ In April 1984, the CPSC characterized the voluntary compliance effort as the "most promising approach for adequately protecting the public" and said that "renewed consideration" of mandatory regulation was "unnecessary," because it "could inhibit greater improvements in the voluntary program."²⁷¹ Two Commission chairmen were disappointed by the industry's initial lack of success,²⁷² but agency staff have been more satisfied with recent work, while one Commissioner even testified that the producers had "made tremendous progress and will continue to [do so]."²⁷³ Although the proceeding seemed destined to "bumble along as a relative stalemate until the cigarette or furniture industry" acceded or new technology emerged,²⁷⁴ Congress intervened in October 1984 and supported research on cigarettes that pose less risk of igniting upholstered furniture.²⁷⁵

269. See Chairman King's characterization *supra* text accompanying note 267; *H.R. 2271 Hearings*, *supra* note 227, at 161, 341 (statements of William Stevens and Acting Chairman Statler); Schwartz, *supra* note 68, at 70 n.272. Although industry promotion of the program at the 1978 meeting alone may not have convinced the CPSC, the UFAC contends it was important. See *H.R. 2271 Hearings*, *supra* note 227, at 160-61 (statement of William Stevens); UFAC Letter, *supra* note 264.

270. See *CPSC Oversight: Hearings Before the Subcomm. for Consumers of the Senate Comm. on Commerce, Science and Transportation*, 97th Cong., 1st Sess. 3-4 (1981) (statement of Chairman Stoerts).

271. See Letter from Chairman Stoerts to Arthur Delibert, President of the Citizens Committee for Fire Protection (Apr. 5, 1984). Cf. *H.R. 2367 Hearings*, *supra* note 224, at 213-14 (statement of Charles Carey); *1984 House Appropriations Hearings*, *supra* note 232, at 4 (proceeding's history from October 1981 to April 1984) (statement of Chairman Stoerts).

272. See *H.R. 2271 Hearings*, *supra* note 227, at 329, 341 (statement of Acting Chairman Statler); *Hearings on Department of Housing and Urban Development—Independent Agencies Appropriations for 1981 Before the Subcomm. on HUD—Independent Agencies of the House Comm. on Appropriations*, 96th Cong., 2d Sess., pt. 2, at 120 (1980) (statement of Chairman King). Cf. Schwartz, *supra* note 68, at 70 n.272 (effort disappointingly slow).

273. CPSC employee 2 said industry had "made fairly good improvement" (telephone interview). See *H.R. 2367 Hearings*, *supra* note 224, at 407 (statement of Commissioner Zagoria).

274. CPSC employee 1, *supra* note 268, offered the prescient quotation, ascribing this partly to the furniture industry's "very fractured nature."

275. See Cigarette Safety Act of 1984, Pub. L. No. 98-567, 98 Stat. 2925, 2926 (1984); cf. Department of Housing and Urban Development—Independent Agencies Appropriations Act, 1986, Pub. L. No. 99-88, 99 Stat. 332 (1985) (\$500,000 appropriation for activities authorized by Cigarette

Assessment of the funded input is complicated by its brevity and by the length and complexity of the initiative on upholstered furniture. During the meeting, a Commissioner said that the consumer “added a balance” which otherwise would not have been available, was obviously “technically well-versed,” and “shook him up” by charging the Consumer Product Safety Commission with favoritism toward industry.²⁷⁶ One agency staffer “rated the consumer very highly,” and another thought her a “very effective, outspoken consumer advocate,”²⁷⁷ but neither Commission employee could say whether she influenced agency decisionmaking.²⁷⁸ A third CPSC staff member found the individual to be an “articulate, forceful, well-prepared advocate who knew her stuff and effectively marshalled arguments” and “as effective as one person could be making a one-shot presentation” in a small segment of a “big, long process” where “different approaches were constantly being torn apart,” although “she probably did not have a substantial impact on the outcome.”²⁷⁹ Despite the positive tone of these appraisals, analysis of the consumer’s testimony indicates that she intended to offer little of substance, championed mandatory controls but provided minimal supporting data, and castigated the Commission for neglecting consumers and “catering to special interests,” thereby allowing manufacturers to dominate the regulatory process.²⁸⁰ Moreover, her ideas effectively were rejected by the Consumer Product Safety Commission, which pursued, until quite recently, the approach urged by industry in the same meeting.²⁸¹

Safety Act of 1984); *Hearings on HUD-Independent Agencies Appropriations for 1987 Before the Subcomm. on HUD-Independent Agencies of the Senate Comm. on Appropriations*, 99th Cong., 2d Sess., pt. 1, at 73 (1986) (subsequent work paid for principally from money appropriated to CPSC). For discussion of subsequent developments, indicating that the Consumer Product Safety Commission is continuing to work closely with manufacturers to develop voluntary standards, that industry intent to comply is satisfactory, and that there have been certain technical innovations which could lead to development of an improved standard, see *1987 House Appropriations Hearings*, *supra* note 264, at 606 (statements of Acting Chairman Dawson, Commissioner Statles).

276. See Transcript, Upholstered Furniture Flammability, *supra* note 265, at 247 (statement of Commissioner Zagoria).

277. See telephone interviews with CPSC employee 2, *supra* note 273; CPSC employee 3.

278. See telephone interviews, *supra* note 277.

279. See telephone interview with CPSC employee 4.

280. See Transcript, Upholstered Furniture Flammability, *supra* note 265, at 235-50. Little was offered, because she was awaiting a CPSC proposal issuance of which seemed imminent. *Id.* at 236-37, 241.

281. See *supra* notes 266-67, 269-70, 275-76 and accompanying text.

9. *Asbestos General Rulemaking*

During 1979, the Consumer Product Safety Commission began an asbestos proceeding distinct from, and broader than, the proceeding concerning asbestos patching compounds.²⁸² In October, the Commission attempted to assess comprehensively the use of asbestos, published an Advance Notice of Proposed Rulemaking (ANPRM) seeking data on consumer products containing asbestos and possible regulatory approaches for reducing public exposure to sources of asbestos, and paid three groups to comment.²⁸³ The CPSC analyzed the public comments and issued a 1980 General Order, which required producers to submit data on asbestos use in products, so as to help the CPSC ascertain the propriety of regulatory action to protect the public.²⁸⁴ The General Order was "purely investigatory" and purported to make "no final regulatory decisions" on products listed therein.²⁸⁵ Although the agency informed Congress in 1981 that it planned "to test selected products, determine exposure and risk, and consider appropriate options for reducing the risks found," the CPSC subsequently has regulated few asbestos-containing products.²⁸⁶

One funded entity prepared thorough data on the dangers of the use of asbestos in art materials. Commission staff estimated that such information would have cost ten times more if secured on a contract basis. The submission, which "identified an extremely hazardous product, free form asbestos, [which the] staff was unaware was commercially available," was transmitted to the agency's product-recall division for investigation.²⁸⁷ Because this evaluation was drawn from the CPSC's own study, it may be suspect. The submission did not convince the Commission to regulate specific art goods or retain innovative regulatory approaches proposed in

282. See *supra* § II.B.4 of this Article (APC). Cf. 44 Fed. Reg. 60,057 (1979) (ANPRM commencing proceeding); *id.* at 60,057-61; 45 Fed. Reg. 84,384-88 (1980); Merrill, *CPSC Regulation of Cancer Risks in Consumer Products*, 67 VA. L. REV. 1261, 1351-54 (1981) (discussion of proceeding).

283. See 44 Fed. Reg. 60,057 (1979) (all except payment); cf. Merrill, *supra* note 282, at 1351 (ANPRM set "huge task for" CPSC); CPSC Study, *supra* note 59, at 6 (groups were Center for Occupational Hazards (COH), National Consumers League (NCL), and EDF).

284. See 45 Fed. Reg. 84,384 (1980).

285. *Id.*

286. See 1982 House Appropriations Hearings, *supra* note 234, at 805 (CPSC statement). *But cf. supra* note 283; *infra* text accompanying note 290 (enormous project); 51 Fed. Reg. 33,910 (1986) (notice of enforcement policy governing the labeling of asbestos-containing household products).

287. See CPSC Study, *supra* note 59, at 4; COH Comments 2.

the ANPRM.²⁸⁸ In fairness, an agency staffer found that the comments provided a “wealth of information on asbestos-containing products and alleged substitutes,” an observation that my own reading confirms.²⁸⁹ Moreover, the asbestos initiative was an enormous undertaking.²⁹⁰ The CPSC has been criticized for the slow pace of its regulation,²⁹¹ and some Commission staffers attribute inaction to the fact that other products posed more risk or that different projects had higher priority, thus indicating that art goods were never very appropriate for regulation.²⁹² Outside analysts claimed that the CPSC already was familiar with most of the art materials that the group designated for possible regulation, used only one idea the organization supplied in compiling the General Order list, and overvalued the submission in the agency self-study. Nevertheless, these analysts found that the “comments were extensive” and that the “staff was investigating [asbestos powder’s] commercial availability.”²⁹³ The external study also seems to be premised on linkages between reimbursed public input and Commission decisions when there had been no final regulatory action and none may have been warranted.

This last observation also applies to the extra-agency evaluation of the other two compensated submissions. The outside analysts stated that one set of comments “seemed only to [affirm the CPSC’s] regulatory approach” and to offer data agency staff could have assembled as easily and cheaply, although the submission’s criticism of the “generic” approach being explored by the Commission “was generally sound.”²⁹⁴ The individual who prepared the input said that funding enabled him “to do more thorough research” on his organization’s comments which can be characterized most accurately as responses to nine questions asked in the ANPRM.²⁹⁵ The third group’s comments were said by the external evaluators only to have confirmed “staff beliefs on asbestos dangers”

288. See telephone interviews with CPSC employees 1, 2, 3 (not regulating art goods).

289. See Memorandum from J. Keenan to R. Fausett 31 (May 21, 1980).

290. See *supra* note 283.

291. The COH employee with primary responsibility for preparing its comments, and the funded party in the APC proceeding have so criticized the CPSC. See telephone interview with COH employee and funded participant, *supra* note 202.

292. See telephone interviews with CPSC employees 1, 3, *supra* note 288; telephone interview with CPSC employee 4.

293. See Stellato & Wright, *supra* note 64, at 21.

294. See *id.* at 20-21.

295. See telephone interview with David Swankin (the input preparer). The description is drawn from my reading of the NCL’s comments.

while ignoring the difficulties of generic regulation.²⁹⁶ However, the submission "made several suggestions [as to] public education and safe disposal" on which the CPSC had not acted.²⁹⁷ An agency staffer observed that the organization tendered data "not otherwise available," that the Commission "could not have gathered," covering "products agency officials had not heard of before."²⁹⁸ I found that the comments supported the CPSC's regulatory approach and, while rather general, they offered many specific ideas.²⁹⁹

All of the compensated parties urged a more liberal policy regarding the disclosure of industry data than the policy the Consumer Product Safety Commission ultimately adopted.³⁰⁰ Moreover, agency employees with substantive responsibility for assessing the comments said that "specific data on [asbestos use] in consumer products did not meet staff expectations," thus requiring issuance of the General Order, but that the submissions offered the Consumer Product Safety Commission viewpoints that were "different from industry."³⁰¹

10. Urea Formaldehyde Foam Insulation

In October 1976, the Consumer Office of the Denver District Attorney petitioned the CPSC to regulate Urea Formaldehyde Foam Insulation (UFFI), because the product caused "unreasonable risk of injury or irritation."³⁰² In February 1979, the commissioners deferred their decision on that petition but instructed staff, and held four regional hearings in the winter of 1979-1980, to collect more data on the health effects of the gas released by UFFI and to ascertain whether there were a need for regulation.³⁰³ Uncertainty existed about the causal relationship between UFFI and health problems experienced by occupants of UFFI-insulated

296. See Stellato & Wright, *supra* note 64, at 20-21.

297. *Id.*

298. See telephone interview with CPSC employee 2, *supra* note 288.

299. See *supra* text accompanying notes 296-98.

300. See COH Comments, at 16-19; NCL Comments, at 2; EDF Comments, at 7. *Cf.* 45 Fed. Reg. 84,384, 84,385-87 (1980) (CPSC industry data-release policy).

301. See Memorandum, Staff Review of Comments, from H. Spritzer, R. Fausett, Chronic Chemical Hazards Program, to Commissioners 5, 2 (Sept. 16, 1980).

302. See 47 Fed. Reg. 14,366-69 (1982). *Cf.* 44 Fed. Reg. 12,080-81 (1979); Ashford, Ryan & Caldart, *A Hard Look at Federal Regulation of Formaldehyde: A Departure From Reasoned Decisionmaking*, 7 HARV. ENVTL. L. REV. 297, 358-68 (1983); Merrill, *supra* note 282, at 1354-60 (discussion of proceeding).

303. See 44 Fed. Reg. 12,080, 12,081 (1979); 47 Fed. Reg. 14,366, 14,367-68 (1982); 44 Fed. Reg. 69,578 (1979).

dwellings.³⁰⁴ Industry contended that because inadequate data existed to ban UFFI a standard would suffice.³⁰⁵ Thus, the Consumer Product Safety Commission solicited input from installers and people believed to have been harmed by UFFI, funding thirty-seven parties.³⁰⁶ In early 1980, the Commission assembled a panel of sixteen senior government scientists and sponsored technical workshops to scrutinize the health effects of UFFI.³⁰⁷ In June, the CPSC issued a proposal requiring industry to inform buyers of the possible health effects of UFFI.³⁰⁸ But the Commission then reached a preliminary conclusion that gas released after installation of UFFI posed an "unreasonable risk of injury" against which "no feasible standard" could safeguard; the CPSC proposed a ban on the use of UFFI in February 1981, and finalized the proscription one year later.³⁰⁹ That rule was overturned in April 1983.³¹⁰

Appraisal of citizens' input in the UFFI proceeding is complicated by the number of contributors. The agency's own study focused on one witness in Atlanta who said that he had become ill when UFFI was placed in his house and that doctors initially could not identify his problem because his symptoms were unfamiliar. The funded party also suggested that the Commission provide physicians with relevant diagnostic data.³¹¹

304. See 44 Fed. Reg. 69,578-80 (1979); telephone interview with Susan King, *supra* note 220.

305. See *H.R. 2271 Hearings*, *supra* note 227, at 689-739 (representative articulation of industry's position) (statements of J. Ramey, J. Bender, Formaldehyde Institute). *Cf. id.* at 15 (commissioners met 30 times with industry when considering regulation) (statement of Chairman King).

306. See 44 Fed. Reg. 69,578, 69,580 (1979); CPSC Study, *supra* note 59, at 7-9.

307. See 47 Fed. Reg. 14,366, 14,369 (1982). *Cf. id.* at 14,369-71 (discussion of composition and findings of Federal Panel on Formaldehyde). For a discussion of the technical workshops conducted by the National Bureau of Standards (NBS), see 47 Fed. Reg. 14,366, 14,368 (1982).

308. See 45 Fed. Reg. 39,434 (1980). The proposal was premised partially on a National Academy of Sciences study that indicated there was no determined human threshold for formaldehyde's irritant effects. *Id.* at 39,437.

309. As to the preliminary conclusion and the ban proposal, see 46 Fed. Reg. 11,188 (1981). The Federal Panel on Formaldehyde issued its report in November 1980. *See id.* at 11,190. The final rule appears at 47 Fed. Reg. 14,366 (1982).

310. See *Gulf South Insulation v. CPSC*, 701 F.2d 1137 (5th Cir. 1983). *Cf. Hearings on Department of Housing and Urban Development—Independent Agencies Appropriations for 1985 Before the Subcomm. on HUD—Independent Agencies of the House Appropriations Comm.*, 98th Cong., 2d Sess., pt. 1, at 33 (1984) (overturning unfortunate because UFFI dangerous but Solicitor General rejected CPSC request that writ of certiorari be filed with the United States Supreme Court) (statement of Chairman Stoerts); *Borden, Inc. v. Comm'r of Public Health*, 388 Mass. 707, 448 N.E.2d 367, *cert. denied sub nom. Formaldehyde Institute v. Frechette*, 464 U.S. 936 (1983) (decision upholding state UFFI ban); *Rapco Foam v. CPSC*, C.A. No. 80-2508-3 (D.S.C. Aug. 16, 1982) (unsuccessful challenge to UFFI proceeding).

311. See CPSC Study, *supra* note 59, at 3-4; Transcript, Public Meeting on UFFI, at 479-99, especially 489-90, Atlanta, Ga. (Jan. 10, 1980).

The CPSC's Executive Director was "persuaded" that the witness had "correctly" indicated that the medical community had a need for information to minimize the anguish caused by an "inability to identify promptly the symptoms."³¹² The official was so impressed that, upon the completion of the testimony, he announced that the Consumer Product Safety Commission would "begin an immediate information campaign so at least doctors would be sensitive to identifying formaldehyde toxicity."³¹³ Agency staff then convinced the *Journal of the American Medical Association* to publish data describing the symptoms of people exposed to UFFI³¹⁴ and distributed similar information to state health departments.³¹⁵ The individual's input, and that of other witnesses, persuaded Commission staff to warn "consumers of [UFFI's] potential health hazards" immediately, and, in June 1980, the CPSC issued the proposal requiring the disclosure of safety data.³¹⁶ Two other participants compensated for speaking in the Atlanta session said that physicians had experienced considerable difficulty in ascertaining that UFFI had caused their health problems, while one added that the "hazards should be well known so people can get [assistance]."³¹⁷ A Commissioner who was present found another citizen's ideas "most helpful," while the agency's Executive Director said that a fifth person described "very pointedly [the] difficulties consumers faced."³¹⁸

The input of seven reimbursed parties in the Portland hearing evoked few questions from CPSC personnel. The testimony consisted principally of descriptions of UFFI-related health problems, distinguished primarily by unfocused monologues on abuse of the mobile home industry by government and mistreatment of a patient by doctors.³¹⁹ Four funded individuals who testified at the Minneapolis meeting offered little new information. They related experiences derived from living in UFFI-insulated homes without clearly linking the product's installation and their

312. See Transcript, UFFI Meeting, *supra* note 311, at 491 (statement of Richard Gross).

313. See *id.* at 491-93.

314. See CPSC Study, *supra* note 59, at 3; 243 J. A.M.A. 1697 (1980).

315. See CPSC Study, *supra* note 59, at 3.

316. See *id.* at 3-4 (staff); *supra* note 308 and accompanying text (proposal).

317. See Transcript, UFFI Meeting, *supra* note 311, at 21, 50 *et seq.* (two participants' input); *cf. id.* at 59 (specific quotation).

318. See *id.* at 415 (statement of Commissioner Statler), referring to testimony in *id.* at 404 *et seq.*; Transcript, Public Meeting on UFFI, at 99, Atlanta, Ga. (Jan. 11, 1980) (statement of Richard Gross), referring to testimony in *id.* at 5.

319. See Transcript, Public Meeting on UFFI, Portland, Ore. (Dec. 13, 1979). *Cf. id.* at 232 *et seq.*; 284 *et seq.* (two monologues).

illness, and the views offered elicited few queries from agency officials.³²⁰ However, a fifth person, who inspected 100 houses containing UFFI, supplied considerable complaint-investigation data on the percentages of foam found in the homes, the effects on occupants of the dwellings and individuals' symptoms, causal relationships between UFFI and health effects, and medical verification of injuries suffered.³²¹ A Commissioner who attended the session said that the witness had "really done a very thorough job [which would] be very helpful to epidemiology staff."³²²

Two paid participants in the Hartford hearing were physicians who had interesting scientific exchanges with agency staff.³²³ The Consumer Product Safety Commission Executive Director found that one of these doctors was "extremely helpful" and stated that the Commission was "going to be able to deal with the problem," because a citizen had "so intelligently" conveyed his concerns.³²⁴ But three other witnesses, who lived in UFFI-insulated dwellings only spoke of its installation and health effects, adding little that was novel.³²⁵ A seventh compensated organization submitted extensive data that was gathered from individuals, state agencies, and public interest groups, on consumer experiences with UFFI.³²⁶ This entity's counsel offered valuable ideas on agency regulatory options and participated in lively dialogue on the CPSC's legal authority with staff, while the Executive Director solicited his opinion on several legal issues and praised the lawyer for providing "very insightful" and "extremely perceptive testimony."³²⁷

The attorney said that citizens reimbursed in the Hartford and Portland meetings submitted "good testimony" about using UFFI, "offgassing, and leaving their homes because of difficulties encountered."³²⁸ One agency staffer found that this lawyer "raised interesting legal questions about agency authority."³²⁹ The employee also believed that it was

320. See Transcript, Public Meeting on UFFI, at 660 *et seq.*, 833 *et seq.*, 847 *et seq.*, 979 *et seq.*, Minneapolis, Minn. (Feb. 6, 1980).

321. See *id.* at 749 *et seq.*

322. See *id.* at 754 (statement of Commissioner Pittle).

323. See Transcript, Public Meeting on UFFI, at 1411 *et seq.*, 1536 *et seq.*, Hartford, Conn. (Feb. 27, 1980).

324. See *id.* at 1428; 1572-73 (statements of Richard Gross).

325. See *id.* at 1125 *et seq.*, 1024 *et seq.*, 1262 *et seq.*, 1559 *et seq.*

326. The data are in the CPSC's UFFI file.

327. See Transcript, UFFI Meeting, *supra* note 311, at 1387 *et seq.* (testimony); *id.* at 1410 (Executive Director's remarks).

328. See Swankin telephone interview, *supra* note 295.

329. Telephone interview with CPSC employee 1.

“helpful for commissioners to see and talk to victims.”³³⁰ Another staffer said that funded input enabled the CPSC to secure a helpful “picture of injury scenarios from the consumer viewpoint” and to “hear from foamers themselves” and that these data underlay the ban because “no one could tell what constitutes good foam.”³³¹ Nonetheless, the employee found that most of the “scientific information submitted was not real new.”³³² The Commission Program Manager agreed that the input was “generally quite useful,” adding that participant compensation had permitted the CPSC to hear directly from injured persons how they had discovered the UFFI-related disorder—data which “weighed heavily” in the final decision.³³³ An agency chairman said that “small business people, installers and homeowners were extremely useful,” serving as “experts” who related actual experiences and identified more precisely the causes of a “problem with a consumer product” that seemed to “arise in users’ hands” and about which little information was available.³³⁴ Reimbursement also allowed the Consumer Product Safety Commission to acquire “much more specific data, and a lot of ideas” not available in Washington, D.C., where “proceedings are dominated by experts and professional lobbyists” whose input is “very different from installers and users.”³³⁵

11. Citizens Band Omnidirectional Antennas

Between 1980 and 1982, CPSC technical personnel worked on a citizens band omnidirectional antenna standard with the following funded people: an electrical contractor who petitioned the agency to adopt a standard; an antenna company president; the president of a CB operators’ group; a retired National Bureau of Standards chemist; an attorney who had represented rural utilities; a retired teacher with experience in labeling; and a professor with expertise on the dangers posed by high voltage lines.³³⁶ The individuals attended development sessions and public meetings, commented on “hazard analysis and technical work,” and

330. *Id.*

331. Telephone interview with CPSC employee 2.

332. *Id.*

333. Telephone interview with CPSC employee 3.

334. Telephone interview with Susan King, *supra* note 220.

335. *Id.*

336. See CPSC Study, *supra* note 59, at 4, 8. *Accord* 47 Fed. Reg. 36,186, 36,188 (1982). *Cf. id.* at 36,187-201; 46 Fed. Reg. 41,081-91 (1981) (discussion of proceeding).

drafted the standard.³³⁷ The CPSC issued a proposal in August 1981 and a final rule one year later.³³⁸ By that time antenna sales, and deaths and injuries ascribed to the product, had declined so substantially that the need for mandatory controls was reduced.³³⁹ Thus, the standard imposed minimized competition in an already over-concentrated industry.³⁴⁰

These factors, and several others, such as the difficulties entailed in securing reliable assessments from observers or much information of value from the CPSC's file, hamper analysis of citizen input.³⁴¹ Commission staff evaluations generally were positive. The agency self-study said that consumers "provided valuable assistance to staff," and that public "participation in actual drafting of safety standards [was] one of the best ways to assure" that those safety standards were "reasonable and workable."³⁴² The report indicated that citizen involvement in standard development was "responsive to regulatory reform concerns" and was "working well" in this proceeding.³⁴³ One Commission staffer found that the effort, which advanced antenna safety, was "one of CPSC's major success stories," and the employee believed that each citizen "made excellent contributions" in specific areas of expertise and did an "excellent job of providing quality input."³⁴⁴ A second agency staff member found "consumers useful because of their personal experience," and the employee concluded that they "served best as sounding boards," although the staffer thought it unrealistic to expect that they would con-

337. See CPSC Study, *supra* note 59, at 4, 8. *Accord* 47 Fed. Reg. 36,186, 36,188 (1982).

338. See 47 Fed. Reg. 36,186 (1982); 46 Fed. Reg. 41,081 (1981).

339. See 47 Fed. Reg. 36,186, 36,197 (1982); *Hearings on Department of Housing and Urban Development—Independent Agencies Appropriations for 1981 Before Subcomm. on HUD—Independent Agencies of the Senate Appropriations Comm.*, 96th Cong., 2d Sess., pt. 1, at 73 (1980) (declines); *cf.* telephone interview with industry representative 1 (antenna sales 3.5 million in 1976 and 50,000 in 1982); telephone interview with funded participant 1 (by the time CPSC decided to regulate product, sales so reduced that \$25,000 could not be raised to develop voluntary standard).

340. See 47 Fed. Reg. 36,186, 36,195, 36,198 (1982); Letter from funded participant 2 to CPSC employee 1; telephone interviews with funded participant 2 and industry representative 1, *supra* note 339.

341. I had difficulty finding sufficiently neutral observers. Moreover, the endeavor's polycentric and lengthy nature complicated analysis because no one could have much impact. See *infra* notes 353, 358 and accompanying text.

342. See CPSC Study, *supra* note 59, at 4, ii.

343. *Id.*

344. See telephone interview with CPSC employee 1, *supra* note 340 (first two quotations); Transcript, Third Public Meeting for Development of a Proposed Mandatory Consumer Product Safety Standard for CB Base Station Omnidirectional Antennas, at 49-50, Bethesda, Md. (July 14, 1980) (third quotation).

tribute directly to the technical requirements for development of a standard.³⁴⁵ A third staffer said that the citizens “proved the process was feasible” and could “produce workable standards,” adding that some participants had taught the CPSC much about high voltage technology which would have value in other contexts, although most members of the public “did not make a major contribution.”³⁴⁶

Extra-agency evaluation was mixed, but more critical. The president of the CB operators’ group principally seemed to be promoting his organizational interests, as witnessed by his unproductive inquiries in an early session.³⁴⁷ He thought that most consumers “offered little input, had no familiarity with CBs and did not want to buck [the] CPSC” and that some were “along for the ride,” but the group’s president did offer “suggestions added to the proposed standard” and say that the work “had been a great exercise and very educational.”³⁴⁸ The antenna company president said that several citizens “had no views and a few had no understanding” of the impact of CB antenna regulation, although his suggestions did prompt staff revision of some agency proposals, while three consumers believed that the company president represented producers in a way that enabled them to stay in business but with improved safety.³⁴⁹ The comments of the two presidents were confirmed by others interested in antenna production. One said that the reimbursed “group was not very astute,” some of its members imposed restrictions without understanding the science, and a few had so little technical knowledge that

345. Telephone interview with CPSC employee 2. *Accord* Transcript, Third Public Meeting, *supra* note 344, at 68; Transcript, Fourth Public Meeting for Development of a Proposed Mandatory Consumer Product Safety Standard for CB Base Station Omnidirectional Antennas, at 45, 51, Bethesda, Md. (Nov. 17, 1980).

346. *See* Transcript, Fourth Public Meeting, *supra* note 345, at 51 (first two quotations); telephone interview with CPSC employee 3 (remainder). *Cf.* telephone interview with CPSC employee 4 (funded participation extensive, pretty helpful as a whole, and not too onerous).

347. *See* Transcript, Second Public Meeting for Development of a Proposed Mandatory Consumer Product Safety Standard for CB Base Station Omnidirectional Antennas, Bethesda, Md. (May 10, 1980).

348. *See* telephone interview with funded participant 1, *supra* note 339 (first two quotations); Memorandum, CPSC Staff Response to Public Participants’ Comments on Draft Standard During Fourth Public Meeting, from Robert Northedge, Chairman, Performance Requirements Subcomm. to Dennis McCoskrie, CPSC Electrical Team Representative for CB Antennas, 1-2 (Feb. 19, 1981) (third quotation); Transcript, Fourth Public Meeting, *supra* note 345, at 149 (fourth quotation).

349. *See* telephone interview with funded participant 2, *supra* note 340 (quotation); Transcript, Fourth Public Meeting, *supra* note 345, at 21, 44-45; Minutes, Human Factors and Labelling Comm. (Nov. 1980) (prompting revision); telephone interviews with funded participants 3, 4, 5 (consumers’ beliefs).

their "contributions were practically nil."³⁵⁰ The other evaluator found that most participants were "'professional consumers' who probably could not contribute to standard development."³⁵¹

Even ostensibly more neutral observers were not very positive. The funded professor said that most consumers were "unable to contribute much to standard writing," and several lacked "technical background" or the ability "to comprehend the problem."³⁵² He also observed that the quantity and conflicting nature of compensated individuals' input "made it very difficult to get anything done."³⁵³ The professor believed that his own "impact was minor," but a committee head stated that the professor "wrote a very good draft," while two funded people viewed the professor as a quite competent, but unassertive, engineer.³⁵⁴ The funded lawyer was similarly, albeit more, impressed with citizen participation and the project's progression.³⁵⁵ He said that although the consumers were initially uncomfortable and at a disadvantage, partly because agency staff failed to prepare or welcome them, the work went smoothly once citizens were educated and staff overcame their ambivalence. The attorney assigned the staff an "excellent rating for acceptance, use of and relationship with" consumers.³⁵⁶ The lawyer helped focus the inquiry and suggested definitional changes which the Consumer Product Safety Commission adopted, while two citizens believed the attorney was productive and found valuable his legal expertise.³⁵⁷

The funded electrical contractor thought that a number of participants provided helpful input, although some did not. The individual found that the forum provided a "wide open opportunity to present" and challenge ideas, and concluded that while everyone considered the "impacts,

350. See telephone interview with industry representative 2.

351. Telephone interview with industry representative 1, *supra* note 339.

352. Telephone interview with funded participant 5, *supra* note 349.

353. *Id.* Cf. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-404 (1978); Stewart, *supra* note 4, at 1777 (problems of polycentric decisionmaking).

354. See telephone interview with funded participant 5, *supra* note 349 (first quotation); Transcript, Second Public Meeting, *supra* note 347, at 20 (second); telephone interviews with funded participants 3, 4, *supra* note 349 (two people's views).

355. See telephone interview with funded participant 4, *supra* note 349; Letter from funded participant 4 to CPSC employee 1 (Nov. 20, 1980).

356. See Letter, *supra* note 355; telephone interview with funded participant 4, *supra* note 349.

357. See, e.g., Transcript, Second Public Meeting, *supra* note 347, at 46 (focusing); Memorandum, *supra* note 348, at 5 (suggesting changes). See telephone interviews with funded participants 3, 5, *supra* note 349 (citizens' beliefs); see also Letter, *supra* note 355 (suggestions for CPSC improvements in funded participation).

relevance, and technicalities of electrical power line accidents, hazards, production, design, testing problems and compliance procedures," and learned from each other, the CPSC let the project become "so drawn out [that] it was impossible to act."³⁵⁸ The electrical contractor offered helpful insights on educating CB owners and on the Commission staff drafts, which prompted revisions; two consumers found that the contractor was assertive and knew the problem's technical aspects, but a third citizen believed that the contractor "did not contribute much."³⁵⁹ The retired chemist believed that most of the participants "did a good job and were pretty thorough" and thought that some were "especially competent to treat technical issues."³⁶⁰ Although one member of the public found that the chemist "had some valuable things to say" and was "vocal on certain questions," two others believed that she was not very helpful.³⁶¹ The retired teacher was "impressed with [consumers'] intense care and thought," adding that "all sides were presented fairly with reasonable alternatives."³⁶² One citizen said that the teacher "contributed new ideas on psychological effects and labeling," while a second lauded her "technical writing skills," even though two others believed that she offered little input, and several thought that she "enjoyed the free trips."³⁶³

III. CONCLUSIONS FROM THE CONSUMER PRODUCT SAFETY COMMISSION EXPERIENCE

This section first offers specific conclusions about compensated non-commercial involvement at the Consumer Product Safety Commission:

358. See telephone interview with funded participant 3, *supra* note 349 (first and third quotations); Letter from funded participant 3 to Sadye Dunn, CPSC Secretary (Sept. 11, 1981) (second quotation).

359. See Transcript, Second Public Meeting, *supra* note 347, at 52-53 (educating CB owners); Minutes, *supra* note 349 (prompting revisions); telephone interview with funded participant 4, *supra* note 349, and telephone interview with funded participant 6 (two consumers' findings); telephone interview with funded participant 5, *supra* note 349 (third's belief). Funded participant 2, *supra* note 340, asserted the electrical contractor would "never have petitioned CPSC," had he known "it would come to all this." *But cf.* telephone interview with funded participant 3, *supra* note 349 (no such indication from contractor).

360. See telephone interview with funded participant 6, *supra* note 359.

361. See telephone interview with funded participant 4, *supra* note 349 (citizen's finding); telephone interviews with funded participants 3, 5, *supra* note 349 (two others' thoughts).

362. See Letter from funded participant 7 to CPSC employee 5 (Feb. 1, 1981).

363. See telephone interviews with funded participant 6, *supra* note 360, and funded participant 3, *supra* note 349 (first and second citizens); telephone interviews with funded participants 4, 5, *supra* note 349 (beliefs of two more); telephone interviews with funded participant 1, *supra* note 339, and funded participant 2, *supra* note 340 (several others' thoughts).

its advantages and disadvantages, the activity's relative and comparative value, a contextual analysis of participation's worth, and lessons from the Commission experience. General conclusions follow.

A. *Specific Conclusions*

1. *Advantages and Disadvantages*

Funded involvement in CPSC proceedings had many beneficial effects which were manifested throughout the agency decisional processes.³⁶⁴ At the outset, compensated parties created frameworks for expeditious, reasoned decisionmaking, by helping to identify all interests affected and assigning them value; broadly defining and incisively evaluating the questions to be addressed; and designating a wide range of potential solutions. Funded participants presented new data or arguments and fresh insights on matters in issue. They also developed and applied innovative testing techniques, while criticizing and improving the methodologies of others, using the approaches thus created or upgraded to generate helpful data. Reimbursed entities comprehensively explored solutions, searching for the least restrictive ones. They devised, suggested, and convinced the Commission to adopt optional, less onerous, and novel means of accomplishing its goals. Moreover, the CPSC used much of this input to reach and justify decisions. In short, those paid promoted fair, accurate, thorough and prompt work; sharpened the issues and focused them for resolution; provided data, ideas, and perspectives which the agency might not have received; helped it assess the material submitted; enhanced appreciation of the entire process' implications; and promoted reasoned, supportable, confident decisionmaking.

The quality of funded input, which is not wholly severable from its efficacy, was respectable.³⁶⁵ Most contributions had substantive validity and even those which were rejected improved analysis by forcing others to treat them. Compensated parties provided relevant, supported data, arguments, and perspectives on issues not available, while they identified, and demanded exploration of, questions which would not otherwise have been addressed. Reimbursed persons competently presented views, clearly explaining and substantiating their own; challenging and demanding explication of those they opposed; and fairly and rigorously debating

364. The advantages and disadvantages listed below are meant to comprise a brief and selective, but representative, summary of the proceeding-specific analysis in § II.B of this Article.

365. For a discussion of quality and efficacy, see *supra* § II.A.2.a of this Article.

ideas elicited. When participants represented a specific interest, that interest was promoted effectively in ways that minimized bias. Funded individuals and organizations were intelligent, conscientious, perceptive, cooperative, creative, aggressive, and realistic, and they served well as sounding boards, conciliators, gadflies and devil's advocates.

Reimbursement had many benefits related less directly to decisional processes. It fostered participation of people, groups, trade associations and others that had been involved minimally or been excluded from administrative decisionmaking.³⁶⁶ Funding rectified an imbalance in perspectives and data proffered to the CPSC, permitting non-commercial interests to participate more equally with industry.³⁶⁷ These reimbursed parties afforded numerous advantages that made compensated activity relatively inexpensive as a general proposition and less costly than the major mechanisms for acquiring decisional input.³⁶⁸

But funded involvement also had a negative or no impact on decisional processes, was mediocre, and had certain detrimental implications more removed from decisionmaking. This participation warrants less extensive treatment, principally because most disadvantages were the opposites of the benefits. For example, reimbursed input was duplicative, flawed or unsupported, which had the important deleterious consequence of delay. Moreover, some funded parties failed to present capably their perspectives, or were unprepared, gullible or even recalcitrant. Furthermore, compensation did not invariably promote involvement of new interests or ameliorate participatory imbalance; indeed, a few of those parties who were awarded grants had participated previously without funding.

2. *Relative and Comparative Value*

In terms of the relative efficacy of reimbursed activity, approximately

366. For example, numerous individuals who testified in public sessions previously had been involved minimally or been excluded.

367. These included consumer groups and individual citizens that testified in public sessions and submitted written comments.

368. The CPSC paid \$25,000 in fees and costs for compensated activity during the last year of funding. *See* CPSC Study, *supra* note 59, at 1. Some activity was cheap, because industry donated certain services and individuals worked for less than their normal rates. The major techniques used to secure decisional input are supplementation of staff and employment of extra-agency contractors. *See* Tobias, *supra* note 2, at 953. *Cf.* HOUSE OFFEROR REPORT, *supra* note 70, at 10 (compensated activity cheaper than staff supplementation); *supra* note 287 and accompanying text (cheaper than contractors).

fifteen percent was effective, twenty-five percent was ineffective and the remainder was in between. As to relative quality, approximately twenty-five percent was high, fifteen percent was low, and the rest was in the middle area. Nearly all funded involvement offered some advantage related less directly to decisionmaking, although one-half to three-quarters provided multiple benefits, while fifty to sixty-six percent afforded meaningful advantages. Compensation also enabled citizens to provide input of quality equal to other participants or techniques for facilitating public involvement or improving decisionmaking. Moreover, reimbursement permitted consumers to have more advantageous, and fewer deleterious, effects on decisionmaking, as well as more beneficial, and fewer detrimental, impacts pertaining less closely to the decisional process than such other participants and techniques.³⁶⁹

3. *Contextual Analysis of Efficacy*

Funded activity obviously is not efficacious in every context. Yet it is difficult to delineate precisely when such involvement was more or less effective at the CPSC, especially for purposes of accurate extrapolation to other contexts or agencies.³⁷⁰ The principal reason for this is that relative efficacy is a function of certain variables which are present, interact, and influence decisionmaking in specific circumstances. Relative effectiveness at the Commission can be identified in terms of many such variables: what the agency needed to make the best decision; participant ability to satisfy that need; timing and extent of reimbursed activity; and the type of proceeding, of issues to be resolved, of input provided, and of participant.³⁷¹ The most significant variables appear to be agency need

369. All estimates in this paragraph are rough approximations. Cf. S. REP. NO. 94-863, 94th Cong., 2d Sess. (1976) (other techniques); Tobias, *supra* note 2, at 953; *supra* note 368 (cost comparisons with other techniques).

370. It is difficult because the inquiry is so situation-specific. Indeed, even delineating instances of relative efficacy at the CPSC may not permit accurate extrapolation to possible future funded activity at the agency. See *infra* notes 371-72 and accompanying text.

371. As to the type of proceeding involved, funded activity generally was more efficacious in "offeror-like" initiatives—those proceedings that were innovative, cooperative, and informal, such as the proceeding to develop a mandatory safety standard for CB antennas—rather than rulemaking or adjudication. Compensated participation in public meetings usually was less effective than comparable activity in notice-comment rulemaking and adjudicatory hearings. Reimbursed involvement had a somewhat greater impact in initiatives that began later in the CPSC's history. Funded participation was most efficacious in the UFFI matter. Thus, although the contexts in which funded activity had more or less impact can be designated by proceeding types much seems attributable to other parameters and exogenous factors.

A second parameter was the extent of compensated participation. Participation occurring over a

and participant capability, although external factors, such as congressional pressure, may also have an effect. Thus, while particular situations of relative efficacy can be designated for the CPSC, that exercise is not very instructive because the inquiry necessarily entails a case-by-case analysis of the variables that comprise every decisional process, each of which must be identified, isolated, and examined in terms of impact.³⁷²

4. *Lessons*

The Consumer Product Safety Commission's experiment in subsidized participatory democracy offers numerous valuable and unexpected lessons. Most importantly, the experience teaches that non-commercial interests can influence beneficially decisional processes. The experience also affords instructive insights about contexts in which it is probable that decisionmaking will be affected advantageously. Decisional processes are more likely to be enhanced when agency receptivity to, and need for, public input are substantial and participants' ability to satisfy that need is substantial. But sufficient resources must be provided to permit adequate citizen preparation. Moreover, the decisional processes may be affected by considerations unrelated to, and beyond the control of, funded parties, such as industry recalcitrance.³⁷³

longer period generally was more effective. A third parameter was timing. Funded activity generally had more impact when it came earlier in the decisional process. A fourth parameter was the type of substantive issues involved. In an absolute sense, reimbursed involvement was more efficacious where the questions were less "refined" and "technical," and less amenable to resolution through application of specialized expertise. This reflects the technical complexion of issues before the CPSC, the agency's needs, the participants' capabilities, and the mismatching of the participants' skills with the CPSC's needs. Thus, in real terms, funded activity was more effective when the issues were more responsive to the particular competence that participants possessed.

The issues parameter is closely related to two others: kind of input and CPSC need. In an absolute sense, compensated involvement had more impact when input contributed to the need for issue identification and refinement or when there were less technical questions or less need for particularized knowledge. Thus, funded activity was more effective where the "inputs needed" called for greater application of the kind of expertise that participants possessed.

A seventh parameter was type of participant. In an absolute sense, national consumer groups were more efficacious than citizens. Among individuals, technical consumers had more impact, while descending efficacy could be plotted along a spectrum from engineers to doctors, attorneys, consumer advocates, students and homemakers. But these views again reflect a mismatching of participant ability, issue composition, and CPSC need. In real terms, reimbursed activity was more effective where the paid participant possessed the kind of competence that the CPSC needed.

372. Thus, the inquiry is polycentric. See Fuller, *supra* note 353, at 394-404; Stewart, *supra* note 4, at 1777 (problems of polycentric decisionmaking).

373. The lessons in this paragraph are drawn primarily from the proceeding-specific analysis in § II.B of this Article and the remainder of § III.

The experiment conducted by the Consumer Product Safety Commission provides evidence of much of this. The agency occasionally mismatched its need and participant competence in the selection process. When the Commission required technical input, the agency paid lay consumers, and when negotiators were needed, antagonistic citizens received compensation. In these situations, reimbursed involvement was less successful than it might have been. Even when the agency's choice of participants was more appropriate, the CPSC mismatched awards, paying so little that efficacy was jeopardized. The agency funded in some contexts where the need for reimbursed input, or the possibility of influencing decisionmaking, was minimal. Citizens received compensation in circumstances where no one could have much impact because of the procedures, as in single hearings during five-year proceedings, or when industry was cooperative. Correspondingly, consumers were paid when the CPSC already had reached a decision or had improperly chosen products to regulate, techniques for achieving agency goals, or procedures to use.³⁷⁴ Thus, the Consumer Product Safety Commission's experience instructs that funding programs must be planned properly and administered carefully with attention to factors like those above if reimbursed activity is to be effective. Most problems can be solved or are amenable to amelioration, but a few may be intractable.³⁷⁵ Moreover, participant funding was reasonably inexpensive. The costs of compensation in terms both of actual payments to citizens and program operation were relatively insubstantial compared to other devices for securing decisional input.³⁷⁶

The CPSC funding effort also teaches that a nascent agency, which is attempting to establish itself, gain constituents, and set priorities as well as experiment with a new statute and novel administrative procedures, may not be the ideal governmental unit to implement a newly created concept like reimbursement.³⁷⁷ Thus, for some similar, and numerous

374. Textual examples of mismatching in this paragraph are drawn from the proceeding-specific analysis in § II.B of this Article. *Cf.* S. BREYER, REGULATION AND ITS REFORM 189-96 (1982) (mismatching in other administrative contexts). Indeed, it is ironic that an agency so committed to openness in government, citizen participation, and public input in its decisionmaking could so ineffectively administer funding that compensated activity's efficacy cannot be ascertained definitely.

375. For the most comprehensive, incisive work on funding program administration, see Boyer, *supra* notes 14, 62.

376. *See supra* note 368 and accompanying text.

377. *Cf.* Schwartz, *supra* note 68, at § IV (similar assertions regarding implementation of offeror procedure). *But cf. infra* text accompanying note 378 (more established agency like FTC "unfortu-

different, reasons, the CPSC may have been like the "FTC of the 1970's, in many respects," a "particularly unfortunate time and place to experiment with direct funding for public participation."³⁷⁸ If two of the three most ambitious reimbursement endeavors in government can be so characterized, however, it is fair to ask whether the compensation idea itself is flawed. The above analysis helps answer the question whether the CPSC funding effort was properly discontinued. Given the apparent efficacy and quality of reimbursed involvement, the difficulties entailed in managing the compensation endeavor, and choices regarding commitment of scarce resources, program suspension seems to have been rational.

Assessment of the CPSC's funding experience also yields informative ideas about evaluating efficacy. The analysis indicates that participant compensation remains a "politically volatile" issue, requiring consideration of evaluators' perspectives. I gleaned very different impressions from reviewing secondary sources, interviewing observers, and reading the actual input, the last of which was often strikingly different. Although I found that the final source, the CPSC staff and certain non-agency assessors, were most reliable, "rigorous" analysis as described below is necessary.³⁷⁹

B. General Conclusions

On balance, I found funded activity at the Consumer Product Safety Commission sufficiently promising to warrant reinstatement and continued experimentation in appropriately tailored contexts, there and at

nate place to experiment with direct funding"). As to funding's new creation and lack of prior experience with it, see *supra* § I.A of this Article.

378. Boyer, *supra* note 14, at 140. It is interesting that the three year experiment with funding under the Equal Access to Justice Act recently was deemed sufficiently worthwhile to warrant permanent institution. See *supra* note 29 and accompanying text.

379. See *infra* notes 384-86 and accompanying text. Of course, many lessons derived from the CPSC's funding experience are not new or unpredictable. But they are helpful, especially insofar as they document and confirm what has been observed. Compensated activity's advantages and disadvantages, relative and comparative value, and contextual worth were similar to what has been observed and might have been expected. For example, funded parties beneficially influenced decisional processes by providing new data or novel views on existing issues, but they also adversely affected decisionmaking by tendering duplicative or flawed material. Moreover, those possessing specialized expertise were generally more effective, as could have been expected at an agency where technical issues predominate. Furthermore, the CPSC experienced difficulties in program administration similar to those of other agencies. The conclusions pertaining to funded activity's evaluation as well were predictable. For instance, the activity was neither as bad as its detractors asserted nor as good as its proponents claimed, and industry found it less effective than consumers.

other agencies. Such experimentation would permit agencies to ascertain more precisely the value of participant compensation. Indeed, reimbursed involvement at the Consumer Product Safety Commission was surprisingly good, given the constraints.

IV. SUGGESTIONS FOR THE FUTURE: POLICY AND POLITICS

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.³⁸⁰ Although the Consumer Product Safety Commission's experience supports reinstatement, it was not so successful as to justify unrestricted experimentation at the Commission or government-wide. Selective work at the CPSC and other agencies ought to occur in contexts where it proved most effective, seemed promising or where no experience exists. While there should be maximum diversity and flexibility to experiment, some preference may be accorded to situations where funding has already been tried to save start-up and day-to-day costs and to capitalize on accumulated experience.³⁸¹ Agencies should properly plan reimbursement efforts, drawing especially upon the experience of the CPSC and other units of government. Agencies should begin by carefully studying participant compensation to determine whether it would enhance decisionmaking, and, if so, identify contexts where this would be most likely. Agencies lacking specific authority or sufficient appropriations should seek the requisite power and money from Congress. These agencies then should institute programs that draw upon prior experience with the funding concept, and maintain maximum flexibility to experiment, tinker, and refine, while paying close attention to administrative detail. More specifically, agencies should carefully choose appropriate circumstances for reimbursement, and rigorously select applicants for awards, by matching agency need with participant ability. Agencies also should allocate sufficient resources to

380. These mechanisms are explored in S. REP. NO. 94-863, 94th Cong., 2d Sess. (1976); Lazarus & Onek, *supra* note 5; the first set of sources cited *supra* note 158. The textual suggestions and those below are for prospective application. But studies of prior funded activity, like this one, should be undertaken, and the conclusions reached should be applied, where appropriate. See *supra* notes 158-59 and accompanying text.

381. For example, the FDA might be a prime candidate, because its funding experiment enjoyed some success and its Office of Consumer Affairs, which implemented the program, has that and other relevant experience. See Tobias, *supra* note 2, at 943-44, 952 n.270, 953 nn.271-73; *supra* note 368 and accompanying text.

permit effective citizen involvement and agency program administration and to closely monitor applicant performance.³⁸²

Congress can best implement these suggestions because it can study systematically prior experience with funded activity and identify and specifically prescribe proper contexts for reinstatement through authorizing legislation. Congress also can provide adequate resources for efficacious public participation and program operation in appropriations statutes. Even if Congress chooses not to pass substantive measures, it should remove appropriations restrictions on participant compensation. Agencies should institute funding pursuant to their implied power if Congress does not specifically authorize reimbursement. Courts should uphold this exercise of agency power unless it clearly exceeds the agency's statutory authority.³⁸³

The compensated involvement that occurs should be analyzed pursuant to the touchstone of "rigor."³⁸⁴ This means closely assessing all, or a representative sample of, the activity which transpires.³⁸⁵ The analysis requires an independent, extra-agency evaluator, such as the ACUS, which possesses sufficient knowledge about the funding idea and methods for its analysis, agency decisionmaking and the administrative process, as well as adequate detachment to maximize accuracy. Evaluators should use pre-defined impact parameters, attend agency proceedings where input is contributed, attempt to isolate all relevant variables to ascertain accurately cause and effect, and conduct analyses for a sufficient period to provide some assurance of statistical validity.³⁸⁶ Analysts should examine reimbursed participation at all agencies and attempt to draw more definitive conclusions about funded involvement, especially its relative efficacy. Finally, evaluators should compare and contrast the effectiveness and expense of participant compensation with other techniques for remedying participatory imbalance and enhancing decisional processes.

382. The best work on these, and many other, aspects of program administration is Boyer *supra* notes 14, 62. Cf. *supra* § II.A of this Article; Tobias, *supra* note 2, at § 4 (suggestions and lessons regarding program administration).

383. For analysis of all the assertions in this paragraph, see *id.*

384. A definition, or sense, of "rigor" can be derived from reading the remainder of this paragraph; the "ideal" parameters are described in § I.A of this Article, or Rosenbaum, *supra* note 100.

385. For difficulties involved in selecting a representative sample, see *supra* § I.A of this Article, especially *supra* note 160 and sources cited therein.

386. Helpful work on "evaluation research methodology" appears in Boyer, *supra* notes 14, 62; Rosenbaum, *supra* note 100; Rosener, *supra* note 100.

V. CONCLUSION

Government-sponsored public involvement at the Consumer Product Safety Commission was an instructive experiment in subsidized participatory democracy. Although participant reimbursement was flawed in certain ways, it possessed sufficient value to warrant properly circumscribed future work. Congress and the agencies should heed the admonition of a former Commissioner who strongly supported funding: Participant compensation is beneficial but not everywhere, everytime, or for everyone.³⁸⁷

387. Telephone interview with Commissioner David Pittle. Indeed, responsive to this admonition are the recent congressional reauthorization of the Equal Access to Justice Act, *see supra* note 29, and burgeoning successful agency experimentation with analogous mechanisms, like resource pools, for facilitating non-commercial involvement in negotiated rulemakings, *see* 1 C.F.R. § 305.85-5 para. 9 (1987).

