

# Conversations With...

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## The Honorable Dick Thornburgh The Honorable Hal Stratton

### The Issue: Consumer Product Regulation

Congress created the Consumer Product Safety Commission (CPSC) in 1972 and charged it with the critical mission of protecting “the public against unreasonable risks of injuries associated with consumer products.” Though it may not enjoy the same level of public notoriety as other federal agencies, the CPSC’s broad mandate and considerable enforcement powers have long earned the attention of those companies who manufacture the 15,000 consumer products under its jurisdiction.

When the Commission identifies a consumer product or group of products that pose an unreasonable risk, it has a wide range of options available to address the problem. It can issue voluntary standards and guidelines or engage in cooperative recalls with the producers’ assistance; or it can promulgate mandatory regulations, impose substantial civil fines, or initiate criminal proceedings. How the Commission decides to proceed on any given problem can have an extremely significant impact on a consumer product manufacturer’s public image and its exposure to private lawsuits.

While the assent of a majority of the CPSC’s three Commissioners is needed to take action, the leadership of the Commission’s Chairman has always been a critical factor in determining how this relatively small agency focuses and applies its personnel and financial resources. In this edition of Washington Legal Foundation’s CONVERSATIONS WITH, former Attorney General Dick Thornburgh leads an engaging discussion with current CPSC Chairman Harold D. Stratton. The conversation addresses Chairman Stratton’s view of the CPSC’s mission, the rationale behind actions it has taken thus far under his leadership, his thoughts on voluntary compliance, and the importance of sound science and risk assessment in consumer protection.

**Governor Thornburgh:** Tell us a little about your experiences in the private and public sectors, and how they have prepared you for chairmanship of the Commission.

**Chairman Stratton:** I have been engaged in the practice of law since 1977. I’ve handled all types of cases including governmental and administrative law with an emphasis on complex litigation for the last several years. I’ve practiced in all courts from arguing in the U.S. Supreme Court to the courts of more limited jurisdiction. This experience has obviously given me a good understanding of the law and our legal system.

I was elected to the New Mexico House of Representatives in 1978. I served there for eight years and the final two years chaired the Judiciary Committee. This experience has helped me better understand the legislative process in Congress. Also, as chairman of the Judiciary Committee I learned how to run a committee. We heard between 300 and 500 bills in that committee each legislative session with virtually no rules. That made it very important for the chairman of the committee to maintain control of and direct the hearing process.

In 1986, I was elected to the office of Attorney General of New Mexico. I was limited to one four-year term by the New Mexico constitution. In this job I not only learned about all the legal issues involving state government and regulatory policy, but also had extensive experience in managing the employees of the Attorney General’s office. Also, at the New Mexico Attorney General’s office we ran the state’s only dedicated consumer protection agency. This experience, obviously, translates well to running a federal consumer agency. And, I’ve been lucky enough to persuade the former



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director of the Consumer Division of the New Mexico Attorney General’s office, Jeffery Troutt, to come to work at the Commission as my senior legal counsel.

In addition to my governmental experience, I think my broad private sector experience, particularly in governmental and administrative law gives me a good perspective on what our stakeholders face when they come before the Commission. This broad and diverse experience, I believe, helps with my duties as the principal executive officer of the CPSC and helps me understand the legislative process as well as how to run a rule-making body like the Commission.

**Governor Thornburgh:** What, in your view, is the Commission’s mission? Have you introduced any new initiatives or a new focus for the CPSC since assuming the Chairmanship? What are your priorities as Chairman?

**Chairman Stratton:** The CPSC has four missions by statute: 1) to protect the public against unreasonable risks associated with consumer products; 2) to assist consumers in evaluating the comparative safety of consumer products; 3) to develop uniform safety standards for consumer products and to minimize conflicting state and local regulations; and, 4) to promote research and investigation into causes and prevention of product-related deaths, illness, and injuries.

The Chairman of the Commission is the principal executive officer of the Commission responsible for exercising all executive and administrative functions. In that capacity, I am working to identify management and process changes that will make the agency more productive and efficient. Currently, my senior management team is performing a top-to-bottom strategic review of the agency and has already identified numerous process improvements and management initiatives we plan to integrate into the CPSC over the coming years. For example, previously Commission briefing meetings only allowed the staff to make oral presentations to

the Commission. We’ve recently changed this policy to include stakeholders in different stages of the process and more particularly to allow them to make oral presentations to the Commission at its meetings. I believe the Commissioners gain a much better understanding of an issue when they have an opportunity to hear from individuals who have an interest in the issue.

We are also re-emphasizing risk-based decision making and cost-benefit analysis agency-wide. With tighter budgets on the horizon, I believe each agency in government must recommit itself to getting the most out of every dollar. Where product safety and our Commission are concerned, I want people to say we used strong science and risk-based decision making to eliminate those hazards that are causing the most injuries and deaths. We basically want to use our agency funds in a manner where they will result in preventing the most deaths and serious injuries.

It is our goal that the CPSC become one of the most effective, efficient and best-run agencies in the government. We hope our strategic review and new management philosophy will help the Commission achieve this goal.

**Governor Thornburgh:** Give us a basic overview of how the Commission works. What is the role of the Chairman in relation to the Commissioners? What is the procedural process you utilize in determining whether and how to take action?

**Chairman Stratton:** The Chairman is the principal executive officer of the three-member Commission. (Although our authorizing legislation provides for five commissioners, Congress appropriates enough money to fund only three.) The Chairman supervises and hires the Commission staff, subject to the approval of the other Commissioners for certain senior staff. The Chairman is further responsible for distribution of business amongst the staff and for the use and expenditure of Commission

funds. The Chairman's staff also prepares the budget, subject to the approval of the other Commissioners. The Commission is a collegial body and carries out public policy through regulatory and enforcement actions, and through public education. Commission regulations, lawsuits and settlements must be approved by a majority vote of the Commissioners. This can be done at a formal public meeting or by a ballot distributed to the Commissioners. With respect to public relations and education, the Chairman serves as the chief spokesman for the Commission. I spend a considerable amount of time speaking with the press, industry and consumer groups about the Commission's policies.

**Governor Thornburgh:** The Commission seems best known for the use of its recall authority. Could you tell us a bit about how most recalls are initiated, how many of them involve the cooperation of the company, what is the interplay between the Commission and the recalling producer, and how recalls affect consumers?

**Chairman Stratton:** Recalls are initiated in a variety of ways. We learn of consumer product issues from our own investigators, private attorneys, consumer groups, newspaper articles and from consumers themselves. Also, companies report problems with their and others' products directly to the Commission. Section 15 of the Consumer Product Safety Act (CPSA, 15 U.S.C. § 2064) requires manufacturers, distributors, and retailers of products that obtain information that "reasonably supports the conclusion" that a product may be hazardous to immediately report the problem to the Commission. That does not automatically mean that a product will be recalled. More often than not, our staff examines a problem and determines that a recall is not necessary. Sometimes, however, companies want to recall a product as a defensive matter — to minimize their risk of product liability litigation — and we'll often cooperate with them. The big problem, from an enforcement standpoint, occurs when companies

do not immediately report. Then they may be liable for civil penalties. One message I've repeated almost everywhere I go is that if companies report properly and in a timely manner pursuant to the statute, they will avoid the penalty process. If companies fail to report dangerous consumer products as required by the statute in a timely manner, we're going to seek appropriate penalties as provided by the law.

When it is determined that a product will be recalled, there are three options provided by the statute — a refund, a replacement or a repair of the product. The statute provides that the company will determine which one of these methods will be utilized to correct the problem, but as a practical matter, this determination is made with the Commission staff. Virtually all recalls are of a "voluntary" nature done in cooperation with the Commission. At this writing we have only two administrative proceedings pending to mandate recalls. This is in contrast to an average of over 300 voluntary recalls per year.

**Governor Thornburgh:** For those companies that don't notify the Commission of a problem with their products or don't engage in a recall, what enforcement vehicles does the Commission have? How often do you have to go to litigation or use civil or criminal fines? What are the factors that dictate the gravity of the penalty?

**Chairman Stratton:** Where a company fails to report a problem in a timely manner the Commission can seek a civil penalty of up to \$1.65 million. The CPSA sets out five factors to be considered in determining a civil penalty: 1) the appropriateness of the penalty to the size of the business of the person charged; 2) the nature of the product defect; 3) the severity of the risk of injury; 4) the occurrence or absence of injury; and 5) the number of defective products distributed (15 U.S.C. § 20(c)). The Commission files these types of actions relatively regularly. In addition, where the Commission believes that a product present

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an unreasonable risk of injury and the company does not agree, the Commission can begin an administrative action that leads to a forced corrective action. These suits are less common, and can be even more time consuming than court litigation. More often than not, we can work something out with a company that addresses the product risk involved.

The Commission can initiate criminal action for violations under the CPSA, Federal Hazardous Substances Act (FHSA), Poison Prevention Packaging Act (PPPA), and the Flammable Fabrics Act (FFA). These statutes provide penalties for offenses such as distributing a product into commerce that is a banned hazardous product or are in violation of a statute or regulation. Much of the conduct we prosecute can also be a felony under statutes enforced by other federal agencies, so we often cooperate with those agencies in bringing actions. We recently prosecuted several fireworks distributors for selling explosives that were much more powerful than permitted by statute, and thus illegal, for consumer use. To prosecute the distributors, we worked with another agency in order to bring felony and misdemeanor charges. I should also note that we enforce civil and criminal penalties by referring them to the Department of Justice (DOJ), which prosecutes them on our behalf. Of course, our attorneys and staff work closely with Justice during these actions. Essentially, the Commission is the client, and Justice Department attorneys serve as its litigation counsel, though our attorneys and investigators assist DOJ in all phases of the litigation.

**Governor Thornburgh:** The Commission has had significant success in working with product makers, something you have stated you wish to continue and expand upon. Other than cooperating on recalls, what else does the Commission do to encourage voluntary compliance, and how does the consumer benefit from a less confrontational approach to federal oversight such as this?

**Chairman Stratton:** Many believe that some

of the Commission's greatest success stories are in the voluntary standards area. Our staff works closely with standard-setting organizations such as the American National Standards Institute (ANSI) as well as industry and others during the development of voluntary industry standards. The array of standards is extremely broad. It can cover electrical, mechanical, thermal and other hazards. We often sit on the committee that drafts standards. There is a preference in the CPSA for voluntary standards. We're obligated to terminate rulemaking if there is a voluntary standard where the standard adequately addresses a product safety hazard and there is likelihood that industry will substantially comply with the standard. So if we're concerned about a particular hazard, industry usually has an incentive to do something about it, by developing a standard that both industry and we believe will eliminate or substantially reduce the hazard. An example of a successful voluntary standard are Ground Fault Circuit Interrupters (GFCI). They are used now in most kitchen and bathrooms outlets, as well as in products such as portable hair dryers—places and products where water and electricity are likely to be used in close proximity. The Commission was deeply involved in developing GFCI and in encouraging their use in consumer products as well as their inclusion in model building codes. GFCI have substantially reduced the number of home and product-related electrocutions, and at a nominal cost.

**Governor Thornburgh:** The Bush Administration, especially through the Office of Management and Budget's Office of Information and Regulatory Affairs, has been pushing agencies to utilize rational risk assessment methods and sound science. What is your view of these initiatives as CPSC Chairman?

**Chairman Stratton:** I am committed to the regulatory principles espoused by President Bush and the Office of Management and Budget (OMB). I believe in utilizing cost-benefit analysis, risk-based decision making and sound science when reviewing or considering potential

regulation. These tools enable decision makers to make better, more informed and more efficient decisions in protecting consumers from consumer product hazards. The CPSC, by statute, must perform cost-benefit analyses in promulgating regulations, and our scientific team is dedicated to ensuring the quality and accuracy of the scientific analysis provided to the Commission. While this commitment may require more time and resources for an agency in making regulatory decisions, it ensures that such decisions will be more effective and efficient.

**Governor Thornburgh:** You have spoken publicly about your desire to keep American consumers safe from dangerous products imported from overseas. With an increasing number of products being made overseas for the U.S. market, especially toys, what tools does the Commission have in dealing with this daunting task?

**Chairman Stratton:** One of the biggest enforcement problems we have relates to the importation of hazardous products, or products that do not meet U.S. safety standards. It's a lot more efficient to stop these kinds of products at the border than to try to track them down once they've gotten into the stream of commerce. In many cases, especially where products are imported in large quantities, it's difficult to deal effectively with them at that point. We're attacking the problem in a variety of ways. We recently entered into a Memorandum of Understanding (MOU) with the U.S. Department of Customs. We will be able to have better access to Customs' database and to work more closely with Customs in intercepting such products. We're also working on MOUs with other countries. That will allow us to work more effectively with them, as well. Through this effort, the Commission staff is reaching out to government officials and manufacturing leaders in certain countries to educate them about U.S. standards, and to make clear to them that we're committed to enforcing those standards. By stepping up our efforts in these respects, we are hoping to greatly reduce the importation of

dangerous products into the country.

**Governor Thornburgh:** How often does the Commission partner with other federal agencies? Do you find that effective?

**Chairman Stratton:** With our broad mission, CPSC works with many other federal agencies in order to avoid duplication, improve communications and address consumer risks more efficiently. We work with the Federal Emergency Management Agency (FEMA), Environmental Protection Agency (EPA), Justice Department, Department of Commerce, Department of Customs, National Institute of Standards and Technology, Department of Health and Human Services, as well as the Centers for Disease Control on projects and initiatives. Each of these agencies has one or more areas where our activities either overlap or are complementary.

**Governor Thornburgh:** In addition to working with other federal agencies, the Commission's work certainly must bring it into contact with those who protect consumers at the state level, especially state attorneys general. What interactions or divergent activities occur? When do federal law and actions preempt the states?

**Chairman Stratton:** Many state attorneys general have consumer protection offices and are active in the consumer area. However, their consumer jurisdiction usually involves issues related to business practices rather than product safety, so there's not a lot of overlap between our basic jurisdictions. Our actions are more complementary, and we often get assistance from state officials when we investigate product failures.

We have at least one main contact in each state—either in the attorney general's office or in a state health and human services office. We work closely with those contacts year-round, and we share a mutual desire to educate the public about consumer safety. One of my goals is to increase our interaction with state and

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local officials. I want to make sure that they are aware of what we are doing, and that they have a way of letting the Commission know how our actions, or proposed actions, affect their state.

In general, safety standards promulgated by the Commission preempt state law and standards. However, states may petition the Commission to permit them to enact stricter safety standards than the Commission's regulations. Also, states may enact safety standards with respect to a consumer product over which the Commission has jurisdiction that addresses a different safety risk than one addressed by Commission regulation. The only consumer product over which the Commission has jurisdiction which states have specific statutory authority to enact stricter standards for is fireworks (15 U.S.C. § 1261n(b)(1)(B)(4)).

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**Harold D. (Hal) Stratton** *is Chairman of the Consumer Product Safety Commission (CPSC). President George W. Bush nominated him to be CPSC Chairman and the U.S. Senate confirmed him on July 25, 2002. Mr. Stratton served in the New Mexico House of Representatives from 1979 through 1986 and as New Mexico Attorney General from 1987 through 1990. From 1991 to 2002, he maintained a private law practice in Albuquerque.*