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REGULATION OF IMPORTERS UNDER THE CONSUMER PRODUCT SAFETY ACT

The Consumer Product Safety Act of 1972¹ is the first comprehensive product safety legislation to be enacted by Congress.² It applies to a wide range of products,³ both imported and domestic,⁴ and subjects parties who manufacture and distribute these products to a pervasive regulatory scheme. The Act creates a Consumer Product Safety Commission with power to promulgate product safety standards and take steps to protect the public from hazardous products.

For the importer, the Act is of the utmost significance. With its unprecedented scope of product coverage, the Act subjects the majority of importers to its stringent provisions.⁵ The importer who fails to comply

1. Consumer Product Safety Act, 86 Stat. 1207, 15 U.S.C. § 2051 *et seq.* (Supp. IV, 1974). Hereinafter, all section references are to particular provisions in the Act, unless otherwise specified.

For general treatments of the Consumer Product Safety Act, see BUREAU OF NAT'L AFFAIRS, ABC'S OF THE CONSUMER PRODUCT SAFETY ACT (1973); BUREAU OF NAT'L AFFAIRS, THE CONSUMER PRODUCT SAFETY ACT: TEXT, ANALYSIS, LEGISLATIVE HISTORY (1973); CONSUMER PRODUCT SAFETY ACT (Scher, Chairman, Practising Law Institute 1973); DEVELOPING TRENDS UNDER THE CONSUMER PRODUCT SAFETY ACT (Scher, Chairman, Practising Law Institute 1974).

2. Section 2(a)(5) states that "existing Federal authority to protect consumers from exposure to consumer products presenting unreasonable risks of injury is inadequate . . ." See also BUREAU OF NAT'L AFFAIRS, THE CONSUMER PRODUCT SAFETY ACT: TEXT, ANALYSIS, LEGISLATIVE HISTORY 3 (1973).

Product safety legislation prior to this Act, *e.g.*, the Flammable Fabrics Act, 15 U.S.C. § 1191 *et seq.* (1970), the Federal Hazardous Substances Act, 15 U.S.C. § 1261 *et seq.* (1970), the Poison Prevention Packaging Act, 15 U.S.C. § 1471 *et seq.* (1970), and the Household Refrigerator Act, 15 U.S.C. § 1211 *et seq.* (1970), covered restricted categories of products, and responsibility for enforcing them was scattered among a number of federal agencies such as the Federal Trade Commission and the Department of Commerce. See generally H. HEFFRON, FEDERAL CONSUMER SAFETY LEGISLATION (Nat'l Comm'n on Product Safety 1970). Section 30 of the Act transfers the responsibility for administering the above four acts to the Consumer Product Safety Commission. These acts are therefore often referred to as the "transferred acts."

3. "Consumer product," which is defined in section 3(a)(1), includes most articles produced for consumer use. The major exceptions are food, drugs, tobacco products, motor vehicles, aircraft, and certain boats and vessels.

4. According to Lawrence Kushner, Vice Chairman of the Consumer Product Safety Commission, estimates have been made which indicate that at least fifty percent of the items subject to the Commission's jurisdiction may be imported products. 2 BNA PROD. SAFETY & LIAB. REP. 501 (1974).

5. Section 3(a)(4) defines "manufacturer" as "any person who manufactures or imports a consumer product." (emphasis supplied). The definition is important, since the Act

with the Act will face sanctions which will frequently result in substantial business losses on his part. Moreover, the importer will bear the brunt of these sanctions even where another party, such as the foreign manufacturer, is initially or primarily at fault.⁶ The situation is further complicated by the fact that the Act contains various ambiguities concerning import regulation, the resolution of which will significantly affect the importer's liabilities. This Note will examine the Act's impact upon the importer in each stage of the importation process and will suggest ways in which the importer can minimize his risks under the Act. To the extent that the importer can anticipate the legal problems raised by the Act, he will be able to act accordingly to prevent their occurrence.

I

THE ACT'S REGULATION OF THE IMPORTER'S CONDUCT

A. THE IMPORT CONTROL SCHEME PRIOR TO THE ACT

In order to understand the impact of the Act upon the importer's activities, it is first necessary to examine the import control scheme existing prior to the Act's passage. The importer has traditionally operated under an extensive body of statutes and regulations governing the importation of goods into the United States.⁷

Under the general procedures prescribed by these laws, imported goods are subject to various types of clearance upon arrival in this country. The products may initially be held under Customs custody⁸ and stored in a Customs warehouse or a private or public bonded warehouse designated by Customs.⁹ Under the Tariff Act, however, the importer is allowed to secure the release of his product by posting a redelivery bond.¹⁰ In practice, goods arriving in this country are often immediately released under bond or delivered directly to the importer, who posts a bond, without ever having been held under Customs custody.¹¹

contains a number of provisions which use the term "manufacturer."

For a prior treatment of importers under the Act, see BUREAU OF NAT'L AFFAIRS, THE CONSUMER PRODUCT SAFETY ACT: TEXT, ANALYSIS, LEGISLATIVE HISTORY 11, 75-80 (1973).

6. See note 34 *infra* and accompanying text.

7. See, e.g., 19 U.S.C. § 1499 (1970), a provision of the Tariff Act permitting Customs custody of imported merchandise to ensure compliance with the applicable laws and regulations, and 21 U.S.C. § 381 (1970), a Food, Drug, and Cosmetic Act provision granting the Secretary of Health, Education and Welfare power to test imported food, drugs, and cosmetics and to refuse their admission.

8. 19 U.S.C. § 1499 (1970).

9. 19 U.S.C. § 1555 (1970).

10. 19 U.S.C. § 1499 (1970).

11. See Killingsworth, *Import Control Under Federal Laws*, 2 FOOD DRUG COSM. L.Q.

The practice of allowing release under bond constitutes a major shortcoming of the traditional scheme of import regulation. The Sixth Circuit decision in *230 Boxes, More or Less, of Fish v. United States*¹² held that if products released under bond are found to be in violation of a pertinent statute or regulation Customs does not have the authority, absent fraud, to compel redelivery of the products to Customs custody. The only sanction which Customs may invoke for a refusal to comply with its redelivery request is forfeiture of a portion of the bond.¹³ The importer, therefore, might well decide that it would be more profitable to forfeit a portion of the bond and distribute the product in commerce rather than to redeliver it to Customs. Although a regulatory agency with jurisdiction over the goods may in this situation bring an injunctive or seizure action against the importer,¹⁴ some of the goods may already have reached the consumer. The weaknesses of this system are especially apparent where product safety is concerned, since the public is not afforded adequate protection against exposure to hazardous products.¹⁵

B. IMPACT OF THE CONSUMER PRODUCT SAFETY ACT ON IMPORT CONTROL

The Consumer Product Safety Act departs significantly from the procedures discussed above. Section 17 of the Act permits the Commission to refuse to admit noncomplying goods and does not give the importer a general right to obtain the release of goods under bond pending a determination of their admissibility. This reflects a conscious decision by Congress to avoid the pitfalls of earlier legislation which contained general provisions for release under bond¹⁶ because such provisions provided inadequate protection to the public from hazardous products.¹⁷

498 (1947).

12. 168 F.2d 361 (6th Cir. 1948).

13. *Id.* at 365.

14. *Id.* at 365-66.

15. For example, the Flammable Fabrics Act, 15 U.S.C. § 1191 *et seq.* (1970), provides for release under bond.

16. The Department of the Treasury submitted to Congress a proposal concerning imported products which authorized a general procedure of release under bond as well as redelivery in instances of noncompliance. *Hearings on H.R. 8110, H.R. 8157, H.R. 260, and H.R. 3813 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 1st & 2d Sess., ser. 59, pt. 1, at 192-93 (1972). However, this proposal was not incorporated into the final version of the Consumer Product Safety Act. Although the Senate bill included a general procedure for release under bond, the House version, which limited this procedure to instances of modification, was enacted. H.R. REP. NO. 1593, 92d Cong., 2d Sess. 54-56 (1972), reprinted in [1972] 3 U.S. CODE CONG. & AD. NEWS 4596, 4645-46.

17. H.R. REP. NO. 1593, 92d Cong., 2d Sess. 54-56 (1972), [1972] U.S. CODE CONG. & AD. NEWS at 4645-46.

The Act does, however, permit release under bond where the importer, pursuant to an agreement with the Commission, undertakes modification of his product to bring it into compliance with the Act.¹⁸ In this situation the danger that the importer will forfeit the bond and distribute the product is theoretically reduced, since under section 17(d) Customs and the Commission are jointly responsible for supervision of modification. If the product is released under bond for purposes of modification and it subsequently appears to the Commission that the product cannot be modified or that satisfactory progress is not being made, the Commission may direct Customs to demand redelivery.¹⁹ If the importer then refuses to redeliver the product, the Commission is authorized to bring seizure and injunctive proceedings.²⁰

Although section 17 does not expressly authorize release under bond in instances other than modification, this does not mean that products covered by the Act will necessarily have to be held in Customs custody upon arrival in the United States. Where the Commission does not suspect a violation and does not request that Customs retain custody of the product,²¹ Customs may choose to release the goods under a redelivery bond authorized by another statute such as the Tariff Act.²² This situation may arise frequently, since the Commission will probably test only a small proportion of imported products. In practice, then, section 17 may well have less impact on importation procedures than its strong language would indicate.

C. GROUNDS FOR REFUSAL OF ADMISSION

These restrictions on the flow of imported goods into the United States operate in a variety of situations. Section 17(a), which lists the general grounds for restriction, provides that a product will be denied admission into the United States if it does not comply with an applicable product safety rule promulgated by the Commission, does not meet the Act's certification and labeling requirements, is or has been determined to be an "imminent product hazard," has a product defect which constitutes a "substantial product hazard," or was manufactured by a person who did not comply with section 17(g), which authorizes the

18. Section 17(c).

19. Section 17(d).

20. *Id.*

21. In a policy statement the Commission indicated that the importer may not be required to hold the entire shipment intact pending the outcome of tests on product samples, since for routine compliance checks this would discriminate against the importer. 3 BNA PROD. SAFETY & LIAB. REP. 390 (1975).

22. 19 U.S.C. § 1499 (1970). See note 10 *supra* and accompanying text.

Commission to condition the importation of products on the "manufacturer's"²³ compliance with inspection and recordkeeping requirements. Thus, as the last ground for refusal indicates, a product may be refused admission even when the product itself is not defective. Section 17 also provides that the importer may be required to provide product samples to the Commission so that the latter can make a determination as to whether the product is hazardous.²⁴ These grounds for refusal of admission are treated more extensively elsewhere in the Act: specific sections concern product safety rules,²⁵ banned hazardous products,²⁶ imminent product hazards,²⁷ and substantial product hazards.²⁸

The Act's certification and recordkeeping requirements are also significant for the importer. The Consumer Product Safety Commission is authorized to require that goods subject to a product safety standard be accompanied by a certificate which specifies the applicable standards and indicates compliance.²⁹ Certification must be based on a test of each product or on a reasonable testing program, which the Commission may prescribe.³⁰ The Commission is also empowered to designate the party responsible for certification.³¹ Besides certification, the Commission may impose labeling requirements on products subject to the Act; such requirements, unlike certification, may be applicable regardless of whether the goods are covered by a product safety standard.³² Finally,

23. This includes the importer's compliance with such requirements. See note 5 *supra*.

24. Under section 17(b) Customs obtains samples pursuant to a request from the Commission and forwards the samples to the Commission.

25. Sections 7-11 prescribe the procedures for promulgation of product safety standards. For a discussion of the standards-setting process, see Scalia & Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 U.C.L.A. L. REV. 899 (1973). See also Page, *Consumer Involvement and the Consumer Product Safety Act*, 2 HOFSTRA L. REV. 605 (1974).

26. Section 8.

27. Section 12.

28. Section 15.

29. Section 14.

30. Section 14(b).

31. The Commission is authorized to impose testing and certification requirements on the importer as well as the foreign manufacturer. Under section 14(a)(2) if there is more than one "manufacturer" or product labeler the Commission may designate one or more of such parties as the person responsible for certification and may exempt all other "manufacturers" or private labelers from this responsibility. Since "manufacturer" includes importers as well, see note 5 *supra*, the Commission can hold the importer responsible for certification. Even if the importer is not subject to any such requirements, he may still want to test the product in order to guard against sanctions such as refusal of admission and seizure actions, especially if he has reason to believe that the foreign manufacturer is failing to comply with the Commission's testing standards. See note 99 *infra* and accompanying text.

32. Section 14(c).

the Commission has the authority to require that the importer maintain certain records and provide information upon the Commission's request, and it may inspect the importer's records and facilities.³³

Refusal of admission imposes a special burden on the importer, for the sanction is applicable regardless of whether the importer or another party such as the foreign manufacturer is primarily at fault.³⁴ If the foreign manufacturer, for example, has failed to test his products in accordance with standards prescribed by the Commission or has refused to comply with recordkeeping requirements, the products will be refused admission even though noncompliance cannot be attributed to the importer.³⁵ Thus, before entering into a transaction with a foreign manufacturer or exporter, the importer should ascertain whether the other party is aware of, and willing to comply with, the pertinent requirements of the Act.³⁶

33. Section 16.

34. The importer is subject to the sanction of admission refusal even where he does not know and could not reasonably be expected to know of the foreign manufacturer's noncompliance. Under section 19(b), however, the importer is not liable for civil or criminal penalties in such a situation.

35. One of the major advantages of this sanction is that it can be directed against foreign manufacturers who do not fall within the Commission's personal jurisdiction.

36. See note 99 *infra* and accompanying text. With regard to the Act's regulation of foreign manufacturers' conduct, the Department of State has commented that "[i]nspection of [foreign manufacturers' facilities and records] may raise delicate questions of national sovereignty and might strain our relations with our trading partners." 2 BNA PROD. SAFETY & LIAB. REP. 841 (1974). However, Barbara Franklin, Vice Chairman of the Commission, has indicated that the Commission has no current plans to inspect the facilities of foreign manufacturers. 2 CCH CONSUMERISM 730 (1974). The Department of State has also warned that if the Commission subjects imported products to any mandatory plans for sampling and testing, this will lead to retaliation by other nations. The Department suggested that imports be exempt from any such sampling plans and that the Commission accept the results of equivalent tests in the country of origin. 2 BNA PROD. SAFETY & LIAB. REP. 841 (1974).

In addition to raising the issue of infringement on the sovereignty of other nations, the Act's regulation of foreign manufacturers also presents the constitutional question of whether Congress has exceeded its power to regulate foreign commerce. It could be argued that regulation of foreign manufacturers' activities outside the United States, such as recordkeeping, is not authorized by the Commerce Clause. However, the foreign manufacturer is under no obligation to submit to such regulation in the first place, since he can decide not to export his products to the United States. Also, courts have characterized the power of Congress over foreign commerce as plenary. *Buttfield v. Stranahan*, 192 U.S. 470 (1904); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946). It has been held that this power may extend to regulating the conduct of foreign companies if such conduct sufficiently affects foreign commerce. *SEC v. Myers*, 285 F. Supp. 743 (D. Md. 1968). In *Vanity Fair Mills v. T. Eaton Co.*, 234 F.2d 633 (2d Cir. 1956), the court stated in dicta that Congress' power under the Commerce Clause "is now generally interpreted to extend to all commerce, even intrastate and entirely foreign commerce, which has a substantial

D. OTHER SANCTIONS

Once the goods have been admitted into the United States, the importer is still subject to various enforcement proceedings if the Commission at any point discovers a violation. The Commission is authorized to bring judicial seizure proceedings against hazardous products under section 12(a), to take administrative steps against substantial product hazards under section 15,³⁷ and to bring injunctive and seizure actions under section 22 to prevent the distribution of nonconforming products.³⁸ The importer faces civil penalties under section 20 if he knowingly distributes a consumer product which is not in conformity with an applicable consumer product safety standard or which is a banned hazardous product, fails to comply with inspection and recordkeeping requirements, fails to furnish information required by section 15(b) with respect to substantial product hazards, fails to comply with an administrative order under section 15(c) or 15(d) concerning substantial product hazards, or fails to comply with any rule under section 9(d)(2) involving stockpiling of goods.³⁹ In addition, the importer is subject to criminal penalties under section 21 if he knowingly and willfully continues to commit a prohibited act after having received a notice of noncompliance from the Commission. In some instances the Commission will have to resort to more than one sanction in enforcing the Act. For example, an importer may disobey a redelivery order under section 17, in which case the Commission can bring injunctive and seizure proceedings and assess criminal penalties. A given sanction, then, can be reinforced by the threat and use of other sanctions.⁴⁰

effect on commerce between the states or between the United States and foreign countries." *Id.* at 641.

37. Actions under section 15 will typically be taken against products that are "already on the dealer's shelves or in the consumer's hands." Scalia & Goodman, *supra* note 25, at 940. This includes imported products that were admitted into the United States and distributed in commerce.

38. Section 22 and section 12 proceedings are similar in that both involve injunctive enforcement and/or seizure of the product. However, there are some important differences. While section 22 applies to banned hazardous products and products that violate a consumer product safety standard, section 12 concerns imminent product hazards, which may or may not be subject to a product safety standard. Also, the Commission does not have to obtain authorization from the Attorney General in order to bring a section 12 action, but must do so for injunctive proceedings under section 22. Finally, a proceeding under section 12(a) may be brought notwithstanding pending judicial or administrative actions. For a discussion of the differences between section 12 and section 22 proceedings, see Note, *The Consumer Product Safety Act: Bold New Approaches to Regulatory Theory*, 5 LOYOLA U. OF CHI. L.J. 447, 459 (1974).

39. Section 19(a) provides that these constitute prohibited acts.

40. In addition to prescribing various sanctions that the Commission may invoke, the

II

LEGAL PROBLEMS INVOLVING REGULATION OF THE
IMPORTER

A. RELATIONSHIP BETWEEN SECTION 15 AND SECTION 17

Several provisions of the Act contain a number of ambiguities which present significant legal problems to the importer. One of the major ambiguities concerns the context in which the Commission can make an initial decision that goods should not be admitted. This problem becomes especially apparent when the Commission bases its decision on section 17(a)(4), which states that a product shall be refused admission if it "has a product defect which constitutes a substantial product hazard (within the meaning of section 15(a)(2)). . . ." Section 15(a)(2), in turn, defines a substantial product hazard as a "product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public."⁴¹ The Act is unclear as to whether a product can be refused admission on this ground when no opportunity for a section 15 hearing has previously been provided. This issue would most likely manifest itself in the following situation: The Commission decides that certain goods distributed in commerce constitute a substantial product hazard within the meaning of section 15(a)(2).⁴² It then contacts the distributor and convinces him to take appropriate action with respect to the nonconforming products. No section 15 hearing will have occurred, since the problem is resolved by informal means. Subsequently, however, the distributor or another individual imports the identical product and the Commission directs Customs to refuse admission on the grounds that the product is a substantial product hazard.⁴³

Act provides in section 23 that a party injured by a knowing violation of a product safety rule may bring a private action for damages. This remedy is in addition to, and not in lieu of, other common law and statutory remedies. Also, section 24 authorizes a private party to bring an action to enforce a product safety rule or an administrative order concerning substantial product hazards.

41. Under section 15(a)(1) a product may also constitute a substantial product hazard if it fails to comply with an applicable product safety standard. Section 17(a)(1) provides that such a product shall be refused admission into the United States.

42. The Commission would make such a decision with respect to either products of domestic origin or imported goods admitted into the United States.

43. In the situation where a section 15 hearing with respect to a certain product *did* take place, it would appear that a subsequent importer of identical goods would nonetheless still have a right to a formal hearing under section 17(b). The only exception to this right in section 17(b) is in situations where the importer has previously had an opportunity for a hearing with regard to imminently hazardous products.

Although under section 15(f) the Commission can issue a section 15 order concerning substantial product hazards only after it has provided an opportunity for a formal hearing,⁴⁴ the language of section 17 supports the contention that products can be refused admission without a prior section 15 hearing. Section 17(a)(4) makes no reference to the procedures delineated in section 15; the only reference is to the definition of substantial product hazard in section 15(a)(2).⁴⁵ Also, section 17(a)(4) states that a product shall be refused admission if it has a product defect that "constitutes" a substantial product hazard, in contrast with analogous language in section 17(a)(3), which states that a product shall be refused admission if it "is or has been determined to be an imminently hazardous consumer product in a proceeding brought under section 12." The lack of the phrase "is or has been determined" in section 17(a)(4) indicates that under this section a prior hearing is not required. Moreover, under section 17(b) a product shall be refused admission if "it appears . . . that a product must be refused admission under the terms of subsection (a)."⁴⁶ In *Sugarman v. Forbragd*,⁴⁷ it was held that the use of "appears" in the Food, Drug, and Cosmetic Act meant that a product could be refused admission on grounds of adulteration without any formal hearing whatsoever.⁴⁸ The term "appears" in section 17(b) similarly indicates that no prior determination as to substantial product hazards is necessary, although the importer would have a right to a section 17 hearing after the Commission decides not to admit the goods.

In addition to the language of section 17, there are two major policy reasons for not requiring a prior formal hearing in this situation. First,

44. A formal hearing in this context refers to a hearing which is governed by the requirements of the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (1970) [hereinafter cited as Administrative Procedure Act].

45. Section 15 proceedings will be initiated in different situations than the section 17 remedy. See note 37 *supra*.

46. (Emphasis supplied). The question arises as to how the word "appears" in section 17(b) can be reconciled with the "is or has been determined" language of section 17(a)(3), regarding imminent product hazards. The Commission might, for example, deny admission of a product on the grounds that it is identical to an item which was previously determined to be an imminent product hazard. The fact that the product "appears" to have been covered by the prior determination would, in the Commission's view, serve as a sufficient basis for refusal of admission. This could place the importer who had previously been a party to a section 12 proceeding (concerning imminent product hazards) at a substantial disadvantage, since under section 17(b) he would not be entitled to a formal hearing with regard to the admissibility of the product.

47. 267 F. Supp. 817 (N.D. Cal. 1967), *aff'd*, 405 F.2d 1189 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969).

48. *Id.* at 824.

such a requirement would lead to a needless multiplicity of hearings, since the same issue—whether a product was a substantial product hazard—would be adjudicated in both a section 15 and a section 17 hearing.⁴⁹ Second, the Commission's powers under section 17 would be considerably weakened, since the product would first have to be admitted, if no prior hearing had occurred, before the Commission could take any action. The Act's intent to protect the public from exposure to product hazards⁵⁰ would be frustrated if the Commission was unable to take steps to halt distribution at the earliest possible point in the importation process.

B. DETENTION OF GOODS

1. *Detention Pending the Outcome of Tests and Hearings*

In situations such as that discussed above, the Commission might initially suspect that a ground for refusal of admission exists but will want to perform tests on product samples in order to make a definite decision as to admissibility.⁵¹ The Act is unclear as to whether goods can be detained pending the outcome of such tests. However, since Congress deliberately refused to include a general provision authorizing release under bond, the Commission apparently would have the authority to direct Customs to hold the goods in its custody pending the outcome of tests.⁵² The goods will thus be detained at this point unless the importer decides to re-export the products. The Commission will subsequently take one of the following steps as a result of tests performed on product samples: (1) if the goods are in compliance, request that Customs release them,⁵³ (2) if a violation is discovered, enter into negotiations with

49. The Commission could only issue an administrative order under sections 15(c)-(d) or refuse admission under section 17(a)(4) if the product was indeed determined to be a substantial product hazard. Therefore, this issue would be central to both section 15 and section 17 hearings.

50. See notes 2 & 16 *supra* and accompanying text.

51. The Commission will not restrict testing to instances where a violation is suspected; it will also make routine compliance checks. See note 21 *supra*.

52. See note 16 *supra* and accompanying text. Although the Act does not contain a general provision for release under bond, several of the "transferred acts," *supra* note 2, do provide for release under bond in such situations. Thus, it is doubtful whether the Commission can order Customs to hold the goods in Customs custody if the Commission is acting under any of these acts. Section 30(d) is pertinent in this regard; it provides that "[a] risk of injury which is associated with consumer products and which could be eliminated or reduced to a sufficient extent by action taken under the Federal Hazardous Substances Act, the Poison Prevention Packaging Act of 1970, or the Flammable Fabrics Act may be regulated by the Commission only in accordance with the provisions of those Acts."

53. Customs would not appear to have any authority to refuse to release goods if it is

the importer to allow modification of the goods, in which case the goods could be released under bond, or (3) if modification would not be feasible, decide that the goods should permanently be refused admission. If the Commission denies admission of the goods, the importer has an opportunity for a formal hearing under section 17(b). The Act does not provide for release under bond during such a hearing,⁵⁴ and in fact section 17(d) states that products released under bond for purposes of modification must be redelivered to Customs if the Commission determines that the modification is infeasible or unsatisfactory. The products will then remain in Customs custody pending the subsequent hearing. Otherwise, products could be distributed in commerce during a hearing which purportedly is determining their admissibility into the United States.

2. *Redelivery and Detention*

Although the Act is quite explicit with regard to redelivery of goods released under bond for purposes of modification, it is more ambiguous with respect to redelivery in other situations. In some instances, the Commission will not discover a violation until after the goods have been released under a bond authorized by another statute such as the Tariff Act.⁵⁵ In this situation the Act, although it does not explicitly provide a remedy, also does not ipso facto prevent the Commission from making a redelivery request to Customs. In view of the Act's purpose to establish a Commission with strong enforcement powers and its emphasis upon cooperation between the Commission and Customs,⁵⁶ the Commission may make reasonable requests to Customs for assistance in preventing violations of the Act. Since the Act does not require redelivery in instances other than modification, however, Customs would not be obliged to comply with a redelivery request in these situations and might even decide that redelivery would be unwarranted in a particular instance⁵⁷ or that it might not want to be burdened with the responsibilities associated with redelivery.⁵⁸ In these situations, as a consequence, the Com-

notified by the appropriate agencies that the goods are in compliance with applicable statutes and regulations. See 19 U.S.C. § 1499 (1970).

54. See note 16 *supra* and accompanying text.

55. 19 U.S.C. § 1499 (1970). See note 10 *supra* and accompanying text.

56. See note 62 *infra*.

57. Customs might, for example, regard redelivery as inappropriate where the importer did not violate a statute such as the Tariff Act or the Food, Drug, and Cosmetic Act, which authorizes the redelivery bond.

58. Under the holding in *230 Boxes, More or Less, of Fish v. United States*, 168 F.2d 361 (6th Cir. 1948), Customs does not have the authority to compel compliance with its redelivery requests. See notes 12-14 *supra* and accompanying text. Thus, even if Customs

mission might well decide to invoke its own enforcement powers and issue administrative orders⁵⁹ or bring judicial proceedings against the importer.⁶⁰ This would provide a more direct and reliable means of enforcing the Act than would the redelivery procedures.

3. Authority of Customs to Detain Goods Without a Prior Request from the Commission

Redelivery and detention of goods will characteristically involve joint action by the Commission and Customs; the Commission will direct Customs to take appropriate steps with respect to the nonconforming products.⁶¹ The Act does not specify, however, whether Customs may under any circumstances detain products without a prior request from the Commission. Despite the frequent provisions in section 17 for cooperation between Customs and the Commission,⁶² the Act does not appear to prevent Customs from detaining goods without prior authorization. Indeed, the Act's policy of providing adequate protection to the public⁶³ will be promoted if Customs is allowed to detain goods on its own, since Customs will at times be in a better position than the Commission to discover violations of the Act. For example, Customs can more readily ascertain whether imported goods are accompanied by the proper certification documents and labels.⁶⁴ If Customs could not detain

agrees to demand redelivery the possibility remains that the importer will ignore the request and distribute the goods, thereby forfeiting a portion of the bond. In this case the Commission would have to resort to injunctive or seizure proceedings, or administrative orders such as product recalls.

59. Section 15.

60. Sections 12 & 22.

61. Section 17(d) provides that the Commission may direct Customs to demand redelivery of the product into Customs custody.

62. This emphasis is reflected not only in the redelivery provision but also in other parts of section 17. Section 17(a)(5) states that a product shall be refused admission when it was manufactured by a person "who the Commission has informed the Secretary of the Treasury is in violation of subsection (g) of this section [involving compliance with inspection and recordkeeping requirements]." Under section 17(b) Customs shall deliver samples to the Commission upon the latter's request. Section 17(c) provides that Customs shall release the goods under bond for purposes of modification pursuant to a request by the Commission, and under section 17(d) Customs and the Commission are jointly responsible for supervision of such modification. Finally, if the importer whose products are in Customs custody does not comply with a re-exportation order by the Commission within a reasonable time, Customs is required to destroy the product under section 17(e).

63. See notes 2 & 16 *supra* and accompanying text.

64. Customs would probably have received initial instructions from the Commission with respect to certification and labeling requirements. Subsequently, however, the responsibility would fall on Customs to ascertain whether the requirements are satisfied in each instance.

goods without prior authorization where it discovers such noncompliance, then the Act would be considerably weakened.

In addition to its implicit authorization under section 17, Customs is also authorized under section 499 of the Tariff Act to detain goods without prior authorization. This section provides in pertinent part that:

Imported merchandise, required by law or regulations made in pursuance thereof to be inspected, examined, or appraised, shall not be delivered from customs custody, except under such bond or other security as may be prescribed by the Secretary of the Treasury . . . until it has been inspected, examined, or appraised and is found to comply with the requirements of the laws of the United States.⁶⁵

As this provision indicates, the only prerequisite for detention by Customs is that there be an applicable law or regulation; there is no requirement that another agency request detention. The Customs regulations further provide that an action by a Customs officer is not invalid even though a statute or regulation states that another person is responsible for taking such action.⁶⁶ Even if the Consumer Product Safety Act is construed as placing responsibility on the Commission for authorizing detentions, therefore, the Customs regulations would validate such an action by Customs.

4. *Due Process Ramifications of Detentions Under Section 17*

Since detentions will take place pursuant to an initial decision by the Commission or Customs, they will generally be *ex parte* in nature, and the importer will have an opportunity for a hearing only after the detention has begun. This raises the issue of whether the importer is denied procedural due process in such a situation.

The constitutional validity of *ex parte* detentions must be considered in light of the plenary power of Congress over foreign commerce.⁶⁷ The interest of the government in regulating foreign commerce and protecting the public has traditionally been weighed more heavily than the importer's property interest in the goods: as Justice Frankfurter stated in his concurrence in *Joint Anti-Fascist Refugee Committee v. McGrath*, "[t]he importation of goods is a privilege which, if Congress clearly so directs, may . . . be conditioned on *ex parte* findings."⁶⁸ In

65. 19 U.S.C. § 1499 (1970).

66. 19 C.F.R. § 1.1(a)-(b) (1975).

67. See *Buttfield v. Stranahan*, 192 U.S. 470 (1904); *Sugarman v. Forbragd*, 267 F. Supp. 817 (N.D. Cal. 1967), *aff'd*, 405 F.2d 1189 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969); *The James J. Hill*, 65 F. Supp. 265 (D. Md. 1946).

68. 341 U.S. 123, 167 (1951) (Frankfurter, J., concurring). See also *Cafeteria Workers, Local 473 v. McElroy*, 367 U.S. 886 (1960), in which the Supreme Court stated that

Sugarman v. Forbragd,⁶⁹ for example, a District Court upheld an ex parte detention scheme under the Food, Drug, and Cosmetic Act in which the procedural requirements were less rigorous than under the Consumer Product Safety Act.⁷⁰ Nevertheless, in recent years the Supreme Court has subjected various ex parte provisional remedies to close constitutional scrutiny and in some cases has held such remedies to be invalid on due process grounds.⁷¹ Where the Court has upheld the challenged remedy, as in *Mitchell v. W.T. Grant Co.*,⁷² the statute in question contained a number of procedural safeguards: the petitioner was required to make specific factual allegations before a judge to obtain the provisional writ, the petitioner had to post a bond, and the other party had an immediate opportunity for a hearing.⁷³ The Consumer Product Safety Act lacks these safeguards; the Commission and Customs do not have to make any preliminary factual showing in order to detain the goods, they do not have to post a bond or other indemnification, and the hearing does not have to occur immediately after detention begins. Moreover, the commercial, as opposed to consumer, status of the importer does not necessarily validate ex parte detentions. In *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,⁷⁴ the Supreme Court held that a corporation was entitled to procedural safeguards in view of the irreparable injury that it might suffer as a result of initial error.⁷⁵ This analysis would apply to the importer, who faces the possibility of irreparable injury as a result of ex parte detention since his goods could become

"[w]here it has been possible to characterize that private interest . . . as a mere privilege subject to the Executive's plenary power, it has traditionally been held that notice and hearing are not constitutionally required." *Id.* at 895.

69. 267 F. Supp. 817 (N.D. Cal. 1967), *aff'd on other grounds*, 405 F.2d 1189 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969).

70. Under the scheme considered in *Sugarman* an importer's goods could be refused admission after only an informal hearing, which would occur after initial detention of the goods. Section 17(b) of the Consumer Product Safety Act, by contrast, gives the importer an opportunity for a formal hearing under the Administrative Procedure Act, 5 U.S.C. § 554 (1970). This requires the administrative interpretation to be made on the record and permits judicial review.

71. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (statute authorizing ex parte wage garnishment held invalid on due process grounds); *Fuentes v. Shevin*, 407 U.S. 67 (1971) (statutes authorizing prejudgment replevin invalidated on due process grounds); *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1974) (statute authorizing ex parte garnishment of bank accounts held invalid on due process grounds).

72. 416 U.S. 600 (1973). This case distinguished *Fuentes* and upheld a statute authorizing prejudgment replevin.

73. *Id.* at 605-606.

74. 419 U.S. 601 (1974).

75. *Id.* at 608.

unmarketable due to such factors as adverse publicity and high storage costs.

On behalf of the Commission, it could be argued that there are several substantial distinctions between *ex parte* detentions and the provisional remedies involved in the Supreme Court cases. One major difference, noted above, is the plenary power of Congress over importation and the paramount public interest in product safety.⁷⁶ In addition, detention of goods does not involve an actual taking of property in the sense of garnishment or replevin, since theoretically the importer is still free to re-export the goods or modify the products to bring them into compliance with the Act. Nevertheless, in actual fact these alternatives may not be available. The goods may have become worthless, and the costs of modification may be prohibitive. The importer, therefore, will have suffered a very real deprivation of property. Thus, even though *ex parte* detentions do not appear invalid *per se*, due process would seem to require that the importer be provided some protections against losses resulting from an erroneous decision on the part of the Commission.

C. FORMAL AND INFORMAL HEARINGS UNDER SECTION 17

1. *The Problem of Delay in Formal Hearings*

One protection which the Act does contain is the opportunity for a full formal hearing under section 17(b). Even under this scheme, however, the importer may still undergo substantial hardships due to the length of the hearing process and the consequent extended period of detention. The Administrative Procedure Act, which prescribes the procedures for formal hearings, reflects an awareness of the problems associated with delay and provides that "[i]n fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives."⁷⁷ This does not necessarily guarantee the importer an opportunity for a prompt hearing, however, because under this provision the administrative agency may take into account its own convenience as well as that of the other parties.⁷⁸ Even if the hearing does begin promptly, it will frequently extend over a lengthy period of time since it is formal in nature and has to meet the extensive requirements of the Administrative Procedure Act concerning discovery, cross-examination, and other such matters.⁷⁹

76. See note 67 *supra* and accompanying text.

77. 5 U.S.C. § 554(b) (1970).

78. *Burnham Trucking Co. v. United States*, 216 F. Supp. 561 (D. Mass. 1963).

79. See, e.g., 5 U.S.C. § 556(c)-(d) (1970).

2. *The Informal Hearing*

The problem of delay could be minimized in many cases if the Commission offered the importer an opportunity for an informal hearing,⁸⁰ which could consist of conferences and negotiations without meeting the extensive procedural requirements of the Administrative Procedure Act. Although the Consumer Product Safety Act does not require or authorize preliminary informal hearings, it does not prohibit the Commission from instituting an informal hearing process; section 17(b) states only that the opportunity for a formal hearing be afforded, not that no other type of hearing be provided. Further, the Administrative Procedure Act itself authorizes an informal hearing.⁸¹ In addition to these statutory bases for an informal hearing, there are several policy reasons for such a procedure. An informal hearing process would save the Commission considerable time and effort, allow the Commission considerable flexibility in dealing with the importer, and increase the prospects for future cooperation between the importer and the Commission by reducing the need for formal hearings, which tend to be more adversarial in nature. For the importer, an informal hearing process would alleviate the problem of extended detention of goods as well as the substantial commitment of time and energy that a formal hearing would entail.

The importer could be afforded even greater protection against losses if the Act were amended to require a prompt preliminary hearing at which the Commission would be obligated to provide reasons for its decision to detain the goods.⁸² At present the Commission has virtually unbridled discretion over whether and when to initiate an informal hearing, which means that the importer always faces the possibility of extended detention before a hearing gets underway or before the final determination is made. Although a required preliminary hearing would not eliminate this problem, it would at least afford the importer an opportunity to present his case to the Commission, learn why the Commission acted as it did, and resolve any misunderstandings that may have arisen.

3. *Waiver of the Right to a Formal Hearing*

Situations may arise in which the informal hearing fails to produce

80. The informal hearing would, of course, be optional for the importer; he could decide that he wants a formal hearing only.

81. 5 U.S.C. § 554(c) (1970) provides in part that "[t]he agency shall give all interested parties opportunity for . . . the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit"

82. The preliminary hearing would not preclude subsequent informal hearings.

an agreement between the importer and the Commission, and in such cases the importer will face the issue of whether he has waived his rights to a formal hearing. If the attempt to reach an agreement by informal means is initially unsuccessful, the importer will doubtless be entitled to a formal hearing under the Administrative Procedure Act provision that "to the extent that the parties are unable so to determine a controversy by consent, [the parties are entitled to] hearing and decision on notice"⁸³ The problem of waiver will most likely arise, however, in situations where the importer becomes dissatisfied with an agreement or settlement reached at an informal hearing and therefore desires a formal hearing. A number of cases, most of which involve the National Labor Relations Board, have dealt with the question of whether a party can obtain a formal hearing on the basis of his objections to a settlement or consent order, and the decisions vary on this issue.⁸⁴ In any event, if the waiver resulted from any coercion on the part of the administrative agency, then the party will be entitled to a formal hearing.⁸⁵ If the

83. 5 U.S.C. § 554(c)(2) (1970).

84. In *Teamsters, Local 282 v. NLRB*, 339 F.2d 795 (2d Cir. 1964), the court held that a labor union which had filed an unfair labor practice complaint with the National Labor Relations Board did not have a right to a formal hearing on the basis of its objections to the NLRB's consent order. However, the case can be distinguished from the situation of an importer under the Consumer Product Safety Act since under the National Labor Relations Act the party filing the initial complaint is not entitled to a formal hearing in the first place. *Id.* at 800. *Contra*, *Marine Engineers Ben. Ass'n No. 13 v. NLRB*, 202 F.2d 546 (3d Cir. 1953), *cert. denied*, 346 U.S. 819 (1953); *Leeds & Northrop Co. v. NLRB*, 357 F.2d 527 (3d Cir. 1966). See also *NLRB v. Oil Workers Int'l Union*, 476 F.2d 1031 (1st Cir. 1973); *Textile Workers Union of America v. NLRB*, 294 F.2d 738 (D.C. Cir. 1961); *Concrete Materials of Georgia, Inc. v. NLRB*, 440 F.2d 61 (5th Cir. 1971).

In a non-NLRB case, *United States Bio-Genics Corp. v. Christenberry*, 173 F. Supp. 645 (S.D.N.Y. 1959), *aff'd*, 278 F.2d 561 (2d Cir. 1960), it was held that a party who had made an agreement with the Post Office to discontinue certain activities had waived its right to a formal hearing. The judge remarked: "I know of no doctrine which prevents such an agreement Having made such an agreement, having reaped the benefits thereof, and absent any claim of involuntariness or coercion, may the person then insist that the waiver be disregarded? I think not. To permit such a *volte face* would be to destroy the efficacy of informal hearings with administrative agencies." *Id.* at 649. In that case the benefits which plaintiff obtained consisted of the saving of time and expense and avoidance of a finding of fraud by the Post Office which might have an adverse effect on plaintiff's business. *Id.* at 649. An importer might be able to distinguish his own situation by arguing that he has not derived similar benefits from his agreement. Also, the plaintiff in *Bio-Genics* urged that the agreement be followed when the Post Office was considering filing a new complaint, and this might afford another basis for distinguishing the importer's situation.

85. See *United States Bio-Genics Corp. v. Christenberry*, 173 F. Supp. 645 (S.D.N.Y. 1959), *aff'd*, 278 F.2d 561 (2d Cir. 1960). For a reference in the legislative history of the Administrative Procedure Act to the issue of coercion, see H.R. REP. NO. 1980, 79th Cong., 2d Sess. (1946), *reprinted in* SEN. DOC. NO. 248, 79th Cong., 2d Sess. 233, 281 (1946).

informal hearing involves different issues and purposes than the formal hearing, moreover, then the importer apparently will not have waived his right to the latter. For example, where the importer agrees to modify the nonconforming products and the Commission subsequently decides that the modification is infeasible or unsatisfactory, the importer will undoubtedly have a right to a formal hearing concerning the admissibility of the goods.⁸⁶

D. RE-EXPORTATION OF IMPORTED PRODUCTS

1. *Seizure and Re-exportation*

Rather than submit to the above process of detention and hearings, an importer might decide that re-exportation of the products would be a more viable alternative. Where the goods are in Customs custody, there is no statutory barrier to voluntary re-exportation,⁸⁷ but situations could arise in which the importer will want to re-export goods which have been admitted into the United States and subsequently seized.⁸⁸

86. Under section 17(c) by permitting modification the Commission defers final determination as to admissibility. If the Commission subsequently decides that the product is inadmissible, the importer will have an opportunity for a formal hearing under section 17(b).

87. Since goods in Customs custody which have been refused admission are subject to compulsory re-exportation under section 17(e), then an importer whose products are detained by Customs pending a determination of admissibility can decide to voluntarily re-export the goods.

88. Richard O. Simpson, Chairman of the Commission, has indicated that under the Flammable Fabrics Act the Commission will not allow re-exportation of imported goods that have been admitted to the United States and subsequently seized; the goods will either be modified or destroyed. However, unlike the Consumer Product Safety Act, the Flammable Fabrics Act makes no mention of the disposition of nonconforming imported products, even where the products have been refused admission. The above policy represents a departure from the practice of the Federal Trade Commission, which formerly administered the Flammable Fabrics Act, of allowing seized imported goods to be re-exported. 3 BNA PROD. SAFETY & LIAB. REP. 143 (1975). Simpson also remarked that the Commission is considering applying this policy to products subject to the Consumer Product Safety Act. *Id.* at 103. The reason for the Commission's opposition to re-exportation of seized imported goods, according to Simpson, is that the Commission wants to motivate importers "to keep non-complying products from entering the marketplace to begin with." *Id.*

The question arises of whether nonconforming items imported for processing into finished products that will be exported are also subject to seizure. This would depend on whether the goods satisfy the criteria of section 18, which provides in part that the Act shall not apply to exports "only if . . . it can be shown that such product is manufactured, sold, or held for sale for export from the United States (or that such product was imported for export), unless such consumer product is in fact distributed in commerce for use in the United States. . . ."

The Act, unlike the Food, Drug, and Cosmetic Act,⁸⁹ does not contain any provision which expressly authorizes re-exportation of seized goods under certain circumstances. It does, however, give the Commission considerable leeway and flexibility in its enforcement powers,⁹⁰ so that the Commission would appear to have discretion over whether to allow re-exportation. In some situations the importer could make a good case for re-exportation. For example, if the importer had no knowledge of the violation when he imported and distributed the product and the Commission subsequently brought a seizure action, a refusal to allow re-exportation would constitute rather harsh treatment of the importer. The importer would be placed at a disadvantage simply because the Commission discovered the violation at a point where the seizure remedy rather than refusal of admission, in which re-exportation would be permitted, was applicable. On the other hand, if the importer knew of the noncompliance and nonetheless distributed the product or if he distributed the product in disregard of a redelivery order, then he would not have a very convincing case for re-exportation.

2. *Re-exportation and Civil Penalties*

Not only may re-exportation be impermissible in some instances, but it also fails to prevent the imposition of civil penalties against the importer when the importer has already committed a prohibited act. For example, the importer might have knowingly issued a false certificate⁹¹ or refused to permit access to records⁹² and subsequently re-exported the products. The Act does not give a party the right to undo or erase violations by subsequent re-exportation⁹³ since such an avoidance would

89. 21 U.S.C. § 334(d)(1) (1970). Under this provision the importer would have to establish that the violation did not occur after the article was imported and that he had no cause for believing that there was a violation before the goods were released from Customs custody. He would also have to show that various conditions under 21 U.S.C. § 381(d) (1970), which concerns exports, will be met.

For arguments that were made by various importers' associations on behalf of this provision, see *Hearings on H.R. 10519 Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 84th Cong., 2d Sess. (1956).

90. See, e.g., sections 15 and 22, which authorize the Commission to impose a number of sanctions.

91. Section 19(a)(6) makes it unlawful for "any person" to "issue a false certificate if such person in the exercise of due care has reason to know that such certificate is false or misleading in any material respect. . . ."

92. Section 19(a)(3) makes it unlawful for "any person" to "fail or refuse to permit access to or copying of records . . . as required under this Act. . . ."

93. However, in some situations re-exportation will preclude the possibility of civil liability arising in the first place. For example, one of the acts prohibited by section 19 is importation of a product which is not in conformity with an applicable consumer product

derogate from the Act's purpose of providing strong means of enforcement.⁹⁴

III

PLANNING BY THE IMPORTER

The legal problems discussed above underscore the need for the importer to plan in advance to avoid, or at least minimize, losses incurred as a result of sanctions imposed under the Act. To the extent that the importer is familiar with the ways in which the Act regulates his activities, his ability to plan effectively will be enhanced.

Planning cannot be undertaken by the importer alone, but instead must reflect a joint effort by the importer and parties with whom he transacts business, such as the foreign manufacturer. Thus, before entering into a contract with the foreign manufacturer, the importer should discuss the applicable provisions of the Act with the foreign manufacturer and make sure that the latter is willing to comply. The Chairman of the Commission has remarked that importers can minimize potential problems by seeking certification from foreign manufacturers that the products have been properly tested, or by testing the products themselves.⁹⁵ Since sanctions such as refusal of admission can be imposed against the importer as a result of the foreign manufacturer's noncompliance, these initial steps are crucial.

Another basic thrust of planning involves making an advance decision as to how losses will be apportioned if and when sanctions are imposed.

safety standard. Section 19(a)(1). If a person imports a product without knowledge of the noncompliance and immediately re-exports the goods upon discovering it, he will not have knowingly violated section 19 and will therefore avoid civil penalties.

The importer would rarely be criminally liable under section 21 after re-exportation of the goods. Under that section those who "knowingly and wilfully" violate section 19 after having received notice of noncompliance are subject to criminal penalties. The importer who re-exports the goods after receiving such notice would not be criminally liable since he would be complying with a re-exportation order under section 17(e). However, if the importer disobeys a redelivery or re-exportation order by offering the goods for sale and then re-exports the goods (assuming they have not been seized) after he is unable to find any purchasers, then he would probably be held criminally liable since he would have already committed the criminal act.

94. See notes 2 & 16 *supra*. See also *W.M.R. Watch Case Corp. v. FTC*, 343 F.2d 302 (D.C. Cir. 1965), *cert. denied*, 381 U.S. 936 (1965). In that case the petitioners contended that the conduct in question was voluntarily abandoned before the filing of a complaint by the Federal Trade Commission. The court replied that "appraisal of the danger that deception may recur if not forbidden is initially for the Commission. If that danger is sufficient there is no bar to enforcement merely because the conduct has ceased at least temporarily under the weight of the Commission's hand." *Id.* at 304.

95. 3 BNA PROD. SAFETY & LIAB. REP. 85 (1975).

In making contractual arrangements, the importer and foreign manufacturer should address themselves to the contingencies in which the apportionment issue would arise, such as product modification and re-exportation. For example, the parties might provide that the manufacturer should bear at least some of the costs of modification if the products were nonconforming before importation⁹⁶ but not if the violation occurred after importation, *e.g.*, in the processing of the goods. With respect to re-exportation, the contract might provide that the manufacturer must refund the purchase price of goods re-exported to him if he is primarily responsible for the violation of the Act but that the manufacturer is under no such obligation if the violation was due to the importer's conduct, *e.g.*, if the importer refused to permit access to records. In order to secure such a provision the contract might also require the manufacturer to post a bond covering at least a portion of the purchase price. By providing for these contingencies, the importer can avoid becoming enmeshed in legal problems such as those described above.

CONCLUSION

In view of the possibility that he may suffer substantial business losses under the Consumer Product Safety Act, the importer will have to rely on various means of avoiding or minimizing possible legal problems under the Act. He will have to familiarize himself with the ways in which the Act regulates his conduct and take whatever steps are necessary to comply with its provisions. This in itself, however, is insufficient for two major reasons. First, there is the possibility of error on the Commission's part, leading to detention of the importer's goods during tests or hearings which subsequently reveal the importer to be in compliance with the Act. To avoid consequent business losses, the importer should be provided some protection against such contingencies; in particular, an informal hearing process at the initial stages would help alleviate this problem. Second, the importer is subject to, or affected by, sanctions imposed as a result of noncompliance by other parties such as the foreign manufacturer. The Commission does not, for example, have to allow re-exportation of seized imported goods, even where the importer acted in good faith and was not aware of the other party's noncompliance. To minimize these problems, the importer should plan in advance with the other parties to avoid noncompliance

96. The foreign manufacturer could, of course, insist that once the goods are shipped to the United States he should no longer be liable for modification costs, but importers might be reluctant to accept such a stipulation.

and to apportion losses in case sanctions are imposed. By taking these steps, the importer can both protect himself against business losses and protect the public against exposure to hazardous products.

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