CONSUMER PROTECTION: A SURVEY AS OF MID 1971

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CONSUMER PROTECTION: A SURVEY AS OF MID 1971

I. Introduction

Consumerism is not new. As President Kennedy said in his consumer message to the Congress of March 15, 1962:

"Ever since legislation was enacted in 1872 to protect the consumer from frauds involving use of the U.S. mail, the Congress and executive branch have been increasingly aware of their responsibility to make certain that our Nation's economy fairly and adequately serves consumers' interests."

In this report on consumer protection, the emphasis is on current developments, with specific reference to the following areas: (1) pending consumer protection legislation; (2) the President's consumer protection program; (3) views of non-government organizations on consumer protection; and (4) effectiveness of the Federal Trade Commission and the Food and Drug Administration.

II. Major Consumer Legislation Pending in the 92d Congress, 1st Session

A. Labeling

1. Foods

a. Grade labeling

H.R. 1361, the Consumer Food Grading Act; introduced on January 22, 1971; referred to the House Committee on Agriculture.

This bill would direct the Secretary of Agriculture, after consultation with representatives of consumers, producers, and processors to promulgate a system of retail quality grades for consumer food products.

i. Arguments for:

(a). The consumer cannot buy foods wisely unless she knows, in addition to prices, the quality and grades of foods.

(b). In refutation of argument No. 2 below, it should be noted that in Canada grade-labelling for certain goods has existed for many years, and brand names flourish.

ii. Arguments against:

(a). When grades such as A, B, and C are established, the minimum standard for the product will become the maximum standard, since a consumer will tend to buy the lowest priced grade A, for instance, even though a higher priced item in the same grade will offer more quality.

2. Grade labeling will cause brands to disappear. As a result, firms will lose the "good will" built up over the years, and the accompanying monetary return embodied in the brand name.

b. Ingredient labeling

S. 1985, the Truth-in-Food Labeling Act. Introduced on June 2, 1971. Referred to the Senate Commerce Committee. (Comparable bill, H.R. 9142)

This bill would amend the Fair Packaging and Labeling Act by requiring all manufacturers and distributors of foods to include on the label all ingredients contained in packaged foods in the order of their

predominance in the food package and by their common or usual name.

i. Arguments for:

(a). Consumers need to know the ingredients in packaged foods because of health, religious, and general dietary needs.

Dieticians in hospitals complain of their difficulty in planning menus for patients with special needs, for example, special salt-free or sugar-free diets, because present regulations do not require a full listing of ingredients.

Also, many persons are allergic to certain foods, but under present regulations cannot determine whether or not packaged foods contain the troublesome items.

ii. Arguments against:

(a). Such labeling would add to the cost of foods.

(b). A Federal law is unnecessary since the Food and Drug Administration has the power to issue rules to this effect.

(c). Consumers do not generally pay attention to such labeling, anyway.

iii. Action by the Food and Drug Administration

The Food and Drug Administration published a proposal in the Federal Register on June 15, 1971 to require food manufacturers to disclose on product labels the name and source of all fat ingredients. The proposal

would also require foods offered for special dietary use to show on the label information concerning fat content and quality. The deadline for comments on this proposal was November 15, 1971.

c. Nutritional labeling

S. 2734, the Nutritional Labeling Act of 1971; introduced on October 21, 1971; referred to the Senate Commerce Committee.

This bill would amend the Fair Packaging and Labeling Act by requiring the nutritional content of foods to appear on their labels. (Comparable bill, H.R. 1017, etc.)

i. Arguments for:

(a) In order to plan the most nutritious diet for her family, the housewife needs to know nutritional values of the foods she buys.

ii. Arguments against:

(a) Such labeling would only add to food costs.

(b) Furthermore, nutritional values of foods are available from various other sources, including the U.S. Department of Agriculture.

iii. Action of the Food and Drug Administration

On January 12, 1971, the Food and Drug Administration announced plans to develop nutrition labels for packaged foods. FDA officials state that the labels probably will be on some packages by the end of the year and that the labeling may be made mandatory. Consumer Research Institute, Inc. (CRI), an industry group which receives most of its support from

grocery manufacturers and food-related businesses, has agreed to donate the research to help shape the new labeling requirements.

In cooperation with the Food and Drug Administration, Giant Food Stores with headquarters in Baltimore, Jewel Company of Chicago, and other food companies are carrying on experiments in nutritional labeling, to determine which method of labeling is most feasible. The results of these tests should be completed by January 1972.

In the Washington, D.C. area, Giant Food Stores are carrying on a special nutritional labeling project, under the supervision of Mrs. Esther Peterson, formerly Special Assistant to President Johnson for Consumer Affairs, and now consultant to the Giant Food Stores.

d. Open dating

S. 2079, a bill to amend the Fair Packaging and Labeling Act of 1966. Introduced on June 16, 1971; referred to the Senate Labor and Public Welfare Committee. (Comparable bills H.R. 98 and H.R. 8417.)

S. 2079 would amend the Fair Packaging and Labeling Act of require a packaged perishable or semiperishable food to bear a label specifying the date after which it is not to be sold for consumption. This amendment would not apply to fresh fruits or vegetables.

The term "perishable or semiperishable" food means any food which the Secretary of Health, Education, and Welfare determines has a high risk

of spoilage, significant loss of nutritional value, or significant loss of palatability as it ages.

Regulations covering open-dating would be drawn up by the Department of Health, Education, and Welfare.

Jurisdiction over imports of foods would be given to the Treasury Department in accordance with the Federal Food, Drug and Cosmetic Act of 1938.

A violation of this law may result in one year imprisonment or a fine of not more than $5,000 or both. These are severe penalties.

Jurisdiction over violations is vested in United States District courts.

It is a common practice for perishable and semiperishable food packages sold in supermarkets and other stores to use a coded dating system. These codes are varied and complex and therefore are generally intelligible only to store personnel.

i. Arguments for:

(a) The use of coded dating systems, rather than a uniform intelligible system of product dating is a deceptive practice, by which necessary information as to the freshness of commodities is concealed from customers.

(b) Surveys have shown that perishable and semiperishable items are left on shelves long after they should have been removed. For example, markets sometimes sell meats and fowl which are no longer fresh.

(c) Another practice revealed by surveys is the repacking, recoding, and replacing of perishable items of shelves.

(d) Concern over the sale of stale foods is well called for, since consumption of such foods may cause food poisoning.

ii. Arguments against:

(a) It is claimed that prices will rise if open dating is used, since customers will buy only the most recent items and leave the others to spoil. Such wastage of food will add to costs, thus causing price increases.

(b) It is also said that the changeover to open-dating will be costly and therefore result in increased prices.

(c) A third argument against the bill is expressed by those who say that legislation is unnecessary since open-dating is being adopted by manufacturers, distributors, and retailers. To meet the competition, all stores must eventually institute such a dating system.

iii. Current developments in open-dating

In connection with open-dating, we call attention to the fact that several large regional supermarkets have already instituted open-dating of packaged foods. (See preceding page.)

Additionally, we suggest reference to a study called, "Food Stability Survey," Volume I, by the Department of Food Science of Rutgers University, in cooperation with the Economic Research Service of the U.S. Department of Agriculture, February 1971.

Furthermore, a conference on "Food Stability and Open Dating" met on October 21-22, 1971 in Brunswick, New Jersey, sponsored by Rutgers University's Food Science Department, with the assistance of the Economic Research Service of the U.S. Department of Agriculture and Office of Consumer Affairs. For further information, the latter two agencies can be contacted.

e. Unit-pricing

S. 868, to amend the Fair Packaging and Labeling Act. Introduced on February 2, 1971. Referred to the Senate Commerce Committee. (Comparable bills, H.R. 990 and other bills).

This bill would require the disclosure by retail distributors of unit retail prices of packaged consumer commodities.

i. Arguments for:

This bill is designed to facilitate easier price comparisons among products by requiring grocers to list the price of food items by pound, quart, or standard numerical count in addition to the total price.

ii. Arguments against:

(a) Additional cost of the labeling would increase prices of items;

(b) In any case, many customers do not pay attention to these labels.

iii. Current developments in unit-pricing

Several supermarkets across the Nation have recently introduced unit-pricing. These include Giant and Safeway here in the District of Columbia

area. The results of these labeling operations are considered generally successful.

2. Durable products

a. H.R. 1374, the Appliance Dating Act. Introduced on January 25, 1971. Referred to House Interstate and Foreign Commerce Committee.

This bill would require that all appliances and consumer electric products be dated with the month and year of manufacture and would authorize the Federal Trade Commission to regulate the use of "model year" designations.

This bill is based on the findings that a significant number of appliances on the market today were manufactured two, three or more years ago and frequently represent an outdated technology.

b. H.R. 1019, the Performance Life Disclosure Act. Introduced on January 25, 1971, referred to the House Interstate and Foreign Commerce Committee.

This bill would require that durable consumer products be labeled as to durability and performance-life.

Since it is well established that manufacturers of consumer durables carry out extensive performance testing of their own products, including performance life, this information should be passed on to consumers, according to the proponents of this bill. Certainly customers should know whether under normal operating conditions light bulb "A" will outlast "B", or which TV picture tube can be expected to last longest.

c. H.R. 1375, the Durable Products Dating Act. Introduced on January 25, 1971. Referred to House Interstate and Foreign Commerce Committee.

This bill would require expiration dating of those "durable" consumer products determined by the Bureau of National Standards to be of a type whose performance life is diminished by long storage.

Batteries and film are examples of such products. An expiration date would reduce the likelihood that such products would be purchased after substantial performance life has been lost.

d. Implicit arguments in favor of these bills appear above in the discussion of the bills themselves.

e. Arguments against these bills:

(1) The cost of adding such information to the labels would raise up the price of the items.

(2) Furthermore, dissemination of the above information would interfere with "free competitive enterprise," i.e. the manufacturer would be revealing "trade data" to the public.

B. Consumer Protection Agency.

H.R. 10835

1. Legislative background

a) Action in the 91st Congress

During the 91st Congress,nearly a decade after the first House hearings were held on consumer problems, the House Government Operations Committee reported out H.R. 18214, the Consumer Protection Act of 1970. The Committee measure combined Congressman Rosenthal's proposal to create an independent consumer protection agency and Congresswoman Dwyer's proposal to establish a permanent Office of Consumer Affairs in the Office of the President. The Nixon Administration opposed both both concepts and had submitted its own alternative calling for a White House Office of Consumer Affairs, and a consumer protection division within the Department of Justice.

During the closing days of the session, the House Rules Committee killed the committee bill on a tie vote of 7 to 7 with one member absent

b) Action in the 92nd Congress

During the opening days of the 92nd Congress, first session, several consumer protection agency bills were introduced. On January 22, 1971, H.R. 14 (and identical bills) were introduced into the House of Representatives. This proposed measure would establish an Office of Consumer Affairs in the Office of the President to coordinate Federal consumer programs and activities. It would also establish an independent Consumer Protection Agency to represent the consumer interest in proceedings before other Federal agencies and courts. Additionally, authority would be given to the Agency to assume the functions of the National Safety Commission.

Both the Office and the Agency would receive consumer complaints. Finally, a Consumer Advisory Council of 15 members would be established to advise the heads of the Office of Consumer Affairs and the Consumer Protection Agency.

On the same date, H.R. 254 was introduced. This bill would establish a Department of Consumer Affairs in order to secure within the Federal Government effective representation of consumer interests. In order to coordinate the administration of consumer services within the Federal Government, consumer functions of the Departments of Commerce; Labor; and Health, Education and Welfare, and other agencies would be transferred to the new agency.

Later, on February 18, 1971, H.R. 4541 was introduced into Congress. This bill would establish an Office of Consumer Affairs within the Office of the President, chiefly to coordinate Federal consumer protection activities. In addition, a Bureau of Consumer Protection would be set up within the Federal Trade Commission to represent the consumer interest in proceedings before other Federal agencies and courts.

Hearings were held by a subcommittee of the House Committee on Government Operations on all these bills on April 27, 28; May 6 and 24; and July 12, 1971.

During Committee discussions and argumentation, a "clean" bill was drawn up -- H.R. 10835.

On November 4 and 5, hearings were held on H.R. 10835 and a similar Senate bill, S. 1177, by the Subcommittee on Executive Reorganization of the Senate Government Operations Committee. As of mid-November the staff of the Subcommittee was drawing up another "clean" bill.

H.R. 10835 - the Consumer Protection Act of 1971

This bill would create an independent Consumer Protection Agency, provide statutory authorization for the Office of Consumer Affairs in the White House, and set up a Consumer Advisory Council.

The Office of Consumer Affairs would continue the present Office under the authority of Congressional statute. This Office would be responsible for coordinating the various consumer programs throughout the Federal government; disseminate information of interest to consumers; and receive consumer complaints.

A Consumer Advisory Council of 15 members would be established to advise the Administrator of the Consumer Protection Agency and the Director of the Office of Consumer Affairs.

The Consumer Protection Agency would be authorized to represent the interest of consumers before Federal agencies and the courts.

However, according to the Fuqua amendment,passed during debate on the House floor, CPA intervention in both agency and court proceedings would be limited to an advisory status, rather than that of a "party" to the proceedings.

Those who oppose this amendment claim that it would "gut" the bill.

Arguments for:

1. The need for further Federal consumer protection has been amply demonstrated. For example, recently poisoned foods have sickened or even killed several persons. Defective automobiles and buses are still being recalled by manufacturers. And many complaints pour into Federal offices and private agencies concerning shoddy and faulty consumer products.

2. Abundant evidence points up the fact that the present organization of consumer activities within the Federal Government is inadequate. Ten years ago, there were more than 100 activities carried out by 33 Federal departments and agencies which affected consumer interests. Since then, these activities have increased. The constantly increasing number of consumer complaints indicates that this Federal activity is not sufficiently effective. Therefore, a new force within the government should be generated to provide coordination and representation and to make certain that the interests and needs of consumers are fully met.

3. The form of consumer agency as embodied in H.R. 10835 is preferable to the establishment of a new department of consumer affairs as set forth in H.R. 254, and identical bills. Such an approach as contained in H.R. 254 would disrupt present operations of Federal consumer functions, present interagency conflicts; and would cause overlapping of operations. On the other hand, a new agency, vested chiefly with the function of consumer advocacy could operate independently and free from entanglements with the administration of programs that could conflict with the interests of consumers.

Arguments against:

1. Federal machinery for consumer protection exists, i.e. in such agencies as the Federal Trade Commission and the Food and Drug Administration and other agencies. We therefore do not need an addition to an already sprawling bureaucracy, but proper administration and enforcement of consumer protection laws.

2. If a concensus of Congressional and other opinion determines that a consumer-advocate function is necessary, then such an office should be placed in the Federal Trade Commission. As President Nixon stated in his consumer message of February 24, 1971, "I believe that this is a better approach than the creation of still another independent agency which would only add to the proliferation of agencies..."

It should be noted that the Ash Council recommended that the consumer protection responsibilities of the Federal Trade Commission is vested in a new Federal Trade Practices Agency. As yet, the President's recommendations on this aspect of the Ash Council report have not been made public. Therefore, pending word from the President, Mrs. Virginia Knauer, speaking for the Administration, stated in hearings on April 27, 1971 before a Subcommittee of the House Committee on Government Operations, that she would favor as an interim measure the placement of the consumer advocacy function within the Federal Trade Commission.

Many critics of the President's consumer protection policy cite his delay in making recommendations following his receipt and study of the Ash Council Report as an example of his lack of true commitment to the cause of the consumer.

C. Warranties and FTC Improvements

S. 986, the Consumer Product Warranties and Federal Trade Commission Improvements Act of 1971. Introduced on February 25, 1971, referred to the Senate Commerce Committee. Hearings were held on March 9, 15, 16, and 22, 1971. Passed the Senate on November 8, 1971. Referred to the House Committee on Interstate and Foreign Commerce.

Title I - Product Warranties

For written warranties covering consumer products that actually cost the purchaser more than $5, this bill would authorize the FTC to issue rules requiring full and conspicuous disclosure in simple and readily understood language of the terms and conditions of such warranties. This bill would also create Federal standards for a new category of warranty to be called "full warranty." If a written warranty covering a consumer product costing more than $5 did not meet the Federal standards for a full warranty, it would have to be clearly labeled in such a manner as to indicate its limited scope.

Sellers would also be forbidden to use a narrowly worded warranty as a device to disclaim responsibility for fixing a product that does not work in normal use.

The bill also provides that buyers may sue warranty violators and collect lawyers' fees and court costs if they win.

1. Title I

a. Arguments for:

i. Consumers have expressed many complaints concerning warranties. As Mrs. Virginia Knauer, the President's Assistant for Consumer Affairs, stated, "All too frequently, the bold print giveth and the fine print taketh away."

ii. Federal regulations are needed since State laws are inadequate to deal with frauds involving warranties.

b. Arguments against:

i. The Administration believes that it would be preferable not to set standards for warranties, but that the content of warranties should be subject to competition in the marketplace.

ii. The distinction between full and partial warranties might not be useful, but might only confuse matters.

iii. The requirements for the full warranty could be met by large corporations, but would be injurious to small firms, which all too often might not have the means to meet such stringent standards as are contained in the bill.

Title II. Federal Trade Commission Improvements.

Title II would authorize the Federal Trade Commission to:

(1) seek preliminary injunctive relief against deceptive consumer practices;

(2) increase the maximum penalty from $5,000 to $10,000 for violation of an FTC cease-and-desist order;

(3) expand the FTC's jurisdiction over deceptive practices to those "affecting" interstate commerce; (the present language of the law reads "in interstate commerce.") and

(4) would authorize the FTC to issue rules "defining with specificity acts or practices which are unfair or deceptive to consumers." Unlike current rules which interpret existing statutes, the new rules themselves would have the force of law unless either house of Congress vetoes them within 60 days. The rules could be challenged in the courts.

2. Title II.

a. Arguments for:

i. Consumer advocates contend that the FTC has no power to stop an unfair consumer practice quickly no matter how much damage is done to the consuming public. That is, if a supplier does not agree to stop his practice he may be able to contest an FTC order for years and continue his marketing methods even though they may be clearly unlawful.

ii. Even though the FTC may obtain a cease and desist order, the penalty for violation is relatively small, and may prove to be no deterent.

iii. FTC authority should be expanded to jurisdiction over deceptive practices "affecting" interstate commerce, as well as "in commerce." This phraseology has been narrowly interpreted by the courts, and therefore has limited the jurisdiction of the FTC. The wise course, say the friends of the FTC, is to amend the FTC Act to make explicit that the FTC's authority includes deceptive acts "affecting" commerce.

3. Title II.

a. Arguments against:

i. "A preliminary injunction in consumer fraud cases is inappropriate. Such action would generally mean the end of the case, because once the promotional practice is discontinued, especially under "an aura" of court condemnation the passage of a year or two or even more until there is final determination of the matter would mean that the case is not worth fighting for the advertiser or for the business any longer, because even if he should win after considerable expense to vindicate himself, it would no longer be commercially worthwhile to resume the practice," according to testimony during hearings on S. 986 before the Consumer Subcommittee of the Senate Committee on Commerce.

ii. If the FTC were given jurisdiction over actions affecting interstate commerce, the development of State and local consumer protection programs which frequently can protect the consumer more effectively than Federal activity might be slowed.

iii. Granting of the proposed rule-making power to the FTC raises serious doubts as to the constitutionality of such an action. "It is questionable as to whether the Commission possesses the competence and resources necessary to make rational and equitable judgments in this area," according to the American Enterprise Institute.

D. Consumer Class Actions

1. Legislative Background--92nd Congress

Several class action bills were introduced into the 92nd Congress. Among the most important of these are S. 1222, the Administration bill, introduced on March 12, 1971; S. 984, introduced on February 25, 1971; and S. 1378, introduced on March 24, 1971. Hearings were held by the Senate Commerce Committee on April 27, and 29, 1971, and additional hearings are expected to be held in the future.

2. Summaries of bills

S. 1222, the Consumer Fraud Prevention Act provides that the commission of any practice outlawed by this Act would subject the supplier to suits by the Attorney General for injunctive relief and to civil penalties and suits by defrauded consumers for damages.

The Act defines 14 practices as unfair consumer practices.

The Act provides that consumers may bring suit for private recovery of damages following successful termination of litigation instituted by the Attorney General or proceedings before the Federal Trade Commission. The Act would also allow consumers to sue as a class when a group of consumers has been damaged by the same act or practice.

The bill would grant jurisdiction to the Federal courts.

S. 984, the Consumer Class Action Act of 1971 would authorize consumers who have been damaged by unfair or deceptive practices to bring class actions for redress of such damages.

This bill would permit class actions for sixteen practices defined by the bill as "unfair or deceptive."

The bill would allow individual consumers adversely affected by a fraudulent act of a supplier, as defined in this bill, to institute a civil action if the Federal Trade Commission had issued an order to such a supplier to cease and desist from such a practice, and if the FTC's order had become final.

Furthermore, a consumer may sue as the representative of a class on the basis of a practice allegedly unlawful under this bill provided that he gives the FTC notice of his claim more than 90 days prior to filing suit and provided his claim is greater than $10.

The bill would give jurisdiction to Federal district courts.

S. 1378, the Consumer Class Action Act of 1971, provides that consumers who have been damaged by unfair or deceptive practices may bring class actions for redress of such damages.

This bill would permit class actions for 16 defined deceptive or fraudulent practices and "violation of any action prohibited by rule of the Federal Trade Commission."

The bill would grant to United States District courts original jurisdiction of class action suits over $25,000 brought by a consumer or group of consumers under this Act.

However, the Federal court could order the case refiled in a State court after consideration of the nature and importance of the case, the number of other cases on the docket, and other factors.

The bill also provides that all individual claims in the class action must exceed $10.

Furthermore, the bill provides that voluntary settlements out of court must be facilitated.

3. Discusiion of points of difference among the bills

a. Initiation of class action suits.

S. 1222, the Administration bill, would enable consumers to bring class action suits following successful termination of litigation started by the Attorney General or proceedings before the Federal Trade Commission.

S. 984 sould allow consumers adversely affected by a fraudulent act of a supplier, to institute a class action suit if the Federal Trade Commission had issued an order to such a supplier to cease and desist from the deceptive practice, and if the FTC's order had become final.

Both of these bills would require prior successful Federal action before initiation of a class action suit, in order to prevent suits which would harass business, and also to prevent "frivolous" suits, encouraged by unscrupulous lawyers in search of "fat" fees. However, opponents state that whether or not consumers may sue for damages would depend upon the "whim" of Federal agencies. Furthermore, such a prerequisite would mean interminable delay for those consumers injured by fraudulent practice.

The proponents of this bill believe that this approach would provide for swifter recovery of damages by defrauded consumers.

S. 1378 would not require prior successful Federal action. However, "in order for an action to be entertained under this act in a district court of the United States" the court must determine that the aggregate amount in controversey must be at least $25,000." Thus, this provision would tend to insure that the case warrants legal action.

b. Jurisdiction

All three bills would grant jurisdiction to the District courts of the United States.

However, S. 1378 would also provide that a District court could refile a consumer class action in a State court, if feasible, in order to reduce the number of cases on the court's docket. Issue has been taken with this provision on the ground that widely differing State laws (some States have no consumer class action laws) could cause confusion.

c. Definnition of illegal consumer frauds.

Each bill contains a list of definitions of what frauds constitute consumer deceptive practices which would be illegal under these proposed laws.

In addition, S. 984 would give consumers the right to bring action in the Federal courts for any violation of section 5(a) of the Federal Trade Commission Act which outlaws unfair methods of competition and unfair or deceptive acts or practices in commerce.

Furthermore, S. 1378 would add violations of an FTC trade rule to those of section 5(a) of the Federal Trade Commission Act as cause for consumer class action suits.

In her testimony on these bills, Mrs. Virginia Knauer, the President's Special Assistant for Consumer Affairs, stated that she believed that the list of offenses in the Administration bill (and in S. 984) "gives both consumers and businessmen a reasonably clear guide as to what their respective rights and obligations are." She would favor Congressional action for any future additions to the list of fraudulent practices.

On the other hand, many "consumer advocates" favor the "open-end" approach of both S. 984 and S. 1378, which would make provision for future deceptive practices to come under the purview of the law.

4. Arguments for:

a. Federal action is needed. Under present Federal law, consumers as individuals are given no legal basis upon which to bring a suit for fraudulent or deceptive practices on the part of sellers. Furthermore, State laws are inadequate to deal with consumer frauds. The law in many States is so highly restrictive that class actions for the benefit of consumers cannot be maintained at all.

b. The availability and threat of class action will serve as a deterrent to unethical business behavior;

c. Class actions will provide speedy relief for consumers;

d. Lawyers will be induced to represent a broad group of consumers whereas they would not be motivated to represent a single consumer having a small claim;

e. Consumer claims would be simplified since many small suits would be combined into one class action;

f. When wrongs have been committed against a substantial number of consumers, substantial damage should be awarded and this can be done best through class action suits.

5. Arguments against:

a. The threat of class actions is having a frustrating effect on the ethical businessman because of the threat of severe penalties for unwillful errors, for example, an error in a business form which is used. However, it is unlikely that such a threat would deter the fringe operator.

b. The possibility of obtaining speedy relief by the class action route is questionable. Court calendars are so crowded that a speedy trial is frequently impossible to attain. Moreover, there must be a determination by a court as to whether a class action exists. This determination may take as much as three years, and the final settlement several more years.

c. Some unethical lawyers will be attracted to the potentially large fees from class actions which are possible because companies tend to capitulate rather than suffer the harrassment of long drawn out suits which may adversely affect their normal business operations and even the price of their stocks. As stated by the New York Court of Appeals in the Hall vs. Coburn case, consumer class action suits, without adequate public control, may become "instruments of harrassment benefitting largely persons who activate the litigation."

E. Product Safety

S. 983, the Consumer Product Safety Act of 1971, introduced into the House on February 25, 1971; referred to Senate Commerce Committee. Hearings were held by the Senate Commerce Committee on July 19, 1971. The bill is pending before the Senate Committee.

The bill would create a new agency, the Consumer Safety Agency, with complete responsibility for preventing consumers from being exposed to unsafe products. It also consolidates within the new agency various consumer product safety activities now being handled by a number of different agencies.

This new agency would be run by an administrator and commissioner of food, drugs and product safety. The bill would abolish the Food and Drug Administration, omitting automatic personnel transfer, thus eliminating the possibility of current FDA staff "simply shifting name plates."

The Consumer Safety Agency would have authority to issue overall safety standards for finished products and for their composition, design, design procedures, construction, manufacturing process, finish, packaging or marketing techniques and those of component parts.

Manufacturers failing to meet CSA standards could have products banned and be forced to buy them back. They could be forced to repair and replace faulty goods. Imports found to be hazardous could be impounded and destroyed. Manufacturers and businesses would face fines of up to $10,000 and a year in jail.

Personnel of the proposed CSA would be subject to law suits initiated by citizens who allege failure to perform duties to protect the public

against unsafe products. Employees would not only face court orders requiring performance of responsibility, but fines, suspensions and imprisonment.

Furthermore, in an attempt to avoid political influence, the bill would remove control of safety programs from White House budget officers. Each of the three commissioners would prepared budgets for public submission to the CSA Administrator without prior White House review and revision. Then the total agency budget would be submitted to the President publicly, and without prior budget office review. The President would still submit the agency's budget to Congress along with his own or his budget officer's estimate of need.

1. Arguments for:

a. The need for further consumer protection against unsafe and impure products is great. Existing agencies have proved ineffective and derelict in their duties; for example, food poisoning has sickened and even killed several persons, as a result of lack of proper inspection of food manufacturers by the Food and Drug Administration.

In view of the imperfections of existing machinery, drastic action in the form of a new agency, which would consolidate within its confines various Federal consumer product safety activities now scattered among many agencies, is indicated.

b. Many consumer advocates believe that the present Administration's attitude toward consumer protection is "lukewarm" and therefore safeguards against political influence, as written into S. 983, are needed.

c. c. Because of laxity in enforcement of safety and health laws, severe legal penalties for dereliction of duty are necessary to protect consumers.

2. Arguments against:

a. Creation of a new super-agency would only add to the existing bureaucratic sprawl.

b. If the avowed purpose of establishing a new agency is to circumvent existing political appointees in charge of Federal consumer protection functions, then organizing a new agency headed by appointees of the Administration would hardly be an answer to the original problem.

c. Furthermore, penalties for dereliction of duty are too severe. Fines and suspension from duty would be commensurate with improper performance, but not imprisonment. Let us remember that most employees are acting under the authority or policy of "top side."

d. The creation of a new agency would only disrupt and upset present safety operations by transferring them out of existing departments to the new organization.

e. Instead of fresh additions to Federal bureaucracy, what is needed is more vigorous and effective enforcement of laws through established agencies, such as the Department of Health, Education and Welfare.

This is the Administration's approach, as expressed in S. 1797, which would set up a Consumer Safety Administration within HEW, incorporating within it the Food and Drug Administration. This Administration

would consist of three offices, an Office of Product Safety; of Drug Regulation, and of Food Regulation.

f. The Federal Government would be given entirely too much power over industry in determining design of products. Instead, manufacturers should be given "the opportunity to remedy problems through voluntary actions and voluntary standards," according to Stanley Groner, of the National Association of Manufacturers.

III. President Nixon's Consumer Protection Program: Summary and Objective Evaluation

A. Summary

Perhaps the best summary of President Nixon's consumer protection program is contained in his Message of February 25, 1971 to the Congress on "Buyer's Bill of Rights."

The President stated:

> "Accordingly, I am again submitting proposals designed to provide such a Buyer's Bill of Rights by:
> —Creating by Executive Order a new Office of Consumer Affairs in the Executive Office of the President which will be responsible for analyzing and coordinating all Federal activities in the field of consumer protection;
> —Recognizing the need for effective representation of consumer interests in the regulatory process and making recommendations to accomplish this after full public discussion of the findings of the Advisory Council on Executive Organization;
> —Establishing within the Department of Health, Education, and Welfare a product safety program. The Secretary of Health, Education, and Welfare would have authority to fix minimum safety standards for products and to ban from the marketplace those products that fail to meet those standards;
> —Proposing a Consumer Fraud Prevention Act which would make unlawful a broad but clearly-defined range of practices which are unfair and deceptive to consumers and would be enforced by the Department of Justice and the Federal Trade Commission. This act, where appropriate, would also enable consumers either as individuals or as a class to go into court to recover damages for violations of the act;
> —Proposing amendments to the Federal Trade Commission Act which will increase the effectiveness of the Federal Trade Commission;

—Calling upon interested private citizens to undertake a thorough study of the adequacy of existing procedures for the resolution of disputes arising out of consumer transactions;
—Proposing a Fair Warranty Disclosure Act which will provide for clearer warranties, and prohibit the use of deceptive warranties;
—Proposing a Consumer Products Test Methods Act to provide incentives for increasing the amount of accurate and relevant information provided consumers about complex consumer products;
—Resubmitting the Drug Identification Act which would require identification coding of all drug tablets and capsules;
—Encouraging the establishment of a National Business Council to assist the business community in meeting its responsibilities to the consumer; and by
—Other reforms, including exploration of a Consumer Fraud Clearinghouse in the Federal Trade Commission, increased emphasis on consumer education and new programs in the field of food and drug safety."

B. Implementation of the President's Program

1. Bills introduced into Congress for the Administration.

In order to implement the President's consumer program, a number of consumer bills were introduced for the Administration.

Under Section II above, the Administration bills in major consumer areas, such as class actions, warranties, product safety and a consumer protection agency, were discussed with criticisms. In general, these bills are considered by critics as "weaker" than other measures in the consumer protection area.

2. Establishment of an Office of Consumer Affairs.

This office was established by Presidential Order on February 24, 1971. Mrs. Virginia Knauer, Special Assistant to the President for Consumer Affairs was named as Director.

The work of the present Office of Consumer Affairs is chiefly that of coordinating Federal programs, disseminating valuable information of interest to consumers; encouraging the establishment of consumer education; and receiving complaints from the consuming public.

The establishment of this office is considered to be a forward step in the Federal consumer protection march. The office upgrades the earlier President's Committee for Consumer Affairs, continued by President Nixon after its original organization by President Johnson in 1964. That Committee was in turn an outgrowth of President Kennedy's Consumer Advisory Council.

3. Consumer Product Information

The action of the Nixon Administration in providing for public distribution of consumer product information derived from government procurement and other operations is another progressive step in the interests of consumer protection.

On October 26, 1970, by Executive Order President Nixon established a Consumer Product Information Coordinating Center within the General Services Administration, for the purpose of sharing with the American consumer much of the information which the government gathers about the products procuring agencies buy. This Coordinating Center will disseminate information throughout the country through 25 Federal information centers operated by the GSA.

As a first step in this program, an index of 211 select low-cost publications of 11 Federal agencies was published by the GSA.

Additionally, the U.S. Army Natick Laboratories of the Department of Defense were directed to undertake a pilot program to translate technical specifications and standards data on products into reports useful to consumers.

As a result of this Natick project, the General Services Administration released brand-name information on products purchased by the Federal Government. (See announcement on the following page.)

4. National Institute for Consumer Justice.

On February 26, 1971, at President Nixon's request, a National Institute for Consumer Justice was established.

The President asked the Chairman of the Administrative Conference of the United States to organize a group of citizens to undertake "a thorough study of the adequacy of existing procedures for resolving disputes arising out of consumer transactions."

The Institute will give "objective scrutiny" to the question of class action, a controversial issue in the consumer field.

The formation of this institute would appear to be a step taken by President Nixon to develop concrete recommendations concerning consumer class actions and other matters.

5. National Business Council for Consumer Affairs

President Nixon appointed this council in August 1971 as an advisory body which will work with the government on consumer problems. Its membership consists of 80 businessmen.

Government gives brand names of 350 products that it uses

Consumers can now find out which products the Federal Government buys for its own use and why. General Services Administration, which buys almost all of the civilian supplies for the Federal Government, has released a list of about 350 brand-name products—ranging from adhesives and air conditioners to personal hygiene & toilet articles and pressure sensitive tape—that are available to consumers. Manufacturers of the products have certified that these brand-name products are identical to the ones purchased and tested for government use.

The list is not a result of comparative testing of brand name products by GSA because it does not make comparative tests. All consumer products needed by GSA are purchased by competitive bid according to government specifications and not according to brand name. The products of successful bidders are tested prior to acceptance to assure that they meet the government's specifications. When GSA accepts a product, it now asks the contractor to indicate whether it sells the same consumer product commercially under a brand name. If so, the contractor is asked to certify this fact and state the brand name. In compiling the October list of brand-name products, GSA said about 5 contractors preferred not to list brand names.

GSA Administrator Robert L. Kunzig said brand information now being released on a trial basis will be updated quarterly. In addition to brand names, the list includes the number of the government specification, which consumers may obtain free, or for a small fee, to learn what the government required in a particular product. He said, "We will be guided by the comments we get from consumers and the business community as to whether the data is helpful and appropriate."

Kunzig made the following points about the government's list of brand-name products:

- The listing of a brand name does not constitute an endorsement by the government nor does it imply that other manufacturers do not have products of equal or better value.
- Many manufacturers are unsuccessful under the bidding process because of price, technical or other reasons not relative to the quality of goods.
- Some producers of quality products may choose not to bid on a contract.
- For reasons of economy, the only products tested are those of successful bidders. The products of unsuccessful bidders may also satisfy or exceed the government specifications.
- The list is generally limited for administrative reasons to current GSA suppliers. Many producers not listed have been awarded contracts and supplied brand names under previous contracts governed by the same specifications.
- Although the needs of government and consumers may coincide, products are on the list because they meet Federal specifications to satisfy the government's needs. Factors that might be important to consumers but that would not be included in government specification include such considerations as color, convenience of dispensing the product from the package, convenience of installation, safety around children, style, odor, taste.

GSA's list of brand-name items may be obtained free from Consumer Product Information, Washington, D.C. 20407, or at any of the Federal Information Centers in 27 major cities. The list is organized by 20 product categories and comprises manufacturers, brand names and/or model numbers, specification numbers, prices of specifications, expiration dates of GSA's existing contracts.

Many consumer organizations including the Consumer Federation of America attacked these appointments with the charge that the President was giving business more influence with the government while neglecting to appoint consumer-minded persons to this council. Furthermore, several appointees are connected with firms which have "run afoul" of several Federal consumer protection agencies, like the Food and Drug Administration and the Federal Trade Commission

6. Appraisal by Critics of the Nixon Administration's Consumer Protection Program

Although the Nixon Administration has chalked up a number of "firsts" in consumer protection, many critics believe with the Democratic Study Group Consumer Task Force "that the consumer programs of the Nixon Administration are marked more by their timidity and failure than by their boldness and success, that consumers are being promised more but given less; and that this is an Administration which is basically apathetic to the plight of the consumer."

Critics cite many instances of Administration failures in consumer protection, for example, flammability standards for children's sleepwear up to 5 years of age were two years in the making. Finally on October 28, 1971, the Secretary of Commerce announced that in two years all such sleepwear must be flame retardant.

Similarly in the case of the banning of cyclamates, after charging regulations concerning the use of cyclamates they were finally banned by January 1, 1970 because of their cancer-inducing properties.

IV. Views of Non-Government Organizations on Consumer Protection

The following is a brief discussion of private consumer organizations, their criticisms of "present arrangements," and their attitudes towards the most comprehensive consumer proposal now before Congress--establishment of a consumer protection agency. Proposals of these private agencies in other consumer areas are too numerous to mention in this brief report.

A. Ralph Nader and His Organization

1. Ralph Nader and his staffs have investigated many areas of "weak spots" in the marketplace from the consumer's point of view, i.e. automobile safety, food and drug inspection, advertising; and monopoly and prices. The Nader crusade is directed toward "shoddy merchandise and sloppy Federal services."

Mr. Nader favors a strong consumer protection agency to act as consumer representative before other Federal agencies and courts.

B. Consumer Federation of America

The Federation has been highly critical of lack of consumer protection in the marketplace, and favors a strong consumer advocacy agency.

The Federation endorsed "an independent consumer agency with full powers of advocacy and capable of representing the interest of consumers before all governmental agencies and courts," in January 1971.

C. Consumers Union of the U.S.A.

The Washington representative of Consumers Union, David Swankin, stated his organization's point of view as follows: "Of all the major economic interests, only the consumer interest is improperly and inadequately represented today. Until it is equally represented with all

economic interests in the business of government, the public interest will suffer."

On April 28, 1971, Mr. Swankin testified before a Subcommittee of the House Committee on Government Operations to the effect that Consumers Union favors a strong consumer advocacy function placed in an independent agency.

D. AFL-CIO

The AFL-CIO believes that the consumer interest has generally not received due recognition by government or business.

On April 28, 1971, Kenneth Peterson of the AFL-CIO said before a Subcommittee of the House Government Operations Committee: "From the very beginning, the AFL-CIO has consistently supported the effort to create a statutory agency which would represent the consumer point of view in the executive branch of the Government."

"We will support any reasonable means of assuring consumer representation whether through a department, office, or other agency within the executive branch."

V. Assessment of the Federal Trade Commission and the Food and Drug Administration in Their Consumer Protection Functions

A. The Federal Trade Commission

1. Appraisal

In January 1969, a critique entitled, "The Consumer and the Federal Trade Commission," by a staff of young lawyers working for Ralph Nader, the consumer advocate made headlines with its sweeping indictment of that Federal agency.

The report concluded not only that the standard criticisms of the FTC continue to be valid, but also that, among other failings, the agency's methods of detecting statutory violations were inadequate, its consumer protection program (particularly in the area of false advertising) was largely ineffective in coping with modern forms of deceptive advertising, and its reliance on voluntary enforcement techniques was failing to secure real compliance with the law.

Following the impact of this report on the public, President Nixon on April 18, 1969 requested the American Bar Association to undertake an appraisal of the operations of the Federal Trade Commission. One aspect of this study was, of course, devoted to consumer protection. Miles Kirkpatrick, now Chairman of the Federal Trade Commission, was named Chairman of the ABA Commission to survey the FTC.

Both of these documents came to the same conclusions.

The ABA report made the following general indictment of the Federal Trade Commission as it has functioned in the consumer protection arena:

> "Our study has led us to the conclusion that the FTC's efforts to investigate the basis in fact for this public outcry and to find ways of coping with whatever underlying (consumer) problems exist have been inadequate."

2. Reorganization of the Federal Trade Commission; Pending Bills for Strengthening the Federal Trade Commission

Following the release of the Nader Study and the ABA report, a thorough reorganization was effected during the summer of 1970 at the FTC, under the direction of Caspar W. Weinberger, who was appointed Chairman of the Federal Trade Commission by President Nixon for this purpose. (He was later transferred by the President to another key position.) A new Bureau of Consumer Protection was organized, and as Miles Kirkpatrick, Chairman of the Federal Trade Commission, said, "the Federal Trade Commission is alive and well, and getting more active and stronger every day." (See "FTC Tests Its Authority with Bold New Activities," National Observer, January 30, 1971) Proposals to strengthen the FTC by law have been discussed under Part II, Pending Legislation. See S. 986.

Additionally, President Nixon in his consumer message of February 24, 1971, called for general restructuring of the Federal Trade Commission into a "Federal Trade Practices Agency," that would deal exclusively with consumer matters. This proposal was derived from the Ash Council which was set up by the President to study the organization of the executive branch of the Federal Government. President Nixon has not as yet made a formal announcement.

B. Food and Drug Administration

1. Appraisal and Recommendations--Non-Congressional

a. Intra-agency investigation

A Study-Group on Food and Drug Administration Consumer Protection Objectives and Programs, an intra-agency task force, was formed to make an investigation of the F.D.A. A final draft was completed in July 1969.

The following capsule appraisal of the work of the F.D.A. was given in the Introduction to the Report by M. D. Kinslow, Chairman of the Study-Group:

> "After reviewing the Food and Drug Administration's consumer protection objectives and programs, the Study-Group believes the agency is at an important crossroad. The American public's principal consumer protection is provided by the Food and Drug Administration, and we are currently not equipped to cope with the challenge."

Detailed analyses and recommendations on all phases of the F.D.A.'s consumer protection functions were made by the Study-Group. The following are the first sixt recommendations, and are of a general nature.

GENERAL RECOMMENDATIONS

1. Develop programs that will inform the consumer but which will also provide for more consumer influence on FDA activitives.
2. Strengthen FDA's capabilities in all scientific disciplines.
3. Develop expanded adverse experience reporting systems covering all products under FDA jurisdiction.
4. Develop an operations research and systems analysis capability within FDA.

5. Explore means of improving the coordination between approved labeling claims of consumer products and health claims made for the same products in the advertising media.
6. Intensify coverage of imported products to increase the degree of confidence that they are in compliance.

For the full report, see Draft Report from the Study Group on Food and Drug Administration Consumer Protection Objectives and Programs--July 1969.

b. The Ralph Nader Group--"The Chemical Feast," by James S. Turner, Project Director, 1970

In his introduction to "The Chemical Feast," Ralph Nader summarized the study's criticism of the Food and Drug Administration in this way: ". . . the FDA is unable to exert any meaningful influence on behalf of the food-consuming public. Impotence has characterized the FDA and its predecessor agencies since passage of the Pure Food and Drug Administration of 1906."

The two most important recommendations contained in this report were the following:

1. New legislation is needed to define more accurately the role to be played by the government in the food regulations area.

2. The FDA should be reorganized so that it represents the public interest.

c. Congressional criticisms of FDA and proposals for improvements

Congressional critics of the FDA have charged the agency with failure to use consistent enforcement procedures to regulate the food and drug industry. FDA's failure to get tougher with drug companies for false and misleading drug advertising and the agency's record of vacillation in getting cyclamates off the market have been cited as examples of lenient regulation of the food and drug industry by the FDA.

Senators Warren G. Magnuson (D Wash.) and Frank E. Moss (D Utah) have introduced a bill (S. 983) to create a Consumer Product Safety Commission. The commission would not affect the FDA's authority to regulate the food and drug industry, but some of FDA's consumer protection activities such as policing the toy industry would be carried out by the proposed agency.

The Administration has proposed a bill (S. 1797) which would convert the FDA into a Consumer Safety Administration. The new administration would regulate food drugs and a wide range of consumer products.

In addition, Congressman Patten of New Jersey introduced H.R. 10817, on September 22, 1971 to amend the Federal Food, Drug and Cosmetic Act to provide for the annual registration and inspection of food manufacturers and processors.

Earlier, on August 26, 1971, Congressman Rosenthal of New York announced that he would introduce a bill to create a new agency to enforce Federal food safety laws. The legislation would set up a single agency to assume the food-inspection duties now performed by the Department of Agriculture and the Food and Drug Administration, both of which the Congressman accused of being incapable of protecting the public from unsafe foods.

This proposed legislation is still in the formative stage.

Finally, Ralph Nader has suggested Federal licensing or chartering of food companies. Thus, if certain standards of operation laid down by the Federal Government were not met, the charter would be suspended or revoked.

VI. Conclusion

There are a number of conclusions which this survey of the consumer protection movement suggests are warranted. There can be no doubt that the governmental involvement in consumer protection, both by the executive branch and by the Congress, is accelerating. While there are differences in approach and emphasis including the extent of government interference which is considered acceptable, there is no doubting the fact that consumer protection has in recent years had a higher priority in government circles than ever before. This is reflected in the broad scope of legislative proposals described in this report as well as the manifold executive actions that are reported. It is also reflected in the growing strength of private consumer organizations and nongovernmental groups, such as labor unions, putting unprecedented emphasis on consumer protection. Finally, the critical view with which such consumer-oriented agencies as the Federal Trade Commission and the Food and Drug Administration are being studied bodes well for constructive reform of these and other government agencies.