

## AMUSEMENT PARK SAFETY: WHO SHOULD REGULATE?

### I. INTRODUCTION

Increased visitation to amusement parks has generated a growing concern for the public's safety. The recent occurrence of accidents<sup>1</sup> has fueled a continuing debate concerning federal regulation of amusement park rides.

Prior to the Consumer Product Safety Amendments of 1981 (Amendments),<sup>2</sup> there was a question as to whether existing legislation empowered the federal government to regulate amusement park rides.<sup>3</sup> The Consumer Product Safety Act (Act)<sup>4</sup> invested the Consumer Product Safety Commission (CPSC) with broad regulatory authority over a host of consumer products. CPSC members believed that the Act granted authority over amusement rides, whereas owners and manufacturers of these

<sup>1</sup> The most publicized amusement park incident, although it did not involve a ride, was the fire that killed eight people and injured seven others in Great Adventure's Haunted Castle. N.Y. Times, May 12, 1984, at A1, col. 2. Other recent newspaper accounts include: the death of a woman who was flung from a stand-up roller coaster at an amusement park in Missouri, N.Y. Times, July 9, 1984, at A8, col. 5; the shutdown of a roller coaster ride at Playland Amusement Park in Rye, New York after a few people were injured, N.Y. Times, July 10, 1984, at B2, col. 1; and the injury of several people when a roller coaster at Six Flags over Georgia stopped abruptly due to a mechanical problem. N.Y. Times, June 5, 1984, at D27, col. 1.

It is interesting to note that most reports occurred during the time of the Great Adventure accident. The only accident reported in the *New York Times* during 1985 was an incident involving the breakdown of a gondola ride in Daytona Beach, Florida where no injuries occurred. N.Y. Times, Aug. 24, 1985, at 46, col. 2.

<sup>2</sup> Consumer Product Safety Amendments of 1981, Pub. L. 97-35 (codified as amended at 15 U.S.C. §§ 2051 (empowering clause), 2052(a)(1) (definition of consumer product) (1982 & Supp. II 1984)).

<sup>3</sup> It should be briefly noted that the commerce clause, U.S. CONST. art. I, § 8, cl. 2, grants Congress the authority to "regulate Commerce . . . among the several States . . ." An item or activity may come under the federal commerce power if it has a substantial economic effect on interstate commerce, even if it seems to be single state activity. Additionally, Congress may regulate activities which affect commerce through their cumulative effect. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 236-37 (1978).

It thus appears that both amusement rides which travel interstate to fairs and carnivals as well as fixed-site rides may be regulated by Congress under the power granted by the commerce clause. Since many amusement parks attract large numbers of out-of-state visitors and advertise over television and radio airwaves which cross state lines, regulation of these rides seemingly are within Congress' broad authority. Additionally, amusement rides and their components are most likely manufactured in states other than those of the amusement parks.

*Wickard v. Filburn*, 317 U.S. 111 (1942); see also *Katzenbach v. McClung*, 379 U.S. 294 (1964) (demonstrating the Supreme Court's approval of the use of the commerce clause to reach primarily local activities); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (a motel affecting interstate commerce could constitutionally be reached by the Civil Rights Act).

<sup>4</sup> Consumer Product Safety Act, 15 U.S.C. §§ 2051-2082 (1982 & Supp. II 1984).

rides claimed that the CPSC had no such jurisdiction. The latter assertion was based on the belief that amusement rides were not consumer products within the meaning of the Act.<sup>5</sup>

The courts likewise were split on the issue of the CPSC's authority to regulate amusement rides.<sup>6</sup> The dispute was finally settled by the Safety Amendments of 1981 which specifically excluded fixed-site amusement rides from the CPSC's jurisdiction.<sup>7</sup> Pursuant to the Safety Amendments, federal law currently regulates only moveable amusement rides such as those at county fairs and carnivals.<sup>8</sup> Safety regulation over permanent, fixed-site rides is left to the states, the amusement park industry, and the insurers.

Certain CPSC Commissioners want the Commission to gain jurisdiction over the nation's fixed-site amusement rides in order to establish consistent safety standards,<sup>9</sup> and several members of Congress have introduced varying forms of legislation which address fixed-site ride safety.<sup>10</sup> Representatives of the International Association of Amusement Parks and Attractions (IAAPA) and other industry associations alternatively believe that there is no justification for federal regulation of the amusement park industry.<sup>11</sup>

This Note examines whether fixed-site amusement rides would be regulated more effectively by the federal government, or whether regulation should continue to be left to the states and the amusement park industry. In addition, it will discuss several proposed congressional bills to gain CPSC jurisdiction over fixed-site rides. This Note will conclude that the individual states and the industry are better suited to handle such regulation than a federal agency.

<sup>5</sup> *Id.* § 2052(a).

<sup>6</sup> See *infra* notes 37-38 and accompanying text.

<sup>7</sup> 15 U.S.C. § 2052(a).

<sup>8</sup> *Id.* See *infra* notes 66-72 and accompanying text.

<sup>9</sup> See *Amusement Park Safety: Hearings Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce, 98th Cong., 2d Sess. 765-770 (1984)* (statement of Nancy Harvey Steorts, Chairman, CPSC) [hereinafter cited as *Amusement Park Safety Hearings*]. Certain commissioners however are opposed to CPSC regulation of fixed-site amusement rides. See *id.* at 789-802 (testimony of Sandra Brown Armstrong, Vice-Chairman, CPSC); *id.* at 771-73 (testimony of Terrence M. Scanlon, Commissioner, CPSC).

<sup>10</sup> See *infra* notes 134-73 and accompanying text.

<sup>11</sup> See *Amusement Park Safety Hearings, supra* note 9, at 854-66 (testimony of Charles S. MacDonald, President, International Association of Amusement Parks and Attractions (1984)); see also MacDonald, *No Federal Action is Required*, L.A. Daily J., July 4, 1984, at 4, col. 5.

## II. THE CONSUMER PRODUCT SAFETY ACT

### A. Background

The Act<sup>12</sup> was promulgated in 1972 as a response to a study undertaken by the National Commission on Product Safety (Commission) which was set up by Congress to investigate "the scope and adequacy of measures employed to protect consumers against unreasonable risks of injuries which may be caused by hazardous household products."<sup>13</sup> The Commission's study revealed shortcomings in existing controls on product hazards.<sup>14</sup> Accordingly, the Commission recommended that the federal government abandon its traditional case-by-case approach to product safety and consolidate in a single agency sufficient authority to regulate the wide spectrum of products which are sold to or used by consumers.<sup>15</sup>

Thus, the Act was promulgated for the purpose of protecting consumers from unreasonable risks associated with the use of consumer products.<sup>16</sup> To carry out this objective, the Act provided for the creation of the CPSC, an independent regulatory commission consisting of five commissioners.<sup>17</sup> Basically, the Act vests the CPSC with authority to: (1) collect and disseminate information on consumer product injuries;<sup>18</sup> (2) establish mandatory safety standards where necessary to prevent or reduce unreasonable product hazards,<sup>19</sup> or, where such standards are not feasible, to ban the product from the marketplace;<sup>20</sup> (3) order the notification<sup>21</sup> and remedy<sup>22</sup> of products which fail to comply with CPSC standards or which create a substantial product haz-

<sup>12</sup> 15 U.S.C. §§ 2051-2082 (1982 & Supp. II 1984).

<sup>13</sup> NATIONAL COMMISSION ON PRODUCT SAFETY, FINAL REPORT 1 (June 1970), reprinted in *Hearings On National Commission on Product Safety Before the Senate Comm. on Commerce, 91st Cong., 2d Sess. app. 23 (1971)* [hereinafter cited as *Hearings on National Commission*].

<sup>14</sup> The Commission's findings included the following:

Federal product safety legislation consist[ed] of a series of isolated acts treating specific hazards in narrow product categories; and no government agency possesse[d] general authority to ban products which harbor[ed] unreasonable risks, or . . . require[d] consumer products [to] conform to minimum safety standards.

[The] limited federal authority [that does] exist [was] scattered among many agencies. Jurisdiction over a single category of products [was] shared by as many as four different agencies.

*Hearings on National Commission, supra* note 13, at 38.

<sup>15</sup> *Id.* at 46.

<sup>16</sup> 15 U.S.C. § 2051(b)(1).

<sup>17</sup> *Id.* § 2053.

<sup>18</sup> *Id.* § 2054.

<sup>19</sup> *Id.* § 2056.

<sup>20</sup> *Id.* § 2057.

<sup>21</sup> *Id.* § 2064(c).

<sup>22</sup> *Id.* § 2064(d).

ard;<sup>23</sup> and (4) to enter and inspect establishments where the products are manufactured or held.<sup>24</sup>

The Act authorized funds to be appropriated in order to carry out its provisions through the fiscal year of 1975.<sup>25</sup> Subsequent amendments have appropriated funds to the CPSC through 1983.<sup>26</sup> Since then, the CPSC has received appropriations on a yearly basis and is currently funded through the 1986 fiscal year.<sup>27</sup> Legislation is currently pending in both bodies of Congress to reauthorize the CPSC and to continue appropriation of funds.<sup>28</sup>

#### B. *The Act As It Relates to Amusement Park Rides*

Several accidents involving amusement rides prompted investigation by the CPSC.<sup>29</sup> Amusement park owners and manufacturers responded by seeking declaratory judgments to determine the Act inapplicable to amusement park rides and thus beyond the jurisdiction of the CPSC.<sup>30</sup>

The Act's definition of the term "consumer product" sets forth its jurisdictional reach and limitations.<sup>31</sup> Prior to the Consumer Product Safety Amendments of 1981<sup>32</sup> which specifically excluded permanent amusement rides from the purview of the

<sup>23</sup> A substantial product hazard is a substantial risk of injury to the public created by "a failure to comply with an applicable consumer product safety rule" or "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." *Id.* § 2064(a).

<sup>24</sup> *Id.* § 2065.

<sup>25</sup> Pub. L. No. 92-573, § 32, 86 Stat. 1233 (1972) (codified at 15 U.S.C. § 2081).

<sup>26</sup> Pub. L. No. 94-284, § 2, 90 Stat. 503 (1976) (codified at 15 U.S.C. § 2081) (authorization for funds to be appropriated through the 1978 fiscal year); Pub. L. No. 95-631, § 1, 92 Stat. 3742 (1978) (codified at 15 U.S.C. § 2081) (authorization for funds to be appropriated through the 1981 fiscal year); Pub. L. No. 97-35, Title XII, § 1214 (1981) (codified at 15 U.S.C. § 2081) (authorization for funds to be appropriated through the 1983 fiscal year).

<sup>27</sup> Since the close of the 1983 fiscal year, the CPSC has received appropriations on a yearly basis through the Annual Department of Housing and Urban Development-Independent Agencies Appropriation Act. *See, e.g.*, Pub. L. No. 99-160, 1986 U.S. CODE CONG. & AD. NEWS (99 Stat.) 915 (authorization for funds to be appropriated through the 1986 fiscal year).

<sup>28</sup> *See infra* text accompanying notes 134-73.

<sup>29</sup> *See infra* notes 37-38.

<sup>30</sup> *Id.*

<sup>31</sup> 15 U.S.C. § 2052(a) provides:

The term "consumer product" means any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation or otherwise . . . .

<sup>32</sup> 15 U.S.C. § 2052(a)(1).

Act,<sup>33</sup> the CPSC held the view that the Act empowered it to regulate all amusement rides.<sup>34</sup> However, owners and manufacturers of amusement rides claimed that the CPSC had no jurisdiction over amusement rides based on the belief that they were not consumer products as defined by the statute.<sup>35</sup> Thus a recurrent issue before the courts was whether an amusement ride was a "consumer product" within the meaning of the Act.

In order to satisfy the Act's definition of "consumer product," a product must be: (a) "any article or component part thereof;" (b) "produced or distributed" either (i) "for sale to a consumer, or (ii) for the personal use, consumption, or enjoyment of a consumer;" and (c) intended for use "in or around a permanent or temporary household or residence, a school, in recreation or otherwise."<sup>36</sup> Federal courts were split on the issue of whether an amusement ride fell within this definition. Two courts had held that an amusement ride was a consumer product<sup>37</sup> and two had held to the contrary.<sup>38</sup>

*Consumer Product Safety Commission v. Chance Manufacturing*<sup>39</sup> was the first case where a court was required to decide whether an amusement ride was a "consumer product" as defined by the Act.<sup>40</sup> The District of Columbia Circuit Court held that the "Zipper" was a consumer product within the meaning of the statute and as such was subject to CPSC regulation.<sup>41</sup> The court found

<sup>33</sup> *Id.*

<sup>34</sup> *See infra* notes 38-39.

<sup>35</sup> *Id.*

<sup>36</sup> 15 U.S.C. § 2052(a)(1).

<sup>37</sup> *Consumer Prod. Safety Comm'n v. Chance Mfg.*, 441 F. Supp. 228 (D.D.C. 1977); *State Fair of Texas v. United States Consumer Prod. Safety Comm'n*, 650 F.2d 1324 (5th Cir. 1981).

<sup>38</sup> *Robert K. Bell Enters. v. Consumer Prod. Safety Comm'n*, 645 F.2d (10th Cir. 1981); *Walt Disney Prods. v. United States Consumer Prod. Safety Comm'n*, No. 79-0170 LEW (PX) (C.D. Cal. April 18, 1979), *rev'd on other grounds*, No. 79-3435 (9th Cir. April 22, 1981).

<sup>39</sup> 441 F. Supp. 228. The CPSC sued to enjoin the manufacturer and commercial operators of an amusement ride called the Zipper from operating it on the ground that the Zipper was an "imminently hazardous consumer product" within the meaning of section 12(a) of the Act. 15 U.S.C. § 2061(a). Under section 12(b)(1), 15 U.S.C. § 206(b)(1), when the CPSC files such an action, a district court may declare the product "imminently hazardous" and "grant such temporary and permanent relief as may be necessary to protect the public from such risk." The manufacturer of the Zipper claimed that the ride was not a consumer product and that consequently the court lacked jurisdiction over the subject matter. *Id.*

<sup>40</sup> *See supra* note 31 (definition of consumer product).

<sup>41</sup> *Accord* *State Fair of Texas v. United States Consumer Prod. Safety Comm'n*, 650 F.2d 1324 (5th Cir. 1981). An accident at the State Fair prompted the CPSC to investigate. The State Fair and the Skyride's operator, Steck & Stapf Attractions, challenged the characterization of the Skyride as a consumer product and sued to prevent the CPSC from conducting the investigation. The Fifth Circuit held that the Skyride was a con-

the operative portion of the Act's definition of "consumer product" to be that covering those products "produced or distributed for 'personal use, consumption or enjoyment of a consumer . . . in recreation or otherwise . . .'" because the ride had never been sold to individual consumers, nor used for any purposes other than recreation.<sup>42</sup> Accordingly, the court concluded that since riders occupied the Zipper's cars, and were exposed to its potential dangers, the "'personal use, consumption or enjoyment' clause of the definition" was sufficiently satisfied.<sup>43</sup> The court concluded that the ride also met the second criterion of the definition, relating to the context in which the product is used—"in recreation or otherwise"<sup>44</sup>—since consumers ride "the Zipper for its own sake and for the pleasure and thrill resulting therefrom, and not for any other purpose."<sup>45</sup>

The *Chance* court pointed to the legislative history of the Act to further support its conclusion that the ride was subject to CPSC regulation.<sup>46</sup> The court believed that the definition of consumer product must be construed broadly to "advance the Act's articulated purpose of protecting consumers from hazardous products."<sup>47</sup> The court also favored a broad construction of the language of the Act since it is remedial in nature and "directed at a widespread, specifically identified threat to the public safety."<sup>48</sup>

Conversely, the court in *Robert K. Bell Enterprises v. Consumer*

sumer product, because it was an article which was distributed and used by consumers in recreation. Accordingly, it permitted the inspection.

<sup>42</sup> *Chance Mfg.*, 441 F. Supp. at 231.

<sup>43</sup> *Id.* at 233.

<sup>44</sup> The court chose to read the phrase "in recreation or otherwise" as an independent basis of jurisdiction rather than as modifying the preceding phrase, "in or around a . . . household or residence, a school . . ." The court found that interpretation to comport with the Act's remedial purposes and to make more grammatical sense. The court further stated that if "in recreation or otherwise" was construed to modify the preceding phrase, "consumer product" would be limited to household and school products, "thereby excluding not only the Zipper ride, but also fireworks, bicycles, lawnmowers and other products investigated by the [CPSC]." *Id.* at 233. Thus, the court concluded that a product does not need to be used in or around a household, residence, or school to be under the CPSC's jurisdiction.

<sup>45</sup> *Id.* at 234.

<sup>46</sup> [P]roducts which are primarily or exclusively sold to industrial or institutional buyers would be included within the definition of consumer product so long as they were produced or distributed for use of consumers (emphasis in original).

. . . If the manufacturer or distributor of an industrial product fosters or facilitates its sale to or use by consumers, the product may lose its claim for exclusion if a significant number of consumers are thereby exposed to hazards associated with the product.

*Id.* at 231-32 (quoting H.R. REP. NO. 1153, 92d Cong., 2d Sess. 27 (1972)).

<sup>47</sup> *Id.* at 231.

<sup>48</sup> *Id.*

*Product Safety Commission*<sup>49</sup> found several statutory grounds on which to hold that an amusement ride was not a consumer product. First, the court stated that the "personal use, consumption or enjoyment" clause of the definition was added later, not for the purpose of enlarging the scope of the articles, but to cover all manner of distribution.<sup>50</sup> Thus, this clause was intended to include those items already covered by the first clause<sup>51</sup> of the definition, but which reach consumers by such means as gifts and promotional samples, rather than by sales.<sup>52</sup> Second, the court explained that a provision of the Act which excepts "any article which is not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer"<sup>53</sup> exempts industrial articles. The Act thus prohibits including an article "customarily sold to an industrial or commercial enterprise which ha[s] the exclusive control and possession of the article in its use[.]"<sup>54</sup> such as an amusement park ride. The court further found that the statutory definition of consumer product "directs the search to articles for consumers' use" and implies a requirement that the article be under the control and direction of the user.<sup>55</sup> Thus, the court believed that control and possession were factors to be considered in determining whether an article is a consumer product.<sup>56</sup> Finally, the court found that in order for the statute to be satisfied, the articles must be ones which are ordinarily used "'in or around a . . . household or residence.'"<sup>57</sup>

*Walt Disney Productions v. Consumer Product Safety Commission*<sup>58</sup> found other grounds on which to hold that an amusement ride is not a consumer product. The court relied on sections of the Act which provide that the CPSC may obtain free samples of imported consumer products<sup>59</sup> and may purchase consumer products at cost.<sup>60</sup> The court concluded that since neither of these provisions could realistically apply to the "Skyride," it was not a

<sup>49</sup> 645 F.2d 26 (10th Cir. 1981).

<sup>50</sup> *Id.* at 28.

<sup>51</sup> See *supra* note 31.

<sup>52</sup> *Robert K. Bell Enters. v. Consumer Prod. Safety Comm'n*, 645 F.2d at 28.

<sup>53</sup> § 2052(a)(1)(A).

<sup>54</sup> *Robert K. Bell Enters.*, 645 F.2d at 29.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*; see also *supra* note 31; cf. *Consumer Prod. Safety Comm'n v. Chance Mfg.*, 441 F. Supp. 228, 233 (D.D.C. 1977).

<sup>58</sup> No. 79-0170-LEW (PX) (C.D. Cal. April 18, 1979), *rev'd on other grounds*, No. 79-3435 (9th Cir. April 22, 1981).

<sup>59</sup> 15 U.S.C. § 2066(b).

<sup>60</sup> *Id.* § 2076(f).

consumer product within the meaning of the Act.<sup>61</sup>

The *Disney* court further found that the rider of an amusement ride purchases only the right to occupy passively the installation and that the ticket is the actual "consumer product."<sup>62</sup> It thus concluded that the ride was not produced for the "personal use, consumption or enjoyment of a consumer."<sup>63</sup>

Next, the *Disney* court turned to the legislative history of the Act to support a narrow interpretation of consumer product. The court believed that the legislative history of the Act reflected congressional intent to limit the Act's scope to products capable of production or distribution for sale to an individual.<sup>64</sup> Finally, the court concluded that a narrow interpretation was warranted, because "[t]oo expansive a reading of the Act's definition of 'consumer product' could result in the [CPSC's] spreading its limited resources too thinly and might rob consumers of the specialized agency expertise that Congress has attempted to guarantee."<sup>65</sup>

### C. *The Consumer Product Safety Amendments of 1981*

The issue of whether the Act's definition of consumer product includes amusement rides was about to be addressed by the Supreme Court, when Congress passed the Amendments<sup>66</sup> specifically excluding fixed-site amusement rides from the definition of consumer product.<sup>67</sup>

The Amendments clarified a line of inconsistent federal court decisions<sup>68</sup> and amended the definition of consumer product to include those amusement rides "not permanently fixed to

<sup>61</sup> While the court acknowledged that the Act does not require the CPSC to obtain samples of every consumer product it investigates, it concluded that the language of the Act contemplated that it would always be practicable to obtain a sample. *Disney Prods.*, No. 79-3435, at 5-6.

<sup>62</sup> *Id.* at 6.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 5 (quoting S. Rep. No. 749, 92d Cong., 2d Sess. 12 (1972)).

<sup>65</sup> *Disney Prods.*, No. 79-3435, at 6-7.

<sup>66</sup> 15 U.S.C. § 2052(a)(1) (1982).

<sup>67</sup> The Amendments state in part:

Such term [consumer product] includes any mechanical device which carries or conveys passengers along, around, or over a fixed or restricted route or course or within a defined area for the purpose of giving its passengers amusement, which is customarily controlled or directed by an individual who is employed for that purpose and who is not a consumer with respect to such device, and which is not permanently fixed to a site. Such term does not include such a device which is permanently fixed to a site.

15 U.S.C. § 2052(a)(1). Thus, when *State Fair of Texas* and *Steck and Staff Attractions* reached the Supreme Court, the judgment was vacated and the case was remanded to the trial court with directions to dismiss it as moot. 454 U.S. 1026 (1981); see *supra* note 41 for a description of the facts of the case.

<sup>68</sup> See *supra* notes 31-65 and accompanying text.

a site."<sup>69</sup> The legislative history dealing with the Amendments is sparse at best,<sup>70</sup> and it merely states that the amended definition intended to "clarify that the agency does not have jurisdiction over amusement park rides such as those found in 'theme parks'<sup>71</sup> but that it does have jurisdiction over amusement park rides such as those found in traveling carnivals."<sup>72</sup>

### III. STATE AND INDUSTRY REGULATION

As a result of the Amendments, federal government jurisdiction has been narrowed so that only mobile rides are within CPSC regulation.<sup>73</sup> Fixed-site amusement rides are thus left to state and industry regulation.

#### A. *State Regulation*

Currently state laws governing mobile and fixed-site amuse-

<sup>69</sup> 15 U.S.C. § 2052(a)(1).

<sup>70</sup> The dearth of legislative history is most likely due to the fact that the Amendments were part of a large omnibus bill, The Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 724 (1981), containing matters which sparked much more interest and debate than the amusement park issue. The amusement park amendment was considered a relatively minor one. The point stressed while this legislation was pending was that fixed-site rides could be regulated by the states because the CPSC had mandated several changes which had no relation to accidents. Accordingly, Congress felt that it was not worthwhile to give the CPSC the power to regulate these rides. Telephone interview with Steve Jacobs, Legislative Assistant (February 15, 1985).

Mobile rides were included in the amended definition of consumer product as a compromise. Because they move from state-to-state, the need for federal involvement was believed to be stronger in their case. Telephone interview with Steven R. Blair, Deputy Director of Congressional Relations (February 11, 1985).

<sup>71</sup> Theme parks are identified by the CPSC as "permanent installations offering a variety of entertainment attractions along with amusement rides. They are usually open on a seasonal basis but some remain open year round." U.S. CONSUMER PRODUCT SAFETY COMMISSION, AN OVERVIEW OF THE U.S. CONSUMER PRODUCT SAFETY COMMISSION'S INVOLVEMENT IN AMUSEMENT RIDE SAFETY (1984).

<sup>72</sup> H.R. REP. NO. 158, 97th Cong., 1st Sess. 422 (1981).

<sup>73</sup> 15 U.S.C. § 2052(a)(1).

ment rides vary.<sup>74</sup> Twenty-seven states and the District of Columbia now regulate amusement rides in differing ways.<sup>75</sup> Of

State	States Regulating Amusement Rides				Inspections Conducted By Other (Insurance)
	Fixed	Mobile	Both	State	
Alaska			X	X	
Arkansas			X	X	
California		X		X	
Colorado			X	X	
Connecticut			X	X	
Delaware			X	X	
District of Columbia			X	X	
Florida		X		X	
[Georgia]	[X]				[X*]
Hawaii			X	X	
Illinois			X	X	
Iowa			X	X	
Kentucky			X	X	
Maine			X	X	
Maryland			X	X	
Massachusetts		X			X
Michigan			X	X	
New Hampshire			X	X	
New Jersey			X	X	
New York			X	X	
North Carolina			X	X	
Ohio			X	X	
Oklahoma			X	X	
Oregon			X	X	
Pennsylvania			X		X[*]
Texas			X		X
Virginia			X		X
Wisconsin			X	X	

CPSC, DIRECTORY OF STATE ENFORCEMENT OFFICIALS AMUSEMENT RIDES, AERIAL TRAMWAYS, SKI LIFTS (March 1985) (footnotes omitted).

\* Provides for inspection by a licensed inspection at the owner or operator's expense.

<sup>75</sup> ALASKA STAT. §§ 05.20.010-05.20.120 (1985) (recreational devices); ARK. STAT. ANN. §§ 82-745 to -787 (1985) (amusement ride inspection); CAL. LAB. CODE §§ 7900-7915 (West & Supp. 1986) (amusement rides safety law); COLO. REV. STAT. §§ 2-8-101 to -107 (1985); CONN. GEN. STAT. ANN. §§ 29-129 to -143a (West Supp. 1985) (amusements and exhibitions); DEL. CODE ANN. tit. 16, §§ 6401-6409 (Supp. 1984) (Amusement rides safety inspection and insurance); D.C. Mun. Regs. tit. 5A-1, § 403.6 (1983) (structural requirements and tests of amusement devices); FLA. STAT. ANN. § 616.091 (West Supp. 1985) (providing for trade and safety standards for operation of public fairs and expositions); FLA. STAT. ANN. §§ 546.001-.008 (West Supp. 1985) (amusement ride and attraction insurance); GA. CODE ANN. §§ 34-12-1 to -12-20 (1985) (amusement ride safety); HAWAII REV. STAT. §§ 397-1 to -12 (Supp. 1984) (boiler and elevator safety); ILL. ANN. STAT. ch. 111 1/2, §§ 4051-4069 (Smith-Hurd Supp. 1985) (carnival and amusement rides safety); IOWA CODE ANN. §§ 88A.1-.13 (West 1984) (safety inspection of amusement rides); KY. REV. STAT. § 247.236 (supp. 1984) (operation and construction of amusement rides and attractions); ME. REV. STAT. ANN. tit. 8, § 502 (Supp. 1985); MD. ANN. CODE art. 89, §§ 65-81 (1985) (amusement park safety); MASS. GEN. LAWS ANN. ch. 140, § 205A (West Supp. 1985) (certain amusement devices and traveling carnivals); MICH. COMP. LAWS ANN. §§ 408.651-.667 (West 1985) (carnival amusement safety); N.H. REV. STAT. ANN. §§ 321-A:1 to -A:9 (1984) (carnival amusement operators); N.J. STAT. ANN. §§ 5:3-31 to -54 (West Supp. 1985) (carnival and amusement rides safety); N.Y. LAB. LAW §§ 870a-870m (McKinney Supp. 1986) (amusement ride safety); N.C. GEN. STAT. § 143-139 (1983) (building code enforcement); N.C. GEN. STAT. § 153A-135 (1983) (county regulation of places of amusement); OHIO REV. CODE ANN. §§ 1711.50-.57 (Page Supp. 1984) (amusement rides); OKLA. STAT. ANN. tit. 40, §§ 460-469 (West Supp. 1985) (amusement ride safety); OR. REV. STAT. §§ 460.310-.990 (1985) (amusement rides and devices); PA. STAT. ANN. tit. 4, §§ 401-419 (Purdon Supp. 1985) (amusement ride inspection); TEX. INS. CODE ANN. art. 21.60 (Vernon Supp. 1986); VA. CODE

these, twenty states require state inspectors to check rides that stay fixed in one site as well as those that travel to various sites.<sup>76</sup> In three states, inspection is required only of mobile rides,<sup>77</sup> and one state only regulates fixed-site rides.<sup>78</sup> Three states require that insurers inspect the rides.<sup>79</sup> Adding local regulation to this, no less than seventy-seven percent of all fixed-site rides are already subject to ride safety laws of one type or another.<sup>80</sup>

Concern about public health and safety has caused many states to evaluate and to enact reformed legislation where inadequacies existed. Other states have enacted regulatory legislation for the first time.<sup>81</sup> Several states have comprehensive legislation which serves as a model for those states which are enacting or improving initial regulatory legislation.<sup>82</sup> The basic features of an effective state safety program should include: an operating permit requirement,<sup>83</sup> a provision for regular inspections by trained individuals,<sup>84</sup> a requirement that an amusement owner or lessee carry a minimum amount of liability insurance,<sup>85</sup> an acci-

§ 36-97-119 (1984) (amusement rides are under the regulatory authority of local building departments throughout the state which enforce this statute); WIS. STAT. ANN. § 101.12 (West 1985) (submission of plans and specifications); WIS. STAT. ANN. § 101.19 (West 1985) (fees for inspection).

<sup>76</sup> See *supra* note 74.

<sup>77</sup> See *id.*

<sup>78</sup> See GA. CODE ANN. § 34-12-2(2) (1985).

<sup>79</sup> See *supra* note 74.

<sup>80</sup> H.R. REP. NO. 1072, 98th Cong., 2d Sess. 14 (1984) (dissenting views on H.R. 5790).

<sup>81</sup> The CPSC June 1984 statistics show only twenty-four states having some regulation of amusement rides. See CPSC, DIRECTORY OF STATE ENFORCEMENT OFFICIALS: AMUSEMENT RIDES, AERIAL TRAMWAYS, SKI LIFTS (June 1984). Currently, twenty-seven states and the District of Columbia regulate amusement rides in some way. See *supra* notes 74-75 and accompanying text.

<sup>82</sup> See, e.g., CAL. LAB. CODE §§ 7900-7915 (West & Supp. 1986); MD. ANN. CODE art. 89, §§ 65-81 (1985); N.J. STAT. ANN. §§ 5:3-31 to -54 (West Supp. 1985).

<sup>83</sup> Arkansas and Maryland, for example, will not issue operating licenses to park owners until the rides have passed a lengthy inspection program encompassing ball bearings, axle shafts, wire rope expansion, hydraulic lifts, brakes, lighting, emergency and electrical systems, and operator maintenance records. See ARKANSAS DEP'T OF LABOR, AMUSEMENT RIDES AND ATTRACTIONS ERRECTED PERMANENTLY OR TEMPORARILY AT CARNIVALS, FAIRS AND AMUSEMENT PARKS (1981); MARYLAND DEP'T OF LICENSING AND REGULATION, DIVISION OF LABOR AND INDUSTRY, AMUSEMENT RIDES AND ATTRACTIONS ERRECTED PERMANENTLY OR TEMPORARILY AT CARNIVALS, FAIRS, AND AMUSEMENT PARKS (1977).

<sup>84</sup> Typically, inspections are required before a ride is originally put into operation for the public's use and annually thereafter, as well as when additions and alterations are made. Additionally, inspection may be required each time a ride is disassembled and reassembled. See, e.g., CAL. LAB. CODE § 7906 (West Supp. 1986); MD. ANN. CODE art. 89, § 72(a) (Supp. 1985); N.J. STAT. ANN. §§ 5:3-41 (West Supp. 1985). Finally, in the case of a serious injury or death, the state agency with jurisdiction may require a full safety inspection before the ride can resume operating. See, e.g., CAL. LAB. CODE § 7914 (West Supp. 1986); MD. ANN. CODE art. 89, § 77(b) (Supp. 1985); N.J. STAT. ANN. § 5:3-46 (West Supp. 1985).

<sup>85</sup> Legislation which requires an owner to carry public liability insurance insures the rider adequate recovery in a claim against the owner arising out of an amusement ride

dent reporting requirement,<sup>86</sup> and civil and criminal sanctions for violation of these basic requirements.<sup>87</sup>

In New York, for example, the State Assembly Committee on Consumer Affairs and Protection evaluated its amusement park safety laws and concluded that "New York should follow the example of those states [with comprehensive legislation] and enact legislation more closely regulating the operation of amusement rides."<sup>88</sup> The Committee's report identified shortcomings in the existing laws<sup>89</sup> and recommended legislation which has subsequently passed, mandating operating permits, inspections, insurance coverage, and accident reporting requirements for all amusement rides.<sup>90</sup> Pennsylvania, which had no regulations regarding amusement ride safety has recently enacted a comprehensive statute applying to both mobile and fixed-site rides.<sup>91</sup>

accident. Additionally, insurance companies have an interest in adopting procedures to minimize potential losses. Thus, they may promote safety through additional requirements of their own, or offer reduced rates to owners who comply with voluntary guidelines or standards, such as those auto insurers frequently offer to drivers who participate in a driver education course, or home owner insurers offer to home owners who install smoke alarms.

The statutory minimum amount of insurance ranges from \$500,000, see, e.g., CAL. LAB. CODE § 7912 (West Supp. 1986) to \$1,000,000, see, e.g., MD. ANN. CODE art. 89, § 78 (Supp. 1985); N.Y. LAB. LAW § 870-f (McKinney Supp. 1986).

<sup>86</sup> Requiring the owner to immediately report accidents and resulting injuries or fatalities is necessary to allow an inspection of a ride which is involved in an incident in order to prevent further injuries.

Additionally, receipt of a report and subsequent inspecting of a ride involved in an accident allows the state agency to act as an information network. This information is necessary in order to follow the ride's history for the purpose of later inspections.

<sup>87</sup> Penalties are necessary to ensure compliance with the statute and to help enforce it.

<sup>88</sup> See NEW YORK STATE ASSEMBLY, COMM'N ON CONSUMER AFFAIRS AND PROTECTION, AMUSEMENT PARKS: HOW SAFE ARE THEY? 1 (April 1982).

<sup>89</sup> At that time, the only legislation dealing with amusement park safety was promulgated in 1961, and it simply delegated authority to the Board of Standards and Appeals of the Department of Labor to "make rules guarding against personal injuries in the assembly, disassembly and use of amusement devices and temporary structures at carnivals, fairs and amusement parks . . . located outside the city of New York." N.Y. LAB. LAW § 202-b (McKinney 1965) (repealed by N.Y. LAB. LAW §§ 870-a to 870-m McKinney 1986). The inspection of amusement devices and temporary structures located within the City of New York was regulated by the Department of Buildings. *Id.*

<sup>90</sup> See N.Y. LAB. LAW §§ 870-a to 870-m (McKinney 1986).

<sup>91</sup> Pennsylvania's statute establishes a nine-member advisory board to be appointed by the Governor. This advisory board includes a mechanical engineer, representatives of the public, a representative of the ride manufacturers, a member of the Pennsylvania State Showman's Association, representatives of the Amusement Park Association and the County Fairs Association. This board is authorized to make recommendations and propose rules, regulations, and standards for the safety and protection of the public to the Department of Agriculture administers and enforces the provisions of the statute and prescribes safety standards relating to the operation and maintenance of amusement rides or attractions taking into consideration recommendations from the advisory board and standards developed by the American Society of Testing Materials. *See infra*

### B. Industry Regulation

The amusement park industry has strong incentives to ensure the safety of its patrons. Since amusement park profits depend on attracting people, owners and operators want visitors to have confidence that parks maintain high levels of safety.<sup>92</sup> Further incentive is provided by the need to obtain insurance. Since so few insurance companies are involved in underwriting amusement insurance risks, an underwriter has no reason to take an inherently poor risk.<sup>93</sup> Policyholders recognize this fact and realize that their insurance rates are directly related to their claims history. Thus they act voluntarily to promote safety.<sup>94</sup> In fact, most responsible owners and operators do more than is required by insurers.<sup>95</sup>

The industry has mechanisms for policing safety including the formation of trade associations. For example, the Outdoor Amusement Business Association (OABA) has been active in ride safety legislation, ride standard activity, and has formed safety programs for carnival rides both in the United States and Can-

notes 104-17 and accompanying text. In addition, the statute contains inspection provisions and minimum insurance coverage requirements.

Furthermore, the Department of Agriculture acts as an information network, because it must receive a copy of accident reports sent to an amusement ride owner's or lessee's insurance company when physical injuries or death resulting from an amusement ride accident occur. The statute includes criminal penalties for violations or non-compliance. PA. STAT. ANN. tit. 4, §§ 401-419 (Purdon Supp. 1985).

<sup>92</sup> Quality control is a primary concern for fairs and carnivals because "a carnival held in disrepute cannot maintain a contractual route." U.S. Consumer Prod. Safety Comm'n, Amusement Ride Meeting 13 (May 10, 1984) [hereinafter cited as Amusement Ride Meeting].

Similarly, amusement parks are concerned with the safety of their patrons. John Graff, Executive Director and Chief Counsel of International Association of Amusement Parks and Attractions states:

[i]t's the core of our business to be able to draw people to the parks who have a high degree of confidence that they are going to be well received, well treated and get home in the same condition in which they came to the parks. To that end, we spend a great deal of time in the parks on safety, and an industry, as an association, on safety. There is not a park existent that does not have a very extensive, well-developed, conscientious park safety program that is carried out on a daily basis.

*Id.* at 23.

<sup>93</sup> *Id.* at 86-87, 100.

<sup>94</sup> For example, Disneyland inspects all of its rides nightly. H.R. REP. NO. 1072, *supra* note 80, at 14 (dissenting views on H.R. 5790); see also *Amusement Park Safety Hearings*, *supra* note 9, at 773 (testimony of Terrence M. Scanlon).

<sup>95</sup> Amusement Ride Meeting, *supra* note 92, at 87.

Tort liability provides further incentive for amusement ride owners and operators to maintain safe conditions. However, a discussion of this point is beyond the scope of this Note. The general rule, however, is that the duty owed by amusement park owners and operators to their patrons is one of "due or ordinary care." See, e.g., Morton, *Disabled Patrons of Amusement Parks: A Survey of Legal Issues*, 7 COMM/ENT L.J. 469, 486 (1985).

ada.<sup>96</sup> It has also advocated that a high minimum amount of liability insurance be set. Its safety committees, along with those of the International Association of Fairs and Expositions, has formulated an opening inspection checklist for each ride and a daily inspection checklist for everyday follow-ups.<sup>97</sup> Another association, the American Recreational Equipment Association (AREA),<sup>98</sup> educates ride operators through the publication of bulletins, operational procedural manuals, maintenance guidelines, and checklists.<sup>99</sup> It also holds an annual week-long seminar for the purpose of educating its members, inspectors, and insurers as to proper maintenance and inspection procedures.<sup>100</sup>

The IAAPA considers its safety committee its most active one. The committee meets regularly to discuss and to develop the range of safety matters affecting the industry and publishes a magazine which keeps members of the industry informed of new safety developments.<sup>101</sup> The IAAPA also played a principal role in developing the American Society of Testing Materials (ASTM) standards<sup>102</sup> and has circulated them to all of its members.<sup>103</sup>

The ASTM, an independent organization which sets voluntary standards for many types of products, developed standard testing methods, performance specifications, definitions, practices, and guides for amusement rides and devices.<sup>104</sup> This project culminated in the publication of standards concerning major aspects of amusement ride safety<sup>105</sup> which created "universal standards for the benefit of public safety as well as private

<sup>96</sup> Amusement Ride Meeting, *supra* note 92, at 13.

<sup>97</sup> *Id.* at 15.

<sup>98</sup> AREA is made up of approximately twenty ride manufacturers and has many associate members in the form of component suppliers. *Id.* at 26.

<sup>99</sup> *Id.* at 27.

<sup>100</sup> AREA finds that one of the largest obstacles to promoting safety is the lack of education and understanding of the product on the part of insurance representatives and other inspectors. AREA states that it is eager to work with states and insurance companies in improving inspection procedures and operations that "take place in the field" because it realizes the benefit of "every additional pair of eyes" examining equipment as a safeguard. *Id.* at 28.

It should be noted that although AREA's annual seminar, is open to everyone who would like to participate, no representatives of the CPSC or its regional offices attend. *Id.* at 27.

<sup>101</sup> *Id.* at 23.

<sup>102</sup> *Id.* at 24; see also *infra* notes 104-17 and accompanying text.

<sup>103</sup> Telephone interview with John Graff, Executive Director and Chief Counsel, IAAPA (March 1, 1985).

<sup>104</sup> The committee, F-24, which was responsible for this project is made up of industry, insurance company, and public interest representatives, as well as public inspectors, professional engineers, and university professors. *Id.*; see 15 ASTM, ANNUAL BOOK OF ASTM STANDARDS § 15.07 (1985) [hereinafter cited as BOOK OF STANDARDS].

<sup>105</sup> BOOK OF STANDARDS, *supra* note 104.

consideration."<sup>106</sup>

The ASTM sets forth four standards. The first, *Specification for Physical Information To Be Provided for Amusement Rides And Devices*,<sup>107</sup> covers "the minimum requirements for information regarding amusement rides and devices that shall be provided to the end user [*i.e.*, the operator or owner] by the manufacturer or seller[.]"<sup>108</sup> and is intended to provide information "necessary for the proper identification, placement, erection, and operation of each amusement ride or device."<sup>109</sup> The second standard is called *Operating Procedures for Amusement Rides and Devices*.<sup>110</sup> It requires the manufacturers to furnish detailed recommended operating instructions<sup>111</sup> with the delivery of each ride or device, and that each owner or operator familiarize himself with those instructions and specifications. Additionally, the owner or operator is required to prepare an "operating fact sheet"<sup>112</sup> to be made available to the device operator and attendant of the ride. The third standard, *Guide for Testing Performance of Amusement Rides and Devices*,<sup>113</sup> "covers basic tests [to] be conducted on amusement rides and devices . . . to determine that the performance of a given ride or device meets the manufacturer's specified design

<sup>106</sup> Amusement Ride Meeting, *supra* note 92, at 14.

<sup>107</sup> This standard is issued under the fixed designation F698. BOOK OF STANDARDS, *supra* note 104, at 427-28.

<sup>108</sup> *Id.* at 427.

<sup>109</sup> Included in this "specification" are identification devices, *e.g.*, serial numbers and name plates, both of which must be permanently affixed to the ride, along with the date on which the ride met the manufacturer's construction specifications. Additionally, the "specification" includes information regarding ride speed, power requirements, passenger capacity, recommended loading and unloading procedures, the actual amount of time the passenger spends on the moving ride, recommended passenger restrictions (for example, height, weight, and age limitations), as well as environmental restrictions (that is, restrictions relating to environmental conditions such as wind, rain, salt corrosion, and extreme heat or cold). *Id.* at 427-28.

<sup>110</sup> This standard is issued under the fixed designation F770. *Id.* at 453-54.

<sup>111</sup> Included in the manufacturer's operating instructions is a description of the operation of the ride and its motion(s) and recommendations regarding passenger loading and safety procedures, maximum passenger capacity, passenger restraint systems, safety checks, and inspections. The instructions also include recommendations for operating restrictions relating to environmental conditions, descriptions, and recommendations concerning positions and functions of ride operators and attendants, as well as recommended emergency procedures and equipment. *Id.*

<sup>112</sup> The fact sheet is to include information regarding operating policies and procedures, a description of specific duties of the ride operator or attendant, and general safety and emergency procedures. Furthermore, the owner or operator is to provide training for each operator and attendant which is to include the above-mentioned information, as well as a demonstration of the ride or device in motion. Finally, the individual operating the ride is instructed to "conduct a daily pre-opening inspection of each ride or device prior to carrying passengers," which includes operating it for a minimum of one complete operating cycle. *Id.* at 453.

<sup>113</sup> This standard is issued under the fixed designation F846. *Id.* at 541-42.



criteria."<sup>114</sup> It is intended to "establish original pertinent test data on a given ride or device which shall be used as the basis for the evaluation of the ride or device's operational performance."<sup>115</sup> The final standard included in ASTM's standards on amusement rides and devices, *Maintenance Procedures*,<sup>116</sup> "delineate[s] information for the maintenance of amusement rides and devices."<sup>117</sup>

Although compliance with ASTM standards is voluntary, amusement operators and manufacturers have strong incentives to conform to them.<sup>118</sup> The International Association of Fairs and Expositions, an organization consisting of 6,800 members, has set up a new program patterned after ASTM standards and plans to adopt those standards without modification.<sup>119</sup> Also, the IAAPA was actively involved in the development of the ASTM standards.<sup>120</sup> It has circulated them to all of its members and its Director believes that all park ride operators will abide by them.<sup>121</sup> In addition, the OABA's safety committee asserted that the ASTM standards will be followed for the manufacturing of amusement rides.<sup>122</sup> For example, regarding the issue of neces-

<sup>114</sup> This standard enumerates four periods when such testing should be conducted: (1) during prototype development; *i.e.*, the "final operational assembly of a newly developed ride or device," (2) installation or erection; *i.e.*, "the actual act of on-site construction or the physical setting up and making it ready for use of a ride or device;" (3) following major modifications; *i.e.*, "any change in either the structure or operational characteristics of the ride . . . which will alter its performance from that specified in the manufacturer's design criteria;" and (4) during normal operation.

Three types of testing are listed in this standard: (1) developmental testing by the manufacturer which is performed on a prototype ride or device so that the "manufacturer/designer may determine the appropriateness for use of not only the parts, but the entire system of a newly designed ride or device;" (2) installation testing covering "those tests relevant not only to installation, but includ[ing] post-modification and major modifications;" and (3) operational tests; *i.e.*, those tests devised by the manufacturer to be routinely performed by the owner or operator of the ride or device for the purpose of determining whether it is "operating within prescribed operational limits." *Id.*

<sup>115</sup> *Id.* at 541.

<sup>116</sup> This standard is issued under the fixed designation F853. *Id.* at 551-53.

<sup>117</sup> These "procedures" are divided into the categories of the manufacturer's and the owner or operator's responsibilities. Basically, the manufacturer is required to provide a detailed set of maintenance instructions and specifications with the delivery of each ride or device, with which the owner or operator must familiarize himself. *Id.* at 551-52. Based on these instructions, the owner or operator must implement a maintenance, testing, and inspection program, as well as provide training for the person performing the routine maintenance of the ride or device. This standard further provides that the owner or operator conduct a daily "documented and signed pre-opening inspection" prior to carrying passengers "to insure the proper operation of the ride or device." *Id.* at 552-53.

<sup>118</sup> See *Amusement Park Safety Hearings*, *supra* note 9, at 860-61 (testimony of Charles S. McDonald, President, IAAPA).

<sup>119</sup> Amusement Ride Meeting, *supra* note 92, at 16, 19.

<sup>120</sup> *Id.* at 23-24.

<sup>121</sup> Telephone interview with John Graff, *supra* note 103.

<sup>122</sup> Amusement Ride Meeting, *supra* note 92, at 79.

sary emergency back-up equipment, OABA's chairman stated that:

[t]he manufacturer knows more about the machine than anybody he will ever sell it to. He has developed—[and] engineered it and these standards are going to say on these stressful rides that need back-up equipment, that it shall be in place.<sup>123</sup>

OABA representatives believe that the ASTM standards will be instrumental in the goal that all rides manufactured have back-up equipment. Thus upon adoption and completion of the standards,<sup>124</sup> the manufacturer will not produce a ride without necessary secondary equipment.<sup>125</sup>

The ASTM standards project is broadly based and has gained wide acceptance in the industry.<sup>126</sup> Furthermore, a number of jurisdictions have incorporated or plan to incorporate these standards into their state laws.<sup>127</sup> Apparently, these standards will be a major force in the promotion of amusement park safety.

If independent inspections arranged by the insurance companies are included with state and industry inspections, ninety-five percent of all fixed rides are subject to at least one form of inspection;<sup>128</sup> sixty-five percent are inspected by both a government agency and an insurance inspector.<sup>129</sup> This may account for amusement parks' commendable safety records with respect to their rides.<sup>130</sup>

<sup>123</sup> *Id.*

<sup>124</sup> The project may never reach completion in the sense that ongoing changes will continue to be made as the need arises. *Id.* at 24. In fact, ASTM currently has an additional standard for the inspection of amusement rides and services on the ballot. *Id.* at 84.

<sup>125</sup> *Id.* at 79.

<sup>126</sup> Telephone interview with John Graff, *supra* note 103.

<sup>127</sup> This is often done by requiring consideration of these standards by the state's standard-promulgating agencies. For example, Oregon's statute states that the Department of Commerce "shall be guided by the safety standards approved by the [ASTM in adopting rules regulating and inspecting the safety of amusement rides, devices, and equipment]." OR. REV. STAT. § 460.355(1) (1985); see also PA. STAT. ANN. tit. 4, § 404(2) (Purdon Supp. 1985) (Pennsylvania's Department of Agriculture may "[p]rescribe safety standards relating to the operation and maintenance of amusement rides or attractions, . . . taking into consideration those standards adopted by the ASTM F-24 Committee and by OABA.").

<sup>128</sup> H.R. Rep. No. 1072, *supra* note 80, at 15 (Rep. Dannemeyer, dissenting views on H.R. 5790).

<sup>129</sup> *Id.*

<sup>130</sup> Amusement rides ranked 163rd on CPSC's list of 183 national hazards. The National Electronic Injury Surveillance System reported a total of approximately 13,500 injuries in the year of 1981. This total figure is for all rides including those at carnivals, fairs, parks, and also unsupervised playground equipment. Note from John Graff, Executive Director and Chief Counsel, IAAPA (March, 1985). According to CPSC data, billiards and pool are riskier than amusement rides. Dancing resulted in an estimated

## IV. PROPOSED LEGISLATION FOR FEDERAL REGULATION

Despite the fact that over one-half of the states<sup>131</sup> have legislation concerning amusement parks, and that the industry itself takes elaborate safety measures,<sup>132</sup> the House Committee on Energy and Commerce and the Senate Committee on Commerce, Science, and Transportation have been considering bills providing for CPSC jurisdiction over fixed-site rides during the last two years.<sup>133</sup>

## A. Consumer Product Safety Amendments of 1985

A bill<sup>134</sup> recently passed in the House of Representatives would grant partial jurisdiction to the CPSC over fixed-site amusement rides.<sup>135</sup> The legislation takes a limited approach be-

26,000 injuries. Bicycles appear second on the CPSC's list of common injuries. CPSC, NATIONAL ELECTRONIC INJURY SURVEILLANCE SYSTEM DATA (April 1982) (computer printout).

It should be noted that many accidents occur due to faults of riders, and many such incidents are not preventable by the industry. Associated Underwriter's, a company which underwrites amusement insurance policies, finds that almost seventy percent of claims are attributable to rider misbehavior and carelessness, such as standing up in a ride or tripping off an exit ramp before the ride has fully stopped. Amusement Ride Meeting, *supra* note 92, at 87-88 (statement of Mr. Yungel). Other incidents where rider misbehavior was the major factor contributing to injury or death involved such conduct as riders deliberately leaving the compartment of a whirling ride, or running out onto the electrified floor of a bumper car ride before the ride was completed. Memorandum to Terrence M. Scanlon, Chairman CPSC (May 23, 1985) (discussing injuries and deaths associated with amusement rides).

<sup>131</sup> See *supra* notes 74-80 and accompanying text.

<sup>132</sup> See *supra* notes 92-130 and accompanying text.

<sup>133</sup> See *infra* notes 134-73 and accompanying text.

<sup>134</sup> Consumer Product Safety Amendments of 1985, H.R. 3456, 99th Cong., 1st Sess., 132 CONG. REC. H380, H396-97 (daily ed. Feb. 6, 1986) [hereinafter cited as Amendments of 1985].

As a historical note, this bill was originally introduced by Representatives Paul Simon and Henry Hyde of Illinois, as amended by Representative Henry Waxman of California. H.R. 5790, 98th Cong., 2d Sess., 130 CONG. REC. H10,617, H10,619 (daily ed. Oct. 2, 1984). The House of Representatives passed the bill by a vote of 300 to 119 under a suspension of rules, an expedited procedure used for noncontroversial measures requiring a two-thirds vote for passage. 130 CONG. REC. at H10,622. The Senate, however, took no action on this bill during the final session of the Ninety-Eighth Congress. Consequently, it was reintroduced in substantially the same form in the Ninety-Ninth Congress as part of the CPSC's reauthorization bill by Representatives Henry Waxman of California, Richard Shelby of Alabama, Ron Wyden of Oregon, Thomas Luken of Ohio, and James Brayhill of North Carolina. 130 CONG. REC. at H10,622.

<sup>135</sup> This bill, reauthorizing the CPSC through fiscal year 1987 at \$36 million, and directing the General Accounting Office to conduct a study of the structure and function of the CPSC, passed on February 6, 1986 by a vote of 298 to 81. Amendments of 1985, *supra* note 134, at H395-96 (daily ed. Feb. 6, 1986). An amendment offered by Representative William E. Dannemeyer of California to establish a study commission to investigate the feasibility of federal regulation of fixed-site amusement rides was defeated by a vote of 198 to 179. *Id.* at H388-89, H394-95.

The Dannemeyer amendment would have circumvented a provision in the bill giving the agency jurisdiction over rides that are involved in deaths or injuries and have a safety defect, and would have postponed any CPSC regulation of fixed-site rides pend-

cause it prohibits the CPSC from conducting routine investigations of amusement park rides in states which have inspection programs.<sup>136</sup> The CPSC would be empowered to inspect an amusement ride in such states only in the event of an amusement ride accident involving a fatality or personal injury requiring hospitalization.<sup>137</sup> In addition, the CPSC would be prohibited from issuing industry-wide product safety standards or banning any permanently fixed amusement ride.<sup>138</sup>

The new bill also requires that any amusement ride operator<sup>139</sup> "who obtains information which indicates a death or serious injury occurred on an amusement ride the operator owns and which reasonably supports the conclusion that the amusement ride contains a defect which could create a substantial product hazard"<sup>140</sup> to immediately inform the CPSC of the defect.<sup>141</sup> This differs significantly from the bill introduced in the last Congress.<sup>142</sup> The current reporting requirement is less onerous<sup>143</sup> and alleviates the problem of enforceability presented by

ing the results of the study. *Id.* at H388-89. The bill, as passed by the House, retains its language giving the agency partial jurisdiction over the rides. See *supra* notes 136-37 and accompanying text. The bill will now go to the Senate, which is likely to call for a conference to work out differences between this bill and the Senate's bill to reauthorize the CPSC. S. 1077, 99th Cong., 1st Sess., 131 CONG. REC. S 10,010 (daily ed. July 24, 1985). The Senate bill would, instead of granting CPSC limited jurisdiction of fixed-site rides, set up a study commission as the Dannemeyer amendment does. Also, the Senate version would reauthorize the CPSC at \$35 million for two years. 131 CONG. REC. S 10,010. For a review of the Senate's bill, see *infra* notes 167-73 and accompanying text.

<sup>136</sup> Amendments of 1985, *supra* note 134, at H397. Section 404 of this bill amends the inspection provision of the Act, 15 U.S.C. 2065(a), granting the CPSC authority to inspect:

- (A) amusement rides which are not permanently fixed to a site, and (B) amusement rides which are permanently fixed to a site if the State in which the ride is located does not have [authority to inspect the ride or if the ride was] involved in a fatality or a personal injury requiring hospitalization.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* Section 401 of this bill provides that an amusement ride which is permanently fixed to a site is not a consumer product for purposes of sections 7 and 8 of the Act (15 U.S.C. §§ 2056-2057). *Id.* Sections 7 and 8 of the Act provide respectively for CPSC authority to issue industry-wide safety standards and to ban products which present an unreasonable risk of injury.

<sup>139</sup> "Amusement ride operator" is defined as the owner of an amusement ride. *Id.* § 401.

<sup>140</sup> *Id.* The Act provides for civil and criminal penalties if the ride operator fails to comply with this provision. 15 U.S.C. §§ 2069-2070.

<sup>141</sup> See *supra* note 23 (definition of a substantial product hazard).

<sup>142</sup> Under the current bill, a report only would be needed in case of incidents involving death or serious injury.

<sup>143</sup> Under the earlier bill, any amusement ride operator would be required to report to the CPSC "a defect which could create a substantial product hazard." H.R. 5790, 98th Cong., 2d Sess., 130 CONG. REC. H10,617 (daily ed. Oct. 2, 1984). This appears reasonable on its face. However, the bill did not distinguish the varying degrees of defects. For example, a defect which could be corrected by routine maintenance, such as a loose bolt, and a more serious defect would both appear to require reporting. Thus the ride operator would have been in a double bind. If the CPSC found that he did not

the earlier bill.<sup>144</sup>

This new bill is clearly aimed at encouraging ride safety legislation at the state and local levels. It appears to promote such legislation by exempting from CPSC inspection all fixed-site rides in states which have enactments.<sup>145</sup> This provision is apparently designed to provide incentives for states to enact their own legislation. While this is a laudable goal, it is doubtful that this bill will result in greater state supervision. First, the exemption from inspection does not extend to the Act's other requirements, for example, the Act's section fifteen reporting requirements.<sup>146</sup> Second, the exemption will not apply if an accident results in serious injury or death, even if the ride is inspected by state authorities.<sup>147</sup> The unintended and counterproductive effect of this could be to discourage state or local action. It is likely that state and local governments will defer to the CPSC believing that since the CPSC, for all intents and purposes is going to regulate, the imposition of duplicative requirements on amusement parks within their jurisdictions will be unnecessary. For example, in 1985, the Georgia legislature passed legislation requiring regulation of rides "other than those regulated by the [CPSC]."<sup>148</sup> Ironically, the end result could be less effective regulation creating a more dangerous situation for riders.

Another concern is that this legislation could create a false public perception that a CPSC program regulating fixed-site

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report a defect, no matter what type, he could have been subject to serious civil or criminal penalties. Moreover, if routine maintenance problems were reported, business could suffer as such information spread.

<sup>144</sup> Recalling that the reporting requirement was applicable to all operators of fixed-site rides, whether or not state inspection provisions existed, the practicability of its enforcement was an issue. The CPSC was—and is under the current bill—authorized to require the ride operator to take corrective action if the CPSC determined that such action was in the public interest. However, it is difficult to imagine how the CPSC could have made that determination, much less implemented a corrective plan without any inspection, a power which the CPSC would hold only in cases where there is a fatality, serious injury, or no state legislation.

<sup>145</sup> Amendments of 1985, *supra* note 134, at H397 (section 404 of the bill). Note that this exemption applies only in the absence of an accident resulting in a fatality or injury requiring hospitalization. *Id.*

<sup>146</sup> Section 15(b) of the Act provides that a manufacturer, distributor, or retailer of a consumer product must inform the CPSC when he obtains information supporting the conclusion that a product fails to comply with a consumer product safety rule or contains a substantial product defect. If the CPSC determines that a substantial product hazard exists, section 15(c) allows the CPSC to order the manufacturer, distributor, or retailer to do one or more of the following: (1) give public notice of the defect, (2) mail notice to each person who is a manufacturer, distributor, or retailer of the defective product, and (3) mail notice to everyone the person required to give notice knows who received or bought the product.

<sup>147</sup> See *supra* note 136.

<sup>148</sup> GA. CODE ANN. § 34-12-2(2) (Supp. 1985).

amusement rides would eliminate, or at least markedly reduce, injuries resulting from amusement rides and assure their safety. One of the Commissioners points out that this may be a misconception.<sup>149</sup>

There are provisions of the bill which present questions related to the intended scope of the proposed amendment and its impact on the CPSC and the public. First, section 404 of the bill authorizes the CPSC to inspect amusement rides which were "involved in a fatality or a personal injury."<sup>150</sup> The meaning of "involved" as used in this provision is unclear and could mean for example, "associated with," "casually connected," or "caused by." The connotation of each of these is different and the level of liability would depend on which connotation is chosen.

Additionally, section 404 of the bill permits CPSC inspection of fixed-site amusement rides if the state does not have such inspection authority. However, since state inspection laws vary,<sup>151</sup> this provision leaves open the question of what type of state inspection authority would preclude CPSC inspection. For example, a state may require inspection during the ride's installation or erection, or an inspection of only a portion of the ride such as its electrical system, or inspection for reasons other than consumer safety, such as occupational safety.<sup>152</sup> It is unclear whether such state inspection provisions would preclude CPSC inspection. Furthermore, state inspection authority may undergo constant changes. As a result, the CPSC would have to constantly monitor all state legislative activity which would affect the states, and in turn would affect the CPSC's inspection authority.<sup>153</sup>

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<sup>149</sup> Vice-Chairman Armstrong testified that:

The [CPSC's] efforts related to amusement rides, both prior to the 1981 amendments and at present, have been primarily *reactive* due to practical considerations, not the least of which are limited [CPSC] resources and staff; the variety and technical complexity of amusement rides and the widely-scattered locations of amusement rides. These factors have led the [CPSC] to focus primarily on investigation of catastrophic incidents and monitoring of remedial action programs in section 15 cases. I cannot, at present, foresee a change in the [CPSC's] basic approach to the issue of amusement ride safety, the scope of the agency's jurisdiction notwithstanding.

*Amusement Park Safety Hearings, supra* note 9, at 802 (testimony of Sandra Brown Armstrong).

<sup>150</sup> See *supra* note 136.

<sup>151</sup> See *supra* notes 74-79 and accompanying text.

<sup>152</sup> See *Amusement Park Safety Hearings, supra* note 9, at 797 (testimony of Sandra Brown Armstrong).

<sup>153</sup> *Id.*

B. *Hyde's Joint Resolution*<sup>154</sup>

Representative Henry Hyde of Illinois believes that a different approach to amusement park safety legislation should be taken and introduced a bill<sup>155</sup> which would have created a temporary commission, the National Commission on Amusement Ride Safety (Ride Safety Commission),<sup>156</sup> "charged with assessing the present status of ride safety efforts, public and private."<sup>157</sup> The five-member Commission<sup>158</sup> would have submitted a report of its findings and conclusions to the President in eighteen months. Additionally, this report would have included recommendations for legislative, administrative, or other action.<sup>159</sup> For the purpose of fulfilling its duties under this joint resolution, the Ride Safety Commission would have "h[e]ld such hearings, s[a]t and act[ed] at such times and places, take[n] such testimony and receive such evidence" as it consider[ed] appropriate.<sup>160</sup>

C. *Guarini/Eckhart Proposal (The Amusement Park Safety Act)*

Congressman Frank Guarini introduced legislation<sup>161</sup> "[t]o

<sup>154</sup> Joint resolutions are used interchangeably with bills by legislative bodies to introduce new legislation. Generally, they are used to authorize investigations by Congress, propose amendments to the Constitution, and to extend temporarily or suspend existing statutes. M. COHEN, *HOW TO FIND THE LAW* 89 (1976).

<sup>155</sup> H.R.J. Res. 230, 99th Cong., 1st Sess. (1985). Representative Hyde was a co-sponsor of the 1984 bill, H.R. 5790. See *supra* note 134. However, he recognized many of the problems and expressed deep concern "over the many legitimate arguments of those opposed to [that] legislation." See 131 CONG. REC. E 1330 (daily ed. Apr. 3, 1985) (remarks of Rep. Hyde). Consequently, he did not support the amusement park ride provision of the bill, which recently passed in the House giving the CPSC partial jurisdiction over fixed-site amusement park rides. See *supra* note 134 and accompanying text.

<sup>156</sup> This legislation takes a similar approach to that legislation which established the National Commission on Product Safety. That Commission's study resulted in the enactment of the Consumer Product Safety Act which established the CPSC. See *supra* notes 12-28 and accompanying text.

<sup>157</sup> 131 CONG. REC. E 1330 (daily ed. Apr. 3, 1985). The Commission's investigation will include a review of:

- (a) federal, state, and local laws regulating the amusement ride industry;
- (b) existing voluntary comprehensive ride safety standards; and
- (c) self-regulation mechanisms within such industry.

H.J. Res. 230, *supra* note 155, at 3. The Commission will also determine the scope of coverage, the effectiveness of available sanctions or enforcement mechanisms, the adequacy of investigative powers for each law, standards, and self-regulation mechanism. H.R.J. Res. 230, *supra* note 155, at 3-4.

<sup>158</sup> The Commission will consist of:

- (1) the National Bureau of Standards Director who would be chairman,
- (2) the CPSC Chairman, who would be vice-chairman, (3) a representative from the amusement ride industry with a background in ride safety, (4) a state agency representative which oversees ride safety, and (5) a consumer representative. H.J. Res. 230, *supra* note 155, § 2.

<sup>159</sup> *Id.* § 3.

<sup>160</sup> *Id.* §§ 4-5.

<sup>161</sup> H.R. 667, 99th Cong., 1st Sess. (1985).

amend the Consumer Product Safety Act to strengthen the authority of the [CPSC] over amusement parks."<sup>162</sup> This bill would have, in addition to including fixed-site rides in the definition of consumer product, included "any amusement building or other facility which is located on the same premises as an amusement device for which an entry fee or its equivalent is charged."<sup>163</sup> This provision is intended to cover the "Haunted Mansion" type of attractions,<sup>164</sup> such as the one in which eight teenagers were killed and seven others injured on May 11, 1984 due to a fire.<sup>165</sup>

D. *Consumer Product Safety Commission Authorization Act of 1985*

The Senate passed a bill<sup>166</sup> reauthorizing the CPSC which also included provisions dealing with amusement ride safety.<sup>167</sup> This bill approaches the issue of amusement ride safety from a standpoint different from the reauthorization bill passed in the House of Representatives.<sup>168</sup> The Senate bill would establish a ride safety commission, to conduct an eighteen-month study to investigate the "scope and adequacy of safety measures employed to protect the public from unreasonable risks of injury from amusement rides."<sup>169</sup> At the end of the investigatory pe-

<sup>162</sup> Representative Guarini is now supporting H.R. 3456, the bill which has just passed in the House of Representatives. 132 CONG. REC., 99th Cong., 2d Sess. H 382 (daily ed. Feb. 6, 1986).

<sup>163</sup> H.R. 667, *supra* note 161, § 2. As a historical note, when Mr. Guarini originally introduced this bill, the provision dealing with the entry fee was not included. This new provision alleviates to some degree a problem in the 1984 bill. Without the entry fee provision, the bill raised difficult issues of scope and definition and could have extended the CPSC's jurisdiction into areas which were probably beyond the intended scope of the amendments. Two key phrases "amusement building" and "other facility which is located on the same premises" were left undefined and vague as to the bill's intended reach. If this language contained no further modification or clarification, the provision could be read to include structures which were unrelated to amusement but which happened to be "located on the same premises," for example, the hot dog stand, restaurants, restrooms, and parking areas. However, it is conceivable that parking areas could still come under CPSC jurisdiction under the newer version if a parking fee were charged.

<sup>164</sup> In his testimony, Representative Guarini stated that:

We must reestablish the authority of the [CPSC] to inspect fixed-site amusement parks such as Great Adventure. Also, in order to prevent the type of tragedy that occurred at Great Adventure on May 11 [1984], we must for the first time allow the [CPSC] to inspect amusement buildings or facilities on park premises.

*Amusement Park Safety Hearings, supra* note 9, at 748 (testimony of Rep. Frank J. Guarini).

It should be noted that Representative Guarini's use of the word "reestablish" is erroneous. It was never clear that the CPSC ever had authority to inspect fixed-site amusement park rides. See *supra* notes 29-38 and accompanying text.

<sup>165</sup> See *supra* note 1.

<sup>166</sup> S. 1077, *supra* note 135.

<sup>167</sup> *Id.* §§ 201-202.

<sup>168</sup> See *supra* notes 134-53.

<sup>169</sup> S. 1077, *supra* note 135, § 201(6)(c)(1).

riod, the Ride Safety Commission would present a final report of its findings and recommendations to the President and Congress. This approach is similar to that taken in the Joint-Resolution proposed by Representative Hyde.<sup>170</sup>

This bill differs from the Joint-Resolution in that the National Bureau of Standards (NBS)<sup>171</sup> would be authorized to investigate serious accidents involving fixed-site rides if the appropriate state or local authority so requested, during the period of time when the Ride Safety Commission is making its determination.<sup>172</sup> NBS would retain this authority until Congress enacted or decided not to enact ride safety legislation based on the Ride Safety Commission's report.<sup>173</sup>

## V. FIXED-SITE AMUSEMENT RIDES SHOULD NOT BE FEDERALLY REGULATED

### A. Present Ability of a Federal Agency to Regulate

Although amusement park patrons should expect that these recreational activities will be safe, the solution to amusement park safety does not lie in federal regulation.

In order to justify a costly federal program, it should be clear that such a program would significantly improve safety. How-

<sup>170</sup> See *supra* notes 154-60 and accompanying text.

<sup>171</sup> The NBS' overall goal is to "strengthen and advance the Nation's science and technology and to facilitate their effective application for public benefit." Accordingly, among the functions of the NBS are conducting research, providing scientific and technological services for industry and government, ensuring United States involvement in domestic and international product standardization activities, and maintaining technical services to promote public safety. OFFICE OF THE FEDERAL REGISTER, UNITED STATES GOVERNMENT MANUAL 139 (1984).

Included in the organizational structure of the NBS is the National Engineering Laboratory which:

provide[s] technology and technical services to users in the public and private sectors to address National needs and to solve National problems in the public interest; conduct[s] research in engineering and applied science in support of objectives in these efforts; . . . develop[s] test methods and propose[s] engineering standards and code changes; develop[s] and propose[s] new engineering practices; develop[s] and improve[s] mechanisms to transfer results of its research to the ultimate user . . . .

43 Fed. Reg. 15,475 (1978).

Senator Danforth believes that the NBS is the federal agency with the expertise to investigate accidents thoroughly. The NBS has a large number of physicists, engineers, computer scientists, chemists, mathematicians, and metallurgists on its staff. The NBS has successfully investigated incidents such as the skywalk collapse at a Kansas City hotel and the roof collapse at the Hartford Civic Center. Mr. Danforth believes that the NBS could successfully investigate amusement park accidents with consideration of technological factors. See 131 CONG. REC., S 10,006 (daily ed. July 14, 1985) (statement of Sen. Danforth).

<sup>172</sup> S. 1077, 99th Cong., 1st Sess., 131 CONG. REC. 10,011 (daily ed. July 24, 1985).

<sup>173</sup> See S. 1077.

ever, it is uncertain whether any federal agency has sufficient resources or expertise to regulate the amusement ride industry at this time. The CPSC for example, does not have the manpower, financial resources, or technical expertise to ensure the safety of the amusement rides scattered throughout the states.<sup>174</sup> For example, the safety regulation of more than 15,000 consumer products is presently within the jurisdiction of the CPSC. An estimated 2.5 million manufacturers, distributors, retailers, and importers—approximately one-half of all businesses in the United States—are within the CPSC's responsibility.<sup>175</sup> Additionally, the CPSC has experienced financial cutbacks and staff reduction. Budget cuts have forced the CPSC to:

cancel or delay investigations of deaths and injuries associated with many consumer products. On-site investigation of injuries associated with priority projects have been delayed for weeks in order for investigators to bunch cases to reduce travel costs. The agency has closed several major investigations into potentially severe hazards in part because the agency did not have resources to do the extensive research necessary to determine properly the existence of a hazard.<sup>176</sup>

Personnel reductions ordered by the Office of Management and Budget have resulted in a reduction of full-time positions from almost 1,000 in 1981 to approximately 600 in 1984;<sup>177</sup> only twenty-five of whom are engineers. These reductions "have seriously damaged the agency's ability to enforce the laws under its jurisdiction [and] have resulted in parallel reductions in vital agency func-

<sup>174</sup> The former Chairman of the CPSC stated that:

ensuring the safety of the nation's amusement rides scattered throughout the 660 parks in all fifty states is a task far too large for the [CPSC's] personnel and financial resources and well beyond its technical expertise. The [CPSC] employs fewer than 600 people; only 25 of these are engineers. Currently, these professionals are engaged in the congressionally mandated tasks of maximizing consumer safety in such products as hair dryers, pacifiers and toy chests.

To provide jurisdiction over 660 fixed-site parks without the ability to properly inspect them, as obviously we could not, would be nothing short of a regulatory mirage.

*Amusement Park Safety Hearings*, *supra* note 9, at 772 (testimony of Terrence M. Scanlon).

<sup>175</sup> H.R. REP. NO. 114, 97th Cong., 1st Sess. 50 (1983).

<sup>176</sup> *Id.* at 7.

<sup>177</sup> *Id.* at 11.

The House bill which passed on February 6, 1986 requires the CPSC, "[s]ubject to the availability of appropriations [to] employ on a permanent basis . . . the full-time equivalent of 568 officers and employees." 132 CONG. REC. H396 (daily ed. Feb. 6, 1986). The purpose of this provision is to maintain the personnel level at that set by the Office of Management and Budget for the 1986 fiscal year. See *id.* at 381 (statement of Rep. Madigan).

tions."<sup>178</sup> For example, "[s]ince fiscal year 1981, inspections have decreased forty-four percent, checks to determine the effectiveness of recalls have been reduced sixty-four percent and investigations of potential product safety hazards have been reduced fourteen percent."<sup>179</sup>

As a result of its limited financial resources, the CPSC must determine which hazards involving consumer products within its jurisdiction are the most serious. It must concentrate its resources on these hazards in order to effectively carry out its functions. The CPSC considers several factors when establishing or revising these priorities, including: the frequency and severity of injuries associated with a product, the likelihood of future injuries, the cost of CPSC action weighed against the expected benefit to society, the unforeseen nature of the risk, the probability that a consumer will be exposed to the hazard, and the vulnerability of the population at risk, such as children, elderly, and handicapped persons.<sup>180</sup> Nine priority projects were identified by the CPSC in its 1985 budget request,<sup>181</sup> and amusement rides were not among them; nor were they included on the 1984 list.<sup>182</sup>

One commissioner has stated that the CPSC did not make "remarkable achievements in eliminating most of the causes of [amusement ride] accidents, even in . . . years when it had a greater staff complement and a larger budget."<sup>183</sup> In addition, as of May, 1984, fifty percent of the fatalities involving amusement rides occurred on mobile rides which are under CPSC jurisdiction.<sup>184</sup> One commissioner describes efforts regarding amusement rides as "essentially reactive."<sup>185</sup> Practical considerations such as limited financial resources and personnel, the variety and complexity of rides, and geographically dispersed sites of rides "have led the . . . CPSC to focus primarily on investigation of catastrophic incidents and monitoring of remedial action programs in section 15 cases."<sup>186</sup> According to this commissioner, the CPSC's basic approach is not likely to change

<sup>178</sup> H.R. REP. NO. 114, *supra* note 175, at 10.

<sup>179</sup> *Id.*

<sup>180</sup> 16 C.F.R. § 1009.8 (1984).

<sup>181</sup> 49 Fed. Reg. 24,043-44 (1984). The nine 1985 priority projects identified by the CPSC included: chlorocarbons, electrocution hazards, fire toxicity, gas heating systems, indoor air quality, nursery equipment, portable electric heaters, riding mowers, and safety for older consumers.

<sup>182</sup> 49 Fed. Reg. 24,044.

<sup>183</sup> *Amusement Park Safety Hearings*, *supra* note 9, at 790 (testimony of Sandra Brown Armstrong).

<sup>184</sup> *Id.* at 771 (testimony of Terrence M. Scanlon).

<sup>185</sup> *Id.* at 789 (testimony of Sandra Brown Armstrong).

<sup>186</sup> *Id.*

"the scope of the agency's jurisdiction notwithstanding."<sup>187</sup>

While it is clear that the CPSC has genuine practical problems which prohibit its effective regulation of amusement rides, it is uncertain whether any other federal agency has sufficient resources or expertise to adequately regulate the amusement ride industry. It has been suggested that the NBS has the expertise to handle amusement rides.<sup>188</sup> However, budget realities which have affected congressional appropriations to the CPSC are likely to affect the budget and staff of federal agencies across the board.

The danger of instituting federal safety legislation which cannot be effectively carried out has already been shown.<sup>189</sup> In brief, the likely result is that state and local action will be inhibited since they are likely to defer to the federal agency in charge rather than duplicate that agency's efforts. Thus, if authority is given to an agency which does not have the resources or staff to properly carry out an effective safety program, safety conditions could become more hazardous.

#### B. *The States and the Industry Should Regulate Amusement Rides*

The Senate's approach to the issue of amusement park safety legislation, and an approach which several House members support, indicates that Congress does not currently see an overwhelming need for federal regulation. The supporters of this legislation acknowledge the probability of more effective legislation at the state level. Senator Danforth, who introduced the Senate bill, urges a presumption in favor of state and local legislation.<sup>190</sup>

States have demonstrated an increased awareness of the issue of amusement park safety and their willingness to address it. An increased number of states have enacted legislation and many have revised their statutes to make them more comprehensive.<sup>191</sup> Because amusement parks bring revenue to the states, states have an interest in maintaining their popularity and continued public patronage. Additionally, states have closer control of their amusement parks and are better able to monitor the occurrence of accidents in their individual states. Furthermore, there is evidence that states can implement efficient inspection programs

<sup>187</sup> *Id.*

<sup>188</sup> *See supra* note 172.

<sup>189</sup> *See supra* note 148 and accompanying text.

<sup>190</sup> *See* 131 CONG. REC., S 10006 (daily ed. July 24, 1985).

<sup>191</sup> *See supra* notes 81-91 and accompanying text.

which would cost less than federal inspection.<sup>192</sup>

The amusement ride industry actively polices the safety of amusement rides and encourages adoption of the ASTM standards by ride manufacturers, park owners, and operators.<sup>193</sup> These standards will bring uniformity to inspection and maintenance procedures followed throughout the industry.

Although industry representatives believe that ASTM standards will be voluntarily followed by manufacturers and park owners, industry organizations could increase their incentives to do so. For example, the IAAPA could issue a "seal of approval" to be prominently displayed at the ticket window of each ride for those rides which comply with ASTM standards. Alternatively, ride manufacturers and operators could indicate on their equipment and in their advertising that their rides comply with these standards. Consumers could then determine whether a ride complies before they choose to ride it. Furthermore, the industry could encourage the enactment of legislation in those states which lack or have inadequate legislation. Industry representatives could participate in the drafting of a model state statute. Finally, a privately sponsored informational clearinghouse could be established to alert amusement park owners when potential hazards are found and accidents occur.

## VI. CONCLUSION

In 1981 Congress decided to exclude fixed-site amusement rides from federal regulation.<sup>194</sup> Congress is currently reexamining the issue of amusement ride safety, although the Senate and House take different approaches to this issue.

The House of Representatives has recently passed a bill granting the CPSC limited authority over fixed-site amusement rides.<sup>195</sup> Inspections will take place only in the event of death or serious injury, or if a state does not have its own legislation. However, this bill does not provide for routine preinspection of these rides. Indeed, the CPSC is not equipped to handle such

<sup>192</sup> For example, North Carolina incorporated amusement ride inspections into its existing elevator inspection program. *See* N.C. GEN. STAT. § 143-139 (1983). It is reported that a yearly 2,596 on-site inspections take place at an estimated cost of nine dollars per hour and twenty-two cents per mile making an approximate total of \$34,000 per year. This figure constitutes fourteen percent of North Carolina's total inspection budget. 132 CONG. REC. H391 (daily ed. Feb. 6, 1986) (statement of Rep. Boner). By way of comparison, the Congressional Budget Office estimated that it would cost the CPSC \$2.5 million per year to inspect the nation's amusement parks. 132 CONG. REC. H391.

<sup>193</sup> *See supra* notes 92-127 and accompanying text.

<sup>194</sup> *See supra* notes 66-72 and accompanying text.

<sup>195</sup> *See supra* notes 134-44 and accompanying text.

inspection. Furthermore, this bill does not effectively encourage states to enact their own laws regulating the amusement park industry. The Senate has also passed a bill dealing with amusement park safety. This bill established an eighteen-month study commission to determine the need for federal regulation.<sup>196</sup> Even before this commission has made any conclusions, the proponent of this bill has urged a presumption in favor of state regulation.<sup>197</sup>

States are closest to their amusement parks and are better suited to regulate this industry. Individual states have been drafting new regulatory statutes and improving on legislation which is inadequate. The amusement park industry has demonstrated that it is responsible and maintains an admirable safety record. Furthermore, both the states and the industry are incorporating the ASTM standards into their safety programs. Therefore, unless present matters change significantly, effective amusement ride safety regulation lies with these bodies rather than with the federal government.

*Susan J. Reiss*

<sup>196</sup> *See supra* notes 166-73 and accompanying text.

<sup>197</sup> *See supra* note 190 and accompanying text.