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

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

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1. The terms "reimbursement," "compensation," and "funding" are used synonymously in this Article to mean voluntary payment from agency resources for expenses incurred by public participants in administrative proceedings. The words "public" and "citizen" are employed interchangeably to mean "non-industry." The terms "involvement," "participation" and "activity" are used synonymously to mean input intended to contribute to the resolution of issues in proceedings. "Efficacy" and "effectiveness" are employed interchangeably to describe the impact public participation has on agency decisionmaking.

2. I have ascribed discontinuation to "judicial interpretation, antiregulatory reaction, budget-cutting, and bureaucratic caution." Tobias, Of Public Funds and Public Participation: Resolving the Issue of Agency Authority to Reimburse Public Participants in Administrative Proceedings, 82 COLUM. L. REV. 906, 955 (1982). Although citizen funding was not discontinued officially by many agencies until 1982 and several still are authorized to provide compensation, it was effectively discontinued with the advent of the present Administration. See infra notes 46-49 and accompanying text.
ate to evaluate some compensated participation to ascertain its quality and how the involvement affected government decisional processes. One way of accomplishing this is to examine reimbursed citizen activity in initiatives conducted by the Consumer Product Safety Commission (CPSC). That agency paid many individuals and groups involved in numerous proceedings during a nine-year period to perform a number of tasks in diverse contexts.³

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

I. ORIGINS AND DEVELOPMENT OF PARTICIPANT REIMBURSEMENT

A. Government-wide Participant Reimbursement

1. Origins and Early Development

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

³. See infra text accompanying notes 68-99.
⁵. See, e.g., the sources cited supra note 4; Gellhorn, Public Participation in Administrative Proceedings, 81 YALE L.J. 359 (1972); Lazarus & Onek, The Regulators and the People, 57 VA. L. REV. 1069 (1971) and the sources cited therein.
⁶. These theories and other explanations for industry-oriented decisionmaking are explored in Cramton, The Why, Where and How of Broadened Public Participation in the Administrative Process,
critiques of the administrative process, however, mention the participatory discrepancy in agency proceedings between regulated parties and non-commercial interests. Because the information on which administrative officials premise their determinations is submitted principally by regulated entities, agency choices predictably reflect the perspectives of industry interests. A primary reason for the disparities in involvement and input of non-commercial and regulated parties is the substantial expense of participation in administrative initiatives. The view thus evolved that if the public could enhance agency decisionmaking by providing more balanced involvement and data, but was stymied by resource deficiencies, the government should encourage non-commercial participation by affording economic assistance. Citizen funding was one response to these considerations.

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

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

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

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


11. Of course, numerous additional solutions have been proposed to the problem of participatory imbalance and to other difficulties that plague administrative decisionmaking and government. Some are explored in the sources cited supra notes 4, 5, 7 and S. REP. NO. 94-863, 94th Cong., 2d Sess. 3 (1976). For recent expositions, see A Symposium on Administrative Law, The Uneasy Constitutional Status of the Administrative Agencies, 36 AM. U.L. REV. No. 2 (1987); Stewart, Reconstitutive Law, 46 MD. L. REV. 86 (1986). Moreover, the account in this paragraph is premised on an "interest representation" model of the administrative process propounded most comprehensively in Stewart, supra note 4. Models are matters for ongoing debate. See, e.g., Bruff, Legislative Formality, Administrative Rationality, 63 TEX. L. REV. 207 (1984); Sunstein, Factions, Self-Interest, and the APA: Four Lessons Since 1946, 72 VA. L. REV. 271, 281-92 (1986). Cf. Cass,
In 1969, the Administrative Conference of the United States (ACUS) and the Federal Trade Commission (FTC) explored ideas which were the conceptual predecessors of participant reimbursement. After studying the involvement of indigent people in federal rulemaking, the Administrative Conference recommended that agencies compensate such individuals for the personal expenditures and lost wages they incurred when participating in administrative hearings and that Congress provide the requisite resources for this activity.\(^\text{12}\) The Federal Trade Commission examined funding in the context of extending financial assistance to impecunious respondents charged in unfair practice proceedings.\(^\text{13}\) During 1970, the FTC continued to wrestle with the reimbursement concept,\(^\text{14}\) and two commentators analyzed the possibility of government sponsorship of public involvement and found that participant funding warranted additional exploration.\(^\text{15}\) In 1971, the members of the Administrative Conference supported the expansion of citizens' rights to participate in agency initiatives but rejected a recommendation that contemplated practical implementation of reimbursement.\(^\text{16}\) Moreover, the FTC commissioners, who strongly disagreed about the legality and advisability of compensation asked the Comptroller General of the United States whether the agency possessed sufficient authority to pay fees and costs incurred by indigent respondents and impecunious intervenors.\(^\text{17}\) When


\(^{13}\) See American Chinchilla Corp., 76 F.T.C. 1016, 1037-38 (1969).


\(^{15}\) See Lazarus & Onek, *supra* note 5, at 1098-1103.


\(^{17}\) See *In re Firestone Tire and Rubber Co.*, 78 F.T.C. 1572, 1573 (1971) (interlocutory order); Letter from Miles W. Kirkpatrick, Chairman, FTC, to Elmer B. Staats, Comptroller General (Mar. 17, 1971). "The Comptroller General is the head of the General Accounting Office (GAO), an independent agency within the legislative branch created as a fiscal watchdog of the agencies," who is authorized to issue opinions about agency power to spend appropriated money. Tobias, *supra* note 2, at 912 n.52. *Cf.* id. (additional discussion of Comptroller and official's responsibilities). The terms "power" and "authority" are used interchangeably in this Article to describe the means by which
the financial officer answered the next year that such activity "would constitute a proper exercise of administrative discretion,"\textsuperscript{18} the Federal Trade Commission relied upon its implied power to fund participant involvement in one agency proceeding.\textsuperscript{19}

2. Decisions of the Comptroller General

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

3. Congressional Activity

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

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

\textsuperscript{19} \textit{See In re Firestone Tire & Rubber Co.}, 81 F.T.C. 1032 (1972).

\textsuperscript{20} For a discussion of the Comptroller's opinions, see Tobias, \textit{supra} note 2, at § I.C.2.


\textsuperscript{22} See, e.g., 44 Fed. Reg. 17,507 (1979); \textit{id.} at 23,046, 70,743.

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

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

4. Agency and Presidential Activity

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

\textsuperscript{30} For a discussion of these legislative proposals, see Tobias, supra note 2, at 917-18. For a discussion of additional significant Congressional activity in the authorization process, see id. at 914-18.
\textsuperscript{31} For a discussion of this legislative activity, see id. at 914-17.
\textsuperscript{32} For a discussion of this legislative activity, see id. at 914-17.
\textsuperscript{33} The five agencies are the Environmental Protection Agency, the Federal Aviation Administration, the Department of Health and Human Services, the Department of Housing and Urban Development and the Department of Agriculture. See OFFICE OF TOXIC SUBSTANCES, U.S. ENVI-
funded non-industry interests in two instances, and the Department of Energy (DOE) and the Food and Drug Administration (FDA) did so in three.\textsuperscript{34} The National Oceanic and Atmospheric Administration (NOAA) of the Commerce Department reimbursed citizen participants in three proceedings involving marine sanctuaries and three rulemakings.\textsuperscript{35} The National Commission on Air Quality (NCAQ) paid the expenses of members of the public who attended ten workshops and a number of meetings held in regional study areas.\textsuperscript{36} The State Department compensated individuals to serve as private-sector advisers on United States delegations to fifteen sessions in which international commodity and civil aviation agreements were negotiated,\textsuperscript{37} as well as to attend nine meetings of the Department’s Advisory Committee on International Investment, Technology and Development, several intra-agency meetings and a “consumer affairs seminar.”\textsuperscript{38} The National Highway Traffic Safety Administration (NHTSA) of the Department of Transportation (DOT) reimbursed many non-regulated people and groups in fourteen initiatives, most of which pertained to standard-setting.\textsuperscript{39} The Federal Trade Commission relied upon explicit statutory au-


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


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

\textsuperscript{38} See id.

\textsuperscript{39} See DOT DEMONSTRATION PROGRAM TO PROVIDE FINANCIAL ASSISTANCE TO PARTICIPANTS IN ADMINISTRATIVE PROCEEDINGS: NHTSA EVALUATIONS AND RECOMMENDATIONS (1977).
authority to compensate a large number of non-commercial parties in eighteen hybrid rulemakings and upon implied power to fund one entity in another proceeding.\textsuperscript{40}

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

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

\textsuperscript{40} See Rulemaking Under the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (June 1979) (explicit funding authority); supra note 19 and accompanying text (implied funding authority).

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

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

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

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

\textsuperscript{45} See supra notes 33 (USDA and HUD), 34 (DOE), 35 (Commerce), 33, 34 (HHS), 33, 39 (DOT).
pended its endeavor in 1980, and the Consumer Product Safety Commission, the Food and Drug Administration, the National Highway Traffic Safety Administration, the National Oceanic and Atmospheric Administration and the Department of Agriculture discontinued operations in 1982, “influenced by the adverse political climate and by doubts about the scope of their power.” Of those agencies with specific authority, the Consumer Product Safety Commission has paid no one since 1982; the Environmental Protection Agency and the Federal Energy Regulatory Commission have been admonished annually for a number of years by appropriations committees that they are not to do so; and the FTC ceased requesting money for funding in its budget after 1980. Thus, the State Department is the only entity currently operating a program, albeit a limited one. Some participant reimbursement occurred during the Republican administrations of Presidents Nixon, Ford and Reagan. President Ford warmly supported, and even promoted, broadened non-industry involvement in agency initiatives. But an overwhelming majority of funding activity undertaken by the federal government transpired during the Democratic administration of President Carter. Carter was the only President to explicitly endorse compensation, recognizing the “need for public participation funding and [strongly encouraging each] agency with the requisite authority to institute a public participation funding program.”

5. Judicial Decisions

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

48. As to President Ford’s support, see 41 Fed. Reg. 42,761 (1976).
50. See cases listed in Tobias, supra note 2, at 918 n.98. For discussion of agency compensation authority, see Tobias, supra note 2.
51. The circuit opinion, Chamber of Commerce v. Dep’t of Energy, 627 F.2d 289, 291 (D.C.
reach the merits of agency authority to fund, and a number of federal judges resolved the question quite differently.\(^{52}\) During 1977, the sharply split Second Circuit, sitting en banc, denied requests by intervenors in a Federal Power Commission licensing matter who asked the court to order that the Commission pay the intervenors' costs.\(^{53}\) In 1978, a District of Columbia district court judge determined that the Department of Agriculture had implied authority to compensate a public interest group for assessing the economic impact of a Department proposal.\(^{54}\) Moreover, during 1981, a divided Fourth Circuit panel ruled that the Food and Drug Administration lacked implied funding power.\(^{55}\)

6. **Prior Studies of Reimbursed Participation**

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

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

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\(^{52}\) For discussion of the cases, see Tobias, supra note 2, at § II.

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


\(^{56}\) See infra § II.A. of this Article.

\(^{57}\) These are FAA, HHS, HUD, NCAQ, and USDA.

\(^{58}\) See supra notes 37 (DOS), 35 (NOAA).

\(^{59}\) See supra notes 33 (EPA), 34 (CAB, FDA), 39 (NHTSA), 40 (FTC); Memorandum: Funding Under 1980 Public Participation Program (not including § 7 (1980) (CPSC) [hereinafter cited as CPSC Study].
governmental units. Independent evaluations commissioned by the Consumer Product Safety Commission, Department of Energy and the Nuclear Regulatory Commission when considering the institution of funding did not analyze quality or efficacy.

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

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


65. See Stellato & Wright, supra note 64.

66. See Tobias, supra note 2, at § 4.
perspectives on the advisability of compensation.\textsuperscript{67} Therefore, evaluators have carefully analyzed a portion of the funded public participation which occurred. The vast majority of that compensated involvement, however, has not even been examined, and much of that studied was not assessed as rigorously as possible. Moreover, there has been little effort to analyze comprehensively reimbursed activity at a single agency, much less at the multiple entity or government-wide level. In sum, many agencies have paid parties to participate in administrative initiatives. Much of that compensated activity occurred at the Consumer Product Safety Commission and is described thoroughly below.

B. Participant Reimbursement At The Consumer Product Safety Commission

The Consumer Product Safety Commission was not involved in the earliest development of the participant funding concept because the agency was only established in 1972.\textsuperscript{68} Moreover, the commissioners never sought the Comptroller General’s views on compensation authority, few references to that power appear in the Comptroller’s opinions, and the CPSC’s reimbursement authority was not challenged in the courts. Nonetheless, Congress has provided for certain types of participant funding in the agency’s substantive legislation and frequently has instructed the Commission on compensation, while the CPSC experimented actively with the reimbursement idea throughout the initial decade of its existence.

1. Congressional Activity

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


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

2. Agency Activity

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

72. Telephone interview with staff member 1, House Appropriations Committee, Subcommittee on HUD-Independent Agencies (Jan. 28, 1985). Cf. Tobias, supra note 2, at 916 n.82 (discussion of misunderstanding and machinations attending congressional decision).
73. Congress’ decision as to agencies other than the EPA apparently was not premised on conscious determinations about the efficacy or quality of funded participation at the agencies.
75. The public playground equipment proceeding, designated a “quasi-offeror” initiative by the CPSC, is considered an offeror proceeding in this Article. The chain saw proceeding, which arguably could be considered a “quasi-offeror” initiative, is not treated as an offeror proceeding.
versial, the Consumer Product Safety Commission paid other costs, such as lost wages, in only one initiative. Moreover, negative resolution of the question was dispositive of offeror selection in another agency matter. Dissatisfaction with the offeror process, voiced by nearly everyone involved in the seven proceedings, prompted Congress to modify the procedure in 1978, but it was not used thereafter. In 1981, Congress abolished the mechanism while prescribing a form of funding which has never been invoked.

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

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

78. See Note, supra note 76, at 1175-96.
79. The offeror process was widely acknowledged to be unworkable. See, e.g., Harter, Negotiating Regulations: A Cure for Malaise, 71 Geo. L.J. 1, 60-61 (1982) (offeror program a "disastrous failure," which "by all accounts . . . did not work well"); Schwartz, supra note 68, at 62-68 (documenting difficulties experienced in implementing offeror process); CPSC Oversight: Hearings Before the Subcomm. on Oversight and Investigation of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 1st Sess. 350 (1977) (no one, including CPSC staff, offerors and trade associations, was very happy, while offerors privately expressed frustration, if not outrage, with offeror process) (statement of Professor Hamilton) [hereinafter cited as 1977 House Oversight Hearings]; House Offeror Report, supra note 70 (Congressional criticism of offeror process); telephone interview with John McLaughlin, Counsel, Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce (Jan. 28, 1985) (nobody, including offerors and CPSC attorneys and staff, "had anything good to say" when Congress considered abolition).
reimbursement. In November, the Commission responded by granting the petition and contracting for an independent study of the concept. During March 1977, the Consumer Product Safety Commission relied upon implied power to propose a demonstration compensation program applicable to informal rulemaking. In May 1978, however, the agency adopted an “interim” rule and announced it would entertain case-by-case applications for initiatives not included therein. Thereafter, the Consumer Product Safety Commission reimbursed many parties to perform a number of tasks.

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

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

81. See id.
82. See id.; CPSC EXTERNAL STUDY, supra note 61.
ual,86 the Office did not become fully operational until shortly before Congress effectively ended compensation at the Commission by proscribing funding under implied power.87 That prohibition has been repeated yearly since 1980,88 and in 1982, the agency suspended the effort initiated under implied authority.89 Congress also substantially decreased the Consumer Product Safety Commission’s budget in 198190 and has increased minimally the appropriation since that time.91 The fiscal constraints thus imposed may well have eliminated anyway the compensation program initiated under implied power, and the financial strictures may explain the agency’s failure to invoke the funding authority specifically granted in 1981.92

3. Prior Studies

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

86. See 43 Fed. Reg. 23,560 (1978) (rank to be assigned director); cf. CPSC Public Participation File (discussion of CPSC-CSC disagreements).
88. See supra note 74 and accompanying text.
92. See supra notes 70-74, 83-84, 87-89 and accompanying text.
93. See CPSC External Study, supra note 61; supra note 82 and accompanying text.
95. See Stellato & Wright, supra note 64, at 18-21.
helpful,96 but the report was prepared chiefly as an advocacy document.97 I have even more selectively attempted to analyze funded involvement.98 Moreover, there is surprisingly little Congressional testimony, especially in contrast to that regarding reimbursed activity at the Federal Trade Commission and the National Highway Traffic Safety Administration which operated the two other most ambitious compensation programs in government.99

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

96. See CPSC Study, supra note 59.
97. See supra text between notes 59 and 60. Cf. Tobias, supra note 2, at 945 (less documentation of negative funding experience, "because agencies, seeking to secure continued congressional support, have no interest in emphasizing program shortfalls").
98. See id. at § IV.A.
99. See, e.g., S. 104 Hearings, supra note 33; H.R. 3361 Hearings, supra note 67. There is, however, much indirect testimony on funded participation at the CPSC provided in the context of reauthorization, oversight or appropriations hearings. See, e.g., 1977 House Oversight Hearings, supra note 79.

II. Analysis of the Quality and Efficacy of Reimbursed Public Participation in Proceedings of the Consumer Product Safety Commission

A. A Word About Methodology

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

1. What to Analyze

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

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

101. The input of individuals and the submissions of offerors in the seven offeror proceedings could be considered funded activity, and evaluated, in this Article. But I rejected this possibility principally because the input differs significantly from the compensated participation analyzed. See supra notes 69-70, 75-79 and accompanying text. I also rejected at the outset the ideal approach—an evaluation of all funded activity that occurred. See supra §§ I.A.4; I.B.2 of this Article. The sheer magnitude of that task was overwhelming; resource and time constraints currently preclude conducting a government-wide assessment with sufficient stringency to make it worthwhile. See supra § I.A.4 of this Article (magnitude evidenced by 14 agencies, 500 funded participants, 100 proceedings); Tobias, supra note 2, at 941 n.204 (cost estimates for conducting analyses); remainder of § I.LA of this Article (stringency). Cf. supra note 62 and accompanying text (ACUS consultant in four-year FTC study rigorously evaluated funded participation in one proceeding).
arity with a specific governmental entity to draw relatively informed conclusions about the reimbursed activity assessed. But this approach did have disadvantages and involve trade-offs. Thus, although evaluation of compensated involvement at one agency is not ideal, it seemed preferable.

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

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

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

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

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

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

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

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

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

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

111. See supra § I.B.3 of this Article.
sion also provided certain less important advantages. However, the agency did not surpass all governmental components in every respect. Nevertheless, the CPSC afforded a number of benefits and posed no more problems than any other single agency, thus making it an appropriate choice for evaluation.

2. How to Analyze
   a. Definition of Terms

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

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

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

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

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

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

117. See infra §§ II.B; III.A.1, 2 of this Article.
cates the "substantive validity of the positions advocated" and how they were asserted.\textsuperscript{118}

\textit{b. Measurement of Impact}

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

\textit{c. Sources}

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

\textsuperscript{118} See B. Boyer, supra note 62, at 136.

\textsuperscript{119} For a helpful analysis of the problem, see id. at 133-34, 138.

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

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

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

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

\textsuperscript{124} I did not read entire files, because some included 15,000 pages, and the effort did not appear cost-beneficial. Cf. B. Boyer, supra note 62, at 133 (opinions of informed observers may be best available data); telephone interview with Barry B. Boyer (Nov. 24, 1981) (interviews generally more valuable than record examination).
reliability, are reported in the next subsection of this Article.\textsuperscript{125} This approach affords many benefits, such as the transmission of considerable raw data, free of value choices.\textsuperscript{126} But concerns about the dependability of the material required consideration of the other principal data source.\textsuperscript{127}

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

\begin{itemize}
  \item \textsuperscript{125} See infra § II.B of this Article.
  \item \textsuperscript{126} I tried to serve as a conduit, so that readers could use the data reported in § II.B of this Article to draw conclusions as I did in § III of this Article. Examination of all this data affords obvious benefits, such as informing my judgments about issues in proceedings and, ultimately, about efficacy. Reading in the files what funded parties said or wrote offered special advantages in terms of accuracy. Indeed, the actual input often was "strikingly different" from the impressions gleaned from "reviewing secondary sources [and] interviewing observers." See infra text between notes 378 and 379.
  \item \textsuperscript{127} One such concern was the considerable potential for bias. See, e.g., supra notes 59-60, 67 and accompanying text. This, and other concerns, meant that the material could not be relied upon exclusively.
  \item \textsuperscript{128} As to numbers, see supra text accompanying note 123. Even if I could have interviewed all potential sources, other constraints, such as space limitations and reader interest, would have precluded the reproduction of all such interviews.
  \item \textsuperscript{129} Thus, the fundamental problems are to secure maximum accuracy in terms of knowledge and to minimize potential bias.
  \item \textsuperscript{130} There were obviously others, such as members of Congress. Moreover, interests within each of the three major categories could not always be "pigeonholed." But I was able to identify four principal groups of people affiliated with the CPSC: (1) technical staff with substantive responsibility for proceedings; (2) personnel responsible for the participant funding program; (3) attorneys responsible for proceedings or the compensation effort; and (4) the commissioners.

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

The second primary category consisted of lawyers and technical experts employed by three major categories of representatives from regulated industry: (1) large manufacturers; (2) small businesses; and (3) trade associations. Their roles as proponents of positions different from, and frequently
meant to provide assurance against error attributable to lack of objectivity by affording certain statistical validity and opportunities for comparing the ideas expressed.131

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

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

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

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

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

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

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

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

135. See infra notes 149-51 and accompanying text. One obvious benefit is the ability to clarify ideas expressed.
clusions about quality and efficacy. For each proceeding, I reviewed all the data accumulated. I began with the compensated input and attempted to reach a preliminary determination by considering it and all data not directly expressing opinions. This exercise rarely yielded dispositive conclusions, but it did help me make determinations by informing my assessments of the opinions that I examined next. I read all opinions of quality and impact and attempted to assign them values based on accuracy, in terms of objectivity and knowledge. I employed several considerations. One factor involved a “theoretical” judgment, premised on the source’s ability to inspire trust. Another set of considerations was “intangible,” such as my sense of a source's perceptivity. I also relied upon other, more pragmatic, factors. I compared the opinions with data that did not express views and contrasted the opinions across, and within, each category and subcategory of the studies, hearings, files and interviews.

I adjusted the “scores” assigned initially when the information considered as a whole warranted modification. One device used was the concept of balance. A second, less exact mechanism was consensus, especially that not attributable to community of interest. Because this methodology was imprecise and had other

136. See infra § III of this Article.
137. This includes data reported in the next subsection and that gathered but not reported, such as information on the underlying substantive issues. See infra § III of this Article.
138. The written comments submitted in several rulemakings provide an example. Most of the funded input is in the CPSC’s files. See supra notes 122, 124 and accompanying text.
139. Dispositive conclusions were possible in some situations. For example, such conclusions could be drawn if the preamble to a CPSC regulation stated that funded input actually had affected a specific decision.
140. Sources inspired trust, either by virtue of perceived capacity for detachment in terms of neutrality or independence, as manifested by the absence of any stake in the funded activity, or knowledge in terms of insight, as evidenced by proximity to the initiative.
141. This sense of a source’s perceptivity, as well as reliability, was derived from interviewing several hundred people and from working with CPSC employees for 15 months. For example, I found peculiarly trustworthy sources to be former CPSC staff who are now employed by those regulated.
142. For instance, reimbursed individuals’ actual testimony during several public meetings was quite different from observers’ later impressions of it. See, e.g., infra § II.B.5. 8. I found this a surprisingly helpful “check.” See supra note 126. Although actual funded input is the classic example, I also relied on material in CPSC files and additional sources like Federal Register preambles.
143. For example, views of funded citizens and industry representatives originally given low values because of potential for bias were upgraded if the detrimental aspects of the views could have been minimized by offsetting the opinions or comparing and contrasting them with perspectives of ostensibly neutral observers, like CPSC technical staff. See supra note 130 and accompanying text.
144. For instance, when several industry employees, two funded parties, three staffers, one commissioner, and an extra-agency evaluator agreed, their views received greater weight than each
limitations, I attempted to refine the ratings by applying more qualitative, subjective factors, such as my perception of the dynamics that operated in particular proceedings. Finally, I made "gestalt" judgments formed while engaging in the entire enterprise.

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

3. Miscellaneous Considerations

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

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

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

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

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

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

148. The recent suspension of citizen funding, which always was controversial, and even has been described as "politically volatile," see Harter, supra note 79, at 56; accord Boyer, supra note 14, should mean that current analysis would be attended less by political pressures and ought to permit calmer reflection, by eliminating temporal constraints and by making reimbursed involvement much less of a "moving target." Passage of time is a mixed blessing. Some proceedings in which compensated activity occurred were completed only recently. For earlier ones, I found that temporal distance yielded considerable objectivity, memories of persons familiar with funded participation remained surprisingly accurate, and most relevant data remained readily accessible. There was, of course, some loss of accuracy, both in terms of memory lapses and data availability, which contemporaneous evaluation would have minimized. The most obvious memory lapses were revealed by the discrepancies between certain observers' recollections of funded input and its actual nature. See
where to evaluate. When the compensated input was an oral contribution, being present would have offered benefits, like securing impressions of credibility. However such attendance would have been prohibitively expensive, and it did not happen and cannot occur now. What is possible and seems next best is the approach used here. A third question is who should perform the assessment. That person ought to possess (1) sufficient familiarity with the funding concept and techniques of analysis, agency initiatives in which reimbursed participation occurred, and the Consumer Product Safety Commission and (2) adequate detachment to render the most accurate account. Although many, especially people affiliated with the Commission, know more about the agency than I do, I have worked on the compensation idea for a decade. Accordingly, the reader can weigh my familiarity with funding and the CPSC as well as my potential for bias.

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

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

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

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

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

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

153. I did so in part as an FDA consultant, in which capacity I had some responsibility for implementing the funding program now discontinued. See supra notes 47, 55 and accompanying text.
significance of reimbursed activity at the CPSC, guided by considerations, such as how important the involvement was to the proceeding in which it occurred or how representative that participation was vis-a-vis other activity at the Commission or additional agencies.  

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

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

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

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

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

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

B. Proceeding-Specific Analysis

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

I. Fireworks

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

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

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

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


162. See id. at 25,473. Postponement and additional consideration were mandated by 21 U.S.C. § 371(e) (1976) because the CPSC intended to impose a ban under the FHSA. Cf. 41 Fed. Reg. 9512-23 (1976); Feinberg, Consumer Product Safety: The Current Record of Administrative Interpretation, 37 Fed. B. J. 56, 64-66 (1978) (discussion of these requirements and proceeding’s background).
to be held in Washington, D.C., but, when sessions also were scheduled for Kansas City, Missouri, and Honolulu, Hawaii, the commissioners authorized the ALJ to fund the rule’s proponents should their involvement be necessary to secure an adequate record. The Administrative Law Judge then awarded compensation to the counsel for the Health Research Group (HRG), the selected representative of a conglomerate of public interest organizations, which included entities such as the National Society for the Prevention of Blindness. The most controversial question at issue in the proceeding was whether fireworks should be banned. The interests represented by the Health Research Group favored stringent controls, arguing for the imposition of a ban on all fireworks products, but submitted evidence supporting strict regulation if proscription were deemed unacceptable. The position of the Consumer Product Safety Commission, participating as a party in the initiative, was more moderate and closer to the perspective of the regulated industry, although the agency advocated a ban on firecrackers. After hearing twenty-one days of testimony, the Administrative Law Judge issued summary conclusions and a narrative decision in April 1975. The commissioners modified many of the determinations made by the Administrative Law Judge and published a tentative order in March 1976 and a final rule in June. That final regulation, which included a compromise on the ban question resembling the views espoused by the CPSC during the hearing, was sustained on appeal.

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

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164. See sources cited supra note 163.
165. See 41 Fed. Reg. 9512, 9513 (1976). Conglomerate members also included the American Public Health Association and many others, most of which are listed at id.
166. See id. at 9512-23; telephone interviews with CPSC employee 1; David Masselli, HRG counsel. See generally Feinberg, supra note 162, at 64-65 (more background discussion).
170. See telephone interviews, supra note 166.
search Group, he was impressed by the entity’s input. The attorney for the Health Research Group was intelligent and aggressive, submitted substantiated information that would not otherwise have been available, and made thorough, effective factual presentations and legal arguments. That input, which required consideration of new ideas, kept the Commission “staff honest and on its toes,” forcing them to rely less on industry, provided evidence to support more stringent controls than might have been imposed and improved the administrative record. Co-counsel for the Consumer Product Safety Commission thought that the lawyer for the Health Research Group “did an excellent job to the extent he participated,” conducting “some extremely effective cross-examination.”

The author of the fireworks opinion issued by the agency agreed with both attorneys, adding that the work of the funded counsel “had a big impact on how the case proceeded” and led to a “more balanced result that was a reasonable solution,” albeit more moderate than the position championed. Two agency technical people were “quite favorably impressed,” finding the HRG’s lawyer “effective in promoting his cause” and cross-examining witnesses, although one said all his contentions were not adopted and the other was unsure of his “effect on the case.” The Administrative Law Judge was “not very impressed,” stating that the attorney “did very little, consumed a lot of time, presented no affirmative case, and simply cross-examined.” Counsel for the Health Research Group explained that he had argued that his client was not obligated by the statute to “put on a case which led to friction with the

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

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


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

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

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

2. Carpet Flammability Enforcement Proceeding

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

3. Toy Safety Public Meeting

In May 1973, the authority to regulate toy safety was transferred to the Consumer Product Safety Commission from the Food and Drug Administration, which had issued a proposal governing dangers posed to
children by small parts during the preceding February.\(^{185}\) In January 1975, the Commission proposed rules on hazards presented by sharp edges and sharp points.\(^{186}\) Because the Consumer Product Safety Commission wished to acquire the “broadest perspectives” in pursuing solutions to the risks involved, the agency held a public meeting in October 1976 to solicit consumer views on potential regulation.\(^{187}\) The possibility of Commission regulation had proceeded slowly because of difficulties in using generic requirements, defining sharp edges and points, and developing testing procedures.\(^{188}\) Two citizens received funding. The Consumer Product Safety Commission revised the small-parts proposal in 1978 and finalized it in 1979, while the sharp edges and points proposals have not become final.\(^{189}\)

One person attended the session but said nothing, and the other commented throughout.\(^{190}\) An agency lawyer who was present said that the participating citizen added “zero.”\(^{191}\) Counsel for the Toy Manufacturers of America, Inc. (TMA), who also attended, found that the individual was “vitirol, extremely critical of all that was done and ineffective.”\(^{192}\) Although the Commission’s Project Manager described the participant’s recommendation that the CPSC “start off subjectively” in treating balloons\(^{193}\) as a “good suggestion,” the “kind of thing” for


\(^{190}\) See Transcript, Toy Safety Meeting, supra note 187.

\(^{191}\) Telephone interview with CPSC employee 1.

\(^{192}\) See telephone interview with industry representative 1.

\(^{193}\) See Transcript, Toy Safety Meeting, supra note 187, at 33-34 (statement of funded participant 2).
which the agency was looking, and an idea "from the outside world [an-
swering] some of our problems,"\textsuperscript{194} even it was ultimately rejected.\textsuperscript{195} My reading of the participant’s input and comparison of it with the Com-
mmission’s resolution of toy-safety issues confirms the above assessments
and indicates that much contributed by the consumer advocate was not
very analytical or effective and that some was explicitly rejected.\textsuperscript{196} In
fairness, the citizen contended that the “deck was stacked against public
involvement,” that the Chairman of the Consumer Product Safety Com-
mision “did not want to rock industry’s boat,” that the attorney for the
Toy Manufacturers of America was the “synthesis of a lobbyist whose
primary concern was toy interests,” and that the producers “were not
interested in her help.”\textsuperscript{197} Moreover, it is unrealistic to expect that a
single party’s input would affect a six-year decisional process.\textsuperscript{198}

\textbf{4. Asbestos Patching Compounds}

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

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

\textsuperscript{194} See id. (statement of John Preston).
\textsuperscript{195} See 16 C.F.R. § 1501.3(a) (1987) (balloons’ exemption from CPSC regulation covering
small parts).
\textsuperscript{196} Compare comments of funded participant 2 in Transcript, Toy Safety Meeting, supra note
187, with last two Federal Register documents cited supra note 188.
\textsuperscript{197} Telephone interview with funded participant 2.
\textsuperscript{198} Indeed, the Child Protection and Toy Safety Act, Pub. L. No. 91-113, 83 Stat. 187, passed
in 1969 and the small parts rule, 16 C.F.R. § 1501, issued in 1979. \textit{Cf. supra} § II.A of this Article
difficulty of assessing such impact.
ing's background).
\textsuperscript{201} Id.
\textsuperscript{202} See telephone interview with funded participant. The two groups were the Environmental
Defense Fund (EDF) and the Natural Resources Defense Council (NRDC).
ulty of estimating one person's impact in a single hearing, when the Consumer Product Safety Commission seemed predisposed to finalizing the proposal, only one producer strongly opposed it, and no specific testimony was mentioned in the preamble to the ban. The citizen's presentation seemed more general, historical, anecdotal, and disorganized than necessary. He only addressed the proposal's substance when admonished by the Chairman of the Commission to "get to the two hazards which" were the subject of the meeting and when he was later instructed to summarize. But the Consumer Product Safety Commission implemented the action the reimbursed individual urged and the agency adopted some of his specific ideas, such as rejection of a Union Carbide solution. A staffer thought that the compensated party was "very effective" and that he provided much helpful written and oral support for the ban. The paid participant said that he "got much in the record" to assure that the ban "was not overturned." That effort apparently succeeded because the Commission decision to ban was not challenged.

5. Children's Sleepwear

In October 1977, the Consumer Product Safety Commission proposed to amend flammability standards for children's sleepwear by deleting restrictions governing residual flame time (RFT), exempting small garments, and revising trim-testing methods. The principal purpose of the Commission proposal was to minimize flame-retardant chemicals in the clothing while maintaining adequate fire protection. Fifteen parties, one of whom was funded, spoke at a November public meeting. The agency analyzed the oral testimony and 200 written comments. The Consumer Product Safety Commission omitted the RFT constraints and modified the trim-testing techniques in February 1978.

204. For the citizen's presentation, see Transcript, Asbestos Patching Compounds, supra note 200, at 154-75. Cf. id. at 162, 175 (Chairman Simpson's admonition and instructions).
206. See telephone interview with CPSC employee 1.
207. See telephone interview with funded participant, supra note 202.
209. See id.
It is more problematic to evaluate this consumer's input than the contributions analyzed in the two proceedings discussed immediately above. The citizen was one of 200 commenters, none of whom was mentioned in the preamble to the final rule. Many people, including producers, agreed with the funded individual and favored the proposal. The Consumer Product Safety Commission appeared predisposed to amend the proposal, as evidenced by the rapid way in which the agency reviewed the public input and finalized the rule. The compensated participant seemed unconcerned about possible fire risk, supplied no data for assertions on possible injuries to children or buyers’ needs, was redundant, and added little not provided by many others. However, the Commission Chairman said that the Consumer Product Safety Commission was “seriously considering” ideas on maximizing consumer choice offered by the reimbursed party, while a Commissioner praised the individual for her candor and for affording a “direct public” perspective that the agency did not always receive.

6. Unvented Gas Space Heaters

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

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212. See Transcript, Flammability of Children's Sleepwear, supra note 210, at 95-117. An important complication was that many manufacturers favored the amendments.
213. See id. at 115, 116 (statements of Chairman Simpson, Commissioner Franklin).
215. See 43 Fed. Reg. 6235, 6238 (1978). The largest region was the South.
216. The notice proposing a ban and announcing the regional hearings in Washington, D.C., Dallas and Miami appears in id. at 11,731. The CPSC funded one citizen in Washington and two in Dallas. Telephone interview with Patricia Chisley, CPSC Office of Secretary.
217. See infra note 220 and accompanying text (CPSC learning of the ODS system); infra text
Consumer Product Safety Commission relied on its findings and the heaters' wide use to issue a September 1980 rule that withdrew the ban and required the ODS system for new heaters.\textsuperscript{218}

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

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


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


\textsuperscript{221} See telephone interview with CPSC employee 2.

\textsuperscript{222} See CPSC Study, supra note 59, at 3. Accord telephone interview with CPSC employee 1, supra note 219.

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

\textsuperscript{224} Those unfunded were employees of Irish and Spanish producers whose testimony is in the
\end{quote}
indicates that Commission officials who were favorably impressed overestimated the impact of compensated parties. The citizens at the second meeting made few new substantive contributions. One of the participants supported the ban with little apparent appreciation of its economic effects, while the other individual only spoke generally to the economic and safety issues.225 The input provided by the person in the first session, while more specific and helpful, was less relevant than it might have been.226

7. Chain Saws

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

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


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

(June 1, 1978), reprinted in H.R. 2271 Hearings, supra note 227, at 599, 607. Cf. Agreement supra;
1981 Senate Reauthorization Hearings, supra note 227, at 152 (statement of Donald Purcell); 43 Fed.

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

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

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

Reauthorization Hearings, supra note 227, at 17, 131-34 (statements of Commissioner Zagoria,
CSMA President Donald Purcell); Hearings on HUD—Independent Agencies Appropriations for
1984 Before the Subcomm. for HUD—Independent Agencies of the House Appropriations Comm.,
House Appropriations Hearings]: infra note 233 and accompanying text (CPSC efforts after en-
deravor's abortion).


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

https://openscholarship.wustl.edu/law_lawreview/vol64/iss4/4
The sources interviewed gave mixed appraisals of the Chain Saw Manufacturers Association. The CSMA President stated that the work was "characterized by complete openness and active participation by government, consumer and industry representatives," producers "candidly shared their expertise" with everyone, and those involved developed an "extremely sophisticated approach to measuring kickback" and engaged in the most "comprehensive attempt to deal with chainsaw kickback anywhere in the world."  

A funded technical expert found that the CSMA's "basic methodology, approach, and technical input were excellent." He said that the Chain Saw Manufacturers Association did a "nice job of coordinating the effort" and of avoiding adversary confrontations. The technical person also reported that the project had been "proceeding extremely well" to a balanced, feasible solution when the endeavor "blew apart" and that it could have been saved but that "common sense did not prevail," adding that the effort was not wasted, because it generated valuable data for later standard work by the Commission and the industry. An extra-agency evaluator concurred, but wondered if voluntary endeavors would have moved faster had the Consumer Product Safety Commission begun mandatory standard development earlier. An agency employee thought that the Chain Saw Manufacturers Association produced a "piece of work way ahead of its time" but "failed to seize the initiative" and provided "spotty project

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

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

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

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

240. See telephone interview with CPSC employee 2, supra note 230.
241. See id.; telephone interviews with funded participants 1, 2, supra note 230.
243. See id. at 62,393.
245. Telephone interview with CPSC employee 1, supra note 230.
246. Id.
247. See 1982 House Appropriations Hearings, supra note 234, at 570; H.R. 2271 Hearings, supra note 227, at 408 (statements of Commissioner Pittle). The Commissioner also appeared prescient because, when the CSMA-CPSC contract was being negotiated, he had evinced concern about the CSMA's ability to develop satisfactory requirements in time. The Commissioner was also concerned about the time that would be lost were the project to abort. See CPSC Decision on Petition for Promulgation of a Consumer Product Safety Standard to Reduce Chain Saw Kickback, Doc. No. 77-10, 15-19 (Apr. 27, 1976) (Commissioner Pittle, dissenting), reprinted in pertinent part in Schwartz, supra note 68, at 70 n.271. But cf. H.R. 2271 Hearings, supra note 227, at 33 (commissioners believed voluntary approach quicker but may have allotted insufficient time) (statements of Chairman King).
reliance on the CSMA's voluntary process to protect the public.\textsuperscript{248} The Consumer Product Safety Commission's Acting Chairman summarized the sentiments of the commissioners and agency staff when he testified that an "18-month cooperative effort with the chainsaw industry unfortunately failed to produce a voluntary standard which could be expected to substantially reduce injuries."\textsuperscript{249}

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

\begin{itemize}
\item \textsuperscript{248} See 45 Fed. Reg. 62,392, 62,393 (1980).
\item \textsuperscript{249} See H.R. 2271 Hearings, supra note 227, at 340 (statement of Acting Chairman Statler).
\item \textsuperscript{250} See id. at 36 (statement of Chairman King).
\item \textsuperscript{251} See 1983 Senate Reauthorization Hearings, supra note 227, at 17; 1984 House Appropriations Hearings, supra note 232, at 24 (statements of Commissioner Zagoria).
\item \textsuperscript{253} See 1981 Senate Reauthorization Hearings, supra note 227, at 4, 276 (statements of Commissioner Zagoria, General Counsel Krulwich). Accord telephone interview with funded participant 2, supra note 230. Cf. H.R. 2271 Hearings, supra note 227, at 405 (CSMA had to represent larger producers that committed resources to safety and other producers lacking resources) (statement of Acting Chairman Statler).
\end{itemize}
communication among commissioners, agency staff and the industry, and effective management, especially in salvaging the effort.²⁵⁵

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

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

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


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

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

²⁶⁰. See telephone interview with funded participant 1, supra note 230. The individual said the citizen mentioned infra notes 261-63 and accompanying text "represented a viewpoint valuable to have." Id. Cf. Transcript, Standard Review Board Meeting, supra note 257, at 4, 11 (examples of conciliatory role).
agency staff. One Consumer Product Safety Commission employee described the same consumer as "very hard working and tenacious." A second staffer, however, thought that the individual held "troublesome preconceptions" and that he was "part of the problem."

8. Upholstered Furniture

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

261. Telephone interview with funded participant 2, supra note 230.
262. Telephone interview with CPSC employee 3.
263. See telephone interview with CPSC employee 2, supra note 230. The staffer added that producers "played off citizens in a highly competitive dog fight between industry members." Id. Cf. telephone interview with Susan King, supra note 220 (project "went through so many iterations" she could not "remember how useful" funded participation was).
266. See Transcript, Meeting on Upholstered Furniture Flammability, supra note 265, at 235-50. Cf. infra notes 277-82 and accompanying text (more discussion of consumer's input).
268. See UFAC Letter, supra note 264; telephone interview with CPSC employee 1.
so impressed the commissioners that in November 1979 they postponed agency proposal of mandatory requirements.\textsuperscript{269} Indeed, the CPSC has acquiesced in the voluntary endeavor ever since. In October 1981, the commissioners unanimously voted to have the agency staff discontinue compulsory standard development and work with the UFAC until evaluation of its project indicated a need for binding controls.\textsuperscript{270} In April 1984, the CPSC characterized the voluntary compliance effort as the “most promising approach for adequately protecting the public” and said that “renewed consideration” of mandatory regulation was “unnecessary,” because it “could inhibit greater improvements in the voluntary program.”\textsuperscript{271} Two Commission chairmen were disappointed by the industry’s initial lack of success,\textsuperscript{272} but agency staff have been more satisfied with recent work, while one Commissioner even testified that the producers had “made tremendous progress and will continue to [do so].”\textsuperscript{273} Although the proceeding seemed destined to “bumble along as a relative stalemate until the cigarette or furniture industry” acceded or new technology emerged,\textsuperscript{274} Congress intervened in October 1984 and supported research on cigarettes that pose less risk of igniting upholstered furniture.\textsuperscript{275}

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


\textsuperscript{273} CPSC employee 2 said industry had “made fairly good improvement” (telephone interview). See H.R. 2367 Hearings, supra note 224, at 407 (statement of Commissioner Zagoria).

\textsuperscript{274} CPSC employee 1, supra note 268, offered the prescient quotation, ascribing this partly to the furniture industry’s “very fractured nature.”

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

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

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

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

278. See telephone interviews, supra note 277.

279. See telephone interview with CPSC employee 4.

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

281. See supra notes 266-67, 269-70, 275-76 and accompanying text.
9. Asbestos General Rulemaking

During 1979, the Consumer Product Safety Commission began an asbestos proceeding distinct from, and broader than, the proceeding concerning asbestos patching compounds. In October, the Commission attempted to assess comprehensively the use of asbestos, published an Advance Notice of Proposed Rulemaking (ANPRM) seeking data on consumer products containing asbestos and possible regulatory approaches for reducing public exposure to sources of asbestos, and paid three groups to comment. The CPSC analyzed the public comments and issued a 1980 General Order, which required producers to submit data on asbestos use in products, so as to help the CPSC ascertain the propriety of regulatory action to protect the public. Although the agency informed Congress in 1981 that it planned "to test selected products, determine exposure and risk, and consider appropriate options for reducing the risks found," the CPSC subsequently has regulated few asbestos-containing products.

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

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


285. Id.


287. See CPSC Study, supra note 59, at 4; COH Comments 2.
the ANPRM.\textsuperscript{288} In fairness, an agency staffer found that the comments provided a "wealth of information on asbestos-containing products and alleged substitutes," an observation that my own reading confirms.\textsuperscript{289} Moreover, the asbestos initiative was an enormous undertaking.\textsuperscript{290} The CPSC has been criticized for the slow pace of its regulation,\textsuperscript{291} and some Commission staffers attribute inaction to the fact that other products posed more risk or that different projects had higher priority, thus indicating that art goods were never very appropriate for regulation.\textsuperscript{292} Outside analysts claimed that the CPSC already was familiar with most of the art materials that the group designated for possible regulation, used only one idea the organization supplied in compiling the General Order list, and overvalued the submission in the agency self-study. Nevertheless, these analysts found that the "comments were extensive" and that the "staff was investigating [asbestos powder's] commercial availability."\textsuperscript{293} The external study also seems to be premised on linkages between reimbursed public input and Commission decisions when there had been no final regulatory action and none may have been warranted.

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

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

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

\textsuperscript{290}See supra note 283.

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

\textsuperscript{292}See telephone interviews with CPSC employees 1, 3, supra note 288; telephone interview with CPSC employee 4.

\textsuperscript{293}See Stellato & Wright, supra note 64, at 21.

\textsuperscript{294}See id. at 20-21.

\textsuperscript{295}See telephone interview with David Swankin (the input preparer). The description is drawn from my reading of the NCL's comments.
while ignoring the difficulties of generic regulation. However, the submission "made several suggestions [as to] public education and safe disposal" on which the CPSC had not acted. An agency staffer observed that the organization tendered data "not otherwise available," that the Commission "could not have gathered," covering "products agency officials had not heard of before." I found that the comments supported the CPSC's regulatory approach and, while rather general, they offered many specific ideas.

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

10. Urea Formaldehyde Foam Insulation

In October 1976, the Consumer Office of the Denver District Attorney petitioned the CPSC to regulate Urea Formaldehyde Foam Insulation (UFFI), because the product caused "unreasonable risk of injury or irritation." In February 1979, the commissioners deferred their decision on that petition but instructed staff, and held four regional hearings in the winter of 1979-1980, to collect more data on the health effects of the gas released by UFFI and to ascertain whether there was a need for regulation. Uncertainty existed about the causal relationship between UFFI and health problems experienced by occupants of UFFI-insulated
dwellings. Industry contended that because inadequate data existed to ban UFFI a standard would suffice. Thus, the Consumer Product Safety Commission solicited input from installers and people believed to have been harmed by UFFI, funding thirty-seven parties. In early 1980, the Commission assembled a panel of sixteen senior government scientists and sponsored technical workshops to scrutinize the health effects of UFFI. In June, the CPSC issued a proposal requiring industry to inform buyers of the possible health effects of UFFI. But the Commission then reached a preliminary conclusion that gas released after installation of UFFI posed an "unreasonable risk of injury" against which "no feasible standard" could safeguard; the CPSC proposed a ban on the use of UFFI in February 1981, and finalized the proscription one year later. That rule was overturned in April 1983.

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

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304. See 44 Fed. Reg. 69,578-80 (1979); telephone interview with Susan King, supra note 220.
305. See H.R. 2271 Hearings, supra note 227, at 689-739 (representative articulation of industry's position) (statements of J. Ramey, J. Bender, Formaldehyde Institute). Cf. id. at 15 (commissioners met 30 times with industry when considering regulation) (statement of Chairman King).
308. See 45 Fed. Reg. 39,434 (1980). The proposal was premised partially on a National Academy of Sciences study that indicated there was no determined human threshold for formaldehyde's irritant effects. Id. at 39,437.
311. See CPSC Study, supra note 59, at 3-4; Transcript, Public Meeting on UFFI, at 479-99, especially 489-90, Atlanta, Ga. (Jan. 10, 1980).
The CPSC's Executive Director was "persuaded" that the witness had "correctly" indicated that the medical community had a need for information to minimize the anguish caused by an "inability to identify promptly the symptoms."\(^{312}\) The official was so impressed that, upon the completion of the testimony, he announced that the Consumer Product Safety Commission would "begin an immediate information campaign so at least doctors would be sensitive to identifying formaldehyde toxicity."\(^{313}\) Agency staff then convinced the \textit{Journal of the American Medical Association} to publish data describing the symptoms of people exposed to UFFI\(^ {314}\) and distributed similar information to state health departments.\(^ {315}\) The individual's input, and that of other witnesses, persuaded Commission staff to warn "consumers of [UFFI's] potential health hazards" immediately, and, in June 1980, the CPSC issued the proposal requiring the disclosure of safety data.\(^ {316}\) Two other participants compensated for speaking in the Atlanta session said that physicians had experienced considerable difficulty in ascertaining that UFFI had caused their health problems, while one added that the "hazards should be well known so people can get [assistance]."\(^ {317}\) A Commissioner who was present found another citizen's ideas "most helpful," while the agency's Executive Director said that a fifth person described "very pointedly [the] difficulties consumers faced."\(^ {318}\)

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

\(^{312}\) See Transcript, UFFI Meeting, \textit{supra} note 311, at 491 (statement of Richard Gross).

\(^{313}\) See \textit{id.} at 491-93.

\(^{314}\) See CPSC Study, \textit{supra} note 59, at 3; 243 J. A.M.A. 1697 (1980).

\(^{315}\) See CPSC Study, \textit{supra} note 59, at 3.

\(^{316}\) See \textit{id.} at 3-4 (staff); \textit{supra} note 308 and accompanying text (proposal).

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

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

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

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

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

320. See Transcript, Public Meeting on UFFI, at 660 et seq., 833 et seq., 847 et seq., 979 et seq., Minneapolis, Minn. (Feb. 6, 1980).
321. See id. at 749 et seq.
322. See id. at 754 (statement of Commissioner Pittle).
323. See Transcript, Public Meeting on UFFI, at 1411 et seq., 1536 et seq., Hartford, Conn. (Feb. 27, 1980).
324. See id. at 1428; 1572-73 (statements of Richard Gross).
325. See id. at 1125 et seq., 1024 et seq., 1262 et seq., 1559 et seq.
326. The data are in the CPSC’s UFFI file.
327. See Transcript, UFFI Meeting, supra note 311, at 1387 et seq. (testimony); id. at 1410 (Executive Director’s remarks).
328. See Swankin telephone interview, supra note 295.
329. Telephone interview with CPSC employee 1.
"helpful for commissioners to see and talk to victims."330 Another staffer said that funded input enabled the CPSC to secure a helpful "picture of injury scenarios from the consumer viewpoint" and to "hear from foamers themselves" and that these data underlay the ban because "no one could tell what constitutes good foam."331 Nonetheless, the employee found that most of the "scientific information submitted was not real new."332 The Commission Program Manager agreed that the input was "generally quite useful," adding that participant compensation had permitted the CPSC to hear directly from injured persons how they had discovered the UFFI-related disorder—data which "weighed heavily" in the final decision.333 An agency chairman said that "small business people, installers and homeowners were extremely useful," serving as "experts" who related actual experiences and identified more precisely the causes of a "problem with a consumer product" that seemed to "arise in users' hands" and about which little information was available.334 Reimbursement also allowed the Consumer Product Safety Commission to acquire "much more specific data, and a lot of ideas" not available in Washington, D.C., where "proceedings are dominated by experts and professional lobbyists" whose input is "very different from installers and users."335

II. Citizens Band Omnidirectional Antennas

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

330. Id.
331. Telephone interview with CPSC employee 2.
332. Id.
333. Telephone interview with CPSC employee 3.
334. Telephone interview with Susan King, supra note 220.
335. Id.
drafted the standard.337 The CPSC issued a proposal in August 1981 and a final rule one year later.338 By that time antenna sales, and deaths and injuries ascribed to the product, had declined so substantially that the need for mandatory controls was reduced.339 Thus, the standard imposed minimized competition in an already over-concentrated industry.340

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

339. See 47 Fed. Reg. 36,186, 36,197 (1982); Hearings on Department of Housing and Urban Development—Independent Agencies Appropriations for 1981 Before Subcomm. on HUD—Independent Agencies Appropriations of the Senate Appropriations Comm., 96th Cong., 2d Sess., pt. 1, at 73 (1980) (declines); cf. telephone interview with industry representative 1 (antenna sales 3.5 million in 1976 and 50,000 in 1982); telephone interview with funded participant 1 (by the time CPSC decided to regulate product, sales so reduced that $25,000 could not be raised to develop voluntary standard).
340. See 47 Fed. Reg. 36,186, 36,195, 36,198 (1982); Letter from funded participant 2 to CPSC employee 1; telephone interviews with funded participant 2 and industry representative 1, supra note 339.
341. I had difficulty finding sufficiently neutral observers. Moreover, the endeavor’s polycentric and lengthy nature complicated analysis because no one could have much impact. See infra notes 353, 358 and accompanying text.
342. See CPSC Study, supra note 59, at 4, ii.
343. Id.
tribute directly to the technical requirements for development of a standard.345 A third staffer said that the citizens “proved the process was feasible” and could “produce workable standards,” adding that some participants had taught the CPSC much about high voltage technology which would have value in other contexts, although most members of the public “did not make a major contribution.”346

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


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


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

349. See telephone interview with funded participant 2, supra note 340 (quotation); Transcript, Fourth Public Meeting, supra note 345, at 21, 44-45; Minutes, Human Factors and Labelling Comm. (Nov. 1980) (prompting revision); telephone interviews with funded participants 3, 4, 5 (consumers’ beliefs).
their “contributions were practically nil.”\textsuperscript{350} The other evaluator found that most participants were “‘professional consumers’ who probably could not contribute to standard development.”\textsuperscript{351}

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

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

\textsuperscript{350} See telephone interview with industry representative 2.
\textsuperscript{351} Telephone interview with industry representative 1, supra note 339.
\textsuperscript{352} Telephone interview with funded participant 5, supra note 349.
\textsuperscript{353} Id. Cf. Fuller, \textit{The Forms and Limits of Adjudication}, 92 Harv. L. Rev. 353, 394-404 (1978); Stewart, supra note 4, at 1777 (problems of polycentric decisionmaking).
\textsuperscript{354} See telephone interview with funded participant 5, supra note 349 (first quotation); Transcript, Second Public Meeting, supra note 347, at 20 (second); telephone interviews with funded participants 3, 4, supra note 349 (two people’s views).
\textsuperscript{355} See telephone interview with funded participant 4, supra note 349; Letter from funded participant 4 to CPSC employee 1 (Nov. 20, 1980).
\textsuperscript{356} See Letter, supra note 355; telephone interview with funded participant 4, supra note 349.
\textsuperscript{357} See, e.g., Transcript, Second Public Meeting, supra note 347, at 46 (focusing); Memorandum, supra note 348, at 5 (suggesting changes). See telephone interviews with funded participants 3, 5, supra note 349 (citizens’ beliefs); see also Letter, supra note 355 (suggestions for CPSC improvements in funded participation).
relevance, and technicalities of electrical power line accidents, hazards, production, design, testing problems and compliance procedures,” and learned from each other, the CPSC let the project become “so drawn out [that] it was impossible to act.” The electrical contractor offered helpful insights on educating CB owners and on the Commission staff drafts, which prompted revisions; two consumers found that the contractor was assertive and knew the problem’s technical aspects, but a third citizen believed that the contractor “did not contribute much.” The retired chemist believed that most of the participants “did a good job and were pretty thorough” and thought that some were “especially competent to treat technical issues.” Although one member of the public found that the chemist “had some valuable things to say” and was “vocal on certain questions,” two others believed that she was not very helpful. The retired teacher was “impressed with [consumers’] intense care and thought,” adding that “all sides were presented fairly with reasonable alternatives.” One citizen said that the teacher “contributed new ideas on psychological effects and labeling,” while a second lauded her “technical writing skills,” even though two others believed that she offered little input, and several thought that she “enjoyed the free trips.”

III. CONCLUSIONS FROM THE CONSUMER PRODUCT SAFETY COMMISSION EXPERIENCE

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

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

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

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

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


363. See telephone interviews with funded participant 6, supra note 360, and funded participant 3, supra note 349 (first and second citizens); telephone interviews with funded participants 4, 5, supra note 349 (beliefs of two more); telephone interviews with funded participant 1, supra note 339, and funded participant 2, supra note 340 (several others’ thoughts).
its advantages and disadvantages, the activity's relative and comparative value, a contextual analysis of participation's worth, and lessons from the Commission experience. General conclusions follow.

A. Specific Conclusions

1. Advantages and Disadvantages

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

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

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

365. For a discussion of quality and efficacy, see supra § II.A.2.a of this Article.
ideas elicited. When participants represented a specific interest, that interest was promoted effectively in ways that minimized bias. Funded individuals and organizations were intelligent, conscientious, perceptive, cooperative, creative, aggressive, and realistic, and they served well as sounding boards, conciliators, gadflies and devil's advocates.

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

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

2. Relative and Comparative Value

In terms of the relative efficacy of reimbursed activity, approximately

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

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

368. The CPSC paid $25,000 in fees and costs for compensated activity during the last year of funding. See CPSC Study, supra note 59, at 1. Some activity was cheap, because industry donated certain services and individuals worked for less than their normal rates. The major techniques used to secure decisional input are supplementation of staff and employment of extra-agency contractors. See Tobias, supra note 2, at 953. Cf HOUSE OFFEROR REPORT, supra note 70, at 10 (compensated activity cheaper than staff supplementation); supra note 287 and accompanying text (cheaper than contractors).
fifteen percent was effective, twenty-five percent was ineffective and the remainder was in between. As to relative quality, approximately twenty-five percent was high, fifteen percent was low, and the rest was in the middle area. Nearly all funded involvement offered some advantage related less directly to decisionmaking, although one-half to three-quarters provided multiple benefits, while fifty to sixty-six percent afforded meaningful advantages. Compensation also enabled citizens to provide input of quality equal to other participants or techniques for facilitating public involvement or improving decisionmaking. Moreover, reimbursement permitted consumers to have more advantageous, and fewer deleterious, effects on decisionmaking, as well as more beneficial, and fewer detrimental, impacts pertaining less closely to the decisional process than such other participants and techniques.369

3. Contextual Analysis of Efficacy

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

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

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

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

A second parameter was the extent of compensated participation. Participation occurring over a
and participant capability, although external factors, such as congres- 
sional pressure, may also have an effect. Thus, while particular situa-
tions of relative efficacy can be designated for the CPSC, that exercise is 
not very instructive because the inquiry necessarily entails a case-by-case 
analysis of the variables that comprise every decisional process, each of 
which must be identified, isolated, and examined in terms of impact.372

4. Lessons

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

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

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

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

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

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

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

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

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

376. See supra note 368 and accompanying text.

377. Cf. Schwartz, supra note 68, at § IV (similar assertions regarding implementation of offeror procedure). But cf. infra text accompanying note 378 (more established agency like FTC “unfortu-
different, reasons, the CPSC may have been like the "FTC of the 1970's, in many respects," a "particularly unfortunate time and place to experiment with direct funding for public participation."378 If two of the three most ambitious reimbursement endeavors in government can be so characterized, however, it is fair to ask whether the compensation idea itself is flawed. The above analysis helps answer the question whether the CPSC funding effort was properly discontinued. Given the apparent efficacy and quality of reimbursed involvement, the difficulties entailed in managing the compensation endeavor, and choices regarding commitment of scarce resources, program suspension seems to have been rational.

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

B. General Conclusions

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

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

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

IV. SUGGESTIONS FOR THE FUTURE: POLICY AND POLITICS

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

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

381. For example, the FDA might be a prime candidate, because its funding experiment enjoyed some success and its Office of Consumer Affairs, which implemented the program, has that and other relevant experience. See Tobias, supra note 2, at 943-44, 952 n.270, 953 nn.271-73; supra note 368 and accompanying text.
permit effective citizen involvement and agency program administration and to closely monitor applicant performance.\textsuperscript{382}

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

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

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

\textsuperscript{383} For analysis of all the assertions in this paragraph, see \textit{id}.

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

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

\textsuperscript{386} Helpful work on "evaluation research methodology" appears in Boyer, \textit{supra} notes 14, 62; Rosenbaum, \textit{supra} note 100; Rosener, \textit{supra} note 100.
V. CONCLUSION

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

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