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Reporting Substantial Product Safety Hazards Under the Consumer Product Safety Act: The Products Liability Interface

TIMOTHY D. ZICK*

Congress enacted the Consumer Product Safety Act1 (CPSA) in 1972 in response to a perception that the common law of products liability did not adequately protect consumers from dangerous products.2 Unlike earlier piecemeal efforts,3 Congress enacted a regulatory scheme whose mandate might best be summed up as a collective command to make almost everything safer.4 However, Congress failed to adequately consider the potential

* J.D., Georgetown University Law Center, 1992; A.B., Indiana University, 1988. I would like to thank Professor Joseph Page of Georgetown University Law Center for his guidance and assistance in developing this note.


2. In 1967, Congress established the National Commission on Product Safety (NCPS) (National Commission on Product Safety Act § 2a, Pub. L. No. 90-146, 81 Stat. 466 (1967) (codified at 15 U.S.C. § 1262 (1982)) to "conduct a comprehensive study and investigation of the scope and adequacy of measures now employed to protect consumers against unreasonable risk of injuries which may be caused by hazardous household products." LEMOV, supra note 1, at 1-10 (citation omitted). The NCPS concluded that the common law of products liability was unreliable in restraining product hazards because it was most concerned with providing post-injury remedies. 1970 NAT'L COMMISSION ON PRODUCT SAFETY, FINAL REP. 3. The common law of products liability serves to provide after-the-fact redress for persons injured through the fault of another. Common law was not originally regarded as a watchdog for marketing practice. To the extent that it deters the marketing of dangerous products, common law serves a function similar to that of the Consumer Product Safety Commission, which was created by the CPSA. CPSA § 4, 15 U.S.C. § 2053. Whether product safety is better left to pervasive federal regulation is a matter beyond the scope of this note. For now, the Commission coexists with the common law system.


The Commission's jurisdiction is limited only by the statute's specific exclusion of products already subject to comprehensive federal safety statutes. CPSA § 3(a)(1), 15 U.S.C. § 2052(a)(1) (excluding tobacco products, motor vehicles, pesticides, aircraft, boats, drugs or cosmetics, and food).

interaction between its solution and the products liability scheme already in place. Whether intended or not, there is a substantial "interface" between the CPSA and products liability.5

Section 15(b) of the CPSA requires manufacturers to report without delay to the Consumer Product Safety Commission (Commission) any information reasonably indicating a product "defect" that has caused or could cause a death or grievous injury.6 Section 15 has become a favored enforcement tool

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5. The lack of sensitivity to the interface between the Commission's work and the products liability system is aptly demonstrated in the following colloquy which occurred during CPSA appropriations hearings between Senator John C. Danforth and Mr. Andrew Krulwich, former General Council to the Consumer Product Safety Commission:

SENATOR DANFORTH. It seems to me that if it's not being done already, what we should do is to take a look at the interrelationship between the work of the Consumer Product Safety Commission, the use of the litigation as a protective measure—that is, as a means of increasing the cost of producing dangerous items and therefore keeping them off the market—and the availability of insurance to manufacturers of products. . . .

MR. KRULWICH. . . . [T]here obviously is a relationship between what the Commission does for product safety, what happens in the private sector in the product liability area, and, frankly, the insurance sector . . . .

SENATOR DANFORTH. You know, it's the stuff that law review articles are made of. But it does not, as far as I know, have anything to do with Government policy.

We have a Consumer Product Safety Commission that goes about studying things and putting out regulations and pulling things off the market. On the other hand, we have the availability of the courts, the products liability cases.


The conception that the CPSA and common law operate in separate spheres is inaccurate. Although the architects of the CPSA disclaimed any intent to alter common-law remedies, there is little doubt that the Act had a profound impact on products liability practice. The interface was recognized early in the Act's history. See Arnold B. Elkind, Consumer Product Safety Act, 9 TRIAL 43, 43 (1973) (noting the likelihood that plaintiffs' lawyers would use information divulged to Commission). In spite of Senator Danforth's invitation, law reviews have neglected to examine the interface.

This note addresses only one of the myriad intersections between the Commission's work and common law of products liability. For an early general discussion, see John S. Martel, The Consumer Product Safety Act and Its Relation to Private Products Litigation, 10 THE FORUM 337 (1974).


The "substantial product hazard" reporting requirement found in § 15 is no anomaly in the modern regulatory era. Mandatory reporting of adverse risk information has become a requirement in a host of statutes regulating the public health. See, e.g., National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1411 (1988) (manufacturers who learn that motor vehicle either contains a "defect" that "relates to motor vehicle safety" or does not comply with an applicable motor vehicle safety standard must notify, among others, the Secretary of Transportation); Toxic Substances Control Act, 15 U.S.C. § 2607(e) (1988) (any manufacturer, processor, or distributor of a chemical substance who learns that substance "presents a substantial risk of injury to health or the environment" must report to the Administrator of the Environmental Protection Agency).
of the Commission. 7

Failure to report to the Commission leaves a firm open to, among other penalties, costly civil and criminal liability. 8 In spite of these penalties, there is substantial underreporting of product defects. 9 Consequently, many of the

7. The significance of § 15 as a Commission enforcement tool cannot be overstated. As early as 1975, former Commission Chairman Richard O. Simpson stated:

There is no question but that Section 15 of the Consumer Product Safety Act has proven to be a key feature of the law—more key, I think, than was envisioned either by the Congress in writing the legislation, or the Commission in its initial appraisal of resources needs [sic] and priorities.


While the degree of underreporting under § 15 is difficult to measure, Congress is convinced that the number of reports received annually is far too low. See Joint Explanatory Statement of the Comm. of Conference on the Consumer Safety Improvement Act of 1990 (H.R. 914, 101st Cong., 2d Sess. 21 (“The Committee is also concerned about the inadequacy of the current level of product hazard reporting under Section 15(b) of the CPSA”), reprinted in 1990 U.S.C.C.A.N. 4419, 4423.

Underreporting has plagued the Commission for most, if not all of, its existence. Former Commission Chairman Stuart Statler’s comments are illustrative:

Rough estimates indicate that about two million separate firms are engaged in the manufacture, distribution, or sale of consumer products. ... When these data are set alongside the expansive language of Section 15(b), it seems reasonable to expect that the Commission would receive a sizable number of Section 15(b) reports. Making very conservative assumptions, if each year only one out of every 1,000 firms received a consumer complaint about a product containing information of the sort described by Section 15(b), with two million firms in the consumer product business, the Commission should receive close to 2,000 reports. In reality, the number of reports received is but a fraction of this figure, averaging only 116 per year over the past three years.

Stuart Statler, Reporting Guidelines Under Section 15 of the Consumer Product Safety Act, 7 J. Product Liability 89, 91 (1984) (footnotes omitted). Statler felt that these were very conservative assumptions. Id. at 91 n.9; see also Michael A. Brown, CPSC Getting More Aggressive About the Reporting of Hazards, Nat’l J., May 7, 1984, at 21 (one commissioner felt proper level of reporting should be 1,000; 5,000; or even 10,000 reports per year). It is clear that underreporting persists. The 150 to 200 reports received are in sharp contrast to the levels of reporting under other safety acts. For example, the Food and Drug Administration receives about 18,000 reports every year on medical devices. President Signs CPSC Reauthorization Bill, 18 Prod. Safety & Liab. Rep. (BNA) No. 48, at 1318 (Nov. 30, 1990).

The underreporting problem is complicated by the tendency of the failure to report to be most pronounced for more serious product hazards. See Improvement Act Report, supra, at 10 (in-
most dangerous products remain on the market long after the dangers they pose become known. One reason for this degree of underreporting is that a firm complying with the reporting requirements faces the prospect of having its own Section 15(b) reports used by plaintiffs in subsequent products liability lawsuits. This note argues that alleviating the dilemma of manufacturers caught between the reporting requirements of Section 15 and greater products liability exposure will help reduce the problem of underreporting and promote the goal of product safety.

Part I of this note presents an overview of Section 15 of the CPSA and briefly examines the perplexing product hazard reporting requirements and the possible consequences of reporting upon products liability suits. The note then offers two possible solutions to the current underreporting dilemma. Part II calls for legislative action to prohibit disclosure and discovery of Section 15(b) reports in private civil suits. Portions of the Consumer Product Safety Improvement Act of 1990 (Improvement Act) are used as a model for striking the appropriate balance between the Commission's need for information and an industry's liability concerns. Part III alternatively recommends the application of the common law privilege of "self-critical analysis" to Section 15(b) reports as a way of allowing firms to comply with the reporting requirements without fear of giving away damaging evidence to potential plaintiffs.

I. OVERVIEW OF SECTION 15

Section 15(b) mandates the reporting of adverse risk information. In general terms, Section 15 requires every manufacturer, importer, distributor, or retailer of a consumer product to report to the Commission upon learning that its product does not comply with a consumer product safety rule or industry reports only lower level hazards and Commission staff has task of uncovering serious product safety defects).

10. Fear of products liability exposure is a significant disincentive to report for firms. See Jonathan S. Kahan, Reporting of Substantial Product Hazards Under Section 15 of the Consumer Product Safety Act, 30 ADMIN. L. REV. 289, 309 (1978) (products liability implications "perhaps the most important negative incentive to reporting").

The only Commission study to date on this issue cited several reasons for underreporting: (1) fear of potential products liability exposure; (2) fear of unreasonable corrective action by the Commission; (3) belief that failure to report would not be detected; and (4) fear of adverse publicity. Brown, supra note 9, at 21. Efforts have been made to combat most of these reporting deterrents. The Commission has informed firms that more aggressive attempts to enforce § 15 will be made, id., and it has attempted to allay fears by reassuring firms that adverse publicity would be minimal. Kahan, supra, at 96-97. These efforts have not increased compliance with § 15.


12. CPSA § 15(b), 15 U.S.C. § 2064(b) (1988). The Commission is authorized to promulgate safety standards under CPSA § 7, 15 U.S.C. § 2056. Although initial perceptions were that mandatory safety standards would occupy much of the Commission's time and resources, the Commission promulgates few safety standards. It is directed to defer where possible to "voluntary"
contains a "defect" which could create a "substantial product hazard."\textsuperscript{13}

There are several adverse consequences for firms that comply with the reporting requirements of Section 15. The Commission, upon receipt of this information and after an investigation, may order a recall of the subject products,\textsuperscript{14} may seek injunctive relief to prevent further distribution of allegedly dangerous products,\textsuperscript{15} and may order a firm to notify the public that a hazard exists.\textsuperscript{16} A firm also must be prepared to defend the timeliness of its reports because failure to file timely Section 15(b) reports may subject the firm to costly penalties.\textsuperscript{17} Finally, and perhaps most significant, is the increase in products liability exposure that can result from filing a substantial product hazard report.\textsuperscript{18} Faced with staggering potential liability, firms may decide that not reporting is a less costly option than reporting and risking the dangers associated with compliance with Section 15.\textsuperscript{19}

Although compliance with Section 15's reporting requirements may be costly, failure to furnish the information required is a violation of the Act and carries its own penalties.\textsuperscript{20} Civil penalties may be assessed if a firm knowingly fails to report information concerning a substantial product hazard.\textsuperscript{21} Moreover, a violator could face criminal penalties if a firm knowingly and willfully fails to report after receiving a notice of noncompliance from the Commission.\textsuperscript{22} Congress and the Commission rely upon these deterrents to ensure compliance with the reporting provisions.

Because both reporting and not reporting carry adverse consequences, the statutory scheme thrusts firms into a least-costly-alternative analysis. If they report, they face possible timeliness penalties, recall orders, damaging public-standards set by industry. 15 U.S.C.A. § 2056(b)(1) (West Supp. 1991). Because few products are now subject to safety standards, the focus of this note is on reporting product defects.

\textsuperscript{13} CPSA § 15(b), 15 U.S.C. § 2064(b).
\textsuperscript{14} CPSA § 15(d), 15 U.S.C. § 2064(d). Recalls can be ordered only after the Commission has determined that the product in question actually constitutes a "substantial product hazard." \textit{Id.}
\textsuperscript{15} See CPSA § 15(g)(1), 15 U.S.C. § 2064(g)(1) (Commission has power to seek preliminary injunction where it has "reason to believe" product presents a substantial hazard).
\textsuperscript{16} CPSA § 15(c), 15 U.S.C. § 2064(c).
\textsuperscript{17} Thus, even if a firm makes an effort to report, the Commission may seek penalties for failure to comply with the immediacy requirement. See CPSA § 19(a)(4), 15 U.S.C. § 2068(a)(4) (failure to comply with § 15 is a "prohibited act"). A firm guilty of failing to comply with the immediacy requirements may be subject to criminal and civil penalties under 15 U.S.C.A. §§ 2069-70 (1988 & West Supp. 1991). \textit{See supra} note 8 for a discussion of the CPSA penalty provisions.
\textsuperscript{18} \textit{See infra} Part I.B.
\textsuperscript{19} As former Commission Chairman Sen. John Byington expressed: "In certain instances the adverse product liability implications of reporting may outweigh the adverse statutory implications of not reporting." Remarks of Sen. John Byington Before the National Symposium on Chronic Hazards Nov. 30, 1977), in Kahan, \textit{supra} note 10, at 309. Former Chairman Byington's remarks may be dated, but his concern is quite timely even some 13 years later.
\textsuperscript{20} \textit{See supra} note 8 for a discussion of the CPSA penalty provisions.
\textsuperscript{22} CPSA § 21, 15 U.S.C. § 2070.
ity, burdensome hearings, and—perhaps most significantly—products liability exposure. If they fail to report, civil and criminal penalties may be assessed. By placing firms in this precarious position, Congress has planted the seeds of the underreporting problem and impeded the Commission’s effectiveness as a product safety regulator. Faced with the specter of expensive products liability judgments or settlements, many firms may understandably opt not to report at all.

A. SECTION 15’S PERPLEXING REPORTING GUIDELINES

The statutory language of Section 15(b) is expansive. It requires every manufacturer, distributor, and retailer of consumer products to report immediately to the Commission any information known to the firm that reasonably supports the conclusion that a product fails to comply with an applicable product safety rule, contains a defect which could create a substantial product hazard, or creates an unreasonable risk of serious injury or death, unless the firm has actual knowledge that the Commission already has been adequately informed.23

Congress and the Commission have focused their efforts on regulating defective products. To this end, Section 15(b) requires a report whenever a product “contains a defect which could create a substantial product hazard . . . .”24 “Substantial product hazard” is defined as:

(1) a failure to comply with an applicable consumer product safety rule which creates a substantial risk of injury to the public, or
(2) a product defect which (because of the pattern of defect, the number of products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public.25

Section 15(b) was drafted to ensure that the Commission would have timely access to information concerning potentially hazardous consumer products. Although only one of a number of enforcement tools available to the Commission, the substantial hazard reporting provisions set forth in Section 15(b) have become “first among equals.”26 Placing the burden of reporting product hazards on private industry is an inexpensive method of policing

23. CPSA § 15(b), 15 U.S.C § 2064(b).
Several commentators over the years have attempted to parse the expansive statutory language of § 15(b) and its accompanying detailed regulations. The depth of their analyses attests to the complicated nature of the reporting obligation. See generally Kahan, supra note 10; M. Stuart Madden, Consumer Product Safety Act Section 15 and Substantial Product Hazards, 30 CATH. U. L. REV. 195 (1981); Statler, supra note 9; James T. Hosmer, Comment, Federal Regulation of Substantial Product Hazards: An Analysis of Section 15 of the Consumer Product Safety Act, 25 AM. U. L. REV. 717 (1976).
26. See Madden, supra note 23, at 195-96 (asserting, and criticizing, the emergence of § 15 as the
the marketplace and preventing product-related injuries for an agency hindered by understaffing and inadequate appropriations. Therefore, it is imperative that firms comply with the reporting requirements of Section 15(b).

The difficulty in interpreting the statute and its accompanying regulations, however, undercuts the effectiveness of the reporting requirements.

Manufacturers have looked to the Commission to clarify the subjective language employed by Congress. The question of when to report has baffled firms since the inception of the CPSA. Firms are understandably reluctant to concede a product "defect" or "substantial product hazard" where, in

primary enforcement tool of the Commission); see also Kahan, supra note 10, at 290 (Commission appears to rely heavily on § 15).


28. See Robert M. Sussman & Peter L. Winik, The Consumer Product Safety Improvement Act of 1990, 18 Prod. Safety & Liab. Rep. (BNA) No. 51, at 1435 (Dec. 21, 1990) (many critics believe § 15(b) not effective because of its vague and open-ended criteria); see also Brown, supra note 9, at 21 (adversarial climate quickly developed between Commission and firms because firms were often confused about the scope of their obligations under § 15). Although the vagueness of § 15 and its regulations is certainly a factor contributing to the underreporting dilemma, this note focuses on the adverse products liability implications of reporting as a deterrent to compliance with § 15.

29. Part of the problem, of course, is that statutory terms like "defect" and "substantial product hazard" necessarily entail subjective analysis by firms. Congress's answer to this problem, however, was apparently to write even more "subjectivity" into the reporting requirements in new § 15(b)(3): firms are now required to report whenever their product "creates an unreasonable risk of serious injury or death." 15 U.S.C.A. § 2064(b)(3) (West Supp. 1991). Firms are left to wonder, of course, how this addition alters their obligation.

30. Reports can be, and often are, filed with disclaimers as to the existence of a defect. "A Subject firm, in its report to the Commission need not admit or may specifically deny, that the information it submits reasonably supports the conclusion that its consumer product is noncomplying or contains a defect ...." 16 C.F.R. § 1115.12(a) (1991). The disclaimer might look something like this:

We would like to emphasize that this preliminary report is being made in order to comply fully with Commission regulations. The corporation does not believe a substantial hazard exists, nor that the Commission could so find pursuant to Section 15.

Id. These disclaimers are typically included to blunt the effect of the defect notice, but the defect notice itself may be admitted into evidence in civil trials arising out of the alleged defect. See H.P.
fact, there may be nothing wrong with the particular product. Nonetheless, the Commission needs this information to enable it to act quickly and prevent product-related injuries. The Commission has attempted to increase reporting by issuing detailed regulations concerning the reporting requirements. Despite the Commission's constant admonition that firms should err on the side of safety by reporting when in doubt, firms retain a great deal of discretion due to Section 15(b)'s subjective reporting criteria. Thus, the problem of underreporting is at least partially attributable to the imprecise language of the statute and its accompanying regulations. But in the twenty years since the enactment of the CPSA, Congress and the Commission have failed to increase compliance by providing detailed guidelines to firms.

B. THE PRODUCTS LIABILITY INTERFACE

The reporting scheme outlined above is clearly designed to maximize the number of reports received by the Commission. Firms are required to report under the broad statutory and interpretive guidelines of the Act, but numerous disincentives have led to underreporting. Perhaps the most significant disincentive is that the reports can become damaging documentary evidence that might be used against firms in pending and future products liability suits. It is perhaps unrealistic to expect firms to generate damaging reports,

Hood & Sons, Inc. v. Ford Motor Co., 345 N.E.2d 683, 687-88 (Mass. 1976) (National Highway Traffic Safety Administration recall notice). Once a report is discovered, and subsequently admitted at trial, these rote "disclaimers" are likely to be viewed as mere self-serving statements. The Commission also attempts to offer some assurance to firms by excluding its definition of "defect" from products liability law: "Defect, as discussed in this section and as used by the Commission and staff, pertains only to interpreting and enforcing the Consumer Product Safety Act. The criteria and discussion in this section are not intended to apply to any other area of the law." 16 C.F.R. § 1115.4 (1990). Firms faced with the prospect of a costly products liability suit are not likely to be reassured by this.


The regulations are emphatic on this point. See 16 C.F.R. § 1115.4 (1990) (stating twice that subject firms should report when in doubt as to whether a defect exists).

In federal suits, the § 15(b) reports will often be admitted as party admissions. See Fed. R. Evid. 801(d)(2) (admission of out-of-court declarations allowed if they were made by the party against whom they are offered). If the firm submits a "disclaimer" with its § 15(b) report, the report probably will not be classified as a non-hearsay admission. Plaintiffs would likely still be successful in getting the report before the fact-finder, however, through Rule 803(6), the exception for records made in the regular course of business. See Fed. R. Evid. 803(6).
often without the benefit of any significant investigation, without offering
them some protection from prospective plaintiffs.

The common law provides that a manufacturer or other seller is subject to
liability for failing either to warn or to warn adequately about a risk or haz­
ard inherent in a product's design. 36 Evidence that indicates a manufacturer
or other seller knew, or in the exercise of ordinary care should have known,
that a product is defective may be highly relevant on such issues as a defend­
ant's prior knowledge of a defect, failure to warn, and the feasibility of any
improved design. 37 By indicating the firm's awareness of a potential defect,
Section 15(b) reports can lend credence to allegations of negligent warning or
failure to warn. Even though the reports are often submitted in the early
stages of investigation of a potential defect, they can greatly influence a jury,
which will be presented with what it is told is written evidence of a firm's
knowledge of a defect prepared by the defendant firm itself. Firms are un­
derstandably reluctant to provide such damaging evidence to potential
adversaries.

Section 15(b) reports also provide support for a strict liability claim that a
product is "defective" and "unreasonably dangerous." 38 By complying with
Section 15, firms may unwittingly resolve the liability issue against them­
selves and lay the groundwork for a punitive damages award. In addition,
compliance with Section 15 may lead to a recall campaign by the Commis­

37. See id. at 652 (court refused to apply privilege to § 15(b) reports in products liability action,
due in part to their relevance as evidence).
38. RESTATEMENT (SECOND) OF TORTS § 402A (1965) states:

(1) One who sells any product in a defective condition unreasonably dangerous to the user
or consumer or to his property is subject to liability for physical harm thereby caused to
the ultimate user or consumer, or to his property . . . .

While the Commission has made clear that its concept of "defect" is not applicable to any other
area of the law, 16 C.F.R. § 1115.4 (1990), such interpretive assurances are not likely to appease
wary manufacturers. The information received under § 15, once presented to a jury, is likely to
have devastating effects.

Recent amendments to the CPSA serve only to heighten this concern. The Consumer Product
Safety Improvement Act of 1990 extends the reporting requirement to cases where a firm has infor­
mation reasonably supporting the conclusion that a product "creates an unreasonable risk of serious
(5th Cir. 1980); Aqua Slide 'N' Dive v. Consumer Prod. Safety Comm'n, 569 F.2d 831, 838-40 (5th
Cir. 1978). The test is very close to the standard of liability set forth in RESTATEMENT (SECOND)
OF TORTS § 402A, supra.

Safety & Liab. Rep. (BNA) No. 27, at 758 (July 6, 1990) (canvassing arguments for and against
admission of both voluntary and government-mandated recalls).
mission of such evidence not only deters reporting under Section 15, but may ultimately tend to deter manufacturers from improving their products and voluntarily recalling products. Products liability judgments and settlements may reduce the funds available for valuable research or voluntary recalls.41

Possible product liability exposure is one of the primary concerns of any company involved in the manufacture and distribution of consumer products. Prospective use of Section 15(b) reports in private litigation imposes significant disincentives on firms contemplating disclosure to the Commission. It is time to recognize these significant disincentives to reporting and to partially cure the problem by offering firms some assurance that their good faith efforts to comply with the reporting obligation will not result in substantial products liability exposure.

II. LEGISLATIVE PROTECTION FOR SECTION 15(B) REPORTS

A. CURRENT PROTECTION FOR SECTION 15(B) REPORTS

The CPSA does restrict somewhat the public disclosure of information received by the Commission.42 Generally, if a manufacturer could be harmed by the public disclosure of information concerning one of its products, the Commission is obligated to notify the manufacturer prior to disclosure and to provide an opportunity for comment by the manufacturer.43 The Commission is also required to assure the manufacturer that any such information is "accurate" and that disclosure would appreciably aid the effectuation of the CPSA's purposes.44

But the CPSA specifically provides for the disclosure of information received under Section 15(b) in judicial proceedings,45 and the Commission's

40. Before a recall order can be issued, the Commission must determine that the subject product actually presents a "substantial product hazard." CPSA § 15(d), 15 U.S.C. § 2064(d) (1988).
41. This is especially true in the case of admission of any voluntary recall letters created by firms. Recalls are already an expensive undertaking, and the addition of products liability exposure may make costs prohibitive.
42. The CPSA contains several restrictions on the disclosure of information. See CPSA § 6(b), 15 U.S.C. § 2055(b) (1988). They were included in the CPSA in 1972 because Congress was aware that the release of inaccurate information by the federal agency charged with regulating the safety of consumer products could seriously harm manufacturers. For several years, the Commission took the position that § 6(b) only applied to Commission-initiated disclosures of information and thus did not affect the Commission's ability to release information under the Freedom of Information Act (FOIA), 5 U.S.C. § 522 (1988). This position was rejected, however, by the Supreme Court. Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 123-24 (1980).
44. CPSA § 6(b)(6), 15 U.S.C. § 2055(b)(6).
45. CPSA § 6(b)(5), 15 U.S.C. § 2055(b)(5). This section reads in part:

(5) . . . [T]he Commission shall not disclose to the public information submitted pursuant to [section 15(b)] respecting a consumer product unless—
policy is to make information available “to the fullest extent possible.” Thus, protection for Section 15(b) reports is quite limited. Manufacturers have been unsuccessful in asserting that the CPSA protects their product hazard reports from civil discovery. By its terms, the CPSA only prohibits disclosure by the Commission, not disclosure in general. The fact that only “public” disclosure is prohibited also cuts against any argument for protection; civil trials are not generally considered “public,” and, in any event, protective orders are considered a plausible safeguard against wide disclosure. Finally, the CPSA exempts from the general prohibition of disclosure any “information in the course of or concerning a judicial proceeding.” The CPSA thus does not protect Section 15(b) reports from plaintiffs’ requests for discovery, which perpetuates the problem of underreporting and jeopardizes the Commission’s effectiveness.

B. SECTION 37 OF THE CONSUMER PRODUCT SAFETY IMPROVEMENT ACT OF 1990: A MODEL OF CONGRESSIONAL INSIGHT

Recently, Congress grappled with the underreporting dilemma and passed new provisions to encourage firms to report product safety information to the

(A) the Commission has issued a complaint under [section 15(c) or 15(d)] alleging that such product presents a substantial product hazard;
(B) . . . the Commission has accepted in writing a remedial settlement agreement dealing with such product; or
(C) the person who submitted the information under [section 15(b)] agrees to its public disclosure.

The provisions of this paragraph shall not apply to the public disclosure of . . . information in the course of or concerning a judicial proceeding.

Id. (emphasis added).

46. 16 C.F.R. § 1016.1(a) (1991). Throughout its history, the Commission has favored disclosing, not withholding, information. For example, the Commission has traditionally been reluctant to invoke the FOIA’s exemptions from disclosure. See 16 C.F.R. § 1015.15(b) (1991) (“The Commission will make available, to the extent permitted by law, records authorized to be withheld under 5 U.S.C. § 552(b) unless the Commission determines that disclosure is contrary to the public interest.”). This bias will only serve to heighten the underreporting dilemma and should be altered in the case of § 15(b) reports.


49. Id. at 683.


51. The Roberts court attacked the central premise of this note—that the threat of discovery of § 15(b) reports significantly impedes the enforcement of the CPSA:

[T]he language of § 6(b)(5) concerning disclosure in a judicial proceeding indicates that Congress itself did not find the disincentive caused by disclosure through discovery to be as threatening to the functioning of the Act as [the defendant] suggests it would be.

Roberts, 107 F.R.D. at 683.
Commission. The protections afforded some of this information are a useful model for Congress to consider in the context of Section 15(b) reports. The Consumer Product Safety Improvement Act of 1990 is the first major amendment to the CPSA in ten years, and is an effort to strengthen the CPSA through revision of the Commission's rulemaking procedures and reporting requirements. Specifically, Congress sought to increase reporting of potential product hazards to the Commission through the imposition of an additional reporting requirement. Section 37 of the CPSA requires that any manufacturer whose product has been the subject of three product liability suits within a two year period must file a report with the Commission. Filing a Section 37 report does not excuse a firm from reporting under Section 15(b).

Section 37 reports, like Section 15(b) reports, are comprised mostly of fac-


It is clear that Congress intended the amendments to lead to increased filing of reports. Senator Richard H. Bryan, sponsor of the Senate bill, commented concerning the "unreasonable risk of injury" amendment:

There may be some situations, however, where reporting will be necessary under the new "unreasonable risk" standard imposed by the bill, as amended, but not under the current version of section 15(b). It is my expectation that, by establishing this additional criterion for reporting, the bill will encourage reporting by some firms who might now conclude that section 15(b) does not apply.

135 CONG. REC. S10,052 (daily ed. Aug. 3, 1989). It is difficult to imagine many circumstances in which a company would decide that a reporting obligation arises under the new "unreasonable risk" language but not under the preexisting statutory language. However, it is clear that Congress believes more reporting is necessary and has taken steps to increase compliance with § 15(b). Unfortunately, the legislature simply has not gone far enough; the new "unreasonable risk" language is no more likely to foster compliance with § 15(b) than the preexisting language. Any regulations ultimately drafted to explain the new requirement will probably be similarly unhelpful.


If a particular model of a consumer product is the subject of at least 3 civil actions that have been filed in Federal or State court for death or grievous bodily injury which in each of the 24-month periods defined in subsection (b) result in either a final settlement involving the manufacturer or a court judgment in favor of the plaintiff, the manufacturer of such product shall, in accordance with subsection (c), report to the Commission each such civil action within 30 days after the final settlement or court judgment in the third of such civil actions, and, within 30 days after any subsequent settlement or judgment in that 24-month period, any other such action.

Id. It is not clear why Congress devoted a separate section to lawsuit reporting and did not simply include the provision under § 15. The result, as indicated below, might have been to exempt § 15(b) reports from civil discovery.
tual data concerning potentially dangerous products. A manufacturer must report: (1) its name and address; (2) the model and model number or designation of the consumer product; (3) whether the lawsuit involved death or grievous bodily injury, and in the latter case a statement of the category of injury; and (4) whether the case resulted in a final settlement or judgment in favor of the plaintiff, and, if a judgment, the names of the case and court and the case number. 55 What the Commission plans to do with the information received under Section 37 is unclear.

Reporting under this section can have serious financial consequences for at least some firms. The Commission will probably analyze the information for broad injury trends, and under certain circumstances, a Section 15 product investigation will be initiated. In some cases, a Section 37 report may lead to a recall order or penalty assessment for failure to comply with the Section 15(b) product defect reporting requirements. Thus, as is the case with Section 15(b) reports, there are certain disincentives to reporting.

But Section 37 does address the fear that compliance will lead to additional product liability exposure. A number of provisions ensure that these lawsuit reports will remain confidential. 56 For example, the manufacturer is not required to report the amount of any settlement when reporting a lawsuit. 57 The statute also provides that the report does not constitute an admission of liability, unreasonable risk of injury, product defect, substantial product hazard, imminent hazard, or "any other admission of liability under any statute or under any common law." 58 These provisions demonstrate Congress's sensitivity to the products liability concerns of manufacturers.

These concerns were also addressed in provisions protecting against disclosure of Section 37 reports by the Commission. The statute explicitly states that neither the Commission nor the Department of Justice may publicly disclose the information reported under Section 37, and only a few authorized personnel are allowed to examine the information. 59 Most importantly, the statute further provides that lawsuit reports under Section 37 "shall not be subject to subpoena or other discovery in any civil action in a State or

55. Id.
56. Rep. Dont Ritter, in his statements regarding the Improvement Act, highlighted the protection afforded § 37 reports: "There are very strict confidentiality protections and stringent prohibitions against the filing of such a report being deemed an admission of any kind." 136 CONG. REC. H11,908 (daily ed. Oct. 23, 1990). Contrast the treatment of § 15(b) reports—very little confidentiality and the opportunity for a self-serving "disclaimer" of product defect. See supra notes 30, 42-51 and accompanying text.
58. Id. § 2084(d).
59. Id. § 2084(e)(1). The penalty for officers and employees of the Commission who "willfully violate" the nondisclosure provisions may be dismissal. Id. § 2084(e)(5).
Federal court or in any administrative proceeding."60 In this portion of the Improvement Act, Congress has recognized the significant product liability deterrent to reporting and has provided additional incentives to encourage reporting through confidentiality.61

The logic behind Section 37's confidentiality provisions can be extended to increase reporting of product hazard information under Section 15 by removing one of the most serious disincentives to reporting: the potential use of the reports in products liability actions.62 Congress enacted blanket confidentiality protection for Section 37 reports in an effort to increase adverse risk information reporting. Reports filed under Section 15, however, are at least as harmful as Section 37 reports in the context of products liability litigation. In fact, the implicit admission in Section 15(b) reports that a product is defective63 provides an even greater concern to a reporting firm. In contrast, Section 37 reports merely document the commencement and settlement of lawsuits associated with a product, and do not reveal the amount of any settlement.

The case for confidentiality is much more compelling under Section 15. Perhaps it is asking too much, in an age of government "sunshine," to urge Congress to protect product hazard reports from disclosure in civil discovery and subsequent trials. But given the endemic underreporting under the present scheme, the Improvement Act's disclosure provisions present a valid model for strengthening Section 15 as an enforcement weapon.64

60. Id. § 2084(e)(2). This clear bar against disclosure of § 37 reports thus avoids the confusion that has arisen in connection with the discoverability of § 15(b) reports. See infra Part III.

61. See 136 Cong. Rec. S16,482 (daily ed. Oct. 22, 1990) (statement of Sen. John C. Danforth). "A crucial aspect of the new section 37 is its strict confidentiality provision. This will ensure that the increased reporting to the Commission has no effect on ongoing product liability litigation." Id. Two observations should be made about Senator Danforth's comments. First, the Senator appears to have abandoned his previous notion that products liability and the Commission operate in essentially separate spheres. See supra note 5 (colloquy with Andrew Krulwich). Second, the Senator's observation is equally relevant to § 15(b) reporting. Congress never explained why these reports are to be treated differently.

62. See 136 Cong. Rec. H11,908 (daily ed. Oct. 23, 1990) (statement of Rep. Don Ritter). "I believe that this section [§ 37] has been carefully constructed to preserve maximum confidentiality while still providing the Commission with information that it can use to identify product hazards." Id. This conclusion highlights the fundamental inconsistency in the treatment of § 15(b) reports. Almost twenty years of experience demonstrates the value of § 15(b) reports, yet they receive little protection. By contrast, § 37 reports have yet to be tested, but their protection is virtually absolute.

63. Under the amended § 15, firms are required to report when they have information that their product might create "an unreasonable risk of serious injury or death." 15 U.S.C.A. § 2064(b)(3) (West Supp. 1991). This requirement implies that firms are to engage in a traditional risk-utility analysis before reporting and comes very close to the standard for strict products liability set forth in the Restatement (Second) of Torts § 402A (1965). This test is followed in a majority of jurisdictions.

64. The bar on discoverability may pose some problems in state courts, but this provision should be enforceable as a legitimate exercise of congressional power. State courts have repeatedly held that federal statutory restrictions on the discoverability of documents are valid acts of federal pre-
With the Commission becoming increasingly dependent for enforcement upon the reporting requirements of the CPSA, it becomes crucial for Congress to encourage reporting by any plausible means available. There will certainly always be those firms that simply choose to “gamble” that the Commission is incapable of full enforcement, but other firms might decide to report more fully if the fear of products liability exposure is removed. Although the efficacy of the Section 37 approach will be difficult to measure, it is at least plausible that firms will be more likely to report if protected than if they are not. Congress expressed this judgment with respect to Section 37 reports, and the same treatment should apply to Section 15(b) reports.65

III. ENCOURAGING COMPLIANCE THROUGH APPLICATION OF THE “SELF-CRITICAL ANALYSIS PRIVILEGE”

Even in the absence of congressional action, there is another avenue available to provide protection for Section 15(b) reports: the emerging common-law privilege for self-critical analysis. Courts faced with discovery requests seeking production of Section 15(b) reports can, and should, protect those reports against discovery to further the public policy goals of the CPSA.

A. THE SCOPE AND APPLICABILITY OF THE PRIVILEGE

In Bredice v. Doctor’s Hospital, Inc.,66 a District of Columbia federal district court held that a plaintiff in a medical malpractice case could not discover hospital “peer review” committee minutes and reports.67 The Bredice court found that ongoing self-analysis plays a critical role in ensuring that hospitals continually improve the care they provide to patients.68 In light of the “overwhelming public interest” in protecting this flow of ideas, plaintiff’s

65. If the self-critical analysis privilege, infra Part III, is to develop in this area, congressional action is potentially very useful. See Ronald J. Allen & Cynthia M. Hazelwood, Preserving the Confidentiality of Internal Corporate Investigations, 12 J. Corp. L. 355, 381 (1987):

Those persons interested in furthering the development of the [self-critical analysis privilege] should consider asking Congress to provide for statutes in specific areas . . . . In advancing such proposals, however, the proponents of a [self-critical analysis privilege] must be prepared to make a compelling case on the facts. What will carry the day, if anything will, is a convincing demonstration that strengthening the common-law development of the [self-critical analysis privilege] through legislation is in our collective self-interest.

67. Id. at 250-51.
68. Id. at 250.
request for production was denied. For the first time, a court had recognized a privilege for "self-critical evaluation."

Since Bredice, many courts, acting pursuant to Rule 501 of the Federal Rules of Evidence, have applied a "self-critical analysis" privilege in situations where there is a desire to promote the creation of socially useful information by protecting it from discovery. The majority approach generally requires that three criteria be met before the privilege will apply:

[F]irst, the information must result from a self-critical analysis undertaken by the party seeking protection; second, the public must have a strong interest in preserving the free flow of the type of information sought; finally, the information must be of the type whose flow would be curtailed if discovery were allowed.

69. Id. at 251. The court stated, "Confidentiality is essential to effective functioning of these staff meetings; and these meetings are essential to the continued improvement in the care and treatment of patients . . . . To subject these discussions and deliberations to the discovery process, without a showing of exceptional necessity, would result in terminating such deliberations." Id. at 250. Thus, the rationale underlying the privilege was explicit—protection of information relevant to an inquiry in the public's interest. Bredice has won the day in the context of medical review procedures. See David W. Jorstad, Note, The Legal Liability of Medical Peer Review Participants for Revocation of Hospital Staff Privileges, 28 Drake L. Rev. 692, 694 n.11 (1979) (list of state statutes following Bredice by either providing immunity from civil suits for peer review participants or protecting medical review procedures from discovery or use at trial). Its application to other classes of documents is less certain.


71. The privilege has generally been limited to certain types of self-analyses. See James F. Flanagan, Rejecting a General Privilege for Self-Critical Analysis, 51 Geo. Wash. L. Rev. 551, 552 (1983) (courts have applied the privilege to confidential evaluations of peer reviews, affirmative action studies, and internal corporate investigations); David P. Leonard, Codifying a Privilege For Self-Critical Analysis, 25 Harv. J. on Legis. 113, 115 (1988) (courts have applied the privilege to reviews of medical procedures, post-accident investigations, police department investigations, affirmative action studies, and confidential peer reviews); Note, The Privilege of Self-Critical Analysis, 96 Harv. L. Rev. 1083, 1090 (1983) (courts have applied the privilege to hospital committee reports, internal investigatory reports, and forms submitted to the government under Title VII).

The privilege, to this day, is regarded as a nascent one and its parameters are uncertain. Several treatments can be found in the academic literature. See, e.g., Allen & Hazelwood, supra note 65; Nancy V. Crisman & Arthur F. Mathews, Limited Waiver of Attorney-Client Privilege and Work-Product Doctrine in Internal Corporate Investigations: An Emerging Corporate 'Self-Evaluative' Privilege, 21 Am. Crim. L. Rev. 123 (1983); Flanagan, supra; Leonard, supra; Note, supra, Comment, Civil Procedure: Self-Evaluative Reports—A Qualified Privilege in Discovery?, 57 Minn. L. Rev. 807 (1973).

This note is not intended to represent an exhaustive treatment of the self-critical analysis privilege. This note accepts the general privilege of self-critical analysis and encourages its application to Section 15(b) reports and other reports submitted pursuant to product safety statutes.

72. Note, supra note 71, at 1086. Commentators have searched for an appropriate definition of self-critical analysis. See Flanagan,
This formulation, however, has come under attack, as it sweeps too broadly and offers litigants an unduly broad veil of secrecy. Courts have limited application of this privilege to certain narrowly defined types of self-critical analyses.

In addition to limiting application of the self-critical analysis privilege by identifying specific categories of eligible analyses, courts also have created broad exceptions to the application of the privilege. Two exceptions have been created that threaten to render the privilege a nullity, both of which should be rejected by the courts.

The first exception involves a distinction between the factual and evaluative components of a self-analytical report. Under this exception, the "factual" portions of a self-analysis are not protected. The vague and confusing nature of this exception severely weakens the social utility of the privilege. The prospect of a court attempting to dissect a "hybrid" report, with unpredictable results, will lead to uncertainty and "chilled" evaluation—the very vices the privilege was developed to ameliorate. In addition, statutes that utilize reporting triggers such as "defective" and "unreasonably dangerous" involve implicit evaluations, regardless of the nature of the information actually reported. While a governmental entity may rely solely on factual information received through a self-critical report, the report's mere existence is

supra note 71, at 556 (defining self-critical analysis as "a review of a major policy or procedure, conducted by or for top management to permit the evaluation and improvement of an organization's operations"); Leonard, supra note 71, at 117 (proposing codification of privilege for "an internal review of a major policy or procedure, conducted by or on behalf of a business' management, and which contains subjective evaluations concerning the policy or procedure"). The courts have failed to set forth any definition. For purposes of this analysis, any government-mandated report requiring a regulated entity to analyze its own performance and compliance with government regulations will qualify as a "self-critical analysis." Title VII reports, generally accepted as within the privilege, are a good example.

73. See Flanagan, supra note 71, at 551 (noting judicial trend toward restricting privileges and expanding scope of discovery). This uneasiness with the prospect of a sweeping privilege has stunted the growth of the self-critical analysis privilege. Even today, courts are not sure of the privilege's boundaries. See Dowling v. American Haw. Cruises, 133 F.R.D. 150, 153 (D. Haw. 1990) (law regarding the "emerging" self-critical analysis privilege "remains unsettled"). Nonetheless, there are those who remain confident that this privilege will survive and develop further. See Allen & Hazelwood, supra note 65, at 357 (while development has been tentative, potential for development is great).

74. See supra note 71; see also Dowling, 133 F.R.D. at 151 (since Bredice, most of the cases applying self-critical analysis privilege have involved Title VII of the 1964 Civil Rights Act).


76. See Flanagan, supra note 71, at 557-58 (distinction is "blurred" and courts have not specifically described materials that qualify for protection); Note supra note 71, at 1093-96 (factual/evaluative distinction is complex and costly). In addition, determining whether information is factual or evaluative may lead to expensive pretrial procedures, such as in camera inspections. Note supra note 71, at 1096.
evidence of an evaluation. Application of this exception will result in limited protection and limited confidence for self-analysts.

The second exception to the privilege involves disclosure of otherwise protected information where the plaintiff shows "exceptional need." This exception has the advantage of recognizing that there are competing interests at stake. But instead of balancing plaintiffs’ need for evidence against the social need for confidentiality, courts sometimes focus only on the plaintiffs’ interest. In many cases plaintiffs may have a legitimate need for the self-evaluative reports. But this cannot be the end of the inquiry as the privilege was created to protect the free flow of socially useful information. Rather than examining plaintiffs’ need for the information in a vacuum, courts should consider both the public interest in confidentiality and the plaintiff’s need in order to serve the social needs which require self-analysis.

The self-critical analysis privilege is intended to encourage full and candid disclosure of critical analyses to regulatory agencies. Regulated businesses will be reluctant to provide this information, even in the face of sanctions, unless they are assured that they will not be massively expanding their products liability exposure by complying. The goals of the privilege, as well as the needs of individuals, are served by the application of the privilege under the approach advocated in Part III.c of this note, without the counterproductive exceptions for factual material or absolute deference to plaintiffs’ interests.

B. CURRENT TREATMENT OF SECTION 15(b) REPORTS UNDER THE SELF-CRITICAL ANALYSIS PRIVILEGE

In spite of compelling arguments for protection of Section 15(b) reports, defendants have been largely unsuccessful in their claims for protection. Firms reporting under Section 15 have made intermittent attempts to challenge the discovery of their substantial product hazard reports, claiming that the reports are protected from disclosure and discovery by the self-critical analysis privilege under common law. Though shielding Section 15 information would probably increase reporting of vital public safety information, courts have been generally unreceptive to claims of privilege. Of the three reported decisions addressing the issue, only one court held that a qualified

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77. Note, supra note 71, at 1097. This exception apparently stems from the original analysis of the privilege in Bredice. Since Bredice, most courts have focused on a balancing of the equities. See Leonard, supra note 71 at 123 (burden on party seeking disclosure under proposed codification to demonstrate that “its need for the information in the preparation of the case substantially outweighs the public benefit from nondisclosure”).

self-critical analysis privilege applies to Section 15(b) reports. Otherwise, courts have displayed both a general lack of appreciation for the significance of Section 15(b) reports in the Commission's enforcement arsenal and a misconception about the workings of the CPSA.

In *Roberts v. Carrier Corp.*, a federal district court in Indiana concluded that there are valid reasons for protecting firms that submit Section 15(b) reports. The court set forth what it believed to be the relevant standards: (1) "the materials must have been prepared for mandatory government reports"; (2) "[a]ny privilege extends only to subjective, evaluative materials"; (3) the privilege "does not extend to objective data in the same reports"; and (4) discovery will be denied "only where the policy favoring exclusion has clearly outweighed plaintiff's need." Applying these criteria, the court held that the manufacturer's Section 15(b) report was subject to a qualified privilege and ordered an in camera inspection to determine which portions of the report were protected.

The self-critical analysis privilege applied in *Roberts*, which does not protect subjective material in Section 15(b) reports, results in little encouragement to report product hazards. The court recognized the social interest in promoting full disclosure to the Commission by "assur[ing] fairness to persons required by law to engage in self-evaluation." But the court went on to subject the Section 15(b) report at issue to an in camera inspection, presumably to extract and disclose the "factual" portions of the report.

Requiring disclosure of factual data from Section 15(b) reports is not adequate protection for the reporting process. Under the present Commission rules, firms are required to submit both an "initial" and a "full" report concerning a potential substantial product hazard. These reports are largely factual in nature. They contain, in part, an identification and description of the product, the name and address of the manufacturer, the nature and extent of the possible defect, and the nature and extent of the injury or risk.

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81. *Id.* at 684 (quoting Resnick v. American Dental Ass'n, 95 F.R.D. 372, 374 (N.D. Ill. 1982)).
82. *Id.* at 684-85.
83. *Id.* at 684 (quoting O'Connor v. Chrysler Corp., 86 F.R.D. 211, 218 (D. Mass. 1980)).
84. 16 C.F.R. § 1115.13(c), (d) (1991).
85. *Id.* The necessary elements of an "initial" report are less comprehensive that what is required in a "full" report. For a full report, in addition to the elements in the initial report, firms must disclose the following: the date and manner in which the information was obtained; the total number of products and units involved; the dates when the products were manufactured, imported, distributed, and sold; an explanation of any changes that have been or will be effected to correct the defect; information that has been given to consumers, including drafts of any letters, press releases, or other written information; and an explanation of the marketing and distribution of the products. 16 C.F.R. § 1115.13(d) (1991).

There is little express "evaluation" necessary under these regulations. Consequently, application
Most of this information requires little evaluative effort on the part of the reporting firm. Given this limitation, the Roberts court was convinced that "the privilege will not protect much of what [the manufacturer] has submitted" to the Commission. The court examining Section 15(b) reports, however, must realize that the mere act of reporting is a form of self-critical analysis. Before a Section 15(b) report is filed, a firm must evaluate the data and apply the appropriate analysis. The act of reporting, by itself, tells the fact finder that the manufacturer believes its product to be "defective" and a potential hazard to the public. The policy of encouraging the free flow of valuable consumer information is not served by a "privilege" that fails to protect these self-critical analyses.

The only other reported decisions considering protection of Section 15(b) reports fail to account for the role that confidentiality can play in assuring adequate future reporting. In Scroggins v. Uniden Corp., an Indiana state court refused to create a common law privilege for self-critical analysis, leaving it for legislative enactment. In dicta, however, the court expressed its doubts about the efficacy of using the privilege to encourage reporting of product hazards, dismissing as mere "recitals" the opinions of other courts indicating that protection was necessary for a successful reporting program and labeling such beliefs a "bald assumption." The court then went on to display its misunderstanding of the actual prac-

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86. Roberts, 107 F.R.D. at 685.
87. The same insight applies to other product safety statutes. See, e.g., National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1411 (1988) (manufacturers required to notify Secretary of Transportation when vehicle contains defect which "relates to vehicle safety"); Toxic Substances Control Act, 15 U.S.C. § 2607(c) (1988) (any manufacturer, processor, or distributor of a chemical substance who learns that substance "presents a substantial risk of injury to health or the environment" must report to the Administrator of the Environmental Protection Agency). The mere filing of such reports requires an "evaluation" of some sort, regardless of the specific information reported. In other words, the decision to report is itself the evaluation, and the physical document is merely the product of the evaluation. Section 15 is in the nature of a forced self-evaluation.
89. Id. at 86.
90. Id. Other courts in similar contexts have also attacked the nexus between disclosure and underreporting. For example, in Martin v. Potomac Elec. Power Co., No. 86-0603, 1990 WL 158787, at *3 (D.D.C. May 25, 1990), the court set out the most common arguments against a disclosure/underreporting connection:

(1) [R]eports are mandated and will continue absent protection; (2) no actual self-analysis occurs—performance is analyzed merely to comply with government reporting requirements; and (3) other deterrents to reporting already exist. None of these arguments is compelling as applied to CPSA reports. The fact that the reports are "mandatory" has not resulted in near full compliance. Self-analysis is implicit in the act of reporting itself. In any event, the fact that other deterrents exist is no reason not to remove the products liability deterrent. It may be the most significant deterrent.
tice under Section 15. The court was under the impression that a "responsible" firm that filed a product report with the Commission under Section 15 would "cease distribution of [that product], or at least be ordered to cease and desist by the CPSC." But this conclusion fails to appreciate that firms are required to report whenever a product could constitute a substantial product hazard; the firm generally is not required to cease distribution immediately. The Commission will order a recall, public notice, or replacement program only after it determines that a product actually constitutes a safety hazard. Section 15(b) reports are merely preliminary analyses, and it is far from clear that a "responsible" firm must cease doing business simply because it has filed a report. Accordingly, the Scroggins decision failed to understand the need for confidentiality for Section 15(b) reports.

In Lamitie v. Emerson Electric Co., a New York appellate court refused to recognize a privilege of self-critical analysis in the Section 15 context. That court simply was not convinced that "confidentiality is essential to the full maintenance of the relationship between [the firm] and the [Commission]..." The court reasoned that full candor is mandated by the statute and was unpersuaded that the self-critical analysis privilege would increase reporting of product hazards to the Commission. Once again, the court failed to appreciate firms' reluctance to report in light of the potential products liability implications. Under the court's analysis, Section 15 itself mandates reporting, and thus confidentiality would not appreciably increase compliance. But the court ignored what some commentators and Congress itself have realized—that in certain circumstances the adverse products liability implications of reporting may outweigh the adverse statutory implications of not reporting. While confidentiality may not result in full compliance with Section 15, it is certainly a step in the right direction.

C. A NEW TEST FOR THE SELF-CRITICAL ANALYSIS PRIVILEGE

The self-critical analysis privilege should be redefined in a manner that is more narrowly tailored to promote the development of the socially useful information contained in self-critical analyses without creating an impenetrable barrier to discovery. Protection should be granted where: (1) the report is required by law; (2) the institution mandating the report serves an impor-

94. Id. at 653.
95. See supra note 10, at 309.
96. A number of courts have accepted this proposition. See e.g., Roberts v. Carrier Corp., 107 F.R.D. 678, 684 (N.D. Ind. 1985) (§ 15(b) reports protected if originally prepared pursuant to CPSA mandate for Commission); Resnick v. American Dental Ass'n, 95 F.R.D. 372, 374 (N.D. Ill. 1982) ("To be privileged, the materials must have been prepared for mandatory government re-
tant public function; (3) the communicative process is integral to the institution’s goals and depends on confidentiality for continued viability; and (4) the party seeking disclosure of the report fails to demonstrate that the need for the material outweighs the public interest in confidentiality.97

This formulation of the privilege considers both plaintiffs’ discovery interests and the public interest in the reporting of product safety information. First, its narrow scope leaves intact the general rule that the public “has a right to every man’s evidence.”98 Self-critical analyses will only receive protection in limited circumstances.99 Second, this formulation also promotes the underlying rationale for the creation of the privilege: encouraging the free flow of socially useful information. Information reported under product safety statutes is undeniably in the public interest.

Under the proposed formulation, Section 15(b) reports are compelling candidates for application of the evolving self-critical analysis privilege. Reporting of product problems is statutorily required for household products, automobiles, aircraft, chemicals, pesticides, medical devices, drugs, microwave ovens, and many other products.100 These reports serve an undeniable social need by protecting the public from product-related injuries. Moreover, government institutions rely heavily on mandatory reports from outside

ports.”); O’Connor v. Chrysler Corp., 86 F.R.D. 211, 218 (D. Mass 1980) (public policy behind privilege is “to assure fairness to persons who have been required by law to engage in self-evaluation”).

There are two rationales underlying this requirement. First, where a third party requires the preparation and reporting of self-critical information, notions of fairness counsel against disclosure. Second, where the requirement is imposed by the government, there is also an interest in encouraging compliance with government programs. See Resnick, 95 F.R.D. at 374 (where self-evaluation is voluntary, “[n]either th[e] fairness rationale nor th[e] effective enforcement rationale operates . . . . No unfairness exists, for no third party required [the defendant] to make a critical self-evaluation or, indeed, any evaluation at all.”).

97. Although the Bredice court indicated that a plaintiff had to show “exceptional necessity,” this requirement has been criticized as too strict. Wei v. Bodner, 127 F.R.D. 91, 100-01 (D.N.J. 1989). Since Bredice, courts have generally applied a simple balancing test: plaintiffs’ need for the material to make their case is balanced against the public interest protected by the privilege. Dow-ling, 33 F.R.D. at 153. Thus, even under a simple balancing test, a plaintiff must overcome a forbidding “public interest” argument.

dence § 2192 (3d ed. 1940)).

99. As a threshold matter, the report must be one that is required by law. Internal, voluntary product safety reports or memoranda, originated for internal use, cannot be shielded simply by forwarding the documents to the relevant institution. Also, confidentiality must be critical to the continued viability of the institution. If the institution is outside-source-dependent, the reports should be protected. If the institution does not rely substantially on the outside sources, courts need not preserve confidentiality.

sources in performing their functions. Reducing the flow of this information would harm the public by impairing the government's ability to regulate dangerous products.

Strong policy considerations justify shielding these documents from discovery.\textsuperscript{101} Congress requires self-reporting in several statutes. Because a requirement to report is often triggered by a reporting party's subjective perception of an "unreasonable risk" or "defect," disclosure of such a report can have drastic consequences for the firm making it, including devastating products liability exposure. As a class, these self-analyses represent the classic confrontation between a party's liability concerns and a public agent's need for information. It is critical that efforts to understand and correct dangerous product conditions are not blocked because companies fear that evidence gathered as part of the corrective process will later be used against them.\textsuperscript{102}

Specifically, the self-critical analysis privilege should be extended to protect the mandatory product defect reports required by Section 15(b). Application of the proposed requirements shows the utility of this approach. First, Section 15(b) reports are required by law. Second, the "important public function" criterion is met in the context of mandated reports under product safety statutes; a court should generally defer to the legislative judgment that the institution benefitting from the receipt of product risk information serves an important public function. The court, however, may consider the nature of the agency's task in determining whether to apply the privilege. For example, the scope of the Commission's jurisdiction and its mission of preventing injury to the public are factors to consider.\textsuperscript{103}

The third requirement—that the communicative process be integral to the

\textsuperscript{101} In Ross v. Bolton, 106 F.R.D. 22 (S.D.N.Y. 1985), the plaintiff sought investigative materials compiled by the National Association of Securities Dealers (NASD). While recognizing that NASD was not a governmental agency, the court applied the self-critical analysis privilege:

- There is a strong public interest in maintaining the integrity of effective industry self-regulation. This interest would clearly be undermined by making NASD files fair game for any of the thousands of private securities fraud litigators across the country who wish to shortcut their own discovery efforts and instead to reap the benefits of the Association's ongoing, statutorily governed work.

\textit{Id.} at 24. Similar concerns are at work in the context of product safety statutes.

\textsuperscript{102} \textit{Cf.} Fed. R. Evid. 407 (subsequent remedial measures not admissible to prove negligence; social policy should encourage people to take, or at least not discourage them from taking, steps designed to increase safety). This social policy is particularly applicable in the case of product safety statutes. The self-regulation achieved through mandatory reporting requirements helps alert appropriate institutions to potentially dangerous products, devices, and substances. The result is a safer consumer environment and product safety innovations.

\textsuperscript{103} Broad jurisdiction indicates that the institution affects a substantial portion of the public. Its success rate, while often difficult to measure, is an indication of its importance to the public safety. These factors are delineated simply to point out that courts should respect a legislative judgment regarding an institution's value to the public.
institution's goals and that confidentiality be essential to the communicative process—will require judicial scrutiny of the regulatory environment. This element should be construed narrowly. Where a defendant submits a self-analysis to an institution that relies primarily on self-critical analyses to carry out its legislative mandate, confidentiality should be preserved.104 An institution with limited appropriations will likely be such a dependent institution.105 Only if "chilling" the influx of product safety information substantially hinders the operation of the recipient institution should the privilege apply.

The final proposed criterion—the "balancing of the needs"—should encompass an examination of both plaintiffs' discovery needs and the public interest in regulation dependent on confidentiality.106 Product safety statutes are generally prophylaxes, focusing on the prevention of future harm. They are not concerned with providing compensation to injured plaintiffs. Therefore, courts should accept the general premise that "long-term accessibility to vital information must not be sacrificed on the altar of immediate discovery needs."107 Where direct evidence of a product defect is available, product safety reports should be immune from discovery.

Firms subject to the mandatory reporting requirements of Section 15 need some positive assurance that compliance will not in the end prove more costly than noncompliance. These reports, if disclosed, are likely to be used

104. The Commission is an excellent example of an institution that is heavily dependent on such reports. See supra Part I.

105. Such institutions are not likely to engage in aggressive regulation and are highly likely to be dependent upon information from outside sources. Limited appropriations, however, are merely a factor to consider in determining reliance on self-analysts. An agency like the FDA, which receives several thousand reports annually on medical devices, will not be "disqualified" simply because it also receives healthy appropriations.

106. It will be the rare case under the proposed formulation when the immediate discovery needs of plaintiffs outweigh the more general public interest in confidentiality. Nonetheless, this requirement is retained for judicial flexibility. If, for example, there is no direct evidence of defendant's culpability, the mandated self-critical analysis is highly probative and courts should consider ordering disclosure. While the test is utilitarian, not every case requires the sacrifice of plaintiffs' interests for the general good. Moreover, the privilege is generally regarded as a limited one. See Flanagan, supra note 71, at 573 (at most, self-critical analysis privilege provides only some protection for subjective conclusions).

One could argue that defendants might shield themselves from liability by hiding behind a general claim of "public interest," and that the truly relevant interest is the individual defendant's. But enforcing agencies are hampered by "chilled" analysts, and these agencies have a special duty to the public at large. See Butcher v. Robertshaw Controls, 550 F. Supp. 692, 703 (D. Md. 1981) (agency relationship exists between Commission and members of consuming public). Thus, placing the public interest in the scales is necessary. See Leonard, supra note 71 at 122 ("While protecting such studies from disclosure may mean the loss of possibly critical evidence for a litigant, the public gain from preventing disclosure may far outweigh that cost."); Note, supra note 71, at 1086 (breadth of the "public interest" criterion largely determines breadth of self-critical analysis privilege).

against firms in private litigation on such issues as prior knowledge of defect and the feasibility of an improved design. It is a truism that firms are risk-averse. If they believe that the least costly alternative is to not report, the Commission will receive few reports. Chronic underreporting harms the consuming public's primary agent, and hence the consuming public.

Application of the self-critical analysis privilege to Section 15(b) reports, under either the majority standard outlined in Part III.A or the standard articulated here, is a valid solution to the tension between a public institution's need for reports and the self-analyst's fear of private suit liability. Although the privilege is not widely accepted, its application is warranted where there is strong public interest in the free flow of certain information. All consumers will benefit indirectly from application of the privilege to Section 15(b) reports since increased reporting will presumably result in fewer consumer accidents. The interests of some relatively small number of individual plaintiffs will be sacrificed where the privilege is applied to Section 15(b) reports, but the public will ultimately benefit from a safer products market.

CONCLUSION

The Consumer Product Safety Commission is charged with the vital task of assuring the safety of the American people against threats posed by defective or poorly designed products. Budget cuts and staffing problems force the agency to carry out this comprehensive mandate without investigative resources equal to the scope of the Commission's jurisdiction. Accordingly, the Commission is forced to rely upon the reporting requirements of the CPSA to carry out its responsibilities. Although the reporting requirements of Section 15 are couched in mandatory terms, it is clear that there is substantial underreporting of product hazards. Many firms, concerned that their product hazard reports might be used to their legal detriment in pending or future products liability suits, may choose to gamble and risk penalties for nonreporting. If the Commission is to be effective, this disincentive to reporting must be removed.

This note offers two approaches to solving the inherent tension between manufacturers' fear of exposure and the Commission's need for information. Congress could follow the model of the lawsuit reporting requirement under the Improvement Act and bar discovery of Section 15(b) reports. Alternatively, courts giving proper consideration to the significance of Section 15 as a primary enforcement weapon for the Commission could find that the reports are protected by a limited common law privilege for self-critical analysis. Either approach denies often deserving plaintiffs relevant information in their lawsuits, but the CPSA was meant in the first instance to prevent injuries, not to assist those who have already been injured in seeking compensa-
tion. Protection of the reports against civil discovery would help the Commission carry out its preventive mandate. Given the broad public interest involved, these options should be seriously considered.