United States
CONSUMER PRODUCT SAFETY COMMISSION
Washington, D.C. 20207

MEMORANDUM

DATE: January 8, 2001

TO : OGC

Through: Sadye E. Dunn, Secretary, OS

FROM : Martha A. Kosh, OS

SUBJECT: Notice of Proposed Rulemaking for Standards of Conduct for Outside Attorneys Practicing Before the Consumer Product Safety Commission. 65 Fed, Reg. 66515, November 6, 2000

ATTACHED ARE COMMENTS ON THE **CA 01-2**

COMMENT	DATE	SIGNED BY	AFFILIATION
CA 01-2-1	12/21/00	Edward Cohen Vice President Government and Industry Affairs	Honda North America, Inc. 955 L'Enfant Plaza, SW Suite 5300 Washington, DC 20024
CA01-2-2	01/03/01	Eric Rubel	Arnold & Porter 555 Twelfth St., NW Washington, DC 20004
CA01-2-3	01/03/01	Jeffrey Bromme	Jeffrey S. Bromme 555 Twelfth St, NW Washington, DC 10004
CA01-2-4	01/05/01	Mary Ellen Fise General Counsel	Consumer Federation of America 1424 16th St, NW, Suite 604 Washington, DC 20036
CA01-2-5	01/05/01	Peter Winik Laura Neuwirth et. al.	Latham & Watkins 1001 Pennsylvania Ave, NW Suite 1300 Washington, DC 20004
CA01-2-6	01/08/01	Stephen Gold for the CPSC Coalition	National Association of Manufacturers 1331 Pennsylvania Ave, NW Washington, DC 20004

CA01-2-1
Outside NPR
Atty ...

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WASHINGTON, D C 20024 (202) 554-1650

December 21, 2000

2000 DEC 28 P 1:50

Office of the Secretary
Consumer Product Safety Commission
Washington, D C. 20207-0001

Re: NPR for Outside Attorneys

To Whom It May Concern.

These comments are filed in response to the Notice of Proposed Rulemaking entitled, "Standards of Conduct for Outside Attorneys Practicing Before the Consumer Product Safety Commission" (65 FR 66515) (the "Notice") The proposed rules would establish procedures that could lead to serious sanctions against an attorney, practicing before the Commission, who is determined to have acted "in a manner prohibited by the state or District of Columbia disciplinary rules applicable to the attorney or otherwise in bad faith." These comments focus on three concerns: (1) the Commission does not identify the need for this new sanctioning authority; (2) the standard of conduct that might trigger a sanction is overly broad; and (3) the procedures outlined fail to protect the rights of attorneys who are the target of a possible sanction.

1. Need for the New Sanctioning Authority

In the Purpose and Scope section, the Notice indicates that the Commission does not have rules governing the behavior of attorneys outside the context of a formal adjudication, 65 FR 66516 However, the Notice fails to disclose whether attorney misconduct in the nonadjudicatory context has been a problem in the past, and if it has, the types of inappropriate conduct that the Commission has experienced. It is difficult to evaluate the appropriateness of the Commission's proposal without understanding the nature and scope of the problem being addressed. Absent a specific rationale, this seems to be a solution in search of a problem Moreover, as discussed below, state and District of Columbia attorney disciplinary processes are already available to the Commission to address issues of attorney misconduct. It is not clear why this additional procedure is needed or whether the Commission has the expertise or infrastructure to administer it.

2. The Standard of Conduct that Might Trigger a Sanction is Overly Broad

Proposed Sec 1026.3 provides that with respect to a matter before the Commission, "no attorney may act in a manner prohibited by the state or District

of Columbia bar disciplinary rules applicable to the attorney *or otherwise in bad faith*" (emphasis added) The italicized term is vague and without boundaries If the Commission decides to proceed with this new rule, the standard of conduct expected of attorneys should be stated with precision and should not provide vague or open-ended language which could have the affect of chilling permissible advocacy.

The District of Columbia bar, as well as the bars of the 50 states, has developed over many years codes of professional conduct which define the behavior expected of attorneys. Those codes typically state a rule and include comments that define the scope of the rule. Additionally, there is a body of additional interpretation including advisory opinions and opinions in disciplinary proceedings which provide guidance as to the permissible scope of behavior. Professionals employed by bar disciplinary boards are experienced in administering these codes. Precision in the drafting and administration of a disciplinary code is critical because of the nature of what lawyers do: formal and informal proceedings are typically adversarial, and vigorous advocacy and representation of a client should not be chilled by broadly or vaguely drafted rules.

Moreover, the bad faith language is unnecessary to meet whatever objective the Commission may have in adopting the proposed rules because bar disciplinary codes fully address attorney misconduct. For example, Rule 3 3(a) of the D.C. Rules of Professional Conduct prohibits a lawyer from knowingly making a false statement of material fact or law, failing to disclose relevant legal authority or offering evidence that the lawyers knows to be false. Rule 3.9 of the Rules specifically provides that these prohibitions apply to a lawyer "representing a client before a legislative or administrative body in a nonadjudicative proceeding." The Comment accompanying the Rule states:

> In representation before bodies such as . . . executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues, and advance arguments in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body should deal with it honestly and in conformity with applicable rules of procedure.[1]

Similarly, Rule 4 of the D C Rules also provide that in the course of representing a client in a negotiation or other bilateral transaction with a government agency, a lawyer shall not knowingly make a false statement of material fact or law to a

[1] Rule 3.9, Comment 1

third person or fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a fraudulent act by a client.[2]

Because bar disciplinary rules such as those of the District of Columbia already adequately address attorney misconduct issues in an administrative context, tying the Commission's rule to the disciplinary rules makes sense because those rules are well understood. The addition of the words "otherwise in bad faith," however, should be deleted. The words are both broad and vague, and attorneys would not have the benefit of interpretations or commentary that define the scope of impermissible activity. Accordingly, they should be deleted from Sec. 1026.3 should the Commission ultimately adopt these rules.

3. <u>The Proposed Procedures Fail to Protect the Rights of Attorneys are the Target of a Possible Sanction.</u>

If an attorney faces the possibility of censure, suspension, permanent exclusion or any other sanction deemed appropriate by the Commission,[3] the attorney should be afforded full rights to defend his or her behavior. The proposed procedural rules do not provide such an opportunity.

First, proposed Sec 1026.4(a)(1) provides that if the General Counsel summarily closes a matter of alleged prohibited conduct, the General Counsel has the discretion to inform or not inform the attorney. The rules should require immediate notification by the General Counsel to the attorney if a member of the staff believes, rightly or wrongly, that the attorney has engaged in misconduct. Because of the nature of the consequences to the attorney's livelihood, such allegations are very serious Even if the General Counsel closes the inquiry, there could be a residual blemish on the attorney's reputation with the complainant or other Commission staff, and the attorney should have the opportunity to address it. Such disclosure would also serve as a deterrent against baseless accusations.

Second, proposed section 1026 4(b)(2)(i) provides that if the General Counsel issues a show cause order to the attorney during the second stage of an inquiry, no discovery is permitted. While the attorney would be entitled to an oral presentation, it is unclear whether the attorney can present his or her own witnesses, confront his or her accuser, have access to relevant documents, or even be present to hear the testimony of the accuser or other witnesses. All such determinations are apparently left to the sole discretion of the General Counsel. This lack of protection of basic due process is particularly serious because the General Counsel's recommendation of sanction is presented to and decided by the ultimate decision maker – the Commission – without any further

[2] Rule 3.9, Comment 3, specifies that the requirements of Rule 4 apply to such transactions.

[3] Draft, Sec. 106.5.

opportunity for the attorney to address the record. The final rule, if adopted, should explicitly provide for (1) discovery, (2) the opportunity for the attorney to cross examine the staff making or supporting the allegation, (3) access to all relevant written documentation and (4) the right of the attorney to be present and participate in all proceedings relevant to the allegation.

Third, the rule should explicitly state that the imposition of a sanction by the Commission pursuant to proposed section 1026.4(c) is a final agency action subject to judicial review under the Administrative Procedure Act.

Sincerely,

Edward B. Cohen
Vice President
Government and Industry Affairs

CA00-1-2-2

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January 3, 2001

Via Federal Express

Ms. Sadye Dunn
Secretary
Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814-4408

2001 JAN -4 P 1:45

Dear Sadye:

I am filing these comments in response to the proposed rules governing the conduct of attorneys who represent clients before the U.S Product Safety Commission (CPSC or Commission). See 65 Fed. Reg. 66515 (Nov 6, 2000) I am writing on my own behalf only and am not representing any client in this proceeding

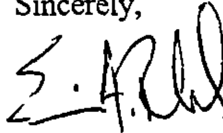
There is no question that attorneys who appear before CPSC have an obligation to act in good faith. Moreover, I do not question the Commission's motivation in proposing standards of conduct for attorneys. However, particularly given the other tools available to the Commission to address perceived misconduct by attorneys -- including filing a complaint with state bar association officials or pursuing criminal penalties in egregious cases under title 18 of the United States Code -- I do not believe that CPSC requires a separate mechanism for such matters. Moreover, I share the concerns expressed in the comments that Peter Winik submitted together with other attorneys and which I believe weigh against adopting the proposed rules.

I am not aware of any instance in which CPSC has referred a matter to state bar officials or taken other formal action to attempt to address alleged attorney misconduct. Nor am I aware of reasons why such measures would be inadequate to address any perceived problems Further, I share the concern that has been expressed by my colleagues that the threat of having CPSC investigate an attorney for misconduct could be misused during contentious negotiations unfairly to gain leverage over attorneys who are attempting to represent their clients' interests In addition, while I believe that the Commission would attempt to implement standards of conduct in a fair and unbiased manner, I am concerned with the appearance of a conflict of interest in having the Office of the General Counsel or other Commission employees investigate alleged misconduct involving matters in which those same employees, or individuals to whom they report, were involved

Accordingly, I do not believe that the Commission should adopt the proposed rules. Further, if CPSC chooses to do so, I believe that the Commission should adopt the safeguards that have been proposed in comments submitted by Mr. Winik and by Jeffrey Bromme.

Thank you for considering these comments

Sincerely,



Eric A Rubel

JEFFREY S. BROMME
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ortny atty comments
CA01-2-3

OFFICE OF THE SECRETARY
2001 JAN -8 A 10 40

January 3, 2001

Ms. Sadye Dunn
Secretary
Consumer Product Safety Commission
Washington, DC 20207-0001

Dear Sadye:

I am filing these comments in response to the proposed amendments to the Commission rules governing the behavior of attorneys who represent clients before the Commission. See 65 Fed. Reg. 66515 (Nov. 6, 2000). I am writing in my personal capacity only and am not representing any client.

I have great respect for Michael Solender, Alan Schoem, Alan Shakin, Melissa Hampshire and the other Commission staff who have clearly given the matter of attorney conduct a great deal of careful thought. The Commission and its staff are entitled to expect opposing counsel to conduct themselves in a manner that is above reproach. However, I question whether the Commission has experienced a serious problem with attorney misconduct. Moreover, in the case when attorney misconduct can be demonstrated clearly, existing tools would seem to be adequate to the task of imposing discipline.

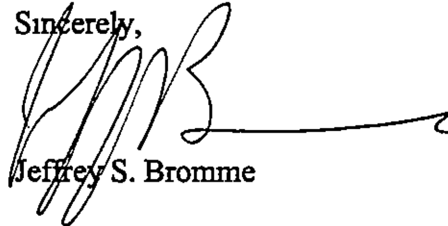
It might be argued that, even if the proposed rule is not necessary, it does no harm to provide the Commission an extra measure of protection against misconduct. However, demonstrable misconduct is so rare that this rule will be seldom, if ever, used to impose discipline on counsel. Rather, it is more likely to be mis-used during negotiations in which Commission staff would threaten the commencement of proceedings under the rule, and opposing counsel would thus be forced to factor in this threat to his or her livelihood while advising his or her client regarding the substantive matter at issue. I do not think Commission staff would routinely mis-use the rule in this fashion, but the occasional possibility cannot be excluded.

Therefore, if the Commission decides to approve this proposal, I urge that the rule be clarified to prohibit staff from citing or otherwise referring to this rule during an enforcement effort without clearance from the Office of General Counsel.

The proposed rule presents certain other problems, a number of which are spelled out in a letter that Peter Winik and others are submitting.

I regret that my first formal communication with the Commission since departing in 1999 is to oppose a proposed rule. However, these concerns are the same as those I had while serving at the Commission.

Sincerely,



Jeffrey S. Bromme

CA 01-2-4

Consumer Federation of America

January 5, 2001

Office of Secretary
Consumer Product Safety Commission
Washington, DC 20207-0001

Copy of comments filed by e-mail to cpsc-os@cpsc gov

RE: Notice of Proposed Rulemaking for Standards of Conduct for Outside Attorneys Practicing Before the Consumer Product Safety Commission 65 Fed. Reg. 66515, November 6, 2000

Consumer Federation of America (CFA) strongly supports amendment of Consumer Product Safety Commission (CPSC) regulations to add a new part (16 CFR 1026) to address the behavior of attorneys on matters before the Commission CFA is a non-profit association of over 270 pro-consumer groups, with a combined membership of over 50 million, that was founded in 1968 to advance the consumer interest through advocacy and education

Such a rule is necessary to address conduct by attorneys outside the context of a formal adjudication Because much of the agency's work happens in this context, this amendment will broaden the agency's ability to assure that actions taken or not taken in this non- formal adjudication arena are subject to sanction should prohibited conduct occur The ability of the agency to sanction attorneys, including censure, suspension, permanent exclusion or other sanctions, will have a deterrent effect and will better enable Commission staff to protect the public

We believe the three stage process set out in the proposed rule gives the agency sufficient flexibility while offering attorneys adequate due process while an allegation is being investigated Prohibited conduct under the proposed regulation would include actions such as knowingly destroying documents that are relevant to a CPSC staff investigation on a particular product, other actions prohibited by state bar disciplinary rules, or those that are otherwise in bad faith

It is appropriate for the Commission to move forward on this rulemaking to close a gap in its existing regulations Providing for sanctions in such type proceedings is not uncommon among federal regulatory agencies and the CPSC's mission of

protecting the public from unreasonable risks of injury and death from consumer products is more than ample justification for such amendment.

CFA strongly urges the Commission to proceed with this rulemaking to amend its regulations to include standards of conduct for outside attorneys practicing before the agency

Thank you very much for your attention to these comments

Sincerely,

Mary Ellen R. Fise
General Counsel

CPC1-2-5

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2001 JAN -5 P 2 41

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January 5, 2001

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VIA FACSIMILE, EMAIL, AND HAND DELIVERY

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United States Consumer Product Safety Commission
Room 502
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Bethesda, MD 20814

Re NPR For Outside Attorneys

Dear Ms Dunn

On November 6, 2000, the CPSC published for comment a proposed rule concerning "Standards of Conduct for Outside Attorneys Practicing Before the Consumer Product Safety Commission " These comments have been reviewed, and are joined, by the attorneys listed below, including two former agency general counsels All of us practice regularly before the Commission The attorneys joining these comments are listed in alphabetical order

David Baker, Thompson, Hine & Flory
Elliot Belilos, Keller & Heckman LLP
Michael Brown, Brown & Freeston
Margaret Freeston, Brown & Freeston
Michael F Healy, Morgan, Lewis & Bockius
Erika Jones, Mayer, Brown & Platt
Andrew Krulwich, Wiley, Rein & Fielding
Mary Martha McNamara, The McNamara Law Firm
Sheila Millar, Keller & Heckman, LLP

Charles Samuels, Mintz, Levin, Cohn, Ferris, Glovsky & Popeo
Kathleen Sanzo, Morgan, Lewis & Bockius

At the outset we wish to stress that we have no problem with the notion that attorneys practicing before the Commission – or any other agency – should adhere to appropriate standards of conduct We already hold ourselves to high standards of conduct and will continue to do so We are already subject to regulation by the various bars and courts to which we are admitted Reasonably crafted standards will not have any impact on the manner in which we practice In this case, however, the proposal appears to us to be deeply flawed and threatens to chill the rightful and proper practice of law before the Commission We respectfully urge that the proposed rule not be adopted.

I. NO COMPELLING NEED HAS BEEN SHOWN TO JUSTIFY THE ADOPTION OF THE PROPOSED REGULATION.

A regulation such as the one proposed, while not unheard of, does not appear to be universal across the regulatory landscape When we inquired of the General Counsel's Office for the other agency and department analogues to this proposal, we were provided with citations to seven other agencies or departments [1] All of the cited agencies differ from the CPSC in several critical respects (a) they have a significant number of formal administrative and adjudicative proceedings in which lawyers appear and practice, and (b) most, if not all, are considerably larger organizations (and thus they can assign the review and evaluation of the alleged improper conduct to people who are totally unconnected with the matter or the lawyers in question) In the case of the CPSC, formal administrative and adjudicative proceedings are rare Moreover, given the small size of the Office of General Counsel and the close interaction between that office and the relatively small group of Compliance attorneys, it may be very difficult as a practical matter to find lawyers uninvolved or unfamiliar with the matter to evaluate the allegations and make recommendations to the Commission

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[1] The Federal Energy Regulatory Commission, Federal Trade Commission, Federal Communications Commission, Securities and Exchange Commission, National Labor Relations Board, Commodity Futures Trading Commission, and Department of Transportation We have not independently searched through the rules and regulations of all agencies and departments of the United States Government, and are, instead, relying on the regulations cited to us by the Office of General Counsel. We are aware that private attorneys practicing before the Executive Office of Immigration Review and the Immigration and Naturalization ("INS") are subject to a separate, additional ethics regime codified at 8 CFR § 292.3. The INS investigates private attorneys for misconduct, but it is the Office of the Immigration Judge, separate and independent from the INS, which conducts hearings and issues decisions Notably, INS attorneys themselves are subject to the same code, and complaints against them get forwarded for investigation to the Department of Justice's Office of Professional Responsibility

In any case, the seven cited agencies would represent a small minority of the agencies and departments that collectively comprise the United States Government. Lawyers represent clients before virtually all of such agencies and departments, and apparently most of them have not seen the need to promulgate special rules regulating the lawyers appearing before them (particularly in agencies in which lawyers appear primarily in a non-adjudicatory role.)

In order to justify what would be a relatively unusual regulation, the Commission ideally would identify facts that demonstrate the necessity for a rule. The record does not reflect such facts. In the absence of any repeated, flagrant problems that could not have been dealt with through the existing state bar regulatory framework, we believe that the Commission should be wary of adopting such a broad and potentially far-reaching proposal as the one published for comment.

Indeed, the proposed rule provides no basis for concluding that existing state bar requirements are not sufficient to guard against whatever potential abuses have been identified by the Commission and staff. To the contrary, Bar Rules would appear to be more than sufficient to regulate attorney misconduct. For example, the DC Bar Rules provide, in relevant part, that a lawyer is barred in certain circumstances from

- Making false statements of material fact or law (Rule 3.3),
- Counseling or assisting a client to engage in conduct the lawyer knows is criminal or fraudulent (Rule 3.3),
- Offering evidence the lawyer knows to be false (Rule 3.3),
- Altering, destroying, or concealing evidence if the lawyer knows the evidence is or may be the subject of discovery in a pending or imminent proceeding (Rule 3.4),
- Falsifying evidence or assisting a witness to testify falsely (Rule 3.4), and,
- Failing to make a reasonably diligent effort to comply with a discovery request (Rule 3.4)

These rules apply to representation "before a legislative or administrative body in a nonadjudicative proceeding . . . ." (Rule 3.9.) (In fact, for egregious cases the CPSC regulations make clear that false statements can lead to criminal sanctions under 18 U.S.C. § 1001. See 16 C.F.R. §1115.22(a).) There is no indication that the CPSC has ever referred an attorney's conduct to a State Bar for possible disciplinary action. Before seeking to create new rules, we would submit that the CPSC should take advantage of existing rules and make a determination – based on actual experience – as to whether the existing rules are sufficient to address the Commission's concerns.

II. THE "BAD FAITH" STANDARD IN THE PROPOSED RULE IS A BROAD AND UNDEFINED STANDARD THAT WOULD BE OPEN TO POTENTIAL MISCHIEF AND ABUSE IN THE FUTURE.

The proposed rule would define "prohibited conduct" as, among other things, conduct "in bad faith " This definition is deeply troubling As far as we can determine, the CPSC would be alone among U S government departments and agencies in regulating "bad faith" conduct Certainly none of the analogous regulations cited to us by the Office of General Counsel featured a "bad faith" standard

Our concern with the "bad faith" standard is that it is in reality no standard at all It is a broad and amorphous concept that is open to potential abuse in the future "Bad faith" to one person could simply be appropriate, zealous advocacy to another The problem with adopting a serious rule that can be triggered by such an ill-defined concept as "bad faith" is that any CPSC compliance officer or lawyer in the future, unhappy with a position taken on behalf of a client by a lawyer, could assert that the position was taken in "bad faith " With no standards whatsoever to guide the parameters or resolution of such an allegation, the proposed rule effectively could be used by staff to pressure lawyers (and, through them, companies subject to regulation) in an inappropriate manner This standard is especially troubling because the proposal does not purport to impose identical standards of conduct on CPSC attorneys

The Rules of Ethics command a lawyer to "represent a client zealously " DC Bar Rule 1 3(a) The proposed rule could threaten counsel with an impossible quandary can counsel zealously represent a client in dealings with the CPSC staff and General Counsel's Office knowing that this rule provides those same employees with a club that can be used against the attorney if they feel he or she acted in "bad faith?" And, even if the proposed rule is revised to apply equally to Commission attorneys, will companies subject to the CPSC's jurisdiction truly feel confident that any complaints about possible violations of the standard of conduct brought to the attention of the General Counsel's office will be given a fair and independent evaluation of the sort routine with any bar process?

III. THE PROPOSED RULE PLACES UNDUE AUTHORITY AND DISCRETION IN THE GENERAL COUNSEL.

Our final area of significant concern with the proposed rule relates to the process to be followed in the event a complaint is received The rule anticipates

- A complaint in the first instance would be received by the General Counsel, with no notice to the attorney in question The General Counsel could "summarily close the matter" without investigation Section 1026 4(a)(1)

- If the General Counsel does not close the matter, he or she may conduct an informal investigation after notifying the attorney in question of the allegation and of his or her right to counsel Evidence developed during this phase would not be part of any formal record At the close of this phase, the General Counsel could either close the matter or order the attorney to show cause as to why he or she should not be sanctioned Section 1026 4(a)(2) – (3)

- If the General Counsel issues a show cause order, an "oral presentation" before the General Counsel will be held No discovery is permitted in connection with such a proceeding The General Counsel has discretion to determine the nature of the "presentation" (the word "hearing" is avoided in the proposed rule) including the number of witnesses, length of testimony, and admissibility of testimony and exhibits Written submissions would be made as well At the conclusion of this process, the General Counsel would decide either to close the matter or forward a sanction recommendation to the Commission Section 1026 4(b) The General Counsel is thus both the "prosecutor" and the "adjudicator" (at least for purposes of determining the record of the matter)

- If a potential witness (such as a knowledgeable CPSC employee) refuses to appear voluntarily, the attorney in question may *ask* the General Counsel to request that the Commission issue a subpoena, but apparently may not go directly to the Commission for a subpoena or otherwise compel potentially helpful testimony Section 1026 4(b)(2)(v)

- If the General Counsel forwards a sanction recommendation to the Commission, the Commission would either decide to close the matter or issue a sanction Section 1026 4(c)

- The General Counsel may delegate some or all of his or her responsibilities to "someone employed by the Commission " Section 1026 4(c)(3)

This process – which can threaten an attorney's reputation and livelihood and be invoked by one Commission employee's allegation of "bad faith" and the General Counsel's unwillingness to reject the complaint at the outset – lacks many attributes of fairness and due process The accused attorney will not be entitled to a full adjudicative proceeding The accused attorney is not assured that he or she can call needed witnesses (for example, experts on attorney ethics) The accused attorney is not assured that he or she can adequately confront the accuser; there is no right to discovery, and there is no assurance that the General Counsel would require the accuser to testify The accused attorney is not even assured that the General Counsel will hear the "presentation," since the rule would allow the General Counsel to delegate his or her responsibilities to <u>anybody</u> employed by the Commission

By contrast, the procedures governing the DC Bar's investigations of complaints of potential ethical violations provide significant procedural protections to the respondent attorney, including a separation of function between the Bar Counsel and the Hearing Board or other presiding body, a right of access to the Bar Counsel's non-privileged files about the matter, a right of discovery from parties and (upon approval of the Hearing Board or other presiding body) from non-parties, and a right to a hearing by an impartial adjudicator before formal sanctions can be imposed and other appropriate protections.

The combination of the broad and malleable "bad faith standard" with an inadequate process that vests enormous discretion in the General Counsel or his or her designee, is an extremely troubling one Our concerns are in part informed by the small size of the agency There are a comparatively small number of Compliance lawyers and lawyers in the General Counsel's Office Lawyers from both offices are often involved in dealing with Compliance matters with outside counsel These matters often involve important issues, tough negotiations, and contentious discussions If this Rule is adopted, an attorney representing a client in a matter of this character and who is dealing with a Compliance lawyer and the General Counsel's Office can be subject to a "bad faith" charge brought and decided by the same people with whom he or she is negotiating Moreover, even if an uninvolved lawyer from the General Counsel's Office is assigned to handle the complaint, that lawyer works in close proximity with, and may even report to, the lawyers handling the underlying matter This would at minimum create an appearance of a conflict of interest, and clearly illustrates the difficulty of establishing the sort of review mechanism anticipated by the proposed rule in a small agency

Because of the overly broad definition of actionable conduct and the minimalist character of the proposed rule's procedural safeguards, there is a very real and disturbing likelihood that lawyers in the future will feel chilled and conflicted in determining whether to represent clients in the zealous manner required by the Rules of Ethics For good reason, none of the other agencies or departments cited to us by the General Counsel's Office appear to vest the amount of discretion in the General Counsel as is proposed in the proposed rule [2]

- Although we believe, for the reasons stated herein, that no rule is needed, if the Commission intends to issue such a rule we would respectfully submit that the procedures should be changed substantially Specifically, the attorney of any allegation made under this rule

- Mutuality of application of all standards of conduct to Commission attorneys

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[2] Only two of the agencies' rules concerning attorney practice set up a procedure involving General Counsel review of complaints, and each has considerably more safeguards (and none provides for action based on "bad faith" by the attorney)

- Assurance that the matter be assigned for review and recommendation to someone (a) totally unconnected to the events in question, and (b) who does not report to anyone involved in the matter in question,

- Separation of function between the counsel investigating the matter and the party with authority to accept evidence and otherwise supervise the development of the record for decision,

- In the event the allegation is not dismissed out of hand, a full adjudicatory process before an administrative law judge, with the same rights of discovery and evidentiary hearing as provided in the Commission's Rules of Practice for such proceedings See 16 C F R Part 1025,

- A right to file briefs with the Commission on the question of whether the administrative law judge's recommended decision should be adopted, and

- Absolute confidentiality throughout this process, as if it were a Compliance investigation, including a prohibition on any contact with the attorney's clients in connection with the allegation or investigation without good cause, just as provided in the D C Bar procedures for investigating alleged violations of the Standards of Professional Conduct See Rule 2 9 (D C Court of Appeals Board on Professional Responsibility)

IV. CONCLUSION

We respectfully submit that the need for the proposed rule has not been articulated in a persuasive manner Moreover, in an effort to address whatever inadequacies are apparently perceived the proposed rule would in fact create a potentially unfair system that should pose serious concerns both for attorneys practicing before the CPSC and for the regulated community in general Ultimately, because of the issues about fairness and process discussed above, the Commission's reputation for fairness and competence could suffer We would respectfully urge the Commissioners not to adopt the proposed rule

Respectfully submitted,

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of LATHAM & WATKINS

cc Commissioners' Legal Assistants
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CPSC-2-6

CPSC Coalition

January 8, 2001

Office of the Secretary
Consumer Product Safety Commission
Washington, DC 20207
FAX: (301) 504-0127 .
ATTN: Sadye E. Dunn, Director

Dear Ms. Dunn:

On November 6, 2000, the CPSC published in the Federal Register (65 Fed. Reg 66525) a proposed amendment to the Commission's regulations (16 CFR part 1025) to add a Code of Conduct for attorneys who practice before the Commission. Comments were filed on Friday, January 5, 2001, by a group of eminent and experienced CPSC practitioners. The undersigned members of the CPSC Coalition submit this letter in support of the comments filed by these attorneys. Many of the individuals listed represent the interests of either the signatory associations or one of their members.

The Coalition views this proposal as unwarranted and dangerous. We know of no instance where the conduct of any counsel appearing before the CPSC would have breached the traditional notions of ethics and professionalism that is required of any bar to which an attorney has been admitted. Rather, the use of "bad faith" as a standard flies in the face of due process, the hallmark principle of our legal system. The Commission would, under this proposal, serve as judge, jury and executioner without affording even the most basic notion of fair play and due process. Ironically, this proposal would not be applicable to CPSC's own staff attorneys or compliance staff.

Without the requisite due process provisions, a likely result of this proposal would be the defamation of the lawyer or law firm subject to the allegations of misconduct. They would be robbed of the ability to legitimately challenge the charge against them and would undoubtedly be tarnished by the accusation alone. This proposal would encourage CPSC practitioners to be more concerned with the potential retaliation of the Commission rather than solely pursuing the interests of their clients.

Additionally, this could invite the mischief by third parties, motivated by their own personal reasons, to seek to undermine the work of lawyers practicing before the Commission. This could easily be accomplished and done so without the knowledge of the accused party and without their ability to challenge such "subrosa" evidence.

The Coalition agrees with the statements of Commissioners Gall and Moore and the CPSC practitioners. The Coalition believes that the proposal fails to present a credible case for

amending the current regulations, is flawed in providing basic due process, and should be withdrawn. There already exists an effective way to handle any improprieties through the ethics boards of the appropriate bar associations.

Sincerely,

Association of Home Appliance Manufacturers
Builders Hardware Manufacturers Association
Consumer Specialty Products Association
Gas Appliance Manufacturers Association
Hearth Products Association
National Association of Manufacturers
National Electrical Manufacturers Association
Toy Manufacturers Association
Window Covering Manufacturers Association