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## Federal Regulation of BB Guns: Aiming to Protect Our Children

### INTRODUCTION—DEFINING A TRAGEDY

On September 18, 1993, seven-year-old Josh Moss finally convinced his father, Larry, to buy him a Crosman 760 Pumpmaster BB gun at the local K-Mart.<sup>1</sup> Although Larry noted the warning on the gun box that said, "May cause death or injury," he paid it no attention, assuming it "might just be referring to birds or small animals."<sup>2</sup> Upon returning home, Larry opened the box, gave Josh the gun, and briefly instructed him on how to use it.<sup>3</sup> As Larry took the gun out of the box to hand it to Josh, he missed two important warnings, one in the manual on page two<sup>4</sup> and a separate flyer included in the packaging labeled "A SPECIAL MESSAGE TO PARENTS."<sup>5</sup>

Two days later, Josh and his eleven-year-old cousin, Tim, were shooting the gun at cans placed in a tree.<sup>6</sup> When it was Tim's turn to shoot, Josh hid behind a tree in front of Tim.<sup>7</sup> As Tim fired the gun, Josh peeked his head out from behind the tree.<sup>8</sup> The pellet hit Josh in the head, entered his brain and killed him almost instantly.<sup>9</sup>

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1. Moss v. Crosman Corp., 136 F.3d 1169, 1172 (7th Cir. 1998).

2. *Id.*

3. Larry admitted he did not read the other warnings on the box, which stated: WARNING: NOT A TOY. ADULT SUPERVISION REQUIRED. MISUSE OR CARELESS USE MAY CAUSE SERIOUS INJURY OR DEATH. MAY BE DANGEROUS UP TO 475 YARDS (435 METERS). THIS AIR GUN IS INTENDED FOR USE BY THOSE 16 YEARS OF AGE OR OLDER. FOR COMPLETE OPERATING INSTRUCTIONS, REVIEW OWNER'S MANUAL INSIDE BOX BEFORE USING THIS AIR GUN.

*Id.*

4. The warning on page two of the manual appeared in red print and stated again: "WARNING: NOT A TOY. ADULT SUPERVISION REQUIRED. MISUSE OR CARELESS USE MAY CAUSE SERIOUS INJURY OR DEATH. MAY BE DANGEROUS UP TO 475 YARDS (435 METERS). READ ALL INSTRUCTIONS BEFORE USING." *Id.*

5. This flyer cautioned that "personal injury or death can result from improper handling if a pellet or BB strikes someone in a vulnerable spot." *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 1170–71. Josh was approximately fifteen feet in front of Tim when the pellet struck him. *Id.* at 1170.

Josh's parents sued the gun manufacturer (Crosman) and the retailer (K-Mart) in Indiana state court.<sup>10</sup> The Mosses alleged that both Crosman and K-Mart were responsible for Josh's death because the BB gun sold was defective and unreasonably dangerous.<sup>11</sup> The complaint alleged product liability under two theories: the gun's design allowed it to fire pellets with a highly destructive force and inadequate warnings accompanied the gun's instructions.<sup>12</sup> The district court granted summary judgment in favor of the defendants, holding that the muzzle velocity, the speed at which the pellet or BB travels out of the gun,<sup>13</sup> was a feature of the gun itself, not part of its design. The court also held that the plaintiff's voluntary decision to choose the air gun with a higher velocity relieved the defendants of any liability.<sup>14</sup> The Court of Appeals for the Seventh Circuit affirmed.<sup>15</sup>

If Josh's case were an anomaly then perhaps nothing more should be done about this issue.<sup>16</sup> Unfortunately, this case is all too

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10. *Id.* at 1170. The Mosses argued that the Pumpmaster gun was defective in design, both because its muzzle velocity was too high and because its design enhanced the injuries that a person might otherwise receive from the gun. They also argued that the air gun was defective because the warnings that came with it were inadequate. *Id.* at 1173.

11. *Id.* at 1173. The complaint also included demands for punitive damages and damages for emotional distress. *Id.* at 1171. In the wake of Josh's tragedy, one might blame the gun manufacturer for both the gun's design and marketing, K-Mart and other discount stores who sell this types of guns, and even Josh's parents themselves for failing to take the manufacturer's warnings seriously. *See id.* at 1172.

12. *Id.* at 1171. Josh's parents argued that even if the "average person" knows that BB guns "[can] cause flesh wounds, loss of eyes, etc.," that same person might be unaware that a BB gun like the Crosman Josh bought could cause a fatality. *Id.* at 1175. Josh's parents sued under Indiana's product liability law. IND. CODE ANN. § 34-20-4-1 (Michie 1998). According to Indiana law, a product can be defective in two ways. First, a product is defective if at the time it is sold it is in a condition (1) not contemplated by a reasonable person who is an expected user of the product, or (2) the product will be unreasonably dangerous to the expected user when used in the reasonably expected way. *Id.*; *see Anderson v. P.A. Radocy & Sons, Inc.*, 67 F.3d 619, 624-25 (7th Cir. 1995); *Whitted v. General Motors Corp.*, 58 F.3d 1200, 1206 (7th Cir. 1995). Second, a product is defective if the seller (1) fails to package properly or label the product with reasonable warnings of danger, or (2) fails to give complete instructions on the proper use of the product when the seller, by "exercising reasonable diligence," could have made necessary warnings and instructions available. IND. CODE ANN. § 34-20-4-2 (Michie 1998).

13. *Air Guns Found to Have Lethal Potential*, 38 MED. TRIB. 19, 19 (1997).

14. *Moss*, 136 F.3d at 1173.

15. *Id.*

16. Children are injured or killed daily under unusual circumstances that, while tragic, do not warrant action by the federal government. *See* Michael Appleton, *Ride Operators Reminded of Responsibilities*, DOMINION (Wellington), Jan. 4, 2002, at 9 (citing recent accidents involving go-karts and children); Sarah Baskett, *Children Toy with Danger*, HERALD SUN (Australia), Dec. 28, 2001, at 9, LEXIS, NewGroup File, Most Recent Two Years (discussing the myriad of toy related accidents hospitals treat over Christmas).

common. High-powered BB guns wound or kill children like Josh regularly,<sup>17</sup> yet these products have not been subject to any sort of special federal regulation<sup>18</sup> and have received inadequate industry self-regulation.<sup>19</sup> An estimated 3.2 million "non-powder" guns are sold in the United States each year, eighty percent of which are powerful enough to penetrate adult bone matter.<sup>20</sup> Furthermore, an estimated six percent of American families with three-year-old children own an air gun, as do eleven percent of American families with boys between the ages of ten and fourteen.<sup>21</sup>

The recent problem of school violence amplifies the need to regulate BB guns.<sup>22</sup> Society focuses on the availability of guns to school children,<sup>23</sup> but overlooks the ease with which a child can

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Inherent in this notion is the idea that federal regulation should be kept in check. See generally Gary S. Becker, *The Best Thing Bush Is Doing for Business*, BUS. WK., July 9, 2001, at 24 (praising the Bush Administration for slowing all federal regulations of business and consumers); Allen S. Myerson, *Union Pacific Fights Tougher Regulation*, N.Y. TIMES, July 7, 1998, at D6 (describing efforts to fend off federal regulation in the railroad industry); *Small Business Owners Frustrated with Regulatory "Hassles," NFIB Study Says*, PR NEWswire, Nov. 29, 2001 (discussing the problem of regulation on small businesses).

17. See *infra* notes 89–127 and accompanying text.

18. See *infra* note 184–220 and accompanying text.

19. See *infra* notes 174–83 and accompanying text.

20. See Centers for Disease Control and Prevention, *BB & Pellet Gun-Related Injuries—United States, June 1992–May 1994*, 44 MORBIDITY & MORTALITY WKLY. REP. 909, 910 (Dec. 15, 1995) [hereinafter *BB & Pellet Gun-Related Injuries*] (stating that eighty percent of non-powder guns have a muzzle velocity of 350 fps); Committee on Accident & Poison Prevention, *Injuries Related to "Toy" Firearms*, 79 PEDIATRICS 473, 473 (1987) (finding that a muzzle velocity of 350 fps is sufficient to penetrate bone); see also Consumer Product Safety Commission, Daisy Mfg. Co., Complaint, 66 Fed. Reg. 56,082 (Nov. 6, 2001) (stating that between 1972 and 2001, Daisy alone manufactured 4,925,353 model 880 high-powered BB guns and between 1984 and 2001, Daisy manufactured 2,353,798 model 856 high-powered BB guns) [hereinafter Daisy Mfg. Co., Complaint].

21. Susan L. Bratton et al., *Serious & Fatal Air Gun Injuries: More Than Meets the Eye*, 100 PEDIATRICS 609, 609 (1997).

22. See Mary A. Hermann & Theodore P. Remley, Jr., *Guns, Violence, and Schools: The Results of School Violence—Litigation Against Educators and Students Shedding More Constitutional Rights at the School House Gate*, 46 LOY. L. REV. 389, 396 (2000) (discussing BB gun violence as one example of school violence); Susan L. Ludwigson, *Legislative Survey: Gun-Free School Zones*, 19 SETON HALL LEGIS. J. 921, 923–24 n.14 (1995) (citing a BB gun incident at a school as a reason for local school violence programs); Landra Ewing, Note, *When Going to School Becomes an Act of Courage: Students Need Protection from Violence*, 36 BRANDEIS J. FAM. L. 627, 628 (1997–98) (citing BB gun violence as a concern for children in schools).

23. Ewing, *supra* note 22, at 627. See generally Blackie Sherrod, *Don't Look Too Far to Find a Reason*, DALLAS MORNING NEWS, May 10, 2001, at 31A ("Every few months, it seems, the Media are consumed with a school shooting tragedy."); Scott Stephens, *Students Fear Shooting in School, Survey Finds*, PLAIN DEALER (Cleveland, OH), Aug.

purchase a high-powered BB gun,<sup>24</sup> some of which can shoot a pellet with a higher velocity than a .22 caliber rifle.<sup>25</sup> In Louisiana, BB gun violence has already affected one school.<sup>26</sup> One student shot another with a Crosman BB automatic pistol that he was carrying in his book bag.<sup>27</sup> The victim suffered a serious eye injury.<sup>28</sup> As children who commit acts of violence in schools learn that BB guns are more available and as damaging as real guns, BB gun violence potentially will increase in school settings.<sup>29</sup>

This Comment certainly does not determine the answer to the problem of gun violence in schools, nor does it determine who is to blame for these unnecessary tragedies; but, it proposes solutions to the growing public safety concern that high-powered BB guns present to today's children.<sup>30</sup> The federal government, through the Consumer Product Safety Commission ("CPSC"), an independent federal regulatory agency,<sup>31</sup> should use its authority to regulate high-powered BB guns, either through an agency-created safety rule,<sup>32</sup> such as those

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29, 2001, at B1, 2001 WL 20549039 (stating that seventy-five percent of high school students are worried about a shooting taking place in their school).

24. See *infra* notes 152–220 and accompanying text (discussing the lack of regulation of children buying BB guns).

25. See 20/20 (ABC television broadcast, Nov. 24, 2000).

26. See *Clark v. Jesuit High Sch.*, 572 So. 2d 830, 831 (La. Ct. App. 1990) (concerning a suit against a school where a student was shot by another student with a BB gun).

27. *Id.*

28. *Id.* (holding that the school was not liable for the victim's injuries). Marc Clark was leaving the main school building when Rene Pagan, a fellow student, approached him. After saying a few joking words to Marc, Rene reached into his book bag and shot the gun through the book bag. *Id.* Rene later admitted to having the gun in his locker for three weeks prior to the incident. *Id.* How Rene acquired the gun was unknown.

29. David Friedman et al., *The Air Gun: Toy or Weapon?*, 89 S. MED. J. 475, 475 (1996) (discussing the availability of air guns). Many states consider BB guns in schools enough of a threat to include laws against the possession of BB guns on school property along with their laws precluding firearm possession. See *infra* note 166 (discussing new state laws prohibiting BB guns on or near school grounds). See generally Tim Bryant et al., *Student Fights Expulsion Over Broken Gun, Rockwood District Should've Weighed Interest, Mother Says*, ST. LOUIS POST-DISPATCH, Dec. 31, 2001, at E1 (recording dispute concerning eighth-grade student expelled for bringing a broken pellet gun to school).

30. See *infra* notes 252–351 and accompanying text.

31. The Consumer Product Safety Commission was created in 1972. Consumer Product Safety Act ("CPSA"), Pub. L. No. 92-573, 86 Stat. 1207 (1972) (codified as amended at 15 U.S.C. §§ 2051–2084 (2000)). The Commission is an independent agency with jurisdiction over consumer products and the authority to write safety standards, ban products, study potential hazards, conduct product recalls, and disseminate general safety information. SAMUEL GOLDBLATT & ERIC L. STONE, CONSUMER PRODUCT SAFETY PRIMER: AN INDUSTRY GUIDE TO THE REGULATORY SYSTEM § 1:1 (1998).

32. The CPSC already regulates lawn darts, Ban of Hazardous Lawn Darts, 16 C.F.R. § 1306 (2000); fireworks, Fireworks Devices, 16 C.F.R. § 1507 (2000); cigarette lighters, Safety Standards for Cigarette Lighters, 16 C.F.R. § 1210 (2000); and various other

used to regulate fireworks<sup>33</sup> and lawn mowers,<sup>34</sup> or through new legislative action<sup>35</sup> comparable to the Poison Prevention Packaging Act.<sup>36</sup>

This Comment first explains the need to regulate high-powered BB guns by describing the guns and the damage they can inflict.<sup>37</sup> Second, this Comment addresses why current law and standards are insufficient, focusing on the unsuccessful nature of most lawsuits against high-powered BB gun manufacturers, the lack of state regulation, and the failure of minimal federal regulation.<sup>38</sup> Third, this Comment addresses why the CPSC is the preferred federal agency to regulate high-powered BB guns.<sup>39</sup> Finally, this Comment explains how the CPSC should develop and conduct a regulatory scheme for high-powered BB guns.<sup>40</sup>

## I. THE GUNS AND THE INJURIES INFLICTED

### A. *Definitions—The Products and Tactics Involved*

BB guns<sup>41</sup> are devices designed to discharge projectiles using energy released by compressed air, compressed gas, or mechanical

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consumer products through safety rules that regulate aspects of manufacturing and packaging, including design of the product and the warnings enclosed. *See* Hazardous Substances & Articles; Administration & Enforcement Regulations, 16 C.F.R. § 1500 (2000). This Comment argues that some sort of federal regulation of dangerous and defective products is appropriate. The larger question of desirability for federal regulation of products in general is beyond the scope of this Comment.

33. 16 C.F.R. § 1507.

34. Safety Standard for Walk-behind Power Lawn Mowers, 16 C.F.R. § 1205 (2000).

35. Under the CPSA, the CPSC has the ability to issue safety rules for unreasonably dangerous products. 15 U.S.C. § 2056 (2000). These safety rules can only concern labeling, instruction, warning, and performance requirements. *See* 15 U.S.C. §§ 2052(a), 2056(a); *infra* notes 189–92. Under a new legislative act, Congress could give the CPSC broader authority to regulate other aspects of the product, such as advertising and sale. *See, e.g.,* The Refrigerator Safety Act, 15 U.S.C. §§ 1211–1214 (2000) (providing the CPSC special authority to regulate refrigerators so that the doors can easily be opened from the inside).

36. Poison Prevention Packaging, 16 C.F.R. § 1700.14 (2000).

37. *See infra* notes 41–127 and accompanying text.

38. *See infra* notes 128–220 and accompanying text.

39. *See infra* notes 221–51 and accompanying text.

40. *See infra* notes 252–344 and accompanying text.

41. This Comment treats BB guns, air guns, and pellet guns as synonyms because all of them work on the same mechanical theory and present the same dangers. *See* Crosman Corp., *Glossary of Terms*, at <http://www.crosman.com/sport> (last visited Jan. 16, 2002) (explaining that an air gun is a device designed to discharge a projectile, whether BB, pellet, or dart, by means of energy released by compressed air, compressed gas, or mechanical spring-piston action) (on file with the North Carolina Law Review).

spring-piston action.<sup>42</sup> BB guns, however, have changed dramatically from the Red Ryder embedded in American culture in the 1950s and 1960s when mothers cried out around the country, "You'll shoot your eye out."<sup>43</sup> BB guns have become more complex and powerful.<sup>44</sup> Manufacturers produce three types of air guns: the pneumatic, the spring-piston, and the carbon dioxide (CO<sub>2</sub>).<sup>45</sup> Understanding the mechanics involved in the different kinds of BB guns available is necessary to understanding the dangers these guns present.

A pneumatic air gun, the most lethal type of air gun,<sup>46</sup> relies on compressed air for power.<sup>47</sup> The most common type of pneumatic air gun is the pump-up air gun,<sup>48</sup> which gets its air supply from the manual pumping of a lever on the gun.<sup>49</sup> Most pneumatic air guns require between two and ten pumps to build enough pressure to expel the pellet out of the barrel at such a speed that the pellet will travel at least a short distance.<sup>50</sup> The more the shooter pumps the gun, the

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42. *Id.*

43. See *A CHRISTMAS STORY* (MGM 1983) (depicting the story of Ralphie Parker, a boy in the 1940s, who wants only a Red Rider BB gun for Christmas). See generally Sterling Blocker et al., *Serious Air Rifle Injuries in Children*, 69 *PEDIATRICS* 751, 754 (1982) (warning physicians that children's BB guns are much more dangerous than they used to be); Gideon P. Naude & Frederic S. Bongard, *From Deadly Weapon to Toy & Back Again: The Danger of Air Rifles*, 41 *J. TRAUMA* 1039 (1996) (explaining advances in technology in the air gun market that have made guns much more dangerous).

44. See *A Brief History of Airguns*, 13 *DYNAMIT NOBEL RWS CATALOG*, available at <http://www.airguns.net/history.html> (last visited Dec. 12, 2001) (on file with the North Carolina Law Review). In fact, the 1984 Olympics featured air gun shooting as a sport for the first time, as many manufacturers developed air rifles with the capabilities to shoot .177 caliber pellets at over 1,000 fps. *Id.*

45. Ben Saltzman, *Three Basic Types of Airguns*, available at <http://www.airguns.net/airtypes.html> (last visited Jan. 16, 2002) (on file with the North Carolina Law Review). Experts in the BB gun industry also differentiate between guns and rifles. Guns have smooth barrels. Friedman et al., *supra* note 29, at 477. Rifles have a grooved barrel that spins the BB for greater accuracy. *Id.* Injury studies, however, have yet to find any significant difference between injuries inflicted with guns and those inflicted with rifles. *Id.*

46. Friedman et al., *supra* note 29, at 475, 477 (noting that the muzzle velocity of a pneumatic rifle is between 390 to 950 fps, while the muzzle velocity of a spring-piston type gun is only 250 to 350 fps).

47. *Id.*

48. Saltzman, *supra* note 45. Other types of pneumatic air guns exist; however, these guns are designed for accuracy and are more common among professional air gun shooters than regular consumers. They are usually sold through specialty stores and are not available at local discount stores. *Id.*

49. *Id.*

50. *Id.* The guns, however, can be pumped more than ten times. See 20/20, *supra* note 25. Josh Moss could pump his gun only four or five times while his father admitted to being able to pump the gun twenty times. *Moss v. Crosman Corp.*, 136 F.3d 1169, 1172 (7th Cir. 1998).

greater the force that expels the pellet.<sup>51</sup> Also, the more the gun is pumped, the greater the force needed to pump the lever again.<sup>52</sup> So, adolescent children would find pumping a gun more difficult on the seventh pump than on the first. The guns are not too difficult, however, for adolescent children to pump more than ten times. Pneumatic air guns generate muzzle velocities<sup>53</sup> of 350 to 950 feet per second (fps), depending on the number of times the gun is pumped.<sup>54</sup> One expert pumped a pneumatic air gun twenty times and shot it with a muzzle velocity of 780 fps.<sup>55</sup>

Fortunately, most American families buying BB guns opt for the spring-piston air gun, which is cheaper and less lethal than the pneumatic gun.<sup>56</sup> The spring-piston air gun requires only one movement of a lever that moves a piston and compresses a stout spring in the gun.<sup>57</sup> When the trigger is pressed, the spring pushes against the piston and a column of air behind the BB, expelling the BB with great speed.<sup>58</sup> Most spring-piston air guns generate muzzle velocities of 250 fps to 350 fps.<sup>59</sup> Most children's BB guns operate on a spring-piston system.<sup>60</sup> These guns are the most common target-shooting air guns. They are also, as a group, the cheapest type of BB gun.<sup>61</sup>

The fewest tragedies occur with the third type of gun, the CO<sub>2</sub> gun, powered by a compressed carbon dioxide cartridge.<sup>62</sup> These guns have the most modern propulsion system on the market<sup>63</sup> and

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51. Saltzman, *supra* note 45.

52. *Id.*

53. For a discussion of muzzle velocities, see *infra* notes 72–79 and accompanying text. The muzzle velocity is the speed at which the pellet or BB travels out of the gun. *Airguns Found to Have Lethal Potential*, *supra* note 13, at 19.

54. Friedman et al., *supra* note 29, at 475. For a point of comparison, many conventional pistols have muzzle velocities between 750 and 1470 fps. *Id.*

55. 20/20, *supra* note 25.

56. Friedman et al., *supra* note 29, at 473 (citing the spring-piston gun as less lethal because of the lower muzzle velocity).

57. Saltzman, *supra* note 45.

58. Friedman et al., *supra* note 29, at 477; Saltzman, *supra* note 45.

59. Friedman et al., *supra* note 29, at 477. These muzzle velocities are less than those for conventional pistols (750 to 1470 fps) and pneumatic rifles (390 to 950 fps). *Id.*

60. See Daisy Corp., *Propulsion Systems*, <http://www.daisy.com/propulsion.html> (last visited Jan. 9, 2002) (on file with the North Carolina Law Review).

61. Friedman et al., *supra* note 29, at 477.

62. *Id.*; see *infra* note 96 (citing several CPSC incident reports of BB gun tragedies, none involving CO<sub>2</sub> guns).

63. Friedman et al., *supra* note 29, at 477.



are popular in pistol form.<sup>64</sup> Carbon dioxide powers recreational low-priced guns as well as premium marksman guns.<sup>65</sup> The carbon dioxide propulsion also makes the guns quite powerful, with muzzle velocities of 350 fps to 450 fps.<sup>66</sup>

The types and extent of injuries inflicted by high-powered BB guns also depend on the type of BB or pellet used. Both BBs and pellets are made of lead, brass, or steel.<sup>67</sup> BBs are usually 0.177 caliber (4.5 mm) while pellets are either 0.177 (5 mm) or 0.9 (5.5 mm) caliber.<sup>68</sup> Studies concerning injuries tend not to differentiate between injuries caused by lead, brass, and steel BBs or pellets.<sup>69</sup> Because of reduced friction, however, highly polished steel pellets maintain their velocity over longer distances and impact their targets at a higher speed.<sup>70</sup> Therefore, an injury caused by a polished steel pellet or BB will likely be worse than an injury caused by a pellet or BB made of lead or brass.<sup>71</sup>

Manufacturers define a high-powered BB gun based on the pellet's muzzle velocity.<sup>72</sup> The Daisy Manufacturing Company's

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64. See Daisy.com, *Powerline: Pistols*, at [http://daisy.ifware.com/cgi-bin/daisy2/products\\_powerline\\_pistols.html](http://daisy.ifware.com/cgi-bin/daisy2/products_powerline_pistols.html). (last visited Jan. 5, 2002) (describing the company's available CO<sub>2</sub> pistols) (on file with the North Carolina Law Review).

65. This is because although the carbon dioxide cartridge design leads to greater accuracy, the cartridges themselves must be treated with great care in order to perform optimally. Saltzman, *supra* note 45 (explaining that the guns are quite unreliable depending on temperature). Therefore, the design is used both in the cheapest guns, for those who are not as concerned with accuracy, and in the most expensive guns, for those who are so concerned with accuracy that they are willing to treat the carbon dioxide cartridge very carefully. See *id.*

66. Friedman et al., *supra* note 29, at 477. Note that these muzzle velocities are still significantly slower than the 350 to 950 fps reached by pneumatic air guns.

67. *Id.*

68. *Id.* For the purpose of this Comment, BB and pellet are used interchangeably.

69. None of the studies discussed in this Comment, including those conducted by the CPSC, see *infra* notes 93–100, the CDC, *infra* notes 101–109, or private pediatricians, *infra* notes 112–25, collected data concerning the type of pellet causing the wound.

70. Friedman et al., *supra* note 29, at 477.

71. The faster a pellet travels, the further it can penetrate into the body. Therefore, if a pellet is traveling faster because it is polished steel, the pellet will penetrate farther into the child's body. See Friedman et al., *supra* note 29, at 477.

72. See Daisy OnLine Catalog, at <http://daisy.ifware.com> (last visited Nov. 15, 2002) (on file with the North Carolina Law Review); Crosman.com, *Airgun and Accessories Product Catalog*, at <http://www.crosman.com/product> (last visited Jan. 21, 2002) (on file with the North Carolina Law Review). "High-powered" is commonly used to describe those guns with a muzzle velocity over 300 fps. Manufacturers themselves recognize this distinction by grouping those guns with muzzle velocities over 300 fps into a different category. For Daisy, these guns are called "Powerline guns." See Daisy.com, *Powerline: Rifles*, at [http://daisy.ifware.com/cgi-bin/daisy2/products\\_powerline\\_rifles.html](http://daisy.ifware.com/cgi-bin/daisy2/products_powerline_rifles.html) (last visited Jan. 16, 2002) (on file with the North Carolina Law Review) [hereinafter *Powerline: Rifles*]; Crosman.com, *supra*. Often muzzle velocities of BB guns are increased above the

online catalog, for example, is divided into different categories, based on the intended age of the shooter.<sup>73</sup> The BB guns listed as intended for “young” shooters have a muzzle velocity ranging from 275 fps to 350 fps.<sup>74</sup> The famous Red Ryder BB gun has a muzzle velocity of 280 fps.<sup>75</sup> In contrast, the Daisy Powerline Models, which are not intended for children under sixteen years of age according to the company’s website, have a muzzle velocity range of 550 fps to 800 fps.<sup>76</sup> For comparison, law enforcement officers carry 0.38 special revolvers with muzzle velocities of 762 fps.<sup>77</sup> In other words, these high-powered BB guns can shoot pellets at a speed faster than a 0.38 revolver shoots a bullet. To put the concept of muzzle velocity into perspective, consider that most conventional pistols have a muzzle velocity of 750 fps to 1470 fps.<sup>78</sup> While the difference in a 0.22 caliber bullet and a 0.177 caliber BB’s energy at impact is significantly greater over long distances, at short distances, the difference in mass only minimally affects damage at impact.<sup>79</sup> Thus, at short distances, some BB gun pellets travel at the same velocity and cause as much damage upon impact as regular bullets. Nonetheless, these rifles are available at local discount stores, like Wal-Mart and K-Mart, and at sporting goods stores across the country.<sup>80</sup>

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velocity of the gun at manufacture by an unexpected phenomenon known as “dieseling.” The heat generated from friction between the pellet and the muzzle causes combustion of the oil in the barrel. The combustion leads to an explosion that increases the energy of the BB being fired. The increased energy results in an increase in the BB or pellet’s penetrating power. Friedman et al., *supra* note 29, at 477.

73. See Daisy Outdoor Products, *Daisy Airguns & Kits*, at [http://daisy.ifware.com/cgi-bin/daisy2/products\\_daisy.html](http://daisy.ifware.com/cgi-bin/daisy2/products_daisy.html) (last visited Jan. 15, 2002) (on file with the North Carolina Law Review) [hereinafter *Daisy Airguns & Kits*].

74. *Id.* (differentiating between guns intended for “young” shooters, and guns intended for shooters over the age of sixteen).

75. *Id.*

76. Daisy Outdoor Products, *Daisy Outdoor Products*, at [http://daisy.ifware.com/cgi-bin/daisy2/products\\_powerline\\_rifles.html](http://daisy.ifware.com/cgi-bin/daisy2/products_powerline_rifles.html) (last visited Nov. 29, 2001) (on file with the North Carolina Law Review).

77. 20/20, *supra* note 25.

78. *Id.*

79. *Id.* This fact is best illustrated by calculating the kinetic energy of the pellets or bullets. The kinetic energy is equal to one half the mass of the body multiplied by its velocity squared. *Id.*

80. See, e.g., *Moss v. Crosman Corp.*, 136 F.3d 1169, 1170–71 (7th Cir. 1998) (involving a gun purchased at K-Mart); *Earsing v. Nelson*, 212 A.D.2d 66, 68 (N.Y. App. Div. 1995) (involving a gun purchased at Service Merchandise retail store); *60 Minutes* (CBS Television broadcast, Jan. 7, 2001) (discussing guns in Walmart). To their credit, however, neither K-Mart nor Walmart sells air guns from their websites. See *K-Mart Hunting*, at <http://www.bluelight.com> (last visited Dec. 31, 2001) (providing a link to sports and hunting products) (on file with the North Carolina Law Review); *Walmart Hunting*, at

### B. Statistics—Describing the Power and the Resulting Injuries

The need for regulation has become more pressing as BB guns have become more powerful. The muzzle velocity is an excellent gauge of the power and the damage a BB gun can inflict because muzzle velocity directly correlates to the impact velocity.<sup>81</sup> Air guns and air rifles can attain an impact velocity of 275 fps to 900 fps.<sup>82</sup> For a pellet to penetrate an eye, it must be traveling at a velocity of at least 130 fps.<sup>83</sup> Skin penetration requires between 120 and 230 fps.<sup>84</sup> For the penetration of bone, the velocity must reach 350 fps.<sup>85</sup>

Children are particularly susceptible to these high-powered pellets. The skin and subcutaneous tissues of children are thin and not fully developed.<sup>86</sup> Therefore, penetration can occur in children at lower muzzle velocities than required to injure an adult. Certain regions of the skull are also thinner in children allowing easier

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<http://www.walmart.com> (last visited Jan. 22, 2002) (same) (on file with the North Carolina Law Review).

81. See *supra* notes 72–79 and accompanying text.

82. Committee on Accident and Poison Prevention, *supra* note 20, at 473.

83. *Id.*; see Consumer Product Safety Commission, Consumer Product Complaint Report, Document No. X-48-1003, Oct. 25, 1981, available at <http://www.cpsc.gov/LIBRARY/FOIA/Foia99/idi/daisybb5.pdf> (p. 26) (reporting an eye injury of a nine year-old female shot with a BB gun with a muzzle velocity of approximately 275 fps) (on file with the North Carolina Law Review); see also *Daisy Airguns & Kits*, *supra* note 73 (providing the muzzle velocity of the gun used in the complaint report); Consumer Product Safety Commission, Epidemiologic Investigation Report, case no. 960424CWE5020, April 24, 1996, available at <http://www.cpsc.gov/library/FOIA/Foia99/idi/daisybb1.pdf> (pp. 19–23) (reporting the loss of sight in the right eye of a fifteen year-old male who was shot with an air rifle with a muzzle velocity of approximately 650 fps) (on file with the North Carolina Law Review); *Powerline: Rifles*, *supra* note 72 (providing the muzzle velocity for the gun used in the incident).

84. Committee on Accident & Poison Prevention, *supra* note 20, at 473; see Consumer Product Safety Commission, Epidemiologic Investigation Report, case no. 900918HCC2317, Sept. 9, 1990, available at <http://www.cpsc.gov/LIBRARY/FOIA/Foia99/idi/daisybb9.pdf> (pp. 64–65) (reporting a puncture wound to the abdomen of a fourteen year-old boy shot with a Daisy air rifle with a muzzle velocity of approximately 280 fps) (on file with the North Carolina Law Review).

85. Committee on Accident & Poison Prevention, *supra* note 20, at 473; see Consumer Product Safety Commission, Epidemiologic Investigation Report, case no. 920108CCC2160, Jan. 15, 1992, available at <http://www.cpsc.gov/library/FOIA/Foia99/idi/daisybb1.pdf> (pp. 37–39) (reporting the death of a thirteen year-old male when a BB penetrated his aorta from a gun with a muzzle velocity of 685 fps) (on file with the North Carolina Law Review); Consumer Product Safety Commission, Epidemiologic Investigation Report, case no. 900717CWE5016, July 16, 1990, available at <http://www.cpsc.gov/library/FOIA/Foia99/idi/daisybb6.pdf> (p. 1) (reporting the death of a ten year-old male when a pellet penetrated his chest from an air rifle with a muzzle velocity of approximately 665 fps) (on file with the North Carolina Law Review); see also *Powerline: Rifles*, *supra* note 72 (providing the muzzle velocities for the guns used in these incidents).

86. Friedman et al., *supra* note 29, at 477.

penetration.<sup>87</sup> A pellet can reach a child's critical organs by traversing much shorter distances over softer tissues, resulting in a higher velocity at impact with internal organs.<sup>88</sup>

Both the CPSC and the Centers for Disease Control ("CDC") have collected and analyzed reports of BB gun injuries. Their data together show not only the number of children killed or injured each year,<sup>89</sup> which arguably is insufficient by itself to support legislative action,<sup>90</sup> but also the reason most of these accidents occur—the lack of understanding of the children and the adults involved.<sup>91</sup> The CPSC

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87. *Id.*; see Consumer Product Safety Commission, Epidemiologic Investigation Report, case no. 960405CWE6001, Apr. 5, 1996, available at <http://www.cpsc.gov/library/FOIA/Foia99/idi/daisybb3.pdf> (pp. 1–11) (reporting death of ten year-old male struck in the head by a pellet from an air rifle with a muzzle velocity of 650 fps) (on file with the North Carolina Law Review); Consumer Product Safety Commission, Epidemiologic Investigation Report, case no. 840614HCC3315, Aug. 1, 1984, available at <http://www.cpsc.gov/library/FOIA/Foia99/idi/daisybb5.pdf> (pp. 1–3) (reporting the death of a twelve year-old female when a BB shot penetrated her ear and entered her brain) (on file with the North Carolina Law Review); see also *Powerline: Rifles*, *supra* note 72 (providing the muzzle velocities for the guns used in these incidents).

88. Friedman et al., *supra* note 29, at 477.

89. The statistics discussed in this section only consider incidents in which children were injured. They do not take into account those incidents in which children shot adults with air guns. Studies tend to focus on children because children represent the majority of victims of air gun injuries. See Bratton et al., *supra* note 21, at 609–11; Friedman et al., *supra* note 29, at 475–77. Children also shoot adults accidentally, however, just as they shoot themselves and each other. See generally U.S. Consumer Product Safety Commission, National Injury Information Clearinghouse, *BB Gun Injuries 1995 to Present* (Jan. 30, 2001) (concerning incidents in which children have shot parents, grandparents, and older siblings with air guns) (on file with author) [hereinafter *BB Gun Injuries 1995 to Present*].

90. Many products harm children everyday, therefore, raw numbers alone would never be enough to warrant legislative action. In fact, more children are harmed each year while riding bicycles, a regulated product, than while using BB guns. See Statement of the Honorable Mary Sheila Gall in Opposition to Issuance of Administrative Complaint Against Daisy Manufacturing Company (Oct. 30, 2001), available at [www.cpsc.gov/library/FOIA](http://www.cpsc.gov/library/FOIA) (last visited Jan. 15, 2002) (on file with the North Carolina Law Review). A finding of substantial injuries, however, combined with a common reason for those injuries and a method to prevent them is enough to warrant regulation. See *infra* notes 188–91 (discussing the criteria for a “regulated product”).

91. See generally Dorothy T. Damore et al., *Parental Attitudes Toward BB and Pellet Guns*, 39 CLINICAL PEDIATRICS 281 (2000) (reporting results of a study conducted to determine parental attitudes towards BB guns). Dr. Damore and her colleagues divided the parents into three groups of twenty-eight. *Id.* at 282. The first group consisted of parents whose children had been injured by BB guns; the second group consisted of parents who allowed their children to have BB guns, but whose children had not been injured; the third group consisted of parents who did not allow their children to have BB guns and whose children had not been injured. *Id.* The study found that parents in the second group underestimated the potential for injury to their children. *Id.* at 283. Dr. Damore concluded that pediatricians should educate parents about the dangers of BB guns. *Id.* at 281.

data exposes the industry standards as inadequate and reveals that the public safety problem that these surprisingly powerful guns pose is not decreasing.<sup>92</sup> With proper advertising, packaging, warnings, performance requirements, and sale requirements, parents and older children would better understand these dangers and many injuries could be prevented.

The CPSC collected statistics concerning BB gun-related injuries from 1995–2000,<sup>93</sup> beginning three years after the industry's attempts to institute its own safety standards.<sup>94</sup> The CPSC data show that these standards are inadequate, as large numbers of children are still injured yearly under the same conditions the industry-designated warnings were designed to prevent.<sup>95</sup> The CDC and CPSC data supports the theory that a high-powered BB gun commonly injures a child when that child is playing at home with a gun that neither the child nor his parents realizes is as powerful as it is, and either the

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92. *BB Gun Injuries 1995 to Present*, *supra* note 89. The consistently high number of injuries demonstrates that any effort on the part of industry or the government thus far has not been effective in decreasing the number of injuries. If the standards were effective, one would expect a continual decline in the number of injuries. No such decline has been observed. The standards no longer, if they ever did, decrease the number of injuries. For a discussion of industry efforts, see *infra* notes 174–80 and accompanying text.

93. The CPSC collects data through the National Electronic Injury Surveillance System ("NEISS"), which allows the agency to monitor certain hospital records through a statistically significant group of data. The CPSC also monitors newspaper clippings and consumer reports for patterns of injuries suffered in relation to the use of consumer products. The data concerning BB gun injuries probably is incomplete, however, because hospital databases do not always distinguish between "gunshot" wounds and "air gun" wounds. Bratton et al., *supra* note 21, at 609. Unfortunately, the data disseminated by the CPSC often contains little information other than the age of the child and the body part damaged. In some instances, the actual injury was not identified and those instances were counted as injuries based on the age of the child only. Enough information, however, is presented through the CPSC data to provide a frightening picture of the number and types of common BB gun-related injuries. As the CPSC disseminated the data in raw form, the author performed all tabulations and calculations. See *supra* notes 83–87; *infra* notes 95–100 (describing the findings in various investigative reports).

94. See *BB & Pellet Gun-Related Injuries*, *supra* note 20, at 910. For a complete explanation of current industry standards, see *infra* notes 174–80 and accompanying text.

95. Due to a lack of information, determining whether the number of BB guns in use increased or decreased during this time period is impossible. Some information on sales of Daisy BB guns is available, however. Between February 1993 and May 1999, Daisy sold 347,069 Model 990 air guns. See Full Report Pursuant to 16 C.F.R. § 1115(d) for Daisy Manufacturing Company, May 14, 1999, available at <http://www.cpsc.gov/LIBRARY/FOIA> (on file with the North Carolina Law Review). The Daisy 990 is a high-powered BB gun with a muzzle velocity of 650 fps. *Powerline: Rifles*, *supra* note 72. During the years 1993 to 1998, Daisy had consistent sales of this high-powered BB gun: 61,941 sold in 1993; 71,102 sold in 1994; 48,279 sold in 1995; 57,941 sold in 1996; 49,586 sold in 1997; 56,766 sold in 1998. Full Report Pursuant to 16 C.F.R. § 1115(d) for Daisy Manufacturing Company, *supra*.

child or a close friend or relative shoots the gun.<sup>96</sup> The number of injuries from year to year failed to decrease during the years of the CPSC study.<sup>97</sup> Therefore, those statistics demonstrate that industry

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96. See *supra* notes 97–109 and accompanying text (describing BB gun injuries in which the danger of the gun was miscalculated); see also Consumer Product Safety Commission, Field Activity Coversheet, Case No. 960821CCN1722, Aug. 22, 1996, available at <http://www.cpsc.gov/library/FOIA/Foia99/idi/daisybb5.pdf> (pp. 33–35) (reporting a puncture wound to the chest of an eleven year-old male when he was shot by his twenty year-old cousin who thought the gun was empty) (on file with the North Carolina Law Review); Consumer Product Safety Commission, Epidemiologic Investigation Report, Case No. 960424CWE5020, Apr. 24, 1996, available at <http://www.cpsc.gov/library/FOIA/Foia99/idi/daisybb1.pdf> (pp. 19–36) (reporting that a fifteen year-old lost sight in one eye when accidentally shot by his fifteen year-old friend while the two were hunting birds) (on file with the North Carolina Law Review); Consumer Product Safety Commission, Epidemiologic Investigation Report, Case No. 960405CWE6001, Apr. 5, 1996, available at <http://www.cpsc.gov/library/FOIA/Foia99/idi/daisybb3.pdf> (pp. 1–68) (reporting the death of a ten year-old shot in the head by a twelve year-old who thought the gun was empty) (on file with the North Carolina Law Review); Consumer Product Safety Commission, Epidemiologic Investigation Report, Case No. 940711HEP9008, July 16, 1994, available at <http://www.cpsc.gov/library/FOIA/Foia99/idi/daisybb5.pdf> (pp. 52–67) (reporting a ten year-old with a neck injury and a BB lodged near his spinal cord after his cousin who was pumping the gun accidentally fired it at the victim) (on file with the North Carolina Law Review); Consumer Product Safety Commission, Epidemiologic Investigation Report, Case No. 920108CCC2160, Jan. 15, 1992, available at <http://www.cpsc.gov/library/FOIA/Foia99/idi/daisybb1.pdf> (pp. 37–59) (reporting that a thirteen year-old male died after being shot in the chest by another thirteen year-old boy while playing with BB guns) (on file with the North Carolina Law Review); Consumer Product Safety Commission, Epidemiologic Investigation Report, Case No. 900918HCC2317, Sept. 21, 1990, available at <http://www.cpsc.gov/library/FOIA/Foia99/idi/daisybb9.pdf> (pp. 64–68) (reporting that a fourteen year-old boy was shot in the abdomen by a twelve year-old friend who thought the safety was on) (on file with the North Carolina Law Review); Consumer Product Safety Commission, Epidemiologic Investigation Report, Case No. 900717CWE5016, July 16, 1990, available at <http://www.cpsc.gov/library/FOIA/Foia99/idi/daisybb6.pdf> (pp. 1–48) (reporting that a ten year-old male was fatally shot in the chest by an eight year-old female playmate when several children were taking turns shooting the gun as a game at a birthday party) (on file with the North Carolina Law Review); Consumer Product Safety Commission, Epidemiologic Investigation Report, Case No. 840614HCC3315, Aug. 1, 1984, available at <http://www.cpsc.gov/library/FOIA/Foia99/idi/daisybb5.pdf> (pp. 2–3) (reporting the death of a twelve year-old female shot in the head when her thirteen year-old brother accidentally fired the gun as he was standing up) (on file with the North Carolina Law Review); Memorandum from Joseph S. Slaton to DRP & DP Phi-Do Region III, Case No. A39873 (May 22, 1973) available at <http://www.cpsc.gov/library/FOIA/Foia99/idi/daisybb2.pdf> (pp. 3–8) (investigating the death of a fourteen year-old male who accidentally shot himself in the head while hunting with a BB gun he thought was locked in the safety position) (on file with the North Carolina Law Review).

97. The raw data totals for each year are as follows: In 1995, total incidents: 279, total injuries for children (defined for these purposes as under 16): 205, children eye injuries: 18, children injured in other areas of the body likely to cause serious injury (“danger zones” defined as head, neck, face, ear, chest, and abdomen): 73. In 1996, total incidents: 373, total injuries for children: 263, children eye injuries: 28, children injured in “danger zones”: 87. In 1997, total injuries: 325, total children injuries: 261, children eye injuries:

warnings, labeling, and other consumer alerting measures have not diminished BB gun injuries among children the longer the guns have been on the market.

According to CPSC data from January 1995 to November 2000, 2,045 air propulsion gun injuries were collected via the National Electronic Injury Surveillance System ("NEISS"), and seventy-three percent of those injured were children under sixteen years of age.<sup>98</sup> The injuries to children under sixteen years of age included eight deaths and 130 eye injuries.<sup>99</sup> Forty-four percent of these injuries harmed the eyes or another highly sensitive area of the body.<sup>100</sup>

The CDC also periodically monitors air gun injuries. The CDC conducted a national study using NEISS for June 1992 through May 1994.<sup>101</sup> The raw data showed a total of 959 BB and pellet gunshot wounds among children and teenagers (defined as nineteen years of age or below).<sup>102</sup> Based on these reports, the CDC estimated<sup>103</sup> that

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22, children injured in "danger zones": 100. In 1998, total injuries: 404, children injuries: 306, children eye injuries: 24, children injured in "danger zones": 119. In 1999, total injuries: 351, children injuries: 236, children eye injuries: 14, children injured in "danger zones": 83. Through November 2000, total injuries: 313, children injuries: 222, children eye injuries: 24, children injured in "danger zones": 77. *BB Gun Injuries 1995 to Present*, *supra* note 89.

The average number of total injuries per year was 345.6. However, the greatest deviation in total injuries between years was an *increase* of 94 injuries between 1995 and 1996. The average number of injuries to children was 252.3. Roughly 73% of the reported BB gun injuries *are* injuries to children. Although the number of injuries alone is insufficient to justify regulation, the continually high number of *preventable* injuries should be sufficient. The CPSC has authority to regulate unreasonably dangerous products, which includes products that the CPSC finds to cause numerous and preventable injuries. See 15 U.S.C. § 2056 (2000); *infra* notes 188–91. The fact that so many of the victims are under the age for which the guns are intended highlights the failure of industry standards to address children and parents using the guns without realizing their dangers. Most of the high-powered guns are intended for children ages sixteen and above. See *Powerline: Rifles*, *supra* note 72.

98. See *BB Gun Injuries 1995 to Present*, *supra* note 89. The total number of injuries to children under the age of sixteen was 1493. *Id.*

99. *Id.*

100. Five hundred thirty-nine of the injured children were hit in an area of the body, other than the eye, to which the BB or pellet could cause serious injury. *Id.* These areas include the head, neck, face, ear, chest, and abdomen. *Id.* This Comment chooses to focus on the most common injuries. See Bratton et al., *supra* note 21, at 610–11; Committee on Accident and Poison Prevention, *supra* note 20, at 473.

101. The study sampled ninety-one hospitals that provide twenty-four hour emergency services and at least six beds. The CDC then weighted the data to provide national estimates of injuries treated in hospital emergency rooms in the United States and its territories. *BB & Pellet Gun-Related Injuries*, *supra* note 20, at 910.

102. *Id.* at 909–10.

103. This estimate had a ninety-five percent confidence interval (39,746–54,528). *Id.* at 910.

47,137 children and teenagers were treated for BB or pellet gunshot wounds in the United States during the same time period.<sup>104</sup> This translates to an annual rate of 23,600 injuries. According to the data collected, thirty-one percent of the injuries were to the eye, face, head, and neck.<sup>105</sup>

The highest injury rate in the CDC study was to males between the ages of ten and fourteen.<sup>106</sup> These children are most interested in BB guns without appreciating their danger.<sup>107</sup> Furthermore, the CDC determined that the majority of injuries resulted from unintentional shootings, and almost one-half occurred at home,<sup>108</sup> where the children were playing with their "toys." The CDC collected victim-shooter relationships on seventy-one percent of its cases, and determined that sixty-four percent of injuries were either self-inflicted or inflicted by an innocent friend, acquaintance, or relative,<sup>109</sup> who most likely did not fully appreciate the gun's power. Taken together, the CDC and CPSC data demonstrate the hidden danger with high-powered BB guns.<sup>110</sup> Most children and parents do not understand that high-powered BB guns are more dangerous than other BB guns with lower muzzle velocities intended for younger users, and accidents occur due to this misunderstanding.<sup>111</sup>

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104. *Id.*

105. *Id.* Hospitalization was required for five percent of the injuries, with over one-third of those requiring admittance due to severe eye injuries. *Id.*

106. *BB & Pellet Gun-Related Injuries*, *supra* note 20, at 910.

107. Pre-adolescents and early adolescents are less likely to appreciate danger than adults. See CENTERS FOR DISEASE CONTROL AND PREVENTION, TEENS AND TOBACCO: FACTS NOT FICTION, at <http://health.medscape.com/cx/viewarticle/204538> (last visited Jan. 15, 2002) (citing an increase in teenage smoking and that young people tend to underestimate nicotine's addictive qualities) (on file with the North Carolina Law Review); WEBMD HEALTH, ROAD SAFETY TIPS FOR TEENS, at <http://health.medscape.com/cx/viewarticle/226503> (last visited Jan. 15, 2002) (citing teens as more likely to speed, run red lights, make illegal turns, ride with a drunk driver, and drink and drive) (on file with the North Carolina Law Review).

108. *BB & Pellet Gun-Related Injuries*, *supra* note 20, at 910; see also Bratton et al., *supra* note 21, at 610 (suggesting that the most severe injuries occur in the home or in other familiar surroundings). Interestingly, only ten percent of the injuries were a product of intentional assault, and suicide attempts were extremely rare. *BB & Pellet Gun-Related Injuries*, *supra* note 20, at 910.

109. *BB & Pellet Gun-Related Injuries*, *supra* note 20, at 910.

110. As these studies were conducted under different conditions and with different defined terms, the numbers from the CPSC and CDC studies cannot be compared directly. The data draw the same conclusions, however, concerning the significant number of preventable BB gun injuries.

111. The CPSC and CDC data show that children are more likely to be injured in situations in which the misunderstanding the power of the gun is obvious. For example, a ten year-old boy was fatally shot in the chest when he stepped in front of his eight year-old playmate to take his turn shooting the gun. Consumer Product Safety Commission,



While the CDC and the CPSC data quantify the injuries, another study of pediatric hospitalization due to air gun-injuries details the specific injuries air guns inflict. Researchers collected data from the charts of children hospitalized for air gun related injuries in three teaching hospitals between January 1988 and September 1996.<sup>112</sup> The study identified 191 children hospitalized, eighty-one percent male, with a median age of 10.9 years.<sup>113</sup> Of the 101 children studied,<sup>114</sup> the median hospital stay was three days, with a range of one to seventeen days.<sup>115</sup>

The most common injury was to the eye—twenty-five children experienced at least partial blindness in one eye.<sup>116</sup> The most dangerous injuries were to the brain and heart.<sup>117</sup> Eleven children were treated for pellets or BBs lodged in the brain.<sup>118</sup> Three of these children died, while two others suffered long-term neurological defects.<sup>119</sup> Three children had pellets lodged in their hearts or major

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Epidemiologic Investigation Report, Case No. 900717CWE5016, July 16, 1990, *available at* <http://www.cpsc.gov/library/FOIA/Foia99/idi/daisybb6.pdf> (pp. 2–5) (on file with the North Carolina Law Review). One thirteen year-old boy was fatally shot in the chest by another thirteen year-old playmate who wanted to shoot really close to the boy to scare him. Consumer Product Safety Commission, Epidemiologic Investigation Report, Case No. 920108CCC2160, Jan. 15, 1992, *available at* <http://www.cpsc.gov/library/FOIA/Foia99/idi/daisybb7.pdf> (pp. 44–46) (on file with the North Carolina Law Review).

112. Bratton et al., *supra* note 21, at 609 (compiling data from teaching hospitals in Cincinnati, Ohio; Kansas City, Mo.; and Seattle, Wash.). See generally James M. DeCou et al., *Life-Threatening Air Rifle Injuries to the Heart in Three Boys*, 35 J. PEDIATRIC SURGERY 785 (2000) (profiling three injuries to the hearts of boys using air rifles); Jayant Radhakrishnan et al., *Air Rifles—Lethal Weapons*, 31 J. PEDIATRIC SURGERY 1407 (1996) (citing a case study in which nine air rifle injuries were inflicted upon children by other children).

113. Bratton et al., *supra* note 21, at 610.

114. *Id.* at 609. The study included all charts of patients under nineteen years of age admitted to one of the teaching hospitals with an air gun injury between 1988 and 1996 with enough recorded information for this study. Only 101 charts met these requirements. *Id.* at 609–10.

115. *Id.* at 610.

116. *Id.* at 611. Thirty-eight out of the 101 children had eye injuries. *Id.*

117. Three children in the Bratton study died from injuries to the head, and the study reported that injury to the heart has an overall survival rate of seven percent. *Id.* at 611.

118. *Id.* at 610. In seven of the children, the pellet only damaged one hemisphere. Those children had BBs lodged in the occipital lobe (3), cerebral peduncle (1), thalamus (1), temporal lobe (1), parietal lobe (1), and lateral ventricle (1). *Id.* In four children, the pellet crossed through the brain, damaging both hemispheres. *Id.* In one child, the pellet traveled through the sphenoid bone to the occipital lobe. *Id.* The sphenoid bone is a winged compound bone at the base of the cranium. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 2192 (1993).

119. Bratton et al., *supra* note 21, at 611. One of these children was an apparent adolescent suicide. The other two were ages two and seven, respectively, and were victims of unintentional shootings. *Id.*

vessels nearby.<sup>120</sup> Two required emergency surgery, with one child having to be resuscitated during surgery.<sup>121</sup> Another child still has a BB in one of his ventricles because two attempts to remove it during catheterization proved unsuccessful.<sup>122</sup>

In total, fifty-six percent of the children required at least one surgical procedure during their hospital stay.<sup>123</sup> Fifteen children required treatment in an intensive care unit.<sup>124</sup> This study also confirmed CDC data reporting that unintentional shootings by relatives or friends near the home are quite common.<sup>125</sup> The CPSC must consider whether regulation is reasonably necessary to prevent or reduce injury before it regulates a product.<sup>126</sup> Although the occurrence of injuries alone is not sufficient to warrant a safety rule from the CPSC, the consistently high number of preventable air gun injuries requires regulatory action. The CPSC and CDC data show that through proper warning, instruction, and performance requirements, the number of BB gun-related injuries would decrease significantly. The hidden danger would be revealed for parents to appreciate before buying a gun for their children.<sup>127</sup>

## II. CURRENT CONSUMER PROTECTION: WHY IT DOESN'T WORK

### A. Courts

#### 1. Product Liability

If neither the federal government nor the states regulate a product and the industry's self-regulation proves inadequate, then a consumer's last hope for protection is through product liability suits.

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120. *Id.*

121. *Id.* at 610.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* Only about half of the charts studied included information regarding the cause of injury. Unintentional shootings near the home were the most prevalent among these charts. Bratton et al., *supra* note 21, at 610. Other studies provide the scenarios of how these injuries occur. For example, an eight year-old girl was playing "bank robber" with her brother when she was shot in the head with a pellet gun. Friedman et al., *supra* note 29, at 476. A twelve year-old boy was shot in the head while he and a friend inspected his father's air gun. *Id.* at 475. These two incidents show that many adults and children remain unaware that air guns can be just as dangerous as firearms.

126. 42 U.S.C. § 2056(a)(2) (1994).

127. See Sheldon J. Bond et al., *Air-Powered Guns: Too Much Firepower to be a Toy*, 41 J. TRAUMA 674, 678 (1996) (concluding that physicians "can no longer continue to underestimate the potential for life-threatening injury from air guns").

If the threat of damages is large enough, or if the damages themselves are large enough, then theoretically, a company will make its product safer for consumers, thereby reducing the threat of a lawsuit.<sup>128</sup> Unfortunately, product liability suits have not yet provided an impetus for BB gun manufacturers to make a safer product.<sup>129</sup>

In today's litigious society one would expect a large number of lawsuits against BB gun manufacturers, considering the number of BB gun-related injuries each year. Very few opinions have been published, however, in cases in which BB gun manufacturers are defendants, regardless of the outcome. This phenomenon could be attributed to the difficulty of obtaining a successful judgment against a BB gun manufacturer on a product liability claim.<sup>130</sup>

The more probable explanation, however, is that the manufacturer settles most of these cases before trial. The impetus to settle exists on both sides of the suit. Plaintiffs understand the difficulty of overcoming summary judgment in a product liability suit against a BB gun manufacturer.<sup>131</sup> Defendants know that the publicity of a trial would draw attention to the dangers of BB guns, and that any plaintiff likely would elicit sympathy from a jury.<sup>132</sup> The

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128. See Rick L. Jeff, *Do Victims of Unlawful Handgun Violence Have a Remedy Against Handgun Manufacturers: An Overview and Analysis*, 1985 U. ILL. L. REV. 967, 979 ("[P]roduct Liability suits encourage manufacturers to *change* their product or to provide better instructions to ensure safer use of the product."); Kimberly A. Pace, *The Tax Deductibility of Punitive Damage Payments: Who Should Ultimately Bear the Burden for Corporate Misconduct?*, 47 ALA. L. REV. 825, 851 (1996) (explaining that punitive damages in product liability cases add to deterrence, in that, if the cost of a product liability suit exceeds the profit from the product, then manufacturers will discontinue the product); Teresa Moran Schwartz, *Punitive Damages and Regulated Products*, 42 AM. U. L. REV. 1335, 1337 (1993) (describing an attempt to limit punitive damage awards in product liability suits involving regulated products as an attempt to remove an "important safety incentive from the manufacturers").

129. See *Sherk v. Daisy-Heddon*, 450 A.2d 615, 627, 635 (Pa. 1982) (Larsen, J., dissenting) (explaining that given the BB gun's known power and the known failure of children to adhere to warnings accompanying Daisy BB guns, Sherk's death was "*virtually inevitable*," but acknowledging that the BB gun manufacturers will not stop marketing to children until product liability suits make such marketing so expensive that it is no longer in the manufacturers' best economic interest). See generally Howard Latin, "*Good*" Warnings, Bad Products, and Cognitive Limitations, 41 UCLA L. REV. 1193, 1208 (1994) (arguing that due to the limitations of product liability suits, BB gun manufacturers specifically are able to rely on "demonstrably ineffective warnings" instead of being forced to adopt "the safest feasible product designs or marketing practices").

130. See *infra* notes 134-51 and accompanying text.

131. See *infra* notes 136, 142 and accompanying text.

132. See Frank B. Cross, *In Praise of Irrational Plaintiffs*, 86 CORNELL L. REV. 1, 7-8 (2000) (explaining that repeat defendants, including those in product liability cases, will sometimes be willing to settle for more than a case is worth if the plaintiff is sympathetic and the case could set bad precedent); Wendy E. Wagner, *Rough Justice and the Attorney*

impetus to settle is much greater than the threat or promise of a large product liability judgment.<sup>133</sup>

To establish a product liability claim in most states, the plaintiff must show either that the product is defective in design or manufacture, or that the manufacturer failed to warn the consumer of foreseeable risks associated with the product.<sup>134</sup> A correctly functioning BB gun is not considered defective just because it injures children.<sup>135</sup> Neither BB guns nor powder firearms have been declared

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*General Litigation*, 33 GA. L. REV. 935, 960-61 (1999) (citing the fear of sympathetic plaintiffs as an incentive for tobacco companies to settle suits); see also Mark P. Gergen, *Tortious Interference: How It Is Engulfing Commercial Law, Why This Is Not Entirely Bad, and A Prudential Response*, 38 ARIZ. L. REV. 1175, 1176 (1996) ("Defendants are likely to settle rather than face a jury trial with a sympathetic plaintiff and the risk of substantial mental anguish and punitive damages.").

133. See Cross, *supra* note 132, at 3-9 (describing the classic theory behind how litigants decide whether to settle a case). See generally Chris Guthrie, *Better Settle Than Sorry: The Regret Aversion Theory of Litigation Behavior*, 1999 U. ILL. L. REV. 43 (discussing both economic and emotional aspects to settlement decisions); George Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527, 531-39 (1989) (discussing time delay as another contributing factor to the economic interest in settlement).

134. *Dias v. Daisy-Heddon*, 390 N.E.2d 222, 224 (Ind. Ct. App. 1979) ("A product may be defective because of manufacturing flaws, defective design, or failure to discharge a duty to warn or instruct with respect to potential dangers in the use of the product." (citations omitted)); see *Trujillo v. Uniroyal Corp.*, 608 F.2d 815, 818 (10th Cir. 1979) (naming the three possible defects in a product as "manufacturing flaw, design defect, and failure to warn"); *Burton v. L.O. Smith Foundry Prods. Co.*, 529 F.2d 108, 110 (7th Cir. 1976) ("A product may be defective because of manufacturing flaws, defective design, or failure to supply complete information about the product's dangers."); *Smith v. Brown & Williamson Tobacco Corp.*, 3 F. Supp. 2d 1473, 1475 (D.D.C. 1998) (establishing a prima facie product liability case with the same elements); *Dinny v. Pace Intern. Co.*, 1988 WL 67663, \*1 (N.D. Ill. 1988) ("[T]hree types of unreasonably dangerous defects may exist in a product. . . ."); *Wernimont v. Int'l Harvester Corp.*, 309 N.W.2d 137, 140 (Iowa Ct. App. 1981) (setting forth similar elements to establish a prima facie case for the plaintiff); Richard C. Ausness, *Learned Intermediaries and Sophisticated Users: Encouraging the Use of Intermediaries to Transmit Product Safety Information*, 46 SYRACUSE L. REV. 1185, 1188 (1996); Timothy D. Lytton, *Negligent Marketing: Halberstam v. Daniel and the Uncertain Future of Negligent Marketing Claims Against Firearms Manufacturers*, 64 BROOK. L. REV. 681, 682 (1998). In cases involving firearms, some plaintiffs have attempted to establish a negligent marketing theory, claiming that the firearms have been marketed to criminals instead of their intended law-abiding users. In general, however, their argument has failed. See Lytton, *supra*, at 683-84. While an analogy could be made to negligent marketing theory in high-powered BB guns, claiming that companies are marketing to children instead of the intended adult users, based upon the lack of success in the firearms industry, a lack of success in the BB gun industry is also likely.

135. If this determination were the case, BB gun manufacturers would never prevail. However, they do prevail. See *Moss v. Crosman Corp.*, 136 F.3d 1169, 1174-75 (7th Cir. 1998); *Sherk v. Daisy-Heddon*, 450 A.2d 615, 616-18 (Pa. 1982); *Dias*, 390 N.E.2d at 229.

defective due to an unreasonably dangerous design.<sup>136</sup> By definition, products are not defective in manufacture when they function exactly as intended.<sup>137</sup>

A product made according to its design can still be found defective and unreasonably dangerous if the manufacturer does not warn consumers of the danger.<sup>138</sup> Nevertheless, courts frequently dismiss failure to warn cases brought against BB gun manufacturers at summary judgment.<sup>139</sup> To state a claim under a failure to warn theory, the plaintiff must show that the manufacturer had a duty to warn<sup>140</sup> and that the warning was inadequate under the circumstances.<sup>141</sup> The difficult hurdle for a plaintiff against a BB gun

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136. See Lytton, *supra* note 134, at 682 (discussing the difficulty of proving such a theory in a powder firearms case where the plaintiff fails to allege a specific "malfunction" in the firearm); see also Moss, 136 F.3d at 1173-74 (affirming summary judgment for manufacturer where plaintiff alleged a design defect in BB gun because of the general public's lack of knowledge of the gun's power); *Salvi v. Montgomery Ward & Co.*, 489 N.E.2d 394, 396 (Ill. App. Ct. 1986) (affirming a jury verdict for Coleman Company, BB gun manufacturer, where plaintiffs alleged a design defect due to the dangerousness of the gun); cf. *Earsing v. Nelson*, 629 N.Y.S.2d 563, 565 (N.Y. App. Div. 1995) (holding that the judge erred in dismissing a complaint against a BB gun manufacturer for negligent design and failure to warn because the judge reasoned that the intervening action of the shooter severed the proximate cause).

137. Some plaintiffs brought cases against manufacturers on a defective design theory based on claims such as lack of operation of the safety or an impossibility to determine if the gun is loaded. See *Dias*, 390 N.E.2d at 223-24 (claiming a design defect because the shooter believed the gun was unloaded after dry-firing it several times, after which the gun fired a BB); *Daisy Mfg. Co., Complaint*, *supra* note 20 (requesting the recall of several Daisy BB guns for the same product design defect).

138. Ausness, *supra* note 134, at 1189. For a discussion of whether warnings can be effective for dangerous products and the implications a warning should have in product liability suits, see generally, Latin, *supra* note 129.

139. See, e.g., Moss, 136 F.3d at 1176 (affirming summary judgment for the defendant manufacturer); cf. *Earsing*, 629 N.Y.S.2d at 565 (reversing the dismissal of a complaint against a BB gun manufacturer for negligent design and failure to warn).

140. The duty to warn is generally based upon a negligence standard. Ausness, *supra* note 134, at 1188. A manufacturer or supplier can be held liable to consumers if: (1) the supplier knows or should know that the product could be dangerous under its normal or foreseeable use; (2) the supplier knows that consumers or others using the gun may be unaware of the product's inherent danger; and (3) the supplier fails to exercise reasonable care in informing users or consumers about the risk. *Id.* at 1188 (citing the RESTATEMENT (SECOND) OF TORTS § 388 (1965)).

141. *Eck v. Parke, Davis & Co.*, 256 F.3d 1013, 1017 (10th Cir. 2001) ("To recover in a failure to warn case, a plaintiff must establish . . . that the manufacturer 'breached a duty to warn. . . .'"); *Grenier v. Med. Eng'g Corp.*, 243 F.3d 200, 205 (5th Cir. 2001) (finding that a plaintiff may prevail on a failure to warn claim if the product's characteristics caused the damages and the manufacturer failed to provide an adequate warning of the characteristics causing damage); *Ritchie v. Glidden Co.*, 242 F.3d 713, 724 (7th Cir. 2001) (holding that a product may be deemed defective if a manufacturer fails to warn adequately of dangers involved in the use of the product); *Broche v. Ortho Pharm. Corp.*, 642 F.2d 652, 657 (7th Cir. 1981) ("An adequate warning is one reasonable under the

manufacturer is either proving a duty to warn or proving causation from lack of warning.<sup>142</sup> Either the plaintiff admits knowledge of the gun's danger or cannot prove that knowledge of the degree of danger involved would have changed his behavior in any way.<sup>143</sup> One court affirmed summary judgment for the defendant BB gun manufacturer, finding that the plaintiff failed to prove that the warnings accompanying the high-powered BB gun were so insufficient that the guns became unreasonably dangerous and placed its users at a risk of injury any different from the general type of injury that an average consumer would anticipate.<sup>144</sup> Another judge explained that when the

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circumstances."). Once the court has determined that a duty to warn exists, it considers a number of factors in determining whether the warning was adequate. *Pavlik v. Lane Ltd./Tobacco Exps. Int'l*, 135 F.3d 876, 887 (3rd Cir. 1998); *Tipton v. Michelin Tire Co.*, 101 F.3d 1145, 1149 (6th Cir. 1996); *Nowak v. Faberge USA, Inc.*, 32 F.3d 755, 759 (3rd Cir. 1994); see *Lindsay v. Ortho Pharm. Corp.*, 637 F.2d 87, 91 (2nd Cir. 1980) ("The manufacturer's duty is to warn of all potential dangers which it knew, or in the exercise of reasonable care should have known, to exist."); *Martinkovic v. Wyeth Lab, Inc.*, 669 F. Supp. 212, 216 (N.D. Ill. 1987) (holding that a vaccine warning provided to a physician may be inadequate because it said the risk of convulsions was "exceedingly rare" when in reality it was as high as one in 1,750). Courts consider several factors in determining whether a warning is adequate. These factors include: (1) the warning's "factual content"; (2) the "physical format" of the warning, including its font size and location on the product; (3) the "degree of intensity" expressed in the warning "commensurate with the danger" warned against; (4) the ease with which the intended audience would understand the warning; and (5) whether the warning has been communicated through "the most effective channels." *Ausness*, *supra* note 134, at 1192-94. Usually the determination of whether a warning is adequate is considered a question of fact for the jury, and thus if a plaintiff shows a duty to warn, the plaintiff may well survive summary judgment. See *id.* at 1192.

142. For example, in the *Moss* case, the court found that the fact that the gun caused death rather than serious injury, which the Mosses admitted was their understanding of the injury capability of the gun, did not transform the fundamental nature of the injury. Thus, the warning was not so inadequate as to create an unreasonably dangerous product. *Moss*, 136 F.3d at 1175. Furthermore, courts are also likely to overestimate the effectiveness of a warning after the accident has occurred instead of considering the way the warning would affect a consumer before the accident. *Latin*, *supra* note 129, at 1220. Social science research has revealed that people tend to exaggerate what should have been anticipated and believe that others should have anticipated events much better than realistically possible. *Id.* People also tend to attribute harm disproportionately to human mistakes. *Id.*

143. See *Moss*, 136 F.3d at 1175 (affirming summary judgment for defendant on a failure to warn theory where plaintiff admitted knowledge that the gun could cause serious injury but denied knowledge that the gun could cause death); *Sherk v. Daisy-Heddon*, 450 A.2d 615, 617 (Pa. 1982) (affirming a jury verdict for defendant manufacturer on a failure to warn theory where plaintiff testified that he knew a high-powered BB gun could kill small animals, holding plaintiff was "legally chargeable with knowledge of the [gun's] lethal propensity").

144. *Moss*, 136 F.3d at 1175 (holding that a product must be "unreasonably dangerous" for consumers who read the warnings for the warnings to be inadequate and that BB guns

plaintiff knows of a risk and still acts, the warning serves no purpose in preventing the harm; therefore, the lack of warning could not cause the injury.<sup>145</sup>

Another difficulty for plaintiffs in failure to warn cases is the assumption in many states that " 'where a warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.' " <sup>146</sup> So, while courts do evaluate the adequacy of the warning, they will assume that whatever warning is given will be read and heeded. Therefore, courts may not even consider the fact that children or parents never observe many of these warnings. The potential widespread inattention, however, suggests that some sort of regulation concerning the warning labels and their placement is needed to protect consumers.<sup>147</sup>

Until recently, almost all courts also recognized the "obvious hazard" principle to defeat claims against manufacturers regarding products known to be dangerous.<sup>148</sup> Under the "obvious hazard" theory, a court would find no duty to warn about hazards accepted as known to the general public.<sup>149</sup> Products such as lawn mowers, above ground swimming pools, and BB guns belong in this category.<sup>150</sup> However, some courts now use an "obvious hazard" as only one

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are not unreasonably dangerous if the consumers are aware of the types of injuries they can cause).

145. *Sherk*, 450 A.2d at 616 (holding that when the shooter admitted to knowing that the BB gun could shatter bottles, pierce cans, and kill rabbits, he had sufficient appreciation of the risk of injury such that the inadequacy of the warning could not have caused the injury).

146. *Dias v. Daisy-Heddon*, 390 N.E.2d 222, 225 (Ind. Ct. App. 1979) ("[T]he law supplies a presumption that an adequate warning would have been read and heeded."); Victor E. Schwartz, *See No Evil, Hear No Evil: When Clear and Adequate Warnings Do Not Prevent the Imposition of Product Liability*, 68 U. CIN. L. REV. 47, 48 (1999); see RESTATEMENT (SECOND) OF TORTS § 402A (1965). The *Restatement (Third) of Torts* provides that " 'when a safer design can reasonably be implemented and risks can reasonably be designed out of a product, adoption of the safer design is required over a warning that leaves a significant residuum of such risks.' " Schwartz, *supra*, at 48 (citing the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, cmt. 1 (1998)). Few jurisdictions have adopted this new provision, however, and thus it would not help many plaintiffs in suits against BB gun manufacturers because the gun's high power is not a risk to be designed out of the product. See *id.*

147. In fact, courts "generally have concluded" that the legislatures and regulatory agencies are better suited to control certain types of widely used, but dangerous products. Schwartz, *supra* note 146, at 48.

148. Ausness, *supra* note 134, at 1190.

149. *Id.*

150. *Id.* at 1191; see also *Bookout v. Victor Comptometer Corp.*, 576 P.2d 197, 198 (Colo. Ct. App. 1978) (holding that the potential for danger in a BB gun is readily apparent to the general public and requires no warning from the manufacturer).

factor in determining whether the manufacturer has a duty to warn.<sup>151</sup> This, however, remains a minority view. Regardless of whether the "obvious hazard" defense is accepted, product liability suits do not create an incentive for BB gun manufacturers to change their products or warnings. Because plaintiffs win so few cases, BB gun manufacturers have little, if any, financial motive to make their products safer. Therefore, product liability suits are an ineffective method of regulating BB gun manufacturers.

## 2. Negligent Entrustment & Regulation of Retailers

Plaintiffs in product liability suits have been somewhat more successful against retailers and these suits have prompted some self-regulation.<sup>152</sup> Under the doctrine of negligent entrustment, courts have held retailers who sell BB guns to children liable for damage caused when the children misused the guns.<sup>153</sup> Liability rests on "selling potentially harmful products to consumer groups that lack the capacity to exercise ordinary care."<sup>154</sup> In other words, the courts impose a duty on sellers to protect the general public from misuse of dangerous products that they sell to persons who may be incapable of

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151. *Westchem Agric. Chems. Inc. v. Ford Motor Co.*, 990 F.2d 426, 431 (8th Cir. 1993) ("Obviousness of danger is one factor which the North Dakota courts consider when determining whether a manufacturer has a duty to warn . . ."); *Lovell v. Marion Power Shovel Co.*, 909 F.2d 1088, 1090 (7th Cir. 1990) ("[T]he mere fact that a product may present a hazard which is 'open and obvious' no longer acts as an absolute bar to plaintiff's recovery . . ."); *Ausness*, *supra* note 134, at 1191.

152. *See Salvi v. Montgomery Ward & Co.*, 489 N.E.2d 394, 394 (Ill. App. Ct. 1986) (affirming a jury verdict against a retailer whose salesman sold an air gun to a child who was fourteen years-old without asking for any identification or whether he had his parents' permission); *Semeniuk v. Chentis*, 117 N.E.2d 883, 886 (Ill. App. Ct. 1954) (reversing summary judgment for defendant retailer who sold air gun to the parent of a child seven years-old when he knew the parent was planning to give gun to child); *Earsing v. Nelson*, 629 N.Y.S.2d 563, 565 (N.Y. App. Div. 1995) (affirming the denial of summary judgment against a retailer who sold an air gun to a thirteen year-old); *cf. Moss v. Crosman*, 136 F.3d 1169, 1169 (7th Cir. 1998) (affirming grant of summary judgment against retailer who sold gun to seven year-old when father gave him the money and was with him at the time of purchase).

153. *See Lytton*, *supra* note 134, at 689; *see also Earsing*, 629 N.Y.S.2d at 566 ("It is evident that the [New York] statutes are aimed at the seller, rather than the manufacturer, of an air gun, and thus the creation of a private cause of action against the manufacturer would not be consistent with the legislative scheme."); *Moning v. Alfano*, 254 N.W.2d 759, 762 (Mich. 1977) (holding that a manufacturer, wholesaler, and retailer of toy slingshots that were advertised for and sold directly to children owed a legal obligation of due care to bystanders harmed by the children's use of the products).

154. *Lytton*, *supra* note 134, at 683; *see also Earsing*, 629 N.Y.S.2d at 565 ("The tort of negligent entrustment is based on the degree of knowledge the supplier of a chattel had or should have had concerning the entrustee's propensity to use the chattel in an improper or dangerous fashion." (citation omitted)).



using them properly.<sup>155</sup> The liability also can extend to retailers who sell BB guns to adults who they know will give the product to a child.<sup>156</sup>

Although retailers are not regulated except by the few state statutes that impose possession or sale restrictions on the age of children who purchase BB guns,<sup>157</sup> some retailers have developed their own standards for the sale of BB guns. For example, Montgomery Ward, J.C. Penny's, K-Mart, and Sears all have policies that prohibit the sale of air guns to children under the age of eighteen.<sup>158</sup> Wal-Mart also has regulations concerning the distance between displays of guns and ammunition, and how the guns should be stored on the shelf.<sup>159</sup> This particular Wal-Mart regulation resulted from incidents in Wal-Mart stores in which children loaded BB guns

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155. See Lytton, *supra* note 134, at 691; see also *Riordan v. Int'l Armament Corp.*, 477 N.E.2d 1293, 1295-96 (Ill. App. Ct. 1985) (holding liability concerning firearms distinguishable from toy gun retailer liability because misuse of firearms is not a foreseeable consequence of their sale to the general public); *Linton v. Smith & Wesson*, 469 N.E.2d 339, 340 (Ill. App. Ct. 1984) (distinguishing the lack of liability of handgun sellers from the liability of BB gun sellers to children by distinguishing between the respective customer bases: children are "a class of persons known to be irresponsible" in the use of BB guns, while adults are not known to be irresponsible in the use of handguns).

156. See *Lessak v. Metropolitan Cas. Ins. Co.*, 151 N.E.2d 730, 734-35 (Ohio 1958) (holding an insurance company liable for damage caused by a BB gun that an insured retailer sold); *Novak v. Piggly Wiggly Puget Sound Co.*, 591 P.2d 791, 791 (Wash. Ct. App. 1979) (affirming a grant of summary judgment for a manufacturer but not for the retailer for damages caused by a BB gun sold to a minor); *Semeniuk*, 117 N.E.2d at 885-86 (holding a retailer liable when he sold an air rifle to the father of a seven year-old boy who he knew was planning to give the gun to the child); cf. *Rosser v. Wal-Mart Stores, Inc.*, 947 F. Supp. 903, 910 (E.D.N.C. 1996) (granting summary judgment for Wal-Mart in suit involving the sale of a high-powered BB gun to a minor); *Jimenez v. Zayre Corp.*, 374 So. 2d 28, 29 (Fla. Dist. Ct. App. 1979) (holding retailer not liable for BB gun sale to minor).

157. See *infra* notes 162-73 and accompanying text.

158. *Salvi v. Montgomery Ward & Co.*, 489 N.E.2d 394, 398 (Ill. App. Ct. 1986) (citing policies of Ward, J.C. Penny's, K-Mart, and Sears). For example, Ward guidelines require: (1) merchandise ordered to be delivered to the nearest Ward establishment in accordance with all state and local laws; (2) state and local laws to be followed if the age requirement for purchasing merchandise is higher than eighteen years-old; and (3) conformance with all federal, state, and local gun laws for every order. *Id.* Additionally, Ward advises customers to check all gun laws before placing an order. *Id.*

159. 60 Minutes, *supra* note 80.

on display in the store and shot customers.<sup>160</sup> These restrictions, however, are self-imposed and, thus, compliance is limited.<sup>161</sup>

### *B. State and Local Regulation*

While BB guns are not regulated federally, other entities have attempted different degrees of regulation. A calculation of the number of states and cities regulating BB guns depends upon the definition of regulation. Some states and cities regulate the possession, purchase or use of BB guns by minors, defined as persons under twelve,<sup>162</sup> sixteen,<sup>163</sup> or eighteen years of age.<sup>164</sup> In these states, the regulation is void if the minor has the permission of his parent or guardian to purchase the gun.<sup>165</sup> Other states prohibit the possession of BB guns when the possession of other weapons is also prohibited.<sup>166</sup> Some states deal with BB guns without declaring them

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160. *Id.* (reporting seven incidents of people being shot with BB guns in Wal-Mart stores); Consumer Product Safety Commission, Consumer Product Incident Report, Doc. No. X9611063, Dec. 26, 1995, available at <http://www.cpsc.gov/library/FOIA/Foia99/idi/daisybb5.pdf> (pp. 28–29) (reporting Wal-Mart incident) (on file with the North Carolina Law Review).

161. *60 Minutes*, *supra* note 80 (reporting that many Wal-Mart stores do not follow the store's regulations). In fact, one Wal-Mart store merely asks customers not to shoot the gun in the store. *Id.*

162. In some counties in North Carolina, parents are prohibited from allowing children under twelve to possess a BB gun without supervision. N.C. GEN. STAT. § 14-316(a), (b) (1999).

163. DEL. CODE ANN. tit. 11, § 1445(2) (2000) (declaring it an unclassified misdemeanor for a person to transfer a BB or air gun to a child under sixteen unless that person has the permission of the minor's guardian); FLA. STAT. ANN. § 790.22(1)–(2) (West 2001) (prohibiting the use of BB guns by persons under sixteen unless supervised by an adult who is the guardian or has permission from the guardian); N.Y. PENAL LAW § 265.05 (McKinney 2001) (providing that it is unlawful for a person under age sixteen to possess an air gun or spring gun).

164. *BB & Pellet Gun-Related Injuries*, *supra* note 20, at 912; *see, e.g.*, CAL. PENAL CODE § 12551 (West 2001) (declaring that the sale of any BB device to a minor is a misdemeanor); CAL. PENAL CODE § 12552(a) (West 2001) (furnishing or transferring without sale a BB device to a minor without express or implied permission of the minor's parent or legal guardian is a misdemeanor); MASS. ANN. LAWS ch. 269, § 12A (Law. Co-op. 1992) (selling to a minor under eighteen or otherwise furnishing a BB gun to a minor, unless seller is the parent, guardian, or instructor, is punishable by fine or imprisonment); N.J. STAT. ANN. 2C:58-6.1 (West 1995 & Supp. 2001) (possession of a firearm by a person under eighteen is unlawful); 18 PA. CONS. STAT. § 6304(a) (2001) (selling or transferring an air rifle to a person under eighteen or to a person reasonably believed to be under eighteen, if a dealer does not make a reasonable inquiry as to age before selling, is unlawful).

165. *BB & Pellet Gun-Related Injuries*, *supra* note 20, at 912.

166. *See* ALA. CODE § 13A-11-50 (2001) (providing that a concealed air gun is a concealed weapon); CONN. GEN. STAT. ANN. § 29-38(a) (West 2001) (defining a BB gun as a weapon for the purposes of the crime of weapon in a vehicle); CONN. GEN. STAT. ANN. § 53-206 (West 2001) (defining dangerous weapon to include a BB gun); N.D. CENT.

to be firearms.<sup>167</sup> For example, Massachusetts law provides that no minor shall possess an air rifle or BB gun in public unless he is accompanied by an adult or holds a sporting license; no minor shall discharge an air rifle or BB gun unless accompanied by an adult or holding a sporting license; and no person shall discharge an air rifle or BB gun into, from, or across any public way.<sup>168</sup> Some local California municipal ordinances prohibit children from possessing or discharging a BB gun.<sup>169</sup> A Connecticut statute defines a BB gun as a "weapon" for the purposes of any statute concerning the possession of a weapon.<sup>170</sup> New York law prohibits the sale, offering for sale, or the transferring of air guns to children under the age of sixteen and requires retailers who sell air guns to post a sign stating that it is unlawful for persons under age sixteen to possess an air gun.<sup>171</sup> At least fifteen states attempt some sort of BB gun regulation,<sup>172</sup> with New Jersey being the most restrictive.<sup>173</sup> Regardless of these measures taken by a few states, however, the vast majority of states still have no BB gun regulation.

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CODE § 12.1-01-04 (2001) (including BB gun in definition of dangerous weapon). A similar trend involves states including BB guns in their prohibitions against weapons on school property. See D.C. OFF. CODE § 22-1457(i) (West 2001); MINN. STAT. ANN. § 624.7181 (West 2002); N.Y. PENAL LAW § 265.06 (McKinney 2001); S.D. CODIFIED LAWS § 13-32-7 (Michie 2001); WASH. REV. CODE ANN. § 9.41.280 (West Supp. 2001).

167. See, e.g., MASS. ANN. LAWS ch. 269, § 12B (Law. Co-op. 1992 & Supp. 2001) (directly regulating possession and use of rifles and BB guns); MINN. STAT. § 624.7181 (2001) (regulating the carrying of BB guns, rifles, and shotguns in public places); NEV. REV. STAT. § 202.290(2) (2001) (regulating the discharge of air guns, firearms, and other weapons in places where persons might be endangered); R.I. GEN. LAWS § 11-47-50 (2001) (regulating the discharge of BB guns and firearms in compact areas).

168. MASS. ANN. LAWS ch. 269, § 12B (Law. Co-op. 1992 & Supp. 2001) (defining a minor as a person under age eighteen).

169. See CAL. GOV. CODE § 25340 (Deering 2000); see also *Olsen v. McGillicuddy*, 93 Cal. Rptr. 530, 530-33 (Cal. Ct. App. 1971) (holding that although a California statute regulated the firing of firearms in public places, cities could regulate the firing of BB guns because BB guns are not firearms).

170. CONN. GEN. STAT. ANN. § 53-206(a) (West 1994 & Supp. 2001).

171. See N.Y. PENAL LAW § 265.10(5) (McKinney 2000 & Supp. 2001); N.Y. GEN. BUS. LAW § 399-s (McKinney 1996 & Supp. 2001).

172. The states include Alabama, California, Connecticut, Delaware, Florida, Massachusetts, Minnesota, Nevada, New York, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Dakota, and Washington. *Supra* notes 162-71; see Damore et al., *supra* note 91, at 284 (finding fourteen states that regulated the sale or possession of non-powdered guns as of May 2000); Friedman et al., *supra* note 29, at 477 (finding twelve states that regulated BB guns as of 1996).

173. See N.J. STAT. ANN. §§ 2C:39-1(f), 2C:58-3 (West 1995 & Supp. 2001). New Jersey treats BB and air guns as firearms and requires a license and registration for possession of a BB gun. *Id.*; see Damore et al., *supra* note 91, at 284 (citing New Jersey as the only state that treats BB guns as firearms); *supra* notes 162-71 (explaining the less restrictive regulations imposed by other states).

### C. Industry Self-regulation

While the federal and majority of state governments have not promulgated any mandatory regulations, the BB gun industry has set its own voluntary standards for BB and air guns.<sup>174</sup> The industry standards try to account for the lack of consumer understanding of the dangers involved in the use of high-powered BB guns;<sup>175</sup> however, the standards have proven ineffective.

Current industry standards require two types of warning labels. One must be on the gun itself, stating, "WARNING: Before using read Owner's Manual available free from [company name]."<sup>176</sup> The second must be on the packaging and read, "WARNING: Not a toy. Adult supervision required. Misuse or careless use may cause serious injury or death. May be dangerous up to [specific distance] yards ([specific distance] meters)."<sup>177</sup> The industry may consider these warnings as necessary to avoid certain product liability concerns as well as to protect consumers.<sup>178</sup>

Voluntary industry standards also require the owner's manual to provide instructions about safe operation, target selection, gun maintenance, and gun storage (unloaded and in a safe and proper

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174. These voluntary regulations were promulgated by the ASTM International Committee on consumer products. ASTM Subcommittee on Standards, American Society for Testing and Materials, Standard Consumer Safety Specification for Non-Powder Guns, at <http://www.astm.org/cgi-bin/softcart.exe/DATABASE.CART/PAGES/F589.htm?L+mystore+clly7939> (last visited Jan. 16, 2002) (on file with the North Carolina Law Review). The ASTM International is a not-for-profit organization that provides a forum for industries to develop and publish voluntary consensus standards. See About ASTM International, at <http://www.astm.org> (last visited Jan. 16, 2002) (on file with the North Carolina Law Review).

175. Industry-related research shows that the manufacturers are well aware of the danger presented by their guns. Evidence introduced in one product liability suit included an internal memo written by Daisy's chief product evaluator concerning Daisy's Power King model, a BB gun with a muzzle velocity of over 685 fps. The memo stated that the gun is dangerous and is "not a controlled velocity *play gun for which we are noted.*" Sherk v. Daisy-Heddon, 450 A.2d 615, 623 (Pa. 1982) (Larsen, J., dissenting). The memo further stated, "[T]his gun, with its absence of proper safety procedures and mechanisms, *invites a dangerous condition, . . . in the consumer's hands.*" *Id.* The memo warned that with the presentation of a gun "*that has the energy capabilities*" of this one, Daisy could "*lose the immunity to criticism that [it has] enjoyed in the toy market.*" *Id.* The memo also shows that Daisy had conducted its own tests and understood the damage a high-powered BB gun could inflict. The evaluator stated, "*Whereas we now can injure an eye or irritate the skin, we will be able to inflict a dangerous wound with the high velocity.*" *Id.* The evaluator, however, did not necessitate altering or ceasing the production of such a high velocity gun. *Id.*

176. *BB & Pellet Gun-Related Injuries*, *supra* note 20, at 911.

177. *Id.*

178. See *supra* notes 128–51 and accompanying text (discussing product liability suits).

manner).<sup>179</sup> Noticeably absent from industry standards are any restrictions on velocity, marketing techniques, protective gear instruction, or sale and distribution by retail stores.<sup>180</sup>

The most recent industry-imposed standards were adopted in 1992,<sup>181</sup> before the CPSC collected the data that is presented in this Comment.<sup>182</sup> The number and severity of preventable injuries under these self-imposed standards remains unacceptably high.<sup>183</sup> The time has come to consider meaningful regulation that will prevent these harmful and unnecessary injuries to American children.

#### D. Federal Regulation

The only federal regulation of BB guns currently in place is through the CPSC. The CPSC oversees BB guns as it does all unregulated consumer products. BB guns are considered "consumer products" under the Consumer Product Safety Act ("CPSA").<sup>184</sup> The CPSA defines a "consumer product" as any item or part of the item that is made or distributed either "for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise,"<sup>185</sup> or "for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation or otherwise."<sup>186</sup>

The CPSC has the authority to regulate all consumer products, but does not regulate them all equally.<sup>187</sup> "Regulated products" are products, including banned products, that the Commission controls

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179. *BB & Pellet Gun-Related Injuries*, *supra* note 20, at 911-12.

180. *See id.*; Friedman et al., *supra* note 29, at 477; Jane E. Brody, *Health Watch*, N.Y. TIMES, Dec. 16, 1997, at F9.

181. *BB & Pellet Gun-Related Injuries*, *supra* note 20, at 911. The regulations were established in 1978 and subsequently revised in 1992. *Id.*

182. *See supra* notes 93-100 and accompanying text. Regardless of any change in injuries that may have occurred after adoption of the industry standards, the CPSC and CDC data show that the number of preventable injuries is still too high and warrants regulatory action.

183. *Supra* notes 90-125 and accompanying text (discussing CPSC and CDC data).

184. 15 U.S.C. §§ 2051-2084 (2000); *see infra* notes 213-17 and accompanying text (discussing the CPSC's authority to issue recalls on BB guns).

185. 15 U.S.C. § 2052(a)(1)(A)-(I).

186. *Id.* The definition also specifically excludes items regulated by other government agencies, such as automobiles, boats, pesticides, foods, drugs, aircraft, and tobacco products. *See id.* § 2052(a)(1)(A-I).

187. In fact, the CPSC has no regulatory rules for BB guns, while many other products, such as bicycles, Requirements for Bicycles, 16 C.F.R. § 1512 (2000); lawnmowers, Safety Standard for Walk-Behind Power Lawn Mowers, 16 C.F.R. § 1205; and refrigerators, 15 U.S.C. §§ 1211-1214 (2000), are regulated in some way.

through the enforcement of a mandatory product safety rule.<sup>188</sup> The CPSC grants authority to the CPSC to issue standards or bans for “unreasonably dangerous product[s].”<sup>189</sup> These rules may include labels, instructions, warnings, or performance requirements.<sup>190</sup> The rules must be “reasonably necessary to prevent or reduce an unreasonable risk of injury” associated with the product.<sup>191</sup> The CPSC regularly monitors these products to ensure that all standards are being met.<sup>192</sup> These products include, among others,<sup>193</sup> items regulated under the Federal Hazardous Substances Act (“FHSA”),<sup>194</sup> the Flammable Fabrics Act,<sup>195</sup> or the Poison Prevention Packaging Act.<sup>196</sup> These acts also provide the CPSC with more control over the manufacturer, including more authority to inspect, to control advertising, to mandate labeling and to issue restrictions on packaging.<sup>197</sup> For example, the FHSA mandates specific labeling requirements for hazardous substances that manufacturers must

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188. GOLDBLATT & STONE, *supra* note 31, at § 2:1; see, e.g., Ban of Hazardous Lawn Darts, 16 C.F.R. § 1306.1 (2001); Safety Standard for Bicycle Helmets, 16 C.F.R. § 1203.

189. 15 U.S.C. § 2052(a)(2) (2000).

190. *Id.* § 2056(a).

191. *Id.*

192. Usually, CPSC field staff collect samples, conduct retail surveillance, and inspect manufacturers. GOLDBLATT & STONE, *supra* note 31, at § 2:1–2:2.

193. Examples of products with bans or standards are children’s toys, rattles, pacifiers, cribs, bicycles, clothing, mattresses, walk-behind mowers, garage door openers, and cigarette lighters. For all banned and regulated products, see 16 C.F.R. §§ 300–503, 1145–1750 (2001).

194. The CPSC has broad regulatory power under the FHSA to regulate any hazardous substance, including any toy or product intended for use by children that “presents an electrical, mechanical or thermal hazard.” 15 U.S.C. § 1261(f)(1)(D). The definition of “hazardous substance” also includes any substance that is toxic, corrosive, an irritant, flammable, combustible, generates pressure through heat or decomposition, is radioactive, has certain lead contents, or has the “capacity to produce personal injury or illness to man through ingestion, inhalation, or absorption through any body surface.” *Id.* § 1261(f)–(g). Whether BB guns could be regulated under the FHSA is unclear because many of the high-powered BB guns are not “intended for children” according to their warning labels. As discussed below, however, because of the number of children using BB guns, one could make an argument that the FHSA applies. See *infra* notes 244–47 and accompanying text. The complaint in the recent case filed against Daisy Manufacturing Company cites the CPSC’s authority under both the CPSCA and the FHSA to regulate BB guns. See Daisy Mfg. Co., Complaint, *supra* note 20.

195. 16 C.F.R. §§ 1610–1632 (2000). Some of the requirements promulgated under the Flammable Fabrics Act include: requirements for flame spread testing on all clothing textiles to be used for wearing apparel, *id.* § 1610; different standards for flame resistance testing for articles intended for use as children’s sleepwear, depending on the size, *id.* §§ 1615–1616; testing for surface flammability of carpets and rugs, *id.* §§ 1630–1631; and, testing for flammability of mattresses, futons, and mattress pads, *id.* § 1632.

196. *Id.* §§ 1700–1702 (2000).

197. See 15 U.S.C. §§ 1261–1265.

follow.<sup>198</sup> Failure to comply results in an automatic ban of the product.<sup>199</sup> Therefore, if the company fails to comply, the product is automatically banned without going through more fact finding hearings and rule promulgation.<sup>200</sup>

All consumer products not considered "regulated products" are investigated generally when the CPSC staff receives a report that the product could be defective and could create a substantial product hazard requiring a recall or investigation into the possibility of the need for a safety rule or regulation.<sup>201</sup> These reports come from consumers, trial lawyers, competitors, newspaper reports, or from the manufacturers themselves.<sup>202</sup> Because no special act, standard, or ban currently regulates BB guns, they are investigated generally when the CPSC receives a report from a consumer or manufacturer indicating a potential defect in the gun.<sup>203</sup>

The CPSA requires manufacturers, distributors, and retailers of consumer products to report directly to the CPSC if they suspect a problem with a consumer product.<sup>204</sup> Specifically, they must report any suspected violations of mandatory or voluntary standards, or any defect that could create a substantial product hazard or an unreasonable risk of serious injury or death.<sup>205</sup> Manufacturers must also report settlements or verdicts against them in three product liability suits involving the same model of the product during any two-

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198. *Id.* § 1278(d).

199. *Id.* § 1261(p). Examples of banned products include small balls for children less than three years of age, 16 C.F.R. §§ 1500.18(17), 1500.19; non-full-size cribs that fail to meet certain structural requirements and pose strangulation hazards, *id.* § 1509; and rattles and pacifiers that fail to meet certain test templates and structural designs, *id.* §§ 1510–1511.

200. *See* 15 U.S.C. §§ 1278(d), 1261(d).

201. GOLDBLATT & STONE, *supra* note 31, at § 2:1. For a discussion of how the CPSC determines a product is defective, see *infra* notes 208–12 and accompanying text.

202. The CPSC welcomes consumer reports. *See* CPSC, *Report Unsafe Products*, at <http://www.cpsc.gov/talk.html> (last visited Jan. 22, 2002) (providing online reporting of injuries, deaths, or unsafe products) (on file with the North Carolina Law Review). Manufacturers also are required to report instances that could signal a dangerous product is on the market. *See* 15 U.S.C. § 2064(b) (requiring the manufacturer to report any defect found); *id.* § 2084 (detailing the reporting requirements of all lawsuits regarding consumer products).

203. The defect could be a manufacturing defect, a design defect, or both. The CPSC has investigated these same high-powered BB guns in prior years for a manufacturing defect that makes the gun appear empty when it is not. The CPSC recently took the first action concerning these claims with the suit it filed against Daisy Manufacturing Company on October 30, 2001. *See* Daisy Mfg. Co., Complaint, *supra* note 20.

204. *See* 15 U.S.C. § 2064(b).

205. *Id.*

year period.<sup>206</sup> Such reporting requirements force companies continually to gather and to evaluate information regarding potential defects or unreasonably dangerous situations.<sup>207</sup>

The CPSC has defined the term "defect" very similarly to a product liability "defect" definition.<sup>208</sup> The CPSC's definition includes a defect in manufacture, design, or warning.<sup>209</sup> While the definition provides that a consumer product may be defective "even if it is designed, manufactured, and marketed exactly as intended,"<sup>210</sup> the CPSC is quick to point out that "not all products which present a risk of injury are defective."<sup>211</sup> To determine whether a product produces a risk of injury that makes the product "defective," the CPSC considers a number of factors, including the nature of the risk, the population exposed to the risk, and the product liability case law involved.<sup>212</sup>

The CPSC collects data and issues recalls in relation to BB guns as it does with all other consumer products.<sup>213</sup> The CPSC has issued recalls of BB guns in the past,<sup>214</sup> but only for manufacturing defects.<sup>215</sup>

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206. *Id.* § 2084 (a)-(c).

207. GOLDBLATT & STONE, *supra* note 31, at § 3:5.

208. See 16 C.F.R. § 1115.4 (2000). A defective product under product liability theory must be defective in design or manufacture, or in a failure to warn the consumer of a foreseeable risk associated with the product. See *supra* notes 134, 138-42 and accompanying text (discussing the elements of a product liability claim).

209. See 16 C.F.R. § 1115.4.

210. *Id.*

211. *Id.* For example, although a knife is very sharp and is capable of causing serious injury, the knife would not be considered defective. In fact, the sharpness of the blade is necessary for the knife to perform its function. *Id.*

212. *Id.* Additional factors considered in a case-by-case determination are as follows: (1) the product's utility; (2) the necessity for the product; (3) the Commission's own experience and expertise; (4) the case law interpreting federal and state public health and safety statutes; and (5) other factors relevant to the determination. *Id.*

213. 15 U.S.C. § 2051(b)(1) (2000).

214. See Daisy Mfg. Co., Complaint, *supra* note 20 (requesting a recall of many Daisy high-powered BB guns through the complaint because the gun does not alert users when it is loaded and is designed so that a BB can be stuck in the firing chamber and not fire for several rounds before discharge from the gun); Press Release, Consumer Product Safety Commission, CPSC and Gamo USA Announce Recall of BB Air Pistols (June 9, 1997) available at <http://www.cpsc.gov/cpscpub/prerel/prhtml97/97140.html> (on file with the North Carolina Law Review) [hereinafter CPSC and Gamo USA Announce Recall of BB Air Pistols]; Press Release, Consumer Product Safety Commission, Daisy BB Guns Recalled (Apr. 12, 1979) available at <http://www.cpsc.gov/cpscpub/prerel/prhtml79/79014.html> (on file with the North Carolina Law Review) [hereinafter Daisy BB Guns Recalled].

215. In one of her last actions as Chairman of the Commission, Ann Brown filed suit on Oct. 30, 2001, against Daisy Manufacturing Co., seeking to recall all Daisy Powerline BB gun models. The Commission alleged that the guns were defective in design because in many instances the user could not determine whether the gun was loaded, and often a



The CPSC's recalling of defective BB guns is insufficient to protect consumers because many injuries result from properly functioning BB guns.<sup>216</sup> In fact, a well-functioning, high-powered BB gun has a high muzzle velocity and is thus potentially more dangerous than a malfunctioning BB gun with a much lower muzzle velocity or a high-powered BB gun that will not fire or will not fire properly.<sup>217</sup>

The guns involved in the incidents discussed in this Comment, however, are not likely "defective."<sup>218</sup> BB guns must be able to shoot pellets at a high speed to be accurate and to function correctly. In a sense, what makes them dangerous is what makes them non-defective. Furthermore, BB guns contain warning labels.<sup>219</sup> Therefore, a defect cannot be alleged through the manufacturer's failure to warn. Although a plaintiff could allege that the warning itself was defective, this has proven unsuccessful.<sup>220</sup> The simple lack of awareness on the part of parents and children does not deem a product defective.

Under the CPSC definition of "defect," the CPSC will not likely find a functioning BB gun defective and worthy of recall; the CPSC must treat BB guns as regulated products to improve their safety. Therefore, the CPSC needs to regulate high-powered BB guns

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BB could get stuck in the gun chamber, initially causing many rounds of "dry-firing," followed by an unexpected expulsion of the BB at its usual high muzzle velocity. Daisy Mfg. Co., Complaint, *supra* note 20. This action did not escape criticism, however. In a response to the decision to file suit, Mary Sheila Gall, a Commissioner of the CPSC, asserted that the "defects" the Commission alleged were instead industry-wide designs. See Statement of the Honorable Mary Sheila Gall in Opposition to Issuance of Administrative Complaint Against Daisy Manufacturing Company (Oct. 30, 2001), available at [www.cpsc.gov/library/FOIA](http://www.cpsc.gov/library/FOIA) (on file with the North Carolina Law Review). Gall argued that instead of filing suit against Daisy, the Commission should consider a scheme of industry-wide regulation. See *id.* In 1979, the CPSC recalled Daisy Manufacturing Company's model numbers 105A, 1938A, and 111A when the Commission found that the BB guns fired despite having the safety mechanism engaged. Daisy BB Guns Recalled, *supra* note 214. The Commission also recalled Gamo USA's Model AF-10 Pre-Compressed Air Pistol in 1997 after it was found to discharge unexpectedly. CPSC and Gamo USA Announce Recall of BB Air-Pistols, *supra* note 214.

216. See *supra* note 96 (discussing the most common circumstances under which a child is injured with a BB gun).

217. See *supra* notes 72-79 and accompanying text (discussing muzzle velocity ranges for high-powered BB guns).

218. The exceptions are the BB guns with broken load indicators and BB guns that get BBs stuck in the chamber.

219. See *Moss v. Crosman*, 136 F.3d 1169, 1172 (7th Cir. 1998) (describing the warning labels that appear on a Crosman high-powered BB gun); see also *supra* notes 176-77 and accompanying text (describing warning labels employed by the BB gun industry's self-regulation standards).

220. See *supra* notes 138-51 and accompanying text.

through a safety rule or Congress needs to issue a separate piece of legislation giving the CPSC authority to regulate BB guns effectively.

### III. WHO SHOULD REGULATE

#### A. Federal Regulation

BB guns represent a significant threat to children in this nation that should be remedied through federal regulation. The number of children injured at home with a BB gun that neither they nor their parents understood was capable of causing life threatening injury would decrease if BB gun manufacturers made changes in manufacturing and marketing. Current attempts to regulate the BB gun industry, however, remain inadequate. Under current federal law, the CPSC usually acts only if it finds a defect in the gun.<sup>221</sup> The state civil court system has failed to instigate change through significant penalties under product liability law.<sup>222</sup> The federal government should fill this void using the powers and abilities of the CPSC to treat BB guns as regulated products, through both a safety rule and a new piece of legislation.<sup>223</sup>

The federal government should regulate BB guns because allowing the states to regulate them is impractical.<sup>224</sup> State or local laws designed to regulate BB guns are sparse and varied.<sup>225</sup> Most BB gun manufacturers and retailers are national companies that manufacture and sell the same gun with the same design in all fifty states.<sup>226</sup> BB guns are also prevalent on web auction and gun shop sites.<sup>227</sup> National regulation should target these retailers, who are

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221. See *supra* notes 208–20 and accompanying text.

222. See *supra* notes 128–51 and accompanying text.

223. For an example of such a regulatory scheme, see appendix *infra* page 1029.

224. Granted, the uniformity of federal regulation would prohibit some state experimenting with regulation. One of the reasons the CPSC was created was to allow the federal government to make uniform safety standards. See 15 U.S.C. § 2051(b)(3) (2000). According to the Consumer Product Safety Act, when the CPSC has created a safety standard that applies to a risk of injury associated with a certain consumer product, it preempts any state standard unless the state standard is identical or more stringent than the federal standard. *Id.* § 2075.

225. See *supra* notes 162–73 and accompanying text.

226. See Daisy Outdoor Products, at <http://www.daisy.com> (last visited Jan. 16, 2002) (on file with the North Carolina Law Review); Crosman, at <http://www.crosman.com> (last visited Jan. 15, 2002) (on file with the North Carolina Law Review); Airsoft BB Guns, at <http://e-weapon.com/airsoft> (last visited Jan. 15, 2002) (on file with the North Carolina Law Review); Pyramid Air, at <http://www.pyramidair.com/> (last visited Jan. 15, 2002) (on file with the North Carolina Law Review).

227. See, e.g., 1 Stop Weapons Shop, at <http://www.1stopweaponsshop.com/BB%20Guns.html> (last visited Jan. 15, 2002) (on file with the North Carolina Law

likely to be less accountable and varied in marketing and warnings compared with national manufacturers who sell products across the country, including via the web.<sup>228</sup>

Federal regulation has the advantage of national uniformity. One of the advantages of federal regulation, even of items that most manufacturers already voluntarily self-regulate, is that the regulation and the implication of the regulation can be the same. If states regulate the manufacture and retail of BB guns, nationwide manufacturers and retailers may be forced to comply with a myriad of different, and possibly conflicting, state standards.<sup>229</sup> BB gun manufacturers and retailers likely would choose to operate and sell only in those states with lower regulatory standards. BB gun retailers and manufacturers would not likely lose customers by operating only in those states with less regulation: out-of-state customers could simply cross state lines to purchase the unregulated products, as they willingly do for handguns<sup>230</sup> and fireworks.<sup>231</sup> Therefore, manufacturers could operate in a more cost-effective manner in states that impose less regulation without much fear of losing their customer

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Review); Big Game Pro Shop Air Rifles, at [http://www.biggameproshop.com/air\\_rifles.htm](http://www.biggameproshop.com/air_rifles.htm) (last visited Jan. 15, 2002) (on file with the North Carolina Law Review); Auction Arms, at <http://www.auctionarms.com> (last visited Jan. 15, 2002) (on file with the North Carolina Law Review).

228. Compare Adventura Marketing, at <http://www.sell-free.com/Adventura/bb.html> (last visited Jan. 5, 2002) (advertising high-powered BB guns under the slogan "Do you remember looking down the sights of your first BB gun? Well, let us take you back there.") (on file with the North Carolina Law Review), with Daisy Outdoor Products, at [http://daisy.ifware.com/cgi-bin/daisy2/products\\_daisy.html](http://daisy.ifware.com/cgi-bin/daisy2/products_daisy.html) (last visited Jan. 5, 2002) (presenting only low muzzle velocity BB guns under the slogan "Remember your first airgun? The excitement. The pride. The fun. For millions of today's shooters the name on that first gun was Daisy.") (on file with the North Carolina Law Review).

229. Businesses have shown the desire to relocate to escape regulation in other circumstances. See Frederick M. Abbott, *Regional Integration and the Environment: The Evolution of Legal Regimes*, 68 CHI-KENT L. REV. 173, 196 (1992) ("The rational business enterprise will move to a location where its profits will be maximized and will factor government regulation of the enterprise into its decision as a cost of doing business."); Paulette L. Stenzel, *Can NAFTA's Environmental Provisions Promote Sustainable Development?*, 59 ALB. L. REV. 423, 460-61 (1995) (citing fears that businesses would leave the United States after NAFTA to operate in a less regulated environment).

230. Editorial, *The Relentless Flow of Guns*, WASH. POST, Dec. 22, 1999, at A32, available at 1999 WL 30309703 (reporting that over half of the handguns seized in D.C., which has a ban on handgun sales, were purchased in either Virginia or Maryland, states with less restrictive laws).

231. Kelly David, *Fireworks Deaths Rare; "About 5 a year, despite tripling of sales,"* NEWSDAY, July 6, 1994, at A52, available at 1994 WL 7423053 (citing relaxation in North Carolina fireworks regulation as a response to illegal cross-border purchases from Tennessee and South Carolina, states with no restrictions on fireworks sales).

base. When this happens, all citizens are not protected equally, and states that attempt to regulate are thwarted easily.

### B. Which Federal Agency is Preferred

The federal government could regulate BB guns through two agencies: either the CPSC or the Bureau of Alcohol, Tobacco, and Firearms ("ATF"). If BB guns were declared "firearms,"<sup>232</sup> the ATF would have exclusive control over their regulation.<sup>233</sup> Despite dangerously high muzzle velocities, Congress has not defined high-power BB guns as firearms,<sup>234</sup> but instead includes them in the

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232. Some public health experts have argued that the best way to control BB guns is to include them in the definition of a "firearm." See generally Gideon P. Naude & Frederic S. Bongard, *From Deadly Weapon to Toy and Back Again: The Danger of Air Rifles*, 41 J. TRAUMA: INJ., INFECTION, & CRITICAL CARE 1039, 1039-43 (1996) (arguing that air guns should be governed by the same laws and in the same way as firearms). At least one state has recognized that BB guns could be considered firearms in some circumstances. In *Commonwealth v. Rhodes*, 451 N.E.2d 1151 (Mass. 1983), the Supreme Judicial Court of Massachusetts recognized that the common definition of a firearm does not include a BB gun, however, the Massachusetts statutory definition could include BB guns when dealing with illegal possession of a firearm. *Id.* Firearms are commonly defined as weapons under a certain length capable of discharging a shot or bullet. *U.S. v. McMurtry*, No. 01-2157, 2001 WL 1525424, at \*1 (7th Cir. Nov. 27, 2001) (citing the definition of a firearm as "any weapon . . . which will or is designed to or may readily be converted to expel a projectile by the action of an explosive"); *Commonwealth v. Sampson*, 422 N.E.2d 450, 452 (Mass. 1981); *Armstrong v. Commonwealth of Va.*, 549 S.E.2d 641, 643 (Va. App. 2001) (describing a firearm as a weapon "designed or intended to expel projectiles by the discharge or explosion of gunpowder"); see also 18 U.S.C.A. § 921 (2001) (defining a firearm as "any weapon . . . which will or is designed to or may readily be converted to expel a projectile by the action of an explosive"). For a more general definition of a firearm, see WEBSTER'S REVISED UNABRIDGED DICTIONARY (1998) available at <http://www.dictionary.com/cgi-bin/dict.pl?term=firearm> (defining "firearm" as "a gun, pistol, or any weapon from which a shot is discharged by the force of an explosive substance, as gunpowder"). The Massachusetts law in question in *Rhodes*, however, defines a firearm as a "pistol, revolver, or other weapon of any description loaded or unloaded from which a shot or bullet can be discharged and of which the length of barrel or barrels is less than sixteen inches." MASS. GEN. LAWS ch. 140, § 121 (Law Co-op 1995 & Supp. 2001).

233. Firearms Legal Overview, at <http://www.atf.treas.gov/firearms/legal/index.htm> (last visited Jan. 31, 2002) (on file with the North Carolina Law Review); see also 18 U.S.C. §§ 841-848, 921-930 (2000) (governing explosives and firearms); 26 U.S.C.A. 53 §§ 4181-4225 (1984 & Supp. 2001) (imposing a tax on manufacturers, importers, and producers of firearms); 22 U.S.C.A. § 2778 (2001) (governing firearms control in the United States); Jill R. Baniewicz, Note, *Is Hamilton v. Accu-tek a Good Predictor of What the Future Holds for Gun Manufacturers?*, 34 IND. L. REV. 419, 422 (2001) (explaining that the ATF is the only federal organization with any regulatory power over the firearms industry); Benjamin Bejar, Note, *Wielding the Consumer Protection Shield: Sensible Handgun Regulation in Massachusetts: A Paradigm for a National Model?*, 7 B.U. PUB. INT. L.J. 59, 61 (1998) (citing firearms as "practically unregulated" and noting the lack of ATF power to issue recalls, approve designs, or set standards for firearms).

definition of consumer products,<sup>235</sup> suitable for CPSC regulation.<sup>236</sup> This distinction leads to good policy, however, because the ATF, cannot regulate the manufacture, design, or marketing of firearms while the CPSC can regulate the manufacture, design, and marketing of consumer products.<sup>237</sup>

The CPSC is the better choice to regulate BB guns because of the power and expertise it already enjoys. The CPSC already has the power to regulate BB guns.<sup>238</sup> The CPSC was created to protect all consumers in the United States from consumer product hazards.<sup>239</sup> High-powered BB guns create a hazard for all children, and all children should be able to benefit from the safety imposed by regulation.

The CPSC has broad rule-making authority to monitor all regulated products and any products that could create substantial safety hazards.<sup>240</sup> Under its authority, the CPSC can create and

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234. The federal government's definition of a firearm is based upon an explosion accomplished with gunpowder that propels a projectile out of the barrel of the weapon. Thus, a high-powered BB gun does not fit under this definition of a "firearm." See 18 U.S.C.A. § 921 (2001).

235. A "consumer product" is defined as "any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise." 15 U.S.C. § 2052(a)(1) (2000).

236. The Consumer Product Safety Commission Improvements Act explicitly provides that firearms are not within the CPSC's regulatory jurisdiction. Consumer Product Safety Commission Improvements Act of 1976, Pub. L. No. 94-284, 3(e), 90 Stat. 503, 504 (1976) ("The Consumer Product Safety Commission shall make no ruling or order that restricts the manufacture or sale of firearms, firearms ammunition, or components of firearms ammunition, including black powder or gunpowder for firearms."); GOLDBLATT & STONE, *supra* note 31, at § 1:1.

237. See discussion, *supra* notes 188-90 and accompanying text. In fact, the ATF is limited in regulation to issuing federal firearms licenses, collecting excise taxes, and tracing stolen guns. See Baniewicz, *supra* note 233, at 422. Any other firearm regulation is conducted on a state by state basis.

238. The CPSC was created to "develop uniform safety standards for consumer products and to minimize conflicting State and local regulations." 15 U.S.C. § 2051(b)(3). Even though the CPSC has the power to regulate BB guns, it is not exercising that power, but rather only acts if it finds a defect in the gun. See *supra* notes 213-20 and accompanying text.

239. See 15 U.S.C. § 2051(b).

240. See *id.* § 2051; *supra* notes 187-212 and accompanying text. Unlike the CPSC in relation to consumer products, the ATF has no power to regulate firearm design nor does it have the capacity to regulate the labeling and marketing of firearms. Jon S. Vernick & Stephen P. Teret, *A Public Health Approach to Regulating Firearms as Consumer Products*, 148 U. PA. L. REV. 1193, 1196-1201 (2000) (describing the current lack of regulation of firearms and describing how firearms could be regulated like other consumer

enforce safety standards, or performance, warning, or instruction requirements.<sup>241</sup> The CPSC also has power to inspect, to subpoena, and to impose penalties over manufacturers who do not follow appropriate standards or reporting requirements.<sup>242</sup>

The CPSC has the authority under the CPSA<sup>243</sup> and the FHSA<sup>244</sup> to regulate high-powered BB guns effectively from design to marketing. The CPSA gives the CPSC authority to regulate all consumer products that present “unreasonable risks of injury” to consumers.<sup>245</sup> Under the FHSA, the CPSC can regulate any product it deems to be a “hazardous substance,” which includes children’s products that present “electrical, mechanical, or thermal hazard[s].”<sup>246</sup> Therefore, the CPSC has jurisdiction over high-powered BB guns under the CPSA and arguably has jurisdiction under the FHSA. Although manufacturers will argue that high-powered BB guns are not “intended for children,” the CPSC could make a convincing argument that due to the number of children who use high-powered BB guns, they should fall under the FHSA.<sup>247</sup>

The CPSC already regulates many products in their design, warning labels, and manufacture.<sup>248</sup> Furthermore, the CPSC already has data collection and inspection procedures in place for all other types of regulated consumer products.<sup>249</sup> In fact, the CPSC is charged

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products through the CPSC); *Attention Holiday Shoppers: ‘Don’t Put a Handgun Under the Christmas Tree This Year,’* PR NEWSWIRE, Dec. 11, 2001 (Press Release, Citizens for a Safer Minnesota) (citing the lack of regulation provided for handguns in comparison with other consumer products). The ATF would therefore have to learn how to regulate in new areas so it could effectively regulate BB guns.

241. 15 U.S.C. § 2056(a). The CPSC can require manufacturers and retailers to include some warning or instructions with their product, or the CPSC can specify the form and substance of the warning or instruction. *Id.* The CPSC can mandate performance requirements, which are standards that a product’s performance must meet. For example, according to regulation, a walk-behind lawn mower must have a blade control system that performs a number of functions. *See* Walk-behind rotary power motor controls, 16 C.F.R. § 1205.5 (2001).

242. *See* 15 U.S.C. §§ 2065, 2069, 2072; *see also supra* notes 204–07 and accompanying text (discussing reporting requirements).

243. 15 U.S.C. §§ 2051–84.

244. *Id.* §§ 1261–78.

245. *Id.* § 2051(b)(1).

246. *Id.* § 1261(f)(1)(D).

247. In its latest action against BB gun manufacturers, the CPSC filed suit against Daisy under both the CPSA and the FHSA, alleging that the guns involved presented a “substantial product hazard” under the CPSA and a “substantial risk of injury to children” under the FHSA. Daisy Mfg. Co., Complaint, *supra* note 20.

248. *See* § 2056(a) (providing that the CPSC may promulgate standards to require warning or instruction labels).

249. For example, the CPSC uses NEISS to collect data from representative hospital emergency rooms around the country and to project national injury rates. GOLDBLATT &

in the CPSC<sup>250</sup> with maintaining an injury clearinghouse and collecting data concerning injuries, illnesses, and deaths resulting from the use of consumer products.<sup>251</sup> The CPSC already has jurisdiction over BB guns and collects data concerning them, but not as regulated products.

#### IV. HOW THE CPSC SHOULD REGULATE

##### A. *The Banning Question*

The CPSC always has the option of attempting to ban products that are too dangerous for their stated uses.<sup>252</sup> Regardless of how dangerous these high-powdered BB guns are, however, banning them would not be in the best interest of the Commission or of the public. An attempt to ban any of these weapons could result in a backlash that would curb any other attempt at much-needed regulation.<sup>253</sup> Furthermore, many sportsmen use high-powered BB guns in lieu of regular guns for marksmen competition.<sup>254</sup> Air guns were included in the Olympics beginning in 1984 and have attracted a subculture of sporting enthusiasts.<sup>255</sup> Therefore, manufacturers are motivated to continue to design guns that are more accurate and, thus, more powerful.<sup>256</sup> The challenge is to allow manufacturers to market their guns to the correct consumers, while educating users and restricting children and parents from buying them for the wrong uses. To combine these goals, the CPSC should establish a regulatory plan

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STONE, *supra* note 31, at § 1:10; *see also* 15 U.S.C. § 2065(a) (providing that the CPSC may enter and inspect any factory, warehouse, or establishment where consumer products are manufactured or held); *supra* notes 93–100 (discussing CPSC's BB gun data).

250. § 2059.

251. *Id.* § 2054(a)(1).

252. *Id.* § 2057. In fact, some groups advocate the banning of "deadly" air guns. *See* Committee on Adolescence, *Firearms and Adolescents*, 89 PEDIATRICS 784, 786 (1992).

253. *See generally* Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57 (1995) (discussing the power of the gun lobby in American politics and the power of the gun on the American psyche).

254. *See* Tom Gaylord, *Bringing a New Shooter Into the Fold*, <http://www.airguns.net/newshoot.html> (last visited Jan. 22, 2002) (on file with the North Carolina Law Review).

255. *A Brief History of Airguns*, *supra* note 44.

256. Robert D. Beeman, *Field Use of an Airgun*, BEEMAN PRECISION AIRGUN GUIDE, at <http://www.airguns.net/fuooaa.html> (last visited Jan. 15, 2002) (on file with the North Carolina Law Review). *See* Powerline, at [http://daisy.ifware.com/cgi-bin/daisy2/products\\_powerline.html](http://daisy.ifware.com/cgi-bin/daisy2/products_powerline.html) (citing the accurate rifles as the powerful ones) (last visited Jan. 31, 2002) (on file with the North Carolina Law Review).

under the CPSA in the form of safety rules and lobby Congress for more power under special regulatory legislation.<sup>257</sup>

### B. *Make BB Guns Regulated Products*

The current method of regulating BB guns only when the CPSC determines they are defective is ineffective.<sup>258</sup> To make them a regulated product, either the CPSC would need to impose safety standards upon the industry, or Congress would need to pass a legislative directive giving the CPSC broad control over the industry.<sup>259</sup> To pass a safety regulation under the CPSA, the CPSC would have to show that the product presents an unreasonable safety risk in its current form.<sup>260</sup> BB guns do present an unreasonable safety risk because most injuries caused are easily preventable if the parents and children are appropriately warned and instructed.<sup>261</sup> To promulgate a rule, the CPSC must find that the injuries could be prevented or reduced by regulation. If these injuries were not preventable and did not reflect misconceptions concerning the damage that the gun could cause, then whether the CPSC should promulgate a rule would require more research regarding the effectiveness of such a rule. Because the injuries currently occurring are easily preventable, however, the safety risk children and parents incur when they purchase BB guns is unreasonable.<sup>262</sup> Therefore, a safety rule would be effective. In addition to the need for a rule

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257. For an example of the format of such a plan, see the appendix *infra* page 1029.

258. See *supra* notes 212–20 and accompanying text.

259. If BB guns were regulated products, the CPSC, by definition, would have control. See 15 U.S.C. § 2052(a)(1) (2000). Congress can also grant the CPSC regulatory power through a separate act like the Federal Hazardous Substances Labeling Act, Pub. L. No. 86-613, 74 Stat. 372 (1960) (codified as amended at 15 U.S.C. §§ 1261–1278 (2000)), the Poison Prevention Packaging Act, Pub. L. No. 91-601, 87 Stat. 1670 (1970) (codified as amended at 15 U.S.C. §§ 1471–1476 (2000)), the Flammable Fabrics Act, Pub. L. No. 83-88, 67 Stat. 111 (1953) (codified as amended at 15 U.S.C. §§ 1191–1204 (2000)), and the Refrigerator Safety Act, Pub. L. No. 84-930, 70 Stat. 953 (1956) (codified as amended at 15 U.S.C. §§ 1211–1214 (2000)).

260. To promulgate a rule, the CPSC must find that (1) the product presents an unreasonable risk of injury, (2) that a rule can reasonably eliminate or reduce the risk of such injury, and (3) the promulgation of the rule is in the public interest. See 15 U.S.C. § 2058 (f)(3)(A)–(B).

261. See *supra* notes 89–127 and accompanying text (discussing BB gun related injuries).

262. A safety rule could reduce at least those injuries in which parents claim they were unaware of the danger associated with the BB gun or those injuries resulting from the fact that the gun did not have a load indicator. See 15 U.S.C. § 2058(f)(3); *supra* notes 187–92 (discussing when a safety rule may be promulgated); *supra* notes 89–127 and accompanying text (discussing types of injuries).



requiring warnings, the higher powered BB guns should be accompanied by safety features similar to regular guns.<sup>263</sup>

Under the FHSA, the only mandate of authority that could currently apply to BB guns besides the CPSA, the CPSC would have to show that the guns were intended for children.<sup>264</sup> As discussed above, this burden could be difficult to meet because the products' warnings say they are intended for adults over the age of sixteen.<sup>265</sup> Therefore, the CPSC should either issue a safety rule under the CPSA or push for a different type of legislative mandate that would focus on high-powered BB guns.<sup>266</sup> Either a safety rule or legislative action is a viable option. The second would be the most drastic, but would lead to the quickest regulation. Although the idea of legislative action being the quickest alternative may seem counterintuitive,<sup>267</sup> the CPSC has to follow administrative procedure and make several factual findings before it can even suggest safety

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263. Such safety features include trigger locks, safeties, and load indicators. A trigger lock allows the trigger to be pulled only after certain buttons on the base of the gun have been pressed. Mark Johnson, *Firearms Industry's Newest Guns Have Few Safety Features; Consumers Don't Want Them, Gun Makers Say*, TIMES-PICAYUNE (New Orleans, La.), Aug. 1, 1999, at A18, available at LEXIS, News. Safeties come in many different forms, but automatic safeties, some of the most often recommended, stop the gun from firing after it has been cocked. See Beeman, *supra* note 256. A load indicator is usually on the side of the gun and tells the user that a round is sitting in the chamber, ready to be fired when the trigger is pulled. Johnson, *supra*; see Cosmo Macero, Jr., *Gun Dealers: New Safety Law Killing Businesses*, BOSTON HERALD, Apr. 19, 2000, at O16, available at 2000 WL 4322849 (describing new Massachusetts law requiring trigger locks, magazine load indicators, and child-proofing safety measures on all handguns sold in the state); John McElhenny, *The 'Toughest Gun Laws,' The Attorney General of Massachusetts Announces Regulations That Treat Guns Like Any Other Consumer Product*, PORTLAND PRESS HERALD, Apr. 4, 2000, at 2A, available at 2000 WL 5079274 (describing a law requiring trigger locks and magazine load indicators as treating the guns as consumer products); 2 *Municipalities File Suit Against Gun Industry*, N.Y. TIMES, Jan. 28, 1999, at A18 (citing Florida Circuit Court case against gun makers and distributors for failing to equip their products with trigger locks, load indicators, and other safety devices).

264. See 15 U.S.C. § 1261(f)(1)(D).

265. See *supra* notes 194–200 and accompanying text. The guns, however, are marketed to children in some instances which would support the CPSC's efforts. See 20/20, *supra* note 25.

266. See *supra* notes 31–36 and accompanying text (regarding CPSC's current ability to regulate and the possibility of a new legislative mandate).

267. A recent example of Congress's normally slow pace is the response to the September 11, 2001 attacks. See Lee Anderson, *Stimulus Package Needed, Now*, CHATTANOOGA TIMES, Nov. 28, 2001, at B11 (criticizing Congress's pace in addressing the economic situation); Gerard Baker, *The White House Fights the Last Economic War: President Bush's Use of Fiscal Policy in the Battle Against Recession Shows What a Dangerous Weapon This Can Be*, FIN. TIMES, Dec. 13, 2001, at 13 (describing the lag in economic response as the overwhelming of honorable efforts "once again by the more powerful forces of partisanship, special interests and cynicism").

rules.<sup>268</sup> Congress can take action without the mandate of making such findings.<sup>269</sup> Considering the political makeup of the current Congress, however, any gun regulation is unlikely to pass.<sup>270</sup>

Next, the CPSC should consider making BB guns a regulated product by imposing CPSC safety standards upon the industry. Congress gave the CPSC broad rule-making authority under the CPSA.<sup>271</sup> Under the CPSA, all safety standards must go through an extensive rule-making process.<sup>272</sup> If the Commission finds a voluntary industry standard that is adequate for the Commission's stated purpose in the proposed mandatory standard, and the Commission finds the industry likely will comply substantially with the voluntary standard, the Commission must terminate the rule-making effort and rely upon the voluntary industry standard.<sup>273</sup> If the CPSC discovers no such voluntary standard, then the Commission must make a final determination of whether the product presents an unreasonable risk and a standard or ban is necessary to protect the public.<sup>274</sup> The Commission also must make additional findings, including the proposed cost of the regulation and whether that cost is reasonable compared to the risk it alleviates.<sup>275</sup>

CPSC mandatory regulations involve an arduous and tedious creation process.<sup>276</sup> The Commission often works with a limited

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268. See 15 U.S.C. § 2058.

269. Congress is not required to undertake any particular findings to make a law. See U.S. CONST. art. I. However, congressional committees normally ask executive agencies for written comments and hold hearings to gather information. About the Senate Committee System, at [http://www.senate.gov/committees/comm\\_about.html](http://www.senate.gov/committees/comm_about.html) (last visited Jan. 31, 2002) (on file with the North Carolina Law Review).

270. See Michael Collins, *New Tack in Effort to Revive Gun Bill*, SCRIPPS HOWARD. NEWS SERVICE, Nov. 29, 2001 (describing failed bills in 1999 that may be revived on the theory that they will keep terrorists from getting guns). In May 2001, Senators Lieberman and McCain introduced a bill regarding criminal background checks in all firearms transactions occurring at gun show events. 147 CONG. REC. S. 4940 (2001). The bill was referred to the Senate Committee on the Judiciary on May 15, 2001 and no other action has been taken. *Id.*

271. 15 U.S.C. §§ 2051–2084; GOLDBLATT & STONE, *supra* note 31, at § 1:2.

272. First, the Commission must issue an advanced notice of proposed rule-making, in which the Commission explains the risk the rule addresses and seeks voluntary standards submissions and comments. 15 U.S.C. § 2058(a); see also GOLDBLATT & STONE, *supra* note 31, at § 1:2. Then, depending upon the response to the advanced notice of the proposed rule-making, the Commission issues a notice of proposed rule-making, in which the Commission gives the proposed standard and a preliminary cost-benefit analysis. § 2058(b).

273. GOLDBLATT & STONE, *supra* note 31, at § 1:3.

274. 15 U.S.C. § 2058(f).

275. *Id.* § 2058(f)(1); GOLDBLATT & STONE, *supra* note 31, at § 1:3.

276. GOLDBLATT & STONE, *supra* note 31, at § 1:3.

budget and little political support.<sup>277</sup> The Commission especially suffered during the Ronald Reagan and George Bush presidencies, and with a new Republican president the Commission's budget is likely to suffer again.<sup>278</sup> Furthermore, even though Congress granted the Commission broad rule-making authority in the CPSA, in the past, Congress has deliberately disrupted the rule-making process.<sup>279</sup>

The difficulty of creating a safety rule should not discourage the CPSC from attempting to do so. The CPSC has issued several safety rules and has banned other products,<sup>280</sup> including lawn darts, a product not unlike high-powered BB guns. Intended to be adult entertainment items, lawn darts were sold among other outdoor toys and were the cause of several children's deaths and injuries.<sup>281</sup> First the CPSC attempted regulation and then finally banned the product.<sup>282</sup>

The CPSC has also had some success regulating products pursuant to other legislative acts.<sup>283</sup> Specific legislative acts, such as the FHSA<sup>284</sup> and the Flammable Fabrics Act, give the Commission more power to regulate.<sup>285</sup> The FHSA, for example, gives the CPSC the ability to regulate labeling, to ban products without accurate labels, and to promulgate regular mandatory standards for hazardous products that come into contact with children with procedures similar to the CPSA.<sup>286</sup> Similarly, the Flammable Fabrics Act allows the CPSC to write flammability standards and labeling requirements for flammable substances.<sup>287</sup> The Poison Prevention Packaging Act<sup>288</sup>

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277. *Id.*

278. *Id.* (citing the deregulation goal of the Reagan and Bush administrations).

279. For example, Congress modified safety standards for lawn mowers after the CPSC worked years to develop what it felt were the most effective standards. *Id.*

280. See, e.g., Safety Standard for Bicycle Helmets, 16 C.F.R. § 1203 (2001); Safety Standard for Entrapment Hazards in Bunk Beds, *id.* § 1213; Ban on Unstable Refuse Bins, *id.* § 1301.

281. Ban of Hazardous Lawn Darts, *id.* § 1306.4 (providing statistics of injuries associated with lawn darts and reasons for the ban).

282. *Id.* § 1306.

283. See, e.g., *id.* §§ 1630–1631 (providing testing standards required for surface flammability of carpets and rugs, promulgated under the Flammable Fabrics Act).

284. Arguably, BB guns fit under the FHSA. See *supra* notes 193, 230–35 and accompanying text.

285. 15 U.S.C. §§ 1261–1278, 1471–1476 (2000).

286. *Id.* § 1274(c); GOLDBLATT & STONE, *supra* note 31, at § 1:5. The FHSA requires a formal evidentiary hearing for all hazardous substance rulemaking, except those rulemakings involving children's products. The procedure for promulgating those rules is similar to the procedure under the CPSA. See 21 U.S.C. § 371(e); 15 U.S.C. § 1262.

287. 15 U.S.C. § 1193; GOLDBLATT & STONE, *supra* note 31, at § 1:6.

288. 15 U.S.C. § 1472.

empowers the Commission to require child-resistant packaging on certain household substances.

A new legislative act could allow the CPSC to regulate BB guns in a more effective manner than the CPSA allows by providing for regulation of the product's advertising and retail sale. Another advantage of regulating through a separate legislative act is that even though the majority of the industry already voluntarily conforms to industry regulatory standards, the federal government is not prevented from imposing mandatory regulations. Furthermore, the CPSC would not have to investigate and prove every voluntary standard ineffective before promulgating a rule. Therefore, promulgation of regulatory standards would be much faster than under the CPSA or FHSA.

In theory, industries may prefer regulation pursuant to a new statute because they are given the opportunity to lobby members of Congress before any act is passed.<sup>289</sup> Industries may suffer much more negative attention, however, when Congress decides to grant the CPSC special regulatory authority because of the public nature of congressional business.<sup>290</sup> Furthermore, political pressures surrounding any legislation concerning BB guns could be extensive, but that is yet to be determined.<sup>291</sup> Due to the political strife likely to result from an attempt to regulate during the next two years, however, the CPSC can use the time to begin promulgating safety rules.<sup>292</sup>

## VI. PROPOSALS - WRITING SAFETY RULES FOR HIGH-POWERED BB GUNS

When determining the appropriate regulation of a gun of any type, each stage of the gun's travel from manufacturer to consumer should be considered: "(1) design, manufacture, and marketing; (2) sale; (3) possession; and (4) use."<sup>293</sup> The following proposed safety standards resolve several of the problems with high-powered BB guns

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289. GOLDBLATT & STONE, *supra* note 31, at § 1:3.

290. While Congress could conduct public hearings, the CPSC is only required to publish proposed regulations in the Federal Register. See 15 U.S.C. § 2058(a).

291. Because no federal regulation has been discussed, national lobbying interests have yet to get involved. The National Rifle Association refused to give any indication of how they would react to proposed legislation regulating high-power BB guns. See E-mail from National Rifle Association Legislative Clearinghouse to author (Feb. 1, 2001) (on file with the North Carolina Law Review).

292. Two years is based on the fact that Congress changes some members every two years. See U.S. CONST. art. I, § 2, cl. 1.

293. Vernick & Teret, *supra* note 240, at 1195.

and doubtlessly would save many lives and prevent hundreds of injuries. They are specifically designed to prevent the most common cause of injury with BB guns—lack of understanding in children and parents who do not respect the gun's power and do not take proper precautions.

### A. *BB Gun Definition*

The plan should begin by defining a BB gun as any gun that is designed to discharge projectiles using energy released by compressed air, compressed gas, or mechanical spring-piston action.<sup>294</sup> The BB guns should further be divided into three different classes based on the gun's muzzle velocity capabilities: *Class A* BB guns with maximum muzzle velocities of 340 fps;<sup>295</sup> *Class B* BB guns with muzzle velocities of 340–700 fps;<sup>296</sup> and *Class C* BB guns with muzzle velocities of over 700 fps.<sup>297</sup> The standards divide the BB guns into different classes so that high-powered BB guns capable of penetrating bone matter are always treated differently than those that only can cause eye or skin damage—the injuries most people assume can be caused by BB guns.<sup>298</sup> Most importantly, BB guns intended as children's toys should be kept below the muzzle velocity possible to pierce bone.<sup>299</sup> Guns designed solely for professional use also are designated differently so that the CPSC could add other regulations if necessary just for those guns or add regulations that specifically exclude those guns because they pose less of a threat to children. The BB gun industry should be required to use these purposed categories from manufacture to sale.

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294. This definition includes all types of BB gun designs. See Saltzman, *supra* note 45.

295. While the BB of a gun with a muzzle velocity of 340 fps still could penetrate the eye or skin, it could not penetrate bone. See Committee on Accident & Poison Prevention, *supra* note 20, at 473; *supra* notes 83–85 and accompanying text. However, the lowest powered air gun has a muzzle velocity of 275 fps. Committee on Accident & Poison Prevention, *supra* note 20, at 473. The Red Ryder BB gun has a muzzle velocity of 280 fps. *Daisy Airguns & Kits*, *supra* note 73. The 340 fps limit for Class A allows only those BB guns with the lowest muzzle velocity to enjoy slightly less stringent regulation.

296. A BB traveling at 350 fps can penetrate bone. Committee on Accident & Poison Prevention, *supra* note 20, at 473; *supra* note 85 and accompanying text. Most BB guns that cause damage are those like the Daisy model 880 that have a 685 fps muzzle velocity. See *supra* notes 89–127 and accompanying text (discussing BB gun related injuries).

297. This category allows BB gun manufacturers to strive for higher muzzle velocities for professional shooters.

298. See *supra* note 43 and accompanying text (explaining the change in the power of BB guns over the past few decades, when the only possible injury was the skin or eye).

299. Committee on Accident & Poison Prevention, *supra* note 20, at 473. Whether to put a load indicator on these guns should be studied further, as the cost may not be worth the added safety if these guns cannot penetrate bone.

### B. *Who is Subject to the Regulations*

After defining BB guns, the federal government should define who is subject to the regulations. A manufacturer would have to comply with the standards if it produces more than ten total BB guns, regardless of classification, per year.<sup>300</sup> A retailer would have to comply if it sells more than two total BB guns, regardless of classification, per year.<sup>301</sup> The definitions of manufacturer and retailer are designed so that those who sell guns over the Internet, at auctions, or at gun shows will also be required to follow these guidelines.<sup>302</sup>

### C. *Manufacturing Process*

Manufacturers should be required to provide certain safety features on guns determined by the gun's classification; with the higher powered BB guns requiring automatic safeties like those used on some firearms.<sup>303</sup> Because *Class B* and *C* BB guns can cause as much or more damage over a short distance as a powder gun,<sup>304</sup> they should have more stringent regulations than *Class A* BB guns. *Class B* and *C* guns should be required to have a load indicator, which indicates whether the gun is loaded, and a safety because of the complaints filed with the CPSC and the cases showing that often people are shot and injured when the shooter thinks the gun is

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300. Under the Consumer Product Safety Act, a manufacturer is any person who manufactures or imports even one consumer product. 15 U.S.C. § 2052(a)(4) (2000). However, by allowing a few to be manufactured, the very specialized manufacturers would not have to comply, nor would someone designing one for his own use. Ten is suggested as a way to regulate any manufacturer with real distribution potential.

301. Under the Consumer Product Safety Act, a retailer is any person who receives from a distributor to sell to a consumer even one consumer product. *Id.* § 2052(a)(6). With the number of auction and on-line classified types sale of BB guns available, any person who sells or re-sells more than one BB gun should have to follow safety regulation, but someone selling one used gun to his neighbor would be exempt.

302. Internet sales to children are a problem. Both air rifles and air pistols are illegal to own or sell in New York City, however, children in New York can purchase them easily over the internet. See Anthony Ramurez, *Metro Brief*, N.Y. TIMES, Mar. 12, 2001, at B4.

303. Automatic safeties are devices that automatically switch the gun into a locked position when the gun is cocked. The safety must be released before the user can shoot the gun. See Robert D. Beeman, *Safeties on Airguns?*, July 4, 2001, at [www.beemans.net/Safety%20%20Devices.htm](http://www.beemans.net/Safety%20%20Devices.htm) (defining automatic safeties and explaining they are unnecessary for BB guns) (on file with the North Carolina Law Review). The CPSC believes safeties are necessary on BB guns. See Daisy Mfg. Co., Complaint, *supra* note 20.

304. See *supra* notes 89–127 and accompanying text (discussing injuries).

unloaded or drops the gun.<sup>305</sup> All *Class B* and *Class C* BB guns should be equipped with load indicators so that the shooter can determine at any time if the gun is loaded.<sup>306</sup> The same classified guns also should be equipped with a safety that can be enabled easily to prevent the gun from firing until the safety is released.

The CPSC should use its labs to determine the threshold amount of foot pounds of pressure that should be required to pump a pneumatic BB gun in *Class B* or *Class C* more than ten times.<sup>307</sup> The regulation then should require that all pneumatic guns in *Class B* and *C* produce resistance so that the determined amount of pressure is required to pump the gun more than ten times. The CPSC should require these guns to be difficult to pump more than ten times because currently an adolescent can pump the gun more than the recommended amount, and the more the gun is pumped, the more damage the pellet inflicts.<sup>308</sup>

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305. See, e.g., 20/20, *supra* note 25 (describing the injuries that occur because children mistakenly believe a gun is unloaded and citing expert opinions that load indicators are necessary and practical); Consumer Product Safety Commission, Epidemiologic Investigation Report, Case No. 960821CNN1722, Aug. 22, 1996, available at <http://www.cpsc.gov/library/FOIA/Foia99/idi/daisybb5.pdf> (pp. 30–67) (reporting puncture wound to chest of an eleven-year-old shot by his cousin who mistakenly thought the gun was empty) (on file with the North Carolina Law Review); Consumer Product Safety Commission, Epidemiologic Investigation Report, Case No. 960405CWE6001, Apr. 5, 1996, available at <http://www.cpsc.gov/library/FOIA/Foia99/idi/daisybb4.pdf> (p. 1) (reporting a ten-year-old shot in the head by a twelve-year-old playmate who mistakenly thought the gun was empty) (on file with the North Carolina Law Review); Consumer Product Safety Commission, Epidemiologic Investigation Report, Case No. 840614HCC3315, Aug. 1, 1985, available at <http://www.cpsc.gov/library/FOIA/Foia99/idi/daisybb5.pdf> (pp. 1–29) (reporting the death of twelve-year-old shot by his brother when the gun accidentally fired as he was standing up) (on file with the North Carolina Law Review). Some powder guns have safeties and load indicators. For firearm information, see *supra* note 263 (discussing load indicators, trigger locks, and safeties). Because *Class B* and *C* guns, as mentioned above, can do as much damage as powder guns, they should have the same safety equipment. Although *Class A* guns may present the same problems, the costs of including load indicators and safeties may outweigh the benefits for *Class A* guns.

306. This requirement is in response to the most recent suit filed by CPSC against Daisy. Daisy Mfg. Co., Complaint, *supra* note 20; see also *Dias v. Daisy-Heddon*, 390 N.E.2d 222, 223 (Ind. 1979) (presenting a case in which a child attempted to shoot a Daisy BB gun into the ground several times without the gun firing a pellet, but when the child aimed the gun at another child, the gun fired a pellet, hitting the by-stander child in the eye).

307. See *supra* notes 49–55. The greater the number of pumps, the greater the muzzle velocity. Friedman et al., *supra* note 29, at 475.

308. For a discussion of muzzle velocity, see *supra* notes 72–79 and accompanying text.

#### D. Advertising and Marketing

All of the BB guns should be required to have a warning more effective than the current industry-imposed warning.<sup>309</sup> *Class A* BB guns should contain a label displayed prominently on the box, in the instruction manual and permanently attached to the gun that states: "WARNING: THIS PRODUCT CAN CAUSE SERIOUS INJURY TO THE HUMAN EYE AND IS CAPABLE OF PENETRATING HUMAN SKIN. NEVER POINT THE WEAPON AT ANYONE. ALWAYS TREAT THE WEAPON AS IF IT IS LOADED."<sup>310</sup> All *Class B* and *C* BB guns should contain a label displayed prominently on the box, in the instruction manual, and permanently attached to the gun that states: "WARNING: THIS GUN CAN KILL YOU. THIS IS NOT A TOY. NOT TO BE USED BY CHILDREN UNDER 16 YEARS OF AGE. NEVER POINT THIS WEAPON AT ANYONE. ALWAYS ENGAGE THE SAFETY WHEN THE GUN IS NOT IN USE. DO NOT STORE LOADED. ALWAYS TREAT THE WEAPON AS IF IT IS LOADED."<sup>311</sup> The first sentence of the warning should explain the damage the gun can inflict. Also, the warning for *Class B* and *Class C* guns should state that the gun can kill the consumer. This is so the consumer does not assume, like Larry Moss did,<sup>312</sup> that the warning refers to killing small animals and not humans. These requirements also address the problem of parents or guardians who fail to notice the smaller, less dramatic warnings on the packaging, manuals, or guns themselves.<sup>313</sup>

The CPSC should also regulate advertisements for BB guns, whether by the manufacturer or retailer.<sup>314</sup> Advertisements for *Class*

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309. See *supra* notes 175-78 and accompanying text. For a discussion of whether warnings in general are ever truly effective, see generally, Latin, *supra* note 129 (concluding that the Restatement (Second) of Torts § 402A comment, which allows a seller to reasonably assume that a warning will be read and headed, is unrealistic).

310. The CPSC can promulgate such a warning under 15 U.S.C. § 2056(a)(2) (2000).

311. See H. Steven Lawrence, *Fatal Nonpowder Firearm Wounds: Case Report and Review of the Literature*, 85 PEDIATRICS 177, 180 (1990) ("Immediate impact can be made on the consumer of the nonpowder firearm through efforts directed at the realization of the potentially deadly force associated with this class of weapons . . .").

312. See *Moss v. Crosman*, 136 F.3d 1169, 1172 (7th Cir. 1998). Larry Moss admitted, however, that he would have purchased the air gun even if the salesperson had told him directly that the gun was capable of killing a human being. *Id.*

313. The parents in *Dias v. Daisy-Heddon*, admitted never seeing the warnings on the Daisy instruction manual or on a sticker on the gun requiring that the operation manual be read before operation of the gun. 390 N.E.2d 222, 223-24 (Ind. Ct. App. 1979). A warning that a product is lethal is also more likely to gain one's attention than a warning to read an operator's manual.

314. Advertising could only be regulated under a new legislative act. The FDA currently regulates the advertisement of prescription drugs. 21 U.S.C. § 352(n) (1994).



B and C guns should state that the guns are not toys and should not depict any person who reasonably could be considered to be under the age of twenty-five.<sup>315</sup> These regulations are designed to prevent parents from seeing the advertisement and believing these guns are suitable for their children. Regulation should also address whether the companies appeal to the parents' nostalgia when trying to sell the BB gun and if they do, regulation should ensure that the advertisement distinguishes between the BB gun that the parents are about to purchase and the one they owned as a child.

### E. Instruction Booklets

Regulation should also concern the instruction booklets contained in the gun box. All manufacturers should be required to enclose an instruction manual in the box of the BB gun.<sup>316</sup> The booklets themselves should be written with the intended user of the gun in mind. Because the power of the guns has changed so dramatically over the past fifty years, parents may have an incorrect view of the power of the gun if they rely on their childhood experiences.

The instruction manual should measure 8.5" x 11" and contain the labeling listed above, depending on the class of the gun, on the front of the manual.<sup>317</sup> The instruction booklets' large size is important so that they are not easily lost in the packaging.<sup>318</sup> Furthermore, the instruction booklet, regardless of the class of the BB gun, should give appropriate instruction encouraging the use of protective eyewear.<sup>319</sup> The booklet should also contain instructions

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Therefore, the government has seen fit in other circumstances to allow agencies to regulate the advertising of a product to protect consumers.

315. See 20/20, *supra* note 25 (explaining that current boxes even on high-powered BB guns feature pictures that arguably depict children); cf. *Sherk v. Daisy-Heddon*, 450 A.2d 615, 622-23 (Pa. 1982) (Larsen, J., dissenting) (stating that the Daisy logo was taken off of the high-power gun to ensure that the gun was not considered a toy). Certainly *Boy's Life Magazine*, a periodical directed at adolescent males, should not advertise high-powered BB guns, as the magazine has in the past. See *id.* at 628 (Larsen, J., dissenting).

316. The CPSC has authority to require this under 42 U.S.C. § 2056(a) (2000).

317. The manual should be large enough so that it is not lost in the packaging or easily overlooked by parents or other consumers. An 8.5" x 11" booklet is suggested as a means of achieving that goal.

318. See *Moss v. Crosman*, 136 F.3d 1169, 1172 (7th Cir. 1998) (describing case in which the instruction booklet was lost in the packaging); *supra* note 4 (describing the warning set forth in the Crosman manual).

319. *BB & Pellet Gun-Related Injuries*, *supra* note 20, at 910 (reporting that severe eye injuries accounted for thirty-seven percent of all hospitalizations for pellet gun-related injuries during June 1992 through May 1994); Damore et al., *supra* note 91, at 284 (calling for legislation mandating protective eye wear); Cheryl Guttman & M. Lisa McHam,

concerning safe uses for the gun, for example, always treat the gun as if it is loaded.<sup>320</sup> For *Class B* and *C* BB guns, the booklet should contain instruction on how to use the safety and the load indicator. To prevent parents from believing that these guns are meant for children, any depiction within the manual, within the instruction booklet, or on the box of a *Class B* or *C* gun should be of a mature-looking person who could not reasonably be considered under the age of twenty-five.<sup>321</sup>

#### F. Safety Campaign

The CPSC also should consider requiring a public safety campaign for parents and children conducted in conjunction with the major BB gun manufacturers,<sup>322</sup> similar to the responsible drinking campaigns conducted by some of the beer companies.<sup>323</sup> The CPSC

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*Nonpowder Firearms Can Cause Severe Ocular Injuries: With Federal Laws for Airguns Lacking, Best Defense May Be Increasing Level of Public Awareness*, 25 *OPHTHALMOLOGY TIMES* 24, 24 (2000) (citing non-powder air guns as responsible for "the largest group of severe, preventable, sports-related eye injuries").

320. According to Daisy Manufacturing Co., the following safety tips are essential: (1) Always keep the gun pointed in a safe direction; (2) Always keep the gun unloaded until ready to use; (3) Treat every gun as if it were loaded and ready to shoot; (4) Always wear eye protection; (5) Always be sure your gun barrel is clean and not plugged; (6) Always have adult supervision; (7) Never carry a gun into your home, camp, or public place loaded or cocked; (8) Carry your gun so you can control the direction of the muzzle even if you stumble; (9) Always keep fingers off the trigger until ready to shoot; (10) Be sure of your target before you pull the trigger; (11) Never point a gun at anything you do not want to shoot; (12) Guns not being used should always be unloaded; (13) Never climb a tree or fence or jump a ditch with a loaded gun; (14) Never shoot at a flat, hard surface, or the surface of water; and, (15) Respect other people's property. See Daisy Outdoor Products, *Safety Tips*, at [www.daisy.com/safetytips.html](http://www.daisy.com/safetytips.html) (last visited Nov. 28, 2001) (on file with the North Carolina Law Review).

321. Currently, depictions on the boxes of the guns are questionably of children. Manufacturers easily could argue whether someone looks sixteen, eighteen, or twenty-one, but manufacturers would have difficulty arguing that a sixteen-year-old looked twenty-five. See 20/20, *supra* note 25.

322. The CPSC could require such a campaign only if Congress granted the CPSC authority to require one under a new legislative act.

323. See Executive Changes, *SUPERMARKET NEWS*, Apr. 9, 2001, at 48, 48, available at 2001 WL 10592273 (citing Anheuser-Busch's "We All Make a Difference" national advertising campaign to promote responsible drinking); *Old Beer, Cool Promos: Sales Promotion Campaigns of Beer Manufacturers*, *GROCERY MARKETING*, Nov. 1, 1996, at 28, available at 1996 WL 12270638 (citing a marketing campaign by the National Beer Wholesalers Association promoting responsible drinking); Lisa Van De Ven, *Stay Sober is Message for Students: A University of Toronto Survey Shows Students Are Not Drinking Just to Be Social: 'Drinking is Fun. It Makes You not Care About Anything.'* *One Teenager Says*, *TORONTO STAR*, Dec. 16, 1997, at C1, available at 1997 WL 26370749 (citing a national campaign by the Brewers' Association of Canada using television commercials to promote responsible drinking); see also Thomas Lee, *NBC Decision Could Provide Liquor Challenge to TV Beer Ads; Makers of Vodka, Rum Will Go Head-to-Head with A-B, Wine*

should consider whether the cost of such a campaign would be manageable for the BB gun industry generally. The CPSC could also suggest that BB gun manufacturers conduct such a campaign voluntarily.

### G. Retailers

Effective regulation must also include retailers because retailers are the last contact with the product before it enters the consumer's hands. Retailers should be required to store high-power BB guns in a locked case in the sporting goods section of the store.<sup>324</sup> Retailers also should be required to post warnings and regulations concerning high-power BB guns and to check customer identification for age before sale.<sup>325</sup> Retailers who do not comply should be fined.<sup>326</sup> All adults who purchase high-power BB guns should be required to sign a form stating they are not purchasing the gun for a minor and realize they could be held liable if they do so.<sup>327</sup>

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*Makers*, ST. LOUIS POST-DISPATCH, Dec. 19, 2001, at C10, available at 2001 WL 4500790 (explaining that liquor sellers have to run responsible drinking ads to be able to advertise on NBC television). Anti-smoking campaigns developed by states with tobacco settlement money have also proven effective. See Alison Sloane Gaylin, *Getting at the Truth: Alex Bogusky Heats up the Miami Ad Scene*, 42 SHOOT 19, Nov. 23, 2001, available at 2001 WL 27222679 (citing a 50% decrease in middle-school cigarette consumption and a 20% decrease in high school consumption in response to Florida's anti-smoking campaign); Michelle Zibisky Silver, *Efficacy of Anti-Tobacco Mass Media Campaigns on Adolescent Tobacco Use*, 27 PEDIATRIC NURSING 293, 294 (2001) (citing a study showing that younger adolescents reporting a baseline exposure to television anti-smoking advertisements were significantly less likely to become established smokers than those not exposed). See generally Robert S. Adler & R. David Pittle, *Cajolery or Command: Are Education Campaigns an Adequate Substitute for Regulation?*, 1 YALE J. ON REG. 159, 171-93 (1984) (citing the success or lack thereof of the seat belt campaign, Project Burn Prevention, and a heart disease education campaign).

324. See Damore et al., *supra* note 91, at 284 (suggesting legislation mandating that retailers store guns and ammunition separately). This is so consumers will associate the BB guns with sporting goods and not with toys. The guns should be in locked cabinets to emphasize the danger of the guns to consumers and to protect consumers in the store from being shot with the gun while in the store. See *60 Minutes*, *supra* note 80 (citing seven BB gun shootings in Wal-Mart stores).

325. While an adult could still purchase the gun and then give it to a child, an adult would no longer be able to give a child the money to purchase the gun himself, as Josh Moss's father did. See *Moss v. Crosman Corp.*, 136 F.3d 1169, 1172 (7th Cir. 1998).

326. Retailers of handguns and other types of firearms are required to check identification. See, e.g., CAL. PENAL CODE § 12071(b)(3)(C) (West 2000 & Supp. 2002); N.C. GEN. STAT. § 14-404, 405 (1999).

327. This requirement could serve the dual purposes of providing evidence in product liability suits and, more importantly, providing another type of warning to the consumer. Daisy Manufacturing Company provides safety tips on its web site as well as requiring that anyone wishing to purchase a gun complete an "Affidavit of Age." See *Affidavit of Age*, <http://www.daisy.ifware.com/cgi-bin/daisy2/affidavit.html> (last visited Feb. 25, 2002) (on

*Class A*, *B*, and *C* guns should not be sold in stores that deal primarily in toys or in the section of a discount store that displays primarily toys.<sup>328</sup> All BB guns should be available only in stores that have a substantial sporting goods business. *Class A* BB guns should not be sold in stores that only sell toys because they are not toys and should not be treated as such. *Class B* and *C* guns should be sold only in sporting goods stores that also sell powder guns.<sup>329</sup> Because these guns are so similar to powder guns,<sup>330</sup> only stores that sell powder guns and are accustomed to selling lethal items, should be permitted to sell them.<sup>331</sup> *Class B* and *C* BB guns should be treated the same as powder guns are treated, and kept behind locked cabinets, near the powder guns in the stores. The ammunition for *Class B* and *C* guns should be stored at least twenty-five feet from the guns.<sup>332</sup> The ammunition should be kept in separate areas to prevent anyone, especially children, from accessing the gun and easily loading the ammunition.<sup>333</sup>

#### *H. Age Requirements and Consent Forms*

Safety rules should also regulate the sale of BB guns.<sup>334</sup> No *Class A* BB gun should be sold to a person under the age of twelve.<sup>335</sup> *Class*

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file with the North Carolina Law Review). Although parents could simply falsify information on this form, one purpose of the form is to educate parents about the dangers the product poses to their minor children so that parents would not purposefully give such a dangerous product to their child.

328. This type of regulation could only be done through a separate legislative action.

329. The purpose of this regulation is two-fold. First, retailers dealing in powder guns would be accustomed to dealing with deadly weapons and would have more experience with storing the guns properly, verifying customer identification cards before sale, and other precautions. Secondly, if the BB guns are sold only with powder guns and not at a local discount store, parents will be more likely to appreciate their danger.

330. See *supra* notes 72–79 and accompanying text (discussing the similarity in muzzle velocities of high-powered BB guns and powder guns).

331. Other agencies do regulate how and where certain materials can be sold. See 21 U.S.C. § 353 (2000) (regulating where and under what conditions prescription drugs and drug samples can be sold and distributed).

332. Damore et al., *supra* note 91, at 284 (calling for legislation mandating that guns and ammunition be stored separately to “minimize unsupervised use and injury”); see also N.C. GEN. STAT. §§ 14-315.1 to 315.2 (1999) (citing the need to keep firearms out of the reach of children). The main goal of this provision is to prevent children from easily loading the gun and shooting it in the store. Twenty-five feet is a suggestion for achieving this goal.

333. See 60 Minutes, *supra* note 80 (discussing shooting incidents in Wal-Mart); *supra* note 160 and accompanying text (same).

334. Regulation of the actual sale could only be promulgated through a separate legislative act.

335. Current industry warnings for low muzzle velocity BB guns say that the gun is not a toy. See *Daisy Airguns & Kits*, *supra* note 73. Seventeen counties in North Carolina

A BB guns may be sold to persons between the ages of twelve and eighteen if the person is accompanied by a parent or guardian.<sup>336</sup> If the sale is to a person between the ages of twelve and eighteen, the parent or guardian should be required to read and sign a consent form that describes the dangers of the gun and verifies that the child is over the age of twelve.<sup>337</sup> Under no circumstances should a retailer sell a *Class B* or *C* BB gun to a person under the age of eighteen.<sup>338</sup> Retailers should be required to check a valid identification before selling the gun to the consumer.<sup>339</sup> The consumer should also sign an information form that describes the gun's danger and verifies that the consumer will not give the gun to a child under the age of eighteen.<sup>340</sup> Many of the injuries discussed in this Comment would have been prevented if the consumers realized the BB guns' potential danger. Consent forms help to ensure that the parents and other purchasers are aware of the danger the product presents.

Retailers should keep all consent and information forms for *Class A*, *B*, and *C* BB guns for a period of six years from the date of sale.<sup>341</sup> Any retailer who fails to check identification or maintain appropriate records should be subject to liability and damages due to the retailer's negligence in addition to punitive fines.<sup>342</sup> Making retailers monetarily liable is the most effective way to ensure they

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deem the age of twelve to be the a child should be allowed to possess any type of BB gun. See N.C. GEN. STAT. § 14-316 (West 2000).

336. A few states now require the presence of a parent or guardian for the purchase of a BB gun by a minor. See *supra* notes 162-73. By requiring the presence of a parent, the parent will be aware of where the gun was purchased, the warnings on the box, and the identification check performed before sale—all indicative of the danger of the gun.

337. The parent is made more fully aware of the dangers and by signing the form, realizes that he accepts some responsibility for placing a dangerous product in his child's hands.

338. Since eighteen is the generally recognized age of adulthood in the United States, purchase of a deadly weapon should not be allowed before this age.

339. See *supra* note 326 (discussing other contexts in which retailers are required to check the consumer's identification before selling a product).

340. See, e.g., *Moss v. Crosman Corp.* 136 F.3d 1169, 1172 (7th Cir. 1998) (showing that Larry Moss testified he did not understand one warning and completely missed another).

341. This regulation could only be promulgated under a new legislative act. Retailers should keep the forms for six years so that the child involved, even if twelve years-old at the time of purchase, will be at least eighteen by the time the form is destroyed.

342. This regulation could only be promulgated under a new legislative act. Firearms are regulated similarly. See, e.g., *Massachusetts Begins Enforcing New Gun Safety Regulations*, Consumer Protection Report, Mar. 2000, at 28 (citing new legislation that allows the State to seek civil penalties against those transferring a firearm that violates the statute).

follow the regulations.<sup>343</sup> The retailers are invaluable as the last contact the CPSC can control before the gun is taken into the home. Therefore, retailers are the CPSC's last chance to prevent an accident.

### I. Background Checks

Finally, the federal government should consider whether requiring any background check or registration process for high-power BB guns is necessary. While, at first glance, it seems that BB guns are dangerous enough to warrant one, to require either may be detrimental to regulation efforts.<sup>344</sup> Many dangerous objects, such as knives, certain chemicals, and pepper spray, are sold without background checks or registration processes. The government's goal should be to regulate the guns to ensure safety. The cost and political backlash from requiring background checks or registration might only overshadow the importance of these goals.

### CONCLUSION—A CALL TO ACTION

While some of these regulations could be costly, the preventable injuries that American children sustain yearly cannot continue. The federal government already has the means in place to regulate high-powered BB guns in a uniform and effective manner. The CPSC should exercise its authority to regulate high-powered BB guns and air rifles through safety rules and under a new legislative act. While the process is likely to be a long one, the CPSC should begin immediately conducting investigations and holding hearings to learn the most effective means of regulating BB guns. The regulations proposed in this Comment could be achieved without infringing on sportsmen who use the guns correctly. Granted, some of the high-powered BB guns may become slightly more expensive, but not

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343. See Timothy A. Wilkins & Terrell E. Hunt, *Agency Discretion and Advances in Regulatory Theory: Flexible Agency Approaches Toward the Regulated Community as a Model for the Congress-Agency Relationship*, 63 GEO. WASH. L. REV. 479, 488-89 (1995) (citing economic incentives, like fines and sin taxes, as effective means of regulating behavior).

344. Attempts to require background checks or registration for powder guns have been met with strong opposition. See, e.g., Eunice Moscoso, *Middle Ground on Guns has Tycoon in Line of Fire*, ATLANTA J. CONST., June 24, 2001, at 9A, available at 2001 WL 3679426 (detailing opposition to recent gun control attempts); Ralph Thomas, *Gun-Bill Talks End in Dispute: Two Lawmakers Disagree on Why*, SEATTLE TIMES, Apr. 4, 2001, at B1, available at 2001 WL 3504990 (tracing the disagreements on both sides of a debate concerning the requirements of background checks at gun shows).

detrimentally so.<sup>345</sup> In fact, sportsmen should support these proposals as common-sense solutions that only make their sport safer.

The CPSC is bound by its duty to protect American citizens<sup>346</sup> to regulate a product that causes so many preventable injuries to American children. The cost of not doing so will be additional unnecessary, preventable tragedies. The CPSC should not be daunted by past political disappointments,<sup>347</sup> but should consider the regulation of high-powered BB guns to fall within one of the fundamental reasons for its creation—to protect the public from unreasonable risks of injury.<sup>348</sup>

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345. See, e.g., Martin Stolz, *Sheriff is Passing Out 3,000 Free Trigger Locks*, THE PLAIN DEALER (Cleveland, OH), Apr. 7, 2000, at 1B, available at 2000 WL 5141922 (citing the cost of a trigger lock on a firearm at sixty cents per gun); Steve Keighton, *Four Sensible Ways to Control Guns; An Epidemic of Violence*, ROANOKE TIMES & WORLD NEWS, Mar. 20, 2001, at A11, available at 2001 WL 5360644 (arguing that requiring trigger locks, registration, and licensing of firearms would add “a little to the cost” of owning a firearm).

346. See 15 U.S.C. § 2054(a)–(b) (2000) (discussing the CPSC’s duties); see also *id.* § 2051(b) (setting forth Congress’s intent to protect the public).

347. See *supra* notes 276–79 and accompanying text.

348. § 2051(3).

## APPENDIX

This appendix indicates how a complete regulatory scheme might appear if both the CPSA and another legislative act granting the CPSC additional regulatory power were used.

**Part XXXX — Regulation of BB Guns****Sec. XXXX.1 Scope, Application, and Effective Date**

(a) *Scope, basis, and purpose.* The Commission declares current regulation of BB guns to be unsatisfactory, such that they create an unreasonably dangerous product for consumers. This consumer product safety standard prescribes BB gun requirements to reduce or eliminate the risk that children and adults will die or be injured from pellets shot from BB guns.

(b) BB guns and similar products that are articles intended for use by children are regulated not under the CPSA but under the FHSA.<sup>349</sup>

(c) *Application and effective date.* The standards in this part apply to all BB guns that are manufactured in the United States or imported, on or after month day, year.

**Sec. XXXX.3 Definitions**

(a) A *BB gun* is any gun that is designed to discharge projectiles using energy released by compressed air, compressed gas, or mechanical spring-piston action.

(b) For purposes of this standard, each BB gun will fit into one of three different classes:

(1) A *Class A BB gun* is one that is capable of shooting a pellet with a muzzle velocity of less than 340 feet per second.

(2) A *Class B BB gun* is one that is capable of shooting a pellet with a muzzle velocity of 340 fps – 700 fps.

(3) A *Class C BB gun* is one that shoots with a muzzle velocity of over 700 fps.

(c) A *manufacturer* is defined as any person or company that manufactures more than 10 BB guns per year of any class.

(d) A *retailer* is defined as any person or company that sells more than 2 BB guns per year of any class.

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349. Most CPSC regulations and safety rules include this provision because of the ease it adds for the FHSA to control where children are involved. Then the product can be banned immediately if the provisions are not followed. See, e.g., Ban of Hazardous Lawn Darts, 16 C.F.R. § 1306.1 (2001).



(e) A *pellet* is defined as any BB or pellet made of lead, brass or steel.<sup>350</sup>

#### **Sec. XXXX.4 Requirements in Manufacturing**

(a) All Class B and Class C BB guns must be equipped with a load indicator that allows the shooter to determine if the gun is loaded.

(b) All Class B and Class C BB guns must be equipped with a safety that can be enabled easily to keep the gun from firing until the safety is released. The safety must not be able to be released from a drop of the gun.

(c) All pneumatic BB guns in Class B or Class C must require more than XX foot pounds of pressure to pump them once they have been pumped ten times.

#### **Sec. XXXX.5 Requirements in Labeling**

(a) All Class A BB guns must contain a label displayed prominently on the box, in the instruction manual, and permanently attached to the gun that states: "WARNING: THIS PRODUCT CAN CAUSE SERIOUS INJURY TO THE HUMAN EYE AND IS CAPABLE OF PENETRATING HUMAN SKIN. NEVER POINT THE WEAPON AT ANYONE. ALWAYS TREAT THE WEAPON AS IF IT IS LOADED."

(b) All Class B and Class C BB guns must contain a label displayed prominently on the box, in the instruction manual, and permanently attached to the gun that states: "WARNING: THIS GUN CAN KILL YOU. THIS IS NOT A TOY. NOT TO BE USED BY CHILDREN UNDER 16 YEARS OF AGE. NEVER POINT THE WEAPON AT ANYONE. ALWAYS ENGAGE THE SAFETY WHEN THE GUN IS NOT IN USE. DO NOT STORE LOADED. ALWAYS TREAT THE WEAPON AS IF IT IS LOADED."

(c) Any gun that does not contain the appropriate warnings will be considered an unreasonably dangerous product and is automatically banned.

#### **Sec. XXXX.6 Instruction Booklets**

(a) Every BB gun will contain an instruction manual that measures 8.5"x11". The booklet must contain on the front the same warning that is required in the Labeling section.

(b) Every instruction booklet will give appropriate instruction encouraging the use of protective eyewear.

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350. See *supra* note 68-69 and accompanying text.

(c) Every instruction booklet for Class B and C BB guns will contain instruction on how and when to use the safety and load indicator.

(d) Every instruction booklet for Class B and C BB guns cannot contain any depiction of a person using the gun who could reasonably be considered to be under the age of 25.

#### **Sec. XXXX.7 Marketing**

(a) All Class A BB guns must be sold in the sporting gun section of stores and can not be sold in stores that deal primarily in toys.

(b) All Class B and C BB guns must be sold in the sporting gun section of stores and must be kept in locked cabinets near powder guns sold by the store. Class B and C BB guns cannot be sold in stores that do not sell powder guns, unless the store sells only BB guns and accessories.

(c) The ammunition for Class B and C guns must be stored at least 25 feet from the guns.

(d) Any advertisement for Class B and C guns must state that the guns are not toys and cannot depict any person reasonably who could be considered to be under the age of 25 using the gun.

(e) All depictions of people on the boxes of Class B and C guns cannot be of persons who reasonably could be considered to be under the age of 25.

#### **Sec. XXXX.8 Sales**

(a) No Class A BB guns shall be sold to a person under the age of 18 who is not accompanied by a parent or guardian. If the sale is made to a child under the age of 18, the parent or guardian must sign a consent form that describes the dangers of the gun and verifies that the child is over the age of 12.

(b) No Class B or C BB guns shall be sold to a person under the age of 18. Retailers are to check a valid identification before selling the gun to the consumer. The consumer also must sign a consent form that describes the danger of the gun and verifies that the gun will not be given to a child under the age of 18.

(c) All consent forms are to be kept by the retailer for six years from the date of sale.

(d) Any retailer who fails to check identification or maintain appropriate records is subject to liability for damages due to the retailer's negligence as well as punitive fines.

**Sec. XXXX.9 Findings<sup>351</sup>**

The Consumer Product Safety Act requires that the Commission, in order to issue a standard, make the following findings and include them in the rule. 15 U.S.C. § 2058(f)(3). These findings are contained in the appendix to this part XXXX.

(a) The rule in this part, including its effective date of month day, year, is reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with the product.

(b) Promulgation of the rule is in the public interest.

(c) Where a voluntary standard has been adopted and implemented by the affected industry, that compliance with such voluntary standard is not likely to result in the elimination or adequate reduction of the risk of injury; or it is unlikely that there will be substantial compliance with such voluntary standard.

(d) The benefits expected from the rule bear a reasonable relationship to its costs.

(e) The rule imposes the least burdensome requirement that prevents or adequately reduces the risk of injury for which the rule is being promulgated.

**Sec. XXXX.10 Test Methods**

Here the rule would explain how the Commission staff would test the manufacturing requirements. The technical explanation that is necessary for this section is not within the range of this Comment.

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351. Safety Standard for Entrapment Hazards in Bunk Beds, 16 C.F.R. § 1213.7 (demonstrating the general findings that must be made when the CPSC is promulgating a safety standard).