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ADVISORY OPINION

CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

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Thomas G. Demling, Esquire
Varnum, Riddering, Wierengo & Christenson
666 Old Kent Building
Grand Rapids, Michigan 49502

Dear Mr. Demling:

This letter is in response to your correspondence of July 11, 1974 to Alan Schoem of this office in which you presented questions in hypothetical form regarding the Consumer Product Safety Act. All of your hypotheticals raise questions of jurisdiction which can best be answered by looking at the Act and its legislative history.

The primary purpose of the Consumer Product Safety Act is to protect the public against unreasonable risks of injury associated with consumer products. The term "consumer product" is defined in section 3(a)(1) of the Act (15 U.S.C. 2052) as meaning:

> "The term 'consumer product' means any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, but such term does not include -- (A) any article which is not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer."

We believe that Congress did not intend that the term "consumer product" be construed narrowly to limit the scope of the Act. The House of Representatives Committee Report specifically admonishes that the definition is "intended to vest omnibus product safety authority in a single Federal agency" and "is broadly stated to include any article which is produced or distributed for sale to, or for the use, consumption, or enjoyment of a consumer in or around a household or residence, a school, in recreation, or otherwise." (H.R. Rep. No. 92-1153, 92d Cong., 2d Sess. 27)

ADVISORY OPINION

The fact that a product is not sold directly to consumers would not necessarily preclude the Commission from exercising jurisdiction over such product. In this regard, the legislative history of section 3(a)(1) states:

> "It is not necessary that a product be actually sold to a consumer, but only that it be produced or distributed for his use. Thus products which are manufactured for lease and products distributed without charge (for promotional purposes or otherwise) are included within the definition and would be subject to regulation under this bill. Also, products which are primarily or exclusively sold to industrial or institutional buyers would be included within the definition of consumer product so long as they were produced or distributed for use of consumers."

Although the definition of "consumer product" excludes "any article which is not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of a consumer," that exclusion is not a blanket one. The legislative history of the Act explains the exclusion in this manner:

> "It is not intended that true "industrial products" be included within the ambit of the Product Safety Commission's authority. Thus, your committee has specifically excluded products which are not customarily produced or distributed for sale to or use of consumers. The occasional use of industrial products by consumers would not be sufficient to bring the product under the Commission's jurisdiction. The term "customarily" should not be interpreted as intending strict adherence to a quantum test, however. Your committee is aware that some products which were initially produced or sold solely for industrial application have often become broadly used by consumers. If the manufacturer or distributor of an industrial product fosters or facilitates its sale to or use by consumers, the product may lose its claim for exclusion if a significant number of consumers are thereby exposed to hazards associated with the product."

In our opinion any product customarily used by a student in a school situation should be considered a consumer product. The definition of "consumer product" specifically includes schools within the coverage of the Act. Such a specific inclusion indicates to us that the Congress was particularly concerned with the prevention of injuries in the school environment. The student, as the user of the services offered by a school, should be considered a consumer especially entitled to the protections of the Act. Further, a school is a peculiarly public place. Not only is the public invited to the school for school events such as parent-teacher meetings, school plays, concerts, and other programs, but the school also often serves as a meeting place for community events. Such use of the school for the benefit and enjoyment of the public would give the Consumer Product Safety Commission jurisdiction over those products customarily used by the public.

Those products used in a teacher's lounge for breaks and lunches would, it seems, fall within the definition of a "consumer product." The lounge area is provided for the teacher's personal use and enjoyment, rather than for use exclusively within the scope of the teacher's employment. The Consumer Product Safety Commission pursuant to section 31 of the CPSA must forego its jurisdiction over hazardous consumer products if the hazard could be "eliminated or reduced to a sufficient extent" by actions taken under the Occupational Safety and Health Act (OSHA), under which an employer is required to provide a safe and healthy work place. However, since OSHA specifically exempts states and their subdivisions from its coverage, public school teachers do not enjoy the protections of OSHA. Thus, the Consumer Product Safety Commission can act to protect teachers from unsafe and defective consumer products used in the schools.

In the case of a product which is produced primarily for use in a business establishment but some of which will be sold directly to consumers for use in residences, there is no rule of thumb as to where the entire line of the product becomes a "consumer product." As pointed out in the legislative history earlier, the Commission should not adhere strictly to a quantum test.

As a general rule, we believe that the manufacturer of a product has the initial responsibility for determining the distribution and use patterns of its products and to act accordingly. In our opinion, any doubts should be resolved in favor of considering the product to be a "consumer product."

In addition to jurisdictional questions, your letter asks what a manufacturer's responsibilities are under section 15. Section 15(b) of the Act requires that a manufacturer, distributor, and retailer of a consumer product inform the Commission if he obtains information that the product fails to comply with a consumer product safety rule or that the product contains a defect which could create a substantial product hazard. The Commission has promulgated regulations establishing notification requirements to be followed in instances of noncomplying or defective products, a copy of which is enclosed.

In response to your specific question regarding the manufacturer's responsibility when he is unable to trace all of the defective products, I would call particular attention to section 1115.7(23)(c):

> Upon request, the reporting person shall furnish to the Commission a list of the names and addresses of all distributors, retailers and purchasers, including consumers, to the extent known to the reporting party. (emphasis added)

Further, the House Committee Report, in discussing the Commission's authority to require manufacturers, distributors, and retailers to mail notice to customers who are known to them, indicates that the notification is limited to "customers of whom they have actual knowledge. Thus, the Commission would not have authority to require a manufacturer to comb the files of its retailers to learn the names of customers who have purchaed the product."

However, it should be noted that section 15(c) of the Act allows the Commission to require a manufacturer, distributor or retailer to give public notice of a substantial product hazard if the Commission determines that such notification is necessary to adequately protect the public. For instance, the Commission could require that notices be posted where the products are sold or used, that announcements be placed in publications where users of the product would be likely to see them, or that television and radio advertising time be purchased to alert consumers to a hazard. The Commission is mandated by Congress to protect the public from hazardous products. Part of that protection consists of seeing that the public is adequately alerted to such hazards.

Your final question raises both jurisdictional and liability issues. As noted earlier, those articles which are not "customarily

produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer" are excluded from the definition of a consumer product. In determining whether a product is covered by the Act, a manufacturer should look not only at whether his product is customarily distributed for sale to consumers, but also at whether his product is customarily distributed for use by consumers. If the answer to both questions is in the negative, then the product would not fall within the definition of a consumer product.

Regarding the liability of a manufacturer who fails to comply with an applicable consumer product safety rule, section 20 of the Act subjects someone who knowingly violates a standard to a fine of up to $2,000 for each violation. Each noncomplying consumer product involved will constitute a separate violation, the maximum penalty for any multiple penalties being $500,000. Further, an individual may be fined up to $50,000 and/or imprisoned for up to one year, if, after having received notice of noncompliance from the Commission, the individual knowingly and willfully fails to conform to an applicable safety standard. Similar sanctions apply to any director, officer, or agent of a corporation who knowingly and willfully authorizes, orders, or performs action which constitutes a violation of a safety standard, if the individual has knowledge of notice of noncompliance received by the corporation from the Commission.

In addition to the civil and criminal penalties, the manufacturer would be subject to injunctions restraining the manufacture or distribution of the noncomplying product as well as to seizure of the product if it has been introduced into commerce.

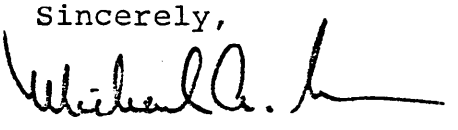
Under the Act, any person injured because of the manufacturer's knowing noncompliance with the consumer product safety standard will have access to the federal courts in a suit for damages involving more than $10,000. An injured person's rights at common law or under State statutory law are not affected by the Act.

In the situation in which a manufacturer sells 90% of his tables for business use and 10% directly to individual consumers, the Consumer Product Safety Commission would more than likely consider it had jurisdiction. The fact that such a significant amount of the product line is sold directly to

consumers would indicate that the entire line is customarily produced or distributed for sale to or use of consumers. If the manufacturer decided to separate the two lines, having one for sale to consumers and the other for sale to businesses, the consumer line would clearly fall within the jurisdiction of the Consumer Product Safety Commission. Whether the tables sold to businesses would fall within the Commission's jurisdiction would depend upon the use and distribution patterns for the tables.

I hope the above information will be useful to you in determining your client's responsibility under the Consumer Product Safety Act. Please let me know if I may be of further assistance.

Sincerely,



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Enclosure

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July 11, 1974

Mr. Allan H. Schoem
Office of the General Counsel
Consumer Product Safety Commission
Washington, D.C. 20207

Dear Mr. Schoem:

Enclosed are questions in hypothetical form concerning the coverage of the Consumer Product Safety Act. While I realize that some of these questions are not conducive to definitive answers I hope that you will be able to give me some guidance as to the scope and applicability of the Consumer Product Safety Act to a manufacturer whose primary product is institutional and business furniture.

Sincerely,

VARNUM, RIDDERING, WIERENGO & CHRISTENSON

Thomas G. Demling

Thomas G. Demling

TGD/cs

Enclosure

QUESTIONS

1. A manufacturer supplies tables and chairs to a school. The school puts them to several uses:

   a. in the principal's office
   b. for secretaries' work areas
   c. for teachers' desks
   d. in teachers' lounge for breaks and lunch
   e. in library for student use
   f. in students' cafeteria

Given all these uses, is all, some, or none of the furniture a "consumer product" under the Commission's jurisdiction:

2. Section 3 (a)(1)(ii) defines a consumer product as one "for the personal use . . . . of a consumer . . . . in recreation . . . ." A manufacturer furnishes tables and chairs for use in a factory's cafeteria and break areas. Are these articles within the definition of "consumer product"?

3. A manufacturer sells bookcases and filing cabinets. What is the impact of the Act in the following situations:

   a. The articles are produced primarily for use in a business establishment. The manufacturer is aware, however, that some of the articles will be sold directly to consumers for use in residences. Is there a rule of thumb as to at what point the entire line of furniture is a "consumer product"?

   b. The articles are produced solely for business use but it is possible that some of the products may ultimately end up in a residence.

   c. The manufacturer in b. finds that some of his chairs have a defect. He notifies his business customers but is aware of a possibility that some of these chairs may have come to rest in a consumer's home. It is impossible to trace all of these chairs. What is the manufacturer's responsibility under the Act (specifically Section 15)?

4. A safety standard is promulgated on "Tables, non-glass". A manufacturer of such tables determines that to follow the standard will involve expensive modifications. What is his exposure to liability <u>under the Act</u> if he opts <u>not</u> to comply with the standards in the following situations?

a. He sells his tables solely for business use but is aware that some <u>may</u> come to rest in a consumer's home.

b. He sells 90% of his tables for business use and 10% directly to indivdual consumers. (I am not trying to play a numbers game but rather to determine how to advise a manufacturer in order to enable him to make an informed judgment in light of his exposure under the Act and the expense involved in compliance).

c. The manufacturer in a. does not comply with the standard and one of his tables does come to rest in a residence, and the consumer is injured by a feature of the desk which the standard modified.