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6(b) CLEARED: 6/4/84
___ No Mfrs Identified
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___ Comments Processed
Not CPSC Juried.

Leighton Kim Oshima, Esq.
Deputy Attorney General
State of Hawaii
State Capitol, 4th Floor
Honolulu, Hawaii 96813

Dear Mr. Oshima:

This is in reference to your letter of October 21, 1974, requesting clarification of my letter of October 9, 1974, regarding jurisdiction over fireworks used at public displays.

Your first question requests a clarification of the distinction made between regulation of the product itself and regulation of the use of that product. Although it may appear contradictory, my statement in the letter is correct that the Federal Hazardous Substances Act regulates products and not uses. If a product is declared to be a "banned hazardous substance," only such of those products which are intended or suitable for use in the household actually become banned since, aside from toys and other children's articles, only household products come under the Act. Although the use of a product is not regulated, it is necessary to look at the use as one of the factors in determining whether a specific lot or quantity of the product is a household product and therefore banned. Even if it is determined that a specific lot is intended for use in the household, and is therefore banned, the use of such product in or around the household is not prohibited under section 4 of the Act. Accordingly, your conclusion that "the most hazardous fireworks device or firecracker could be exempt from the proposed regulation if it is only used at legitimate public displays" is correct. An example of this would be a situation where class B fireworks, such as M-80's, are distributed for public display

ADVISORY OPINION

purposes. In such a case we would not be able to enforce the regulation as to these specific items. However, if a particular shipment of M-30's were to be made for ultimate use or storage around households, this particular shipment would be banned and the regulation could be enforced.

Your second question is whether section 191.1(c) as referred to in the letters attached to my October 9 letter should now be referred to as 16 CFR 1500.3(c)(10)(i). Section 191.1(c), correctly cited as 21 CFR 191.1(c), is a citation to a regulation the Food and Drug Administration. After functions under the Federal Hazardous Substances Act were transferred to the Consumer Product Safety Commission, the Commission transferred the regulation to Title 16 and the present regulation cited as 16 CFR 1500.3(c)(10)(i) is merely a recodification of 21 CFR 191.1(c).

Regarding your third request, our only knowledge of the specific and official capacities of Mr. O'Keefe and Mr. Clark within the Food and Drug Administration at the time the letters were written is the title of these individuals under the signature. For further information concerning this I suggest that you contact the Food and Drug Administration directly. Clearer copies of the June 11, 1962, and November 14, 1961, letters are enclosed.

I apologize for any inconvenience the poor copies and lack of clarity my earlier opinion may have caused you.

Sincerely,

Original signed by
Michael A. Brown

Michael A. Brown
General Counsel

Enclosures

DSLemberg:mli:11/11/74

cc: Executive Director
Office of the Secretary
Bureau of Compliance
Office of Standards Coordination and Appraisal
Office of Field Coordination
DSLemberg
GC Files
GC CHron
GC Reading

Commissioners

ADVISORY OPINION

COPY

ATLANTA DISTRICT

June 11, 1962

Division of Case Control

(Mfr) J W Harris Co
Cincinnati Ohio (AF 4-775)

63-910 T
Southern Specialty Liquid
Soldering Flux

(Dir) Southern Specialty Mfg Co
Miami Fla

SEIZURE DISAPPROVED - PA

After consulting with the Office of the Commissioner, it has been decided that jurisdiction has not been established in the case of the lot represented by this sample.

It is not our intention of assuming jurisdiction over industrial chemicals simply on the basis of a chance that the ordinary individual may be able to seek these materials out at industrial suppliers and purchase them for household use. We believe in order to establish jurisdiction that it is necessary to show that the material is customarily and knowingly offered for sale to the consuming public for household use through normal channels of distribution such as retail hardwares, auto stores and comparable outlets.

We are therefore abating the number without seizure and suggest no further follow-up by you on this number.

Harold F. O'Keefe

AF 24-806

November 14, 1961

Mr. A. Lieberman
Assistant Secretary
West Chemical Products Inc.
46-16 West Street
Long Island City 1, New York

Dear Mr. Lieberman:

With reference to your visit to our office on November 2 and to your letter of November 3, 1961, we have the following comment.

On the basis of the representations made in this conference and the letter we do not believe that your products for industrial and institutuional use fall under the provisions of the Federal Hazardous Substances Labeling Act. Implementing regulations under this statute indicate that industrial supplies which might through some devious route enter a household are not considered to be containers intended or suitable for household use. We have therefore no objection to the labeling of products "For industrial and institutional use only," although that caption in itself would, as we stated, not necessarily exempt the product from the provisions of the Federal Hazardous Substances Labeling Act.

Sincerely yours,

Franklin D. Clark
Assistant to the Deputy Commissioner

cc: DAO

FDClark/las
11/14/61

R/D Init: DCM 11/14/61

ADDRESS REPLY TO
THE ATTORNEY GENERAL OF HAWAII
AND REFER TO
INITIALS AND NUMBER

LKO:dsk

157

CABLE ADDRESS:
ATTGEN

GEORGE PAI
ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
STATE CAPITOL
4TH FLOOR
HONOLULU, HAWAII 96813

October 21, 1974

Mr. Michael A. Brown
General Counsel
U.S. Consumer Product
Safety Commission
Washington, D.C. 20207

Dear Mr. Brown:

Thank you very much for your response to my inquiry concerning the usage of fireworks at legitimate public displays. I wish to make these additional comments and requests to you.

1. I discern an inherent contradiction in the following statements you have made:

   "The Federal Hazardous Substances Act actually regulates products themselves and not the uses of such products."

   ". . . if a firework device is manufactured, distributed and sold for such non-household uses as mentioned in your letter, it will be considered outside of the scope of the Federal Hazardous Substances Act."

By the statutory definition and earlier letters of interpretation by FOA employees, it appears in fact that the use of the product and not the product itself is pivotal and determines the applicability

or jurisdiction of the Federal Hazardous Substances Act. Therefore, the most hazardous fireworks device or firecracker could be exempt from the proposed regulation if it is only used at legitimate public displays. Is this a correct conclusion?

2. Throughout the letters of interpretation, reference is made to 191.1(c) of the implementing regulations which purportedly clarifies the significant distinction between industrial, commercial and household uses. Query: Is the present codification of Section 191.1(c), 16 C.F.R. 1500 3(c)(10)(i)?

3. Could I receive clearer copies of the letters of interpretation dated June 11, 1962 by Harold F. O'Keefe, Division of Case Control, and November 14, 1961 by Franklin D. Clark, Assistant to the Deputy Commissioner. Also, could the specific and official capacities of these two individuals within the Food and Drug Administration at the time these letters were written be identified?

Again, thank you for your time and attention on this matter.

Very truly yours,

Leighton Kim Oshima
Deputy Attorney General