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U.S. CONSUMER PRODUCT SAFETY COMMISSION

WASHINGTON, D.C. 20207

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CONSUMER PRODUCT SAFETY COMMISSION

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RECEIVED OFFICE OF

Dean W. Ward, CSP
Manager, Loss Control Department
Alexander & Alexander of Texas, Inc.
34th Floor, 2001 Bryan Tower
Dallas, Texas 75201

Dear Mr. Ward:

This is in response to your January 10, 1975 letter requesting an interpretation of whether a "mini-bike" is subject to the Consumer Product Safety Act (CPSA) (copy enclosed).

Mini-bikes meet the threshold definition of "consumer product" because they are articles produced and distributed for the use and enjoyment of consumers "...in or around a permanent or temporary household or residence, a school, in recreation, or otherwise..." (CPSA, section 3(a)(1)). However, an exclusion from this definition which could apply to mini-bikes is the one stating that the term consumer product does not include "motor vehicles or motor vehicle equipment (as defined by sections 102(3) and (4) of the National Traffic and Motor Vehicle Safety Act of 1966)" (CPSA, section 3(a)(1)(C)).

Section 102(3) of the referenced 1966 Act (15 U.S.C. 1391 et seq.) defines "motor vehicle" as "any vehicle driven or drawn by mechanical power manufactured primarily for use on the public streets, roads, and highways..." This definition has been interpreted by the National Highway Traffic Safety Administration (NHTSA) which administers the Act. In a September 30, 1969 interpretation of its jurisdiction over mini-bikes (34 FR 15416, October 3, 1969), the NHTSA reiterated and expanded upon its earlier view (34 FR 1909, February 8, 1969) that "[i]n the absence of clear evidence that as a

ADVISORY OPINION

practical matter a vehicle is not being, or will not be, used on the public streets, roads, or highways the operating capability of a vehicle is the most relevant fact in determining whether or not that vehicle is a motor vehicle under the Act..." This September 30 document further explains that other factors will be considered when the "operating capability" test does not provide a clear result: "Perhaps the most important of these [factors] is whether state and local laws permit the vehicle in question to be used and registered for use on public highways. The nature of the manufacturer's promotional and marketing activities is also evidence of the use for which the vehicle is manufactured." (The September 30 document discusses these factors in greater detail; copies of it and the February 8 document are enclosed with this letter.) The conclusion of the NHTSA Administrator is that "...for the most part, mini-bikes should not be considered motor vehicles under the [criteria discussed]." In addition, the September 30 document makes the following important procedural point:

> In the first instance, each manufacturer must decide whether his vehicles are manufactured primarily for use on the public streets, roads, and highways. His decision cannot be conclusive, however. Under the law, the authority to determine whether vehicles are subject to the provisions of the National Traffic and Motor Vehicle Safety Act is vested in the Secretary [of Transportation].

The Consumer Product Safety Commission (CPSC), in interpreting the motor vehicle exclusion from the category of consumer products, gives great weight to the NHTSA interpretation of the motor vehicle definition which appears in the 1966 Act. As that definition applies to mini-bikes, we concur with the view that jurisdiction is affected by such factors as the operating capability of the vehicle, the applicability of state and local laws to it, and the nature of any marketing and promotional activities made on behalf of the vehicle. Because these factors imply that a factual determination would be necessary, we cannot give a conclusive response to your jurisdictional question about mini-bikes. As a general matter, this Commission will exercise jurisdiction over any mini-bike found by NHTSA to be outside the definition of motor vehicle which is set forth in the 1966 Act. Further,

we would exercise jurisdiction over any other mini-bike which we find not to be excluded from the CPSA definition of consumer product. While this policy may present a theoretical conflict with the NHTSA's jurisdiction, we anticipate that no conflict will ever arise. In that respect, we have worked and will continue to work closely with the NHTSA on jurisdictional matters. Ultimate protection of the consumer takes precedence over narrow jurisdictional disputes. In addition, we plan to consider our jurisdiction over mini-bikes in the general context described by the NHTSA's September 30 document.

We trust that this is responsive to your request.

Sincerely,

Michael A. Brown
General Counsel

Enclosure

Copy furnished:
NHTSA, 400 7th St., SW, Washington, D. C. 20590
Mr. Richard B. Dyson, Assistant Chief Counsel

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Alexander & Alexander

January 10, 1975

RECEIVED
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Consumer Product Safety Commission
Office of the General Counsel

Consumer Products Safety Commission
1750 K Street
Washington, D. C. 20207

Attention: Office of the General Counsel
Mr. Michael A. Brown,
General Counsel

Dear Mr. Brown:

Would you please give me an official interpretation of whether or not the following product is subject to the Consumer Product Safety Act, Public Law 92-573.

The product is a "mini-bike" - it can otherwise be described as a small-wheeled motorcycle. Some of them are equipped with lights, etc. and are suitable for licensing, while a majority of them are "stripped" models, designed to be used off the streets and not licensed.

It would seem to me that the "stripped" model would definitely be under the CPS Act while the "street" model could be under the Act but would be under DOT. May I have your interpretation on this matter?

Assuming that the product does fall under the Act, I would like your interpretation or opinion as to whether the manufacturer himself needs to maintain records that will enable him to recall any model or series of models from the serial numbers direct from the consumer. Or, whether the retailer is responsible for maintaining the records of who purchased the mini-bikes. It is the retailer who will be selling the products (delivered to him by the manufacturer) to the consumer. The manufacturer will sell only to the retailer and will have records indicating when and where each specific model was delivered to the retailer.

Any guidelines that you may have would be greatly appreciated, along with your interpretations.

Sincerely,

Dean W. Ward

Dean W. Ward, CSP
Manager, Loss Control Dept.

DWW/bp

PART 371—FEDERAL MOTOR VEHICLE SAFETY STANDARDS

Appendix A—Interpretations

MINI-BIKES

American Honda Motor Co., Inc., has asked for a determination whether its "Honda Mini-Trail" and other similar motor-driven cycles ("mini-bikes") are "motor vehicles" within the meaning of section 102(3) of the National Traffic and Motor Vehicle Safety Act of 1966.

Section 102(3) defines a motor vehicle as a vehicle "manufactured primarily for use on the public streets, roads, and highways." Honda states, both in its petition and its sales literature, that the mini-bike is a recreational vehicle designed for private property or backyard usage, and is not a vehicle manufactured for use on the public roads. Honda further states that mini-bikes would be legally barred from the public roads of most States since they are not equipped with lights, batteries, or generating systems.

In the absence of clear evidence that as a practical matter a vehicle is not being, or will not be, used on the public streets, roads, or highways the operating capability of a vehicle is the most relevant fact in determining whether or not that vehicle is a motor vehicle under the Act, and what category of vehicle it is under the standards. Thus, if it is initially determined that a vehicle is designed so that it is physically capable (either as offered for sale or without major additions or modifications) of being operated on the public streets, roads, or highways, the vehicle will be considered as having been "manufactured primarily for use on the public streets, roads, and highways". To overcome the conclusion reached by an examination of the operating capability a manufacturer would need to show substantially more than that it has advertised the vehicle as a recreational or private property vehicle or that its use on a public roadway, as manufactured and sold, would be illegal. Thus for example, if a vehicle was manufactured that was substantially identical to the typical present day, six-passenger sedan but was advertised for farm and other private property usage, and was manufactured without any lighting equipment, the vehicle would be presumed to be a motor vehicle, since it clearly would be fully capable of being operated on the public streets, roads, and highways. To overcome this presumption, the manufacturer would have to show that there were reasons why as a practical matter the vehicle would not in fact be operated on the public streets, roads, and highways. The logic of this approach is clear since once a vehicle is introduced on the public streets, roads, and highways it is, if not properly equipped, a safety hazard. Therefore, a manufacturer who produces a vehicle that is designed to be capable of that use cannot be permitted to avoid compliance with the safety standards through advertising that states a contrary intention or by making the vehicle physically capable of, although technically ineligible for, that use.

The Administrator concludes therefore that mini-bikes are "motor vehicles" within the meaning of section 102(3) of the Act, and specifically "motorcycles" or "motor-driven cycles" within the meaning of 49 CFR 371.3(b) (formerly 23 CFR 255.3(b)).

Issued on February 4, 1969.

JOHN R. JAMESON,
Deputy Federal Highway Administrator.

[F.R. Doc. 69-1676; Filed, Feb. 7, 1969; 8:51 a.m.]

Title 49—TRANSPORTATION

Chapter III—Federal Highway Administration, Department of Transportation

SUBCHAPTER A—MOTOR VEHICLE SAFETY REGULATIONS

[Docket No. 69-10]

PART 371—FEDERAL MOTOR VEHICLE SAFETY STANDARDS

Appendix A—Interpretations

MINI-BIKES

A number of persons have asked the Federal Highway Administrator to reconsider his February 4, 1969, interpretation of the National Traffic and Motor Vehicle Safety Act of 1966 concerning mini-bikes (34 F.R. 1909). In that interpretation, the Administrator concluded that mini-bikes are "motor vehicles" within the meaning of section 102(3) of the Act, and are regarded as "motorcycles" or "motor-driven cycles" under the Federal Highway Administration regulations (34 F.R. 1909). Under those regulations, motorcycles, and motor-driven cycles must conform to Motor Vehicle Safety Standard No. 108, which imposes performance requirements relating to lamps, reflective devices, and associated equipment.

The primary basis for the conclusion of the February 4 interpretation, as stated therein, was that "[i]n the absence of clear evidence that as a practical matter a vehicle is not being, or will not be, used on the public streets, roads, or highways the operating capability of a vehicle is the most relevant fact in determining whether or not that vehicle is a motor vehicle under the Act * * *" It was stated that if examination of a vehicle's operating capability revealed that the vehicle is "physically capable (either as offered for sale or without major additions or modifications) of being operated on the public streets, roads, or highways, the vehicle will be considered as having been 'manufactured primarily for use on the public streets, roads, and highways'." It was also stated that a manufacurer would need to show substantially more than that it has advertised a vehicle as a recreational or private property vehicle or that use of the vehicle on a public roadway, as manufactured and sold, would be illegal in order to overcome a conclusion based on examination of the vehicle's operating capability.

Petitioners have urged the Administrator to abandon the operating capability test. They have argued that many vehicular types, such as self-propelled riding mowers, have an "operating capability" for use on the public roads and yet are obviously outside the class of vehicles which Congress subjected to safety regulation. True as that may be, the Administrator has decided to adhere to the view that the operating capability of a vehicle is an important criterion in determining whether it is a "motor vehicle" within the meaning of the statute. As the above-quoted portion of the February 4, 1969, interpretation states, however, the operating capability test is not reached if there is "clear evidence that as a practical matter the vehicle is not being used on the public streets, roads, or highways." In the case of self-propelled riding mowers, golf carts, and many other similar self-propelled vehicles, such clear evidence exists.

It is clear from the definition of "motor vehicle" in section 102(3) of the Act[1] that the purpose for which a vehicle is

[1] "'Motor vehicle' means any vehicle driven or drawn by mechanical power manufactured primarily for use on the public streets, roads, and highways, except any vehicle operated exclusively on a rail or rails." 15 U.S.C. 1391(3).

manufactured is a basic factor in determining whether it was "manufactured primarily for use on the public streets, roads, and highways." However, this does not mean that the proper classification of a particular vehicle is wholly dependent on the manufacturer's subjective state of mind. Instead, the Administrator intends to invoke the familiar principle that the purpose for which an act, such as the production of a vehicle, is undertaken may be discerned from the actor's conduct in the light of the surrounding circumstances. Thus, if a vehicle is operationally capable of being used on public thoroughfares, and if in fact, a substantial proportion of the consuming public actually uses in that way, it is a "motor vehicle" without regard to the manufacturer's intent, however manifested. In such a case, it would be incumbent upon a manufacturer of such a vehicle either to alter the vehicle's design, configuration, and equipment to render it unsuitable for on-road use or, by compliance with applicable motor vehicle safety standards, to render the vehicle safe for use on public streets, roads, and highways.

In borderline cases, other factors must also be considered. Perhaps the most important of these is whether state and local laws permit the vehicle in question to be used and registered for use on public highways. The nature of the manufacturer's promotional and marketing activities is also evidence of the use for which the vehicle is manufactured. Some relevant aspects of those activities are: (1) Whether the vehicle is advertised for on-road use or whether the manufacturer represents to the public that the vehicle is not for use on public roads; (2) whether the vehicle is sold through retail outlets that also deal in conventional motor vehicles; and (3) whether the manufacturer affixes a label warning owners of the vehicle not to use it for travel over public roads.

In the first instance, each manufacturer must decide whether his vehicles are manufactured primarily for use on the public streets, roads, and highways. His decision cannot be conclusive, however. Under the law, the authority to determine whether vehicles are subject to the provisions of the National Traffic and Motor Vehicle Safety Act is vested in the Secretary. As delegee of the Secretary, the Administrator will exercise that power in the light of all of the relevant facts and circumstances (including the manufacturer's declaration of his intent) with the objective of reducing the toll of injuries and deaths on the public highways.

Analysis of the available data about mini-bikes, including the contents of petitions for reconsideration of the February 4, 1969, interpretation, has convinced the Administrator that, for the most part, mini-bikes should not be considered motor vehicles under the above criteria. Mini-bikes do have an operating capability for use on public roads. It now appears that incidents of their actual operation on public streets, roads, and highways, while undoubtedly extant, are comparatively rare. What is more important, their use and registration for use on public thoroughfares is precluded by the laws of virtually every jurisdiction, unless the mini-bike is equipped with lamps, reflective devices, and associated equipment of the sort that Safety Standard No. 108 requires. Most manufacturers of mini-bikes do not advertise or otherwise promote them as being suitable for use on public roads, and some actually attach a label to their vehicles, warning against on-road use. Those manufacturers do not furnish retail purchasers with the documentation needed to register, title, and license the vehicles for use on public roads under the relevant state laws. Finally, mini-bikes are commonly sold to the public through retail outlets that are not licensed dealers in motor vehicles.

Accordingly, so long as the great majority of the States do not permit the registration of mini-bikes for use on the public highways and streets and until such time as there is clear evidence that mini-bikes are being used on public streets to a significant extent, the Administrator is of the view that, at a minimum, persons who manufacture mini-bikes are not manufacturers of "motor vehicles" within the meaning of the National Traffic and Motor Vehicle Safety Act of 1966 if they (1) do not equip them with devices and accessories that render them lawful for use and registration for use on public highways under State and local laws; (2) do not otherwise participate or assist in making the vehicles lawful for operation on public roads (as by furnishing certificates of origin or other title documents, unless those documents contain a statement that the vehicles were not manufactured for use on public streets, roads, or highways); (3) do not advertise or promote them as vehicles suitable for use on public roads; (4) do not generally market them through retail dealers in motor vehicles; and (5) affix to the mini-bikes a notice stating in substance that the vehicles were not manufactured for use on public streets, roads, or highways and warning operators against such use. Cases of manufacturers who fulfill some, but not all, of the above criteria will be dealt with individually under those criteria and such others as may be relevant.

A manufacturer of mini-bikes is, of course, at liberty to design and construct his products so that they conform to the provisions of the motor vehicle safety standards that are applicable to motorcycles and thereby to manufacture motor vehicles within the meaning of the National Traffic and Motor Vehicle Safety Act.

In consideration of the foregoing, the petitions for reconsideration of the February 4, 1969, interpretation relating to mini-bikes are granted to the extent set forth above, and that interpretation is withdrawn.

(Secs. 103 and 119, National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. 1392, 1407, and 49 CFR 1.4(c))

Issued on September 30, 1969.

F. C. TURNER,
Federal Highway Administrator.

[F.R. Doc. 69-11813; Filed, Oct. 2, 1969; 8:46 a.m.]