U.S. CONSUMER PRODUCT SAFETY COMMISSION

WASHINGTON, D.C. 20207

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APR 21 1975

Thomas S. Carles
Gutkin and Miller, P.A.
225 Millburn Avenue
Millburn, New Jersey 07041

Re: Your file No. 1467

Dear Mr. Carles:

This is in response to your letter of February 10, 1975 requesting an advisory opinion as to the Commission's jurisdiction under the Consumer Product Safety Act (CPSA) over wheat grinding wheels. You also ask whether warning labels are required by the CPSA and whether the products your client manufactures would be subject to regulation by any other agency.

The Consumer Product Safety Commission has broad regulatory authority over consumer products. Section 3(a) of the CPSA (a copy is enclosed) defines "consumer product" 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. (emphasis added)

Although section 3(a)(1)(A) of the Act expressly excludes from the definition of consumer product, "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 qualified in the legislative history of the Act:

> "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 tests, 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. <u>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."</u> (emphasis added) H.R. Rep. 1153, 92d Cong., 2d Sess. 27 (1972).

It is our opinion that the manufacturer has the initial responsibility for determining the distribution and use patterns of his product. Any doubts should be resolved in favor of considering the product to be a "consumer product." The use pattern which you describe in your letter indicates that some grinding wheels are sold as a component of a consumer product. Therefore, we could conclude that the wheat grinding wheel is subject to regulation under the CPSA.

Excluded from the definition of consumer product in section 3(a)(1) of the CPSA are several categories of products, including "food," as that term is defined in section 201(f) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 201 et seq. Under that Act, "food additives" include any substance intended for use in producing, manufacturing, packing, processing, preparing, treating, packaging, transporting or holding food and which may reasonably be expected to result, directly or indirectly, in its becoming a component of or otherwise affecting the characteristics of any food. Since food additives are "food" within the meaning of the Federal Food, Drug, and Cosmetic Act, food grinders and their grinding wheels may be considered "food" insofar as they consist of substances which can migrate into or otherwise affect the characteristics of food. Thus, to the extent that any hazard from grinding wheels is caused by migration of particles into food, the product may be subject to regulation by the Food and Drug Administration (FDA).

It is our opinion, however, that the language of section 3(a)(1) of the CPSA does not preclude the Commission from exercising jurisdiction, insofar as other safety hazards are concerned, over consumer products which may be subject to regulation to a limited extent by the FDA.

Accordingly, should your client discover that one of its consumer products contains a defect which could create a "substantial product hazard," as defined in section 15(b) of the CPSA, and the regulations promulgated thereunder (16 CFR 1115), your client must immediately report that defect to the CPSC Office of Product Defect Identification.

In addition to regulation by the Commission and possibly the FDA, your client may be affected by the provisions of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651.

Please note that this opinion reflects the most current interpretation of the law by the Office of the General Counsel, but could subsequently be changed or superseded by the Commission. Thank you for your interest in the Consumer Product Safety Commission.

Sincerely,

Original signed by
Michael A. Brown

Michael A. Brown
General Counsel

Enclosure

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SYDNEY A. GUTKIN
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February 10, 1975

Michael Brown, Esq.
General Counsel
Consumer Products Safety Commission
1750 K Street
Washington, D.C. 20207

Re: Advisory Opinion
Our File No. 1467

Dear Mr. Brown:

We are writing at the suggestion of the New York Regional Office of the Consumer Products Safety Commission for the purpose of obtaining an advisory opinion as to the jurisdiction of the Consumer Products Safety Act based on the factual situation described below.

Our client manufacturers industrial grinding wheels. These are used in lieu of blades to cut valuable materials because much less waste is involved. Most of these products are sold for industrial and construction trade use. A very small part of the client's business results from the sale of "wheat grinding wheels". The latter are sold to manufacturers of portable grinding mills which are in turn sold to consumers for use in their homes. Apparently, there is a small but consistent market for this product in the mid-west among certain groups who insist on eating bread made from their own ground wheat.

Our client further advises us that it is possible that a small amount of aluminum oxide particulate ($AL_2 O_3$) may be produced through the use of this grinding wheel. Generally, this will only occur as a result of the improper manufacture of the grinding mill and the improper installation of the "wheat grinding wheel" therein.

Our client has no evidence of any hazard involved in the ingestion of this particulate matter. In fact, we have been advised that aluminum oxide is an inert substance classified as a nuisance dust. We have no knowledge of any injuries or lawsuits, pending or threatened, with respect to this issue.

We have, however, been advised that some sort of warning may be required with respect to the possibility that this particulate matter might be either inhaled or ingested along with the ground wheat.

Michael Brown, Esq.

We would greatly appreciate your advising us of the applicability of the Consumer Products Safety Act in this situation. If a warning notice is required, should it be given to the manufacturer of the mill, the consumer, or both. Lastly, would you please advise us of any overlapping jurisdiction which might exist vis-a-vis any other regulatory agency of which you are aware.

Thank you very much for your cooperation.

Yours very truly,

GUTKIN and MILLER, P.A.

By: Thomas S. Carles

TSC:b