UNITED STATES GOVERNMENT

Memorandum

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

DATE: JAN 2 1976

TO: Stan Morrow, SCAV

FROM: Alan H. Schoem, OGC

THRU: Margaret A. Freeston, Assistant General Counsel

SUBJECT: Jurisdiction Over Gang Or Public Showers

The attached memorandum was prepared by a law clerk in our office. I believe it is responsive to your inquiry.

Attachment

#232

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#232

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Memorandum

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

TO : Alan Schoem, OGC

DATE: JAN 2 6 1976

FROM : Sherry Kinland, OGC
SK

SUBJECT: Jurisdiction Over Gang or Public Showers

The jurisdictional question raised in the letter dated November 17, 1975 from R.P. Gaughan, Chairman of Committee F 15.03, ANSI, would seem to involve two types of showering facilities, individual bath or shower facilities, and multi-person shower or tub facilities. The controlling provision of the CPSA is section 3(a)(1), which defines "consumer product" as "any article or component part thereof, produced or distributed (1) 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 or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise...."

This definition would seem to cover individual bathtub or shower facilities in such public places as hotels (a temporary residence), schools, and gyms (in recreation). What remains unclear is whether such facilities in an occupational setting would be within the scope of the definition of consumer product.

The Senate Commerce Committee Report states that the phrase

> " ' personal use, consumption or enjoyment' is intended to differentiate the consumer product from the 'industrial product' personally used... /although/ such /a/ product might be excluded if it were subject to safety regulations under the Occupational Safety and Health Act of 1970. To the extent that action is taken against a 'consumer product' which is used 'in or around a household or residence' and also in a factory, the risk evaluation for that product would be made in terms of its use in or around a residence and not its use in the factory. (S. Rep. 749, 92d Cong. 2d Sess. 12 (1972).

ADVISORY OPINION

Under this interpretation, then, it would seem that CPSC could regulate industrial showers which are the same as those used in the household, provided OSHA could not reduce or eliminate a risk of injury associated with them. A distinction between the Senate passed bill and the final enactment must be noted in this connection. The Senate bill explicitly excluded from the definition of consumer product those products subject to OSHA safety regulations. The enacted version includes section 31, which denies CPSC the authority to regulate any risk of injury associated with a consumer product if such risk could be eliminated or reduced to a sufficient extent by actions taken under OSHA of 1970. Thus, as enacted, the relevant provisions would seem to exclude CPSC regulation not of all consumer products having occupational uses, but only of those associated risks which could be adequately regulated by OSHA. This provision would seem to give latitude as broad as that stated in the Senate Commerce Committee Report to regulate an industrial consumer product.

The House Committee Report noted that it is unnecessary that the product be actually sold to a consumer, only that it be produced or distributed for his use; products primarily or exclusively sold to industrial or institutional buyers would be included, so long as produced or distributed for use of consumers. The House Committee Report states that "true industrial products" - those not customarily produced or distributed for sale to or use of consumers, were not intended to be within the Commission's jurisdiction under the CPSA. The occasional use of industrial products by consumers would not be sufficient to bring the product under the Commission's jurisdiction. A bathing facility in an industrial setting, which does not differ from one used in a residential, recreational or school setting, would not be excluded from the Commission's jurisdiction under CPSA as a "true industrial product" following this line of reasoning. (H.R. Rep. 1153, 92d Cong. 2d Sess. 27 (1972).

The next question is whether multi-person tubs or showers ("gang showers") would be consumer products.

An initial problem with such a facility is that it is constructed on site. Whether such on-site construction would be covered under the section 3(a)(1) requirement of "produced or distributed" is unclear. In general, CPSC lacks authority to set a consumer product standard covering the installation of a consumer product, unless installation is part of the manufacture of the product and is one or more of the types of requirements listed in section 7(a)(1) of the CPSA. It could be argued that installation is an integral part of the manufacture of a gang shower, since it is constructed on site.

In any event, section 3(a)(1) does cover component parts, so it would seem possible under the Act to at least regulate individual components, such as the flooring, hand grips, shower heads, and the like if they present an unreasonable risk of injury.