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U. S. CONSUMER PRODUCT SAFETY COMMISSION

WASHINGTON, D. C. 20207

February 5, 1985

OFFICE OF THE
GENERAL COUNSEL

James J. Kriva, Esq.
Kasdorf, Dall, Lewis & Swietlik, S.C.
1551 South 108th Street
Milwaukee, Wisconsin 53214

Dear Mr. Kriva:

This is in response to your letter of January 3, 1985, to Alan Schoem of this office concerning whether a particular brand of **infra-red** heat lamp is a **consumer** product subject to the jurisdiction of the **Commission**.

The term "**consumer** product" is defined in section 3(a)(1) of the **Consumer** Product Safety Act, 15 U.S.C. § 2052(a)(1), and does not include "any article which is not **customarily** produced or distributed for sale to, or use or consumption by, or **enjoyment** of, a **consumer**." 15 U.S.C. § 2052(a)(1)(A). The legislative history of this section indicates that products that are not used **more** than occasionally by **consumers** are not **consumer** products. H.R. Rep. No. 1153, 92d Cong., 2d Sess. 27 (1972). In general, we have established no specific criteria to determine whether consumers use a product **more** than occasionally. Instead, we review all **available** information relevant to a particular determination.

Based on the **information** supplied in your letter, we would **conclude**, at least preliminarily, that the subject heat **lamp** is a consumer product.. The product's packaging shows illustrations of a **woman** warming her upper back and shoulders with a **lamp**; also, a **woman** dressed like a housewife is shown with a **lamp** near what appears to be a **home-type** freezer or refrigerator. Further, the packaging refers to "many farm and **home** uses" and states precautions for "when using for personal, household, or family."

Your letter also states that the heat **lamp** is sold "through hardware stores, department stores, and household and farm retail sales outlets throughout the United States." The price of the product is well within the reach of **consumers**.

6(b) CLEARED: 2/5/85

- No Mfrs Identified
 - Excepted
 - Mfrs Notified
 - Comments Prepared
- pm*

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Considering these factors together, we conclude that these heat lamps are consumer products. However, the controlling considerations are the actual use and distribution patterns for this model product. If data showing different use and distribution patterns become available, our determination could change.

Two other factors are worthy of note. First, if this product were deemed a (medical) 'device' as that term is defined at 21 U.S.C. § 321(h), it would be excluded from the definition of consumer product by 15 U.S.C. § 2052(a)(1)(H). "Devices" are regulated by the Food and Drug Administration (FDA), which looks primarily at the marketing claims made for the product. We do not believe that FDA would consider a claim that a product provides "soothing" heat to be sufficient to make the product a device.

Also, the Commission would not have authority to regulate this product if the risk were "associated with electronic product radiation emitted from an electronic product," as such terms are defined in 42 U.S.C. § 263c, if the risk can be regulated under 42 U.S.C. §§ 263b-263n. 15 U.S.C. § 2080(a). While infra-red rays from a heat lamp bulb are considered to be electronic product radiation from an electronic product, our understanding is that 42 U.S.C. §§ 263b-263n, which is administered by FDA, can regulate risks associated with electronic product radiation only where they are due to exposure to the radiation, and not where the risk is indirect, as where the product causes a fire.

For the reasons stated above, therefore, we conclude that these heat lamps would not be excluded from the Commission's jurisdiction by either 15 U.S.C. § 2052(a)(1)(H) or 15 U.S.C. § 2080(a).

The views expressed in this letter are those of the Office of General Counsel and are based upon the most current interpretation of the law by this office; however, these views could be changed or superseded by the Commission. Please do not hesitate to contact me if you have further questions regarding these matters.

Sincerely,



Martin Howard Katz
General Counsel