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U.S. CONSUMER PRODUCT SAFETY COMMISSION

WASHINGTON, D.C. 20207

OFFICE OF THE
GENERAL COUNSEL

13 JUN 1982

Jonathan S. Kahan, Esquire
Hogan & Hartson
815 Connecticut Avenue
Washington, D. C. 20006

Dear Mr. Kahan:

This is in response to your letter dated January 20, 1982. requesting an advisory opinion about the effect of the decision of the U. S. Court of Appeals for the Fourth Circuit in the case of National Knitwear Manufacturers Association v. Consumer Product Safety Commission (No. 81-1002) on the Commission's enforcement of the flammability standards for children's sleepwear (16 CFR Parts 1615 and 1616).

As you know, that decision sets aside statements of enforcement policy issued on November 6, 1980 (45 F. R. 73884), concerning the scope of the children's sleepwear standards. The Court held that notwithstanding the Commission's characterization of the issuance of November 6, 1980, as a policy statement, it was in fact an amendment of the standards to expand their coverage to include some children's underwear garments.

In your letter you state:

> One extreme interpretation of the National Knitwear case would be that the Fourth Circuit meant to preclude the CPSC from addressing the problem of borderline garments in specific enforcement actions. If this interpretation is accepted, the Commission would be precluded from commencing enforcement actions where certain garments are simply labeled as underwear, and then are sold, promoted, and used as children's sleepwear.

We do not believe that the decision in the National Knitwear case would prohibit the Commission from initiating an action to

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enforce the applicable children's sleepwear standard in a case involving garments which are labeled as underwear, but are in fact promoted, sold, and used as children's sleepwear, that is "to be worn primarily for sleeping or activities related to sleeping." See 16 CFR 1615.1(a) and 1616.2(a).

The National Knitwear decision sets aside policy statements listing factors which the Commission stated that it would consider when determining whether borderline garments fall within the definition of children's sleepwear in section 1615.1(a) and 1616.2(a) of the standards; however, that decision does not alter or affect any provision of the two standards, including their definitions of the term "children's sleepwear."

For this reason, the Commission believes that the same fabrics and garments which were subject to the standards before the National Knitwear decision remain subject to the provisions of those standards at this time. Similarly, any garments which were in fact underwear before the date of that decision were excluded from the definition of children's sleepwear then, and remain excluded at this time.

We do not believe that the National Knitwear decision has the effect of exempting a children's garment which is labeled as "underwear" from the requirements of the applicable children's sleepwear standard if it is in fact "intended to be worn primarily for sleeping or activities related to sleeping." As you recognize, in any enforcement action, the Commission would be required to prove to the satisfaction of the trier of fact that the garment falls within the standard's definition of children's sleepwear, and the respondent or defendant would have the opportunity to present evidence to show that the garment in question is not sleepwear.

In your letter, you also make reference to the Commission's decision of July 23, 1980, to grant a petition from Bates Nitewear Company, Inc. for a rule to require labeling of children's thermal underwear to indicate that such garments do not meet the requirements of the children's sleepwear standards, and are not intended to be worn for sleeping. As you know, when a draft Federal Register notice to propose such a labeling rule was submitted to the Commission in 1981, three votes to authorize publication of the notice were not forthcoming. We agree with your conclusion that this has the effect of reversing the vote of July 23, 1980, and of denying the petition. The Commission did not approve proposal of a labeling rule for children's thermal underwear because a majority of the Commissioners did

not believe that the draft rule was needed for the administration and enforcement of the Flammable Fabrics Act, or to protect the public from risks of injury from fires associated with children's thermal underwear.

This letter has been approved by the Commission.

Sincerely,

Martin Howard Katz
General Counsel