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January 12, 1984

Dr. Roy T. Gottesman
The Society of the Plastics
Industry, Inc.
355 Lexington Avenue
New York, New York 10017

Re: United States v. Stauffer Chemical Co.

Dear Roy:

For some time we have been following the conflicting litigation concerning whether the Environmental Protection Agency (EPA) may employ private contractors to conduct or assist with plant inspections under the Clean Air Act. In particular, the question is whether such private contractors are "authorized representatives" under Section 114(a)(2) of the Act. At present, the United States Courts of Appeals for the Sixth and Tenth Circuits have held that EPA may not use contractors to search plants. The Ninth Circuit has upheld EPA's position.

The United States Supreme Court agreed to review the Sixth Circuit's decision. We had hoped that the case would lead to a definitive resolution of the question. However, the Court's decision, issued on January 10, 1984, did not reach the Clean Air Act question. Thus, the private contractor question is still open. United States v. Stauffer Chemical Co., No. 82-1448 (Jan. 10, 1984) (copy enclosed.)

The Court's decision was based on the doctrine of mutual defensive collateral estoppel. In this case, EPA attempted to use private contractors to inspect a Stauffer's plant in Wyoming. EPA lost that case in the Tenth Circuit. The Agency then attempted to inspect a Stauffer's plant in Tennessee. While Stauffer lost in

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the Tennessee District Court, the Sixth Circuit held that the Clean Air Act did not authorize EPA to use private contractors. Alternately, the Sixth Circuit held that the government was precluded by the doctrine of mutual defensive collateral estoppel from relitigating the same issue already litigated against the same party in another case involving similar facts. The Supreme Court's decision (9-0) focused solely on the collateral estoppel issue and affirmed the Sixth Circuit on this point.

While the decision does not resolve the conflicting circuit courts' decisions on the use of private contractors, it does provide some relief for companies that may face EPA or other federal administrative agencies such as the Occupational Safety and Health Administration (OSHA) or the Internal Revenue Service (IRS) at different locations throughout the country.

In the past, we forwarded letters involving this subject to the Legal Committee and the Manufacturing Practices Committee. You may wish to consider doing so for this case.

If you have any comments or questions, please let me know.

Cordially yours,

Peter

Peter L. de la Cruz

Enclosure

cc: G.R. Munger (w/o enc.)

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