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August 19, 1977

Secretary
Consumer Product Safety Commission
1111 18th Street, N.W.
Washington, DC 20207

Re: Proposed Rules to Regulate Consumer Patching Compounds and Artificial Emberizing Materials Containing Respirable Free-Form Asbestos

Dear Sir:

In the July 29, 1977 issue of the Federal Register, the Commission proposed to regulate consumer patching compounds and artificial emberizing materials containing free-form asbestos (hereinafter referred to as "the Proposal"). Johns-Manville would like to take this opportunity to comment on certain aspects of the Proposal.

(1) First, we fully support the Commission's decision to proceed to regulate these products under the Consumer Product Safety Act rather than the Federal Hazardous Substances Act.

(2) Of considerable concern however, is that portion of the Proposal in which the Commission seeks to assert jurisdiction over patching compounds through a broadened definition of a consumer product, as recently set forth in the Anaconda decision.[1] The appellants' challenge to the Commission's jurisdiction over building materials raises very serious legal questions. This is further confirmed by the Kaiser[2] case and the court's stay in the Flat Glass appeal.[3]

[1]United States of America v. The Anaconda Co., et al, Misc. No. 77-0024 (D.D.C.), June 15, 1977.

[2]Kaiser Aluminum & Chemical Corp. v CPSC, Civ. No. 76-44 (D. Dela.) March 11, 1977.

[3]Flat Glass Association v. Consumer Product Safety Commission, No. 77-1238.

We do not intend to devote a considerable portion of our comments to the many persuasive arguments supporting the appellants' appeal of the Anaconda decision, as we are sure that the Commissioners and the Commission's Office of the General Counsel are fully knowledgeable on this matter. We fully support the position and arguments of the appellants as set forth in the papers which have been filed in that appeal.

We do not believe that the definition of a consumer product reaches a residence itself and the integral parts of its structure. The legislative history of the Consumer Product Safety Act confirms the Congressional belief that housing poses unique problems that would be foreign to the expertise of a consumer product agency. It was the Congressional intent in promulgation of the Consumer Product Safety Act to only regulate articles used within the home and to leave the regulation of the home structure itself, including the materials used to build it, to other government bodies.

Obviously, the Commission does not agree with this jurisdictional finding, or the current litigation referred to above would not be in process. However, we do not believe in the instant case that it is necessary for the Commission to rely on the Anaconda decision to accomplish its objective of regulating consumer patching compounds containing respirable free-form asbestos. We believe that the Commission would accomplish the same objective by merely relying on its finding that the suppliers of such compounds cannot assure the Commission that asbestos-containing products will not get into the hands of consumers based on current marketing channels, and therefore, all such compounds must be regulated. To rely instead on the Anaconda decision would only serve to enmesh this Proposal into the ongoing litigation of the Anaconda, Kaiser and Flat Glass cases.

Therefore, we strongly urge the Commission in its final regulation to delete the first full paragraph in the second column on page 38787 of its July 29, 1977 Federal Register Notice. This will serve to simplify the final regulation and avoid the creation of an unnecessary conflict even within the regulation itself. The preceeding paragraph adequately and clearly covers the scope of the regulation intended.

(3) Another concern which we had upon reviewing the Proposal after publication, surfaced to some extent during the oral presentations on the Proposal which were held on August 15, 1977. The Commission has proposed to ban "consumer patching compounds containing respirable free-form asbestos." By doing so, the Commission may inadvertently be banning all patching compounds, including those to which asbestos has not been deliberately added as an ingredient. Unfortunately, and probably as a result of oversight, the Proposal fails to set forth the criteria or methodology by which the regulation can be judged. How is one to determine if a consumer patching compound contains no "free-form asbestos"? No methodology is established to determine if a patching compound is in fact "free" of asbestos. What if one fiber can be found in a container of patching compound? Is it to be banned? All patching compounds may inadvertently be banned due to the ubiquitousness of asbestos. Some quantity of asbestos can be found in many minerals or metals that are mined in areas of the country where serpentine rock deposits are located. Therefore, some substances used to formulate patching compounds may contain certain amounts, perhaps just traces, of asbestos. Even the water used to formulate patching compounds in paste form is likely to contain some asbestos fiber. Recent EPA studies have well documented the almost universal presence of asbestos in water.

As a possible solution to this dilemma, we refer your attention to EPA's April 6, 1973 National Emission Standard for Asbestos. On December 7, 1971, EPA had proposed, as part of the standard, to prohibit the spraying of any material containing asbestos on any portion of a building or structure. Comments received during that rulemaking process pointed out that the proposal, if promulgated as a standard, would prohibit the use of materials containing only trace amounts of asbestos which occur in numerous natural substances. Therefore, in its standard promulgated on April 6, 1973, EPA limited the asbestos content of such spray-on materials to 1 percent. As stated by EPA, "the intent of the 1-percent limit is to ban the use of materials which contain significant quantities of asbestos, but to allow the use of materials which would...contain trace amounts of asbestos which occur in numerous natural substances..."

(4) It would appear from a review of the proposal that too little attention may have been given to the issue of potential hazards of the substitute materials that are and will be used to replace asbestos-containing formulations. The possible risks are mentioned, but not analyzed in sufficient detail.

Such an analysis should be undertaken for several obvious reasons.

Scarcely any substance today can escape the suspicion of being carcinogenic under some circumstances - some more than others. Certainly, we should attempt to avoid the inappropriate use of carcinogenic substances. However, in many circumstances, such judgment is made most difficult by the fact that substitutes of totally unknown risks may be utilized. Since carcinogenic materials appear uniformly to have a dose-effect relationship, in certain circumstances, it may be more prudent to control the amount of exposure to a carcinogenic substance about which a great deal is known, rather than to encourage the use of other substances of totally unknown risks. We are not saying that this is, in fact, the situation with respect to asbestos-containing consumer patching compounds. What we are recommending is that the alternative substances, which are presently and will be used in the future, be more closely evaluated as to potential health effects on the consumer before their use is mandated. Perhaps this question will be covered in the A. T. Kearney & Co. report now being prepared for the Commission.

(5) It is also our hope that the Kearney report will focus on the possible economic impact of the proposal on construction costs. Although some data has been introduced with respect to the cost of reformulating existing asbestos-containing patching compounds and likely cost increases for non-asbestos-containing compounds, little mention has been made as to the increased labor costs which may be incurred by the use of substitutes. Although we do not have definitive data in this regard, we have been advised that employees of drywall contracting firms experience certain difficulties when using the non-asbestos-containing compounds and, as a result, require more time in use. If this is the case, construction costs would be increased.

(6) It would appear from the Proposal that the Commission is relying almost exclusively on OSHA's October 9, 1975 proposed amendment to the standard for occupational exposure to asbestos as the basis for its analysis of the medical-scientific literature on asbestos-related diseases and threshold limit. We are concerned that the Commission would give the OSHA October 9, 1975 asbestos proposal the dignity of further publication by adopting significant portions of its medical-scientific review in total, without even any reference or regard to its glaring scientific inaccuracies. In that regard, we refer your attention to Johns-Manville Corporation's April 8, 1976 response to the OSHA proposal, copies of which were sent to the Commission

last year in response to the NRDC petition on patching compounds. We request that the Commission correct the scientific inaccuracies in the information taken from the OSHA proposal, or at the very least, acknowledge its inaccuracies or the failure on the part of the Commission to evaluate its accuracy.

(7) In Dr. Paul Kotin's letter of June 14, 1977, he commented on certain concerns he had regarding that portion of the first draft proposal relating to an assessment of the risk to consumers from any patching compounds containing respira free-form asbestos. In his letter of July 13, 1977 to Beatrice Pitkin, Dr. Gerald R. Chase, Johns-Manville's Biostatistician/Epidemiologist comments on his concerns as to the risk assessment set forth in the second draft proposal. These concerns are still present. During the oral presentations on August 15, on several occasions Commissioner Franklin questioned the accuracy of the assumption in the risk assessment of consumer use of patching compounds for six hours a day, four times a year. Unfortunately, the Proposal does not provide the basis upon which this assumpti is founded. We question whether in fact there is any foundation for this assumption. Based on the responses to Commissioner Franklin on August 15 and our limited knowledge of consumer use of these products, we believe it to be an erroneous assumption unsupported by fact. A more accurate assumption would likely be fewer hours of exposure once or twice in a lifetime. Naturally, it must be recognized that we have no actual data to support a lower assessment of consumer exposures. However, common sense alone would appear to dictate the lower exposure frequency.

(8) The last paragraph in the subsection headed "Industry Resource Considerations - Assessment of Substitutes", in the third column on page 38787 is inaccurate and confusing. That paragraph states:

> "These conditions may be further affected by OSHA's course of action on asbestos. Should a commercial-industrial fiber limit standard be imposed, the industry would probably eliminate asbestos from paints and other building materials as well as from patching compounds."

First, the use of the terminology "commercial-industrial fiber limit standard" is not correct. To the best of our knowlege, no such terminology has ever been utilized by OSHA or the asbestos industry. The current OSHA standard for occupational exposure to asbestos, which was promulgated

in June 1972, covers all occupational exposures to asbestos, including both the manufacturing-fabrication segment as well as the construction segment of the industry. On October 9, 1975, OSHA published a notice of proposed amendments to that standard. However, the construction industry was specifically excluded from the proposal because of its uniqueness. OSHA indicated at the time that it would publish a separate proposal for construction. Since that time, the proposal has not been promulgated nor has OSHA proposed a new standard for the construction industry. However, occupational exposure to asbestos in the construction industry is covered by the current standard promulgated in June 1972, as is exposure to asbestos in the remainder of industry.

The Commission's use of the terminology, "should a commercial-industrial fiber limit be imposed..." is most confusing, as it appears to assume that no standard presently exists. Even if it is referring to the possible promulgation of the October 9, 1975 proposal or the future publication of a proposal for the construction industry, the assessment as to the possible elimination of asbestos may not be correct.

The Commission should refer to the terminology utilized by OSHA in its standards. Also, it should be recognized that the possible elimination of asbestos from products has been encouraged and restricted at the same time by various factors. No single factor, for example, is responsible for substitution of alternate substances. In this regard, we would refer the Commission to the report being prepared for OSHA by CONSAD Research Corporation on possible substitutes for asbestos. Basically, the possible elimination of asbestos from building materials in general is not likely, but the extent to which it is eliminated at all in any product would depend on many factors, not just the promulgation of a new OSHA asbestos standard.

(9) In the middle column on page 38788, under the heading "Industry Resource Considerations - Assessment of Substitutes" (Part C. Artificial Emberizing Materials), it is stated that fibrous glass is currently being used as a substitute for asbestos in artificial emberizing materials. Johns-Manville is a major producer of fibrous glass and is totally unaware of such use. Based on our considerable knowledge of the properties of fibrous glass, it is our judgment that

fibrous glass does not possess the necessary properties to make it desirable for such use. Furthermore, we have contacted the Fireplace Institute in Chicago and have been advised that to the best of their knowledge, fibrous glass is not being used as a substitute for asbestos in artificial emberizing material.

Therefore, we would appreciate it if the Commission would either delete its reference to fibrous glass being used as a substitute for asbestos in artificial emberizing material or verify and indicate its source of information in this regard.

(10) In the third column on page 38788, under the heading "Environmental Issues", a reference is made to "floating fibers." We presume that the Commission is referring to "airborne concentrations of asbestos fibers". If that is so, the latter term should be used, as to the best of our knowledge, the term "floating fibers" is not a common reference

(11) Finally, in that same column, the following inaccurate statement is made: "(Fibrous glass and the synthetic fiber are similar in shape and size to chrysotile, for example)." Although we are not certain as to the specific synthetic fiber to which the Commission is referring, that statement is not correct as to fibrous glass. The geometry, that is, diameter and length, of most fibrous glass is different than asbestos, which apparently accounts for its different biological effect in animals and man. Basically, the nominal diameter of fibrous glass in most products is too thick to be respirable. Therefore, we would request that the Commission delete the above referenced sentence or modify it so as to accurately reflect similarities and differences between fibrous glass and asbestos.

It is our hope that the above comments will beneficially assist the Commission in its efforts to regulate consumer patching compounds and artificial emberizing materials containing respirable free-form asbestos.

If we can be of any further assistance, please contact me.

Very truly yours,

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