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September 7, 1979

CONFIDENTIAL -
PRIVILEGED COMMUNICATION

Mr. B. J. Pigg
Executive Director
Asbestos Information Association
1745 Jefferson Davis Highway
Arlington, Virginia 22202

Dear Bob:

We appreciated the opportunity to meet with you, Tom Dougherty and Guy Gabrielson several weeks ago regarding the possible representation by our firm of the Association in connection with tentative proposals by several government agencies to regulate use of asbestos and products containing asbestos.

As you requested at that meeting, we have set out in this letter an approach which might be used in dealing with the current, tentative regulatory proposals. The approach follows the main points raised in our recent discussion with you. We caution that any strategy adopted by the Association at this juncture should be preparatory in nature, acknowledging that the tentative regulatory proposals could be substantially revised, perhaps to bear on different aspects of the Association's interest. In any event, in our experience an effective and thorough strategy for dealing with government regulatory initiatives can best be developed through the joint efforts of persons in the affected industry or industries and their counsel.

Based upon the discussion at our meeting and the materials you subsequently furnished to us, I understand that the Consumer Product Safety Commission ("CPSC") and the Environmental Protection Agency ("EPA") are currently considering regulatory action to limit or ban use of asbestos or products containing asbestos. It is expected these agencies will formally announce their activities in companion Advance Notices of Proposed Rulemaking ("ANPR") to be published in mid-to-late September. The Occupational Safety and Health Administration ("OSHA") and the Food and Drug Administration ("FDA") apparently also are considering revision of their regulation of asbestos, although I gather the timing of their activities is less clear. The Department of Transportation and the Mine Safety and Health Administration may take regulatory action as well.

The coordination reflected in the tentative proposals lends credence to the work of the Interagency Regulatory Liaison Group ("IRLG"). It seems evident that asbestos and products containing asbestos will be the focus of regulatory actions by a number of government agencies during the next few years, and that these agencies' actions will be interdependent to a significant extent. The regulatory proceedings likely will be conducted in an atmosphere where political concerns are quite evident and important, in part as the result of activities of environmentalist and other groups.

Formulation of an Overall Strategy or Approach

The Association should promptly take steps to develop, to the extent possible, an overall approach toward responding to and dealing with proposed regulatory actions respecting asbestos. Of necessity the approach must provide for participation in administrative and other agency proceedings; but as you pointed out in our discussion, it may well require litigation and perhaps also legislative initiatives. These three areas will be interrelated, because a position taken in proceedings before one agency would affect the course of other agency proceedings and of litigation, and may also affect any legislative possibilities.

To formulate an overall strategy that will take into account all three forums, a group within the Association -- perhaps the Executive Committee or an *ad hoc* committee formed for this specific purpose -- could begin *now* to work with counsel. By focusing on problems now, the Association will stand the best chance of shifting the focus of agency proceedings (and any resulting litigation) to issues and options of greatest interest to the Association's members. A modest amount of timely planning should also enable the Association to marshall its resources in the most effective and efficient way, particularly respecting the possible <u>future</u> use of economic and technical consultants.

The CPSC draft ANPR which you provided us suggests several elements of an approach. In considering the CPSC's proposed regulatory program as set forth in the draft ANPR, the Association could emphasize to the CPSC that regulations focusing on use should be evaluated and developed on a product-by-product (or class of products) basis rather than by way of a generic approach. Regulation by the CPSC (and by other agencies) on a product-by-product (or class of products) basis would be beneficial in a number of respects. Among other things, it would force the Agency to develop factual support for decisions respecting specific products, following submissions by the Association and its members. Numerous factual aspects of a given product or line of products would become pertinent to the regulatory decision, where these factual matters likely would be passed over or masked if a generic approach were adopted. Such an approach also would allow the Association to enlist the aid of other groups with respect to specific asbestos products, even though those groups might have little interest in the regulation of asbestos generally.

In seeking to focus CPSC regulatory efforts on a product-by-product basis, the Association could work with the General Accounting Office with respect to the scope of the general order seeking information which the CPSC intends to submit under the Federal Reports Act. As part of that effort, the Association should seek to have the CPSC gather factual information that may be helpful to the Association's own positions and should attempt to limit the reporting burden.

A product-by-product (or class of products) approach to regulation of asbestos would also be consistent with potential legal challenges by the Association to the CPSC's regulatory authority. For example, if the CPSC should decide to regulate products containing asbestos under the Consumer Product Safety Act, that Act among other things requires the Agency to make certain factual findings and to perform a risk-assessment. <u>See Aqua Slide 'N' Dive</u>

Corporation v. Consumer Product Safety Commission, 569 F.2d 831 (5th Cir. 1978). It is likely that a judicial challenge to the CPSC's policy (as stated in the draft ANPR) of banning all non-essential uses of asbestos would have a greater chance of success if presented in the context of a ban on a particular product or class of products, rather than in the more abstract context of a general ban against asbestos. This circumstance probably would be recognized by the Commission, and it might foster a more even-handed attitude in the rulemaking proceedings themselves.

As part of its overall approach, the Association should at least consider what position to take with respect to the health effects of asbestos. Here too, a product-by-product approach to regulation presents a greater likelihood of relatively more favorable administrative action. For the present, as part of its approach to health issues we believe the Association should advocate the approach described by the Office of Science and Technology Policy ("OSTP"), of making a scientific estimate of the "most probable" level of risk.*/ From the Association's standpoint, the OSTP approach would be preferable to the "conservative assumption" technique endorsed in a recent report of the IRLG.**/

In considering health effects, the Association should determine whether to take a position on the health effects of smoking when asbestos exposure also occurs. In that regard, from our current work in other health regulatory matters, we understand that possibly favorable factual data on this subject may be accessible from certain computerized health records. While this matter should be explored carefully before any study is undertaken, we believe this issue merits consideration.

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*/ Office of Science and Technology Policy, Executive Office of the President, Identification, Characterization, and Control of Potential Human Carcinogens: A Framework for Federal Decision-Making (February 1, 1979).

**/ Scientific Bases for Identification of Potential Carcinogens and Estimation of Risks, Report of the Interagency Regulatory Liaison Group (IRLG) Work Group on Risk Assessment, Part III, "The Quantitative Estimation of Risk," 44 Fed. Reg. 39858, 39871 (July 6, 1979).

The foregoing discussion also has application to potential regulation by EPA and other agencies. Even though EPA's draft ANPR is not available, the statements of work to be conducted by EPA's technical and economic contractors (GCA and Research Triangle Institute, respectively) illustrate the extent to which the various agencies will be considering common issues. For example, EPA's contractors are directed to consider which products containing asbestos are "essential" and to evaluate non-asbestos substitutes in various product categories. Both issues are discussed in the CPSC's draft ANPR, and the same issues almost certainly will be raised by other agencies. This commonality of issues underscores the importance of formulating an overall approach at the outset, so that the Association can determine where to direct its efforts most effectively.

The fact that EPA's technical and economic contractors are already at work underscores the importance of prompt action by the Association. There is now an opportunity for the Association and its members to make their views known to the agencies and to the EPA contractors, and perhaps to some degree to focus their technical and economic analysis and conclusions. This is especially important because EPA's technical and economic conclusions will serve as a starting point for similar analyses by other agencies.

The preceding dicussion has focused primarily on the points raised at our meeting and the CPSC and EPA materials you furnished to us. The Association should also be giving thought to whether, as part of its long-term approach, it is going to take an affirmative position with respect to the use of asbestos and develop alternative proposals to those of government agencies.

Staffing

As I indicated at our meeting, if our firm is retained to assist the Association respecting these matters, I would have principal responsibility for that representation, together with Jack Murphy of our office. Jack and I would be assisted by one or more younger associates, depending upon the needs of the Association at any particular time. Bob Barnard, the senior partner in our office, is very expert on these matters and has said he would make available a substantial amount of time to provide advice and counsel respecting the Association's matters. Don Morgan and Doug Kliever, both partners in our office, are also very knowledgeable in the pertinent regulatory areas, and would be available as needed. However, based on my understanding of your needs, I would not expect their participation to be substantial.

Attached as an appendix to this letter are brief biographical sketches of the persons named above. I have supplemented each biography with a short description of that person's recent experience in the areas relevant to your matters.

As we discussed briefly when we met, our firm's approach to regulatory and litigation matters involving multiple agencies is to have the same attorneys handle all aspects of a project. We find that this approach enables us to handle client matters efficiently, with a minimum of duplication and overlap particularly where, as here, the attorneys involved practice regularly before the agencies in question and also have substantial experience in litigation. I should add that we have carefully considered our ability to meet the Association's needs if we are retained, and we believe that we could meet your needs on a timely basis.

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As indicated at the outset, because of a desire to be brief and in recognition of the tentative nature of the regulatory proposals, the suggestions in this letter are necessarily somewhat constrained. Now is the appropriate time to make plans, however, and to try to shape regulatory proceedings to fit the Association's interests and to anticipate options provided by judicial and legislative forums. If you should have any questions regarding this letter, I hope that you will feel free to discuss them with me, Bob Barnard, or Jack Murphy.

Sincerely yours,

Charles F. Lettow

Charles F. Lettow

Attachment

Appendix

ROBERT C. BARNARD is the senior partner in the Washington office of the firm. He was born in Portland, Oregon in 1913 and received his A.B. from Reed College. He attended Columbia Law School in 1935-36, where he was elected to the Board of Editors of the Columbia Law Review, and Oxford University (Rhodes Scholar) in 1936-38, receiving a B.A. in Jurisprudence, a B.C.L. and an M.A.

Mr. Barnard was with the U.S. Department of Justice from 1939 to 1947, where he served, progressively, as Special Assistant to the Attorney General and Assistant Chief of the Appellate and Law Section, Antitrust Division; Special Assistant to the Attorney General in the Antitrust Division; and Chief Legal Consultant to the Assistant Solicitor General's office. Mr. Barnard joined the firm as an associate in September 1947 and became a member of the firm on January 1, 1951.

Mr. Barnard has practiced in a wide variety of substantive areas involving administrative matters, litigation and legislative projects. He has been actively involved in matters relating to EPA, OSHA, CPSC, FDA and DOE, as well as other agencies. His work in these areas has involved administrative practice, litigation in Federal district courts, in the Courts of Appeal, and before the Supreme Court, and numerous legislative matters. Mr. Barnard currently practices in these areas on behalf of a variety of individual companies and groups, including his work for the American Industrial Health Council involving carcinogencity and other chronic health matters.

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DONALD L. MORGAN is a resident partner in the Washington office. He was born in Houston, Texas in 1934. He received his B.A. (Magna Cum Laude) from Harvard College in 1956 and his LL.B. (Magna Cum Laude) from Harvard Law School in 1962. He served as Articles Editor of the Harvard Law Review. He joined the Washington office as an associate in 1962 and has been a partner since January 1, 1970.

Mr. Morgan has extensive administrative law and litigation experience. His recent practice has involved a range of regulatory agencies, including OSHA, EPA, CPSC and the Department of Interior, and has included litigation at all levels of the Federal court system. He has been actively involved in issues relating to the regulation of carcinogens.

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DOUGLAS E. KLIEVER is a resident partner in the Washington office. He was born in Oregon in 1942. Mr. Kliever received his undergraduate degree at Princeton University (A.B., Magna Cum Laude, 1964) and his law degree at Stanford Law School (LL.B., 1967). He was President of the Stanford Law Review. He served as a law clerk to Judge Oscar H. Davis on the U.S. Court of Claims in the 1967-68 term and joined the Washington office of the firm in 1968. Mr. Kliever became a partner on January 1, 1976.

Mr. Kliever practices primarily in the environmental law and trade areas. His recent practice has involved all aspects of environmental regulation, including administrative proceedings, litigation and legislative matters. His work has included matters relating to the regulation of carcinogens by government agencies (particularly EPA).

* * * *

CHARLES F. LETTOW is a resident partner in the Washington office. He was born in Iowa Falls, Iowa in 1941. He received a B.S. degree in Chemical Engineering from Iowa State University in 1962 and an LL.B. from Stanford Law School in 1968. He was a Note Editor of the Stanford Law Review. Mr. Lettow was a law clerk for Judge Ben C. Duniway on the U.S. Court of Appeals for the Ninth Circuit for the term 1968-69, and a law clerk to Chief Justice Warren E. Burger on the U.S. Supreme Court for the term 1969-70. He served as Counsel to the U.S. Council on Environmental Quality from 1970 to 1973. He joined the Washington office of the firm in 1973, and he became a partner on July 1, 1976.

Mr. Lettow's practice encompasses regulatory matters and litigation at all levels, including a significant amount of appellate litigation. His recent practice has included the successful challenge to OSHA's benzene standard (presently pending before the U.S. Supreme Court), as well as litigated matters relating to EPA, OSHA, CPSC and the ICC. In addition to administrative proceedings and litigation, several of these matters have also involved legislative aspects.

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JOHN C. MURPHY, JR. is a senior associate in the Washington office. He was born in Minneapolis, Minnesota in 1945. He graduated from Georgetown University (A.B. Cum Laude, 1967) and the University of Pennsylvania Law School (J.D., Cum Laude, 1971), where he served as an Editor of the Pennsylvania Law Review. After a graduate fellowship and private practice on the West Coast, Mr. Murphy served as a Special Counsel to the U.S. Securities and Exchange Commission from 1975-1977. He joined the Washington office of the firm in 1977.

Since joining the office, Mr. Murphy has handled administrative and litigation matters, principally relating to OSHA, CPSC and the regulation of financial institutions. His recent work has involved the regulation of benzene by OSHA and CPSC, including the litigation before the Court of Appeals for the Fifth Circuit and now before the Supreme Court, and other OSHA, EPA and CPSC matters. His current projects include those in which both regulatory and legislative solutions are being considered.

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