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April 1, 1994

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Dear Attorney:

For your information, I am attaching a copy of a letter which I received from Peter de la Cruz of Keller and Heckman pertaining to TSCA reporting obligations of members of The Vinyl Institute. This question came up in the context of information which may be exchanged at committee meetings of Vinyl Institute members. You may want to review with the people in your company that participate in these committees their obligations concerning reporting of information which may be discussed at the committee meetings. Additionally, you may want to caution your company participants on discussing information which may trigger reporting requirements.

I hope to see you at The Vinyl Institute Annual Meeting in Dallas on May 23rd and 24th. As you may be aware, the Legal Committee will be meeting in conjunction with the Environmental, Health and Safety Committee.

Very truly yours,

Beverly V Gholson

Beverly V. Gholson
Associate General Counsel

BVG/ln

Attachment

cc: Mr. R. H. Burnett - The Vinyl Institute
Mr. F. E. Borrelli - Georgia Gulf Corporation
Mr. Peter de la Cruz - Keller and Heckman

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Re: TSCA Reporting Obligations of the Vinyl Institute Trade Associations and Its Member Companies

Dear Beverly:

This letter follows our telephone conversation and your February 2, 1994, letter, in which you requested information on the obligations of the Vinyl Institute (VI), The Society of the Plastics Industry, Inc. (SPI), its member companies, and employees to report substantial risk information to the Environmental Protection Agency (EPA) under section 8(e) of the Toxic Substances Control Act (TSCA)(15 U.S.C. § 2607(e)).

Briefly, neither SPI nor the VI has a legal obligation to report substantial risk information under section 8(e) of TSCA because they do not manufacture, import, process, or distribute chemical substances or mixtures. Moreover, information received by SPI is not automatically imputed to members. However, SPI will gladly (and often does) submit to EPA substantial risk information generated by or through SPI and its member companies on their behalf, as a matter of convenience and to eliminate multiple filings. SPI apprises members of the 8(e) filing, and the SPI submission satisfies the filing obligations of the individual member companies.

As a general consideration, SPI members should exercise caution in communicating unsubstantiated risk information at SPI-sponsored functions. If a member company employee obtains substantial risk information through SPI on a substance manufactured, imported, distributed, or processed by that person's company, an 8(e) reporting obligation may attach to both that person and the associated company. This includes information orally received at trade association meetings.

I. Application of Section 8(e) Reporting Obligations to SPI

A. Information Covered by Section 8(e)

Section 8(e) of TSCA states:

> Any person who manufactures, processes, or distributes in commerce a chemical substance or mixture and who obtains information which reasonably supports the conclusion that such substance or mixture presents a substantial risk of injury to health or the environment shall immediately inform the Administrator of such information unless such person has actual knowledge that the Administrator has been adequately informed of such information.

EPA has interpreted the term "immediately" to mean within fifteen working days.[1/]

What constitutes "substantial risk" has been the subject of much discussion. Adverse effects observed in toxicity studies, particularly carcinogenicity, reproductive effects, neurotoxicity, and mutagenicity constitute the principal source of the roughly 1,000 reports that have been submitted to EPA. However, several other kinds of phenomena, such as releases to and presence in environmental media, can lead to a conclusion of substantial risk. Given ambiguity as to what poses a substantial risk, EPA's aggressive enforcement posture with respect to violations of section 8(e), and the potential of multi-million dollar penalties for such violations, prospective 8(e) submitters frequently deem it prudent to over-report rather than under-report.

B. Trade Associations are Not Subject to Section 8(e)

The applicability of section 8(e) to trade associations is directly addressed by EPA as follows:

> While it is clear that entities such as labor unions, trade associations, contract testing laboratories and agencies of

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1/ 43 Fed. Reg. 11110, 11111 (March 16, 1978).

> the Federal Government are "persons" covered by TSCA Section 8(e), the mandatory obligation to report substantial risk information is incurred only to the extent that the entity is engaged commercially in manufacturing, importing, processing or distribution of the chemical substance or mixture about which substantial risk information is obtained; however, these particular entities are not typically involved in such commercial activities.[2/]

Thus, to the extent SPI does not itself manufacture, import, process, or distribute a particular substance or mixture, it is not subject to section 8(e) reporting requirements with respect to that substance or mixture.

C. SPI Voluntarily Reports 8(e) Information

Even though neither SPI nor the VI have a legal obligation under TSCA to report substantial risk information, SPI often does so as a convenience to its members. Such an "industry-wide" filing avoids duplicative filings, a policy which EPA encourages.[3/] Indeed, EPA encourages persons who have no legal obligation under TSCA to report substantial risk information to do so, because such reporting "is a clear demonstration of the respondent's stewardship."[4/] Thus, there exist some compelling reasons to submit 8(e) notices on behalf of member companies.

A section 8(e) notice submitted by a trade association on behalf of member companies discharges members' 8(e) obligations by ensuring that EPA has been adequately informed of such information. As such, the notice is subject to the same requirements applicable to notices submitted by individual member companies; the notice must be identified as submitted under section 8(e), contain the requisite information, and be submitted within fifteen days of receipt of the information. Once an 8(e) notice is submitted, SPI ensures that all member companies that manufacture, import, process, or distribute a substance or mixture that is the subject of an 8(e) filing by SPI are apprised of the submission of the 8(e) notice. This is easily accomplished by distributing a receipt-stamped copy of the 8(e) notice to all affected member companies.

2/ TSCA Section 8(e) Reporting Guide, EPA Office of Toxic Substances (June 1991) at 3 (emphasis added).

3/ Id. at 4.

4/ Id.

Should EPA request additional information concerning the submission, it would likely look to SPI for such information. While EPA's authority to require a voluntary submitter to submit follow-up information or to impose penalties for failure to do so is somewhat unclear from a purely legal standpoint, EPA has frequently imposed such "requirements" in the past.[5/]

II. Reporting Obligations of Vinyl Institute Member Companies and Employees of Member Companies

Under section 8(e) of TSCA, a reporting obligation is triggered when a person subject to reporting "obtains" such information. This, in turn, depends on two factors: (1) whether a person is aware of such information; and (2) whether the person is able to recognize the significance of the information.

With respect to the first element, the potential sources of substantial risk information are multiple and varied. EPA explains that substantial risk information can originate from draft, interim or final written reports (including study reports), letters, telegrams, and telex reports, or verbal reports received at meetings or by telephone.[6/] A prospective 8(e) submitter, however, is only charged with information which that person possesses or knows, or which a prudent person similarly situated could reasonably be expected to possess or have knowledge.[7/] Thus, SPI membership alone does not trigger an 8(e) reporting obligation with respect to all substantial risk information which SPI might possess; the obligation is only triggered insofar as the information is known to or possessed by the prospective submitter and also on whether the member manufacturers, processes or distributes the substance.

SPI may serve as a source of substantial risk information under a variety of circumstances. For example, EPA specifically

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5/ See, e.g., Preliminary Evaluations of Initial TSCA Section 8(e) Substantial Risk Notices; January 1989 - September 1990, EPA Office of Pesticides and Toxic Substances (EPA 560/2-91-001)(July 1991) at 114-116 (EPA requests that a voluntary submitter provide information about submitter's activities to notify others and to reduce or eliminate exposure, and information concerning additional studies conducted or planned).

6/ TSCA Section 8(e) Reporting Guide at 7.

7/ 43 Fed. Reg. at 11111.

states that information obtained from a private conference or meeting is subject to section 8(e) reporting.[8] Any written information distributed by SPI to member companies also serves as a source of substantial risk information. To the extent a person capable of appreciating the significance of such information obtains significant risk information concerning a substance or mixture manufactured, imported, processed, or distributed by that person or affiliated company, both the person and the company have an obligation to report such information under section 8(e) within fifteen days.[9] Therefore, SPI should ensure that meeting attendees and document recipients are sensitive to the section 8(e) obligations that might be triggered by information that may be disclosed or received.

To trigger an 8(e) reporting obligation, substantial risk information must be received by a person "capable of appreciating the significance" of that information.[10] EPA clarifies that this phrase describes persons who "have a responsibility to be alert to and report substantial risk information."[11] Nonetheless, for the purpose of information received from trade associations, it is perhaps prudent to presume that all employees of all member companies are capable of appreciating the significance of significant risk information and have an obligation to report it to EPA when they receive it.

As discussed above, information received by SPI and the VI is not automatically imputed to members; only if reported in writing or orally to members is the 8(e) obligation triggered. SPI proceeds on a case-by-case basis when substantial risk

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8/ Id.

9/ Both business entities and their individual employees and officers have section 8(e) reporting obligations. A business entity is considered to have obtained any substantial risk information which any officer or employee capable of appreciating the significance of such information obtains. 43 Fed. Reg. at 11111. A business entity can relieve its employees and officers of individual responsibility for section 8(e) reporting by establishing, internally publicizing, and implementing appropriate procedures for reporting substantial risk information. Id. at 11111.

10/ Id. at 11111.

11/ Id. at 11114.

information is received by member companies through affiliation with SPI.

III. Section 8(c) Recordkeeping Requirements

Although outside the scope of your request, we note that companies may also receive allegations of significant adverse reactions to chemicals or mixtures which may not rise to the level of 8(e) reportable information. Receipt of such allegations may trigger a separate recordkeeping requirement under section 8(c) of TSCA.[12/] Indeed, it is perhaps more likely to encounter 8(c) recordable information than 8(e) reportable information because no substantiation is required to render an allegation recordable under section 8(c) whereas as under section 8(e) a person must obtain information which "reasonably supports" the conclusion that a substantial risk is presented. Therefore, SPI and its members should also be sensitive to this requirement.

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We trust that this letter is fully responsive to your request. If you have any questions regarding this or any other matter, please do not hesitate to call.

Cordially yours,

Peter

Peter L. de la Cruz

cc: Ronald McCreedy
Frank E. Borrelli
Larry Thomas
Lewis R. Freeman, Jr.
Robert H. Burnett

12/ Under section 8(c), manufacturers, importers, and certain processors of chemical substances or mixtures are required to develop and retain records of "allegations of significant adverse reactions to health or the environment" caused by chemical substances or mixtures.