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November 21, 1979

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Mr. B. J. Pigg
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Dear Bob:

In the past few weeks, we have extensively discussed the pending EPA and CPSC Advanced Notices of Proposed Rulemaking with you and members of AIA/NA. In addition, we have met with representatives of the EPA staff and discussed CPSC's plans with representatives of that agency. As a consequence, we are now in a position to provide at least general guidelines to be followed by AIA/NA (and its member companies) in responding to the EPA and CPSC ANPRM's.

In this letter, we outline those general guidelines, especially with regard to voluntary provision of the information sought in the ANPRM's. Within the next week, we plan to offer more detailed and longer range advice concerning the authority of the two agencies to compel information and associated problems of maintenance of confidentiality for such information. At that time, we also plan to provide you with an outline of the substantive comments which we believe AIA/NA should submit to EPA and CPSC in response to their ANPRM's.

As indicated in our letter to EPA, we are disturbed (although perhaps not surprised) by the intransigent position taken by the EPA staff to the seemingly routine issue of a short extension of the December 17, 1979 deadline for submitting comments. Despite AIA's consistent efforts to cooperate with the EPA staff in providing information about the asbestos industry, EPA refused to narrow the sweeping nature of its information request or to consider extending the current December 17, 1979 deadline for submitting comments.

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Indeed, EPA would consider such an extension only if AIA/NA were willing to make firm, definite commitments of what information AIA/NA and its member companies would supply to EPA. As you know, and as EPA staff conceded, the ANPRM seeks a vast array of information on the industry. Much of the information sought is held by companies in the utmost confidence. The practical problems in supplying any meaningful information to EPA by December 17, 1979, are insurmountable. Accordingly, after consultations with you, we today transmitted the attached letter to Richard Denney of the EPA Office of General Counsel summarizing the position taken at the meeting and reiterating reasons why an extension of time is appropriate.

In light of EPA's attitude toward the proposed rulemaking, we recommend that AIA/NA adopt the following guidelines for responding to the EPA and CPSC Advance Notices of Proposed Rulemaking. At this point EPA and CPSC both ask that information be given voluntarily. As both proceedings progress, the agencies may (and probably will) seek to use legal means to compel the submission of information about asbestos products. In addition, AIA/NA and its member companies will have opportunities to provide whatever information they deem helpful in establishing their case for continued use of asbestos products at several points as the proceeding progresses. It is in this context of early, voluntary requests for information that we have formulated the following guidelines. We would recommend that you urge similar actions by AIA/NA members, although we recognize that each member is free to chart its own course and to respond in whatever manner it sees fit:

1. Response to the EPA ANPRM: We doubt that any meaningful information can be provided by AIA/NA and/or member companies by December 17. The comprehensive information sought by EPA obviously cannot be prepared by that date. Moreover, in light of the substantial confidentiality problems posed by many of the information requests (e.g., detailed sales figures, information on the technological and financial aspects of asbestos substitutes, future capital expenditure plans, see the EPA ANPRM, 44 Fed. Reg. 60067, ¶¶ 3(a), 5(a)-(i)), we believe AIA/NA should be cautious in providing such information until appropriate assurances of confidentiality can be worked out with EPA.

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We consider it wise for AIA/NA members to adopt a policy of responding to such requests only when they are made in writing. In addition, we recommend that such requests be funneled exclusively through a single designated official at each company. By putting all such requests for information and responses in writing, and then funneling the responses through a single official, the company will not only insure that the information submitted to EPA is accurate but it will also guard against the inadvertent submission of confidential information without the necessary protection. As with any comments that the companies may ultimately decide to submit on December 17, 1979, you may want to request that copies of all data submitted to EPA be sent to AIA/NA for the reasons explained in your memorandum of October 18, 1979.

3. Responses to the CPSC ANPRM: At present it is still difficult to discern to what extent the CPSC will pursue its ANPRM concerning asbestos in light of EPA's expressed intention to proceed comprehensively, especially against asbestos friction and paper products. However, in light of the two agencies' expressed intentions of sharing information, we believe the same caution is necessary in supplying information to CPSC as we have advised with EPA.

As with EPA, we doubt that meaningful information can be submitted to CPSC by its December 17 ANPRM deadline. On the other hand, as with EPA, we believe it valuable at this point to raise a number of legal issues in that proceeding now, such as the scope of the CPSC's authority as restrained by the definition of "consumer product," CPSA § 3(a)(1), 15 U.S.C. § 2052(a)(1), and the definition of crucial statutory terms such as "unreasonable risk of injury" and "no feasible consumer product safety standard," CPSA §§ 8 & 9(c)(2)(C), 15 U.S.C. §§ 2057 & 2058(c)(2)(C). We will be working on such a response and plan to supply you with an outline next week and a draft for consideration at the December meeting of the AIA Executive Committee prior to submission to the CPSC.

4. Protection of Confidential Documents: As we reported at the AIA/NA Executive Committee meeting, we are developing a detailed guide to handling of confidential information in connection with the EPA and CPSC proceedings. Both agencies seek much

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that connection, we will be calling on your members to assist us in compiling much factual information that will be important in the proceeding. Our memorandum on information-gathering and confidentiality issues will address not only the issue of confidentiality in submitting information to the agencies, but also the means by which inter-company confidentiality can be maintained in compiling information for use by AIA/NA counsel and consultants.

* * * * *

To summarize, we recommend great caution in supplying information to EPA and the CPSC at this time. Although AIA/NA has been active to date in seeking to cooperate with the Government to help its staff understand the asbestos industry, the clear intentions of the agencies now to seek harsh regulation and their unwillingness to date to extend the ANPRM deadlines require that you be circumspect. Given the confidential nature of much of the information EPA and the CPSC seek, hasty delivery of information could be dangerous in the long run.

Sincerely yours,



Edward W. Warren

EWV/gka

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information which is now held in the utmost confidence by the industry. Our concern for protecting such information relates not only to voluntary delivery of information now in response to the ANPRM, but also to the longer term problems of delivery of information at later points in both agency proceedings.

EPA and CPSC have the right to certain information through subpoenas, TSCA § 11(c), 15 U.S.C. § 2610(c), CPSA § 27(b)(3), 15 U.S.C. 2076(b)(3), or rulemaking, TSCA § 8(a), 15 U.S.C. § 2607(a), CPSA § 16(b), 15 U.S.C. § 2065(b), or by general or special orders, CPSA § 27(b)(1), 15 U.S.C. § 2076(b)(1), and each may at some point seek to obtain such information under one or more of these provisions. Similarly, both agencies have statutory provisions granting some protection to such information, TSCA § 14, 15 U.S.C. § 2613, CPSA § 6, 15 U.S.C. § 2055. Although both statutes, in general, prohibit distribution of confidential business information and trade secrets, thus providing some protection against disclosure in response to Freedom of Information Act requests, both statutes also provide for disclosure in certain other circumstances to other government agencies and to the Congress and, more generally, to other third parties in the context of rulemaking proceedings.

In short, as we will explain in greater detail in the issue memorandum now in preparation, neither TSCA nor CPSA provide ironclad confidentiality protection.

Because of the complexity of the confidentiality issue, we are preparing a detailed memorandum on the information-gathering and confidentiality protection at CPSC and EPA which we should provide you late next week. As that memorandum will detail, considerable risk will exist unless any confidential information is transmitted only after careful review and under provisions carefully worked out in advance with the agencies. We thus recommend that AIA/NA be especially circumspect about supplying any confidential information at this time.

5. Preparation of Our Substantive Case: As you know, we have been visiting a number of AIA members in beginning to prepare our substantive case for the proposed CPSC and EPA rulemakings. We intend to continue those visits in the next month. In