

July 29, 1976

CONFIDENTIAL MEMORANDUM

For: The Executive Committee and the Board of Directors, Manufacturing Chemists Association

From: Outside Counsel (Wilmer, Cutler & Pickering) and the Legal Advisory Committee

Subject: MCA's Safety Publication Program

At the request of the Legal Advisory Committee, Outside Counsel drafted a confidential legal opinion on the MCA safety publication program. That confidential opinion has now been put in final form after review and concurrence by the Committee. It consists of (1) a description of the existing safety publication program, based on facts and materials obtained by Outside Counsel on a confidential basis from MCA staff and from MCA member companies; (2) an analysis of the legal risks to which MCA is exposed by its operation of the publication program; and (3) recommendations for steps which might be taken to minimize those legal risks without jeopardizing the essential purpose of the program. This memorandum summarizes its main conclusions and recommendations, in which the Legal Advisory Committee and Outside Counsel jointly concur.

The safety publication program has been one of MCA's most active and significant projects over the last several decades. The publications are essentially the product of various MCA committees -- most significantly, the

CMA 159799

Safety and Fire Protection Committee, the Labeling and Precautionary Information Committee, the Occupational Health Committee, the Chemical Packaging Committee and the Transportation Equipment Committee. The most important publications, from the standpoint of possible legal problems, are the "Chemical Safety Data Sheets" (hereafter "Safety Sheets"), which provide information on individual chemicals and recommendations for their safe handling. In an Appendix to this Memorandum, we set forth a description of the process by which Safety Sheets are currently produced, revised and distributed.

In recent years there has been a growing concern among members of the Legal Advisory Committee as to the potential liability of MCA arising out of its publication program, particularly the Safety Sheets. This concern has been fueled by (a) the development of the law with respect to the duty of a manufacturer of an inherently dangerous product to warn customers and users about its hazards; (b) the explosion in concern and information about the possible carcinogenicity and other long-term effects of chemicals, and the difficulty of obtaining a scientific consensus as to the existence and scope of such hazards; and (c) the naming of MCA as a defendant in recent product liability lawsuits.

We are aware of no instance in which a trade association has been held liable in a product liability suit

because of one of its safety publications. Nevertheless, there is clearly a risk of potential liability inherent in any safety publication program such as MCA's. It is well established that a manufacturer of an inherently dangerous product such as a chemical has a duty to exercise reasonable care in warning customers and users of his products of its hazards. And a number of conceptual bases exist for extending such liability to a trade association such as MCA, when it issues safety publications directly relevant to the use of its member companies' products. If a court should reach a determination that MCA owes a duty of reasonable care to persons who use and rely on its safety publications, MCA's success in defending itself from liability would turn, in the last analysis, on the court's judgment as to the reasonableness of MCA's conduct. In judging this issue of reasonableness, the court would be influenced by the social utility of the association's program, the claims that are made for the program, and -- above all -- the reasonableness of the procedures by which the program is implemented.

MCA's risk of liability in operating its publication program can be reduced but it cannot be entirely eliminated. This raises the obvious question of whether the publication program should be continued -- a decision that requires a balancing of the inevitable risk of liability against the benefits to MCA, its members and the public that flow from the publication program. This balancing judgment

is a difficult one, since it is impossible to quantify the risk in any precise way, and since judgments as to the value of the publication program may vary. However, the view that the program performs a substantial service to the industry and the public appears to be widespread and, if appropriate cautions are observed, the risks of legal liability are not likely to be so high that counsel feels obliged to advise discontinuing the program.

Outside Counsel and the Legal Advisory Committee believe strongly that, if the MCA publication program -- particularly the publication of Safety Sheets -- is continued, various changes in policies and procedures should be made. The following recommendations have been designed with the goal of reducing MCA's legal risk without jeopardizing the effective functioning of the publication program or interfering with its basic purposes; if they cannot be effected, serious consideration should be given to dropping the entire program.

(1) The process of reviewing and updating publications -- particularly Safety Sheets -- should be upgraded and regularized. In the past, review or revision has been somewhat haphazard, depending upon the initiative of an MCA committee member or staff representative in raising a question as to the need for review or revision. A program should be established for a regular, in-depth review for each Safety Sheet as frequently as possible. Since it may not be feasi-

ble to assure such a "plenary" review of each Safety Sheet on a schedule more frequently than, say, every three years, we recommend that procedure be established for a less detailed but still meaningful review of all Safety Sheets on a more frequent basis -- e.g., at least annually. Such a review could at least determine whether any new developments warrant withdrawing any Safety Sheets from circulation pending an in-depth review and revision.

(2) The present system of relying on committee members to bring to MCA's attention all relevant new developments should be supplemented by a systematic monitoring of scientific and epidemiological literature on a continuing basis. This function could be performed by qualified MCA staff personnel or by an outside scientific literature service.

(3) MCA and its committees should adopt a policy of incorporating references to significant new scientific reports of possible safety problems of chemicals -- particularly involving carcinogenic and other long-term effects -- in Safety Sheets and other publications at the earliest possible date. By its very nature, such information does not lend itself to a speedy consensus as to its relevance or as to the recommendations that should be made in light of the information. But rather than waiting for a consensus to develop, Safety Sheets and other publications should be promptly revised to report the findings of such studies

while disclaiming any judgment on the validity of those findings or any recommendation based on them until a consensus does exist.

(4) A procedure should be developed whereby persons who have in their possession copies of Safety Sheets and other MCA safety publications can be advised of significant changes in those publications. MCA has no practical way of maintaining a current list of holders of its publications (since many are purchased in bulk for redistribution). However, we recommend that a system be established whereby users of Safety Sheets could register with MCA (perhaps by means of a form included with each Safety Sheet) to receive notice of any significant revisions.

(5) We believe consideration should be given to the feasibility of involving outside experts -- chemists, toxicologists and others who have no connection with the industry -- in reviewing MCA safety publications. We recognize and sympathize with the widespread opinion in MCA and the industry that the best expertise in the area is available within the industry and that it is neither necessary nor particularly helpful to involve outside experts in the process of drafting and reviewing these publications. Nonetheless, we think that if a way can be found to use outside experts meaningfully without interfering with the effective functioning of the publication program, their use should be considered by MCA.

(6) We recommend that MCA discontinue using the following statement that appears on the outside cover of each Safety Sheet:

"Chemicals in any form can be safely stored, handled or used if the physical, chemical and hazardous properties are fully understood and the necessary precautions, including the use of proper safeguards and personal protective equipment, are observed."

Despite the thorough disclaimer that appears on the inside cover of the Safety Sheet, the cover statement unnecessarily raises questions as to whether MCA is representing that nothing will go wrong if the recommendations in the Safety Sheet are followed. In the same vein, we also recommend that the word "safe" be eliminated from the phrase "Properties and Essential Information for Safe Handling and Use of . . ." which appears on the cover of each Safety Sheet. Any references in a Safety Sheet which suggest that the chemical may be safely used if MCA's recommendations are followed should similarly be eliminated.

(7) We understand that consideration is currently being given to increasing the amount of MCA's liability insurance from \$10 to \$20 million or even \$50 million. We believe this proposal worthy of serious consideration, and we recommend that the insurance policy be reviewed carefully as to the adequacy of the scope of coverage. For example, it is important that the policy cover costs of litigation as well as any ultimate judgments.

CMA 159805

(8) We urge that if these recommendations are adopted, MCA's staff and committees be instructed to work closely with counsel in implementing them.

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In closing, we would observe that if MCA is to continue its activities in the safety publication field, it must continually renew its commitment to operate the program carefully and efficiently. Recognizing the expert resources available to it through its various committees, and the inevitable difficulties in coordinating the work of these committees, MCA should place a high priority on ensuring that the publication program is viewed as a unified whole and that various parts of that program are consistently and effectively coordinated.

APPENDIX

The Current Process of Publication of Safety Sheets

There are currently issued and outstanding approximately one hundred Chemical Safety Data Sheets ("Safety Sheets"), each between fifteen and thirty pages in length. Most follow the same general format: The front cover carries the name of the chemical, the date the Safety Sheet was adopted, and a statement that "[c]hemicals in any form can be safely stored, handled or used if the physical, chemical and hazardous properties are fully understood and the necessary precautions, including the use of proper safeguards and personal protective equipment, are observed." On the inside cover is a short disclaimer^{1/} of any responsibility for correctness and sufficiency

1/ All Safety Sheets adopted or reprinted after February, 1976 contain the revised disclaimer:

"The information and recommendations contained in this Chemical Safety Data Sheet were prepared for the guidance of plant engineering, operations and management, and for persons working with or handling [name of chemical]. The information was compiled from experience and information provided by various manufacturers of [name of chemical] and from material on [name of chemical] appearing in scientific publications. While the Manufacturing Chemists Association believes these sources are reliable and represent the best opinions available on the subject as of [date of publication], the Association makes no warranty, guaranty or representation as to the correctness or sufficiency of any information or recommendation herein, and the Association assumes no responsibility in connection therewith; nor can it be assumed that all necessary warnings and precautionary measures are contained in this Chemical Safety Data Sheet, or that other or additional information or measures may not be required or desirable because of particular or exceptional conditions or circumstances, or because of applicable federal, state, or local law."

CMA 159807

of any information. The main text of the Safety Sheet consists of the names and properties of the particular chemical; a description of the hazards associated with the chemical and how they can be prevented or counteracted; and guidelines for employee safety, handling and storage, equipment cleaning and repairs, waste disposal and precautionary labeling.

The Safety Sheets are drafted under the general auspices of the Safety and Fire Protection Committee (the "Committee"). The members of the Committee are typically individuals with major responsibility for safety and/or fire protection at their own companies. Currently, the Committee meets four times a year.

The impetus for the initial publication or revision of a Safety Sheet can emanate from any source, including the MCA staff or persons outside the industry. The bulk of suggestions, however, come from Committee members themselves. The expectation and experience are that the Committee, which has among its members some of the most experienced industry personnel, will be alerted as to the need for establishing or revising a Safety Sheet pertaining to a particular chemical by its own members. A suggestion that a Safety Sheet be established for a specific chemical is accepted only after discussion of its frequency of use, the volume used and the degree of hazard presented.

Once a chemical is chosen, the Committee requests one or more of its members to produce the initial draft. Typically, the Committee member whose company has the most experience with the particular chemical volunteers for the assignment. Using his company's resources and his own judgment as to what reference materials and sources to consult, the volunteer casts the first draft in the standardized format of a Safety Sheet. Except where information is generally known and available, specific standards, threshold levels, etc. mentioned in the Sheet are referenced by source.^{2/}

The draft safety sheet usually is circulated first to members of the Safety and Fire Protection, Occupational Health, and Labeling and Precautionary Information Committees, to the officers of several other committees, and to MCA companies who manufacture the chemical in question (regardless of whether such companies are represented on the committees). After their written comments are received the Committee Secretary or the original authors revise the draft in light of these comments and resubmit it for review to those who commented on the initial draft. At no point in the process is the draft reviewed by any "outside" consultants or authorities.

^{2/} In many early Safety Sheets, the practice of citing specific sources for such figures and other data was not always followed. It is our understanding that an effort is made to supply such citations when Safety Sheets are revised.

Some sections of the Safety Sheet are actually drafted by other MCA committees, while other sections are only reviewed by them. Where, for example, a Safety Sheet is to include a recommended precautionary label for a certain chemical, the Labels and Precautionary Information Committee typically supplies the text of the label. Similarly, the Occupational Health Committee may cooperate by writing or reviewing that portion of a Safety Sheet dealing with health management, while the Air Quality, Water Resources, and Solid Waste Management Committees review for environmental controls. Shipping and transportation considerations are reviewed by the Chemical Packaging and Transportation Equipment Committees. On the inside cover of most Safety Sheets is a list of those committees which usually cooperate with the Safety and Fire Protection Committee in the preparation of Safety Sheets.

The final product is reviewed by MCA's Staff Counsel to ensure compliance with relevant laws and MCA policies. When a new Safety Sheet finally goes to press, typically about two years have elapsed.

Safety Sheets are revised and updated from time to time. However, there is no formalized mechanism for monitoring and evaluating new data and no formal requirement that publications be updated or reviewed at any particular time.^{3/} As

^{3/} Presently, the latest versions of at least 28 of the approximately 100 Safety Sheets currently issued and outstanding were adopted in the 1940's or 1950's; 39 bear adoption dates in the 1960's.

in the case of new publications, suggestions for revisions are expected to come from individual members of the respective committees whose companies use the various chemicals every day and who can be counted on to keep up with the latest developments relevant to their products. We understand, though, that a proposal for regular review of Safety Sheets by the Safety and Fire Protection Committee is under consideration by the Committee. Under the proposed procedure, each sheet would be reviewed as often as necessary, but in any event not less than every five years.^{4/}

The MCA publications program is operated as a public service and not for profit. MCA does not solicit sales of its publications, but responds to requests for such publications, virtually always on a prepaid basis. The charge for Safety Sheets is nominal (75¢). Requests for publications are accepted, processed and shipped by mail from the Washington office. At present there exist no tabulations^{5/} of how many

4/ As an interim measure, the Secretary of the Safety and Fire Protection Committee has recently sent a questionnaire to selected individuals -- both on and off the Committee -- designed to determine in a short period of time whether any Safety Sheets should be revised in minor respects or withdrawn from distribution pending major revision.

5/ MCA has on file invoices from publication requests received over the last several years, including over 32,000 invoices for the combined two year period 1973-74. A sample of the most recent invoices from 1975 indicates that up to one third of all Safety Sheets are sent to non-members -- primarily industrial companies but also schools, hospitals, book stores, foreign agencies and others.

Safety Sheets are sent out, and no general profile of publication users is kept. Nor is any master list of purchasers kept or employed when particular publications are updated. (Revisions are noted, however, in MCA's Publications List, which is regularly reviewed.) Indeed, since many orders of individual publications are in bulk (100 or 500 copies) the Association currently has no way of knowing to whom Safety Sheets are eventually distributed. Some MCA members distribute them to their own industrial customers, though not always with every separate purchase. Other companies reserve them exclusively for internal use. Still others use them as a primary source in designing their own safety publications, or as a resource to respond to questions from customers.