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Manufacturing Chemists' Association, Inc.
(FOUNDED 1872)
1825 CONNECTICUT AVENUE, N. W.
WASHINGTON, D. C. 20009

MINUTES OF MEETING

PLASTICS COMMITTEE
The Greenbrier
White Sulphur Springs, West Virginia
June 3, 1965

PRESENT:
Messrs. W. C. Goggin (Chairman), The Dow Chemical Company
R. G. Askew, Phillips Petroleum Company
H. Harold Bible, Monsanto Company
Earle S. Ebers, U. S. Rubber Company
Carl Setterstrom (for R. M. Knight), Rexall Chemical Company
T. T. Miller, W. R. Grace & Co.
Thomas B. Nantz, B. F. Goodrich Chemical Co.
Frank M. Norton, Allied Chemical Corp.
Glenn L. Pitzer, Union Carbide Corp.
R. G. Richards, Celanese Plastics Company
Walter H. Salzenberg, E. I. du Pont de Nemours & Co.
H. B. Warner (Board Liaison), B. F. Goodrich Co.
Robert E. Workman, Goodyear Tire & Rubber Company
F. H. Carman, MCA

New Committee Members

The Chairman welcomed new Committee members and stated that last minute complications prevented attendance of George M. Hale of Shawinigan Chemicals Limited and James W. Ferguson of Hooker Chemical Corporation, also new appointees.

The Chairman expressed sincere thanks to members who had served their two-year terms and were retiring from the Committee; he emphasized that they were always welcome to attend meetings whenever convenient.

Because of a new assignment in Monsanto Company, J. D. Mahoney, formerly representing Mobay Chemical Company, had resigned from the Committee as of May 21, 1965.

A digest of the Terms of Reference for the Plastics Committee, the General Principles Applicable for Structure and Operation of Committees, and a recently prepared Antitrust Guide for MCA Committee Members are included with these minutes.

The Plastics Financial Package and New Budget

The Secretary reported that the estimated 12 months' expenses as cleared to all members May 17, 1965 (also reviewed in the May 6 meeting of this Committee) was in substantial agreement with the final auditors' report. A surplus of $45,076 had been anticipated; the auditors reported $46,427.

Items budgeted for the next fiscal year and methods of assessment were briefly discussed. On motion duly seconded, the budget was unanimously approved.

Committee Chairman

Dr. W. C. Goggin advised that he had completed his two-year term as Chairman, also, that Mr. W. C. Brown, Vice Chairman, could not participate in this session because of business travel but was planning to be present for the evening meeting of the Plastics Group. On motion, duly seconded, Mr. W. C. Brown was unanimously elected new Chairman of the Committee.

All present expressed their sincere thanks to retiring Chairman, Dr. William C. Goggin, for his faithful service over the past two years.

Weatherability Project

The Liaison Committee met with the Research Associates at NBS on May 25. Six representatives of the Steering Committee interested in rigid vinyl plastics for building components also participated.

This meeting was concerned mainly with setting up a program for testing rigid PVC materials. In addition, the Research Associates submitted a brief progress report, a summarization of weatherability test methods with individual member's evaluations of these methods as supplied in the April 29 meeting.

Oyster Harbors Conference

For the conference scheduled for September 9 and 10, a number of names were suggested by the Secretary and Chairman W. C. Goggin as possibilities for a Program Committee. It was agreed that Mr. Glenn Pitzer should act as Chairman for this Fall meeting. Others for the committee will be selected following consultation with new Plastics Committee Chairman, Mr. W. C. Brown.

On suggestions for subjects for the business meeting, the Program Committee was asked to consider:

(1) A panel discussion on general business economics and forecasts, using economists from industry, government and an academic institution. Professor Warren Law of Harvard was suggested as a qualified speaker.

(2) Plastics in packaging. This should be similar to presentations in previous years on important industrial areas using plastic materials, such as automotive, aircraft, and rockets. Mr. Lloyd Stauffer of Modern Packaging was suggested as a speaker.

SPI Plastics in Construction Council

Following comments in this Committee's May 6 meeting, the Secretary learned from Mr. Robert Gutzeit, Manager of the Council, that the Opinion Research Survey (estimated cost is $12,900), and Phase I of a Research Program at Illinois Research Institute (estimated at $35,000) have been approved.

Opinions Research is to undertake a survey of 200 architectural firms and a few editors of some of the larger magazines in this field. The Council's Education Committee recognized that the Yankelovich Report covered the area of architectural firms but not in depth as now planned by Opinions Research. Further, Mr. Gutzeit stated there was no question in their minds as to the need for performance standards and certification procedures.

On the Research Program at Illinois Research Institute, Mr. T. T. Miller indicated that this was to consider fire, smoke, and toxicity hazards and that they were trying to get away from the panic concept in hazard problems usually pinpointed and a major concern with plastic components in building.

Foreign Trade Questionnaire

Committee members were alerted on the plans of SOCMA to seek information on world trade and manufacturing capacity for plastics and resins. This is to be used in assisting the Technical Specialists working with Mr. Herter's office on GATT negotiations. The original proposed questionnaire of 31 pages has been materially shortened and should be circulated shortly to the industry.

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The MCA Annual Report was mailed to Executive Representatives and Committee members on June 3.

Next meeting of the Committee will be held at Oyster Harbors unless an interim session is found necessary which will be called at the discretion of the Chairman.

Respectfully submitted,

FHCarman

F. H. Carman, Secretary
Plastics Committee

FHC:jdh
Enclosures

CC: Plastics Committee, Members and Alternate
Lloyd Symington
Harry Warner, Board Liaison

June 10, 1965

Manufacturing Chemists' Association, Inc.
June 20, 1952

TERMS OF REFERENCE
PLASTICS COMMITTEE

The Board of Directors approved a resolution setting up certain Terms of Reference governing formation and activities of the Plastics Committee. These were approved in the early part of 1952 by the Plastics Committee. Pertinent provisions of interest are:

1. Members shall be appointed on a rotating basis with the objective that they do not at any time represent in numbers or volume of production a predominant position in the industry or any major segment.

2. The Committee is authorized to select its own chairman.

3. The Committee may make oral reports of its activities to the members twice a year at regularly scheduled sessions in conjunction with the Association meetings. Any other reports other than those at such special meetings as may be authorized by the Board shall be in writing.

4. The Committee is authorized to represent the manufacturers on broad problems arising from activities of Government agencies, etc.

5. The Committee is authorized to sponsor and make available technical literature as may be required.

6. The Committee is authorized to promote safety in the manufacture of plastics utilizing to a maximum extent the existing committees of the Association.

7. The Committee is authorized to participate in voluntary standardization programs with respect to color and the like in cooperation with the Commodity Standards Division of the Department of Commerce, and to maintain liaison with A.S.T.M. on similar programs.

8. The Committee is authorized to continue to encourage and participate on a voluntary basis in a fundamental research program such as that at M.I.T.

9. The Committee is authorized to collect statistical data pertaining to volume of production and past transactions or activities as required for specific, non-routine purposes.

In all instances these activities of the Committee and the Plastics Group must be consistent with the By-Laws. The above-mentioned activities were carried on by the former association and it is understood that they would be so conducted in M.C.A. on the same basis as was the practice in P.M.M.A. The only important departure from P.M.M.A. is frequency of general meetings.

MANUFACTURING CHEMISTS' ASSOCIATION, INC.

General Principles Applicable to the Structure and Operations of Committees*

Preamble. The Association's By-Laws, in Article V, Section 8, authorize the Board of Directors to appoint such committees with such duties and functions as it may from time to time determine. The By-Laws further permit each such committee, unless otherwise directed, to adopt rules and regulations for the conduct of its affairs consistent with Association policy and subject to review and approval by the Board where such approval is deemed desirable.

To assist the committees in carrying out their functions consistent with the By-Laws, certain general principles applicable to the structure and operations of all committees are formalized in this Resolution. No committee, subcommittee, or other group operating under MCA auspices on MCA business shall deviate from these general principles, except where specifically authorized by the Board (or as determined to be necessary by the President or Secretary of the Association after clearance with General Counsel). Each MCA committee, subcommittee, or other group whose organization, procedures or activities do not presently conform to this Resolution shall promptly take steps either to conform thereto, or to advise the Board to what extent and for what reasons it cannot conform.

As used in this Resolution, unless otherwise indicated, the term "committee" includes all MCA standing committees, standing subcommittees, and such ad hoc committees as may be authorized from time to time, but does not include the Executive Committee or other committees composed of members of the Board.

1. Functional vs. Product Committees. The Association's committees shall continue to be organized primarily along functional, rather than product, lines. No committee or other group having to do with a particular chemical product or product segment shall be formed without specific approval by the Board of Directors (or in an emergency by the President of the Association after clearance with General Counsel). The Board hereby confirms paragraph 3 of its Resolution of October 9, 1951, which reads in part as follows:

> ...it is hereby recognized that there may be from time to time a need for special committees in cases where manufacturers of a particular product or class of products have a special problem that is peculiar to that segment of the industry and which cannot by its very nature be effectively handled at the outset through the existing functional committee structure. In such event, the Board of Directors may, pursuant to Section 8 of Article V of the By-Laws, establish a special committee to consider the particular problem under the following conditions:

*As approved by the Board of Directors on March 12, 1963.

(a) The Board of Directors may take up such a matter on its own motion, or upon a written request from any member or group of members of the Association.

(b) Before agreeing to the establishment of any such special committee, the Board of Directors will determine whether or not the existing functional committees are adequate to handle the problem, and if not, whether the problem is of such general concern as to call for a new functional committee.

(c) If, as a result of such preliminary determination, the Board decides to establish a special committee, the Board will prescribe by resolution the duties and functions of such special committee which shall be limited to specified problems and, whenever practicable, to a stated duration.

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(g) In appointing members to any such committee, the Board will, to the maximum practicable extent, exercise care that the members do not, taken collectively, represent in numbers or volume of production a predominant position in the industry or industry segment that produces the product or class of products that gave rise to the establishment of the committee.

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2. Ad Hoc Committees. All committees dealing with a particular product segment of the industry (other than the Plastics Committee which operates under specific Terms of Reference approved by the Board on March 11, 1952) and all other committees formed for a temporary purpose shall be deemed ad hoc committees rather than permanent or standing committees. Unless otherwise specified in its terms of reference, the term of each such committee shall be no longer than two years, subject to renewal for additional periods of one year or less by specific action by the Board of Directors.

3. Terms of Reference; Subcommittees and Task Groups. Each committee shall operate under terms of reference defining its authorized activities which have been approved by the Board. A committee may form such subcommittees, task groups or other groups as may be necessary to assist it in conducting its authorized activities. The Board shall be promptly advised of the formation of each such subcommittee or group, and terms of reference in each case shall be established in writing by the parent committee subject to review and approval by MCA staff and General Counsel. Existing terms of reference of particular committees are deemed approved unless and until modified by the Board. A brief summary of the terms of reference of each committee shall be included in the Association's annual Directory.

4. Organization and Procedures. All committees shall, unless otherwise specifically authorized in their terms of reference, be subject to the following rules in respect to their organization and procedures:

(a) Members. The members of each committee shall be appointed by the Board from qualified, full-time-personnel of member companies interested in participating in the activities of the particular committee after receiving the recommendation of the committee. Such appointments shall be made in such a way that, to the maximum extent practicable, the committee will be reasonably representative of all members interested in its activities, taking into account such factors as their size, geographic location, products manufactured, and any differences in the general nature of their operations. Normally, a member company will have only one representative on a given committee. Members of any necessary subcommittees and task groups shall be appointed on the same basis by the parent committee. The membership of each standing committee should usually be composed of persons technically qualified in the committee's field of activity; normally these persons will be staff representatives or men with technical responsibilities within their respective companies. The nomination of each proposed committee member to the Board for appointment shall include his name, company affiliation, and his major area of activity within his company.

(b) Rotation. Where a committee has fewer places than MCA member companies who are interested in providing qualified representatives to participate in its activities, its members shall be appointed on a rotating basis.

(c) Staff Representative and Committee Secretary. Each committee shall have as its staff representative and Secretary a full-time MCA staff employee who shall function as the Board's administrative representative on such committee and as its chief administrative officer. It shall be the staff representative's duty and responsibility to see that all operations and proceedings of the committee, and of all of its subcommittees and task groups, are conducted in full conformity with their terms of reference and this Resolution, consulting with General Counsel as necessary. On all procedural questions arising within any committee, including matters relating to established Association policy, the staff representative's decision shall be final.

(d) Chairman; Other Procedures. Each committee is authorized to select its own chairman and other officers (other than the staff representative assigned as committee Secretary). It may also, in consultation with MCA staff and General Counsel, adopt such other procedures and rules as may be necessary or desirable, consistent with the committee's terms of reference and this Resolution. All such actions shall be reported promptly to the Board and are subject to its approval where such approval is deemed desirable.

5. Meetings.

(a) Frequency. Each committee, subcommittee and task group will meet only as necessary to perform authorized committee business as determined by the MCA staff. Meetings should not be held where the subject matter can be adequately and practicably handled by correspondence or telephone between the appropriate staff representative and individual members.

(b) Location. To the extent practicable and in the absence cogent reasons for holding meetings elsewhere, all committee meetings should held at the Association's office or other suitable location in Washington, D.

(c) Agenda. The staff representative assigned to each committee shall prepare written agenda prior to each of its meetings, which agend shall be cleared in advance with General Counsel.

(d) Attendance of Staff Representative. No MCA committee meeting shall be held without the attendance of the staff representative assig to it or other full-time MCA staff employee. General Counsel should also atten any meeting whenever in his opinion the nature of any subject on the agenda makes his presence desirable.

(e) Minutes. The staff representative assigned as Secretary to the committee shall keep accurate and complete minutes of all business transacted at each meeting, which are to be subject to review and approval by General Counsel.

(f) Discussions limited to agenda. All substantive discussions at any MCA committee meeting are to be limited to authorized aspects of subjects on the agenda, except where additions to the agenda are specifically approved by the staff representative assigned to the committee. The staff representative's decision as to the propriety of any subject matter raised for discussion at any meeting shall be final. Any discussions or occurrences on the occasion of any meeting which are contrary to MCA's policies or rules and which come to the staff representative's attention shall be reported promptly by him to his superior and to General Counsel.

(g) Subcommittees and task groups. The foregoing rules on meetings are applicable to all committees, subcommittees, task groups and other working groups meeting under MCA auspices, except that subparagraph (c), (d) and (e) may be modified as indicated below in those cases where the subcommittee or other group must meet in order to carry out a limited and specific written assignment from the parent committee. In each such case, (i) the specific assignment must be set forth in the parent Committee's minutes; (ii) the MCA staff representative assigned as Secretary to the parent committee must be satisfied that the meeting in question is necessary and that the subject matter is not such as to require his presence; (iii) the Chairman of the subcommittee or other group is to be responsible for carrying out the duties of the MCA staff representative, including particularly those specified in subparagraph (f) above; and (iv) such Chairman must promptly make an accurate and complete written report to the parent committee and to the MCA staff representative as to everything occurring at such meeting.

6. Policy Statements. Statements of Association policy or position developed by any MCA committee, subcommittee or other group for submission to the Congress or any governmental or other external agency shall, unless otherwise authorized, be transmitted by the President or other appropriate officer of the Association.

7. Annual Report. An annual written report shall be prepared on the activities of each committee during the preceding fiscal year, which shall

appear in the Association's Annual Report. Such reports will be supplemented from time to time by an oral summarization on the part of the Chairman of each committee at regular Board meetings.

8. Periodic Reminder to Committee Members. A copy of this Resolution, as it may be amended from time to time, shall be furnished to each member of each MCA committee, subcommittee and task group at the beginning of his duties as such committee member, and at least once a year thereafter so long as he remains a member.

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The purpose of this pamphlet is to help give MCA committee members, in non-technical language, a working understanding of the Federal antitrust laws as applied to their MCA activities. It was prepared by Lloyd Symington, a member of the Washington law firm of Fowler, Leva, Hawes & Symington, MCA's General Counsel.

Mr. Symington has asked me to add the following cautionary notes: This pamphlet is only a guide, to alert you to possible situations or activities in your MCA work which could lead to antitrust troubles. It is not intended to be a complete statement of the law nor to cover every possible situation.

For advice on any particular problem concerning your company, you should, of course, consult your own company counsel.

April 1, 1965

PRESIDENT

ANTITRUST GUIDE FOR MCA COMMITTEE MEMBERS

This pamphlet is designed to be a layman's guide on how the antitrust laws apply to trade association activities, with particular reference to MCA committee work. It is written primarily for the guidance of those MCA Committee members who have no particular knowledge of this complicated subject. For those who may have had the benefit of advice on this subject from their own company counsel, it is hoped that this pamphlet will serve as a useful reminder or "refresher course".

The Manufacturing Chemists' Association, Inc. is a non-profit industry association representing over 200 chemical producers. Like other industry associations, MCA is composed of competitors or groups of competitors, representatives of which serve on its Board of Directors and on its committees.

Obviously, whenever competitors meet together problems can arise under the antitrust laws—in antitrust jargon, there is "opportunity for abuse". If the meeting or other activity among competitors is conducted by or through a trade association, it is just as vulnerable to antitrust attack as if the same companies were meeting or acting together without the medium of an association. Trade associations generally seek, quite properly, to promote understanding and cooperation among their members. But if this "cooperation" goes so far as to replace or reduce competition, both the association and its members will be in trouble under the antitrust laws.

Some years ago, antitrust enforcement officials tended to view all trade associations and trade association activities with suspicion; fortunately, that attitude is now less prevalent. Indeed, if a trade association has proper objectives, plus procedural safeguards that are conscientiously observed by its members, activities sponsored by it can be reasonably safe from antitrust hazards.

Like most reputable trade associations, therefore, MCA has objectives and programs that are well within the law. It also makes every effort to prevent possible antitrust abuses from arising. But a large responsibility also rests upon its member companies —and particularly upon their individual representatives who serve on MCA's committees. This means that committee members should know enough about this subject to be able to avoid doing or discussing things in their MCA work that might raise antitrust questions. The main purpose of this pamphlet is to help all committee members to recognize what is, or might become, an "antitrust question".

Some subjects that might be taken up or discussed by members of a trade association are clearly illegal; many others are wholly legal and proper; and there is a sizeable "grey area" or danger zone in between. (See examples in Lists A and B at the end of this pamphlet.) This grey area between legal and illegal association activity is often vague and uncertain, and MCA's policy has always been to keep as far away as is reasonably possible from the doubtful zones.

The chemical industry has certain features which, rightly or wrongly, tend to make some of its segments a target for antitrust attack or investigation—for example, the homogeneous nature of many chemical products, the tendency of prices of such products to seek a common level, and the relatively large size of many chemical manufacturers. As a result, the Association's aim is not only to avoid actual violations of law—it wants to prevent even any appearance of violation which might invite suspicion or investigation on the part of the enforcement authorities. To protect itself and its members in this respect, MCA has adopted and observes several basic policies:

1. It has well-defined, constructive objectives and programs which are designed to promote the over-all interests of the industry and the public.
2. Its organizational structure consists primarily of functional committees rather than individual product committees; likewise, any activities concerned with pricing or marketing chemical products are scrupulously avoided.
3. It maintains various procedural safeguards—particularly those set forth in the Board's "General Principles Applicable to the Structure and Operations of Committees" (reprinted in the Association's annual Directory).
4. It retains General Counsel to help insure full observance of the above policies and procedures, and to provide guidance and protective advice as to all MCA's operations from an antitrust standpoint
5. It has approved the issuance of this "Antitrust Guide" to help member company representatives

on MCA committees to stay out of trouble under the antitrust laws.

This last item recognizes the obvious fact that the good judgment of those who serve on MCA's committees is of primary importance in avoiding violations of law. It is hoped that this guide, by providing a working understanding of the antitrust laws, will help all MCA committee members to be alert to possible pitfalls or questionable situations to be avoided—particularly those that might otherwise arise innocently or inadvertently.

The Federal Antitrust Laws

To understand and comply with the Federal antitrust laws, it is important to know why they exist. They were not intended to put road-blocks on legitimate business activity. Rather, their objective is to help preserve a free economy by encouraging competition in the market place, and by outlawing artificial restraints on competition. Our main concern here is with possible restraints that can result from joint action or discussions in connection with trade association activities, with particular reference to MCA.

There are four basic Federal antitrust statutes: the Sherman Act, the Clayton Act, the Robinson-Patman Act, and the Federal Trade Commission Act. The provisions that are most likely to apply to trade association activities are contained in Section 1 of the Sherman Act and Section 5 of the FTC Act. (Most states also have antitrust statutes of various sorts, but they are outside the scope of *this pamphlet.*)

These laws were first enacted at a time when trusts and combinations were threatening to control the market place. Since then, with some refinements, they have become generally accepted as vital to preservation of our free competitive economy. It is true that some parts of these laws have been given an unnecessarily rigid interpretation. At the same time, they often seem to be subject to uncertainties or inconsistencies as applied to particular kinds of business conduct. But if these laws should fail to do their main job, most experts feel they would be replaced by a much more inflexible system of government regulation and controls over business.

Businessmen thus have a double incentive to make our antitrust laws work. They want to avoid the serious consequences, including jail sentences, that can result from violations. And in their own business interest, compliance with the letter and spirit of these laws is the best way to avoid further legislative controls incompatible with the free enterprise system.

The Sherman Act

The Sherman Act, passed in 1890, is the first and most basic Congressional directive on this subject. It is enforced by the Antitrust Division of the Department of Justice through civil or criminal actions, or both (Criminal actions are usually, though not necessarily, limited to *per se* violations such as price-fixing conspiracies.) The Act also provides for the bringing of civil suits for treble damages by private litigants.

Section 1 prohibits "contracts", "combinations" or "conspiracies" in restraint of trade or commerce. These are terms of collective action or conduct by two or more persons, and they include agreements and understandings of all kinds—whether written or oral, formal or informal—which unduly restrain competition. Over the years the courts have developed a "rule of reason"—that is, the restraint must be an unreasonable one to amount to a violation. But some restraints are deemed unreasonable *per se*, including those which have the purpose or effect of fixing prices, limiting production, allocating markets, or boycotting third parties. These are the so-called *per se* restraints. (See List A, below.)

Because of the collective nature of most trade association activities, this Section 1 of the Sherman Act is the principal weapon used by the Department of Justice in any antitrust suit against a trade association or its members. Such suits are usually based upon an alleged conspiracy or agreement among competitors to restrain trade. (The Federal Trade Commission also can, and does, challenge trade association activity of this sort under Section 5 of the Federal Trade Commission Act, described below.)

Section 2 of the Sherman Act prohibits "monopolization" of any part of trade or commerce. Its main thrust is to prevent a single company from acquiring or holding sufficient power to control prices or to foreclose access to the market. The section further forbids any "attempt" to monopolize by a single person, or any "conspiracy" with others to monopolize.

Any trade association activity which might amount to a conspiracy to monopolize could thus be attacked under Section 2.

Federal Trade Commission Act

The Federal Trade Commission Act was passed originally in 1914. It is enforced by the Commission through administrative proceedings designed to secure a "cease and desist order", which is appealable to the Federal courts.

Section 5 (the main operative section) contains sweeping prohibitions against all "unfair methods of competition" and all "unfair or deceptive acts or practices" in commerce. As construed by the Commission and the courts, this section 5 covers everything that is unlawful under Section 1 of the Sherman Act, such as price-fixing, boycotts, and the like. (It also goes beyond the other antitrust laws to reach various forms of "unfair" business conduct such as false advertising.)

The Clayton Act

The Clayton Act was passed in 1914 to cover certain specific forms of business restraints which might not amount to Sherman Act violations—for example, exclusive dealing and "tie-in" sales (Section 3), acquisitions and mergers (Section 7), and interlocking directorships (Section 8). It is enforced by both the Antitrust Division and the Federal Trade Commission.

The Robinson-Patman Act

The Robinson-Patman Act was passed in 1936 as an amendment to Section 2 of the Clayton Act. It is directed against discriminations in price or services which have anti-competitive effects, and is enforced by the Federal Trade Commission.

Antitrust Enforcement

As indicated, the Federal antitrust laws are enforced by the Department of Justice (Antitrust Division) and the Federal Trade Commission. The enforcement agencies, together with the courts, are given wide discretion in the application and interpretation of these laws. Only too often their application appears uncertain, their interpretation ambiguous or inconsistent. But their underlying purpose is reasonably clear, as are some of the basic guidelines of legality vs. illegality set forth below. And there is no question but that enforcement activity is nonpartisan, whether under Republican or Democratic leadership. For example, administrations of both parties had a hand in the vigorous prosecution of the celebrated electrical machinery conspiracy cases —in which businessmen learned they could go to jail for violating the antitrust laws.

The consequences of losing an antitrust case (or becoming subject to a consent decree or FTC consent order)* are usually quite serious. They include:

- **a.** The very real danger in criminal cases of jail sentences, or fines (up to $50,000 for each offense), or both.
- **b.** Dissolution of trade association.
- **c.** Modification (or even prohibition) of customary methods of doing business.
- **d.** Permanent supervision by the court, or the FTC, over day-to-day business operations (for example, pricing practices, trade association activities, dealings with suppliers or customers, and many others).
- **e.** Liability for treble damages in suits by private litigants.

Application of Antitrust Laws to Trade Association Activities

So much for the statutes themselves, which are obviously very general in their terms.

A number of trade association activities have been challenged under these laws, particularly under Section 1 of the Sherman Act and Section 5 of the FTC Act. As already noted, some activities among competitors are considered illegal on their face—the so-called *per se* restraints on competition which the courts have said cannot be justified under any circumstances.

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* The agreement of defendants to sign a consent decree or FTC cease-and-desist order does not necessarily constitute an admission of wrongdoing and companies often agree to them (or plead ***nolo contendere*** in a criminal case) as a means of avoiding costly and time-consuming litigation. The final decree (or criminal sentence) in such event, however, may be just as severe, and the consequences just as serious, as if the case had been lost after litigation.

Certain other activities or courses of conduct by trade association members are in the danger zone of being potentially illegal restraints, but are subject to the "rule of reason"—that is, defendants can try to show the court that any challenged activities were justifiable or "reasonable" under the circumstances. In most cases, however, the dividing line between what is legal and illegal is vague and unpredictable. As a result, activities in this category are apt to be highly vulnerable to attack, or at least subject to investigation by the enforcement authorities. As far as MCA is concerned, its traditional policy has been to keep as far away as is reasonably possible from these danger zones.

Specific examples under both of the above categories of what *not* to do in your MCA committee work are given in List A below.

On the other hand, there are numerous trade association activities which are entirely consistent with free and open competition, and which do not normally give rise to any anti-trust questions. MCA has always sought to conduct its programs and activities within this area. Examples of permissible activities in your MCA work are given in List B below.

Lists A and B: Introduction

In reviewing the specific activities listed below, there are a few general points you should bear in mind:

1. The listings of legally proper and improper activities given as examples in Lists A and B below are not intended to express a legal opinion that the respective break-downs are necessarily correct under all circumstances.* Thus, an activity listed as proper by itself, could become vulnerable if combined with other activities or if done with an improper motive. And one that is listed as being

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*** For anyone interested, additional non-technical references on this general subject include the following:**

Society of the Plastics Industry, 1961 Antitrust Laws Bulletin, "The Antitrust Laws and You."

Kintner, "An Antitrust Primer" (Macmillan Company, 1964).

Van Cise, "The Federal Antitrust Laws," American Enterprise Association (Washington, D.C. 1962)

National Institute for Commercial and Trade Organization Executives, "Trade Association Management" (Chicago, 1948), Chapter XIV

Lamb & Kittelle, "Trade Association Law and Practice" (Boston, 1956) Chapters 1-11

Whiting, "Antitrust & the Corporate Executive" Virginia Law Review (Oct. 1961, Jan. 1962) of questionable legality might be quite all right if conducted under careful safeguards to achieve a legitimate association objective.

2. Good motives are not an excuse for doing things that are otherwise unlawful.

3. As indicated above, an otherwise lawful act may become unlawful if done for an improper purpose, or to further an illegal end, or if it is part of a larger unlawful scheme. For example, a product standardization program might be justifiable considered by itself, but not if it is combined with other activities to facilitate the fixing of uniform prices. In other words, the courts will look at the cumulative effect of several activities —not at each one separately.

4. An ostensibly lawful program or activity may, inadvertently or otherwise, get into vulnerable areas if conducted by a group of competitors making the same product. That is the main reason why MCA operates primarily through functional committees, and imposes limitations on the subject matter and duration of any *ad hoc* committees dealing with matters concerning a specific chemical product or product segment.

5. As a member of an MCA committee, you and your company can be held responsible for any improper acts that may occur which you know about (or should know about), and if you fail to protest or otherwise disassociate yourself from them.

LIST A

Examples of Illegal or Potentially Illegal Areas to be Avoided by MCA Committee Members

(1) **Illegal "Per Se" Restraints.** Don't agree with your competitors or anyone else:

(a) To fix the prices of your products, or their terms or conditions of sale. (The law condemns *all* collective attempts to fix prices—whether by agreement or general understanding, whether the prices fixed are "reasonable" or not, and regardless of the motivation or whether the attempt proves successful.)

(b) To limit your production, fix production quotas, or otherwise limit the supply of any product reaching the market (Agreements to limit output suppress competition and tend to increase prices, supposed "justifications" such as preservation of the industry, or conservation of natural resources, are unavailing.)

(c) To divide up the market, either geographically or by classes of customers. (The practical effect of any such scheme, if successful, is to give each participant monopolistic control over the market area assigned to him.)

(d) To blacklist or boycott customers, competitors or suppliers (Any scheme to exclude buyers or sellers from the market, or not to trade with them, restricts their freedom to buy or sell, and denies to the consumer the benefits which flow from free and open competition.)

Note An illegal "agreement", "combination" or "conspiracy" does not have to take the form of a written document or other formal arrangement. Enforcement personnel and the courts will readily infer an agreement or understanding from a particular course of conduct or events in connection with discussions among competitors —for example, if an identical price increase by the leading producers in an industry should follow shortly after a trade association meeting among them at which "business conditions" were discussed. An agreement or conspiracy may also be inferred from a combination of association activities which, taken together, might produce any of the forbidden results listed above.

(2) **Potentially Illegal or Vulnerable Activities:**

(a) Don't participate in any program with competitors to collect and distribute price, cost or production statistics on your products, or to collect or disseminate freight rates on individual products.

(b) Don't agree to standardize your products or containers for your products. (Standardization of TSP containers was a principal factor in the 1962 FTC charges against MCA in the TSP case; these charges pertained to an activity in 1939-40 which has long since been abandoned. MCA denied that this activity was illegal, but joined the respondent TSP producers in signing a consent order prohibiting the various practices charged, in order to avoid costly and time-consuming litigation.)

Note Product standardization is not illegal in itself, but is in the "grey" or borderline area from an antitrust standpoint. The degree of antitrust danger in such activities is greater in industries which make and sell homogeneous products and where delivered prices tend to be uniform at any given time. MCA does *not* participate in any activity to standardize chemical products. It does assist appropriate regulatory bodies in developing standard specifications for containers of hazardous products to promote safety.

(c) Don't participate in certification or "seal of approval" programs for particular products which might result in excluding producers or suppliers from the market (for example, as to "non-standard" or "off-quality" products).

(d) Don't agree to adopt or use uniform Codes of Ethics.

(e) Don't agree to adopt or use standard contract forms.

(f) Don't exchange non-public information on labor relations programs of individual companies, including wage rates, specific contract clauses, etc., don't discuss formulation of industry-wide policies on employer-employee relations

(g) Don't agree to any "no-raiding" arrangements as to employees.

(h) Don't exchange information on subjects concerning particular products (unless in a technical area pursuant to an authorized MCA committee program), or concerning the commercial or competitive interests of individual companies.

(i) Don't reach agreements or understandings with competitors without consulting your own company counsel.

(3) **Discussions.** Don't have discussions or exchange information with your competitors on any subject relating to the "per se" restraints listed in (1) above, whether inside or outside MCA-sponsored meetings. As examples, you should avoid any formal or informal discussion with competitors of the following:

(a) Individual company prices, price changes, terms of sale, etc.

(b) Industry pricing policies, price levels, price changes, etc.

(c) Price differentials; mark-ups, discounts, allowances; credit terms.

(d) Costs of production or distribution; cost accounting formulas; methods of computing cost.

(e) Transportation rates or rate policies for individual shipments or particular products, including basing point systems, zone prices, freight equalization, etc.

Note: This was an alleged factor in the FTC charges against MCA in the TSP case. MCA denied the charges, but joined the producers in signing a consent order prohibiting the practices charged for the reasons indicated in item 2(b) above

(f) Bids on contracts for particular products; procedure in responding to bid invitations.

(g) Sales aspects of individual products; marketing or distribution methods.

(h) Credit programs or activities.

(i) Individual company figures on costs, production, inventories, sales, etc.

(j) Information as to future plans of individual companies concerning the design, production, distribution or marketing of particular products, including proposed territories or customers.

(k) Matters relating to individual suppliers or customers, particularly in respect to any action that might have the effect of excluding them from any market.

(l) Any matter relating to TSP as a specific product.

Note: Where compilation of individual company figures or other facts may be necessary in connection with an MCA program, MCA handles them on a confidential basis, and makes them available only to the extent required by the program, and only in consolidated form without disclosing individual company data.

(4) **Unauthorized Meetings; "Rump" Sessions.**

(a) It is important to avoid discussions of the above subjects, not only at formal MCA or committee meetings, but also in connection with social or other gatherings on those occasions—sometimes referred to as "rump" sessions. If any improper discussion should start in your presence, you should protest; if the discussion continues, you should promptly excuse yourself from the group and communicate your protest to the appropriate MCA staff member. Even if you do not take part in any improper discussion, your presence without participation could still get you and your company into trouble. Obviously, MCA cannot fully police against improper rump sessions, but any individuals who participate in them, whether deliberately or innocently, are doing their companies, and MCA, a real disservice.

Note. In case of doubt as to whether a particular subject may properly be discussed with your competitors, you should consult your own company counsel.

(h) Regardless of subject matter, you should not attend or tolerate any meeting with your competitors in connection with supposed MCA business which has no agenda, or which is concerned with matters outside your Committee's terms of reference, or which otherwise fails to conform with the procedures in the "General Principles."

(5) **MCA Task Group Meetings.**

If you participate in an MCA task group meeting held without the MCA staff member being present (pursuant to the special circumstances set forth in subparagraph 5(g) of the "General Principles"), be sure that the meeting complies with the requirements of that subparagraph 5(g), including an "accurate and complete written report . . . as to everything occurring at such meeting."

Note. The attitude of enforcement personnel will be governed by what committee or task group members actually do, not by what is said in reports or minutes that may be incomplete or inaccurate.

LIST B

Examples of Permissible Activities in MCA Committee Work

You may (in carrying out authorized MCA programs) participate in the following kinds of activities:

(1) Activities to promote safety in your plants, and in packaging, transporting, handling and using your products. (In addition to the work of MCA's Safety & Fire Protection Committee, safety-promoting activities are carried on by MCA Committees dealing with precautionary labeling, packaging, transportation, tank cars, ammonium nitrate (ad hoc), rocket propellants (ad hoc), etc.).

(2) Activities to protect or improve the public health (for example, air and water pollution abatement programs, and other activities bearing upon environmental health).

(3) Public relations, informational and educational activities to promote MCA's objectives.

(4) Activities to support or oppose legislation of concern to the industry.

(5) Government relations programs, including efforts to secure workable administrative regulations and other activities before administrative agencies, cooperation with regulatory bodies, etc.

Note: Where an executive agency may be seeking information or advice from industry relating to a particular product or group of products, it is advisable, where appropriate, to have the matter handled by an official Industry Advisory Committee formed and run by the government agency under Executive Order 11007, dated February 27, 1962.

(6) Activities in connection with international trade and tariff policies of general concern to the industry.

(7) Activities on transportation matters of general concern to the industry, such as safety, technical efficiency, and matters involving a principle or policy of wide applicability for consideration by rate-making or other regulatory bodies (excluding rates or rate policies for individual products).

(8) Activities on industrial relations policy matters of general interest (excluding consideration of industry-wide positions or policies as to employer-employee relations, and excluding consideration or exchange of non-public information pertaining to individual companies).

(9) Programs to develop voluntary standards, other than chemical product standards. (MCA committees are currently authorized to participate in projects such as the following: developing voluntary standards for certain items of chemical process equipment (pumps, piping, etc.) in cooperation with the American Standards Association; developing standard specifications of containers for regulated (hazardous) products in cooperation with appropriate regulatory bodies; and developing standard methods for testing or analyzing certain chemicals under the programs and procedures of the American Society for Testing and Materials.)

(10) Participation in or support of research programs where the results will be made available to all interested persons.

Note: MCA policies as to what constitutes acceptable activity may appear to some of those concerned to be over-conservative when related to a proposed new program of a particular committee or task group. These policies are deliberate for the reasons indicated earlier in this pamphlet. Should such a proposed program seem vital, however, the chairman should write out a full description of its nature, its objectives, and the reasons for embarking on it, for review by the MCA staff representative and MCA counsel

CONCLUSION

It is hoped that this pamphlet will help you to understand how the antitrust laws bear upon trade association activities, and to carry out your MCA work in full conformance with these laws and with MCA policies. Again, please remember that this is only an outline guide, and is not intended to be complete—for answers to specific problems, you should consult your own company counsel.