TO: John Irvine - Austin

~~TGG~~: ~~JCL~~: ERT: MJH: ~~AJO~~: RF

XF: None

FROM: T. G. Grumbles
DATE: February 5, 1991

Interoffice Communication

VISTA

SUBJ: TSCA REGULATION OF IMPORTED POLYMERS

Interesting that I should receive the attached at a time we are discussing the importation of BASF 5-6015 from Germany.

This article certainly underscores the importance to have good TSCA procedures, having solid assurance the products imported are on the inventory, and the fact that EPA is pretty "hard nosed" on these issues.

T. G. Grumbles

dlj

Attachment

cc: John Kirkpatrick-Austin, Rick Flammer

VVV 000011758

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January 17, 1991

Thomas G. Grumbles
Vista Chemical
900 Threadneedle
Houston, TX 77079

Re: 3M TSCA Enforcement Action

Dear Tom:

We have prepared the attached memo pointing out some implications of a pending enforcement action brought by the Environmental Protection Agency against the 3M Company under the Toxic Substances Control Act (TSCA). Specifically, the outcome of this proceeding may affect the manner in which chemical manufacturers maintain records and document efforts to assure compliance with TSCA.

We thought this might be of interest to you. Please let us know if you would like to see a full copy of the referenced Administrative Law Judge decision, or if you have any questions or comments.

Cordially yours,

John

John B. Dubeck

Attachment

MEMORANDUM

RE: Compliance Implications of EPA's Appeal of Penalty Reductions in TSCA-88-H-06 (TSCA 3M Enforcement Action)

DATE: January 1991

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In November, 1990, EPA's Chief Administrative Law Judge, Henry Frazier, recently reduced a penalty EPA sought to impose against 3M from $1.3 million to $111,780. The penalty arose out of 3M's admitted importation of two polymers that were not listed on the TSCA Inventory. EPA is now vigorously appealing the reduced penalty. The outcome of this proceeding is likely to have a significant impact on the nature of TSCA compliance obligations, and the extent to which large fines may attach to relatively harmless instances of non-compliance as a matter of strict liability.

By way of background, 3M discovered in 1986 that it had been importing two polymers that were not listed on the TSCA Inventory in violation of the premanufacture notice requirements of section 5 of TSCA. Upon discovering the violations, 3M immediately shut down all operations using the chemicals, notified EPA of the violations, and submitted a polymer exemption application for each substance. Both substance promptly cleared polymer-exempt review, were added to the TSCA Inventory, and re-introduced into U.S. commerce. Under a straightforward application of its section 5 Enforcement Response Policy, EPA sought to assess a $1.3 million penalty against 3M.

3M fought the penalty as being far out of line with the nature and gravity of the violation. 3M had been importing "polymer A" since before the compilation of the TSCA Inventory in the late 1970s. During 3M's massive Inventory reporting operation, polymer A was identified as a raw material purchased from General Electric. Polymer A was, in fact, being imported from General Electric, Canada. The obligation to report polymer A to EPA for inclusion on the TSCA Inventory therefore fell on 3M. A subsequent internal audit of 3M's imported raw materials revealed that "polymer B" was also not listed on the TSCA Inventory. This violation occurred because 3M's German supplier modified the composition of the product from one that was included on the TSCA Inventory to one that was not. Polymer B is used as a coating on reflective traffic control signs.

What is most noteworthy about this enforcement action is that 3M made a demonstrable, good-faith effort to assure that both substances were on the TSCA Inventory, yet EPA is not satisfied with the $111,780 penalty ordered by an Administrative Law Judge. 3M's posture is that it has complied diligently with TSCA; these violations were accidental and harmless; it sought to cooperate fully with EPA in resolving the matter; and the proposed penalty is far out of line with these mitigating circumstances and section 16 of TSCA. EPA's posture, on the other hand, is essentially that any compliance program that allows a substance to slip through the cracks is inadequate, and industry must either invest in foolproof TSCA compliance programs or face seven-figure fines. If this is indeed EPA's position, it does not comport with earlier guidance from the Agency on TSCA compliance, and we suspect it is inconsistent with the estimated economic burden imposed on industry by the Inventory Reporting and Premanufacture Notice Rules.

Several pages of Judge Frazier's decision are devoted to a review of 3M's TSCA compliance efforts. Like other organizations its size, 3M developed a computer data system to manage its initial Inventory reporting obligations. To report for the processor phase of Inventory reporting, 3M reviewed the status of 30,000 to 34,000 raw materials. 3M organized a team of 53 TSCA representatives from the Company's 45 divisions. As recommended in EPA's manual, Reporting for the Chemical Substance Inventory: Instructions for Reporting for the Revised Inventory, 3M solicited letters from thousands of suppliers confirming that all raw materials 3M purchased had been reported for the TSCA Inventory. 3M's ongoing TSCA compliance program is overseen by its Department of Environmental Protection Engineering and Pollution Control, staffed by approximately 85 persons. The two polymers that are the subject of this enforcement action are the only substances known to have been manufactured or imported by 3M in violation of section 5 of TSCA. In short, 3M's TSCA Compliance program would rival the best in the industry and would likely put to shame EPA's own information management capabilities.

In promulgating the Inventory Reporting Rule, EPA determined that the regulation did not require the compilation of an Economic Impact Analysis pursuant to Executive Order 11821. This determination was based on an estimate that "[t]he total cost to industry of complying with the requirements of this regulation does not exceed $15 million." 42 Fed. Reg. 64575, 1977. In promulgating the Premanufacture Notice Rule, EPA conducted a Regulatory Impact Analysis and submitted the regulation to the Office of Management and Budget for review as required by Executive Order 12291. The Economic Impact Analysis estimated industry's cost of compliance at $5 to $12 million annually. Without a doubt, these figures did not contemplate that manufacturers would be held strictly liable for accidental, harmless, and statistically inevitable instances of non-compliance that will arise throughout the industry during the course of good-faith compliance.

If EPA prevails in its challenge to the reduced 3M penalty, every American chemical manufacturer will need to re-evaluate the adequacy of its TSCA compliance program. On the other hand, if the decision is upheld, it may lead to a welcome re-evaluation of EPA's TSCA enforcement policies.

John B. Dubeck
David R. Joy, Law Clerk