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Mr. Michael J. Madda
Baker and McKenzie
Attorneys at Law
Prudential Plaza
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Dear Mr. Madda:

This letter is in response to your correspondence of September 25, 1974, regarding your client's responsibilities under the regulation classifying as a banned hazardous substance those self-pressurized products intended or suitable for household use that contain vinyl chloride monomer as an ingredient or in the propellant. The order was published in the August 21, 1974 Federal Register (39 F.R. 30112) and became effective October 7, 1974.

It is our opinion that your client does fall within the definition of "manufacturer" under section 15 of the Federal Hazardous Substances Act (15 U.S.C. 1274) and the repurchase regulations at 16 CFR 1500.202. 16 CFR 1500.202 defines manufacturer to include "any person who manufactures or imports an article or substance for distribution or sale in the United States or any territory thereof, except that in the case of an article or substance distributed or sold under a name other than that of the actual manufacturer of the article or substance, the term "manufacturer" includes any person under whose name the article or substance is distributed or sold." Your client produced the lubricant and was responsible for seeing that it was packaged and marketed in the aerosal spray cans. Even though the filler directly reshipped the product to private labelers, presumably the private labelers did not purchase the product from the filler but rather purchased it from your client and regarded the product as your

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client's product. If such was the case, your client is responsible for repurchasing the product from the persons to whom he sold it.

Regarding the relationship between your client and the filler, your letter does not contain sufficient information for this office to give an advisory opinion as to whether the filler is covered by the repurchase regulations. If your client supplies the filler with the lubricant and then once the filling process is completed, purchases from the filler the completed product, the filler would be a manufacturer for the purposes of the repurchase requirements of the Federal Hazardous Substances Act. However, if your client only pays the filler for his services, it is our opinion that the filler does not fall within the definition of "manufacturer" under the repurchase regulations. As stated above, those regulations define "manufacturer" to include "any person who manufactures or imports an article or substance for distribution or sale...." (emphasis added). Since the filler, in the latter situation, is selling a service rather than manufacturing an article or substance, he would not be covered by the repurchase regulations. The primary purpose of the repurchase provision is to assure that banned hazardous substances are removed from the hands of consumers and from the market place, and the repurchase regulations are designed to implement this goal. Any relief that your client may obtain from the filler would have to be under common law rather than under the repurchase regulations of the Federal Hazardous Substances Act.

The repurchase regulation at 16 CFR 1500.202(f) specifies the notification procedure by which the manufacturer is to notify his distributors, etc., that a product has been classified as a "banned hazardous substance." The notification is to be immediate, it must identify the article or substance involved, (including model number or other distinguishing characteristics), set forth the nature of the hazards involved, provide instructions for return or other disposition of the product, and advise that any distributor or dealer who receives the notice is required to provide notice to the persons to whom the distributor or dealer has sold the product. The actual mechanics of the process by which the manufacturer provides the requisite notice are left to the discretion of the manufacturer.

The order banning products containing vinyl chloride monomer includes all self-pressurized products intended or suitable for household use that contain vinyl chloride monomer as an ingredient or in the propellant. The order does not exempt products which were manufactured and distributed prior to any specified date. Therefore, it is our opinion that your client has the responsibility to notify all persons to whom the manufacturer has sold the product, not just those within the recent past.

I hope this answers your questions. If I can be of further assistance, please feel free to write again.

Sincerely,

Michael A. Brown
General Counsel

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*RESIDENT COUNSEL

September 25, 1974

Secretary, Consumer Product Safety Commission
Office of the General Counsel
1750 K St. N.W.
Washington, D.C. 20207

Re: Self-pressurized Household Substances Containing Vinyl Chloride Monomer; Classification as Banned Hazardous Substance.

Gentlemen:

On Wednesday, August 21, 1974 the Consumer Product Safety Commission issued a proposed regulation declaring any household substance in a self-pressurized container which has a vinyl chloride monomer among its ingredients or in the propellant to be a banned hazardous substance in accordance with the Federal Hazardous Substances Act. 39 Federal Register at 30112. In accordance with the repurchase provisions of Section 15 of the Federal Hazardous Substances Act, and the regulations issued by the Commission for repurchase of hazardous substances, 16 CFR 1500.202, manufacturers and distributors must take appropriate action to give notice and effect repurchase of products containing vinyl chloride monomer.

We represent a client who may be subject to the repurchase provisions as cited above, and are hereby requesting a legal opinion from your office with respect to whether our client falls within the jurisdiction of the repurchase provisions contained in 16 CFR 1500.202. We discussed this matter with Mr. Erlich of your office on September 23, 1974, and it was his opinion that we are not within the jurisdiction of the repurchase provisions of the regulations. Briefly, the circumstances surrounding our client's involvement with the distribution of vinyl chloride monomer products are as follows:

Our client produces a lubricant which, although not principally intended as a household product, is definitely suitable as such. This product is sold in cans in liquid form, and some quantities are sold in aerosol spray cans. Our client does not package its product in aerosol spray cans, but rather forwards quantities of the lubricant in drums to a filler who packages the product in aerosol cans. Our client has never specified the propellant to be used in the aerosol cans. Some of the cans are labeled with the private label of distributors, and subsequently directly reshipped from the filler to the private label distributors. Some aerosol cans reflect our client's label and are returned to our client who reships those to subsequent distributors. Thus, our client is not involved, at any stage in the manufacturing process, with introduction of vinyl chloride monomers into the aerosol cans. We have been informed that for a specified period of time in the past, the filler of our client's aerosol cans was using a propellant which contained vinyl chloride. The filler discontinued use of vinyl chloride in its filling process more than one year ago.

It is our understanding of the proposed ban on vinyl chloride monomer, 16 CFR 1500.17 (a)(10) and the definitions of manufacturer and distributor contained in 16 CFR 1500.202 (b)(1), (2), that our client is neither a manufacturer or distributor subject to the notice and repurchase provisions contained in 16 CFR 1500.202.

We would appreciate your reply and opinion, with respect to our client's obligations under the proposed ban of vinyl chloride, at your earliest convenience to facilitate our responding to the ban prior to its effective date on October 7, 1974.

Very truly yours,

Michael J. Madda

Michael J. Madda

MJM/GHO/lmp