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The Honorable Anne K. Bingaman
Assistant Attorney General
Antitrust Division
U.S. Department of Justice
Washington, D.C. 20530

Re: Metal Building Manufacturers Association, Inc.

Dear Ms. Bingaman:

On behalf of the Metal Building Manufacturers Association ("MBMA"), we seek a Business Review Letter, pursuant to the provisions of 28 C.F.R. § 50.6., stating the present enforcement intentions of the Department of Justice (the "Department") with regard to a proposed membership requirement in MBMA. MBMA proposes to make company certification under the American Institute of Steel Construction ("AISC") Metal Building Certification Program a condition of MBMA membership. The primary reasons for this proposal are to promote structural integrity and public safety in the construction of metal building systems and to enhance the image of the industry.

I. Metal Building Manufacturers Association

A. Organization and Purposes

MBMA is a voluntary, nonprofit association, incorporated under the laws of the District of Columbia, and is tax exempt under Section 501(c)(6) of the Internal Revenue Code. The purposes and objectives of MBMA as stated in the Bylaws are:

...to promote the uses of metal buildings; to deal with technical and trade promotional problems pertinent to the industry; to compile and publish information of benefit to the industry and others interested in metal buildings; to cooperate in every lawful way in the

adoption and maintenance of standards for metal buildings; and to do all other lawful acts to promote the use of metal buildings and to promote and protect any other legitimate common interest of the members.

A copy of the MBMA Bylaws is enclosed as Exhibit A.

B. Association Activities

MBMA undertakes a variety of activities for the industry including promotion of metal building systems, collection of statistics, preparation of materials on insurance issues affecting metal buildings, working with code bodies, liaison with related industry organizations, and addressing environmental regulations and common manufacturing problems.

MBMA is also active in the technical field. Its "Low Rise Building Systems Manual" is used by building code officials, specifiers and manufacturers as a standard source for the design requirements of metal building systems. The Association also sponsors extensive research at universities around the country on topics such as wind and snow loads, measurement techniques for wind uplift, the performance and design characteristics of framing members, and the efficacy of various steel framing connections, to name but a few.

C. MBMA Membership

MBMA currently has twenty-nine members which range in size from relatively small, regional manufacturers with annual sales under \$ 5 million to large publicly traded companies with metal building sales exceeding \$400 million. A copy of the current membership list is attached as Exhibit B.

In 1994, MBMA member companies' shipments (which are estimated to comprise approximately 85-90% of the systems market) totaled \$1.87 billion. There is also a significant, but unquantified, market for buildings that are constructed from metal components.

Of the twenty-nine members, 15 are currently AISC certified and 10 have expressed interest in seeking certification.

D. Metal Building Systems

Membership in MBMA is open to manufacturers of systems, defined in the Bylaws as:

...the design, detail and manufacturing approach that combines building elements such as structural framing, covering materials and accessories to meet end user requirements.

Metal building systems are integrated combinations of mutually dependent components and assemblies that form a building. Primary steel frames, secondary steel framing, and covering materials of steel or other cladding materials such as glass, masonry, and stone work, work interdependently to provide the structural properties of the building.^{1/}

This systems approach distinguishes MBMA members from other segments of the industry which supply various building components, but may not take overall responsibility for the design and engineering of the building.

Building systems are engineered by the manufacturers either from standard proprietary designs or in accordance with customized plans created by the building owner's design professional. The various parts of the building system are produced in the manufacturer's facility and transported to the site where they are erected by a contractor.

Many building parts such as columns, beams, frames, walls, and roof panels have been standardized within the individual companies in order to realize the advantages of mass production. This results in the most efficient design in terms of material utilization and system design quality, and ease of fabrication. This proprietary standardization of systems is accompanied by the extensive use of computerized design, drafting and fabrication. Standardization also aids the fast and efficient erection of the systems on the job-site.

The advantages of metal building systems have led to a significant acceptance in the market. Metal building systems are estimated now to enjoy over 60% of the non-residential,

^{1/} Enclosed as Exhibit C is the MBMA "Images" brochure which shows examples of metal building systems and explains the industry.

low-rise construction market. Metal building systems are used in such diverse applications as manufacturing plants, commercial centers, churches, jails, schools, shopping malls, aircraft hangars, office parks and others. As in all construction, the structural integrity of these buildings is of critical importance.

II. AISC Quality Certification Program

A. The American Institute of Steel Construction

The AISC is a separate, tax exempt organization which participates in a variety of educational, technical, and promotional programs relating to fabricated steel construction, particularly in high-rise steel structures. AISC also publishes and maintains steel design manuals for the Allowable Stress Design ("ASD") method (which is used in the low rise industry) and the newer Load Resistance Design Factor ("LRFD") method. AISC associate membership is included as a benefit of membership in MBMA, and thus all MBMA members are also members of AISC.

B. The AISC Metal Building Certification Program

1. Background

As early as the 1970's, AISC offered a certification program which focused on the fabrication capabilities of metal building manufacturers, although few companies participated in the program at that time.^{2/} In the 1980's, there was heightened concern about building safety, prodded by the Kansas City Hyatt Hotel disaster and other failures involving all types of construction. These events caused manufacturers, contractors, engineers, architects, building code officials and others to reevaluate the nature of the construction process, the lines of engineering responsibility, and the integrity of the resulting structures.

Several localities such as Houston, Seattle and Los Angeles instituted their own unique and differing certification requirements for metal building manufacturers which covered not only fabrication practices, but also design

^{2/} AISC has certification programs for other types of steel construction, as well.

and engineering. These programs created unreasonable burdens on manufacturers who were forced to comply with several different certification programs to sell their products into these geographic areas.

In the early 1980's, MBMA started to explore the possibility of developing a certification program which would evaluate a manufacturer's processes and procedures, not only in fabrication, but also in other important areas that impact quality. After almost seven years of discussion among the industry and with AISC, an expanded Metal Building Certification Program was developed which addressed such critical functions within the metal building companies as personnel qualification, order screening, design procedures, design practices, procurement, manufacturing, and quality assurance. The Program was endorsed by the MBMA in 1988 and implemented by the AISC in 1989. It has gone through a thorough, periodic reviews by both MBMA and AISC and was revised in May of 1994. A copy of the latest version is enclosed as Exhibit D.

2. Nature of the AISC Certification

The AISC Metal Building Certification Program does not certify individual products, rather it evaluates the capabilities of the manufacturer as manifested in its policies, procedures and practices. Randomly selected job plans are evaluated to ensure that appropriate engineering practices are utilized and that the procedures are reflected in the product.

The nature and scope of the Program are set forth in its five objectives:

To provide a uniform, nationally recognized, certification program for metal building systems manufacturers that incorporate engineering services as an integral part of the fabricated end product.

To evaluate the basic design and quality assurance procedures and practices used by a manufacturer with regard to the organization's capability to produce metal building systems of predictable structural integrity and quality that can meet the public safety requirements imposed by the applicable building code.

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To certify manufacturers that have submitted to a rigorous examination of their professional engineering and manufacturing policies, procedures and practices and their quality assurance standards and controls and have been found to meet the requirements for certification as set forth in the Program.

To periodically audit certified manufacturers for continued compliance with Program requirements.

To aid, assist and encourage non-certified manufacturers and the various code authorities to adopt the Program in order to improve the integrity of design and quality of fabrication within the metal building systems industry for the benefit of the consumer.

Like ISO 9000 and other developing certification programs, the focus is on the benefit to the end user and correspondingly on the company's (and the industry's) reputation for integrity.

The Program is administered by AISC which hires independent engineers who actually conduct the on-site inspections. Currently, inspection services are provided registered engineers employed by Computerized Systems Design, Inc. of Milwaukee, Wisconsin. The participants make payments to AISC to defray the costs of the Program.^{3/} AISC has established procedures for appeals, reevaluation and recertification.

^{3/} The fee schedule is enclosed as Exhibit E. MBMA members are charged a lower rate for AISC certification than are non-members. This is explained by two factors. First, MBMA worked for many years with AISC in the development stages of the Program and facilitates the periodic review and evaluation of the Program through its AISC Certification Advisory Committee. (MBMA has no input on the specific inspections or day-to-day operation of the Program; its review is focused on recommendations to AISC regarding possible modifications of the Program itself.) Second, MBMA members are also associate members of AISC and thus contribute to the general overhead of AISC through their dues.

Certification lasts for three years, but it is subject to annual checks between full evaluations.

Certification is open to all metal building manufacturers; membership in MBMA is not currently a requirement to be certified, nor would it be under the proposal. Currently, one non-MBMA member is certified in the AISC Metal Building program.

III. The Proposed MBMA Requirement is a Reasonable Restriction

A. The Proposal and its Benefits

MBMA submits that the proposal to condition membership on company certification under the AISC Metal Building Certification Program is a reasonable requirement which would redound to the benefit of the consuming public and the industry at large,^{4/} but because of the historical concern about trade association membership restrictions, we seek the Department's guidance.

The overwhelming public interest in ensuring that buildings are safe for occupancy and use is beyond debate. We assume that our business structures and residences will both protect us and our belongings from the elements and also will perform under foreseeable stresses. The certification Program provides reasonable assurance to code bodies, specifiers, contractors, and owners that the certified companies have taken reasonable steps to address safety and quality in their everyday operations, including the following:

- They have qualified welders and engineers working on projects;
- They ensure that steel used in the structures meets the ordered specifications;

^{4/} This program is like many other mandatory trade association restrictions which condition membership on endorsement and participation in programs designed to promote the public interest and the industry's reputation. A notable example is the Chemical Manufacturers Association's Responsible Care[®] program dealing with the management of chemicals.

- They check to see that appropriate information on local building codes and loading conditions have been specified in the Order Documents;
- The building design complies with specified codes;
- They have a meaningful quality assurance program to locate and correct errors that might occur;
- They ensure that computer applications are appropriate

These and many other features of the AISC Program have a meaningful impact on the companies' approach to the quality and integrity of their operations and on the acceptance of metal building systems by consumers and code bodies alike.

The wide acceptance of the AISC certification will provide several efficiencies for the industry also. As noted above, Houston, Seattle, Los Angeles all instituted their own distinct certification requirements for metal buildings. It is very difficult for companies to keep track of, let alone qualify under, these diverse programs. The availability of a credible, well-run, national certification program will minimize the wasteful burden of complying with multiple programs. We have already seen the acceptability of this approach. For example, Dade County has reacted positively to the use of the AISC Metal Building Certification, rather than imposing its own system of manufacturer qualification, in the wake of Hurricane Andrew.

Having all MBMA members certified under the AISC Metal Building Certification Program will promote the image and acceptability of metal building systems with code officials and specifiers. It will underscore that the industry trade association is striving for quality and integrity in its products.

B. The Authorities Support the Proposal

MBMA is aware that unreasonable restrictions on membership in trade associations are viewed skeptically under the antitrust laws. However, there are well-established principles that support reasonable restrictions such as the AISC Program.

First, it should be underscored that the proposed restriction does not have any anti-competitive motivation or impact; it is designed to improve the credibility and image of the industry through enhanced quality. It will not impact the costs of the end product nor the ability of companies to

compete. Indeed, many companies who have become certified indicate that they have pared their costs through fewer claims, reduced rework, and less scrappage.

We have been advised that the Department of Justice Antitrust Division, Middle Atlantic Office, conducted an investigation of the AISC Program in 1992-3 in response to a complaint that the program could have an exclusionary impact on small businesses. As noted in the August 26, 1993 letter of Roger L. Currier attached as Exhibit F, the Department found that the "...certification program addresses legitimate concerns of some purchasers of metal buildings. We further believe...that smaller manufacturers can be certified without undue burden to them."

In an effort to ease the certification process, AISC and MBMA sponsored a seminar in late 1994 for smaller companies to explain the AISC Certification and procedures in more detail. Seventeen companies (12 MBMA members and 5 non-members) attended.^{5/} Every effort is being made by AISC, MBMA and the auditing engineers to facilitate the application process, particularly for small companies.

Under the proposed MBMA membership requirement, companies would still have the ability to participate in the AISC Certification Program whether or not they chose to join MBMA. Thus, there is no possibility that a company would be foreclosed from bidding on a project that required AISC certification because it was not an MBMA member. Companies would have the option of obtaining the certification, but not joining the MBMA. One company currently is in this position currently and five non-members attended the recent seminar on certification.

We believe that the overwhelming majority of companies interested in MBMA membership will also be interested in being AISC certified. However, the law permits reasonable restriction under these circumstances. For instance, Assistant Attorney General Charles F. Rule in a 1989 speech before the Chicago Bar Association noted:

On the other hand,...there are many legitimate reasons for exclusion in the context of self-regulation. Thus, the Department limits its condemnation of self-regulatory exclusion to those

^{5/} A copy of the Agenda is attached as Exhibit G.

cases that truly threaten consumer welfare, as opposed to competitors. [footnote omitted] Self-regulation that excludes competitors (and that does not also facilitate collusion) should be condemned only if (1) the structure of the market is such that it appears that market power is currently being exercised... (2) access to the market is dependent on (that is, controlled by) compliance with the self-regulatory regime; and (3) there is no legitimate reason (relating to efficiency or to good faith health or safety concerns for example) for the exclusion.^{6/}

In this instance, there is a clear, bona-fide safety and efficiency concerns that have motivated the Program from the outset. Second, access to the market is not dependent on compliance with the restricted element (MBMA membership).

Recent comments of Mary Lou Steptoe, Acting Director of the FTC Bureau of Competition, are consistent:

If a denial of access to an association does not restrict rivalry in the marketplace, it is unlikely to be considered inherently suspect. Recall that in Northwest Wholesale the defendants had ousted the plaintiff from membership in their buying cooperative and had therefore in a sense refused to deal with a competitor. The refusal to deal, however, did not restrict the way in which the collaborators competed in the marketplace, and thus their agreement did not inherently restrict rivalry or consumer choice. Because exclusion from the venture was quite different from exclusion from the marketplace, the Court insisted that the plaintiff demonstrate that the conduct "share[d] with the per se forbidden boycotts the likelihood of predominantly anticompetitive consequences."^{7/}

^{6/} Charles F. Rule, "Business Self-Regulation: An Enforcement Policy of Cautious Tolerance," remarks before the Chicago Bar Association, January 17, 1989.

^{7/} Mary Lou Steptoe, "Under What Circumstances Does Exclusion of a Member or Potential Member From a Trade Association Raise Antitrust Concerns?" Remarks before the D.C. Bar Association Conference on Trade Associations, February 16, 1994.

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The situation at hand is analogous. Denial of membership in MBMA for failure to subscribe to the AISC Certification, like denial of membership in the buying coop in Northwest Wholesale would have no impact on the rights or ability of the company to compete.

Conclusion

We request on behalf of MBMA that the Department of Justice issue a Business Review Letter stating that the Department does not intend to take enforcement actions with respect to the MBMA proposal to require AISC certification of all MBMA members. We would be pleased to provide you with more information and data and to answer any questions that you might have.

Very truly yours,



Brock R. Landry