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EXPEDITED TREATMENT REQUESTED

The Honorable Joel I. Klein
Acting Assistant Attorney General
Antitrust Division
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

**Re: Request for Business Review Letter To Evaluate Proposed
Joint Venture for Development of Escalator Step-Skirt
Performance Standard**

Dear Mr. Klein:

Pursuant to the Antitrust Division's Business Review Procedure set forth in Title 28, Part 50, Section 50.6 of the Code of Federal Regulations, 28 C.F.R. § 50.6 (1996), this letter respectfully requests a statement of the Antitrust Division's present enforcement intention regarding a proposed joint venture involving the National Elevator Industry, Inc. (NEII). The purpose of the proposed joint venture is to develop an escalator step-skirt performance standard to enhance the safety of escalator usage, a goal currently advocated by the United States Consumer Product Safety Commission (USCPSC) (Exhibit 1).

This request for a Business Review Letter is submitted on behalf of NEII. NEII is a Section 501(c)(3) trade association consisting of manufacturers, installers, and maintainers of elevators, escalators and moving sidewalks. Its offices are located in Fort Lee, New Jersey. There are presently thirty-four members in the association, including virtually all major domestic manufacturers and installers of escalators (Exhibit 2).

The Honorable Joel I. Klein
Business Review Request
March 31, 1997
PAGE 2

EXPEDITED TREATMENT REQUESTED

NEII proposes to enter into a joint venture whereby an independent company, unaffiliated with NEII or its members, will develop a performance standard to characterize and measure the potential for entrapment between the moving steps and stationary skirt panel (step-skirt) on escalators. The results of the proposed joint venture, an escalator step-skirt performance standard, will be submitted by the NEII Consumer Product Safety Commission Advisory Group (Exhibit 3) to the NEII Central Code Committee (Exhibit 4). The NEII Central Code Committee will then determine whether to endorse and submit the step-skirt performance standard to the American Society of Mechanical Engineers A17 Elevator and Escalator Safety Code Committee for their consideration. NEII thus seeks a letter of the Antitrust Division's enforcement intentions with respect to the proposed conduct involving NEII members, acting through the aforesaid group and committee.

I. Introduction

There are presently between 30,000 and 35,000 escalators in operation in the United States and Canada. Conservative estimates based upon 1992 data suggest that the 18,946 escalators then in use carried an annual 40,923,360,000 people (Exhibit 5). Given the widespread use of escalators and advancements in technology, the safety of escalators has continuously improved since they were first introduced in 1899. Reasonable safety precautions by the rider, coupled with regular and proper maintenance, have made the escalator one of the safest modes of transportation.

Beginning in 1996, the USCPSC engaged in a series of meetings and correspondence with representatives from the escalator industry, including NEII, to address what the agency perceived were potential escalator safety problems. A type of injury that can occur on an escalator is the entrapment of an object between the stationary skirt panel and the moving steps. The USCPSC cited data concerning the number of annual entrapment injuries (Exhibit 6). One remedy proposed by the USCPSC was the adoption of an escalator performance standard.

A. Escalator Safety Codes

The construction, maintenance and safety of escalators is based upon product standards contained in a balances consensus code developed by the American Society of Mechanical Engineers A17 Elevator and Escalator Safety Code Committee (ASME A17 Committee). The American Society of Mechanical Engineers (ASME) is a nonprofit corporation that promulgates and publishes over 400 separate codes and standards for

The Honorable Joel I. Klein
Business Review Request
March 31, 1997
PAGE 3

EXPEDITED TREATMENT REQUESTED

areas of engineering and industry, many of which are incorporated by reference into federal and state laws. American Soc'y of Mech. Eng'rs. v. Hydrolevel Corp., 456 U.S. 556, 559 (1982). The ASME A17 Committee operates under the procedures of ASME and the American National Standards Institute. No more than one-third of the ASME A17 Committee can be from any single interest group.¹

The current ASME Safety Code for Elevators and Escalators, ASME A17.1-1996 (ASME A17.1 Safety Code) becomes effective on July 1, 1997 (Exhibit 7). A version of the ASME A17.1 Safety Code has been adopted in all jurisdictions in the United States except for California and Pennsylvania, which are in the process of formally adopting the Code.²

There have been fifteen editions of ASME A17.1 Safety Code, excluding numerous supplements, since its inception in January 1921. Due process and public notice are integral parts of the consensus code writing process. According to the ASME, its "codes and standards are developed and maintained with the intent to represent the consensus of concerned interests. As such, users of this and other ASME A17 codes and standards may interact with the committee by requesting interpretations, proposing revisions, and attending committee meetings." (Exhibit 7, at xxv).

B. Escalator Entrapments

While the ASME A17.1 Safety Code currently provides that the clearance on each side of the steps between the step tread and the adjacent skirt panel be not more than 3/16 inch, (Exhibit 7, Part VIII, Section 802.3e), it does not contain a performance

¹ Some members of NEII are also members of the ASME A17 Committee including E. A. Donoghue, and representatives from Dover Elevator Systems, Inc., Fujitec America, Inc., Montgomery Elevator Co. (now Montgomery Kone Inc.), Otis Elevator Co., and Schindler Elevator Co.

² See Exhibit 7, at xxiii ("The Code is intended to serve as the basis for state, municipal, and other jurisdictional authorities in drafting regulations governing the installation, testing, inspection, maintenance, alteration, and repair of . . . escalators It is also intended as a standard reference of safety requirements for the guidance of architects, engineers, insurance companies, manufacturers, and contractors, and as a standard of safety practices for owners and managements of structures where equipment covered in the Scope of the Code is used").

The Honorable Joel I. Klein
Business Review Request
March 31, 1997
PAGE 4

EXPEDITED TREATMENT REQUESTED

standard to measure and characterize an escalator's potential for entrapment between the step and skirt. Such a performance standard must consider four factors including (1) the distance between the step tread and the skirt panel required due to mechanical tolerances (step-skirt gap); (2) the extent to which the stationary skirt panel deflects or bends when pressure is applied; (3) the frictional force generated between an object (on the step adjacent to the skirt panel) and the skirt panel itself; and (4) the manner in which the escalator is ridden.

Currently, ASME A17.1 Safety Code Section 802.3e is the closest approximation to an industry-wide performance standard. Section 802.3 focuses on three of the four factors which contribute to entrapment. Two of these factors are presently measurable in the field, namely (1) the requirement pursuant to Section 802.3e that the clearance on each side of the steps between the step tread and the adjacent skirt be not more than 3/16 inch; and (2) the Section 802.3f(2) requirement that the skirt panel not deflect more than 1/16 inch under of force of 150 pounds (force). The third factor, as set forth in Section 802.3f(3), is not presently measurable in the field. This factor requires that the exposed surfaces of the skirt panels adjacent to the steps be smooth and made from a low friction material or treated with a friction reducing agent. Because Section 802.3e and Section 802.3f only address three of the factors which contribute to entrapment, only two of which are measurable in the field, the escalator industry presently has no uniform testing procedures to measure and index the relationship among all the factors. The proposed step-skirt performance standard would both permit the measurement of each factor in the field and provide a method to gauge their interrelationship.

C. USCPSC and NEII Communications

The USCPSC invited representatives from the elevator and escalator industry to a meeting on May 14, 1996, to discuss escalator safety issues (Exhibit 8). The meeting was chaired by Ronald L. Medford, Assistant Executive Director of the USCPSC Hazard Identification and Reduction Department. During the meeting, the USCPSC inquired into whether performance standards should be developed to measure step-skirt entrapment.

While NEII considers escalators to be industrial products outside the jurisdiction of the USCPSC, the association believes that a coordinated effort between the NEII and the Commission will ultimately benefit both consumers and the escalator industry. To foster this coordinated effort, NEII and the USCPSC staff met again on August 22, 1996, to discuss technical aspects of escalator mechanics and efforts by the entire industry

The Honorable Joel I. Klein
Business Review Request
March 31, 1997
PAGE 5

EXPEDITED TREATMENT REQUESTED

to improve escalator safety (Exhibit 9). The USCPSC supported NEII's decision to develop performance standards to address step-skirt entrapment. Responding to the USCPSC's concerns, NEII informed the Commission and its staff of its intent to pursue a number of proposals including retaining an independent research and testing organization to study safety standards relating to step-skirt entrapments. This intention was further refined in subsequent correspondence between the NEII and the USCPSC in October and November 1996 (Exhibits 10 and 11).

II. Proposed Conduct for Which Business Review Letter is Requested

The proposed joint venture will involve an independent study to define a performance standard to measure potential entrapment between the moving steps and the stationary skirt panel on escalators. A copyrighted Request for Proposal (RFP) was sent on January 31, 1997, to four organizations including Arthur D. Little, Inc., Canadian Standards Association, Southwest Research, and Underwriters Laboratories, Inc. (Exhibit 12). To keep the USCPSC fully informed of NEII's objectives, the RFP was also sent to Mr. Nicholas V. Marchica, Director of Mechanical Engineering, USCPSC (Exhibit 13). Proposals from the bidders were due in writing no later than March 10, 1997. Upon selection of a bidder, NEII proposes to enter into a written contract with the bidder (Exhibit 14).

The RFP notes that the scope of the work will involve the supplier:

1. Meeting with key technical personnel from NEII members (including Otis Elevator Company, Schindler Elevator Corporation, and Montgomery Kone Inc.) to understand escalator design fundamentals and system operation as needed. The supplier is also encouraged to communicate with and consider input from sources outside the industry as appropriate.
2. Creating a concept for developing a performance standard that measures the potential for step-skirt entrapment and a viable methodology for measurement and verification of the standard. In doing so, the supplier should consider the three key factors of gap dimension, skirt stiffness and the coefficient of friction.

The Honorable Joel I. Klein
Business Review Request
March 31, 1997
PAGE 6

EXPEDITED TREATMENT REQUESTED

3. Developing a methodology and tool suitable for field use that will measure the potential of step-skirt entrapment.
4. Performing proof-of-concept experiments to validate the feasibility of the performance standard and measurement methodology. From these proof-of-concept experiments, the supplier will develop an index detailing acceptable and unacceptable performance levels.

The RFP also requires the supplier to deliver oral and written reports concerning the proposed performance standard, measurement methodology, and feasibility of implementation.

III. Necessity for Collaboration

A step-skirt performance standard requires industry-wide collaboration. Most of the expertise regarding the construction, specifications and tolerances of escalators resides within the industry. While the study will be independent, key technical personnel from NEII members may be required to meet with the supplier to further their understanding of escalator design fundamentals and system operation as needed.

Collaboration of the industry is also necessary so as to ensure that the performance standard is compatible with existing escalator design specifications and functional so that manufacturers and maintainers can utilize it. Further, the standard will be most effective where it maintains the widest degree of acceptance by the escalator industry. Since any effort by an individual company to develop a performance standard would likely be inapplicable or unacceptable to others in the industry, collaboration in that effort is necessary. Absent the proposed joint effort, it is unlikely that the goal of establishing a step-skirt standard would be accomplished.

IV. Anticipated Results of the Proposed Joint Venture

The result of the proposed joint venture will be an escalator step-skirt performance standard which will be submitted by the NEII CPSC Advisory Group to the NEII Central Code Committee. The Central Code Committee will then determine whether to endorse and submit the step-skirt performance standard to the ASME A17

The Honorable Joel I. Klein
Business Review Request
March 31, 1997
PAGE 7

EXPEDITED TREATMENT REQUESTED

Committee.³ The ASME A17 Committee may accept the performance standard, revise it, or reject the proposal based upon its internal procedures.

V. Legal Analysis

It is well-recognized that standard setting activities by a private trade association can result in significant procompetitive benefits. Where a trade association's standards are reflected in state and municipal building codes, such standards may attract greater antitrust scrutiny. See, e.g., Structural Laminates, Inc. v. Douglas Fir Plywood, Ass'n, 261 F.Supp. 154, 156 (D. Ore. 1966), aff'd, 399 F.2d 155 (9th Cir. 1968), cert. denied, 393 U.S. 1024 (1969). Generally, the test is whether the interpretation and application of the trade association's standards "may result in economic prosperity or economic failure" for a particular product. American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 570 (1982) (citation omitted).

Absent market power, the actions of a trade association in advocating particular industry standards raise few antitrust concerns. Moore v. Boating Indus. Ass'ns, 819 F.2d 693, 713 (7th Cir.), cert. denied, 484 U.S. 854 (1987) ("Once it is established that an association wields market power in setting or enforcing industry standards, it is the arbitrary application of those standards . . . that gives rise to antitrust liability"). See Greater Rockford Energy & Tech. Corp. v. Shell Oil Co., 998 F.2d 391, 396-97 (7th Cir. 1993), cert. denied, 114 S.Ct. 1054 (1994) (no anticompetitive effect from denial of petroleum association certification where plaintiff was able to sell its ethanol effectively without it); Consolidated Metal Products, Inc. v. American Petroleum Inst., 846 F.2d 284, 292 (5th Cir. 1988) ("We hold that a trade association that evaluates products and issues opinions, without constraining others to follow its recommendations, does not per se violate section 1 when, for whatever reason, it fails to evaluate a product favorably to the manufacturer").

³ NEII also has performance standards which apply to new and modernized escalator and elevator installations. See NEII 7th Edition Vertical Transportation Standards for Elevators, Escalators and Dumbwaiters (1992), and 1994 Supplement (Exhibits 15 & 16). As noted in the 7th Edition of the NEII Vertical Transportation Standards, "[i]n the preparation of this standard, the requirements of the Safety Code for Elevators and Escalators, ASME A17.1 1990 including Addenda A17.1a-1991 and the National Electrical Code, ANSI/NFPA No. 70-1990 have been complied with in all respects." Exhibit 16, at 2.

The Honorable Joel I. Klein
Business Review Request
March 31, 1997
PAGE 8

EXPEDITED TREATMENT REQUESTED

In Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 501 (1988), the Supreme Court instructed standard-setting bodies to adopt fair procedures which are "based on the merits of objective expert judgments." Allied Tube involved a steel conduit manufacturer which blocked trade association approval of a competing product by "packing" the association's meeting with new members who voted down the product. The Court stated that the existence of procompetitive benefits which justify standard-setting under the rule of reason "depends on the existence of safeguards sufficient to prevent the standard-setting process from being biased by members with economic interests in restraining competition." 486 U.S. at 509. One such procompetitive benefit according to the Court in Allied Tube is the promulgation of safety standards. 486 U.S. at 501 ("When, however, private associations promulgate safety standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition, those private standards can have significant procompetitive advantages") (citation omitted).

Another aspect to be weighed in determining whether standard-setting has sufficient safeguards so as not to restrain competition is the presence of procedural protections.⁴ Such protections include (1) procedural fairness in the standard-setting process, see 846 F.3d at 295 (relevant association committee was composed of buyers who could have no motive for driving plaintiff manufacturer out of business); (2) voluntariness in compliance with the association's standard, see Radient Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961) (allegations that an association ordered its utility members not to sell gas for use in unapproved burners stated antitrust claim); and (3) the existence of a reasonable basis for adoption of the standard.

⁴ See Judy Whalley, Standards & Certification: The Role of Antitrust 8 (1988):

[A] standard is likely to survive any antitrust challenge if the standards maker has established procedures that provide for input by most interested parties, adequate record keeping of the process and the basis of the decision, and some justification, based on the observed performance of the products or services for the standard and its application in particular cases.

Id.

The Honorable Joel I. Klein
Business Review Request
March 31, 1997
PAGE 9

EXPEDITED TREATMENT REQUESTED

NEII's proposed joint venture to develop a step-skirt escalator performance standard would not violate the antitrust laws under any of these legal criteria. As the facts and documentation presented herein demonstrate, the proposed joint venture is procompetitive, procedurally fair, and clearly in the public interest.

VI. Predictable Effect on Competition

The proposed joint venture is not undertaken for any anticompetitive purpose and will not have a significant impact on competition. While NEII strongly believes that the potential for step-skirt entrapment is relatively small in light of the overwhelming usage of escalators, the association has always been and continues to be receptive to working with individuals, organizations and the USCPSC in order to enhance the safety of the products its members and others manufacture and install. NEII has cooperated with the USCPSC on previous issues confronting the elevator and escalator industry which have ultimately been incorporated into the ASME A17.1 Safety Code.

No competitors of the participating companies will be disadvantaged by the joint collaboration. In fact, the development of a performance standard may open new markets to aftermarket suppliers and equipment maintenance companies in terms of retrofitting existing escalators to improve overall safety.

VII. Procedural Fairness

The development of the step-skirt performance standard is also proposed in a fair and inclusive manner. The proposed joint venture will be based upon research performed by an independent company or supplier. The RFP invites the supplier to communicate with and consider input from sources outside the industry as appropriate. If the performance standard is endorsed by the NEII Central Code Committee and submitted to the ASME A17 Committee, the ASME A17 Committee will employ its own due process and public notice procedures to determine whether the standard should be adopted, revised or rejected.

VIII. Public Interest

The proposed joint venture is in the public interest and is beneficial to consumer welfare. That is, the proposed joint venture is prompted by governmental and industry concern with the safety of escalators and responds to the USCPSC's desire to have the industry address step-skirt entrapment.

The Honorable Joel I. Klein
Business Review Request
March 31, 1997
PAGE 10

EXPEDITED TREATMENT REQUESTED

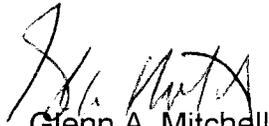
The performance standard should lead to a higher level of maintenance for escalators currently in-use. This should be accomplished through the evaluation of existing escalators and the comparison of their performance to the performance standards developed through the joint venture. Thus, a step-skirt performance standard should permit aftermarket suppliers and service technicians to identify and correct escalators which do not satisfy given performance specifications, thereby reducing the potential for entrapment.

IX. Ancillary Matters

Information exchanged between the joint venture participants will be limited to the costs and accuracy of the testing methods and the technical and scientific data relating to performance standards. This request for a Business Review Letter contains all relevant data and copies of operative documents. We will provide any other additional information or documents as requested by the Antitrust Division.

NEII also respectfully requests that the Antitrust Division give expedited consideration to this request for a Business Review Letter and respond by the end of April 1997 or as soon as possible thereafter.

Sincerely,


Glenn A. Mitchell
Basil J. Mezines

Enclosures