VI EXECUTIVE BOARD MEETING

Stouffers Tower City Hotel
24 Public Square
Cleveland, Ohio 44113

Tuesday
September 18, 1990
8:00 a.m.

Attendees:

Alan Bailey, Occidental Chemical Corporation
Michael Barish, Borden Chemicals and Plastics
Pat Benkner, Vinyl Institute
Chuck Bush, BFGoodrich Company
Rick Flammer, Vista Chemical Company
Roy Gottesman, Vinyl Institute
Robert Kelly, CertainTeed Corporation
Don Knechtges, BFGoodrich Company
Jerry Koral, Atochem, N.A.
Fred Krause, BFGoodrich Company
Robert Luss, Occidental Chemical Corporation
Donna Magill, PPG Industries
Robert Margevich, Akzo Chemicals
Woody Miller, GE Specialty Chemicals
William Patient, BFGoodrich Company
Robert Petrich, Rohm and Haas Company
Michael Reynolds, Vista Chemical Company
John Russ, Borden Chemicals and Plastics
Fred Sacks, Occidental Chemical
Gonzalo Sandino, Petroquimica Colombiana
Meredith Scheck, Vinyl Institute
Ed Schiffer, Georgia Gulf Corporation
E. Schroeder, Shintech Inc.
William Shoun, Dow Chemical Company
Rick Smith, Vista Chemical Company
D'Lane Wisner, BFGoodrich Company
John York, EVC

I. OPENING OF MEETING AND SELF-INTRODUCTIONS

The meeting was convened at 8:00 a.m. by Executive Board Chairman H. R. Flammer. In brief opening remarks, he thanked the BFGoodrich Company for hosting the members of the Executive Board and guests on September 17, 1990. Mr. Flammer's brief opening remarks were followed by a round of self-introductions.

II. APPROVAL OF MINUTES OF MAY 12, 1990 EXECUTIVE BOARD MEETING

Mr. Russ moved that the minutes of the May 12, 1990 meeting of the Vinyl Institute Executive Board as contained under Tab A of the briefing book for this meeting be approved. The motion was seconded by Mr. Schiffer and approved by voice vote.

III. FINANCIAL REPORTS

A. Final Financial Results for Fiscal Year Ending May 31, 1990

Dr. Gottesman reviewed the cash basis statement of revenues and expenditures for the period ending May 31, 1990 as contained under Tab B of the briefing book for this meeting. He noted the revised fund balance figure of $99,454.

Dr. Gottesman also reviewed the comparison of performance vs. budget chart included under Tab B of the briefing book and noted that indirect expenses were up 1% over budget; and that direct expenses were up 4% over budget. He noted that the chart contained a bookkeeping error in the direct project area and that a portion of the expenditures reflected under the Communications Committee were expended by the Pipe Resource Organization. He noted, however, that the bottom line of total expenses in the actual and budget areas are correct.

B. Status of Current Expenditures

Dr. Gottesman reviewed the cash basis statement for the period ending July 31, 1990, the first two months of the current fiscal year, is included under Tab C of the briefing book for this meeting. Dr. Gottesman noted that the assessments of one affiliate and one associate member are not reflected on this chart. He noted that the fund balance of $548,873 only reflects half-year assessments.

C. Revised Fiscal Year 1990-1991 Budget

Dr. Gottesman noted that a copy of the revised Fiscal Year 1990-1991 budget is included under Tab C of the briefing book for this meeting. He commented that the FY 1990-1991 budget, which was officially approved at the May 12, 1990 Executive Board meeting, has been revised to reflect the loss of assessment income due to the

resignations of Air Products and Chemicals and the BASF Corporation and the use of the actual fund balance through May 31, 1990, rather than an estimate of the fund balance. Dr. Gottesman noted that the revised budget does not reflect any changes in budgeted amounts for either direct or indirect expenses. He noted that the net effect of the changes discussed was to have an amount of $60,613 available for contingency.

IV. PROACTIVE TASK FORCES AND MARKET-RELATED ACTIVITIES

A. Pipe

1. Pipe Resource Organization Update

Mr. Flammer welcomed the new PRO Chairman Mike Barish of Borden Chemicals and Plastics to his first meeting of the Executive Board. In addition to the material included under Tab D of the briefing book for this meeting, Mr. Barish's comments also reflected discussions at the September 6th PRO meeting. Mr. Barish updated the Board on the status of the current advertising campaign and noted that the total inquiry list developed is to be shared by members of PRO.

Additionally, he updated the Board on PRO's discussions related to recent anti-plastic pipe advertising campaigns; liaison projects underway with the Uni-Bell PVC Pipe Association; and a report on "The Scope of Plastics in DWV Pipe in High-Rise Buildings" prepared for PRO by Business Communications Company. He noted that this market was identified to be in the 100-110 million pound range, and the group has discussed technical issues related to expansion into this market.

In response to a question from Mr. Flammer regarding whether it appears as though originally-budgeted items for FY 1990-1991 need to be expended, Mr. Barish commented that to date the feedback from pipe producers is positive and that PRO has been working to change previous opinions that the industry was fragmented.

He commented that the FY 1990-1991 PRO budget had been constructed to better position the industry and that the group decision to seek additional feedback on its current advertising campaign to continue to assess the effectiveness of its activities may help refine necessary financial resources.

2. California Environmental Impact Report (EIR) - Status Report

At the May 12, 1990 Executive Board Meeting, the Executive Board authorized the Executive Director to become involved in negotiations with representatives of the California Pipe Trades Council on behalf of the vinyl interests, if such action was appropriate and might lead to an early issuance of a completed EIR. In addition to the background material included under Tab P of the briefing book for this meeting, Dr. Gottesman reviewed in detail all events since April 19th that have involved SPI representatives and legal counsel and noted the current status of the completion of the report by SRI.

In response to a question from Mr. Luss regarding expenditures made to date, Dr. Gottesman noted that to date some 80% of the money spent has been contributed by vinyl interests and that it is not his intention to recommend additional financial contributions. Mr. Patient commented that the CPVC people are pursuing their own interests, which he believes are not in conflict with industry activity. Following an extensive roundtable discussion on the status of this issue, the Board's frustration of its continuation, the following two action items were agreed to:

1. Mr. Luss is to provide Mr. Flammer with a draft letter to Mr. Thomas, President of SPI, noting agreement be sent with SPI policy as detailed in Mr. Thomas' letter of August 3rd. Further, this letter is to agree not to deviate from this policy if SPI and/or other affected interests agree to pick-up all other costs associated with the completion of this project.

2. Mr. Barish and Dr. Gottesman are to further discuss the involvement of PW Pipe.

B. <u>Electrical Materials Council</u>

Mr. Rick Smith, Chairman of the Electrical Materials Council, reviewed in detail the Market Advisory Panel meetings held July 23rd and 24th. A report on these meetings prepared by Mr. Dan Stanowick of Edward Howard and Company was included under the Council's report to the Board under Tab E. Mr. Smith commented that the Electrical Materials Council is scheduled to meet September 19th to consider program proposals to undertake as a result of the panel sessions.

Among the suggestions to be considered by the Council are the development of a video and accompanying literature on key issues, the preparation of a quarterly or monthly newsletter, and direct interface with editors covering this market. In response to a question from Mr. Flammer, Mr. Smith noted that it is the committee's intention to develop programs at or under the amount included in the FY 1990-1991 budget.

C. <u>Vinyl Packaging Council</u>

Mr. Wisner, Chairman of the Vinyl Packaging Council updated the Board on recent activities undertaken by the Council. Background information is included under Tab F of the briefing book for this meeting. He commented that the Council had decided that it would focus its promotional activities in the bottled water market, which represents a return to the Council's original marketing plan. At the same time, the group intends to closely coordinate its activities with those of VIGOR, as it is the solid waste issues that are of significant concern to packaging specifiers.

Mr. Wisner noted that during the second year of the VIP awards program, which is now underway, the Council intends to significantly expand public relations activity. Mrs. Scheck noted that the group also intends to undertake a media briefing program to the vertical trade press.

At the conclusion of the reports on the activities of the three market task forces (PRO, Electrical Materials Council and the Vinyl Packaging Council), Mr.Flammer commented that it is difficult to assess from a cost vs. benefit approach the impact of these activities which now consume approximately 1/3 of the Institute's operating budget.

Mr. Flammer commented that he has been considering instituting a new reporting format that would include a measurement system for committee activities. Dr. Gottesman noted that the Board had decided to form the committees at a time when it appeared as though the critical, defensive activities needed were under control. Mr. Knechtges commented that data can be important in helping to decide whether resources should be redeployed rather than institutionalizing existing structures and programs. Mr. Krause urged that it is important to look at the underlying issues that are affecting important markets.

At the conclusion of the discussion, it was agreed that Mr. Flammer and Dr. Gottesman would work on developing a reporting format for committee activities to help the Board focus more easily on the benefits of projects undertaken.

V. **SPECIAL PROJECTS/ISSUES**

A. **Solid Waste Management**

1. Vinyl Institute Group on Recycling (VIGOR) Report

Mr. Krause updated the Board on recent activities undertaken by VIGOR. Background information was included under Tab G of the briefing book for this meeting. Mr. Krause commented that since the last meeting of the Executive Board a press briefing on the project at the Center For Plastics Recycling research at Rutgers University was held. A video of the May 21st briefing and the recycling technology was shown. Mr. Krause noted that a fact kit of materials related specifically to the solid waste issue has been developed in a format that can easily be added to or amended.

Mr. Krause stated that at the September 13th meeting of VIGOR it was decided to proceed with a proposal from the Vinyl Packaging Council to demonstrate vinyl recycling technology at the Packaging Materials Machinery Institute Trade Show in November 1990. He noted that Mr. Mullen of American Mirrex is serving as program director of this project.

Mr. Krause updated the attendees on research underway at National Recovery Technology and showed a brief video of the process. He stated that at this time, a press briefing is planned for October 16th and that NRT is working with the Institute's public relations firm to finalize the speakers. Mr. Krause noted that NRT intends to install its technology on a pilot basis at XL, a material recovery facility in Illinois.

Lastly, Mr. Krause reviewed technology developed by DevTech Labs, Inc. and noted that both VIGOR members and staff of the Council For Solid Waste Solutions have signed secrecy agreements on the technology which was presented at the September 13th meeting. Mr. Krause noted that DevTech is seeking approximately $450,000 to help fund the pilot plant scale up of a prototype commercial machine for their separation process which handles plastics in flake form. He commented that the Council For Solid Waste Solutions is considering funding at a $75,000 level and that individual companies are also to be contacted for their support. He noted that this would be beneficial also to PET interests as the process would not only help the curbside collection problems, but also assist in yielding a pure PET stream for recycling.

2. European Developments

Mr. York commented that he had provided Dr. Gottesman and members of the Board with a status report as of July 1st on legislative and regulatory developments in Europe. He noted that this report would be updated at the end of the year. Mr. York's comments focused on activities in Austria related to the positive deselection of vinyl building materials.

Mr. York also updated the Board on the ban on PVC beverage containers in Switzerland that will go into force in November 1991. He commented that EVC is the only European PVC producer with facilities in Switzerland and that the company is considering what activities to undertake that may have an effect on this action.

3. Legislative/Regulatory Update

Mrs. Scheck updated the Board on state and federal legislative activities underway since the last Board meeting. Background information is included under Tab K of the briefing book for this meeting.

Mrs. Scheck noted that 42 states have already adjourned or were not in session this legislative cycle, but that there is a significant amount of "study" activity underway at the state and municipal level that will impact the direction of legislative proposals beginning in January 1991. She commented that there has been a distinct trend away from outright ban proposals, with more focus to proposals specifying recycling rates or recycled content requirements.

B. Fire and Combustion Toxicity

1. Technical Committee Report

Dr. Bush, Chairman of the Technical Committee, updated the Board on committee activities as they relate to the issue of fire and combustion toxicity. Background information was included under Tab H of the briefing book for this meeting.

Dr. Bush reviewed in detail a recent amendment to the model building code issued by BOCA regarding radiant heat requirements for materials used on building exteriors. He commented that this is of great concern to the SPI Vinyl Siding Institute and that Dr. Hirschler of the VI Technical Committee is providing liaison on this issue. The next meeting of the VSI on this issue is scheduled for September 27th. Mrs. Scheck updated the Board on discussions at the last meeting of this VSI group. Dr. Bush noted that it appears likely that NIBS will submit their toxicity protocol to ASTM in the near future and that a critique of the method has been prepared. Dr. Bush also reviewed the report being prepared by Brady Williamson of the University of California regarding fire performance in flashover situations.

VI. REGULATORY AND LEGAL UPDATE

A. Health, Safety & Environment Committee

On behalf of the Chairman, Frank Borrelli, Mrs. Scheck updated the Board on activities undertaken by the committee since the last report. She noted the two special task forces that had met over the summer to address the issues of establishing a vinyl-specific mutual aid emergency response network and that, based on a survey conducted, a meeting with CMA is scheduled to further discuss the network concept. She noted that it was not envisioned that this would be a Vinyl Institute activity or that it would consume VI resources or staff.

The second workshop dealt with the hazard communication issues. Mrs. Scheck further noted that as noted in the Legal Counsel's report under Tab J of the briefing book that the final rule on the vinyl chloride standard had been published July 10th. This rule implemented the settlement agreement signed in 1988. She also noted that the briefing schedule in challenge to OSHA's reduction of the permissible exposure limit for ethylene dichloride is to be completed by January 1991, with oral arguments to take place early in 1991. Mr. de la Cruz provided additional comments.

B. <u>Legal Committee/Legal Counsel's Report</u>

Mr. de la Cruz updated the Board on activities related to H&W Industries vs. Formosa Plastics Corporation. He commented that Dr. Gottesman was deposed on March 20, 1990. He noted that Magistrate Orlansky of the U.S. District Court for the Northern District of Mississippi has recently granted SPI's move to quash H&W's subpoena for additional materials. Mr. Luss commented that because of this case and recent press coverage of resin price increases, he urges all members of the VI Board and committees to be particularly mindful of their antitrust responsibilities. Mr. Luss asked that materials on this issue be appended to the minutes of this meeting.

Mr. de la Cruz also commented on recent activities of the Federal Trade Commission dealing with environmental claims and commented that the Commission's Consumer Protection Division has taken a number of actions on claims in the consumer products area.

Mr. Luss updated the Board on the status of litigation resulting from the Happy Land Social Club fire. Noting that New York State is a marketshare state, he commented that interested companies are pursuing a settlement agreement and that Vinyl Institute members may be contacted. He noted that this is not a Vinyl Institute activity, but an individual member company activity.

VII. <u>OTHER BUSINESS</u>

A. <u>Research and Strategic Plan to Manage Anti-PVC "No Chlorine" Issues</u>

1. <u>Introduction</u>

Mr. Reynolds, Chairman of the Communications Committee presented a summary of recent activities that have targeted chlorine, noting that the issue in the U.S. has focused largely on the paper industry, while in Europe the focus has been PVC. Mr. Reynolds noted that the Chlorine Institute has recently retained a public relations agency. Mr. Reynolds commented that based on discussions at the May 12th meeting of the Executive Board, he, Mr. Krause of BFGoodrich, and Roy Gottesman met and developed a "Request For Proposal". In these preliminary discussions, it was agreed that the industry has faced many problems in the past, and that the vinyl industry in the U.S. should anticipate that the anti-chlorine initiative will grow beyond the initial "ban" proposals that have already surfaced. Mr. Reynolds noted that the RFP for Research and Strategic Planning was sent to several companies who were asked to submit proposals that would include an audit of all current Institute communications programs as well as problems that vinyl products have as a result of environmental or other pressures.

Mr. Reynolds noted that a review committee consisted of Sandra Kroeger of Occidental, Dave Taylor of BFGoodrich Company, John Catt of the European Vinyls Corporation, Fred Krause of BFGoodrich, Maryann Stephenson of Vista Chemical and Roy Gottesman. Five firms reviewed their proposals at July 18-19 meetings.

The task force selected Ketchum Public Relations to carry-out a first-stage research project to include secondary research and quantitative research. Mr. Reynolds noted that the work done to date is well within the amount authorized by the Board on May 12th (not to exceed $30,000). Details on the Ketchum proposal are included under Tab N of the briefing book for this meeting. Mr. Reynolds introduced the Ketchum account team for the purpose of making a presentation on the work completed to date.

2. Ketchum Presentation

a. Walter Lindenmann, Senior Vice President, Director of Research

Dr. Lindenmann reviewed the media search activities covering the period of January 1989 through September 1990, which included a total of 688 articles contained in the following publications:

national and local newspapers
general interest magazines
special interest magazines
industry newsletters

Dr. Lindenmann reviewed in detail the major findings of this media audit, including a summary of topics mentioned and the description of the rating scale used and the outcome for specific subjects.

b. Jerry Olszewski, Vice President and Senior Account Manager

Mr. Olszewski highlighted a series of summary observations and reviewed some preliminary conclusions, including:

1. Within the consumer media there is no coalescing around a particular view, and that there is time for industry to affect coverage.

2. Within the trade media industry insiders are receiving positive messages about PVC.

3. There is no clear indication that environmental groups have put PVC at the top of their agenda, but that more in-depth research is warranted within the environmental groups.

4. The media coverage is surprisingly positive, but did not include the larger universe of general plastics stories, which may be considerably more negative.

5. No clear advantages or disadvantages for PVC vs. other plastics surfaced.

6. The analysis of the media coverage alone does not surface the "hot button" which might be driving customer deselection. There is a need to stay and continue the hunt.

c. Lorraine Thelian, Senior Vice President and Senior Strategist

Ms. Thelian addressed the issue of appropriate next steps to be taken and briefly highlighted the recommendations. The next steps recommended was to expand on talking to the "customers", defined as including building contractors, building code bodies, product managers, product designers and engineers, package designers and engineers retailers.

An in depth roundtable discussion followed Ms. Thelian's presentation, including discussion on the need for additional research to be conducted.

B. **Program To have PVC Ecobalance Developed - Status Report**

Dr. Bush noted that a subcommittee of the Technical Committee had been formed to develop a Request For Proposal for a definitive and comprehensive analysis of the quantitative aspects of raw materials inputs and environmental effects, as well as the costs and benefits of vinyl plastics relative to alternative materials. Dr. Bush noted that the members of the subcommittee included Frank Borrelli of Georgia Gulf, Dr. William Carroll of Occidental Chemical, Fred Krause of BFGoodrich Company, John Krokosky of Dow Chemical and Robert van Winkle of Klockner Pentaplast.

He noted that detailed material is included under Tab M of the briefing book for this meeting. Based on a September 13th subcommittee review meeting, 3 of these firms have been selected to make a presentation on their recommended approach in early October. He reviewed in detail why the subcommittee believes that this is an important project to undertake. The basic scope of such a project will provide a cradle-to-grave lifecycle analysis, will compare vinyl pipe, siding and packaging materials with alternatives, and yield a user-friendly computerized model. Dr. Bush noted that the subcommittee feels that there are benefits to being a pioneer in this area. Dr. Bush also noted that a similar project is underway within Europe, and that Mr. Gabe Lefebvre is providing liaison.

The Board had an extensive discussion on the need for proceeding with this proposal, its potential reception by environmental activists, resources necessary for the total project, the importance of a scientific vs. public relations approach and a review of alternative materials to be considered.

VIII. **NEW BUSINESS**

A. **Funding of Proposed Research/Strategic Plan and Ecobalance**

As background to further discussions by the Board on discussing the Ketchum Public Relations proposal and the ecobalance issue, Dr. Gottesman commented that he had reviewed the VI current fiscal year budget and preliminarily developed a list of savings that might be realized from current activities. He emphasized that this review was not done in consultation with the committee chairmen, and that it only represented his best estimate of how existing available funds could be reallocated. He reviewed the following information:

Estimate of Additional Funding Needs and Potential Sources

Sources

Indirect Project Costs (salaries/benefits)	$ 25,000
Technical Committee:	
- Plastics Recycling Foundation (CPRR)	20,000
- Hennepin County	10,000
Communications Committee:	
- Fire Issues	15,000
- Symposium	30,000
Vinyl Packaging Council	23,000
Electrical Materials Council	55,000
PRO Direct Mail Program	30,000
Consultants	2,000
Total	$210,000

Needs

Completion of Strategic Research by Ketchum	95,000
Approval of Strategic Plan in December and 5 Months of Funding Through May 31, 1991	100,000
Ecobalance - Expenditure of Part of a Total Assumed Expenditure of $350,000	150,000
Total	$345,000

Dr. Gottesman stated that based on his review of the potential sources of funding, he recommends that the Board authorize the expenditure of up to $95,000 to complete the research phase and development of a strategic plan by Ketchum, with such plan to be presented to the Board at the December meeting.

After extensive discussion by the Board, the following motions were made:

Motion: Mr. Reynolds moved that the Board approve the expenditure of up to $95,000 to complete the research program and the preparation of a strategic plan by Ketchum and further that Vinyl Institute members agree to share with Ketchum any existing research that could supplant recommended original research thereby offsetting some of the resources needed, and further, that if other research by independent organizations exists that it be provided to also offset the total cost.

The motion was seconded by Mr. Russ and approved on a vote of 7 to 1.

<u>Motion</u>: Dr. Bush moved that the Technical Subcommittee be authorized to proceed and to select a contractor to prepare an ecobalance within the financial guidelines discussed at an amount not to exceed $150,000 this fiscal year, and further that a) the definition of comparative materials is to be decided by the committee, and b) that the VI Executive Board be presented with a report taking the ecobalance through a finished product within these financial guidelines.

The motion was seconded by Mr. Bailey and voted on and approved by the Executive Board by a vote of 7 to 1. Dr. Gottesman agreed that he would provide the Board with revised/final current fiscal year budget numbers from each of the committees at the December meeting of the Executive Board.

B. **Executive Committee of the Board**

Mr. Flammer proposed that an "Executive Committee" of the Board be formed and that this committee plan to meet from 4:00 p.m. to 6:00 p.m. the day preceding the Executive Board Meeting. He indicated this group will consist of the present officers, the voting representative of the affiliate members, and Mr. Shoun (representing the VCM interests) and Mr. Bailey.

IX. **MEMBERSHIP**

A. **Current Status/Resignations**

1. <u>Air Products and Chemicals Inc.</u>

Dr. Gottesman noted that the material included under Tab O of the briefing book for this meeting includes a letter from Mr. Fred Fisher of Air Products and Chemicals formally notifying the Vinyl Institute that Air Products' PVC business had been sold to PW Resins and, therefore, Air Products was officially dropping its membership in the Vinyl Institute effective June 1, 1990.

<u>Motion</u>: Mr. Schiffer moved that the resignation of Air Products and Chemicals Inc. as a member of the Vinyl Institute, be accepted effective June 1, 1990. The motion was seconded by Mr. Shoun and approved by voice vote.

2. BASF Corporation

Dr. Gottesman noted that as reflected in the material included under Tab O of the briefing book for this meeting, on August 14, 1990 the Executive Director was notified that BASF would not continue its affiliate membership in the Vinyl Institute as a result of a decision to exit the phthalate plasticizer business.

Motion: Mr. Schiffer moved that the resignation of BASF Corporation as an affiliate member of the Vinyl Institute be accepted effective June 1, 1990. The motion was seconded by Mr. Flammer and approved by voice vote.

B. **Potential New Members**

Dr. Gottesman reviewed the information contained in the program of the briefing book as it relates to activity to secure new members and asked the members of the Board to contact him should they be able to provide any assistance in this area.

X. **FUTURE MEETING DATES**

A. **Next Executive Board Meeting**

The next meeting of the Executive Board is scheduled for December 12, 1990 in New Orleans. Dr. Gottesman noted that the meeting would likely be held at the Westin Canal Place Hotel and that Board members would shortly be receiving details including the definitive hotel selected.

B. **March 13, 1991 Meeting Location/Change of Date**

Dr. Gottesman noted that due to a conflict with another SPI division in which some VI member company representatives are active, that it is necessary to change the date for the previously-agreed to March 13th meeting. Mr. Flammer suggested that the Board meet in late February in Houston. Following a brief discussion, it was agreed that a suitable date/location would be selected and the Board notified at the earliest possible date.

C. **Annual Meeting**

As a result of discussions at the May 12, 1990 Executive Board meeting, Ms. Benkner of the VI staff has put a hold on space at the Four Seasons Hotel in Dallas, Texas.

However, because of the hotel's unavailability of space for the previously-agreed to dates of May 14-16, 1991, space was tentatively put on hold for May 29-31, 1991. Because this was a change in date, Ms. Benkner did additional research on suitable sites for the 1991 Annual Meeting. A letter to the Board outlining alternative locations and availability was distributed. Following a brief discussion by the Board, it was agreed to proceed with the alternative dates of May 29-31, 1991 at the Four Seasons Resort Hotel in Dallas.

XI. **ADJOURNMENT**

There being no other business, the meeting was adjourned at 3:20 p.m.

Respectfully submitted,

Meredith N Scheck

Meredith N. Scheck

ATTACH TO MINUTES OF
7-18-90 EXECUTIVE BOARD
MEETING.

LAW OFFICES

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July 6, 1990

Mr. Larry Thomas
The Society of the
Plastics Industry, Inc.
1275 K Street, N.W.
Washington, D.C. 20005

Re: <u>United States of America v. The American Institute of Architects</u>

Dear Larry:

You may or may not have seen the article in today's <u>Post</u> regarding the settlement of the above-designated antitrust suit against the architects trade association. I realize that you are out of the country and, thus, might never see the article, so I thought I would send you a copy of it. In addition, however, because I think the case points up how onerous even a Consent Decree in what amounts to a case involving no moral turpitude whatsoever can be, I decided to send you all of the documentation available on this matter.

At some convenient time in the future, after you have had a chance to peruse this material, you might want to circulate copies of the <u>Post</u> article and the Department of Justice press release to everyone on the staff, perhaps with a short covering memorandum noting that the prosecution of antitrust cases against trade associations may indeed be on the upswing.

I hope that by the time you see this you will have had a wonderful European trip. I am looking forward to hearing all about Leningrad when you return.

With best personal regards,

Sincerely yours,

Jerome H. Heckman

Jerome H. Heckman

Enclosures

SPI-09356

Washington Post [illegible]

Architects Group Settles Federal Antitrust Suit

AIA Allegedly Discouraged Competition

By Sharon Walsh
Washington Post Staff Writer

The American Institute of Architects yesterday settled an antitrust suit filed by the Justice Department alleging that the association tried to discourage price competition for architects' services.

Representatives of the 55,000-member association signed a consent decree in which they agreed not to adopt policies dictating pricing practices to members. They also agreed to educate their members about antitrust laws.

The settlement ends a nationwide investigation of the pricing practices of architects that lasted 4½ years. It is the second time the AIA has been accused of violating antitrust law. In 1972, the AIA signed a consent decree that alleged violation of the pricing statutes.

The association did not admit guilt in either instance. "We take the position that we did not violate antitrust laws," said David K. Perdue, associate general counsel of the association.

The complaint alleged that the AIA entered into an unlawful agreement to prohibit architects from bidding competitively for work, offering discounted fees or providing free services. The Justice Department complaint cites a written policy that was adopted by the association's Chicago chapter in 1984 that prohibited such practices.

Washington architect Hugh Newell Jacobsen said yesterday that architects have traditionally felt that

> *"If a client calls and wants a price to design a building, I won't do that. I don't want to get into a price competition."*
>
> — Architect Ted Mariani

they should be chosen for characteristics other than price.

"It's a thing in the rules . . . that you never discuss fees," Jacobsen said matter-of-factly. "If you interview us, select us for our ability, our experience or our necktie, but never talk about fees. Don't come in and have us tell you our design philosophy and then ask us our fee.

"Of the men and women whose work I admire, we'll never do it," he said of the practice of quoting fees

See ARCHITECTS, C2, Col. 5

AIA Settles Antitrust Suit Filed by Justice Department

ARCHITECTS, From C1

for a building when there is a competition for architects.

The Justice Department consent decree does not require architects to engage in competitive bidding, according to Perdue. It simply says the institute may not take actions or adopt policies that restrain them from giving price quotations if they choose to.

Architects charge for their services in a number of ways. Some charge a percentage of the total value of the project. Others charge a lump sum for their work, an hourly fee or a combination.

Washington architect Ted Mariani, who handled the negotiations on the settlement for AIA, said yesterday that the agreement would have little real impact on architects' lives.

"I can still refuse to get into a competition that involves price," said Mariani, of Mariani & Associates.

"If a client calls and wants a price to design a building, I won't do that. I don't want to get into a price competition," he said.

However, he said some architects had gotten careless about antitrust issues over the last several years.

"If I get together with two or three architects and say 'I don't think we should compete on price,' that's a problem."

SPI-09357

Department of Justice

FOR IMMEDIATE RELEASE
THURSDAY, JULY 5, 1990

AT
202-514-2007
(TDD) 202-514-1888

DEPARTMENT OF JUSTICE FILES ANTITRUST CASE AGAINST THE AMERICAN INSTITUTE OF ARCHITECTS

The Department of Justice filed a civil antitrust suit against the American Institute of Architects (AIA) today, alleging that it unreasonably restrained price competition in the sale of architectural services. The parties also filed a consent decree that would settle the suit.

The suit alleging a violation of Section 1 of the Sherman Act and proposed consent decree were filed in the U.S. District Court in Washington, D.C.

The AIA is generally recognized as the national professional association of architects. About 54,000 architects belong to the AIA.

The complaint alleged that the AIA and co-conspirators had entered into an unlawful agreement to prohibit AIA members from engaging in competitive bidding, discounting fees, or providing free services. According to the complaint, the Chicago Chapter of the AIA in September 1984 adopted a Compensation and Fee Policy Statement which prohibited such practices.

The complaint further alleges that various national officers and employees of the AIA also endorsed and assisted in promoting

(MORE)

SPI-09358

and disseminating the statement.

The proposed consent decree enjoins the AIA and its approximately 280 local and state components from having any code of ethics or statement that has the purpose or effect of prohibiting or restraining AIA members from engaging in competitive bidding, discounting, or providing free services or that states or implies that any of these practices are unethical, unprofessional, or contrary to any policy of the AIA or any of its components.

The consent decree requires the AIA to institute a comprehensive antitrust compliance program, which would include annual written certifications from various AIA officials for the next 10 years that they understand and agree to comply with the decree and that they understand that noncompliance may result in disciplinary measures and charges of criminal contempt. The AIA also is required to establish a Decree Committee to supervise and monitor compliance with the decree.

The consent decree further provides that the court may impose a civil fine upon the AIA or any of its components for a violation of the decree without any showing of willfulness or intent.

The decree further requires the AIA to pay $50,000 to the United States for the costs of the investigation.

(MORE)

If the consent decree is approved by the court after a required 60-day comment period, it would terminate the suit.

The consent decree supersedes a final judgment entered against the AIA in 1972 for violating the antitrust laws.

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ASSOCIATION SPECIAL REPORT
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FEDERAL TRADE COMMISSION PROMISES ANTITRUST INVESTIGATION OF ASSOCIATIONS

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High officials of the Federal Trade Commission (FTC) have recently stated that the agency will soon target associations, in general, for antitrust investigation.

While the understaffed FTC is not known for its antitrust vigor, these statements should not be treated as mere rhetoric. Indeed, indications are that the FTC's program of investigation is underway and that the agency is currently identifying the associations it will target.

Now is clearly the time for associations to make sure their antitrust houses are in order.

This Special Report describes what is presently known about the FTC's investigation and what associations should do in light of it.

The FTC's "Trade Association Project"

The first indication of the FTC's new concern about association activities came during a January 17, 1990 speech before the Chicago Bar Association by Kevin J. Arquit, director of the FTC's Bureau of Competition.

During the speech, Arquit said: "We intend to commit more resources to horizontal restraints . . . we are certainly going to be aggressive in this area, and where enforcement action is warranted, we will take it.

"Where might we look? We hear increasingly that trade associations and other joint enterprises are engaging in facially legitimate conduct that serves as a cover for collusive and other anti-competitive conduct. We intend to find out whether these accusations are justified."

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Arquit added, "With respect to collusion that takes place under the guise of legitimate joint activity, the troubling message I hear is that many associations have gotten lax, some say downright sloppy, in their procedures to ensure antitrust compliance.

"The problem may not be so much with formal compliance programs, but with informal information sharing that takes place among members of the organization."

More recently, another FTC official, Michael McNeely, provided additional information about the agency's planned investigation. He had been put in charge of what he called the FTC's "trade association project."

As part of that project, the agency is considering several options for identifying association antitrust targets. The first is a "broad sweep of associations" in which the agency would send out many inquiry letters to associations representing concentrated industries with high-entry barriers.

McNeely expressed doubts about the wisdom of this approach because of the large number of FTC personnel needed to pursue it and because in concentrated industries "collusion is not necessary as tacit collusion works just fine."

According to McNeely, a second option would be to look at associations representing recently-deregulated industries. A third would be to investigate associations which, based on information which the FTC receives from "public sources" and from its own personnel, may be involved in collusive or other anti-competitive activities.

The FTC is presently exploring the third option, he said, but it apparently has made no final decision on its ultimate approach.

McNeely stated that the FTC's investigations will focus on the following kinds of association activities:

-collusion among members;
-any concerted action that "significantly diminishes rivalry among competing firms";
-mechanisms that "facilitate anti-competitive practices";
-misuse of standards and certification processes;
-conduct characterized by the FTC as "non-price predation" (e.g., false filings before the agency for anti-competitive purposes); and
-denial of membership "where membership is essential to meaningful competition in the market."

Associations should take McNeely's remarks seriously. Although, understandably, he would not reveal the basis for the statement that associations have become lax in their antitrust compliance, he plainly indicated that the FTC has evidence to support it.

Although, in general, the level of antitrust enforcement declined during the Reagan years, most associations are well aware that there was no slowdown in challenges to hardcore collusive activities such as price-fixing.

There is now also the increasing likelihood that individual antitrust violators will serve prison sentences. (See Special Report #15 titled New Antitrust Sentencing Guidelines Result in Increased Criminal Prosecutions dated June 1989).*

Antitrust lawyers counseling trade associations generally confirm that there has been no compliance letdown by their clients. Nevertheless, the FTC has the perception that compliance has become lax and it intends to act on that perception.

Apparently, some associations have already been identified as targets and they can expect to receive inquiry letters from the FTC in the near future. Also, it should be obvious that there is now a greater likelihood that the FTC will investigate an association if it receives information indicating that the association may be engaging in anti-competitive conduct.

Finally, it is possible, though probably unlikely, that the agency will decide to pursue the "shotgun" investigation approach even though that would require the use of a large number of personnel.

If this approach is followed, it must be assumed that the primary targets of the investigation would be larger associations representing basic industries.

The FTC's investigation of associations is a further demonstration of the continuing need for strict compliance with the antitrust laws. You will find a thorough analysis of the laws as they relate to associations in Associations and the Antitrust Laws (Malcolm MacArthur, author; U.S. Chamber of Commerce, publisher, $8 per copy).

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*New sentencing guidelines that took effect in January 1989 state that individuals found guilty of bid rigging, price-fixing and market allocation must be sent to jail for a minimum of 4 to 10 months.

Not only do the guidelines require mandatory jail sentences, but they also impose a new concept in establishing fines. The minimum fine for individuals is $20,000 and the minimum fine for corporations is $100,000.

However, individuals are subject to fines totalling 4 to 10 percent of the volume of commerce attributable to the violation and corporations or other organizations must pay a fine equal to 20 to 50 percent of the volume of commerce affected. The scope of potential antitrust fines has been increased enormously.

It includes an analysis of the laws as well as a detailed discussion of association practices and programs subject to antitrust laws. Prevention policies are also discussed.

The following is a brief description of those laws, antitrust compliance programs and basic antitrust guidelines for associations.

Antitrust Laws Applicable to Associations

The two federal statutes which are of principal concern to individuals and firms who take part in association activities are Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission Act.

These laws prohibit contracts, combinations and conspiracies in restraint of trade. The U.S. Supreme Court has said that not every contract in restraint of trade constitutes a violation; only those which unreasonably restrain trade are unlawful.

Thus, a court will look at all the facts and circumstances surrounding the conduct in question in order to determine whether it unreasonably restrains trade and, therefore, violates the law.

Certain conduct, however, is conclusively presumed unreasonable and, therefore, unlawful. Such conduct, which is considered unlawful per se, consists of certain practices which clearly restrain competition and have no other redeeming benefits. Examples are: agreements to establish prices (price-fixing); most agreements to refuse to deal with third parties (boycotts); and agreements to allocate markets or limit production.

Antitrust Enforcement

The Sherman Act is enforced by the U.S. Department of Justice in private suits for treble damages by persons or firms injured by antitrust violations. Government suits may be either civil or criminal in nature. In the civil suit, the government seeks an injunction to prohibit the offender from violating the law in the future. Criminal actions seek to impose fines or imprisonment.

The Federal Trade Commission (FTC) Act is enforced by the FTC, an administrative agency. The FTC issues "cease and desist" orders when a practice is found to violate the law. The violation of an FTC order may result in a substantial monetary penalty. When a trade association is adjudged in violation of the antitrust laws, a court may order the association to dissolve.

Trade Associations Present Special Problems

As a matter of law, trade associations and their members stand in the same position under the antitrust laws as any other group of persons or firms. Thus, the legality of association activities is judged by the same standards as are applied to other entities.

For several reasons, however, associations, by their very nature, present special antitrust problems. One reason is that, in bringing competitors together, there is created immediately the means by which collusive actions can be taken in violation of antitrust laws.

The Sherman Act prohibits "combinations...in restraint of trade." Because a trade association, by its very nature, is a combination of competitors, one element in a possible violation is already present; only the action to restrain trade remains to be shown.

A second special antitrust problem of a trade association is that many of its most valuable programs may deal with subjects sensitive from an antitrust viewpoint -- price reporting, product standards, statistics, certification and customer relations.

Antitrust Compliance Program

Antitrust compliance programs seek to minimize the danger of becoming involved in antitrust investigations or litigation. The first step in developing such a program is for counsel to conduct an antitrust audit or survey of the association's operations.

The audit serves two main purposes:

-to familiarize the antitrust counselors with the association and industry they represent so they may formulate an appropriate compliance program; and

-to identify any antitrust problem, actual or potential.

The audit begins with a study of pertinent association records. This is done with the attitude that virtually every piece of paper in the association's files could turn up before a federal grand jury.

However, because of the volume of documents, this is usually only a spot check or random sampling. The study of association documents is the prelude to interviews with key members of association staff and, in some cases, volunteer leaders.

Once the document search and interviews are completed, a written statement is prepared which sets forth the essence of the compliance program. The statement facilitates the transmission of the antitrust message and underscores the seriousness and importance of compliance in the eyes of the association's governing body.

Written programs, approved by the association's governing body, should include the following:

-a brief statement of purposes of the antitrust laws and the sanctions for violating those laws;

-a clear and simple statement of association policy to adhere strictly to the antitrust laws; and

-specific guidelines on prohibited activities to assist association staff and members in avoiding antitrust pitfalls. (They should include specific advice for conducting all association meetings.)

The program should set forth rules concerning the maintenance of association records according to a record-retention program that ensures that only necessary documents are kept.

As part of the program, association staff, officers, directors and members should receive sufficient knowledge of the antitrust laws so they can recognize antitrust problems when they arise. Legal counsel should be readily available to provide advice when needed.

Antitrust Guide for Associations

The basic principle to follow in avoiding antitrust violations in connection with association activities is to see that no illegal agreements -- expressed or implied -- are reached or carried out through the association. Members should also avoid engaging in conduct which may give the appearance of an unlawful agreement.

Set forth below is a listing of certain subjects which often present antitrust problems for associations:

Pricing. The most common antitrust violation is price-fixing: an agreement to establish prices. For that reason, competitors should never discuss prices or discounts at an association meeting or elsewhere. The association should not involve itself in the pricing practices of members.

Associations may establish statistical programs involving past prices -- but only under the careful supervision of counsel. They should never allow discussion of present or future prices.

Membership. Associations should develop reasonable membership qualifications that will include all members who share the common problems (in the industry or profession) that the association was established to represent.

The association should make certain that the qualifications are objective in nature and set forth in the bylaws. It should automatically admit those into membership that meet those qualifications.

Associations should make available to non-members all those services which are valuable from a competitive standpoint. They may charge non-members a reasonable fee for the services. This fee may be higher than the fee, if any, charged to members.

Normally, the only grounds an association may have for expelling a member is that it is no longer in the industry or profession or that it has not paid its dues. The association should consult counsel if it desires to expel the member for any other reason.

Industry Self-Regulation. Counsel should review all programs in which the association seeks in some way to establish rules for the industry. They should take particular care to review codes of ethics so they do not unreasonably restrict competition.

The association should take great care to avoid any conduct which might be construed as an agreement not to deal with industry competitors or suppliers.

Standardization, Certification and Statistical Programs. Such programs are proper so long as they are not used to restrict competition or injure a competitor. There are specific rules for conducting such programs so that they fit safely within antitrust laws. Associations should consult counsel about those rules and the way they apply to the association's programs.

Antitrust Operating Procedures

The following are some general guidelines which can minimize the possibility of drawing inferences of antitrust guilt from association activities.

1. You should hold meetings only when there are proper items of substance that require discussion.

2. You should send an advance notice of a meeting (along with an agenda) to each member of the group. Make certain the agenda is specific and that such broad topics as "marketing practices" are avoided.

3. You should make certain that participants adhere strictly to the agenda. Don't consider subjects not included on the agenda.

4. You should tell meeting participants that a subject is not proper for discussion if they begin talking about a something of doubtful legality from an antitrust viewpoint. This is the counsel's responsibility. In the absence of counsel, the association staff representative or any member aware of the legal implications of the subject should halt the discussion. If members refuse to halt the discussion, members aware of the problem should leave the meeting.

5. You should keep minutes of all meetings. These minutes must accurately report what actions, if any, were taken.

6. You should avoid secret or "rump" meetings held at the time of the regular meeting. Such meetings seldom have any purpose except to discuss illegal activities. Accordingly, they seriously jeopardize legitimate association activities and create a very substantial risk of investigation. An association staff member should attend all meetings.

7. You should make certain that meetings include no recommendations with respect to "sensitive" antitrust subjects such as price, production, markets and selection of customers or suppliers. Avoid any discussion of prices, pricing, discounts, credit terms, refusals to deal and allocation of markets. Recommendations are sometimes permissible in standardization activities.

8. You should not coerce members into taking part in association activities. Don't police the industry to see how individual members are conducting their business.

9. You should make certain that no officer, director or member of the association makes any statement -- orally or in writing -- which states or appears to state an official policy or position of the association without specific authorization to do so.

10. You should make certain that counsel attend all meetings of the association's Board of Directors and all other meetings where there is the potential for discussion of legally sensitive subjects.

11. You should insist that members check with association staff and counsel if there is any doubt about an association program or subject of discussion. Members may also wish to consult with their company's counsel.

12. You should make certain that members cooperate with association counsel in all matters, particularly when counsel has ruled adversely about a particular activity.

About the Author

Malcolm D. MacArthur is a partner in the Washington, D.C., law firm of Keller and Heckman. He entered private practice after serving four years as a trial attorney with the Antitrust Division of the U.S. Department of Justice. An authority on association law, he represents many national associations and has written extensively on the legal problems facing associations. He is a member of the bars of the District of Columbia, California and Wisconsin. He is the author of Associations and the Antitrust Laws (#5152) published by the U.S. Chamber of Commerce.

Order Information

Federal Trade Commission Promises Antitrust Investigation of Associations (#0219) is $5 per copy. Add $1.95 shipping/handling plus appropriate sales tax for deliveries in the District of Columbia and California.

Associations and the Antitrust Laws (#5152) is $8 per copy. Add $1.95 shipping/handling plus appropriate sales tax for deliveries in the District of Columbia and California.