AMERICAN BAR ASSOCIATION

Section of Antitrust Law
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5550
Fax: (312) 988-5637
email: antitrust@abanet.org
www.abanet.org/antitrust

ASSOCIATION YEAR 2001-2002
CHAIR
Roxane C. Busey
Suite 3000
321 North Clark Street
Chicago, IL 60610-4795
CHAIR-ELECT
Robert T. Joseph
Suite 8000
233 South Wacker Drive
Chicago, IL 60606-6342
VICE-CHAIR
Kevin E. Grady
One Atlantic Center
1201 West Peachtree Street, NW
Atlanta, GA 30309-3424
SECRETARY
Michael L. Weiner
New York, NY
COMMITTEE OFFICER
Joseph Angland
New York, NY
FINANCE OFFICER
Richard J. Wallis
Redmond, WA
INTERNATIONAL OFFICER
Abbott "Tad" Lipsky
Washington, DC
PROGRAM OFFICER
Donald C. Klawiter
Washington, DC
PUBLICATIONS OFFICER
Kathryn M. Fenton
Washington, DC
SECTION DELEGATES
Barbara O. Bruckmann
Washington, DC
Pamela Jones Harbour
New York, NY
IMMEDIATE PAST CHAIR
Ky P. Ewing, Jr.
Washington, DC
COUNCIL MEMBERS
William Blumenthal
Washington, DC
Mary B. Cranston
San Francisco, CA
Edward F. Glynn
Washington, DC
Ilene Knable Gotts
New York, NY
William L. Greene
Minneapolis, MN
Margaret E. Guerin-Calvert
Washington, DC
Helene D. Jaffe
New York, NY
Thomas F. Lemons
Irving, TX
Jeffery A. LeVee
Los Angeles, CA
Christopher J. MacAvoy
Washington, DC
Gary R. Spratling
San Francisco, CA
Richard M. Steuer
New York, NY
Theodore Voorhees
Washington, DC
Robert C. Walters
Dallas, TX
James A. Wilson
Columbus, OH
JUDICIAL REPRESENTATIVE
Honorable Douglas H. Ginsburg
Washington, DC
DEPARTMENT OF JUSTICE REPRESENTATIVE
Honorable Charles A. James
Washington, DC
NAAG REPRESENTATIVE
Patricia A. Conners
Tallahassee, FL
FTC REPRESENTATIVE
Honorable Timothy Muris
Washington, DC
BOARD OF GOVERNORS REPRESENTATIVE
Blake Tartt
Houston, TX
YOUNG LAWYERS DIVISION REPRESENTATIVE
Katherine A. Havely
Washington, DC
SECTION DIRECTOR
Joanne Travis
(312) 988-5575
travisj@staff.abanet.org

August 5, 2002

Via Facsimile and U.S. Mail

Senator Herb Kohl
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Senator Michael DeWine
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Senate Judiciary Committee's Oversight Hearings

Dear Senators Kohl and DeWine:

I am writing on behalf of the Section of Antitrust Law of the American Bar Association in connection with the Committee's oversight hearings with respect to the antitrust enforcement activities of the Federal Trade Commission and the Antitrust Division of the Department of Justice. This letter addresses three subject areas: (1) progress made by the federal agencies in response to recommendations contained in the 2001 report of the Section's Task Force on the Federal Antitrust Agencies,[1] (2) the need for adequate funding for the agencies, and (3) the Section's opposition to expanding antitrust exemptions.

The views expressed herein are presented on behalf of the Section of Antitrust Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and, accordingly, should not be construed as representing the position of the Association.

---

1 *Report of the Task Force on the Federal Antitrust Agencies - 2001,* American Bar Association, Section of Antitrust Law, Task Force on the Federal Antitrust Agencies -- 2001.

1. Adoption of Section of Antitrust Law Task Force Recommendations

The Task Force on the Federal Antitrust Agencies was appointed by the Chair of the Section of Antitrust Law in the Fall of 2000, with the mission of evaluating and reporting on the state of federal enforcement of the antitrust laws of the United States, with the view that the resulting report would be of use to the new Administration, whichever political party might be in power. In its 2001 report, the Task Force offered the new Administration a number of recommendations that it felt, if followed, would significantly advance the cause of competition policy in the United States and around the world. The recommendations included giving immediate review to the relationship between antitrust law and policy and intellectual property law and policy, making global competition initiatives a high priority, evaluating the merger review process, and reviewing the agencies' operations and organizations to improve staff-private party interaction. We are pleased that the Administration has acted on these recommendations.[2]

a. Reviewing the Relationship Between Antitrust Law and Policy and Intellectual Property Law and Policy

The Section's Task Force report urged the new leadership of the antitrust agencies to encourage examination of and debate about the relationship between antitrust law and policy and intellectual property law and policy. In response, the FTC and the Antitrust Division are conducting public hearings to develop a better understanding of how to analyze the issues that arise at the intersection of these two areas. In addition, the FTC has established a Noerr-Pennington Task Force which has considered misuse of antitrust immunity by patent holders in the pharmaceutical industry.[3]

---

[2] The Section's Task Force report also recommended that the Administration appoint experienced leaders of the Antitrust Division and the FTC who are committed to positive change. The Section believes the Administration has followed this recommendation by appointing highly qualified persons to fill leadership positions in both agencies.

[3] *See* the written testimony of Timothy J. Muris, Chairman of the FTC, before the Committee on Commerce, Science, and Transportation, United States Senate, April 23, 2002. The *Noerr-Pennington* doctrine provides antitrust immunity for individuals petitioning the government. *Eastern R.R. Presidents Conf. v. Noerr Motor Freight,*

In 1995, the enforcement agencies recognized the complementary nature of antitrust and intellectual property in their "Antitrust Guidelines for the Licensing of Intellectual Property." Both the FTC and the Antitrust Division have pursued enforcement actions against firms allegedly using intellectual property in attempts to obtain or extend monopoly power. The intersection of these two areas of the law presents questions about which enforcement policies the agencies will apply and how these two bodies of law can be reconciled most effectively. As Chairman Muris announced at the outset of the hearings, "[T]he hearings will consider the implications of competition and intellectual property law and policy for innovation and other aspects of consumer welfare."[4] The Section called for greater dialogue between the enforcement agencies on these issues, and the agencies have met this challenge with success, through their hosting of numerous joint public hearings including business, consumer, and government representatives.

b. International Competition Initiatives

The Section's Task Force report urged the new Administration, through the antitrust agencies, to continue the global competition initiatives already underway. It recommended that, as a priority matter, the United States work with other nations toward reducing the compliance burden, especially the cost and time delays associated with multi-jurisdictional pre-merger review. The FTC and the Antitrust Division have not only continued the global competition initiatives, but have also expanded their close working relationship with their counterparts in the European Commission (EC). Furthermore, in October 2001, the Antitrust Division and the FTC launched the International Competition Network (ICN) with top foreign antitrust officials. The ICN will provide a venue where senior antitrust officials from developed and developing countries will work to reach consensus on proposals for procedural and substantive convergence in antitrust enforcement. Its focus will include the merger control process as it applies to multi-jurisdictional mergers and the competition advocacy role of antitrust agencies, particularly in emerging economies. The Section is willing to assist and cooperate with the antitrust enforcement agencies in working with their

---

Inc., 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965).

[4] Press Release, FTC, Muris Announces Plans for Intellectual Property Hearings (Nov. 15, 2001) (*available at* http://www.ftc.gov/opa/2001/11/iprelease.htm).

international counterparts to bring about procedural and substantive convergence in antitrust enforcement.

Under the new Administration, the antitrust agencies have attempted to build on their relationships with the EC to achieve convergence in analytical approaches to cases of mutual concern. Although the EC and the U.S. antitrust agencies have had divergent views on issues such as the competitive effects of "bundling" products and on the application of the theories of market foreclosure, the two continue to work together through the Working Group on Mergers.[5]

c. Continued Evaluation of the Merger Review Process

The Section's Task Force report recommended that the new Administration focus on the merger review process, since it is a frequent point of contact between the business community and the enforcement agencies, and since it has a disproportionate effect on perceptions of agency behavior and performance by the general business community.

The Section's Task Force suggested an early, candid exchange of concerns that agency staff may have with the parties. To remedy past criticisms, the Antitrust Division announced the details of its Merger Review Process Initiative last October. The goals of the new process are to facilitate more efficient and more focused investigative discovery and to provide for an effective process for the evaluation of evidence. The initiative addresses the use of the initial 15 or 30 day waiting period, the issuance of Second Requests, and the post-Second Request Period.

In addition, the FTC staff has participated in a series of successful multi-city "brown bag" discussions focusing on merger investigations practices and on developing and negotiating remedies. The merger investigations workshops focused on FTC procedures during the HSR Act Second Request process for obtaining additional information and data used to assess the likely competitive effects of mergers and acquisitions. The remedies workshops have considered whether the agency's remedy provisions are necessary or sufficient and whether the process through which they are

---

[5] Press Release, FTC, FTC Chairman Muris Stresses Commitment to Cooperation with European Commission (Nov. 14, 2001) (*available at* http://www.ftc.gov/opa/2001/11/euus.htm).

negotiated can be improved. Corporate personnel, outside and in-house attorneys, economists, and consumer groups have provided input on the efficiency of the merger review process, the time and expense involved in that process, the perceived stringency of the remedy requirements, and the information that parties should provide during the review process.

The Section also applauds the agencies' efforts to work out an agreement concerning clearance procedures for merger reviews and other antitrust matters. We support overhauling the clearance system between the FTC and the Antitrust Division to avoid time-consuming clearance disputes that delay initiation of investigations.[6]

d. Review of Agencies' Operations and Organizations

The Task Force suggested that the new Administration review both the structure and the actual operation priorities of both federal antitrust agencies to ensure that they are organized and operated in a way that promotes efficient and effective enforcement efforts and improves interaction with the public. Recently, the Antitrust Division was reorganized to concentrate investigatory and enforcement expertise and resources for commodities within a particular section, and thereby minimize the dispersion of enforcement efforts across sections. This effort also recognizes the emergence and importance of certain changing areas of the economy, such as information technology, telecommunications and industries characterized by network competition.

2. The Need for Adequate Funding for the Agencies

Vigorous enforcement in the United States of the antitrust laws is important for long-term economic growth, consumer well being, and the international competitiveness of American enterprises. A broad consensus exists today, not only with respect to the importance of vigorous antitrust enforcement, but also with respect to the major thrust of appropriate antitrust enforcement policies. There is also a broad consensus that traditional consumer protection problems persist and that the FTC should continue its enforcement mission in this area.

---

[6] *See* Letter to Chairman Timothy J. Muris and Assistant Attorney General for Antitrust Charles A. James from Roxane C. Busey dated January 23, 2002 (available at http://www.abanet.org/antitrust/jamesmuris.doc).

The Section of Antitrust Law has long supported adequate funding for these agencies. In ranking adequate funding for the federal agencies high on its list of serious issues for the new Administration in the 2001 Task Force report, the Section pointed out that "[t]here is little point in enacting legal commands without providing the means to enforce them effectively."[7]

Two principal considerations underscore the need for adequate funding. First, there is a significant enforcement activity at the agencies -- a number of important mergers requiring review under the HSR Act, other civil non-merger investigations particularly in intellectual property and the drug and health care industries, and criminal prosecutions. Adequate funding is necessary to support these enforcement activities. Second, the agencies are engaged in activities in addition to traditional law enforcement such as holding hearings and workshops, providing business advice, conducting pertinent studies,[8] engaging in competition advocacy, enhancing training activities, and participating in international initiatives to promote the harmonization of antitrust laws and procedures. These tasks are essential elements of a sensible competition policy program. In particular, even more resources should be available for the agencies to engage in thoughtful contemplation of their past enforcement activities, including an examination of the policy bases for such activities, whether past enforcement decisions have actually produced the predicted results, and whether or not they have ultimately served the public interest.

Adequate funding of the FTC's consumer protection mission is equally important. Traditional consumer protection problems continue, even in the new economy, and the FTC's recent focus on the Internet is appropriate. Privacy, children's online access issues, and media violence are items on the FTC's agenda that require continuing attention. Protecting both business and consumer needs for safe, predictable, and healthy e-commerce without impeding the growth and development of this new medium will continue to challenge the agency and tax its resources.

---

[7] *See also* Letter to Senator Hollings and Congressman Gregg from Roxane C. Busey dated April 18, 2002 (available at http://www.abanet.org/antitrust/congressltr.pdf).

[8] *See, e.g.,* Press Release, FTC, "A Study of the Commission's Divestiture Process" evaluating 35 divestiture orders entered between 1990 and 1994 (available at http://www.ftc.gov/opa/1999/9908/divestreport.htm).

It is widely believed in the antitrust community that some unknown numbers of matters do not get proper attention from the agencies because of limited resources. This is true where there are statutory deadlines, as in the review of mergers subject to HSR Act reporting requirements, but it is most obvious in areas where there are no such deadlines, as in non-merger civil investigations and business review letters. Adequate funding will help to ensure that the agencies will have the resources they may need to respond to the many challenges of antitrust and consumer protection enforcement in this era of increasing globalization and rapid technological advance -- efficiently, fairly, effectively, and in a way that benefits consumers.

3. Opposition to Antitrust Exemptions

Finally, the Section of Antitrust Law would like to take this opportunity to note its concern over increasingly frequent attempts to secure Congressional exemption of conduct from the antitrust laws. The Section strongly believes that the courts and antitrust enforcement agencies are best at protecting our economy from antitrust violations when not constrained by ill-advised antitrust exemptions which threaten competition.

The Section has consistently expressed its opinion generally disfavoring antitrust exemptions directed at specific industry categories or conduct.[9] The antitrust laws are designed to provide general standards of conduct for the operation of our free enterprise system. Special exemptions from these standards are rarely justified.

---

[9] *See, e.g.*, Reports of the ABA Section of Antitrust Law on the Quality Health-Care Coalition Act of 1999, Antitrust Health Care Advancement Act of 1997, the Television Improvement Act of 1997, the Major League Baseball Antitrust Reform Act of 1997, the Curt Flood Act of 1997, and the Major League Baseball Antitrust Reform Act of 1995 (all available at http://www.abanet.org/antitrust). Other, similar reports on analogous legislation may be obtained through inquiry to the Section of Antitrust Law. Such reports include the Reports of the Antitrust Section on the Malt Beverage Interbrand Competition Act of 1985, the proposed modification of McCarran-Ferguson Act in 1989, and the Petroleum Pricing Legislation of 1992.

With very few exceptions, the courts determine when an alleged restraint is unreasonably restrictive of competition by applying the "rule of reason."[10] Under this standard, a court will evaluate the impact of a challenged agreement upon competitive conditions in a properly defined relevant market, weighing the anticompetitive harms against the procompetitive benefits of an arrangement.[11] The rule involves an extended inquiry into the competitive effects of the conduct at issue, and affords firms ample opportunity to demonstrate that their cooperative activities do not unreasonably restrain competition. The rule of reason approach allows the courts to resolve similar cases consistently, regardless of the industry in which they arise. The standard is also flexible over time, allowing the courts to judge practices under the specific facts and circumstances presented. By contrast, a legislative exemption created at a specific point in time may become inappropriate as time passes and the market evolves.[12]

---

10 *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978). A very limited set of restraints are treated as "*per se*" unlawful -- that is, unlawful without regard to their effects. *See, e.g., Palmer v. BRG of GA., Inc.*, 498 U.S. 46, 49-50 (1990) (per curiam); *United States v. Topco Assocs.*, 405 U.S. 596, 608 (1972). Price fixing is a classic example of a *per se* unlawful activity, but even price fixing may be lawful where it is undertaken pursuant to a joint venture or other arrangement that brings a new product to market that would not otherwise exists. *See Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 19-20 (1979); *Northern Pacific Railway v. United States*, 356 U.S. 1, 5 (1958).

11 *See Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) ("The true test of legality is whether the restraint is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question, the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, and purpose or end sought to be attained, are all relevant facts.").

12 With respect to the insurance industry, for example, Congress passed the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, in 1945, at a time when the industry was dominated by strong cartels. The industry became less concentrated over time, but the exemption and regulation persisted.

Exemptions from the antitrust laws generally are undesirable because the antitrust laws reflect our fundamental national economic policy favoring free competition.[13] In light of the flexibility of the antitrust laws, exemptions are very seldom necessary to achieve any legitimate purpose. Only in the rare instances where antitrust regulation causes undesirable results or prevents plausible efficiencies are exemptions justified. Indeed, even where exemptions might be hoped to promote legitimate goals, experience has demonstrated that they seldom do so. Antitrust exemptions seldom achieve any legitimate purpose and often impose real costs upon consumers and the nation as a whole. Experience has shown that granting an exemption not only reduces consumer welfare; it also frequently fails to help the industry that is seeking the protection.[14]

---

[13] *See, e.g., FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973)("[A]ntitrust exemptions are disfavored"); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 316 (1956). Similarly, any form of "[i]mplied antitrust immunity is not favored." *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City,* 452 U.S. 378, 388 (1981). *See, e.g., United States v. Philadelphia National Bank,* 374 U.S. 321, 350 (1963) ("Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions.") (footnotes omitted). *See also United States v. National Association of Securities Dealers*, 422 U.S. 694, 719-20 (1975); *Gordon v. New York Stock Exchange* 422 U.S. 659, 682 (1975); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973) ("When . . . relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws"); *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963) ("Repeal is to be regarded as implied only if necessary to make the [subsequent law] work, and even then only to the minimum extent necessary"); *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 126 (1973); *Carnation Co. v. Pacific Westbound Conference et al.*, 383 U.S. 213, 217-18 (1966); *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963); *California v. FPC,* 369 U.S. 482 (1962); *United States v. Borden Co.,* 308 U.S. 188 (1939).

[14] For an extensive discussion of the benefits of competition and the costs associated with regulation designed to replace competition, *see* Report on Regulatory Reform, Industry Regulation Committee, Section of Antitrust, American Bar Association, 54 Antitrust L. J. 503 (1985). *See also* Section of Antitrust Law, American

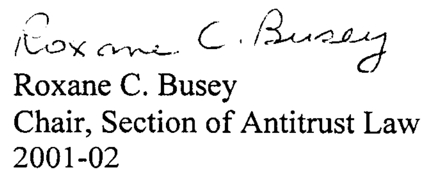
In addition to imposing costs on consumers and society, antitrust exemptions often burden national policy by undermining free trade goals. At a time when our nation is working to promote free trade and the harmonization of competition laws, creating or maintaining special preferences for particular industries cuts against that goal. Studies of the antitrust exemption for export cartels frequently have criticized the exemption on the grounds that it makes the task of the United States more difficult when it presses foreign nations to curtail the activities of their own authorized export cartels.[15]

4. Conclusion

The Section of Antitrust Law commends the agencies for responding to many of the Section's Task Force recommendations, and it supports adequate funding for the FTC and the Antitrust Division. The Section also hopes the Committee will find its views on antitrust exemptions helpful in its oversight responsibilities.

I hope you will let me know if you have questions, or if the Section of Antitrust Law can provide any other input into the oversight process.

Sincerely,



Roxane C. Busey
Chair, Section of Antitrust Law
2001-02

Bar Association, Regulated Industries, Antitrust Law Developments 1245–1431 (5th ed. 2002).

15 The exemption is codified at 15 U.S.C. §§61-65, and was studied by the Federal Trade Commission and the Organization for Economic Cooperation and Development. *See* Federal Trade Commission, WEBB-POMERENE ASSOCIATIONS: A 50 Year Review (1967); Organization for Economic Cooperation and Development, Export Cartels (1974). The studies also criticized the exemption on the grounds that an item may serve as a vehicle for conspiracies directed at the domestic market.

cc: Assistant Attorney General Charles James
Chairman Timothy J. Muris
Commissioner Sheila F. Anthony
Commissioner Mozelle W. Thompson
Commissioner Orson Swindle
Commissioner Thomas B. Leary

CH01/12236549.2