MEMORANDUM

TO: Brian Henry, ABA Antitrust Section Vice Chair  
    Long Range Planning Committee

FROM: DISTRIBUTION & FRANCHISING COMMITTEE  
    Chair: Deena Jo Schneider  
    Vice Chairs: Christopher T. Casamassima  
                David H. Evans  
                Gregory W. Fortsch  
                James Nichols  
                Frank Y. Qi  
    YLRs: Anna Aryankalayil  
          Daniel Graulich

DATE: December 21, 2017

RE: Long Range Plan, 2017-19

I. Current State of Your Committee

A. Scope of Charter [slightly modified from what appears on our web page]
   
   - The Distribution & Franchising Committee provides a unique vehicle for  
     Section members to get involved in programs, publications, and other  
     activities involving all types of distribution systems, including but not limited  
     to franchising.

   - Our Committee’s broad mandate encompasses the host of U.S. and  
     international antitrust/competition issues that arise in distribution and  
     franchising, including among others dealer-supplier relationships and  
     franchise agreements, terminations and refusals to deal, customer and  
     territorial market allocations, exclusive dealing arrangements, price and  
     distribution restraints, dual distribution, licensing, joint ventures, branding  
     and marketing, supply chain economics, restrictive covenants, and data  
     collection, privacy, and consumer protection.

   - The Committee’s mandate naturally overlaps with that of other substantive  
     committees, especially Pricing Conduct, Unilateral Conduct, Corporate  
     Counseling, and International. We strive to work collaboratively with these  
     and other committees, while also providing unique benefits for our members.

B. Description and Reflective Evaluation of Membership Levels, Diversity, and  
   Growth
   
   - The latest Section staff report shows 464 Committee members, an increase  
     from the 381 reported in the 2015 Long Range Plan and the 319 reported in  
     the 2011 Long Range Plan. Connect lists 442 Committee members. The  
     number of active participants is smaller, perhaps no more than 50-75.
• Our membership appears to be reasonably diverse in including women and minorities, young and international lawyers, economists, and different types of practices (e.g., plaintiffs’ and defense lawyers, franchisors/licensors’ and franchisees/licensees’ lawyers, regulators, etc.) We are working to increase membership and engagement of all these groups in our activities.

C. Level of Interaction with Other Committees (including co-sponsored programs)

• Together with the Economics Committee, we recently published the second edition of *Antitrust Law and Economics of Product Distribution.*

• The Committee has collaborated successfully with numerous other committees in developing and co-sponsoring programming. Recent programs have covered Robinson-Patman Act litigation, international price and online vertical restraints, and global distribution and pricing issues and have involved the Pricing Conduct, Corporate Counseling, Competition Torts, Economics, International, Media & Technology, and Mergers & Acquisitions Committees, among others.

• We also have promoted programs and publications of other committees that we considered of likely interest to our members.

D. Top 3 Accomplishments Since Last Long Range Plan

• Publication achievements: An article published in the Committee’s newsletter *DISTRIBUTION* has won an award in each of the last three years, *Antitrust Law and Economics of Product Distribution* is reportedly the Section’s fourth best-selling publication, and our bi-monthly e-bulletin *Up the Downstream* initiated three years ago summarizes distribution and franchising developments as they occur.

• Programming achievements: In addition to topical Committee programs, we have presented or co-sponsored two to three well-attended Spring Meeting programs in each of the last three years (as we will again in 2018).

• Programming innovation: This fall we initiated a series of Committee programs on Distribution Fundamentals. We plan to cover all topics within our mandate, collaborating with other committees as appropriate, featuring diverse speakers from varied backgrounds, discussing both current law and hot topics, and following up each program with a summary of the discussion.

II. Major Competition/Consumer Protection Policy or Substantive Issues within Committee’s Jurisdiction Anticipated to Arise Over Next Three Years

General Committee Response/Activities: On each of the following issues, our Committee will monitor and keep our members informed of industry, technological, and legal developments through our programming, Connect postings, and newsletters and e-bulletins, working with other committees to share expertise and resources. Responses related to specific issues are noted below.
A. Online Marketing

- Issue: changes and divergence in U.S. and international distribution law as a result of the rapid growth of online marketing, dual distribution (direct sales by manufacturers to consumers), and other innovations affecting retail sales

- Specific Committee response: We will work to develop resource materials (1) with the Economics Committee on how to define markets and measure market power in the increasingly online world and (2) with the International and State Enforcement Committees on comparative distribution law issues.

B. Developing Legal Standards

- Issue: continually developing legal standards (within and across jurisdictions) governing pricing, especially bundled and loyalty discounts and tying, but also resale price restraints, price differentials, MFNs, etc. and excessive pricing and abuse of dominance concerns outside the U.S.

- Specific Committee response: We will work with the Pricing Conduct, State Enforcement, and International Committees to develop an overview of these issues and the ways in which they intersect, looking toward a Spring Meeting Pricing Fundamentals program or possible publication.

C. New Industry Issues

- Issue: changing approaches in the analysis of new industry distribution and sales systems resulting both from mergers and acquisitions (e.g., Amazon-Whole Foods, AT&T-Time Warner) and more organically (e.g., health care product distribution, motor vehicle and ride sharing)

- Specific Committee response: We will propose a joint effort with the Mergers & Acquisitions and other committees to consider appropriate legal distinctions in analyzing acquired vs. organically grown distribution systems.

D. No-Hire/Non-Compete Agreements

- Issue: increased focus on the competitive impact of no-hire, non-competition, and non-disclosure provisions imposed by suppliers/franchisors on distributors/franchisees and their employees and consultants

- Specific Committee response: We will consult with the Forum on Franchising and the Labor and Employment Law Section and present a program or pro and con articles on the issues presented by these provisions.

E. Electronic Data

- Issue: increased gathering and sharing of electronic data across all levels of distribution and new privacy laws and rules like the EU’s GDPR that require suppliers, distributors, franchisors, and franchisees to protect consumers
Committee response: We will work with the International, Privacy, and Consumer Protection Committees to develop programming and resource materials on how data should be protected at each stage of distribution.

III. Specific Long Term Plans to Strengthen Your Committee

A. Potential Modifications to Charter

The Committee’s charter as slightly restated above (including use of “&” in place of “and” in the Committee’s name) remains appropriate.

B. On-going Activities and Plans for Growth

a. Expansion of Membership

The Committee has developed and begun to implement a plan to increase membership and engagement of our members through:

- Connect solicitations
- Town Halls and surveys
- outreach to colleagues and friends
- solicitation of program attendees and contributors to our publications
- cross-marketing to other committees
- expansion of offerings to demonstrate value of Committee engagement
- possible networking events

b. Diversification of Membership\(^1\)

We are also working on a plan to increase membership and engagement by women, minorities, young lawyers, and LGBTQ and disabled lawyers, as well as plaintiffs’, government, in-house, franchise, and international lawyers and economists. Our efforts here will include (in addition to the above):

- outreach to individuals we know come within these categories
- solicitation of committees and groups that focus on these sectors
- special efforts to include these individuals as speakers and authors
- offerings designed to cover a broader spectrum of issues and viewpoints
- consultation with the Membership & Diversity Committee

c. CLE/Committee Programs

The Committee will continue to submit multiple program proposals for each Spring Meeting, including one on Distribution Fundamentals, hopefully maintaining our strong track record of success in this area.

\(^1\) Please consider diversity goals identified in the ABA’s Diversity Plan (https://www.americanbar.org/content/dam/aba/global/ABA_Diversity_Plan_May_2011.pdf) and the Section’s Diversity and Inclusion Plan (https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/diversity_inclusion_plan.authcheckdam.pdf).
We will also continue our new Distribution Fundamentals program series, presenting four to six programs annually on such topics as:

- customer and territorial market allocation
- distribution and franchising policies and practices
- horizontal arrangements, including joint ventures and trade groups
- dual distribution and other new forms of ecommerce
- anti-steering provisions and other distribution restraints
- price discrimination, MFNs, and related conduct
- RPM, MAPs, and Colgate policies
- conditioned pricing and purchasing (exclusive dealing, bundled and loyalty discounts, and tying)
- advertising, branding, licensing, and IP
- data collection and privacy

Additionally, we will continue to develop Spring Meeting program proposals into Committee programs where appropriate and to present Committee programming on other topics as they arise.

d. Publications and Newsletter (consult Long Range Publications Plan)

- The Committee will continue its pattern of publishing two annual issues of our newsletter DISTRIBUTION, which focuses on cutting-edge antitrust analysis of distribution and franchising issues and practice tips.

- We will also continue to publish our bi-monthly e-bulletin Up the Downstream, which summarizes distribution and franchising news items.

- There are no new editions of publications coming up for which the Committee is responsible. (We are not involved in the publication or updating of Antitrust Law Developments.) We plan to publish the collected summaries of our Distribution Fundamentals programs and to explore new potential publication opportunities as noted above.

e. Technology, CONNECT, and Innovative Content/Value Delivery

- The Committee has developed and begun to implement a plan to use Connect more effectively to communicate with our members through:
  - annual welcome message and periodic follow-ups from leadership
  - solicitation of articles, program ideas, and volunteers
  - announcement and promotion of programs and other events
  - circulation of e-bulletins and newsletters
  - topical discussions to promote programs in advance
  - follow-up discussions building on programs and publications
  - notices of breaking news, other committees’ upcoming events, etc.

- We are working to make our Connect messages and publications easier to read, to organize our Connect content in a more user-friendly way, and to coordinate our website more effectively with Connect.
f. Joint Activities with Other Committees/Entities

The Committee will continue our long tradition of collaborating with other committees on programming, publications, and other activities:
- with the Pricing Conduct, Unilateral Conduct, and Corporate Counseling Committees on pricing issues
- with the International and State Enforcement Committees as we cover non-U.S. and non-federal distribution law
- with the Economics Committee in co-authoring and co-editing *Antitrust Law and Economics of Product Distribution* and other publications
- with additional committees in presenting our Distribution Fundamentals and other programs and addressing the emerging issues noted above

g. Development of Future Leaders

- The Committee involves our Young Lawyer Representatives extensively in our activities, has been soliciting other young lawyers to speak at our Distribution Fundamentals programs and contribute to our e-bulletin, and is working to develop new programming geared to young lawyers.
- We regularly seek all members’ active engagement in our publications, programming, and other activities looking for additional leaders.
- We are considering creating an advisory group to promote the development of new leaders for the Committee and the Section.

h. Other Recommended Resources, Support, or Initiatives?

Assistance in making Connect work better would be helpful.

C. Principal Challenges, Weaknesses, or Impediments to Operation of Your Committee – And Plans to Address

Our Committee’s leadership and members are all busy practicing lawyers and economists with only limited time and energy to devote to volunteer activities and multiple committees and organizations competing for those resources. Our Committee’s focus may not at first blush seem important to all antitrust lawyers. But for those who recognize its value, the law in these areas is becoming more complex as a result of technological developments and the increased proliferation of differing legal standards, including among the states and outside the U.S. More and more engaged members are needed for us to maintain the high-quality programming and publications we have traditionally offered and should expand to cover this new world. The steps outlined in this Long Range Plan are our initial efforts to increase our Committee’s profile and hopefully membership and engagement, which will then permit us to grow in other directions.

cc: Responsible Council Member: John Roberti
Committee Operations Representative: Amy B. Manning
Long Range Planning Committee Representative: Robert L. Hubbard