REPORT OF THE SECTION OF ANTITRUST LAW
CONCERNING THE ABUSE OF THE APPROPRIATIONS PROCESS

The Section of Antitrust Law of the American Bar Association ("ABA Antitrust Section") hereby reaffirms its long-standing opposition to the use of the Congressional budget and appropriations process to intervene in or influence on-going antitrust enforcement matters, such as investigations and cases being pursued by the Antitrust Division of the Justice Department (AAntitrust Division≅) and the Federal Trade Commission (AFTC≅). It also reaffirms its long-standing opposition to the use of riders on appropriations bills as a vehicle for Congress to establish federal antitrust enforcement policy, which is properly the jurisdiction of the substantive committees of the Congress.

The views expressed herein are being 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 should not be construed as representing the policy of the Association. This recommendation and report was adopted by the Section=s Council on May 3, 1999.

RESOLVED, That the Section of Antitrust Law of the American Bar Association

(a) opposes the use of the Congressional budget and appropriations process to intervene in or influence on-going antitrust enforcement matters, such as investigations and cases of the Antitrust Division of the Justice Department and the Federal Trade Commission, and

(b) opposes the use of riders on appropriation bills as a vehicle for Congress to establish federal antitrust enforcement policy.

The federal antitrust laws are "the "Magna Carta of our economic liberties." The Supreme Court described the Sherman Act as

> "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." [1]

[1] *Northern Pacific Railway v. United States, 356 U.S. 1, 4 (1958*).

Enforcement, whether civil or criminal, of the federal antitrust laws by the Antitrust Division and the FTC must be responsible, fair and impartial. Correspondingly, their enforcement ***must be seen by all*** to be responsible, fair and impartial, and unaffected by political considerations. Antitrust enforcement is not a partisan political matter, nor is it a governmental activity where the influence of powerful interests or political individuals should play any role.

It would be improper for a President or a Cabinet Officer to intervene in or try to influence an enforcement decision relating to a friend, colleague, or family member. Traditionally that same standard has been applied by Members of Congress.

Fortunately, in the history of the country there have been remarkably few instances in which the political arms of government or powerful individuals (whether politicians or private citizens) have attempted to influence or interfere with the lawful exercise of prosecutorial decision making by duly constituted antitrust law enforcement prosecutors of the United States of America. Unfortunately, at various times in history, attempts have been made to use the Congressional budget and appropriations process as a vehicle for accomplishing what otherwise would be considered an impermissible intervention into an on-going antitrust investigation or law enforcement action of the Antitrust Division or the FTC. Sometimes, the attempt is somewhat indirect, such as prohibiting one of the agencies from having a regional office in a certain locality, by means of an attachment of a rider to an appropriations bill. For several years, it took the form of so many riders on FTC authorization bills that reauthorization could not be enacted, resulting in numerous riders in appropriation bills to direct particular FTC actions.[2] At other times riders have been used, for example, to prohibit an antitrust agency from spending any money to distribute a telephone book of the agency to anyone outside of government, presumably so that fewer complaints could be called into the agency for investigation. Sometimes, somewhat more directly, a rider to an appropriations bill will prohibit one of the agencies from expending any money to advocate to a court or elsewhere a particular antitrust policy position. At other times, the attack on the enforcement action takes the form of verbal attacks accompanied by attempts to cut the entire budget of the agency (or to prohibit increases in funding that are clearly justified).

S. Con. Res. 20 (106th Cong. 1st Sess.), a concurrent resolution to the FY2000 budget is the most recent example of an indirect attempt to influence the antitrust agencies' policies with respect to a pending case, *United States v. Microsoft*. The Resolution would deny the increase in the Antitrust Division's funding proposed by the Administration.[3] Amendment 207 to that Resolution, offered by the Chair of the Senate Judiciary Committee on the floor of the Senate,

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[2] *See in general*, Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission, Antitrust & Trade Reg. Rep. (BNA) No. 1410, at S-29 (April 6, 1989) (the "Kirpatrick II Report"); Report of the ABA Commission to Study the Federal Trade Commission, Antitrust & Trade Reg. Rep. (BNA) No. 427, at 35 (Sept. 15, 1969) ("the Kirpatrick Report"), and Testimony of Michael L. Denger on behalf of the American Bar Association before the Subcommittee on Transportation and Hazardous Materials, Committee on Energy and Commerce, U.S. House of Representatives, May 26, 1993.

[3] *See* Report of the Committee on the Budget, United States Senate, to accompany S. Con. Res. 20, together with Additional and Minority Views, including especially the additional views of Senator Slade Gordon (R. Washington State).

with heavy backing from Senators of both parties, declared it to be the sense of the Senate that the Antitrust Division should receive adequate funding. [4] Amendment 207 was adopted.[5] The final result of the budget and appropriations battle for funding of the antitrust agencies for FY2000 is still unknown.

S. Con. Res. 20 provides a classic example of why it is important for the Section of Antitrust Law of the American Bar Association once again to reaffirm its long-standing position that the Congressional budget and appropriations process should not be used, nor should riders on appropriations bills be used, to influence or intervene in antitrust enforcement actions.[6] whatever the merits or demerits of the Justice Department's case in *United States v. Microsoft*--- which are now the province of the federal courts to decide,[7] the fact remains that the appropriations and budget process should not be used to intervene in or influence the outcome of that case.

There are a number of reasons why the Section of Antitrust Law opposes these efforts at intervention by means of the Congressional budget and appropriations process.

Congressional attempts, whether by a single Member of Congress, or through the appropriations process, to influence or intervene in a specific on-going case in midstream are viewed as being ***improper interference with what are essentially prosecution and judicial functions***.

Action through the appropriations process is ***vulnerable to the charge that it is "special interest" legislation that is politically motivated.*** Furthermore, in a budget and appropriations context, action is usually fast and, unlike legislation that goes through the committees with substantive jurisdiction, is not usually taken on the basis of hearings and policy input from affected and interested parties. Both the rules of the House and of the Senate prohibit "legislating" on appropriations bills; this means that most riders are narrowly drawn and may,

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4 *See reports in* Technology Daily (pm edition), March 24, 1999, and March 30, 1999.

5 *Congressional Record of March 25, 1999 (S.3392).* The Section of Antitrust Law of the American Bar Association supports adequate funding of the Antitrust Division (and of the Federal Trade Commission) at a level no less than that proposed in the FY2000 Budget requests of the Administration.

6 *See, for example,* Testimony of Michael L. Denger on behalf of the American Bar Association before the Subcommittee on Transportation and Hazardous Materials, Committee on Energy and Commerce, U.S. House of Representatives, May 26, 1993, in which the Chair of the Antitrust Section presented the views of the full BA, as enunciated in a formal Board of Governors resolution, condemning riders on FTC authorization bills and attempts to legislate through appropriations riders. *See also,* American Bar Association Section of antitrust Law Report on S. 1022 (1997), on which blanket authority was received from the ABA so that the Section's position could be made known, opposing S. 1022's attempt to deny funding to the FTC for the prosecution of the administrative case of *In the matter of Butterworth Health Corporation and Blodgett Memorial Medical Center,* FTC Docket No. 9283. *See also* Report to the Board of Governors by J. Thomas Rosch, Chair of the Section of Antitrust Law of the American Bar Association (May 20, 1991).

7 The Section of Antitrust Law hereby takes no position regarding the merits of *Microsoft* or the Justice Department's prosecutorial decision to seek redress in a federal court of competent jurisdiction.

indeed, be inadequate to achieve fully the policy objectives of their authors.[8] Of even greater concern is the fact, widely understood by the public, that riders on appropriation bills are most often added in Committee or in conference between the Senate and House, or during hurried floor debate, on the application of one member or a small group, and ***may not embody any considered policy preference reflecting a true consensus of the Congress.*** Consequently, the grounds of action tend to remain unarticulated thereby denying the public confidence that the grounds for the action were proper. Thus, ***public confidence in the legislative process is also undermined.***

For related reasons, Congressional intervention through the budget and appropriations process similarly ***undermines the public's confidence in the law enforcement and agency adjudicative process.*** If parties to litigation can affect the outcome of their particular matter by seeking quick, favorable budget action in Congress, independent of the merits of their position, it appears that those with significant influence in Congress can avoid the consequences of general laws and regulatory statutes ordinarily enforced through agencies and courts. It may, indeed, subvert the independence of the judiciary and of agencies entrusted with adjudicative functions.

Furthermore, appropriations-based policy making is an inappropriate substitute for enacting substantive legislation for a number of reasons. It ***diverts the evaluation and review of agencies of government away from the Congressional committees with oversight of the substantive law*** provisions being enforced by the agencies, and places it in the hands of committees with only funding responsibilities. Such committees seldom have either the time, background, inclination or resources to study relevant policy considerations.[9] Moreover, because appropriations riders tend to be of short duration (one appropriations cycle), they tend to be stop-gap measures that tend to delay substantive consideration of potentially necessary reforms in the substantive laws being enforced.

For all of the foregoing reasons, the Section of Antitrust Law believes that the Congressional budget and appropriations process should not be used as a vehicle by which to intervene in or influence the appropriate prosecutorial decision making by duly constituted antitrust law enforcement officials of the United States of America. Because of the recent attempts to do, and the current potential for attempts improperly to utilize riders on appropriations bills, the Section of Antitrust Law hereby reaffirms it long-standing opposition to such practices.

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8 *See generally*, Devins, Regulation of Government Agencies Through Limitation Riders, 1987 Duke L.J. 456, 464-65.

9 Devins, *supra* note 8, at 465; Bloch, Orphaned Rules in the Administrative State: The Fairness Doctrine and Other Orphaned Progeny of Interactive Deregulation, 76 Geo. L.J. 59, 112-14 (1987).