The views stated in this submission are presented jointly on behalf of the Section of Antitrust Law and the Section of International Law (“the Sections”) only. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

EXECUTIVE SUMMARY

The Sections welcome the additional certainty and guidance that the guidelines prepared by the Superintendent of Industry and Commerce will provide to trade and professional associations and their members doing business in Colombia. It is evident that the Draft draws from the extensive body of judicial precedent and regulatory guidance that has evolved in this area of the law among many jurisdictions. In particular, the Sections wish to commend the drafters for providing rules and principles of guidance that help identify areas of prohibited anticompetitive conduct while respecting and leaving undisturbed the many areas in which the work of associations can provide procompetitive benefits.

These comments, which are intended to build upon and further enhance the Superintendent's balanced approach, make several suggestions focusing on the following ideas, among others:

- Further elaboration on the ways free competition benefits all levels of the Colombian economy, including consumers;
- Additional distinctions between high- and lower-risk association conduct;
- Additional examples of potential procompetitive benefits that flow from association activity;
- A more pragmatic approach to risk reduction in the context of association meetings and information exchanges;
- A clearer demarcation of the difference between agreements ("decisions") concerning prices and those concerning other matters; and
- An abandonment of blanket prohibitions on "obstruction and discrimination" in favor of a standard competitive balancing analysis for association conduct that may have both exclusionary and procompetitive effects.
SPECIFIC COMMENTS

I. Rationale for the Protection of Competition

The Draft enumerates compelling reasons to protect competition, including standard rationales for competition that are recognized across many jurisdictions with well-developed competition law and enforcement programs. The Sections respectfully suggest that these rationales could be augmented by the inclusion of at least two more reasons to promote competition:

- Lower pricing at all levels of the value chain, including lower consumer prices. This key benefit is a cornerstone of antitrust policy and jurisprudence in the United States.¹

- Enhanced competitiveness for Colombian companies in a global economy. This benefit is especially important in light of the U.S.-Colombia Trade Promotion Agreement ("CTPA"), made effective on May 15, 2012.² By reciprocally eliminating tariffs on trade between the United States and Colombia, the agreement attempts to stimulate competition between firms in each country, making them more competitive globally.

II. Potentially Procompetitive Activities of Professional Associations and Trade Organizations

The Draft acknowledges some of the types of trade association activities that may have procompetitive benefits. The Draft emphasizes:

- "Representing the collective before national authorities";

- "Carrying out forums and debates about the problems of a particular sector as well as looking for their respective solutions";

- "Issuing of directives or recommendations" promoting "[c]ertain socially and economically desirable behaviors";

- "Adopting standards of quality"; and

- "Compiling information for general reports and statistics on the development as well as the current situation of the sector."

In order to promote clarity for companies considering involvement in a trade association, the Sections suggest that the list of potential benefits be expanded. As an introduction to its later explanation of potential antitrust risks associated with different types of association conduct, the Competition Authority could list additional activities of trade associations that are widely understood to be procompetitive under most circumstances such as:

¹ See, e.g., United States v. General Motors Corp., 384 U.S. 127, 148 (1966) ([p]rotection of price competition from conspiratorial restraint is an object of special solicitude under the antitrust laws”).

• Representing the association before government entities;
• Compiling and disseminating information with low competitive sensitivity \((i.e.,\) historical, aggregated, or otherwise non-sensitive information compiled by a third party).
• Joint research and development;
• Setting technological or quality standards, or standards for professional certification or qualification; and
• Industry marketing and advertising.

III. Activities of Professional Associations and Trade Organizations that May Violate the Norms of Free and Fair Competition

Paragraph 40 of the Draft explains that the decisions of a trade association are subject to Competition Law to the same extent as are those of any individual person or firm. Applying antitrust/competition laws to trade associations as they would be applied to other persons is consistent with the practice in most jurisdictions.\(^3\) The United States Supreme Court recently clarified, however, that mere participation in a trade association does not, by itself, provide sufficient evidence of a conspiracy in restraint of trade.\(^4\) Assuming that this view is consistent with enforcement practice in Colombia, the Sections recommend that the Draft be clarified to reflect that mere trade association membership does not lead to an inference of anticompetitive or conspiratorial intent or conduct.

A description of the types of conduct that might subject a trade association to antitrust/competition review is a critical component of any trade association or collaboration guidelines. Paragraph 42 of the Draft provides useful guidance in its description of "decisions" of an association that may constitute violations of the conditions of free competition.\(^5\) Antitrust law in the United States similarly defines an "agreement" for Sherman Act purposes, and Article 81 of the EC Treaty defines "decision." In the EU, for example, "decision" has a broad meaning and may include the constitution, rules or recommendations of an association.\(^6\) As described by the Office of Fair Trading, the day-to-day conduct of an association, rulings of its chief executive

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\(^5\) "Decisions" is defined as "all those manifestations of the same that involve a recommendation, order, suggestion and, generally, any kind of action that will represent the will of the association and is intended to direct the behavior of its associates or members."

\(^6\) See Nat'l Sulphuric Acid Ass'n, 1989 O.J. (L 190) 22, art. 85(1); see also Case 16/79, Openbaar Ministerie v. Danis, 1979 E.C.R. 3327, 3 C.M.L.R. 492, 500 (1980).
or management, or any other activities that are organized through trade associations can constitute a decision "if they have an appreciable effect on competition within the common market."\(^7\) Although Paragraph 42 of the Draft is framed broadly – and thus is similar to U.S. and EU law in this area – it may be helpful, particularly for business executives, if the Draft more clearly explains that even informal communications within a trade association (e.g., conversations held over a meal or at an event) can result in liability, even if no formal "agreement" or "decision" is made.

Paragraph 43 of the Draft provides a list of areas that will have "greater emphasis and weight" when evaluated by the competition authority. Identifying higher risk practices in the Draft is a helpful approach for business and professional associations and their advisors. However, the Sections respectfully recommend that the Draft be modified to distinguish more explicitly between activities that are of the type that always or almost always tend to restrict competition or decrease output and those activities the effects of which are not as clear and must be analyzed under a balancing standard. Additional examples in this area could provide helpful guidance, particularly examples drawn from the types of day-to-day activities in which trade or business associations engage.

Finally, the Sections recommend that the Draft highlight that even "unilateral" or single-firm behavior in the context of an association can, in certain circumstances, raise competitive concerns. For example, if a firm with pre-existing "monopoly power" is able to unfairly advantage its own products by bypassing competition on the merits – and thereby "maintain" that power through improper manipulation of trade association processes or standards – then such behavior may also expose the individual member to antitrust risk.

IV. Meetings and Information Exchange

One of the most useful and potentially procompetitive activities of an association is the collection and dissemination of industry information. The introductory paragraphs of this section of the Draft (¶¶ 47-50) identify some of the potential benefits and procompetitive effects of meetings and information exchanges undertaken by associations.

A. Meetings

The Sections commend the agency for recommending best practices for trade association meetings, including use of public agendas and the recording of minutes (¶¶ 60-61). Agendas and minutes are the most basic tools for counsel to monitor trade association meetings and assess antitrust risk. Unfortunately, these items may be merely useful, but not sufficient, to alert counsel to most antitrust risks, because unlawful conspiracies frequently occur where people make conscious decisions to act outside the law and then go to extraordinary lengths – including deceiving their own counsel – to accomplish their purpose.


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Generally, the diligence of a trade association's counsel to assure antitrust compliance will be influenced by the industry involved, the association's general purposes, and the nature of its day-to-day activities. Considerations unique to each association should be taken into account in determining the extent of the monitoring of trade association meetings, including the training and experience of the association staff, budgetary resources, and the sophistication of the member companies and their representatives at each meeting. We recommend that the Guidelines be revised to account for the varying degrees of risk posed by these variables, and to make clear that precautionary measures should be taken in proportion to the level of risk expected. In addition to agendas and minutes, as part of a "menu" of potential risk reduction strategies, the Draft might also recommend that experienced competition-law counsel attend all meetings and review all agendas and presentation materials in advance.

B. Information Exchanges

Paragraph 57 discusses the types of information that "endanger free competition within the market," including "commercial policies for pricing, lists of current and future prices, market shares, cost structure, production levels, discount policies, customers, and marketing strategies, among other topics." The inclusion of exchanges of otherwise confidential price-related information is appropriate because it is widely recognized that these exchanges can be used as tools for the effectuation and policing of price-fixing agreements. By contrast, exchanges of cost information – particularly if it is historical information – generally raise fewer antitrust issues. In fact, the collection and dissemination of aggregated production cost information may be part of a procompetitive "benchmarking" program that firms use to improve their efficiency and performance by emulating the best practices of other companies.

The Sections recommend that the agency consider providing more guidance that recognizes the varying degrees of risk posed by different kinds of information exchange, and suggest practical parameters within which the Superintendent will consider an information exchange to pose low antitrust risk. For example, data exchange or statistical reporting that includes current or future prices, or competitively sensitive data of individually identified competitors, raise greater antitrust concerns than information reporting cost or data other than price, and historical data rather than current or future data, is less likely to raise antitrust concerns. Dissemination of aggregated data managed by an independent third party (like a trade association) also raises fewer concerns.

The Sections further recommend that the Draft mention some of the specific circumstances in which an information exchange has been found to be evidence of the existence of an agreement, concerted practice or decision of an association, while acknowledging that detailed, straightforward guidance on this topic may not be possible under existing Colombian law. This topic has arisen repeatedly under U.S. antitrust law and been resolved by courts on a

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9 See generally Brian R. Henry, Benchmarking and Antitrust, 62 ANTITRUST L.J. 483, 489 (1994); see also 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 101-02 (7th ed. 2012).
No court has fashioned a bright-line rule covering every circumstance in which evidence of an information exchange is appropriately considered as a factor supporting an inference of conspiracy among firms in concentrated markets.

However, under U.S. law it is clear that an information exchange may only support such an inference where other conduct, such as parallel pricing behavior, is also alleged. As the Second Circuit held in *Todd v. Exxon Corp.*, “[i]nformation exchange is an example of a facilitating practice that can help support an inference of a price-fixing agreement;” an information exchange may serve as a “plus factor” that supports an inference of conspiracy where firms are engaged in “interdependent conduct” such as parallel pricing.\(^\text{11}\) In the absence of such interdependence, an information exchange is subject to the normal balancing analysis under the rule of reason.\(^\text{12}\) The Sections recommend that the Draft make clear that, standing alone, the exchange of information is not sufficient to support an inference of conspiracy.

Finally, the Sections recommend that the Draft be modified to provide a "safety zone" or "safe harbor" for information exchange behavior that, under normal circumstances, the Superintendent will not challenge. In the United States, practitioners and businesses derive considerable certainty from the "safety zone" set out for information exchanges in the joint FTC/DOJ Statements of Antitrust Enforcement Policy in Health Care (guidelines that are broadly applicable to other industries as well).\(^\text{13}\) The safety zone means that U.S. regulators will generally not challenge information exchanges: (1) that are gathered and managed by a third party (like a trade association); (2) involve data more than three months old; and (3) involve at least five participants, where no individual participant accounts for more than 25% on a weighted basis of the statistic reported, and the data are aggregated such that it would not be possible to identify the data of any particular party.

Additionally, the Draft does not address exchanges of public information. As a general rule, the exchange of public information should not affect the independent market behavior of firms since the data – being public in nature – are available otherwise. The Sections recommend that the Draft be modified to make this point clear.

\(^{10}\) *See, e.g.*, Maple Flooring Mfrs.’ Ass’n v. United States, 268 U.S. 563, 567 (1925) (upholding an open exchange of statistical information regarding past prices and other data that did not identify individual customers); Am. Column & Lumber Co. v. United States, 257 U.S. 377, 411-12 (1921) (holding that a trade association’s plan that included exchange of detailed data on sales, production, and inventories, including future levels of production and market demand, was evidence of an unlawful agreement to limit output and raise prices).

\(^{11}\) 275 F.3d 191, 198 (2d Cir. 2001); *see also* In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 906 F.2d 432, 445-50 (9th Cir. 1990) (holding that evidence of exchange of pricing information supported inference of conspiracy under § 1 of the Sherman Act (15 U.S.C. § 1)); In re Flash Memory Antitrust Litig., 643 F. Supp. 2d 1133, 1143-44 (N.D. Cal. 2009) (holding that allegations that “[d]efendants routinely exchanged highly sensitive competitive information, including pricing and production data,” were sufficient to support inference of conspiracy under § 1); *see also* ABA SECTION OF ANTITRUST LAW, PROOF OF CONSPIRACY UNDER FEDERAL ANTITRUST LAWS 83-87 (2010) (collecting cases).


V. **Decisions or Agreements on Pricing or other Conditions for Commercialization**

The Draft captures the primary concerns inherent in trade associations: the explicit or implicit joint setting of prices and non-price terms of service, product offerings, or commercial allocations. The Sections recommend that the Draft discuss another form of cooperation: formal or informal agreements regarding inputs—primarily those regarding input costs, but potentially decisions on purchasing levels. Joint purchasing collaborations are widely recognized to bring potential economies of scale, and information on costs is often shared for benchmarking and other purchases. However, "naked" agreements on input prices and agreements not to compete for production inputs, particularly labor, have been determined to be illegal in the United States.¹⁴

VI. **Discrimination**

The Draft rightly points out that associations may be misused to harm overall competition in an industry by raising barriers to entry or serving as vehicles to deprive competitors of access to markets or resources. Paragraphs 72-82 describe this risk in three contexts: the denial of trade association membership to certain competitors; the denial of critical inputs to non-member competitors should a trade association purchase a high percentage of available supply for its members; and the setting of standards, certifications, and endorsements in a way that prevents new entry, retards innovation, or denies non-member competitors access.

The Sections suggest, however, that the Draft place less emphasis on exclusion as a competitive evil *per se*, and more emphasis on determining whether the exclusion harms competition. Not all exclusion is anticompetitive.

Membership criteria and rules of conduct for a trade association ensure the integrity of the association and its activities, just as quality standards for products, certification processes and marks, and standards for industry products and processes require the exclusion of non-conforming products or processes—all to ensure the integrity of the standard, certification, or mark, and permit industry participants and consumers to place their faith in them.

The Sections recommend that the Draft include some focus on market power as the threshold requirement for a finding of anticompetitive exclusion. If a trade or business association's certification is one of many ways that a product can gain marketplace acceptance, it is unlikely that deprivation of the certification or endorsement would result in a significant competitive effect.¹⁵ However, if failure to comply with a particular standard is likely to result in a firm's exclusion from a market, it is more likely that the practice could have an anticompetitive effect.¹⁶ Shifting the emphasis from mere exclusion, in and of itself, to the

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¹⁴ *See, e.g.*, Todd v. Exxon Corp., 275 F.3d 191, 211 (2d Cir. 2001) (exchange of salary information can violate Section 1 of the Sherman Act); *see also* United States v. Adobe Sys., Inc., No. 1:10-cv-01629 (D.D.C. filed Mar. 18, 2011) (Final Judgment) (consent order prohibiting Adobe, Apple, Intel, Intuit, and Pixar from agreeing not to poach each others' employees).

¹⁵ *See, e.g.*, Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 487 (1st Cir. 1988).
competitive effects of exclusionary conduct will reduce the risk that procompetitive conduct with some exclusionary effects will be discouraged.

As to denial of critical inputs, the Sections believe that Paragraph 78 would benefit from some clarification. In particular, it is unclear what is meant by “if the goods or services purchased are the property of those market participants who hold a dominant position or a high market power.” (Par. 78) If it means that exclusion from a joint-buying arrangement is problematic only where the association has taken control of a very large share of available supply, the Sections agree: as a factual matter, a non-member’s mere inability to purchase through the association’s purchasing cooperative does not mean that it is unable to purchase the inputs in other ways. The Sections also note that the rarity of antitrust cases that actually have found such an inability suggests that this situation rarely arises.

If, on the other hand, that clause refers to a situation in which the association has itself created or developed a necessary input (e.g., intellectual property or a physical facility critical to participating in the market), the Sections note that the legal and economic analysis becomes much more complicated; the reviewing agency should consider, among other things, how forced sharing might have the potential to adversely impact firms’ incentives to invest in IP or facilities.

VII. Standard of Illegality vs. Evidence of a Violation

The Sections agree generally with the principle that any individual should be held responsible for his or her violation of competition laws, regardless of position. The Sections suggest, however, that the Draft be revised to distinguish between actions that are in fact violations of Colombian competition law (for example, as in the United States, agreements to fix prices or divide markets), and those actions that are not violations in and of themselves, but may be evidence that a violation may have occurred (for example, "advising" or "suggesting" anticompetitive conduct). Although the distinctions may be fine, they could be important.

Consider a trade association member who suggests in a meeting that the members divide territories amongst themselves. The suggestion is universally condemned as improper by other members on the record, the member apologizes, and the meeting continues on appropriate topics. In the United States, the member's conduct, though foolish, would not subject him or her to sanction for violating the antitrust laws, as long as no agreement was reached with another economic actor. Assuming the same analysis applies in Colombia, then the Sections suggest


See, e.g., Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 296 (1985) (refusing to condemn the expulsion of a company from a purchasing cooperative as illegal per se because they "must establish and enforce reasonable rules in order to function effectively . . . [u]nless the cooperative possesses market power or exclusive access to an element essential to effective competition, the conclusion that expulsion is virtually always likely to have an anticompetitive effect is not warranted").

clarifying the Draft to distinguish conduct that is illegal from that which is ill-advised or fraught with risk.

CONCLUSION

The Sections commend the Superintendent for taking the initiative to provide updated guidance in this important area. The Sections very much appreciate the opportunity to comment on the Draft and would be pleased to respond to any questions the agency may have, or to provide any additional information that may be of assistance.