January 7, 2005

Deborah A. Garza, Chair
Jonathan R. Yarowsky, Vice Chair
Antitrust Modernization Commission
1120 G Street, NW
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Re: *Webb-Pomerene and Export Trading Company Antitrust Exemptions*

Dear Ms. Garza and Mr. Yarowsky:

We understand that among the topics being considered by the Antitrust Modernization Commission ("AMC") for possible review and study may be the possible repeal of the Webb-Pomerene and Export Trading Company exemptions.[1] On behalf of the Webb-Pomerene Associations ("Webbs") and Export Trading Companies ("ETC's") listed below, we respectfully suggest that there is no need to conduct any such review or to recommend any change in these exemptions. These exemptions have been recognized and repeatedly reaffirmed instruments of U.S. trade policy for over 80 years and continue to serve as essential vehicles to promote the competitive and successful sale of U.S. products overseas.

While the Immunities and Exemptions Working Group has included the two export antitrust exemptions among over 20 exemptions listed for possible study, it has acknowledged that limited resources may well require the AMC to devote more attention to a representative subset and has offered no compelling reasons for any priority to be assigned to the Webb and ETC export exemptions.[2] For the reasons set forth below, we respectfully submit there is no reason for such a study – particularly given the much greater significance of the many other issues this Working Group and the other Working Groups have identified for review.

Although the International Working Group has also suggested study of these exemptions, critically it concedes that these exemptions, which by their very terms only exempt conduct which is *not* in restraint of U.S. domestic trade or the trade of any U.S. competitor[3], "may have limited direct effect on U.S. consumers." [4] Instead, the only reason suggested in support of such a study is "antitrust diplomacy" and the possibility that these exemptions might be used by other countries to justify restraints on competition overseas.[5] However, the laws the AMC is charged

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[1] These exemptions are found at 15 U.S.C. §§ 61-66 and §§4011-4021, respectively.

[2] Memorandum of Immunities and Exemptions Working Group dated December 21, 2004 at pp. 3-5.

[3] 15 U.S.C. § 62; 15 U.S.C. §4013.

[4] Memorandum of International Working Group dated December 21, 2004 ("Int'l Working Group Memo") at p. 5.

[5] *Id.*

with studying are *U.S.* laws adopted for the protection of *U.S.* consumers and *U.S.* competition. The AMC is not charged with studying or modernizing competition law overseas, and elsewhere the International Working Group wisely recognizes that creation of an international competition regime would impinge on questions of national sovereignty and would be "too amorphous" to address meaningfully within the AMC's time frame.[6]

Accordingly, for these reasons and the reasons set forth below, including the positive effect these exemptions have had on U.S. export trade without any demonstrated effect on U.S. consumer interests, we respectfully request that Webb and Export Trading Companies Act exemptions *not* be included among the final list of topics for review.

REASONS WHY THE STUDY OF WEBBS AND ETC's IS UNNECESSARY

Antitrust Export Trade Exemptions Enjoy Significant and Important Use

While some unfamiliar with their operation might question the continued relevance of the Webb-Pomerene and Export Company Acts, suggesting they are rarely used, in point of fact, there are approximately 100 organizations operating under these exemptions to promote U.S. trade. ETC certificate holders alone number over 5,000 U.S. businesses, with the majority of them being small and medium-sized enterprises – the backbone of the U.S. economy.

As reported by the Federal Trade Commission ("FTC") and Department of Commerce, Webbs and ETC's cover industries as diverse as agricultural products (rice, almonds, apples, pears, blueberries, fruit, citrus, nuts, pistachios, kiwifruit, corn sweetener, cotton, ginseng, refined sugar), basic food (poultry and seafood), industrial chemicals (chlor-alkali, soda ash, phosphates), plastics and specialty chemicals, forest products (pulp and paper, wood chips, timber), motion pictures, metals and ores (bronze ingots, ferrous scrap, forging) and services (shipping, tooling and machining, machinery, and general exporting services).[7]

According to recent figures from the Department of Commerce, ETC certificate holders and their members exported approximately $15 billion in 2003 and we conservatively estimate that Webbs handled at least another $3-4 billion more. In addition to this significant overall positive contribution to U.S. balance of trade, Webbs and ETC's benefit economies and citizens of virtually every U.S. state, including notably Wyoming, California, Washington, Oregon, the Carolinas, Florida and Georgia. It is estimated that exports of Webbs and ETC's directly result in tens of thousands of U.S. jobs, and likely hundreds of thousands directly and indirectly.

U.S. antitrust export exemptions are critically important for many of U.S. industries to compete in the global marketplace. From a business standpoint, they serve to strengthen the position of

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[6] *Id.* at p. 9.

[7] For a list of ETC's see http://www.ita.doc.gov/td/oetca/list.html. For a list of Webb associations see http://www.ftc.gov/os/statutes/webbpomerene/index.htm.

U.S. exporters in international trade, providing significant benefits to exporters and their overseas customers. As stated by the previous U.S. Trade Representative in a letter to Senator Craig Thomas of Wyoming during her tenure:

> "...the Webb-Pomerene and Export Trading Company Acts provide important assurances under U.S. law for the commercial interests of some of our leading exporters."[8]

Webbs and ETC's make dramatic contributions in many specific and concrete ways:

- **Reduction of Transportation and Logistics Premiums:** Webbs and ETC's help reduce variable costs of transportation, warehousing and handling by enabling U.S. exporters to negotiate better rates for larger volumes of trade and then to coordinate shipments to efficiently utilize transportation networks. Several associations aggregate movements in unit trains or chartered ships, or enter into long-term volume-based contracts with low rates possible because of the volume base load they provide. Without export joint ventures, these firms would be unable to take advantage of volume discounts and would not be able to maintain their competitive position with foreign suppliers.

- **Consolidation of Market Research and Administrative Costs:** Webbs and ETC's assist U.S. exporters in reducing fixed costs of market research and setting up and maintaining networks and facilities for shipping, customs clearance, storage, marketing and distribution, and liaison with government officials where necessary. These are likely to be specific to each destination, and individual producers often find that their volumes are too small to justify incurring such costs. At a minimum they avoid unnecessary duplication by centralizing these functions in a common agency.

- **Mitigation of Risks:** Webbs and ETC's are a means to pool risks. Access to the production facilities of many producers yields a more reliable source of supply, resulting in the association being better placed to meet orders. Common marketing gives each producer a share in a diversified portfolio of buyers, spreading the risks of non-payment by buyers, demand slumps, or disruption in deliveries caused by political or natural events in particular markets.

- **Leveling the Playing Field:** In many instances Webbs and ETC's are used to serve developing country markets where governments effectively control trading and distribution rights, frequently discriminating against imported products in favor of subsidized domestic production. They often must deal with state trading companies and state-sanctioned buyer cartels that either directly or indirectly restrict, limit or otherwise control imports. Foreign tariff and non-tariff barriers to trade are a significant hurdle to U.S. exporters. By creating an effective distribution network, credit apparatus and reliable marketing presence, Webbs and

[8] Ambassador Charlene Barshefsky, Letter to Senator Craig Thomas, June 4, 1998.

ETC's are often able to overcome these barriers. By combining their sales and marketing efforts through these export associations, U.S. exporters become more competitive and are able to participate in some markets that individual companies might forego because of the risks and costs involved.

All of the foregoing considerations benefit producers who reduce their costs and the U.S. economy which realizes increased exports and jobs. They also benefit overseas consumers and economies, allowing U.S. exporters to be more efficient and more effective competitors, able to meet the challenges of overseas competitors overseas who do not face the significant transportation costs and other market barriers. Webbs and ETC's also allow U.S. exporters to sell at competitive prices with greater assurance and certainty that they will not encounter claims of dumping or other unfair measures. Equally important, the organizations made possible by these exemptions allow U.S. exporters to demonstrate a commitment and reliability of supply to far-flung markets, serving to benefit overseas consumers in riskier areas.

Antitrust Export Trade Exemptions Have Important Legal Significance

From a legal standpoint, antitrust export exemptions provide important protections. Without these exemptions, U.S. exporters would be subject to greater risk of unjustified civil litigation, which could become very costly and would discourage continued participation in Webbs and ETC's. Congress both implicitly and explicitly recognized these benefits in 1982 at the time it simultaneously adopted the Foreign Trade Antitrust Improvements Act ("FTAIA")[9] and the Export Trading Companies Act as clear expressions of national policy, while at the same time retaining Webb-Pomerene protections intact because of the number of successful associations which had operated under that Act for years.

As illustrated by last term's Supreme Court decision in *F. Hoffman-La Roche Ltd., et al. v. Empagran*[10], and continued litigation both on remand of that case and elsewhere in other proceedings, the scope of the FTAIA remains uncertain and is likely to remain so for years. It is under continuing development before the courts, in the meantime exposing businesses to significant and substantial exposure and litigation costs. It will never afford either the certainty or the reassurance of an exemption.[11]

By contrast, the Webb-Pomerene Act and the Export Trading Company Act provide clear and explicit protection for all the activities in the course of export necessary to accomplish legitimate export trade objectives. Interpretation and scope of the exemption is supported by over sixty

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[9] 15 U.S.C. § 6a.

[10] No. 03-724; 124 S.Ct. 2359 (2004)

[11] The International Working Group has itself recognized these uncertainties in recommending that the FTAIA be a topic for consideration because "concerns about the meaning and interpretation of this statute appear to be sufficiently pressing matters that a proposal by the Commission for a legislative solution could be a useful contribution to clarity in this area." Int'l Working Group Memo at p. 4. However, with all due respect it must realistically be suggested that the prospects for securing legislation which would clarify and assuage the concerns of U.S. exporters, as opposed to still further confusing the matter, appear questionable.

years of case law. The seminal case of *United States v. Minnesota Mining & Mfg. Co.*[12] articulated and transcribed the basic policy. Numerous FTC administrative cases addressed specific issues and export associations "do's and don'ts."[13] And the most recent case of *International Raw Materials v. Stauffer Chemicals*[14] reaffirmed the policy and the appropriate use of the exemption by an association to obtain reduced stevedoring charges. In the case of ETC's, this case law is further buttressed by the availability of prior review and clearance by the Department of Justice and issuance of certificates, protecting those who operate within their terms from treble damage liability and deterring frivolous claims through a shorter limitations period and reallocation of attorney's fees for a successful defendant.

The success of the certainty afforded by the exemption is perhaps best illustrated by the fact that there have been very few antitrust cases challenging export trade association activity in the last thirty years. As the International Working Group itself acknowledges, "these exemptions may have limited effect on U.S. consumers."[15] No cases have been brought by the government, and the few cases brought by private parties have *not* been brought by consumers and have all been dismissed. Of equal significance is the compliance with U.S. antitrust law such associations and ETC's promote through their transparency. This good citizenship is illustrated by the fact that no Webbs or ETC's have been involved in any of the many hard core international cartel prosecutions of recent years.

Antitrust Export Exemptions Are Consistent with Global Competition Norms

Another demonstrably false assertion is that the Webb and ETC Acts are inconsistent with the development of global competition norms or in some way cause problems for "antitrust diplomacy." From a policy standpoint, the Webb and ETC antitrust export exemptions have simply reflected a consistent national policy that *U.S.* antitrust law should not interfere with any joint export activity that serves to promote export trade and which is not in restraint of trade within the United States. This policy is mirrored by the approach taken by many other jurisdictions overseas which speak in the same manner to export activities by their exporters and exemptions under *their* local laws or inapplicability of *their* local laws to such activities.

Specifically, several countries, including but not limited to Canada, Mexico, Australia, India, South Africa, Israel and Taiwan, have explicit exemptions for export trade similar to the U.S. exemption.[16] And the antitrust law of virtually every other jurisdiction – including (for example)

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[12] 92 F. Supp. 947 (D. Mass. 1950).

[13] *See, e.g., Florida Hard Rock Phosphate Export Ass'n.*, 40 FTC 843 (1945); Phosphate *Export Association*, 42 FTC 555 (1946); Sulphur *Export Corporation*, 43 FTC 820 (1947); *Carbon Black Export, Inc.*, 46 FTC 1245 (1949); *Phosphate Rock Export Association*, 92 FTC 1844 (1983).

[14] 767 F. Supp. 687 (E.D.Pa. 1991), *aff'd* 978 F.2d 1318 (3d Cir. 1992), *cert. denied* 113 S. Ct. 1588 (1993).

[15] Int'l Working Group Memo at p. 5.

[16] See Canada COMPETITION ACT §45; Mexico FEDERAL ANTITRUST LAW (1992) Art. 6; Australia TRADE PRACTICES ACT, 1974 §§6-7; India COMPETITION ACT, 2002 § 3(5); South Africa COMPETITION ACT No. 89 §10, Israel RESTRICTIVE TRADE PRACTICES ACT 1998 No. 5748 § 10(7); and Taiwan FAIR TRADE LAW 2000 Art. 14(4).

the European Community by virtue of Article 85(1) of the Treaty of Rome – explicitly address and restrict only activities restricting competition *within* their respective borders, thereby also implicitly approving of joint export associations.

Considerations such as these led the OECD in its 1998 recommendation against hard core cartels to draw a careful distinction between naked restraints among competitors, which it condemned, and arrangements "reasonably related to the lawful realization of cost reducing or output enhancing efficiencies" or "excluded directly or indirectly from the coverage of a member country's own laws," or "authorized in accordance with such laws." The latter legitimate and openly transparent arrangements were specifically *excluded* from such condemnation and have remained so.[17]

The United States has consistently opposed any outside attempts to cut back on U.S. export association protections – attempts which would undermine the fundamental U.S. policy in support of these exemptions as reaffirmed by Congress in 1982 and thereafter in many letters Members of Congress have sent to various administrations. Thus, for example, in connection with the North American Free Trade Agreement ("NAFTA") negotiations Congress specifically rejected a request by Mexico to repeal the exemptions. The 1993 NAFTA statement of administrative action specifically notes:

> *"No changes in U.S. antitrust laws, including the Export Trading Company Act of 1982 or the Webb-Pomerene Act, will be required to implement U.S. obligations under the NAFTA. These laws have contributed to the export competitiveness of U.S. industries and they remain appropriate in the context of a free trade area. Nothing in the Agreement requires any NAFTA government to take measures that would adversely affect such associations."*[18]

In 2002, the United States argued in WTO sessions that antitrust export exemptions should not be condemned outright along with hardcore cartels because "such arrangements clearly had pro-competitive effects."[19] And again in 2003, the U.S. argued that such arrangements often injected new players into overseas markets, increased competition, supported innovation and lower prices and were not secret and therefore did not bear the hallmarks of what was traditionally considered to be a hardcore cartel.[20]

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[17] "Recommendation of the Council Concerning Effective Action Against Hard Core Cartels," 25 March 1998, No. C(98)35/Final.

[18] North American Free Trade Agreement, Dec. 8, 1993, U.S.-Can.-Mex., 19 U.S.C.A. §3313, 103.

[19] WTO document WT/WGTCP/M/18 (Minutes of the WTO Working Group meeting of 1-2 July 2002), ¶ 44. The point was reiterated by the United States in an August 15, 2002 submission (WT/WGTCP/W/203, at ¶7 and ¶6 [making the point that in the US horizontal arrangements may yield pro-competitive efficiencies]).

[20] WTO document WT/WGTCP/M/21 (Report of Meeting of 20-21 February 2003), ¶ 37).

Significantly, the recognition that open and transparent export trading companies ought not to be condemned outright has in no way interfered with the growing number of transnational international hardcore investigations. And importantly, it should be noted that U.S. antitrust exemptions for export trade speak only to the applicability of U.S. law to such activity, leaving enforcement discretion to governments overseas who are entrusted with the protection of their own particular consumers. This is the position of both the Department of Justice and the Federal Trade Commission as well. At the end of the day the locus of enforcement power should be put in the hands of those jurisdictions that are most directly affected; it is neither necessary nor in the interests of the United States to be protecting the interests of consumers overseas when their own governments have or should have that power.

Against this background it can clearly be seen there is not only no reason or need to examine U.S. antitrust export exemptions for purposes of global competition policy[21], but such an inquiry would be contrary to a consistent U.S. policy spanning decades, as well as similar policies recognized in many foreign countries. Both the 1979 National Commission for the Review of Antitrust Laws and the 2000 International Competition Policy Advisory Committee implicitly recognized the continued need and importance, and support for U.S. export antitrust exemptions when they declined to make any recommendations on repeal of either Webb or ETC protections despite urgings from several quarters that they do so.

Export Trading Associations Will Be of Increasing Importance in the Years Ahead

From an international trade policy perspective, export trade associations are not only permissible, they are indispensable in countering the challenges U.S. exporters will face in the years ahead. Above we have outlined the practical effect of the Webb and ETC exemptions for U.S. farmers, fishermen, manufacturers, service providers and their workers. As noted, these provisions allow U.S. products and services to be more competitive in the global marketplace. Export associations are now more vital than ever given increasing U.S. trade deficits.

The U.S. monthly deficit in the trade of goods has exceeded $50 billion for all but two months of 2004. In June, the monthly goods deficit reached a peak of $59.1 billion. Through September, the trade in goods deficit has amounted to $481.6 billion, well on its way to surpassing the all-time annual high of $547.5 billion in 2003.

On a sectoral level, U.S. agriculture trade – which has traditionally served to reduce U.S. trade deficits – is now showing signs of going into deficit. USDA's Economic Research Service now projects that U.S. agriculture imports will equal exports in 2005, as USDA expects lower prices for U.S. commodities and increased foreign competition to eliminate the trade surplus in agriculture. As such, the value of U.S. agricultural exports is forecast to decline from $62.3 billion in FY 2004 to $56.0 billion in FY 2005.

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[21] Indeed, not only are concerns about the export exemptions' impacts upon "antitrust diplomacy" unfounded, but it would seem inconsistent even to raise such supposed concerns as a justification for a review given that the International Working Group has decided *against* recommending consideration of an international antitrust regime and given that the laws the AMC is charged with reviewing are laws adopted for the protection of *U.S.* consumers and encouragement of *U.S.* competition.

As noted in a recent report from the U.S. Trade Representative's Office (USTR)[22], U.S. farmers and agricultural firms rely heavily on export markets to sustain prices and revenues. These markets have accounted for up to 30 percent of U.S. farm income over the past 30 years and are projected to remain at this level in the near future. Agricultural exports also have significant linkages to the non-farm economy, particularly through their effects on employment and off-farm business activity.

Non-tariff barriers, however, are an increasing hindrance to U.S. agriculture exports. Since the EU imposed a moratorium on imports of agricultural biotech products in 1998, for example, U.S corn [maize] exports to the EU have declined by 55 percent. U.S. poultry exports to Russia have decreased by almost 45 percent since import restrictions on U.S. poultry have gone into effect. Russia is the top U.S. export market for poultry, and the import restrictions helped contribute to a $500 million decline in U.S. poultry exports in 2002. Other examples of non-tariff barriers include unfair treatment of U.S. agricultural exports under Chinese tariff-rate quotas ("TRQ's"), Mexican anti-dumping duties, and Japanese import restrictions on apples, rice, wheat, lettuce, and citrus, to name a few.

U.S. producers of rice, pistachio, apple, ginseng, tobacco, pear, blueberry, cherry, almond, fruit, sugar, corn, cotton, seafood products and pork all benefit from the antitrust exemptions provided in the Webb Pomerene and Export Trading Company Acts. In fact, of the 79 current holders of ETC certificates, over one-third (30) are dedicated to the promotion of U.S. exports of agricultural commodities and processed foods.

USTR has recommended using Export Trade Certificates to form joint ventures for proposed TRQ arrangements with Russia involving beef, chicken and pork, and with Central American countries concerning pork. Any TRQ that will be administered by a specified U.S. industry needs to operate with an Export Trade Certificate.

To eliminate these associations would only put U.S. agriculture and industrial exporters in a more difficult situation, exacerbating trade deficits.

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The AMC has already recognized that in order effectively to discharge its review responsibilities, and in view of its limited time and resources, its selection of review topics should be prioritized and informed by a realistic assessment of where it may be most productive.

A number of complex, broad-based issues crying out for attention have been identified by the AMC's various Working Groups, including: merger review enforcement, agency responsibilities and standards, analysis of merger efficiencies, sentencing guidelines, agency restructuring, the

[22] 2003 National Trade Estimate Report on Foreign Trade Barriers, see http://www.ustr.gov/Document_Library/Reports_Publications/2003/2003_NTE_Report/Section_Index.html

Robinson-Patman Act, the indirect purchaser doctrine, state enforcement and remedies (including treble damages, joint and several liability and contribution, prejudgment interest, attorneys fees and standing to pursue injunctive relief), technological innovation, how intellectual property law affects competition, whether different definitions and standards should apply in "new economy" industries, appropriate standards to apply to unilateral exclusionary conduct, treatment of "buyer power," and various questions in the interface between antitrust and regulated industries.

In the international arena examination of the FTAIA and a wholesale re-evaluation of anti-dumping law have been identified. At the same time it has been conceded that export exemptions may have limited direct effect on U.S. consumers while nearly twenty other domestic antitrust exemptions which directly and substantially affect U.S. markets and U.S. consumers have been identified for review.

For all of the foregoing reasons, we urge the AMC to select other topics for its review, and to leave the Webb-Pomerene and Export Trading Company exemptions intact.

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