

December 1, 2005

**TESTIMONY OF JOHN J. SULLIVAN  
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BEFORE THE ANTITRUST MODERNIZATION COMMISSION**

**EXECUTIVE SUMMARY**

Chairwoman Garza, Vice Chairman Yarowsky, and distinguished Commissioners, thank you for inviting me to testify before the Antitrust Modernization Commission. My testimony is limited to the Export Trade Certificate of Review Program administered by the Department of Commerce under the authority of Title III of the Export Trading Company Act. The Department strongly supports this program, which creates export opportunities for small and medium-sized companies that otherwise would not be able to export, or not be able to export on a sustained basis. As the numerous public comments received by the Commission on this program demonstrate, it is invaluable in promoting U.S. exports.

Through Export Trade Certificates, the Departments of Commerce and Justice provide U.S. firms with pre-clearance to coordinate and conduct export activities on the terms and conditions specified in Certificates issued by the Department of Commerce. Vetting of the Certificate applications by the Departments ensures, as required by Title III, that the proposed export activities will not have anti-competitive effects in the United States. No proposed export activities are approved that would violate federal or state antitrust laws. Thus, only after a thorough review of a Certificate application and a determination that the proposed export activities would not violate the standards specified in Title III, will the Secretary of Commerce, with the concurrence of the Attorney General, issue an Export Trade Certificate. Even after the Certificate is issued, the holder remains under the oversight of the Departments of Commerce and Justice and is required to file annual reports on the export activities engaged in under the Certificate.

The benefits of this program are well established. Export Trade Certificates promote and encourage joint export activities, particularly by small and medium-sized companies, by providing the holders with a high level of assurance that, while they remain within the specified boundaries of their Certificates, they will not violate U.S. antitrust laws. This allows exporters to establish "joint ventures" that can, for example, negotiate lower overseas shipping rates and help U.S. exporters increase their competitiveness in foreign markets. By forming export joint ventures, spreading risks, and sharing costs, firms can reduce their individual costs and allay their fears of exporting. Approximately 5,000 companies now enjoy the pre-clearance provided by an Export Trade Certificate of Review while exporting over \$10 billion per year.

Almost every country that has antitrust laws exempts export activities that do not adversely affect its domestic market. Under Title III, the United States provides the same benefit to its exporters through a highly transparent process incorporating public notice, opportunities for public comment, antitrust enforcement agency review, and ongoing U.S. Government oversight, including modification or revocation of Certificates of Review.

The positive effect of this transparency is evidenced by the fact that there has never been a successful antitrust challenge to export conduct covered by a Certificate of Review – either in the United States or, to the best of our knowledge, anywhere else in the world. This is a tribute to the careful manner in which Title III has been administered by the Departments of Commerce and Justice, and to the pro-competitive uses of Title III by U.S. exporters. Indeed, Export Trade Certificates of Review encourage small and medium-sized U.S. companies to compete in foreign markets, thereby benefitting consumers abroad.

Moreover, the pre-clearance program established by Title III in 1982 has not hindered the United States' ability to work with other countries in their development of modern antitrust laws. With the support of the United States Government, the number of countries with antitrust laws has grown from 25 to over 100 in the past fifteen years. Illustrative of the U.S. Government's continued role in supporting such development, the Department of Commerce, in conjunction with other U.S. agencies and the private sector, recently sponsored a week-long exchange with members of the Chinese Government to assist in the development of China's first-ever antitrust law.

Export Trade Certificates also eliminate foreign trade barriers. U.S. agricultural exporters use Certificates of Review to administer tariff rate quotas implementing agricultural market access provisions of international trade agreements. The increased market access benefits U.S. exporters and their employees, as well as foreign consumers.

The Commission asked the Department of Commerce to comment on the proposed framework prepared by Darren Bush, Gregory Leonard, and Stephen Ross. In our view, the framework is not applicable to Title III because there is no potential for injury to U.S. markets or consumers. The Departments of Commerce and Justice do not approve any conduct that would injure U.S. consumers or competition in U.S. markets. Similarly, the framework's proposed sunset provision and review of immunities should not apply to Title III. Subjecting Title III to a sunset provision requiring periodic review and re-enactment would be detrimental to U.S. exporters. U.S. exporters need to compete in foreign markets for long-term sales and business relationships. Long-term certainty is attainable only with a long-term commitment to this law.

### OVERVIEW OF TITLE III

Title III of the Export Trading Company Act provides assurance to those certified persons or entities engaged in specified export trading activities – whether joint or unilateral, horizontal or vertical – that they are not violating either federal or state antitrust laws. An Export Trade Certificate allows exporters to coordinate the export-related efforts of the Certificate holder and members of the covered group (members) to become more competitive.<sup>1</sup> The Certificate, issued by the Department of Commerce with the concurrence of the Department of Justice, provides antitrust pre-clearance so long as the holders and members comply with the enumerated terms and conditions of the Certificate. The Departments of Commerce and Justice will issue a Certificate only after they have concluded that the proposed export activities do not violate federal or state antitrust laws. A Certificate provides additional benefits in the case of private litigation through the reduction of treble damage awards to actual damages and the ability to recover the costs of successfully defending against a private antitrust claim.

With Export Trade Certificates alleviating U.S. antitrust concerns, exporters can seize more opportunities in foreign markets. In many cases, the Certificate provides the first step for U.S. firms, particularly small and medium-sized enterprises, to enter export markets. The Department of Commerce believes that Title III is an extremely useful tool for encouraging greater numbers of small and medium-sized companies to join the ranks of America's exporters, generating jobs at home and competition abroad.

It is important to emphasize that Title III is limited to certification of those activities that are strictly export-oriented. Certification is available only for those goods, wares, merchandise, or services that are exported, along with the services and methods for doing so.<sup>2</sup> This limitation to export-related activities ensures that the certified conduct does not adversely impact domestic markets. Furthermore, the standards for certification in Title III provide additional assurance that the certified persons or entities,<sup>3</sup> through their export

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<sup>1</sup> Certificates provide coverage to all persons or entities specified as either the Certificate holder or members of the covered group. Because a Certificate can have only one applicant, any additional persons or entities desiring coverage by a specific Certificate can receive protection as a member of the covered group. *See generally* Guidelines for the Issuance of Export Trade Certificates of Review, 50 Fed. Reg. 1786-1801 (Jan. 11, 1985).

<sup>2</sup> *See* 15 U.S.C. § 4002(a)(1) (2000); 15 C.F.R. § 325.2(j) (2005).

<sup>3</sup> Title III provides:

activities, do not affect domestic competition (*e.g.*, by foreclosing export market opportunities or reselling the goods or services designated for export in the United States).

Title III is not an “exception” to federal or state antitrust laws. Title III instead is designed to provide a high degree of assurance that specified export-related activities do not violate such laws. By “pre-clearing” specified export activities, Title III provides explicit affirmation from the Department of Commerce and the Department of Justice that the enumerated export activities do not violate U.S. antitrust law. U.S. antitrust laws focus on conduct that has an anticompetitive effect on the domestic market.<sup>4</sup> As the activities subject to certification relate only to export markets, they are by definition beyond the purview of federal and state antitrust laws, and thus Title III does not actually serve as an “exemption” or an “immunity” from the antitrust laws.

In implementing Title III, the Department of Commerce takes the protection of domestic competition and U.S. consumers very seriously. The Department engages in a thorough vetting of each application, ensuring that the specified conduct complies with U.S. antitrust laws, and the Departments of Commerce and Justice have a direct role in determining what conduct qualifies for certification, specifying the terms and conditions under which the covered persons and entities may engage in that conduct, and ensuring that all of the enumerated export activities are legal and therefore not injurious to U.S. consumers or industry.

The Departments of Commerce and Justice provide further assurance that the covered persons or entities are not engaging in illegal conduct by monitoring the export activities

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A certificate of review shall be issued to any applicant that establishes that its specified export trade, export trade activities, and methods of operation will -

- (1) Result in neither a substantial lessening of competition or restraint of trade within the United States nor a substantial restraint of the export trade of any competitor of the applicant
- (2) Not unreasonably enhance, stabilize, or depress prices within the United States of the goods, wares, merchandise, or services of the class exported by the applicant,
- (3) Not constitute unfair methods of competition against competitors engaged in the export of goods, wares, merchandise, or services of the class exported by the applicant, and
- (4) Not include any act that may reasonably be expected to result in the sale for consumption or resale within the United States of the goods, wares, merchandise, or services exported by the applicant.

15 U.S.C. § 4013(a) (2000).

<sup>4</sup> *See, e.g.*, Foreign Trade Antitrust Immunities Act, 15 U.S.C. § 6a (2000).

through Title III's annual reporting requirements. Moreover, Title III requires a Certificate holder to apply for an amendment to its Certificate should it desire to change the competitive structure of the Certificate by introducing additional members or adding new export trade activities.

The thoroughness of the pre-clearance process and monitoring is evidenced by the fact that, in the twenty-three years of the program's existence, not a single Certificate has approved conduct that was later challenged and found to violate either federal or state antitrust laws. In the only reported appellate decision, the Third Circuit in *Horizons International, Inc. v Baldrige*, 811 F.2d 154 (3d Cir. 1987), upheld the Certificate at issue. Furthermore, to the best of our knowledge, there has never been a successful antitrust challenge to conduct certified under Title III in any foreign jurisdiction.

The substantial benefits to U.S. exporters come at very little cost to the Department of Commerce. The program office currently consists of three part-time professionals and one full-time administrative employee. In addition, the General Counsel's Office provides legal assistance as needed to the program during the review process. The Department of Commerce offers its services for free, which is particularly advantageous for small and medium-sized companies unable to incur any significant cost for pre-clearance assurance.

### **TITLE III ESTABLISHES A MODEL PROGRAM**

Title III is a model of transparency. As a result, the pre-clearance program substantially reduces the possibility of violations of the federal and state antitrust laws. The transparent nature of Title III ensures that any person or entity that has a concern about the export activities for which certification is sought has an opportunity to provide comments during the review process. At the beginning of the process, the Department of Commerce publishes a Federal Register notice providing information on the export activities the applicant proposes for certification, as well as the export market and other relevant information. This allows any party that has access to the Federal Register to review the proposed Certificate and to provide comments. Domestic persons and entities; foreign persons and entities; and local, state, and foreign governments can and do provide comments, which the Departments of Commerce and Justice consider when reviewing the application.

The transparency of the program extends beyond the opportunity for interested persons or entities to comment during the review process. Upon a final determination, the Department of Commerce issues a second Federal Register notice providing details on the Certificate, including the certified export activities and the terms and conditions governing the Certificate holder and members. These notices remain accessible to the public in print

and via the internet: all Certificates of Review are available at the Department of Commerce's Freedom of Information Act Office, and the Department's Export Trading Company Affairs' website (<http://www.ita.doc.gov/oetca>) contains an updated list of Certificate holders.

In addition to the transparent nature of the review process, the Departments of Commerce and Justice maintain continual oversight of the certified persons or entities. The program established under Title III requires those holding a Certificate to submit annual information concerning their continuing export-related activities. Failure to file an annual report, or providing information that illustrates a significant change in circumstances, can result in modification or revocation of a Certificate. This monitoring ensures that the certified persons or entities remain within the bounds of the Certificate and continue to engage only in lawful export activities.

While exporters seeking to engage in joint export activities could receive informal advice on the legality of their proposed actions from the Department of Justice, the Federal Trade Commission, or private law firms, such advice would not provide the level of assurance of certification under Title III. Title III provides exporters with virtually complete certainty that their reported export activities do not violate federal or state antitrust laws. Because the Department of Commerce and the Department of Justice engage in a thorough economic and legal review of each application and continually monitor the activities of Certificate holders and members, the holders and members can be confident that their export activities are legal. Private law firm opinions, Department of Justice business review letters, and Federal Trade Commission advisory opinions do not provide this important benefit.

Moreover, the benefits of certification under Title III extend beyond assurances concerning criminal or civil actions by U.S. antitrust enforcement authorities. Export Certificates of Review also provide protection from private antitrust suits. Certified persons or entities that limit their export activities to those specified in the Certificate and abide by the listed terms and conditions receive the following additional benefits: a presumption of the legality of their actions; recovery of attorneys' fees on the successful defense of a suit challenging certified activity, including attorney's fees; the limitation of damages awarded to actual damages, as opposed to the treble damages typically awarded under U.S. antitrust laws; and a shorter statute of limitations. These advantages decrease the risk of nuisance suits and provide additional confidence to businesses seeking to engage in joint export-related operations.

### **TITLE III BENEFITS U.S. COMPANIES SEEKING EXPORT OPPORTUNITIES**

Title III provides a mechanism for businesses to combine to reach export markets that, standing alone, each lacks the resources to reach. Under Title III, exporters can effectively coordinate their efforts by sharing marketing expenses, distribution costs, and the costs associated with analyzing trade information. Our experience with certification under Title III is that these cost savings realized by individual firms are the chief business reason horizontal export arrangements are formed. Combining export efforts also allows exporters to share risks associated with exporting goods and services. Many areas of the world pose significant risks that individual exporters – particularly small and medium-sized enterprises – are not willing, or able, to assume on their own. For instance, there are many risks in exporting to emerging markets, including political risks, currency risks, credit risks, and regulatory risks. There are also risks that exporters face in both developing and developed markets, such as non-payment, demand slumps, disruption in deliveries, and natural disasters. Allocating these risks among several exporters makes the risks less costly to each individual exporter, allowing each exporter either to enter in a market previously unavailable or to offer goods and services at a more competitive price.

Having the protection of the Certificate can also allay the fear of exporting that small and medium-sized companies or new exporters frequently feel when first engaging in international sales. Selling goods or services internationally carries additional difficulties and nuances that are not found, or are not as prevalent, in selling domestically. Not only must exporters address the aforementioned costs and risks, but they must also address the complications of dealing with foreign customs authorities, securing foreign distributors, and engaging in foreign marketing and advertising. By having the additional security provided by a Certificate, U.S. exporters can jointly work through any complications that arise and can allocate their resources and expertise to address such complications with others that may or may not have engaged in exporting in the past.

Reducing export-related expenses, allaying fears, and increasing sales opportunities abroad benefit the exporters by opening new markets for their products and increasing their total revenue. Exports covered by a Certificate have exceeded \$10 billion a year since 2001. Many of those exports came from small and medium-sized businesses that would not have been able to export but for the ability to reduce their costs by sharing them with fellow exporters.

Exporters have also discovered that they can use a Certificate to address new challenges in the global marketplace. As international trade becomes more common, exporters are discovering they must find flexible solutions to address market barriers and

trade remedies. Gaining the ability to cooperate with fellow exporters under a Certificate can provide that flexibility.

One new function that exporters are discovering for Export Trade Certificates is the administration of tariff rate quotas (TRQs) that the U.S. Government has negotiated as part of market access provisions in international trade agreements.<sup>5</sup> Export intermediaries can benefit from the pre-clearance of certified conduct by establishing a non-discriminatory and transparent mechanism to oversee the bidding and allocation processes for exporting rights under TRQs. This provides an efficient method to allow U.S. exporters to take advantage of the reduced tariff rates in a particular product and geographic market. An example of a Certificate used to administer a TRQ is the Certificate granted to the Association for the Administration of Rice Quotas, Inc., which administers a TRQ with the European Union on rice. The Departments of Commerce and Justice are also reviewing an application concerning the administration of the TRQ established under the Central America-Dominican Republic Free Trade Agreement (CAFTA) to allocate U.S. exports of chicken leg quarters to certain CAFTA countries.

Exporters are also using Certificates to coordinate their efforts in dealing with trade remedy proceedings conducted by foreign governments. Covered persons and entities have utilized Certificate protections to provide them with confidence that they have the ability to formulate strategies for addressing such situations. An example of a Certificate being used in this manner is the Certificate issued to the Northwest Fruit Exporters.

All of these benefits of Title III come at minimal cost to the applicant. There is no fee associated with applying for, receiving, retaining, or amending a Certificate. This is an important consideration for cost-conscious small and medium-sized companies seeking assurance that their export-related activities comply with federal and state antitrust laws. The alternatives available to these companies frequently entail significant costs and do not provide the same level of assurance. Moreover, the Department of Commerce provides free counseling to prospective applicants, thereby further reducing the burden to small and medium-sized companies.

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<sup>5</sup>Under a TRQ, imports of a certain good (usually agricultural products) up to a predetermined level are subject to a low tariff rate. Once the level of imports has reached the quota, all additional imports of that good are subject to a much higher, often prohibitive, tariff rate.

**MOST COUNTRIES THAT HAVE ANTITRUST LAWS RECOGNIZE  
THE PRO-COMPETITIVE BENEFITS OF JOINT EXPORT ACTIVITIES**

The Certificates issued by the Secretary of Commerce, with the concurrence of the Attorney General, provide U.S. exporters with assurance that they are not engaging in export-related activities that violate the federal or state antitrust laws. The Certificates do not promote the formation of hardcore “cartels” seeking to exploit market power to the disadvantage of consumers. Certification merely provides a means to “increase United States exports of products and services by encouraging more efficient provision of export trade services to United States producers and suppliers . . . .”<sup>6</sup> This results in pro-competitive effects in foreign markets by encouraging new entrants and increased competition.

While not every country has antitrust laws, “[o]ver 100 countries now have antitrust laws of some sort, and antitrust is no longer limited to a handful of developed countries.”<sup>7</sup> This represents a significant improvement over the situation fifteen years ago, when only twenty-five countries had antitrust laws.<sup>8</sup> Many of the countries with antitrust laws exempt export activity either through an explicit exemption, or through an implicit exemption by limiting their regulation to activities that affect the domestic market. A recent study of the antitrust regimes of fifty-five countries, both developed and developing, found that nearly ninety-three percent (all but four countries) either implicitly or explicitly exclude export activities from domestic regulation.<sup>9</sup>

Exclusion of export activities is premised on the principle that governments should focus on those actions that impact their domestic markets and consumers, not foreign markets and consumers. It is not the place of the United States Government, nor any other government for that matter, to enforce its antitrust laws in another country’s domestic market. As a result, under Title III, the activities of U.S. exporters are not shielded from review by

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<sup>6</sup> 15 U.S.C. § 4001(b) (2000).

<sup>7</sup> R. Hewitt Pate, Competition and the End of Geography, Remarks at The Progress & Freedom Foundation (August 23, 2004), <http://www.usdoj.gov/atr/public/speeches/205153.htm>.

<sup>8</sup> Randolph W. Tritell, *International Antitrust Convergence: A Positive View*, ANTITRUST, Summer 2005, at 25.

<sup>9</sup> See Margaret C. Levenstein & Valerie Y. Suslow, *The Changing International Status of Export Cartel Exemptions*, 20 AM. U. INT’L L. REV. 785 (2005). Of the surveyed countries only Luxembourg, Russia, Thailand, and Uruguay did not provide explicit or implicit exemptions for joint export activities. *Id.* at 819-20.

foreign antitrust regulation. Each Certificate issued by the Department of Commerce warns that the certification addresses only U.S., not foreign, antitrust issues. During pre-application counseling and later during the review process, the Department of Commerce advises applicants to seek foreign antitrust counsel to analyze potential foreign legal issues.

**THE PROPOSED FRAMEWORK, INCLUDING THE SUNSET PROVISION,  
IS INAPPLICABLE TO TITLE III**

The Commission asked the Department of Commerce to comment on the proposed framework prepared by Darren Bush, Gregory Leonard, and Stephen Ross. In our view, the framework is not applicable to Title III for the simple reason that there is no potential for injurious effects on U.S. consumers or markets. The framework notes, with respect to pro-consumer justifications, that the “key issue to analyze with respect to this justification is the relationship between immunized conduct and the final price paid by consumers.”

In particular, sunset provisions are predicated on the assumption that a granted immunity balances a tradeoff between consumer welfare and other public policy objectives. In the case of Certificates issued under Title III, there is a strong policy justification for promoting the export of goods and services from the United States, but there is no potential harm to consumer welfare. The Departments of Commerce and Justice do not approve activities that would injure U.S. markets or consumers or violate federal or state antitrust laws. Thus, the justification for instituting a sunset provision does not apply to Title III.

Furthermore, implementing a sunset provision subjecting Title III to periodic re-enactment by the Congress would erode the primary benefit that exporters receive under this program: the near certainty that the export activities do not violate the antitrust laws of the United States. Exporters would not have the same level of certainty if their “protection” had the possibility of being eliminated during a periodic re-enactment of the statute by Congress. This could lead to a decline in the competitiveness of joint exports, which often require a long-term presence in the foreign markets, long-term contracts, and the development of long-term business relationships. Global markets are not only becoming more lucrative for U.S. exporters, but also more competitive. Certified U.S. exporters must know that they can compete aggressively in these markets by developing long-term contracts and relationships.

**CONCLUSION**

Title III is a unique and beneficial program that strengthens the ability of U.S. companies to export to foreign markets. An Export Trade Certificate is an assurance that the export activities described in the Certificate do not violate U.S. antitrust laws. Title III’s

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notice, opportunity for public comment, antitrust enforcement agency review, and ongoing U.S. Government oversight, including modification and revocation, ensures a transparent process that provides U.S. exporters with the confidence they need to engage in joint export activities. With Title III in place, the United States remains an antitrust leader throughout the world, as many countries provide similar exemptions, although not necessarily through explicit, transparent programs. To foster increased competition and provide U.S. firms, particularly small and medium-sized companies, with the opportunity to develop new export markets and increase competition in foreign markets, Title III must remain a tool for U.S. exporters to incorporate in their long-term export strategies.