

Enclosure 3

Certificates and their Alternatives

Export Trade Certificates of Review provide important benefits not available from law firm opinion letters or from Department of Justice Business Review Letters or Federal Trade Commission Advisory Opinions.

Each of these provides some level of assurance that specified conduct does not violate U.S. antitrust laws and will not result in a government antitrust action against the exporters. Opinion letters provide the lowest level of assurance because there is likely to be no effective recourse for the exporters if the law firm's opinion is incorrect and the government commences an antitrust action against the exporters. Representing the views of the government itself, Business Review Letters and Advisory Opinions provide a relatively high level of assurance. However, they represent only the current view of the Department of Justice or Federal Trade Commission, respectively, and there is no guarantee that those views will not change in the future. Certificates also represent the views of the government itself but provide an even higher level of assurance because they are not hampered by the "current view" limitation of Business Review Letters and Advisory Opinions. Certificates effectively constitute pre-clearance of the specified conduct that is binding on the government.

Additionally, Certificates provide three unique benefits in the context of private antitrust litigation. First, a Certificate creates the rebuttable presumption that U.S. antitrust laws are not violated by a covered company's conduct so long as that conduct complies with the terms and conditions of the Certificate. Second, if the plaintiff overcomes this rebuttable presumption and is ultimately successful in the litigation, then the plaintiff will be able to recover only actual damages rather than the treble damages typically available in private antitrust litigation. Finally, if the covered company is ultimately successful in the litigation, then a Certificate allows recovery of costs (including attorneys' fees) from the plaintiff. None of these benefits is offered by law firm opinion letters or by Business Review Letters or Advisory Opinions.

While these benefits would be appealing to any exporter, they are particularly important to small and medium-sized enterprises (SMEs), which constitute the vast majority of companies covered by Certificates. Before forming an export joint venture and beginning to export or increasing the level of their exports, SMEs often need the reassurance offered by the certainty of the Certificate and by the unique benefits of the Certificate in the context of private antitrust litigation. Indeed, as noted in Enclosure 2, numerous SME Certificate holders have already written to this Commission to make that very point. Based on these letters, without the benefits of a Certificate, many SMEs would simply decide not to export or to reduce the level of their exports rather than face the risks inherent with any of the alternatives to a Certificate.