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Via FEDERAL EXPRESS

Ms. Deborah Garza, Chair
Mr. Jonathan R. Yarowsky, Vice Chair
Antitrust Modernization Commission
1120 G Street, NW, Suite 810
Washington, DC 20005

Immunities and Exemptions
Need for Export Antitrust Exemptions

Dear Commissioners Garza and Yarowsky:

This letter is submitted on behalf of American Natural Soda Ash Corp. ("ANSAC") in response to the May 19, 2005, *Federal Register* notice requesting comments on *General Immunities & Exemptions* selected for study by the Antitrust Modernization Commission ("AMC"). For the reasons set forth below, ANSAC strongly supports the export safe harbors provided in the *Webb-Pomerene Export Act* and the *Export Trading Company Act* and urges that the Commission not recommend any change, limitation or repeal of either of these export promotion laws.

A. About ANSAC and the U.S. Soda Ash Industry

ANSAC, based in Westport, Connecticut, is a fully-integrated risk- and cost-sharing export joint venture registered with the Federal Trade Commission under the 1918 Webb-Pomerene Act (15 U.S.C. §§ 61-66). ANSAC was organized in the early 1980's with the encouragement of the late Commerce Secretary Malcolm Baldridge for the purpose of promoting exports of U.S. soda ash and currently exports to over 50 countries throughout Asia, Latin America, Eastern Europe, the Middle East and Africa.

ANSAC's current members are: (1) FMC Wyoming Corporation, headquartered in Philadelphia, Pennsylvania; (2) General Chemical (Soda Ash) Partners, headquartered in East Hanover, New Jersey; (3) Solvay Soda Ash Joint Venture, headquartered in Houston, Texas, (4) American Soda LLP, also headquartered in Houston and (5) OCI Chemical Corporation, headquartered in Shelton, Connecticut. Last year ANSAC sold about 2.9 million metric tons of their soda ash in export and handled another 500,000 metric tons which they sold to overseas consuming affiliates.

Soda ash is a raw material derived from natural deposits which, after processing, takes the form of a fine white powder. It is used primarily in the production of glass and detergents, as well as a variety of smaller applications. It accounts for approximately 60% of the raw material cost for glass production, and about 30% of the raw material cost for producing detergents. There are many other producers located throughout the world, including China, India, South Africa, Brazil, Australia and Europe, many of which enjoy varying degrees of local governmental support and the advantage of closer proximity to their customers.

Because soda ash is a basic chemical commodity required to make other basic commodities, even the smallest price premiums can significantly raise production costs for these value-added downstream industries and influence critical sourcing decisions. In the world of global trade, even a relatively low tariff (e.g., 5%) can protect inefficient local production and pose significant barriers to U.S. exports. Moreover, owing to the fact that soda ash consumers buy in large quantities at far-flung distance from the United States, logistics costs, commitment to customers and reliability of supply are critical to U.S. product achieving export success.

ANSAC was formed to meet these challenges through creation of an integrated organization dedicated exclusively to exports. Its full time staff handles all aspects of export sales from plant to customer, taking title to product, assuming all transport and sales risks, negotiating volume reduced logistics contracts with railroads and vessel owners, and securing dedicated warehouses, ships and other facilities to store and handle their product. Since ANSAC's activation on a global basis in 1983, logistics costs have been dramatically reduced, reliability of supply has been significantly enhanced and U.S. soda ash exports have more than tripled. Principally as a result of ANSAC's efforts, U.S. soda ash exports are now valued at over $500 million, making soda ash this country's largest inorganic chemical export.

B. Benefits of the Webb-Pomerene Act Safe Harbor for Soda Ash

ANSAC's joint offshore marketing of U.S. soda ash is decisively efficiency–enhancing and pro-competitive. The efficiencies created by joint distribution permitted by the Webb-Pomerene Act have enabled the company to be a real success story. These efficiencies include:

- Market information, sales force and distribution infrastructure. ANSAC operates four regional offices and maintains an expert sales force marketing U.S.-produced soda ash in over 50 countries. ANSAC makes possible an export-dedicated physical infrastructure, from port facilities to a fleet of dedicated ships, and offers full service to customers including direct delivery into their manufacturing facilities.

- Risk sharing. Many areas of the world are simply too risky for individual producers to make the investments necessary to sell there. Demurrage, credit and currency risk, and overseas regulations present challenges and risk that must be shared in order to be sustainable. The infrastructure required to deliver, unload, store, market and physically distribute soda ash in a foreign market is very expensive and must be created up front. These huge costs are normally recovered only over the course of several years. The risks facing

such recovery can be political, financial, meteorological or – more commonly – all of the above.

- Uninterrupted supply. Reliability and uninterrupted supply are essential to maintaining long-term relationships with far-flung customers. Only ANSAC, which can call upon six plants and four port locations, can reliably deliver the major, sustained volumes required to serve overseas customer needs.

- A global seller to serve global buyers. Glass manufacturers who are the primary purchasers of soda ash produce in numerous markets around the world. Serving them requires an ability to meet and transact simultaneously on different continents, in different languages and in different currencies. It requires, in short, a supplier operating on a scale that is difficult for individual companies to attain.

- Attacking foreign government barriers. ANSAC allows the U.S. industry to challenge foreign trade barriers in a coordinated and effective manner. This has proven to be vital in such fast-growing countries as China, India and Brazil and in other countries like Japan, Korea and Taiwan.

- Economies of scale. Joint offshore distribution via ANSAC results in dramatic cost savings. Reduced cost of delivery has resulted in market growth and lower final costs to consumers around the world.

- Consumer satisfaction. The efficiencies of joint export trade have resulted in competitive prices, which ultimately mean less expensive consumer goods – food and beverage containers, cars, windows for housing and other important products. ANSAC competes against roughly 100 plants around the world, many of which are state-owned or managed. While certain inefficient overseas competitors have sometimes sought their host country's protection from U.S. soda ash imports, overseas glass, detergent and other consumers have consistently supported ANSAC and welcomed its export sales efforts.

C. The Soda Ash Industry's Continued Need for the Webb-Pomerene Safe Harbor

1. Legal Certainty is Critical for Continued Joint Export Trade

ANSAC is intimately familiar with the academic and theoretical arguments that the safe harbors supposedly have no beneficial significance insofar as U.S. antitrust liability is concerned. From first hand knowledge ANSAC can state that these arguments are contradicted by reality.

ANSAC has direct experience showing these arguments are simply untrue. The risks of proceeding with joint export arrangements under ambiguous legal protection and the threat of treble damages litigation are too great. In the real world, companies simply will not proceed to engage in cooperative export activity without the legal clarity and assurance provided by a statutory exemption.

The legislative history of both the Webb-Pomerene and Export Trading Company Act make it clear that a dominant and motivating force driving passage of the safe harbor laws was the need for clarity, predictability and protection from prosecution and private litigation. In the case of the Webb-Pomerene Act, the impetus behind the law's passage was an analysis by the newly created Federal Trade Commission which informed the Senate in 1916, *inter alia*, that "the Commission has established the fact that doubt as to the application of the antitrust laws to export trade generally prevent concerted action by American businessmen in export trade..."[1] The principal Congressional sponsors confirmed that the Act was intended to allow exporters to achieve greater efficiencies through joint marketing and offset some of the substantial costs associated with entering foreign markets.[2]

The more recent history of the 1982 Export Trading Company Act (15 U.S.C. §§ 4011-4021) makes the point even clearer. Testimony leading up to the introduction of the law and during its deliberation in Congress recognize that many of the efficiency producing activities carried out by joint export ventures would be curtailed or impossible without the protection of law; in other words, the threat of antitrust liability would significantly deter joint export trade. For example, Assistant Secretary of Commerce Frank Weil noted that without safe harbor protection, "many companies, fearing illegality, would cease engaging in long-term joint activities which are essential to developing profitable foreign markets."[3] Indeed, former Assistant Attorney General for Antitrust and AMC member John Shenefield recognized the need for this business certainty in the Congressional deliberation of the Export Trading Company Act, where he "acknowledged a perception of the antitrust laws as a hindrance to joint export activities."[4]

ANSAC speaks from first-hand knowledge when it comes to the benefits of having an exemption. In 1981 pursuant to its mission to reduce logistics costs, ANSAC negotiated a low-cost handling contract with a freight handler in Portland, Oregon, based on making a long-term volume commitment to the freight handler. With that commitment, the freight handler, the Port of Portland and the Union Pacific Railroad committed to the construction of a modern handling and storage facility making possible a quantum leap in efficient handling with millions of dollars in projected costs savings. A disgruntled, would-be competing provider of handling services then commenced a lawsuit alleging that these pro-competitive arrangements amounted to an unlawful "boycott" and "price fixing."

ANSAC got that lawsuit dismissed solely due to the protection afforded by the export trade exemptions, without which it would have been consigned to years of discovery and trial. *International Raw Materials v. Stauffer Chemical Co., et al.*, 767 F. Supp. 687 (E.D.Pa. 1991), *affirmed* 978 F.2d 1318 (3d Cir.

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[1] Federal Trade Commission, *Report on Cooperation in American Export Trade*, May 2, 1916, p. 8-10.
[2] 53 Congressional Record 13537 (1916) (remarks of Congressman Webb).
[3] Letter from Frank A. Weil to the National Commission for the Review of Antitrust Laws and Procedures (NCRALP), November 20, 1978.
[4] House Judiciary Committee, *Report on the Foreign Trade Antitrust Improvements Act of 1982*, August 2, 1982, No. 97-686.

1992), *cert. denied* 113 S Ct. 1588 (1993). It is the presence of a clear statutory exemption which allows such cost-savings activities, as well as other ordinary and normal features of a joint export enterprise, to continue with a firm assurance of immunity from attack – a firm assurance which is critical to the real-world decisions of businessmen to form joint export enterprises and achieve the trade promotion goals at the foundation of the Webb-Pomerene and Export Trading Companies Acts.

2. *Rising Industry Costs and Foreign Trade Barriers Speak to Need for Joint Export Trade*

The need for the efficiency-producing advantages offered by ANSAC through its Webb-Pomerene Association status is as critical today as it was two decades ago. Domestic soda ash consumption of about 7 million metric tons (MT) has been essentially flat for more than 20 years. The growth of exports is vital in order to support continued production and employment. But while exports grew 100% between 1992 and 1997, in the past several years they have encountered increased challenge from Chinese producers and continued tariff and non-tariff barriers, resulting in only 4% reduced growth since 1997.

Moreover, while the United States is blessed by major deposits of the mineral trona, located principally in Green River, Wyoming, the domestic industry has faced spiraling structural cost increases. These rising costs have significantly eroded industry competitiveness in three specific areas: (1) rising energy costs (natural gas, a major production cost, has increased by 150% over the past four years); (2) high rail and ocean freight costs (it costs more to ship soda ash to its final destination than it costs to make it, and the skyrocketing ocean freight market in particular has created ever higher hurdles); and (3) an increasingly burdensome share of taxes, fees and royalties (taxes now account for 14% of the cost of doing business). The average U.S. soda ash worker is also substantially better compensated than their global counterparts. For example, a soda ash worker in Green River, Wyoming earns about $65,000 a year which with benefits increases compensation costs to about $100,000 a year. In Turkey, the comparable cost including benefits and social costs is $20,000 a year.

Overseas, foreign governments maintain a multitude of tariff and non-tariff barriers to protect local suppliers which continue to proliferate. Such state intervention props up inefficient producers and raises costs for customers in the glass and detergent industries. For example, Chinese soda ash producers are protected by a 5.5% import tariff, subsidized bank lending with lax repayment requirements, and a significantly undervalued *Yuan*-dollar exchange rate. In India, producers are protected by a whopping net effective import tariff and tax rate of 36%. In Turkey, proposed government-assisted financing would help subsidize start-up costs for a solution-mining soda ash facility that equates to 10% of U.S. soda ash production and 25% of U.S. exports, and threatens up to 200 U.S. jobs, principally in Wyoming and California. And in Argentina, the introduction of a soda ash plant is expected to be followed by an increase in the country's tariff from zero to 17.5%.

Consequently, without the benefits offered by the Webb-Pomerene Act, and the cost efficiencies only a fully-integrated joint marketing and logistics organization can provide, the U.S. soda ash industry's ability to remain competitive in world markets would significantly erode.

D. The Use of Safe Harbor Laws Spreads Benefits Across the U.S. Economy

ANSAC is not alone in harnessing the benefits of the export trade exemptions to help grow the U.S. economy, for there are many other industrial, agricultural and service sectors that benefit from the Webb-Pomerene and ETC Acts. The GAO reported in 1986 that several years after the ETC Act was passed, 57 companies had been issued Certificates of Review.[5] According to the U.S. Department of Commerce, there are currently 93 Export Trade Certificate of Review holders, representing interests as diverse as U.S. fruit growers to machinery manufacturers.[6] The Webb-Pomerene Act also continues to provide important benefits to a number of sectors in addition to the soda ash industry. It is estimated that Webb associations handle $3 to $4 billion in export trade annually, certainly not a negligible amount.

The Bush Administration has made it clear that the legal protections afforded by the export exemptions are of critical importance to other U.S. exporters. In a March 10, 2005, letter to the AMC, Under Secretary of Commerce for International Trade Grant Aldonas wrote:

> "We believe it is imperative to retain the ETC Act, because, just as Congress intended, it is working to overcome hurdles to exporting that keep many U.S. firms from competing effectively in international markets. More than 5,200 firms representing a broad spectrum of United States industry and agriculture currently take advantage of the ETC Act, representing upwards of $15 billion in export activity in 2002 and 2003.
>
> "The ETC Act is thus an essential component of a broad United States effort to promote and enhance the competitiveness of U.S. firms in the global marketplace."

Addressing the benefits and importance of the safe harbor law, Under Secretary Aldonas underscored the importance of joint export initiatives, citing as examples the following:

> "ETC members frequently pool their resources to take advantage of large volume export sales orders that they otherwise would not be able to fill on their own. They also use their acquired ETC leverage to reduce export unit costs, for example, by consolidating their shipments and negotiating for volume discounts on export transportation rates, warehousing, and other export services. In addition, by working together as an export unit, ETC members often share the costs of exporting. Such coordination includes sharing the costs of developing new export business, and splitting the costs of export trade facilitation services."

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[5] U.S. General Accounting Office, *EXPORT PROMOTION: Implementation of the Export Trading Company Act of 1982,* February 1986, GAO/NSIAD-86-42, p. 15

[6] See http://www.ita.doc.gov/td/oetca/list.html, accessed June 10, 2005.

Similarly, in a May 19, 2005 letter to the AMC, Under Secretary for Farm and Foreign Agriculture Services J.B. Penn underscored the benefits of the Webb and ETC Acts by stating:

> "The ETC and Webb-Pomerene Acts serve the interests of thousands of U.S. agricultural exporters and together facilitate $7-8 billion in agricultural exports annually. Exports facilitated by these acts include rice, almonds, apples, pears, blueberries, citrus, pistachios, kiwifruit, corn sweeteners, cotton, poultry, seafood, and forest products.
>
> "Exporter associations who register under the ETC and Webb-Pomerene Acts use them to pool resources, identify strategies for specific foreign markets and benefit from economies of scale, without which they might not be able to effectively compete globally. Acting individually, small and medium-sized producers would find it difficult, if not impossible, to secure orders from foreign buyers or obtain bulk rate shipping costs for their exports. Some exporters are only able to access tariff-rate quotas with trading partners through the antitrust exemptions offered by the ETC and Webb-Pomerene Acts."

Any analysis of these laws should also take into account the potential users of export safe harbors. With an affirmation of the Webb and ETC Acts, the AMC would provide businesses that are not currently engaged in joint export trade the opportunity to achieve efficiencies and gain competitiveness in exporting in the future.

E. Responding to the AMC's Questions

In addition to inviting general comments, the AMC has identified a number of specific questions where comments are solicited. Several questions address the notion of "costs and benefits," including:

1.a. *What generally applicable methodology, if any, should Congress use to assess the costs and benefits of immunities and exemptions?*

1.d. *Should the proponents of an immunity or exemption bear the burden of proving tha the benefits exceed the costs?*

2. *Provide any relevant information about ... [an immunity's or exemption's] costs, benefits or impact on commerce.*

As the above discussion should make clear, there are significant and substantial benefits and positive impact on export commerce associated with the safe harbor exemption for the U.S. soda ash industry, and billions of dollars of trade associated with the various other industries which utilize these exemptions to promote exports. This has led two Cabinet Departments and numerous other Executive Branch spokesmen over the years to underscore the broader business value and need for retaining the Webb and ETC Acts.

In terms of "costs," it is difficult to respond to this request, since the AMC does not indicate what concerns it has about these laws. While there is certainly some

modest administrative "cost" to the U.S. Government in implementing these laws and, to the limited extent it is done, encouraging U.S. business to enter into joint export ventures, these administrative costs are far outweighed by the savings to the U.S. Government in not having to maintain a regulatory apparatus to monitor the export activities of U.S. companies in foreign markets and the increased economic benefits from effective export trade promotion efforts of organizations operating under the protection of exemptions.

Critics of these two laws sometimes contend that a "cost" exists in that joint export trade somehow undermines global antitrust diplomacy and this country's "credibility" in advocating the adoption of strong international antitrust rules.[7] However, not only is there not a shred of evidence to support this view, it is belied by the significant and substantial progress the U.S. has made in multilateral efforts to combat hardcore cartels and other forms of per se violations. The "credibility" argument has been considered unpersuasive by various senior U.S. government officials[8], as well as Blue Ribbon business advisory groups.[9] In fact, based upon public comments by the U.S. Government's leading antitrust enforcers, there is every indication that global antitrust initiatives have been enormously successful. To this point, Deputy Assistant Attorney General William Kolasky recently noted that:

> "Twenty years ago, only a handful of countries had antitrust laws that were seriously enforced, and we few were thought by most everyone else to be eccentric enthusiasts. Today, over 90 countries -- accounting for nearly 80 percent of world production -- have enacted antitrust laws, and over 60 have adopted antitrust merger notification regimes. Having convinced much of the world to structure national economies around competition and free markets, we have a responsibility to ensure that antitrust works effectively and efficiently to deliver what it promises.[10] (emphasis added)"

To critics of the safe harbor laws, the answer to the "embarrassment factor" is to either repeal the laws outright or recommend reforms that will have the same effect. However, unilateral repeal would do nothing to address the fact that at least 17 other countries have similar antitrust exemptions for joint export trade, and 33 others have implicit exemptions.[11] The major difference is that U.S. safe harbor laws are transparent, whereas foreign statutes generally are not. It is obvious that the repeal of export safe harbors would serve no purpose whatsoever, other than to further damage American export competitiveness. To address one of the AMC's questions, the burden should not be carried by the "proponents" of these laws, but rather by the opponents of a validly-enacted Act of Congress.

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[7] See, for example, the National Commission for the Review of Antitrust Laws and Procedures, *Report to the President and the Attorney General*, January 22, 1979, p. 300.

[8] See letter and responses from Frank A. Weil, Assistant Secretary for Domestic and International Business, Department of Commerce, to the NCRALP, November 20, 1978.

[9] See Business Advisory Panel Report in the NCRALP *Report to the President and the Attorney General*, January 22, 1979, p. 296-297.

[10] William J. Kolasky, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, "International Dimensions of Competition Law Conference," Toronto, Ontario, Canada, March 22, 2002.

[11] Margaret C. Levenstein and Valerie Y. Suslow, "The Changing International Status of Export Cartel Exemption," November 11, 2004.

Another common critique is that the safe harbor laws permit "export cartels" which result in higher prices overseas and, in case of exported raw materials, to higher prices for U.S. consumers on foreign-manufactured goods that are subsequently imported back into the United States. In reality, most of the complaints against U.S. export associations are from foreign producers that are seeking protection against the competitively low prices of U.S. joint export traders. To say that joint export trade results in higher costs to U.S. consumers is extremely farfetched. Even if an isolated case could be found to support this hypothetical, the Justice Department and/or FTC are empowered under these laws to respond to any competitive abuses that would adversely affect U.S. consumers. Congress took into account the unlikely possibility of domestic spillover, such that it cannot even be considered a "cost" of export safe harbors.

A further AMC question relates to the merits of sunsetting any of these laws:

> 2.c. *Should Congress subject immunities and exemptions to a "sunset" provision, thereby requiring congressional review and action at regular intervals as a condition of renewal?*

The suggestion that Congress should regularly hold reviews of export safe harbor laws to affirm their continued benefits is a poor one. In terms of a cost-benefit analysis, the costs of a regular renewal hearing would be extremely burdensome to the users of these laws. While antitrust lawyers would surely benefit, regular congressional review would only serve as a waste of time and resources for members of the Congress and legitimate U.S. exporters. In addition, participation in joint export trade depends heavily on the assurance of future protection of the association from antitrust activity. The uncertainty that would be inherent to a regular sunset review would effectively discourage companies from participating in joint export ventures.

It is possible that the AMC may consider whether to recommend that both laws be amended by conditioning the exemptions upon a showing of need by individual export associations, as has been considered by previous antitrust commissions.[12] Conditioning the Webb or ETC Acts on a need requirement would effectively signal a repeal of both laws. There are several reasons for this: (1) If foreign trade conditions did not develop exactly as anticipated, the exemption might be in jeopardy; (2) It would be difficult to establish valid criteria to determine when a particular exemption is needed; (3) Trying to impose strict limitations on the type of export activity which Webb Associations or ETC's might undertake could destroy the requisite flexibility necessary to enter foreign markets effectively; and (4) It would be a nearly impossible task for Webb Associations or ETC's to predict whether future trade conditions will continue to warrant an exemption.

For these reasons, a sunset provision or "need" requirement for the continuation of the Webb and ETC Acts is not only a bad idea, it would constitute an effective death sentence for U.S. joint export trade.

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[12] National Commission for the Review of Antitrust Laws and Procedures, *Report to the President and the Attorney General*, January 22, 1979, p. 302.

F. Conclusion

The Webb-Pomerene Act, passed in 1918, continues to provide significant advantages to U.S. exporters of soda ash, benefiting thousands of U.S. workers and their communities. Along with the Export Trading Company Act, this export safe harbor is as consequential to the U.S. economy today as when it was passed. U.S. industrial, agricultural and service exporters may begin and end their participation in joint export trade as conditions warrant, but there is no dispute that the future will continue to require the existence of these laws for the competitiveness of the U.S. economy. ANSAC, therefore, urges the AMC to evaluate these laws solely on the facts. If this is done, the AMC will certainly not be able to recommend the elimination or limitation of the Webb Pomerene or Export Trading Company Act.

We look forward to assisting the AMC during the course of its study.

Respectfully submitted,

John M. Andrews
President & CEO

JMA/jlo's

cc: The Honorable Craig Thomas
The Honorable Michael Enzi
The Honorable Gordon Smith
The Honorable Barbara Cubin