

# AMERICAN COTTON EXPORTERS ASSOCIATION

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July 11, 2005

Deborah A. Garza, Chair  
Jonathan R. Yarowsky, Vice Chair  
Antitrust Modernization Commission  
1120 G Street, NW  
Suite 810  
Washington, DC 20005  
Attention: Public Comments

Re: Immunities and Exemptions: Webb-Pomerene  
& Export Trading Company Acts

Dear Ms. Garza and Mr. Yarowsky:

The American Cotton Exporters Association (ACEA) submits these comments in support of maintaining the Webb-Pomerene and the Export Trading Company Acts pursuant to the Federal Register Notice of May 19, 2005,<sup>1</sup> and urges the Commission to recommend to the President and the Congress the continuation of these vitally important laws, which serve to protect the exporting segment of the U.S. economy. These Acts provide segments of the U.S. export trade the ability to compete in the world market and in the case of the ACEA, to effectively monitor the contract compliance of our export customers.

ACEA is a registered Webb-Pomerene Association. Its members are engaged in the merchandising and exporting of cotton and do business in the seventeen cotton-producing states (VA, NC, SC, GA, AL, FL, MO, AR, TN, MS, LA, KS, OK, TX, NM, AZ, & CA) and with the major banks, insurance companies, warehouses, trucking lines, and the railroad and ocean carriers located outside of the cotton producing states. Currently, approximately sixty-five percent of the U.S. cotton crop moves into the export market. The National Cotton Council of America estimates that the 14 million acres of cotton planted in the U.S. generates approximately \$40 billion in direct business income to the U.S. economy each year.

The ACEA was initially organized in 1969 by independent and cooperative entities engaged in the export of U.S. cotton for the purpose of pooling cotton cargo in order to obtain competitive freight rates from the ocean carrier rate making conferences who then had, and still do, an exemption from the antitrust laws.

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<sup>1</sup> Federal Register, Vol. 70, No. 96 at pages 28902-07

The ACEA's organization resulted in a policy decision by the Federal Maritime Commission that the ACEA could negotiate with the ocean carrier conferences who dominated the cotton trade routes. This action enabled individual exporters, particularly small and medium sized exporters to gain a more equal bargaining position in an unfair contract system, which pitted individual exporters against a conference of U.S. and foreign owned vessels that set rates based on the operating costs of its least efficient and high operating cost members. That system allowed for a rate structure that rewarded the inefficient and over-rewarded the efficient resulting in higher costs to land cargo and lost export business for U.S. exporters. The mere existence of the ACEA resulted in the offering of more competitive rates and eventually the diversion of cargo to non-conference carriers and the development of a competitive environment with freight rates more influenced by the availability of space in a given trade route.

In 1974-75, a crisis of significant proportions developed in the international trade of cotton as prices plummeted from record levels in the previous year exposing U.S. cotton exporters to contract defaults on a massive scale as foreign purchasers of four million bales of U.S. cotton communicated their intentions to renegotiate prices or not take delivery on their higher priced contracts. The U.S. cotton industry in consultation with the Departments of State, Agriculture, and Justice and in furtherance of the purposes for which the ACEA was formed, to promote the "the export or course of export from the United States of raw cotton and cotton products," directed its efforts towards the fulfillment of outstanding export contracts. Through an effort coordinated by the Assistant Secretary of State for East Asian & Pacific Trust Affairs and the Assistant Secretary of Agriculture for International Affairs & Commodity Programs each outstanding and unfulfilled arbitration award was reviewed, arbitrations were commenced, and contract damages were established based on the arbitration awards. Thereafter, official claims were asserted in the domiciliary country of the buyer and in government-to-government negotiations credits were made available by USDA's Commodity Credit Corporation to facilitate the contract defaulters to take delivery and make payment on the contract in fulfillment of their contracts.

During this process, the ACEA established a procedure, which could result in the listing, by country, mills or merchants in default<sup>2</sup> who failed to honor a contract or honor

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<sup>2</sup> ... a party shall be deemed to be in default when:

- (A) In the case of contracts calling for the opening of a letter of credit (L/C) for the benefit of the exporter, the purchaser has failed to open a letter of credit in accordance with the terms of the contract or other agreements on or prior to the last day of the shipment month; or refused to extend a L/C if requested by the exporter; or opened the L/C with insufficient time to load; or added other clauses designed to make the L/C inoperable;
- (B) In the case of contracts made on CAD, COA, FOB, FAS, C&F, and CIF terms, payment has not been received by the exporter in the ordinary course of business;
- (C) In the case of contracts calling for shipment to the exporter, the seller fails to make shipment according to the terms of the contract or other agreement on or prior to the last day of the shipment month;
- (D) In any case where the party has definitely notified the exporter of his intention not to honor the contract.

an arbitration award. The procedure requires that a complaint be filed by the seller of U.S. cotton explaining in detail the circumstances of the alleged contract breach. The complaint is then verified by ACEA staff following an examination of the documents accompanying the complaint. Upon verification, the buyer is notified and provided 14 days in which to respond. If the response establishes that the buyer is at fault or if there is no response, the buyer is placed on the Default List. Should the buyer provide information that places the matter in doubt, a Committee of the ACEA Board reviews the complaint and response. If it is determined that a complaint is not valid or is questionable, the buyer is not placed on the Default List. If the complaint is determined to be valid, the buyer is placed on the Default List.

Once a buyer is placed on the Default List he/she will remain on the list, unless they agree to arbitrate, open the Letter of Credit and take delivery of the cotton, or pay the seller offsetting damages for not taking delivery. The ACEA Default List is circulated with the advisory that "the listing of a party in default is for the purpose of advising U.S. exporters of the potential business risk inherent in dealing with that party based on the documented experience of other ACEA members."

While this activity is clearly permissible pursuant to the rulings of the U.S. Supreme Court in the Maple Flooring and the Cement Manufacturers cases<sup>3</sup>, the cloak of immunity provided by the Webb-Pomerene Act provides the ACEA with a recognized status by foreign textile organizations and their overseeing governments thereby facilitating the resolution of outstanding contract defaults.

The repeal of the Webb-Pomerene Act could in fact repeal the standing the ACEA enjoys in the world cotton market and limit the ability of U.S. cotton exporters to maintain their effective contract enforcement efforts.

Sincerely,



Neal R. Gillen,  
Counsel

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(E) Notwithstanding the above, if the party has agreed in writing to submit the dispute to arbitration, to abide by the award, and to pay the expense of his arbitrator, the exporter shall not add such party to the Default List;

(F) The final arbitration award is not paid within 30 days.

<sup>3</sup> *Cement Manufacturers Protective Association v. U.S.*, 268 U.S. 588, (1925)