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Congress of the United States

House of Representatives

109th Congress

Committee on Small Business

2361 Rayburn House Office Building

Washington, DC 20515-6315

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Via Electronic Mail
Mr. Andrew Heimert
Executive Director & General Counsel
Antitrust Modernization Commission
1120 G Street, N.W., Suite 810
Washington, DC 20005

RE: Remedies

Dear Mr. Heimert:

These comments respond to the Antitrust Modernization Commission's (Comission) request for input on the need for changes, if any, to the remedies currently available under the antitrust laws. As Chairman of a Congressional Committee whose focus is the health of the small business economy, the antitrust laws have proven of significant value in ensuring a competitive marketplace. Treble damages and attorney's fees are key elements in efforts by small businesses to ensure that the marketplace remains competitive. This will ensure continued growth of the American economy[1] while maintaining competition that benefits consumers.

Rule X, cl. 1, § (o)(1) of the Rules of the United States House of Representatives assigns to the Committee on Small Business (Committee) legislative matters concerning "assistance to and protection of small business...." The Committee also has special oversight jurisdiction to "study and investigate on a continuing basis the problems of all types of small business." *Id.* at cl. 3, § k. The Committee has a longstanding interest on issues related to unfair competition and proper enforcement of the antitrust laws.[2] The

[1] Data from the United States Small Business Administration shows that small businesses employ half the private sector workforce and constitute half the economic output of the country. UNITED STATES SMALL ADMINISTRATION, THE SMALL BUSINESS ECONOMY 5 (2004). Growth in the economy stemmed from expansion of small businesses. *Id.* at 7-8, 10.

[2] Some of the recent hearings held by the Committee investigating unfair competition include: *Anticompetitive Threats from Public Utilities – Are Small Businesses Losing Out: Hearing Before the House Comm. on Small Business*, 109th Cong., 1st Sess. (2005); *CRS Regulations and Small Business in the Travel Industry: Hearing Before the Subcomm. on Regulatory Reform and Oversight of the House Comm. on Small Business*, 107th Cong., 2d Sess. (2003); *Railroad Consolidation – Small Business Concerns: Hearing Before the House Comm. on Small Business*, 104th Cong., 1st Sess. (1995); *The Impact of Discount Superstores on Small Business and Local Communities: Hearing Before the House Comm. on*

Committee commends the Commission for undertaking the broad reexamination of the antitrust laws in light of massive changes that have occurred in the American and global economies since Senator John Sherman authored his Act in 1890. In addition, the Committee appreciates the Commission's efforts to seek input from as many interested parties as possible rather than relying on the narrow expertise of antitrust lawyers and industrial organization economists.

I. Original Legislative Intent of the Sherman Act

Congress drafted the Sherman Act at a time when the concentration of industrial wealth in the form of trusts was expanding rapidly.[3] Members of Congress were outraged by this concentration of wealth and the ability of trusts to exploit farmers.[4] Little doubt exists that Congress, despite revisionist history to the contrary,[5] were mainly

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Small Business, 103d Cong., 2d Sess. (1994); *Petroleum Marketing Practices – Pumps, Prices and Competition: Hearing Before the Subcomm. on Antitrust, Impact of Deregulation and Ecology of the House Comm. on Small Business*, 102d Cong., 1st Sess. (1991).

The Committee's interest in antitrust matters and unfair competition go back to its formation during World War II as a Permanent Select Committee. The House Resolution creating the Committee required it to study, among other things, whether small businesses were being treated fairly. H.Res. 294, 77th Cong., 1st Sess. (1941). Among the first actions of the Committee after the end of World War II, was to examine concentration and other antitrust matters related to the petroleum industry. *Investigation and Study of the Monopolistic Practices in the Petroleum Industries: Hearings Before the House Select Comm. on Small Business*, 80th Cong., 2d Sess. (1948). The Committee conducted numerous investigations on fair trade practices, *e.g.*, H.R. REP. NO. 1943, 88th Cong., 2d Sess. (1964); H.R. REP. NO. 1292, 82d Cong., 2d Sess. (1952), and held approximately 30 hearings between the formation of the Committee and 1972 in which issues of monopolistic and other unfair trade practices were addressed. Frequently, this resulted in the Committee forwarding information to the Department of Justice or Federal Trade Commission for further legal action, including the filing of federal court litigation. *E.g.*, STAFF OF HOUSE PERMANENT SELECT COMMITTEE ON SMALL BUSINESS, 93d Cong., 1st Sess., A HISTORY AND ACCOMPLISHMENTS OF THE PERMANENT SELECT COMMITTEE ON SMALL BUSINESS 68 (COMM. PRINT 1973) (discussing antitrust action brought by Justice Department against American Society for Composers, Authors, and Publishers).

The Committee's interest in antitrust matters did not wane when it became a standing committee with legislative jurisdiction over small business and government procurement matters. In the 1980's the Committee examined the competitive issues arising from concentration in the telecommunications, petroleum, and media industries. *Impact of the Changes in the Telecommunications Industry on Small Business: Hearing Before the Subcomm. on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the House Comm. on Small Business*, 99th Cong., 1st Sess. (1985); *Future of Independent Marketers in the Post-Merger Petroleum Marketplace: Hearing Before the Subcomm. on Energy, Environment, and Safety of the House Comm. on Small Business*, 98th Cong., 2d Sess. (1984); *Media Concentration (Parts 1 and 2): Hearings Before the House Comm. on Small Business*, 96th Cong., 2d Sess. (1980).

[3] Robert Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L. J. 65, 95-101 (1982).

[4] Jon Lauck, *Toward an Agrarian Antitrust: A New Direction for Agricultural Law* 75 N. DAK. L. REV. 449, 452 & n.10 (1999).

[5] *E.g.*, ROBERT BORK, THE ANTITRUST PARADOX, *in passim* (1978) (arguing that antitrust laws must be interpreted to maximize consumer welfare); Herbert Hovenkamp, *Distributive Justice and Antitrust Laws*, 51 GEO. W. L. REV. 1-4 (1982) (summarizing prevailing view that economic efficiency is only rational goal of antitrust laws). The concepts of consumer welfare and consumer surplus certainly were alien to the authors of the Sherman Act. Alfred Marshall, an English mathematician and economist, first expounded the concept of consumer surplus in his famous treatise, PRINCIPLES OF ECONOMICS which was first published in July of 1890, the same month that the Sherman Act became law. To assume that populist

interested in punishing the trusts that were damaging ordinary citizens.[6] One way to do this was to require the payment of treble damages. To spur citizen enforcement, Congress, following in the footsteps of the Interstate Commerce Act, also authorized the payment of reasonable attorney's fees to a successful litigant. By mandating attorney's fees, Congress ensured that there was no diminution in the treble damages through the use of contingency fee contracts to the lawyers representing the persons harmed by the anticompetitive activities. It would be hard to gainsay that Congress viewed the Sherman Act as one designed to punish wrongdoers. The question is not congressional intent in 1890; rather, the question is whether a bill written in 1890 is appropriate for a global, 21st century economy.

II. Arguments of Overdeterrence are Misplaced with Respect to Small Businesses

The primary concern about treble damages is that the putative liability will deter economic activity that is beneficial. Congress recognized the potential adverse consequences when it prohibited treble damages for joint research and production activities under the National Cooperative Research and Production Act.[7] However, such specific instances must not be interpreted to mean that the elimination of treble damages represents the better balance between deterrence and enabling beneficial economic activity. In my opinion, the authors of the Sherman Act struck the correct balance and alteration of the treble damages and attorney's fee provisions will have significant adverse consequences to small business owners and competitive markets.

Opponents of treble damages forcefully argue that potential litigation deters valuable economic activities. While that may be true with respect to large businesses, it is a canard when discussing small businesses. The Committee has first hand knowledge of the "Chicken Little" sky-is-falling syndrome when it comes to small business litigation under the Regulatory Flexibility Act (RFA) and Equal Access to Justice Act (EAJA). In both the RFA and EAJA contexts, concerns existed that small businesses would use these statutes to deter significant beneficial action by the federal government. While the federal agencies may give pause about their actions due to the RFA and EAJA, it has little to do with concerns about overuse of litigation by the small business community.

Opponents to the authorization of judicial review of federal agency compliance with the RFA claimed that it would dramatically slow the issuance of important federal regulations. In fact, that has not been the case. During an equivalent period after the enactment of the National Environmental Policy Act (NEPA), nearly six times[8] as many

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senators, such as Sherman and Reagan, were intimately familiar with the leading edge of economic theory expounded by an English mathematician constitutes while the theories were being developed dehors the legislative record of the Sherman Act.

[6] *See* LAWRENCE SULLIVAN & WARREN GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 908 (2000).

[7] 15 U.S.C. § 4303(a).

[8] The statistic is based on Committee staff LEXIS survey of reported decisions on NEPA compared to reported RFA decisions.

lawsuits were filed against government agencies challenging agency compliance with NEPA than have been filed under the RFA.[9]

Nor has EAJA, which authorizes attorney's fees of small businesses that sue the federal government and win, led to a rush to the courthouse. EAJA was enacted to "reduce the disparity in resources between individuals, small businesses, and other organizations with limited resources and the federal government ... by relieving such parties of the fear of incurring large litigation expenses."[10] Despite the interest in protecting small businesses,[11] statistics demonstrate that the overwhelming use of EAJA is by individuals seeking payments under the Social Security Act rather than small businesses challenging government agency action.[12]

Thus, the perception that remedies available to small businesses will breed litigation simply is not correct given the evidence. Small businesses do not have the resources needed to fund and prosecute litigation against the government even if the litigation requires very little discovery.[13]

That conclusion is even more applicable to antitrust litigation. From its inception, the antitrust laws recognized two factors: 1) private enforcement would be critical to prevention of anticompetitive actions; and 2) antitrust litigation is undeniably risky. Therefore, Senator Sherman stated that treble damages "be commensurate with the difficulty of maintaining a private suit."[14] Antitrust litigation is fact-intensive and requires a substantial amount of discovery and use of economic consultants. If small businesses are not rushing to the court in matters for which Congress provided special resources – the RFA and EAJA – small businesses certainly are not overburdening the courts or overdeterring valuable economic activity under the antitrust laws.

III. Treble Damages and Attorney's Fees Remain Crucial to Robust Competition

During the 60 years this Committee has been in existence, it has seen increasing concentration in all industries. Such concentration makes it more difficult for small

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[9] It is important to note that during the time period referenced in the text for NEPA cases, counsel could not rely on the federal government reimbursing for attorney's fees should the plaintiffs succeed in their challenge. NEPA does not provide for attorney's fees and EAJA had not yet been enacted.

[10] H.R. Rep. No. 120, 99th Cong., 1st Sess. 4 (1985), *reprinted in* 1985 U.S.C.C.A.N. 4984, 4991.

[11] Melissa Peters, Note, *The Little Guy Myth: The FAIR Act's Victimization of Small Business*, 42 WM. AND MARY L. REV. 1925, 1928-30 (2001).

[12] *Pierce v. Underwood*, 487 U.S. 552, 564 (1988).

[13] Challenges to compliance with the RFA are based on the record before the agency under an arbitrary and capricious standard under § 706 of the Administrative Procedure Act. *E.g., United States Telecom Ass'n v. FCC*, 400 F.3d 29, 30 (D.C. Cir. 2005); *Associated Fisheries of Maine v. Daley,* 127 F.3d 104, 114 (1st Cir. 1997). Thus, no discovery, except in unusually circumstances is either required or permitted. *Camp v. Pitts*, 411 U.S. 138, 142 (1973). To the extent that small businesses are challenging federal agency action for which their counsel can obtain fees pursuant to EAJA, the challenges are based on the rulemaking record and discovery is not required. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1972).

[14] THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES, VOL. 1, 114, 178 (Earl Kintner, ed. 1978).

businesses to compete on a level playing field. The buying power of large businesses in concentrated fields is well-known and need not be expatiated here. Such buying power is not an evil in itself. However, the combination of increased buying power combined with fewer firms generates greater opportunities for the firms to take anti-competitive action. Thus, absent the availability of treble damages and compensation for attorney's fees, small businesses will be unable to enforce the antitrust laws and protect competition.

Although the Supreme Court has made it clear that the antitrust laws protect competition not competitors,[15] it is the competitors that have the greatest incentive to ensure a fair and competitive market.[16] Therefore, eviscerating the ability of small businesses to protect competition by eliminating treble damages and attorney's fees constitutes the height of irresponsibility. The ultimate losers will be consumers who will no longer have access to a competitive marketplace.

The antitrust laws are not the only instance in which Congress granted small businesses the opportunity to protect themselves and, ultimately, a competitive marketplace. Among the statutes that recognize the resource differentials between large and small businesses are: Packers and Stockyard Act;[17] Petroleum Marketing Practices Act;[18] and the Lanham Act.[19] Without the availability of attorney's fees and increased damage awards, the attorneys representing small businesses would have little incentive to take on the arduous task of litigating against much larger corporate entities. Nothing this Committee has seen demonstrates that these statutes deterred economic activity beneficial to competition. Nevertheless, they rely on small businesses to protect competitive marketplaces. In this regard, the antitrust laws are no different.

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[15] *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962).

[16] LAWRENCE SULLIVAN & WARREN GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 14 (2000).

[17] 7 U.S.C. § 210(f) (authorizing attorney's fees). Congress passed the Packers and Stockyard Act to prevent packers from using their market power to exploit livestock producers. *See Stowers v. Mahon*, 416 U.S. 100, 106 (1974).

[18] 15 U.S.C. § 2805(d) (providing for attorney's fees, experts fees, and exemplary damages). The Act was passed to reduce the disparity in bargaining power between oil company franchisors and their small business franchisees. *See, e.g., Simmons v. Mobil Oil Corp.*, 29 F.3d 505, 509 (9th Cir. 1994); *May-Som Gulf, Inc. v. Chevron, USA, Inc.*, 869 F.2d 917, 921 (6th Cir. 1989).

[19] 15 U.S.C. § 1117 (authorizing attorney's fees, exemplary damages, and treble damages). The Lanham Act, among other things, protects businesses from harassment of unfounded infringement litigation. *See Scotch Whisky Ass'n v. Majestic Distilling Co.*, 958 F.2d 594, 599-600 (4th Cir.), *cert. denied*, 506 U.S. 862 (1992); *Noxell Corp. v. Firehouse No. 1 Bar-B-Que Restaurant*, 771 F.2d 521, 525-26 (D.C. Cir. 1985).

To summarize, the antitrust laws of the United States have proven valuable in ensuring a competitive marketplace. The tools for enforcement – treble damages and attorney's fees – must remain available so that small businesses damaged by unfair competition have the financial resources to vindicate their rights. The ultimate beneficiaries will be consumers who will have a robust, competitive marketplace from which to obtain goods and services.

Sincerely,

Donald A. Manzullo
Chairman