Joint Export JETA Trade Alliance

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Deborah A. Garza, Chair
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Antitrust Modernization Commission
1120 G Street, NW, Suite 810
Washington, DC 20005

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

Dear Ms. Garza and Mr. Yarowsky:

This letter is submitted to the Antitrust Modernization Commission ("Commission") by the Joint Export Trade Alliance ("JETA"), in response to the Commission's request for public comment published at 70 Fed. Reg. 28,902 (AMC May 29, 2005).

JETA is a coalition of agricultural, industrial, and service sector organizations that are users of, or otherwise knowledgeable about, the U.S. joint export trade ("JET") provisions (the Webb-Pomerene Act and Export Trading Company Act). In January 2005, JETA members wrote to the Commission explaining why there was no basis for including the Webb and Export Trading Company ("ETC") Acts in the Commission's investigation. The Commission nonetheless decided to "study" the prospects for repealing these laws, and to treat them under the "Immunities and Exemptions" heading.

This new letter responds to the questions on "Immunities & Exemptions" published by the Commission in May, and contains important information about the benefits of joint export trade (and the JET safe harbors) to users, to the U.S. economy, to the U.S. government, and to consumers and economies overseas. The letter also refutes various claimed "costs" of these laws, and identifies one area in which the implementation of the ETC Act could be improved.

JETA appreciates the Commission's attention to these comments and asks that they be considered alongside the submissions of individual Webbs and ETCs, which may provide more sector-specific detail on the benefits of the JET statutes.

I. SUMMARY OF JETA'S POSITION

The JET provisions of U.S. law help dozens of important American industries compete successfully in world markets and make export opportunities available to many thousands of (mostly small and medium-size) U.S. firms that could not realize them individually. They do this by facilitating, to cite just a few examples, the realization of scale economies, cost- and risk-sharing, reduced transportation and warehousing costs through long-term contracts with volume-based discounts, and consolidation of market research and administrative costs. All of this

makes U.S. suppliers more competitive with foreign suppliers who do not face the same transport costs and market barriers facing U.S. suppliers.

The U.S. economy benefits directly from roughly $20 billion per year in added export trade, taking the edge off an ever-more-worrisome merchandise trade deficit, and also from second-order effects such as greater inland transport of products destined for export and increased export financing activity for U.S. financial services companies. The net result is that the JET safe harbors benefit the economies and citizens of virtually every U.S. state, directly and indirectly supporting hundreds of thousands of U.S. jobs.

In policy terms, the JET provisions remove (with surgical precision) what would otherwise be an unintended chilling effect on JET activities the government has many compelling reasons to avoid discouraging. They do not shelter conduct that would otherwise be actionable, because the conduct in question (1) consists of efficiency-enhancing behavior that should never trigger liability under the rule-of-reason approach used for joint ventures, and (2) would in any case be outside the subject matter jurisdiction of the U.S. antitrust laws. Because this conduct could nonetheless trigger lawsuits that, while unwarranted, would be costly to defend, very little joint export trade would occur without safe harbors. This was the primary reason for their enactment, and it is more compelling than ever today.

The JET provisions also provide transparency and oversight through registration, while usefully clarifying the limits on what the U.S. antitrust enforcement agencies are (and are not) responsible for regulating in the export trade context. The underlying policy – of relying on importing country competition laws and authorities in this context -- allocates enforcement responsibility in the most sensible manner, respects the sovereignty of foreign governments, aligns U.S. policy with that of virtually every other jurisdiction with an advanced antitrust regime, and avoids costly and unnecessary policing of exporters' offshore marketing behavior.

The overseas impact of the Webb and ETC provisions is also highly beneficial. Foreign consumers and economies benefit when U.S. exporters can organize on an efficient scale and introduce meaningful price competition into their foreign markets.

In view of these many benefits, it is not surprising that the Bush Administration has, like its predecessors, articulated strong support for the JET provisions.

These extensive benefits are unalloyed by any costs. Of course, anyone promoting repeal of a validly enacted law bears the burden of demonstrating that the law's costs exceed its benefits. But in this case, critics of the Webb and ETC Acts have not only failed to make a "net cost" showing; they have failed to identify any costs at all, and indeed there are none.

Assertions that the Webb and ETC Acts cause problems for U.S. "antitrust diplomacy" or other aspects of the U.S. Government's outreach effort in the antitrust field are decisively refuted by the evidence. Indeed, according to assessments by agency officials, it appears that no category of U.S. international antitrust objectives is being impeded by *any* cause; the record they describe is one of continuous and uninterrupted success. Moreover, the U.S. policy on JET reflects a broad international consensus; most foreign governments agree with it and follow the same

policy at home. The U.S. policy also acknowledges the primacy of local enforcement and respects foreign sensibilities regarding the extraterritorial application of U.S. law, while doing nothing to impede the enforcement of importing-country law against stray instances of anticompetitive export association behavior. It is not surprising, therefore, that those who cite "embarrassment," "damaged credibility," "setting a bad example," and similar factors as a reason to change the JET provisions are consistently unable to identify specific U.S. objectives whose achievement is being frustrated, and specific evidence linking that result to the JET safe harbors. In fact, there is not a shred of evidence suggesting that the United States could get better cooperation in the antitrust field, or in any other area, if we altered our JET policy or laws.

Likewise unsupported is the suggestion that the JET provisions adversely affect competition in the U.S. market -- either by facilitating domestic collusion by JET participants or by making it harder to prosecute foreign cartels selling here. The notion of members of an export association – who operate in a fishbowl -- abusing the Acts to secretly fix prices or quantities domestically does not merit serious consideration. Nor do the safe harbors impede the U.S. government in prosecuting foreign or international cartels selling into the U.S. market. The JET laws are based, precisely, on the primacy of importing-country enforcement. As for obtaining foreign agencies' help in collecting information and pursuing prosecution in international cartel cases, the story as told by the U.S. enforcers themselves is one of unalloyed success.

Finally, there is no cost to trade diplomacy, which has also managed to proceed impressively on all fronts despite the supposedly debilitating presence of the JET safe harbors.

The Commission should terminate its "study" of these laws and announce that it will not be recommending any changes to the Webb and ETC safe harbors, except for the narrow technical improvement discussed in Section III below.[1]

II. RESPONSES TO QUESTIONS PUBLISHED BY THE COMISSION

1. In what circumstances, and with what limitations, should Congress provide antitrust immunities and exemptions?

The U.S. antitrust laws have a sphere of protected interests, today generally understood to include allocative efficiency and U.S. consumer welfare. Congress should be very cautious about exempting or immunizing conduct that could adversely affect these protected interests.

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[1] JETA also wishes to raise a concern about the structure of the Commission's investigation. The public comment arrangements regarding "exemptions and immunities" are not well-designed to promote a meaningful exchange. The Commission has asked for input on the benefits and costs of various exemptions and immunities, but without preliminary staff findings or any other "bill of particulars" to respond to, commenters are left to guess what alleged costs should be addressed. At least, this is true for the Webb and ETC Acts, for while individual Commissioners have signaled their personal dislike of these provisions, neither they nor anyone else has ever specified any actual costs that could be the subject of public comment. If Commissioners believe that such costs exist, they should be publicized in detail to facilitate informed public comment. Expecting commenters to guess what is on the Commissioners' minds is inappropriate, and serves neither the Commission's purposes nor those of stakeholders.

There may be valid reasons why, consistent with a cost-benefit analysis of the type suggested in the Commission's questions, general antitrust law should be supplanted in a given sector or circumstance. A balance may have to be struck which takes account of legal/political constraints (*e.g.*, state action doctrine), practical constraints (*e.g.*, preemption by a sectoral regulatory body), or other factors. These are difficult issues, the understanding of which will benefit greatly from application of the Commissioners' individual and collective expert judgment.

None of that, however, has *anything to do* with joint export trade or the JET safe harbors, which do not even arguably touch the above-mentioned sphere of protected interests. As a result, any conclusions the Commission may ultimately draw, about immunities and exemptions generally, will provide little if any useful guidance with respect to the joint export trade issue.

Of course, the JET safe harbors, with substantial benefits and no discernible costs, can easily pass a cost-benefit test. The point here, at the level of generality of this introductory question, is that the JET safe harbors shouldn't even attract the same sort of skeptical examination applied to exemptions and immunities that could potentially affect U.S. consumer welfare.

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

First**, as a substantive matter**, the "costs" considered in this context should involve some burden on U.S. consumers or at least on U.S. commerce. (For example, an antitrust exemption for the wallpaper sector might entail higher prices to consumers; it might also depress U.S. economic activity in the wall coverings sector and/or in related sectors.) The Webb and ETC Acts entail no such costs or burdens; they have no impact on U.S. consumer interests, and their effect on U.S. commerce is not a burden but a boon. Congress noted these facts in passing the Webb and ETC Acts, intending to effectuate a policy in the national interest and stimulate exports. There is no evidence to suggest that Congress assessed the costs improperly then, or that new costs have surfaced that might support a different result now.

The "benefits" of a given exemption could involve either the core objectives of antitrust law (allocative efficiency and U.S. consumer welfare) or, more commonly, other public policy objectives. Benefits in the latter category – unrelated to core antitrust values -- can still be quite important and can suffice to justify an exemption, especially one that has no antitrust-related costs. This is the case with the Webb and ETC provisions, whose U.S. benefits involve mainly jobs and export earnings (although there substantial consumer welfare benefits outside the United States).

Second**, as an evidentiary matter**, Congress (and the Commission) should focus on the *documented impacts* of exemptions and not on hypotheses, anecdotes or rumors. This is particularly true for alleged "costs." In the case of the joint export trade safe harbors, the available information regarding "costs" consists exclusively of vague references to impaired antitrust diplomacy and speculation about damaged U.S. "credibility." The authors (and recyclers) of these fuzzy critiques should not be given a pass, as if merely speculating about a potential "cost" could make it real. Congress would be obliged to ask, at a minimum, what

specific U.S. antitrust outreach objectives have been frustrated, how important those objectives are in the broader context of U.S. national interests, and what evidence supposedly links the observed diplomatic failure to the existence of the JET safe harbors. Nothing that has surfaced so far in the Commission's investigation even comes close to meeting this evidentiary standard.

B. Should Congress analyze different types of immunities and exemptions differently? Are those that do not protect core anticompetitive conduct (e.g., price fixing) preferable to those that exempt all joint activities? Are those that eliminate, for example, treble damages, but retain single damage liability acceptable?

Registration systems, whose main effect is to provide added legal certainty and transparency to a situation that would exist anyway by virtue of the antitrust laws' jurisdictional provisions, are naturally in a separate class from other "immunities and exemptions." The Webb/ETC provisions are in this separate category. They do not immunize conduct that could affect U.S. consumer interests and would be reachable under the Foreign Trade Antitrust Improvements Act ("FTAIA"). They provide legal certainty and transparency with respect to export trade arrangements that could not affect U.S. consumer welfare and ought never to be reachable under the FTAIA.

Congress should also analyze exemptions/immunities in light of their alternatives, and make distinctions accordingly. There are only two alternatives to the JET safe harbors, neither one terribly appealing:

> (1) the existing policy (no USG regulation of joint export trade) could be left in place, but without the safe harbor/registration provisions and the legal certainty and transparency those provisions afford; or
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> (2) the federal antitrust enforcement agencies could actually attempt to begin regulating joint export trade.

The former proposition would do nothing to advance antitrust diplomacy or the overseas popularity of the U.S. antitrust regime, but it would chill a considerable share of current JET and remove transparency and accountability from the remainder. The latter proposition is so implausible – requiring a complete rewrite of the FTAIA and a sprawling, costly expansion of the existing antitrust enforcement bureaucracy -- that it does not merit serious consideration.

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?

Periodic review against a presumption of sunset may make sense for measures whose underlying policy rationale, already marginal, is conceded to be fading with the passage of time and may "cross the line" at any moment. Such an approach makes no sense whatsoever for measures like

the JET safe harbors, whose underlying policy rationale is exceedingly strong and is not deteriorating with time at all.

On a more practical note, a sunset provision for the Webb and ETC Acts would destroy the legal security and predictability needed to foster JET. JET is principally about accessing hard-to-reach foreign markets. The planning horizon for decisions and investments related to that objective is necessarily long-term. There is already more than enough uncertainty in the emerging markets/export business, without having to factor in doubts about whether the U.S. legal environment will remain stable.

D. Should the proponents of an immunity or exemption bear the burden of proving that the benefits exceed the costs?

To apply a presumption of repeal, under which an existing immunity/exemption would be slated for repeal unless its benefits were demonstrated to exceed its costs, would not be appropriate. Anyone recommending the repeal of a validly enacted Act of Congress naturally bears the burden of showing that the Act's costs exceed its benefits. A study methodology reversing this common-sense principle would sow confusion, would command no respect from stakeholders inside or outside government, and would ultimately prevent the resulting recommendations from contributing meaningfully to the government's policy deliberations.

Where no costs can be demonstrated for a particular immunity/exemption -- as in the case of the Webb and ETC Acts -- the analysis ought to stop there, with no change considered much less recommended. Such a presumption is neither pro- nor anti-exemption; it is simply "pro-current-law," as one would expect in a legal culture that values the rule of law and recognizes the importance (to regulators and the regulated community) of predictability and precedent.

2. Provide any relevant information about … the Webb-Pomerene Export Act (15 U.S.C. 61-66) and ... the Export Trading Company Act (15 U.S.C. 4001-21), including their costs, benefits, and impact upon commerce.

Set out below is pertinent information about the JET provisions' (A) history, (B) benefits, and (C) alleged costs. This information demonstrates the points summarized in Section I above -- that the JET provisions help many of America's most effective export industries compete successfully in world markets; are as important to the U.S. economy today as they have ever been; and are *unambiguously valuable* from a national interest standpoint because they entail no costs of any kind.

A. Brief History of the JET Provisions

Congress enacted the Webb-Pomerene Act in 1918 "to aid and encourage our manufacturers and producers to extend our foreign trade."[2] While such sentiments may sound vaguely mercantilist

[2] H.R. Rep. No. 1118, 64th Congress, 1st Sess., 1 (1916).

today, the intent was to foster efficient combinations with a global reach that would benefit, not take advantage of, foreign customers. Congress explicitly found that the Webb Pomerene associations would lead to lower, not higher, prices in competition with foreign suppliers.[3]

Webb-Pomerene associations have done exactly that for nearly 90 years, and besides introducing new low-priced competition into foreign markets the Act has helped make export opportunities available to many U.S. firms that could never have realized them individually. One government expert -- Assistant Secretary of Commerce for Industry and Trade Frank Weil -- noted in a 1978 letter to the National Commission for the Review of Antitrust Laws and Procedures that "{t}he Webb-Pomerene Act provides the greatest help to industries which have little competitive advantage in world markets …. For companies in these industries, the cost savings from joint exporting … help keep them in world markets." Without Webb-Pomerene protection, he noted, "many companies, fearing illegality, would cease engaging in long-term joint activities which are essential to developing profitable foreign markets."

The ETC Act, part of a broader 1982 update of international aspects of the U.S. antitrust regime, reflected a determination that the Webb Act, while based on a sound joint export trade policy, was doing an incomplete job. Rising U.S. trade deficits, the limited export success of small and medium-size enterprises, and ineffective marketing of U.S. farm products, were seen as establishing the need for "well-developed export trade intermediaries which can achieve economies of scale and acquire expertise enabling them to export goods and services profitably, at low per cost unit to producers." The role of antitrust law in hindering the development of such "intermediaries" had been widely noted; in 1981 Congressional testimony, then-Assistant Attorney General for Antitrust John H. Shenefield "acknowledged a perception of the antitrust laws as a hindrance in joint export activities."[4]

The ETC Act sought, among other things, to remove this "hindrance." Its stated purpose was "to increase United States exports of products and services by encouraging more efficient provision of export trade services to United States producers and suppliers"[5] – or, as explained by the House and Senate conferees, "the major public benefit sought by the enactment of the export trading company legislation is jobs for Americans through the promotion of exports."[6]

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3 *See* S. Rep. No. 1056, 64th Cong., 2d Sess. (1917); H.R. Rep. No. 1118, 64th Cong., 1st Sess. (1916); Hearings on H.R. 17350 before the Senate Committee on Interstate Commerce, 64th Cong., 2d Sess., 44 (1917).

4 Henry N. Schiffman and William Weber, "The Export Trading Company Act," Practising Law Institute, 1983, p. 244, *citing* House Judiciary Committee Report No. 97-686 (Aug. 2, 1982) ("Prepared Statement of Mr. John H. Shenefield, dated April 1, 1981 at 1-2"). Mr. Shenefield elaborated that "{i}t is an article of orthodoxy in the business community that the antitrust laws stand as an impediment to the international competitive performance of the United States. Specifically, it is believed that the antitrust laws hinder our export performance."

5 Public Law 97-290, 97th Congress, October 8, 1982, Section 102: Findings; Declaration of Purpose.

6 Schiffman and Weber, p. 220. Representative John LaFalce of the House Banking Committee noted that "while the ETC bill is not meant as a panacea for this country's formidable export problems, it is a very important step toward formulating and implementing a comprehensive export promotion policy." Congressman Barney Frank called the ETC Act of 1982 one of his "highest legislative priorities," noting that "we need to keep American exports competitive in the world economy" and that "small businesses, in

B. Benefits of the Webb and ETC Acts

1. Benefits to Users

Approximately 100 export organizations operate under the JET laws today, representing a vastly larger number of U.S. firms that are successfully exporting through this channel in sectors ranging from agricultural products (rice, almonds, apples, pears, blueberries, citrus, nuts, pistachios, kiwifruit, corn sweetener, cotton, ginseng, refined sugar) to basic food (poultry and seafood), industrial chemicals (chlor-alkali, soda ash, phosphates), plastics and specialty chemicals, forest products (pulp and paper, wood chips, timber), motion pictures, metals and ores (bronze ingots, ferrous scrap, forging), and services (shipping, tooling and machining, and general exporting services).[7]

The JET provisions are essential for these U.S. firms and industries to succeed globally. As stated by U.S. Trade Representative Charlene Barshefsky, "the Webb-Pomerene and Export Trading Company Acts provide important assurances under U.S. law for the commercial interests of some of our leading exporters."[8] Specific benefits to users include:

- **Reduction of transportation and logistics premiums:** Webbs and ETCs help reduce variable costs of transportation, warehousing and handling by enabling U.S. exporters to negotiate better rates for larger volumes of trade and then to coordinate shipments to efficiently utilize transportation networks. Several associations aggregate movements in unit trains or chartered ships, or enter into long-term volume-based contracts with low rates possible because of the volume base load they provide. Without export joint ventures, these firms would be unable to take advantage of volume discounts and would not be able to maintain their competitive position with foreign suppliers.

- **Consolidation of market research and administrative costs:** Webbs and ETCs assist U.S. exporters in reducing fixed costs of market research and setting up and maintaining networks and facilities for shipping, customs clearance, storage, marketing and distribution, and liaison with government officials where necessary. These are likely to be specific to each destination, and individual producers often find that their volumes are too small to justify incurring such costs. At a minimum they avoid unnecessary duplication by centralizing these functions in a common agency.

- **Mitigation of risks:** Webbs and ETCs are a means to pool risks. Access to the production facilities of many producers yields a more reliable source of supply, resulting in the association being better placed to meet orders. Common marketing gives each producer a share in a diversified portfolio of buyers, spreading the risks of non-payment

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particular, have been placed at a competitive disadvantage by new international trade realities." *Id*., pp. 230-31.

7 For a list of ETCs, *see* http://www.ita.doc.gov/td/oetca/list.html. For a list of Webb associations, *see* http://www.ftc.gov/os/statutes/webbpomerene/index.htm.

8 Ambassador Charlene Barshefsky, Letter to Senator Craig Thomas, June 4, 1998.

by buyers, demand slumps, or disruption in deliveries caused by political or natural events in particular markets.

- **Leveling the playing field:** The world can be a difficult place for U.S. exporters. One longstanding rationale for JET is that organizing on a larger scale helps exporters interact successfully with large-scale (sometimes even cartelized or monopsonistic) buyers. But many types of obstacles are more easily addressed by a voluntarily united industry than by a single company or a number of companies acting separately. Webbs and ETCs often sell into developing country markets where governments control trading and distribution rights, discriminate against imports and/or subsidize competing local production. State trading entities often have the ability and incentive to limit imports. And, of course, more traditional tariff and non-tariff barriers remain significant in various overseas markets. Creating an effective distribution network, credit apparatus and reliable marketing presence can help Webbs and ETCs overcome such barriers.

- **Legal certainty:** This benefit, while listed last, is arguably the most important. Without the safe harbors, U.S. exporters would face a greater risk of unjustified civil litigation – sufficient by itself to discourage continued participation in joint export trade. As illustrated by the *Empagran* decision[9] and continued litigation in its wake, the scope of the FTAIA remains uncertain and is likely to remain so for years.[10] Jurisdictional principles will never afford exporters the certainty or reassurance of the Webb/ETC Acts. Congress recognized this in 1982 when it simultaneously adopted the FTAIA and the ETC Act as clear expressions of national policy. Congress appreciated – as the user community does today – the importance of statutory safe harbors and the impossibility of relying on the FTAIA alone when making decisions about participation in JET. The Webb and ETC Acts provide real and tangible "legitimacy" for many companies that would not otherwise engage in joint export trade, whether or not such conduct would fall technically within the subject matter jurisdiction of U.S. antitrust laws.

2. Benefits to the U.S. Economy

According to recent figures from the Department of Commerce, ETC certificate holders and their members (more than 5,000 mostly small and medium-size U.S. businesses) exported approximately $15 billion worth of products in 2003. Webbs are conservatively estimated to have handled at least another $3-4 billion more. This significant positive contribution to the U.S. trade balance comes at a time when that balance is (for other reasons) negative. While the causes of the merchandise trade deficit and the urgency of reversing it are subjects of lively debate, there is no serious dispute about the fact that the national interest requires that all reasonable means of exportation be encouraged.

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[9] *F. Hoffman-La Roche Ltd., et al. v. Empagran*, No. 03-724; 124 S.Ct. 2359 (2004).

[10] The Commission's International Working Group has recognized this uncertainty. "{C}oncerns about the meaning and interpretation of this statute appear to be sufficiently pressing matters that a proposal by the Commission for a legislative solution could be a useful contribution to clarity in this area." Int'l Working Group Memo at p. 4.

The beneficial second-order effects of the JET provisions are also substantial; prominent examples include greater inland transport of products destined for export markets and increased financing activity for U.S. financial services companies. The net result is that the JET safe harbors benefit the economies and citizens of virtually every U.S. state, most notably and directly Wyoming, California, Washington, Oregon, the Carolinas, Florida and Georgia. Webb and ETC exports directly and indirectly support hundreds of thousands of U.S. jobs.

One important example is U.S. agriculture trade. As noted in the USTR's *National Trade Estimate*, U.S. farmers and agricultural firms rely heavily on export markets which have accounted for up to 30 percent of U.S. farm income over the past 30 years. Agricultural exports also have significant linkages to the non-farm economy, particularly through their effects on employment and off-farm business activity. However, these exports are at risk from a variety of barriers -- EU Member State bans on agricultural biotech products, poultry import restrictions in Russia, mistreatment of U.S. agricultural exports under Chinese tariff-rate quotas, and improper trade contingency measures in Mexico, to name just a few. For these and other reasons agriculture trade, which has traditionally served to reduce U.S. trade deficits, is now showing signs of going into deficit itself.

To imperil U.S. farm exports by repealing or limiting the joint export trade provisions would be the height of irresponsibility. U.S. producers of rice, pistachio, apple, ginseng, tobacco, pear, blueberry, cherry, almond, sugar, corn, cotton, poultry, seafood products and pork all benefit from the Webb and ETC Acts. In fact, of the 79 current holders of ETC certificates, over one-third (30) are dedicated to the promotion of U.S. exports of agricultural commodities and processed foods.

Moreover, the ETC program has found a valuable new use as a means of taking advantage of newly-negotiated market access opportunities featuring TRQs that have to be administered privately by the affected U.S. farm commodity sectors. Damaging the legal mechanism used to exploit these hard-won market access commitments could render the commitments themselves useless. Lowered export trade for U.S. suppliers, along with reduced competition from U.S.-origin produce in foreign markets, is not the kind of a pro-competitive outcome the Commission ought to be pursuing with its recommendations on antitrust modernization.

3. Benefits to the U.S. Government

The benefits of the Webb and ETC Acts are not limited to the private sector. These provisions also prevent court dockets from being over-run with meritless lawsuits, and usefully clarify the limits on what the U.S. antitrust enforcement agencies are (and are not) responsible for regulating in the export trade context.

Beyond clarity, and more substantively, the JET provisions reflect a policy that has tremendous benefits for the U.S. government – a policy of relying on importing country competition laws and authorities to regulate the behavior of export associations. This policy, which other countries follow as well, allocates enforcement responsibility in the most sensible fashion. When concerns arise over the conduct of export associations, the responsibility for acting properly belongs where the incentive is – with the government whose consumers' interests are at

stake. Importing countries have shown themselves to be quite capable of defending their consumers in the JET context. And the alternative -- a sprawling expansion of national antitrust regimes, under which governments would assume responsibility for policing the offshore marketing behavior of their exporters – makes no sense. For the United States, it would be prohibitively expensive and an immense distraction (in terms of staffing, funding, management attention, *etc*.) from the government's legitimate antitrust enforcement agenda.

The government also benefits, like the regulated community, from the established body of rules that have built up around the JET provisions. The conduct potentially sheltered by the Webb and ETC Acts is that which is necessary to accomplish legitimate export trade objectives. Case law has clarified the rules considerably over time. The seminal case of *United States v. Minnesota Mining & Mfg. Co.*[11] articulated the basic policy. FTC administrative cases have answered specific questions and established "do's and don'ts."[12] And the most recent case of *International Raw Materials v. Stauffer Chemicals*[13] reaffirmed the appropriate use of the safe harbor to obtain reduced stevedoring charges. In the case of the ETC program, this case law is further buttressed through prior review/clearance by the Justice Department.

Finally, government antitrust enforcement agencies must expend resources to investigate potential antitrust problems. In the case of companies engaging in registered JET under the safe harbors, the transparency allows enforcers to observe their actions at minimal cost. This saves money for both the enforcers and the companies, enabling the government's antitrust aims to be accomplished at the lowest possible cost.

In view of these many compelling benefits, it is not surprising that the current Bush Administration has, like its predecessors, articulated strong support for the JET provisions:

- In a March 10, 2005 letter to the Antitrust Modernization Commission, Commerce Under Secretary for International Trade Grant Aldonas wrote that the ETC Act "should be retained in U.S. law," citing it as "an essential component of a broad United States effort to promote and enhance the competitiveness of U.S. firms in the global marketplace."

- In a May 19, 2005 letter to the Commission, Under Secretary for Farm and Foreign Agricultural Services J.B. Penn expressed USDA's support for the Webb-Pomerene and ETC Acts, noting the "vital role these acts play in facilitating U.S. agricultural competitiveness."

- In his May 2005 confirmation hearing, U.S. Trade Representative Rob Portman promised "vigorous enforcement and defense" of the Webb and ETC Acts and assured the Senate that USTR "is unaware of any initiatives" in the trade field that might call into question these two export promotion laws.

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[11] 92 F. Supp. 947 (D. Mass. 1950).

[12] *See, e.g., Florida Hard Rock Phosphate Export Ass'n.*, 40 FTC 843 (1945); Phosphate *Export Association*¸42 FTC 555 (1946); Sulphur *Export Corporation*, 43 FTC 820 (1947); *Carbon Black Export, Inc.*, 46 FTC 1245 (1949); *Phosphate Rock Export Association*, 92 FTC 1844 (1983).

[13] 767 F. Supp. 687 (E.D.Pa. 1991), *aff'd* 978 F.2d 1318 (3d Cir. 1992), *cert. denied* 113 S. Ct. 1588 (1993).

4. Benefits Overseas

The overseas impact of the Webb and ETC provisions – to the extent that interests the Commission -- is also highly beneficial. Foreign consumers and economies benefit because, as noted above, the JET provisions enable U.S. exporters:

- to organize on an efficient scale, able to compete against local (or more local) suppliers who do not face the same transportation costs and market barriers;

- to demonstrate a commitment and reliability of supply to remote and otherwise risky markets; and

- to reduce costs by pooling marketing expenses and sharing distribution infrastructure such as port facilities and ships.

The end-result is that new competition is introduced into foreign markets -- an unalloyed benefit in antitrust terms. The cost savings achieved and passed forward by export associations drive market growth and lower final costs to consumers around the world. Put differently, joint export trade benefits both exporters and their customers; it is a win-win proposition. That the JET provisions promote competition within export markets is shown by, among other things, the fact that virtually all of the complaints lodged against export associations have been predicated on their prices being too low in the eyes of competing local suppliers.

C. The JET Safe Harbors Have No "Cost"

As noted above, anyone promoting repeal of a law bears the burden of demonstrating that the law's costs exceed its benefits. In this case, critics of the Webb and ETC Acts have not only failed to make a "net cost" showing; they have failed to identify any costs at all.

Addressing "costs" in this context is difficult for the reasons mentioned above at footnote 1 (no Commission staff report or other bill of particulars to react to) and at pages 4-5 (criticisms couched in vague references to damaged overseas popularity or "credibility," with no discussion of what specific U.S. goals are going unmet as a result). JETA members have nonetheless done their best to research and fill in the many blanks of the anti-Webb/ETC position, in hopes that we could be at least somewhat responsive to the Commission's questions. As best as we can tell, there are three categories of alleged or theoretical "costs" – to antitrust diplomacy/cooperation, to domestic competition, and to international trade relations. We address these in turn below.

1. No Cost to Antitrust Diplomacy or Cooperation

One thread of discussion holds that the Webb and ETC Acts somehow cause problems for U.S. "antitrust diplomacy" or other aspects of the U.S. Government's outreach effort in the antitrust field. The evidence against this claim is overwhelming.

First, most foreign governments with an opinion on the subject agree with the U.S. policy on JET and indeed follow that policy at home. The most recent comprehensive study reported that 40 of 56 jurisdictions surveyed follow the same basic policy as the United States -- they neither purport to regulate, nor assert jurisdiction over, the offshore activities of joint export trade associations.[14] Looking deeper, this study indicates that in recent years the mix has shifted somewhat between countries that have explicit statutory carve-out/registration schemes (like Webb-Pomerene and ETC), and countries that exempt joint export trade "implicitly" and thus without the transparency of a registration system. Most of this shifting has resulted from harmonization of the national antitrust regimes of EU Member States and candidate countries.[15] What distinguishes the U.S. regime from many of the others – greater transparency – should be considered a badge of honor, not a reason to be defensive.[16]

Complaints that provisions like the Webb and ETC Acts impede international harmonization in the antitrust field ignore the fact that harmonization on joint export trade rules has already largely been achieved. Other countries not only agree with the United States about allocating enforcement responsibility in the JET context, but also have historically relied more heavily on JET.[17]

Second, the U.S. policy demonstrates respect for the primacy of local enforcement and for foreign sensibilities regarding the extraterritorial application of U.S. law. *Cf. Empagran S.A. F. Hoffman-La Roche Ltd., et al.*, Slip Op. No. 01-7115 (D.C. Cir. June 28, 2005) at 7 (underscoring "the respect sovereign nations afford each other by limiting the reach of their laws" and the importance of avoiding "interference with other nations' prerogative to safeguard

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

[15] *See id.* at 1. For examples of explicit JET exemptions, *see* Canada COMPETITION ACT §45; Mexico FEDERAL ANTITRUST LAW (1992) Art. 6; Australia TRADE PRACTICES ACT, 1974 §§ 6-7; India COMPETITION ACT, 2002 § 3(5); South Africa COMPETITION ACT No. 89 §10, Israel RESTRICTIVE TRADE PRACTICES ACT 1998 No. 5748 § 10(7); and Taiwan FAIR TRADE LAW 2000 Art. 14(4).

[16] JETA considers especially bizarre the argument that the current JET policy is acceptable *but* should henceforth be effectuated indirectly (solely through jurisdictional rules) and not through explicit carve-out/registration systems. This change would not increase exporting country authorities' supervision of joint export trade, but it would greatly reduce transparency. *See* Levenstein and Suslow, supra, at 3 ("{i}t may be worse, not better, to have countries moving to implicit exemptions if 'implicit' implies no notification, no ongoing oversight, and increased uncertainty …"). In other words, even from the standpoint of JET critics, such a change would seem to make the current situation unambiguously worse. It would also chill a considerable amount of JET, as participants deprived of a statutory safe harbor would choose to forego exporting, or to export individually at lower levels, rather than run the risk of facing meritless-but-still-costly antitrust actions.

[17] *See, e.g.*, U.S. General Accounting Office, "EXPORT PROMOTION: Implementation of the Export Trading Act of 1982," February 1986, GAO/NSIAD-86.42, p. 10 ("in Japan and Europe, ETCs handle *a large share of the export market* and play an important role in foreign trade") (emphasis added). *See also Statement by Assistant Secretary Frank A. Weil before the National Commission for the Review of Antitrust Laws and Procedures* (Nov. 20, 1978) at 24: "The Department of Commerce does not believe that the United States has any need of justifying to foreigners the existence of Webb-Pomerene Associations. All our major trading partners permit, and in fact often encourage, their exporting companies to join together … Moreover, the United States monitors the activities of our Webb-Pomerene associations much more closely than any of our major trading partners do…."

their own citizens from anticompetitive activity within their own borders"). As emphasized by the House Judiciary Committee during its consideration of the ETC Act, the U.S. approach to JET "in no way limits the ability of a foreign sovereign to act under its own laws against an American-based export cartel having unlawful effects on its territory. Indeed, the clarified reach of our own laws could encourage our trading partners to take more effective steps to protect competition in their markets."[18]

Third, no category of U.S. international antitrust objectives is being impeded by *any* cause, if assessments by agency officials are to be believed. Rather, during a relevant recent time frame (since the ICPAC process concluded with no adverse discussion of the JET provisions), the United States seems to have managed to achieve everything it wanted in international antitrust – from avoiding the initiation of a WTO competition negotiation, to launching an "all antitrust, all the time" best practices forum in the ICN, to concluding (on favorable terms) bilateral antitrust cooperation agreements and competition chapters in free trade agreements, to cooperating on specific merger and anti-cartel cases, to soft harmonization of legal standards and procedures, to influencing the sound development of foreign antitrust regimes. These successes have been particularly significant, it seems, where it counted the most – in dealings with the EU. Following are some representative examples:

> *Cooperation among competition law enforcement authorities has undergone an extraordinary change in the past five years. During that period, there has been a growing worldwide consensus that international cartel activity is pervasive and is victimizing businesses and consumers everywhere. This shared commitment to fighting international cartels has led to the establishment of cooperative relationships among competition law enforcement authorities around the world.*[19]

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[18] Schiffman and Weber, p. 254. While the Judiciary Committee used the term properly here, constructive discussion in this area is often hindered by careless use of conclusory and pejorative terms like "export cartel." The term "cartel" implies the possession of market power and the commission of anticompetitive acts (as well as, typically, an element of secrecy). There is no basis for assuming that JET organizations enjoy market power in any relevant market. As former Director of the Antitrust Division's Office of Domestic and International Policy Joel Davidow once noted, "since there are very few products in which the U.S. alone accounts for a dominant share of the world's export, most of the {Webb} associations do not have the power to achieve prices higher than the international market level." *Legal Times of Washington*, June 26, 1978 at 21. Nor is there any basis for assuming that JET organizations or their members are committing anticompetitive acts. Considerations such as these led the OECD in its 1998 recommendation against hard core cartels to draw a careful distinction between naked restraints among competitors, which it condemned, and arrangements "reasonably related to the lawful realization of cost reducing or output enhancing efficiencies" or "excluded directly or indirectly from the coverage of a member country's own laws," or "authorized in accordance with such laws." The latter legitimate and transparent arrangements were specifically *excluded* from such condemnation and have remained so. "Recommendation of the Council Concerning Effective Action Against Hard Core Cartels," 25 March 1998, No. C(98)35/Final. And export associations, under the U.S. system at least, certainly do not operate in secret. In short, the JET provisions provide a safe harbor for joint export activities, not for "export cartels."

[19] Makan Delrahim, Deputy Assistant Attorney General, Antitrust Division, "Antitrust Enforcement Priorities and Efforts Towards International Cooperation at the U.S. Department of Justice" (November 15, 2004).

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In the EC, we now have an important partner in the fight against international cartels. We routinely share non-protected information and coordinate investigative strategies with the EC in order to maximize the success of each other's investigations. EC member states have executed search warrants and obtained testimony and other evidence at our request. The end result of our efforts is often coordinated, simultaneous raids, service of subpoenas, and drop-in interviews of targets located in the United States and Europe. A good example of just how smooth and effective our coordination has become occurred in February 2003, when the antitrust enforcement officials of the United States, the European Commission, Canada, and Japan coordinated surprise inspections, interviews, and other investigative activity in a cartel investigation relating to heat stabilizers and impact modifiers. Without highly effective working relationships among all of those jurisdictions, coordinated action on such a large scale would not have been possible. … Although the divergent outcomes on the GE-Honeywell transaction certainly grabbed international headlines, the reality is that--despite certain differences in our laws--the US agencies and the EC tend to reach the same conclusions on matters where we are engaged with one another on the analysis and work from a common set of facts. … In many ways, US-EC cooperation and coordination is a good model for how an effective bilateral antitrust relationship should work.[20]

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{T}here's been great progress in terms of substantive convergence between the United States and the European Commission. … In our dealings with the EC,

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[20] Makan Delrahim, Deputy Assistant Attorney General, Antitrust Division, "Facing the Challenge of Globalization: Coordination and Cooperation Between Antitrust Enforcement Agencies the U.S. and E.U. (October 22, 2004). This speech also made clear that where cooperation and diplomacy have encountered obstacles, the U.S. joint export trade regime is not to blame:

> *Due to legal constraints in the US and EU, there are limits to our ability to gather evidence for each other and share confidential information. A more comprehensive arrangement that would allow greater evidence gathering assistance and information sharing, akin to our agreement with Australia, remains unattainable for now. The European Commission currently lacks the authority to pursue such an agreement. An IAEAA-type agreement would require a change in EU law to enable the European Commission to make reciprocal cooperative commitments.*

Even on this point, the blockage seems to be gradually dissolving. *See White House Fact Sheet, U.S.-EU Summit: Initiative to Enhance Transatlantic Economic Integration and Growth* (June 20, 2005) at Annex, page 4: "The European Commission and U.S. competition authorities cooperate intensively under the 1991 and 1998 agreements, coordinating enforcement activities and exchanging non-confidential information. To further enhance this cooperation, our authorities will explore ways to allow them to exchange certain confidential information, including with respect to international cartels."

> *both on specific cases and in discussions about broader antitrust policy issues, we find ourselves saying basically the same thing. At a recent OECD meeting I was listening to Commissioner Kroes talk about enforcement priorities with special emphasis on criminal cartel enforcement, and I found myself thinking that Hew Pate could have given the same speech. … The revisions to the technology transfer block exemption are another example of where they have moved in a direction that's consistent with us, as is their movement towards having fewer per se rules. And, of course, the creation by the EC of a senior economist position within the Commission, along with their general recognition of the importance of economic analysis in effective antitrust enforcement, is something the Division has applauded. I am not suggesting that we never reach different conclusions, but the terms of the discussion and the analytical framework are closer than they have ever been. … We have been successful in encouraging other countries to adopt or strengthen their cartel programs, to enhance penalties, and to adopt effective leniency programs, which are such a potent investigative tool in cartel enforcement.*[21]

Although there are no published quotes to demonstrate it, at public speeches recently when asked about unmet U.S. antitrust diplomacy objectives, incumbent officials have been unable to identify any. It even appears that in some countries where the United States (due to the absence of one or more predicate conditions like an independent judiciary) would prefer not to see a strong competition regime emerge for the time being, none is emerging.

U.S. antitrust diplomacy cannot be at once succeeding famously and hobbled by the JET provisions. At minimum, anyone citing diplomatic pressure, "embarrassment," "credibility," "setting a bad example," or any similar factor as a reason to change the JET provisions should be obliged to identify specific U.S. objectives whose achievement is being frustrated, and specific evidence linking that result to the presence of the JET safe harbors.

Of course, this will never happen. The point isn't that the laws attract no foreign criticism – plainly they do. The point is that the criticisms are completely weightless and meaningless, because the U.S. JET policy doesn't actually offend anyone and most governments follow the same policy themselves. The criticisms reflect the occasionally felt need to needle Uncle Sam, nothing more. There is no foreign government that would make even the tiniest concession to the United States, or increase its cooperation with the United States in any area, in exchange for the United States repealing the Webb and ETC Acts. The laws' value as "trading stock" is nil. The cost of maintaining these laws is not low, but *zero*. More to the point, the laws' significant benefits, described above, are unalloyed by any corresponding costs. The Webb/ETC issue ought to be the most easily resolved of all those selected by the Commission for study.

2. No Cost to Domestic Competition

[21] "Interview with Thomas Barnett, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice," *The Antitrust Source* (May 2005).

A second canard is that the JET provisions impair competition in the U.S. market -- either by facilitating collusion among U.S. participants or by making it harder for the U.S. government to contend with foreign cartels selling here. Again there is no evidence of such circumstances existing (now or at any time in the past), and the contrary evidence is overwhelming.

Export associations, whether organized under the Webb or ETC Act, are fully subject to U.S. antitrust laws. Prior registration with U.S. antitrust enforcement agencies is required in order to obtain coverage under the Acts, and ensures government oversight. If U.S. antitrust authorities determine that the activities of an export association (or its members) adversely affect domestic U.S. commerce or restrain the export trade of a non-participating U.S. exporter, they can prosecute. Export associations and their members are also subject to treble damage actions by private parties alleging antitrust injury. Thus, any argument that export safe harbors are inconsistent with a U.S. commitment to vigorous antitrust enforcement is uninformed.

The House Judiciary Committee stated after hearings on the ETC Act that it did "not believe the legislation {would} result in a rejuvenation of international cartels." According to the Committee:

> {A}ny major activities of an international cartel would likely have the requisite impact on United States Commerce to trigger United States subject matter jurisdiction. For example, if a domestic export cartel were so strong as to have a "spillover" effect on commerce within this country – by creating a world-wide shortage or artificially inflated world-price that had the effect of raising domestic prices – the cartel's conduct would fall within the reach of our antitrust laws…. The Committee would expect the Department of Justice and the Federal Trade Commission to continue their vigilance concerning cartel activity and to use their enforcement powers appropriately.[22]

The Commission's International Working Group has observed (with great understatement) that the JET laws "may have limited effect on U.S. consumers."[23] In fact, there is no effect on U.S. consumers. The notion of members of a joint export association abusing the Acts to secretly fix prices or quantities for domestic sales does not merit serious consideration. Aside from the complete lack of any evidence – anecdotal or otherwise – of such abuse, anyone who has had any experience with these laws knows that Webbs and ETCs operate in a fishbowl. In addition to the filings and periodic reports required, Webbs and ETCs are constantly under scrutiny. At the first sign of adverse domestic price impacts, the FTC, acting under Section 5 of the Webb Act, has express power to immediately "summon such associations, its officers, and agents to appear before it, and thereafter conduct an investigation into the alleged violation of the law."

It is not surprising, therefore, that there have been very few antitrust cases challenging export trade association activity in the last thirty years. None have been brought by the government, and the few private lawsuits have not been brought by consumers and have all been dismissed. Of equal significance is the antitrust compliance that the Webb and ETC Acts promote through

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22 *See* Schiffman and Weber, p. 253.

23 Int'l Working Group Memo at p. 5.

their transparency. No Webb or ETC has been involved in any of the many hard core international cartel prosecutions of recent years.

Nor do the safe harbors impede the U.S. government in prosecuting cartels selling into the U.S. market. In fact, what the JET laws stand for is, precisely, the primacy of importing-country enforcement. As for the U.S. enforcement agencies obtaining foreign agencies' help in collecting information and pursuing prosecution in international cartel cases, the story as told by the U.S. enforcers themselves is (as recounted above) one of unalloyed success.

3. No Cost to Trade Liberalization

As with antitrust diplomacy, trade diplomacy has also managed to proceed impressively despite the supposedly debilitating presence of the JET safe harbors. U.S. trade liberalization goals have been achieved on a multilateral, regional and bilateral basis over the past half-century, with no let-up in recent years.

In one negotiation, regarding the North American Free Trade Agreement ("NAFTA"), Mexico asked the United States to repeal the JET provisions or make them inapplicable to Mexico-bound exports. The U.S. government declined, and the negotiations nonetheless concluded promptly and successfully. As later explained in the NAFTA Statement of Administrative Action:

> "*No changes in U.S. antitrust laws, including the Export Trading Company Act of 1982 or the Webb-Pomerene Act, will be required to implement U.S. obligations under the NAFTA. These laws have contributed to the export competitiveness of U.S. industries and they* ***remain appropriate in the context of a free trade area****. Nothing in the Agreement requires any NAFTA government to take measures that would adversely affect such associations."*[24]

In more recent times, the United States has revived Trade Promotion Authority, has negotiated and implemented numerous other free trade agreements (on every populated continent except Europe), and has helped launch a new multilateral negotiating round which now appears to be well en route to a successful conclusion. The JET provisions have not impeded these achievements in the slightest. Indeed, the only other time the JET provisions have attracted any negative attention in a trade forum was during working group discussions aimed at a possible WTO competition agreement opposed by the United States on principle. The handful of critical comments tabled in this working group were -- as the United States pointed out in its own responsive submissions -- based on an inaccurate caricature of JET and the JET provisions.[25]

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[24] NAFTA Statement of Administrative Action at 159 (1993) (emphasis added).

[25] Minutes of WTO Working Group meeting of 1-2 July 2002, WT/WGTCP/M/18, at ¶44 (JET "arrangements clearly had pro-competitive effects"). *See also* U.S. Submission (Aug. 15, 2002), WT/WGTCP/W/203 at ¶¶6-7; Report of Meeting of 20-21 February 2003, WT/WGTCP/M/21, at ¶ 37 (JET arrangements often injected new players into overseas markets, increased competition, supported innovation and lower prices, were not secret and therefore did not bear the hallmarks of cartels).

III. IMPROVED OPERATION OF THE ETC PROGRAM

There is a useful recommendation the Commission could make – not to repeal the JET provisions, but to improve their operation by adjusting slightly the allocation of responsibility between the Department of Justice ("DOJ") and the Department of Commerce ("DOC") at the Export Trade Certificate of Review ("ETCR") application stage.

The needed improvement is a narrow one. By way of background, both the DOJ and the DOC in reviewing ETC applications pursue – quite appropriately – the goal of preventing any adverse effect on pricing or competition in the U.S. market. The departments further recognize that if demand for a covered product is less elastic in the United States than abroad, it might make good business sense to steer as much product as possible toward export markets. For example, if there are entry barriers limiting other sources of U.S. supply, the result could be upward pressure on prices in the U.S. market. The departments believe – again quite appropriately – that they have to guard against this possibility when reviewing ETC applications.

However, the DOJ, which has a veto power over the issuance of certificates, has shown a tendency to base its actions on conjecture, rather than hard evidence, regarding demand elasticities. Specifically, DOJ officials have at times blocked ETCRs based on a concern that the special circumstances outlined above might exist, rather than on actual knowledge and documentation that those conditions *did* exist. This approach puts individual applicants in an impossible position, makes certification harder to get than it should be, leads to overly onerous conditions on issued certificates, and is inconsistent with the intent of Congress to have the ETC as a vehicle to promote exports.

The solution, which the Commission should endorse, is for Congress (1) to require that ETCR applications cannot be blocked or conditioned simply on the basis of conjecture, (2) to require that the government collect and evaluate pertinent data within a reasonable timeframe, rather than allowing the absence of data to justify delays in the granting of an ETCR; and (3) to provide increased resources so that if there is reason to suspect that the unusual demand scenario described above exists, empirical research can be conducted enabling a fact-based resolution. In JETA's view, these resources should be steered to the DOC, which already has a network of overseas commercial officers and is better-situated to meet the daunting challenge of measuring foreign demand elasticities. (Under no circumstances should the burden of producing information on demand elasticities be placed on ETCR applicants; this would only increase the difficulty of using the ETC program.)

Following these minor changes, the DOJ's concerns about competitive impacts in the U.S. market will continue to be squarely addressed; the DOC will be bolstered in its ability to contribute to the fact-based resolution of any initial disagreement with the DOJ about a particular ETCR; and the overall operation of the ETC program can be expected to improve accordingly.

IV. CONCLUSION

Maintenance of the statutory JET safe harbors is essential to continued U.S. export success in many industrial, agricultural and service sectors. Chilling U.S.-based joint export trade would

mean lost U.S. jobs and GDP, further deterioration of the U.S. trade balance, and less U.S. economic engagement (through trade) with key emerging markets around the world -- all for no better reason than protecting foreign consumers against supposed competitive harms that rarely exist and are properly a matter for importing-country enforcement when they do exist.

The JET safe harbors provide clarity and transparency, not a cloak for secret or nefarious behavior. They reflect a policy followed in most advanced antitrust regimes, and do not harm the U.S. Government's global antitrust or trade objectives. Moreover, JETA members, speaking from experience, have confirmed the overriding importance of the legal certainty which statutory JET safe harbors provide. No one outside the user community can dispute this assessment, except based on inference and hypothesis (not actual experience).

The Commission would poorly serve the President, the Congress, and the country as a whole if it recommended repeal, sunset or other limitation of the Webb and ETC Acts.

Sincerely,

- AMERICAN COTTON EXPORTERS ASSOCIATION
- AMERICAN FARM BUREAU FEDERATION
- ASS'N FOR MANUFACTURING TECHNOLOGY
- AMERICAN NATURAL SODA ASH CORP.
- AMERICAN – EUROPEAN SODA ASH SHIPPING ASS'N INC.
- AMERICAN TEXTILE EXPORT COMPANY (AMTEC, LLC)
- CALIFORNIA DRIED FRUIT EXPORT ASS'N
- CALIFORNIA KIWIFRUIT COMMISSION
- CALIFORNIA KIWIFRUIT EXPORTERS ASS'N
- CALIFORNIA PISTACHIO EXPORT COUNCIL
- CORN REFINERS ASS'N
- CHINA TRADE DEVELOPMENT CORP.
- GINSENG BOARD OF WISCONSIN
- HOLLAND & KNIGHT LLP
- MUTUAL TRADE SERVICES
- NATIONAL CHICKEN COUNCIL
- NATIONAL COUNCIL OF FARMER COOPERATIVES
- NORTHWEST HORTICULTURAL COUNCIL
- NORTHWEST FRUIT EXPORTERS
- NATIONAL PORK PRODUCERS COUNCIL / AMERICAN PORK EXPORT TRADING COMPANY – APEX
- OUTDOOR POWER EQUIPMENT INSTITUTE
- PHOSPHATE CHEMICALS EXPORT ASS'N
- U.S. APPLE ASS'N
- U.S. SHIPPERS ASS'N
- USA RICE FEDERATION
- VIRGINIA APPLE GROWERS ASS'N
- WATER AND WASTEWATER EQUIPMENT MANUFACTURERS ASS'N
- WOOD MACHINERY MANUFACTURERS OF AMERICA
- WORLD BUSINESS EXCHANGE NETWORK