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VIA HAND DELIVERY

Honorable Thomas O. Barnett
Acting Assistant Attorney General
Antitrust Division
United States Department of Justice
10th Street & Constitution, N.W.
Washington, D.C. 20530

Re: **Fair Factories Clearinghouse Request for Business Review Letter**

Dear Acting Assistant Attorney General Barnett:

We are requesting, on behalf of our clients, World Monitors Incorporated and the Fair Factories Clearinghouse ("FFC"), a Business Review Letter, pursuant to 28 C.F.R. § 50.6, with respect to the FFC's proposal to operate a database that member companies can use to collect and voluntarily share information about workplace conditions in apparel, footwear, and light manufacturing facilities around the globe, and to develop targeted remediation plans to address concerns identified in these facilities.

The proposed activities for which approval is sought are intended, among other things, to improve the collection and sharing of information relating to factory workplace conditions (*e.g.*, information relating to child labor, forced labor, wages and hours, health and safety, workers' rights, and related issues); to drive compliance with applicable laws and universally-recognized workplace standards; to promote workers' rights and their understanding of these rights; to eliminate the use of "sweatshops" in the manufacture of consumer goods; and to educate the public on these issues. Because we believe that the proposed activities would pose no meaningful antitrust risk, and to the contrary would greatly benefit workers and consumers alike, we would like to request on an expedited basis that the Department provide the members of FFC with confirmation that it has no antitrust enforcement intentions with respect to the proposed activities.

Factual Background

The FFC's proposed activities can be traced back to at least August of 1996, when President Clinton convened a meeting of leaders from the apparel and footwear industries, along with representatives from labor, consumer and human rights communities, to address widely publicized revelations that "some of the clothes and shoes [American consumers] buy are manufactured by people who work under deplorable conditions." The Apparel Industry Partnership ("AIP" or "Partnership") was formed as an outgrowth of this meeting, with the goals of articulating a common set of standards defining decent working conditions, recommending monitoring mechanisms to verify compliance with those standards, and educating consumers as to their importance. Notably for antitrust purposes, two members of the AIP – Nike and Reebok – were direct competitors who collectively represented approximately 55% of the U.S. sales of their key products, athletic shoes. Certain other members were also direct competitors, but only in a *de minimis* sense.

On October 30, 1996, the AIP sent a request to DOJ for a BRL to confirm that its proposed activities did not violate the antitrust laws. Only one day later, on October 31, the DOJ issued a BRL indicating that the DOJ would not challenge the group's proposed activities under the antitrust laws, so long as the members complied with certain basic principles intended to prevent the exchange of competitively sensitive information or any collusive or otherwise unlawful agreements. Among other things, antitrust counsel would be present at any discussions between direct competitors; discussion guidelines would be prepared in advance; and all discussions would be documented.

By December of 1999, the AIP (by then joined by over 100 universities and additional apparel and footwear companies) had developed a Workplace Code of Conduct ("Code") meant to be adopted, on a voluntary basis, by members of the apparel and footwear industries, along with a set of Principles of Monitoring intended to monitor participants' claims of compliance with the Code. In addition to incorporating certain provisions of the federal and state labor laws, the Code also included minimum wage and maximum hours provisions. Members of the Partnership also formed a non-profit association known as the "Fair Labor Association" or "FLA," dedicated to continuing the development of monitoring criteria and implementing procedures. The ultimate goal of this entity was to ensure that the objectives and verifiable standards set forth in the Code were implemented, in order to respond to consumers' demand for accountability with respect to the working conditions under which the products they are purchasing were manufactured.

The Partnership sought, and received, another favorable BRL from the DOJ with respect to the implementation of the Code and the Principles of Monitoring. In its request for a BRL, the AIP emphasized the clear procompetitive benefits of the Code

– gathering and disseminating objective information about labor conditions to allow consumers to make educated choices among products and manufacturers. DOJ, in the BRL, stated the following, "You note that the impetus for the Code was not typical of a cartel or other restrictive agreements, i.e., the desire of rivals to enhance profits by reducing competition, but rather was founded in 'concerns about public policy forcefully articulated by the President and echoed by the human rights, labor, consumer and religious communities.'" Further, the AIP request noted that "the provisions of the Workplace Code that deal with topics of the greatest potential competitive sensitivity [i.e., wage minimums and hour maximums] are those which manufacturers could most easily do without and which were deemed necessary by the labor, consumer, human rights and religious organizations participating in the Partnership's discussions."[1]

The AIP acknowledged that the implementation of the Code and the Monitoring Principles could have some impact on the price ultimately paid by consumers, but argued that this effect would be *de minimis* – citing federal studies for the proposition that "labor typically accounts for less than 3% of the United States retail price of clothing made in domestic sweatshops and as little as 0.5% for garments sewn abroad." Indeed, the AIP noted, there was data to suggest that a modest increase in wages (and a reduction in child or forced labor) might actually *decrease* the ultimate price to consumers, because it would likely result in a sharp increase in worker productivity.

The DOJ's second BRL, issued on April 7, 2000, essentially adopted the reasoning of the Partnership, concluding that "it is far from clear that adherence to the Code will have any adverse effect on the prices paid by United States consumers of apparel or footwear. Moreover, to the extent that a firm's ability to advertise compliance with the Code provides useful purchasing information to a substantial number of consumers, it is possible that development of the Code and Monitoring Principles will have a net procompetitive effect."[2]

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[1] The AIP also claimed that the provisions of the Code, even if widely adopted, would fall well within the "safety zone" established under Statement 7 of the DOJ/Federal Trade Commission's Statements of Antitrust Enforcement Policy in Health Care (which has been applied to other industries) even if participants were actually agreeing to jointly purchase labor – which they were not, given that the standards were voluntary. In support of this claim, the Partnership stated that it was highly unlikely that the labor arrangements undertaken by companies that would choose to adopt the Code would account for over 35% of the unskilled labor market in any U.S. geographic market or in any foreign market, or that the costs of labor under the Code will exceed 20% of the total revenues from products sold by participants utilizing the Code. As noted *infra*, the same is true of the proposed activities of the FFC.

[2] In fact, we do not believe that there is evidence of any increase in prices or decrease in competition flowing out of the activities approved in the 1996 and 2000 BRLs.

The Fair Factories Clearinghouse

The FFC initiative is an organic outgrowth of the activities of the AIP and the FLA, as approved by DOJ in the two BRLs, though it uses different means to further the same objectives. The common goal of each of these initiatives is the eradication of sweatshop conditions in retail production facilities around the globe.

The FFC would include many of the same members as the FLA, as well as other participants, both large and small, in the retail industry. With the assistance of a grant from the United States Department of State, the FFC would own and operate a database that member companies can use to collect and voluntarily share information about workplace conditions in apparel, footwear, and light manufacturing facilities around the globe (*e.g.*, information relating to child labor, forced labor, wages and hours, health and safety, workers' rights, and related issues), and to develop targeted remediation plans to address concerns identified in these facilities.

The FFC project contemplates the following elements:

- System: The FFC will be a not-for-profit entity possessing an exclusive license to the Reebok Human Rights Tracking System (HRTS) – software developed by Reebok to track workplace conditions in the factories from which it sources product. Reebok is donating the HRTS to the FFC in pursuit of the venture's philanthropic mission.

- Goals: The goals of the FFC will be to improve the collection and sharing of information relating to factory workplace conditions at audited factories, to drive compliance with applicable laws and universally-recognized workplace standards, to promote workers' rights and their understanding of these rights, to eliminate the use of "sweatshops" in the manufacture of consumer goods, and to educate the public on these issues.

- How the FFC Will Promote the Achievement of These Goals: The FFC will make the collection and use of information about factory workplace conditions better and more efficient by:

    - Providing members with a technological tool for effectively and efficiently collecting and using information regarding facilities where they source their goods;

    - Providing members with a mechanism for sharing information regarding common facilities from which they (independently) source their goods, thus reducing costly, duplicative, and disruptive audits at production facilities;

- Promoting constructive dialogue between and among FFC members and facilities producing their goods, for purposes of reducing and ultimately eliminating workplace abuses, and enhancing overall workplace quality.

- Sourcing Decisions Will Remain Independent and Autonomous: The database will not "rate" factories as good or bad. Rather, it will be a "decision support tool" to be used by FFC member companies in choosing factories from which to source their products. All sourcing decisions will remain exclusively with the individual member companies, who will remain free to source from whichever factories they choose, and who will not collaborate with other companies in making sourcing decisions.

- Data Collection and Management: The first phase of the FFC will be to license for a fee to companies wishing to use the database software to track workplace conditions in the factories they use. The fees derived from licensing the database software will be used generally to promote the mission of the FFC, and specifically to underwrite the movement to the second phase of the project. This first phase is already underway. Because it involves no issue of member collaboration, no Business Review Letter is sought for Phase One of the FFC.

- Data Sharing: The second phase of the FFC, for which a Business Review Letter is sought, will involve the creation of a database of "shared" workplace information on factories. This database will primarily consist of information that is collected through audits undertaken or commissioned by member companies.[3] Factories can also submit audits that they commissioned on their own, provided such audits satisfy the requirements of the FFC. During this second phase, member companies will at all times remain free to decide what information they wish to contribute to the common (shared) database.

- Access to Information: Only FFC members will have access to the information in the shared database. Factories will not be given access to such data, except in aggregated form that will not enable entity-specific information to be ascertained.

- Collaboration on Remediation: The sharing tool that will be put in place during the second phase will also contain a mechanism that will allow FFC members to determine whether particular factories are making product for other FFC members, and enable the members to work together on the

[3] The workplace information that would be captured and used through the FFC database will generally be quite similar in nature to that captured in generally accepted ethical sourcing codes, such as the FLA Code and auditing protocols. *See, e.g.,* http://fairlabor.org/all/code/index.html, http://fairlabor.org/all/monitor/compliance.html).

development and effectuation of remediation plans for such factories. This tool will help eliminate the risk of ineffective, inefficient, or contradictory remediation demands being placed upon shared factories, and should help ameliorate sweatshop conditions in shared facilities. However, as noted above, members will always make independent decisions regarding whether or not to source from particular facilities, and will be expressly prohibited from jointly threatening factories with termination of any sourcing relationship or from acting collectively to terminate such factories.[4]

- Antitrust Safeguards: Pursuant to the FFC's Membership Services Agreement, Members will be required to comply with an Antitrust Policy Statement (attached here as Exhibit A), and violation of such Policy will be grounds for termination of membership. Among other things, the Policy require that outside counsel will be present at all meetings of the FFC Board and membership, and otherwise as counsel deems appropriate. In addition, the Policy makes clear that notwithstanding the joint remediation efforts, all decisions regarding whether a particular member will use a factory rest with that individual member.

- Non-Restrictive Membership Rules: FFC membership is presently contemplated to be open to all retailers and brands. FFC is considering rules that would make some form of membership available in the future – on an appropriate and non-discriminatory basis – to factories, universities, standard-setting organizations, and buying agents. These latter entities may receive some lesser level of access to information than would retailers and brands, but whatever information they would have access to would be equally available to that class of members.

- Industry Participation: The initial membership of the FFC is aimed primarily at footwear and apparel brands and retailers. The long-term goal of the FFC would be to become a tool for all manner of retail brands and companies, including toys, electronics, and other industries, to eradicate sweatshop conditions in their supply chains.

[4] Note that members do not today, and would not under the auspices of the FFC, collectively agree to share factories with one another; instead, they would continue to independently identify factories that have the capacity, skill, and other necessary elements to produce product, and when they approach the factory as a potential supplier, they will generally have no information regarding who else is producing goods there. (Indeed, some companies source products through sourcing agencies, and are one step further removed from the process.) The FFC would enable a member who is currently using, or considering using, a particular factory to communicate with another member who has submitted an audit regarding that factory, and then, if remediations were necessary, the parties would be able to decide if they wished to jointly develop and effectuate a remediation plan. At all times, the members would be free to take any action (or inaction) they independently deem appropriate as a result of the inspection/remediation process.

- Use of Revenues: All revenues derived from the operations of the FFC will be used to cover administrative costs, with any surpluses being applied to promote workers' rights, the identification and remediation of abusive workplace conditions, and public education on these matters.

Legal Analysis

We believe that that the FFC may lawfully undertake the elements of their proposed program as set forth above, based upon its plainly procompetitive goals and the safeguards developed to prevent any potentially anticompetitive conduct.

The FFC proposal parallels, and builds on, the procompetitive aspects of the AIP program in a number of pertinent respects:

- Like the AIP, the FFC is intended to develop a means by which its members can promote compliance with critical human rights and labor laws and standards at the factories from which they source products. It is "not an initiative devised by competing manufacturers but rather the concerns about public policy forcefully articulated by the President and echoed by the human rights, labor, consumer and religious communities." (December 13, 1999 Request for BRL, at 6.)

- As was true with respect to the AIP's voluntary standard-setting, FFC members will always make independent decisions regarding whether or not to source from particular facilities. Thus, the purpose and effect of the FFC data sharing tool will simply be to promote fundamental human rights concerns, and in no way to limit competition between or among the members.

- Like the AIP, the FFC proposal presumes the implementation of safeguards to prevent the exchange of competitively-sensitive information through the database, as set forth in the Antitrust Policy and Rules to which all members will be bound. To the extent that some audits that will be placed in the database may include certain factories' wage and hour information, the exchange of such information among the member companies will not result in any anticompetitive effects. This is true for a number of reasons, including the fact that the FFC's goal is to raise wages to legal levels, rather than to fix input costs as between the members, and, as noted above, the

impact of success on this front will not materially affect the prices paid by consumers.[5]

- Importantly, as was true for the AIP Code, the aspects of the proposed FFC database "that deal with topics of the greatest potential competitive sensitivity [i.e., wage minimums and hour maximums] are those which manufacturers could most easily do without and which were deemed necessary by the labor, consumer, human rights and religious organizations participating in the [formation of the program]." (December 13, 1999 Request for BRL, at 6.) Moreover, this information will not be seen by any other factory (which might otherwise conceivably be able to use the information to an anticompetitive end), since factories will not be permitted to join the FFC or access the database.

- Finally, as with the AIP, even if the FFC proposal were analyzed under the rules applicable to competitor joint ventures for the purchase of labor inputs (which, in light of the voluntariness of the program, it should not be), it would easily fall within the safe harbors set forth in Statement 7A of the DOJ/FTC's 1996 Statements of Antitrust Enforcement Policy in Health Care for such arrangements, in that (1) the members' joint purchases would account for less than 35 percent of the total sales of the purchased product or services in the relevant market (for relatively unskilled labor); and (2) the cost of the services purchased jointly would likely account for less than 20 percent of the total revenues from all products or services sold by each of the competing participants in the joint purchasing arrangement.[6]

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[5] The AIP noted that it was extremely unlikely that widespread adoption of its proposed workplace standards would have an appreciable impact on the prices or output of apparel and footwear products sold in the U.S., because "labor typically accounts for less than 3% of the United States retail price of clothing made in domestic sweatshops and as little as 0.5% for garments sewn abroad." (1999 Request for BRL, at 6.) We believe that the same is true with respect to the *de minimis* relationship between labor costs and the price of other retail and light industry goods manufactured by entities who may ultimately become members of the FFC.

[6] As to the second requirement, given that, like the AIP, the FFC hopes that a large number of companies will ultimately make use of this database, it is impossible to provide specific information as to what percentage of the U.S. retail price of apparel, shoes, and the other retail products that are hoped to be a part of the database reflects the costs of labor. However, as noted by the AIP, the typical labor costs as a percentage of the selling price of apparel and footwear products are in the single digits, December 13, 1999 Request for BRL at 8, and we believe the same is true for other retail items. It is unlikely in the extreme that, in any particular case or for any particular product, this percentage would reach as high as 20%.

For all of these reasons, it is clear that, as in *Maple Flooring Manufacturers Ass'n v. United States*, 268 U.S. 563 (1925), while the purpose of the proposed FFC database would be to "gather and disseminate information" about certain labor-related variables, because the members would do so "without however reaching or attempting to reach any agreement or any concerted action with respect to prices or production or restraining competition," they would "not thereby engage in unlawful restraint of commerce." *Id.* at 586.[7]

The FFC proposal does introduce one materially new element that was not addressed in the prior BRLs – the proposed mechanism within the database that will enable members interested in a common factory to work together on the development and effectuation of remediation plans for such factory – but this aspect of the proposal does not raise any material antitrust concerns. As noted above, this tool is intended to help eliminate the risk of ineffective, inefficient, or contradictory remediation demands being placed upon shared factories, and thereby to help ameliorate sweatshop conditions in shared facilities. At the same time, members will be prohibited from making joint sourcing or factory termination decisions based upon any shared remediation activities. The proposed joint remediation activities are thus entirely ancillary to the manifestly procompetitive and ethical objective of promoting decent and humane working conditions around the globe, and easily satisfy the standards for competitor collaborations established in the Department's 2000 *Antitrust Guidelines for Collaborations Among Competitors*, §§ 1.2, 3.3 (explaining that where the nature of the particular agreement – including the parties' subjective intent – and the absence of collective market power together demonstrate the absence of anticompetitive harm, there is no basis for further inquiry). *See also, e.g., Los Angeles Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1395 (9th Cir. 1984) (recognizing that "some agreements which restrain competition may be valid if they 'are subordinate and collateral to another legitimate transaction and necessary to make that transaction effective'") (quoting Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 Yale L.J. 775, 797-98 (1965)), *cert. denied*, 469 U.S. 990 (1994).

Here, again, the proposed joint remediation efforts will, if successful, result in the quicker adoption of legally-mandated wage and other standards at affected factories; will have at most a *de minimis* effect on the price of the end products sold; and, in any case, will, by their nature, be divorced from any conceivable intent to harm

[7] The Court noted that it "decide[d] only that trade associations or combinations of persons or corporations which openly and fairly gather and disseminate information as to the cost of their product, the volume of production, the actual price which the product has brought in past transactions, ... and who, as they did, meet and discuss such information and statistics without however reaching or attempting to reach any agreement or any concerted action with respect to prices or production or restraining competition, do not thereby engage in unlawful restraint or commerce." 268 U.S. at 586.

competition between or among the jointly-acting members. Finally, as noted, members will always make independent decisions regarding whether or not to source from particular facilities.

* * *

We would be pleased to provide you with any further information that you may require. We appreciate your prompt attention to this matter.

Very truly yours,

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