DEPARTMENT OF JUSTICE

ANTITRUST AND TRADE ASSOCIATIONS

Address by

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I am delighted to be here today to talk with you about antitrust and trade association law.

To begin with, the program organizers have asked me to speak about "DOJ's Increased Antitrust Budget, Manpower, and Enforcement Activity: What Does This Mean to Trade Associations?" To put the answer to this question in perspective, it may be useful to start by getting a sense of exactly what sort of increase in antitrust budget and manpower has taken place. In 1980, the Antitrust Division had 456 attorneys. By 1989, staffing had fallen to 229 attorneys; it was, in other words, cut almost exactly in half, over a period when real GNP had grown by over 20% and the complexity of the economy was greater than ever. Under Jim Rill, staffing levels grew modestly, so that in 1992, there were 295 attorneys. Anne Bingaman has been fortunate to be able to continue this modest increase, so that we had 323 attorneys in 1994 and are projected to have moderate additional growth in 1995. That still put us some 30% below 1980 levels in 1994, despite nearly 30% growth in real GNP.

So in answer to the question, "what does this mean for trade associations?," the short answer is that it means what it means to the rest of the economy: we are getting to a point where we may soon have the bare minimum level of resources needed to do our jobs. That, we hope, is a cause for anxiety on the part of price-fixers and others who commit clear-cut antitrust violations that are likely to do significant damage to the economy. But it should be a cause for celebration for the vast majority of law-abiding businesses who all have a stake in a healthy, competitive economy.

And that means, of course, your members. It is good for your members that would otherwise be the victims of price-fixing, for price-fixing can raise the prices of the intermediate goods and services your members use as inputs and, when engaged in by buyers, can artificially lower the prices of the goods and services your members sell. It is good for your members that

might be foreclosed from a market because of arrangements that lock up the available distribution channels or deprive your members of needed inputs. It is good for your members that buy inputs from, or sell outputs to, concentrated markets that could become more concentrated as a result of anticompetitive mergers and acquisitions.

Because of the stake that your members have in a competitive economy, we often find that trade associations play a positive role in helping us do our jobs. Trade associations often bring to our attention competitive problems in an industry, frequently in the context of legislative activity or other aspects of our competition advocacy mission, but also in connection with investigations of potential violations of the antitrust laws. Once an investigation has begun, trade associations are a useful source of information about the functioning of an industry, particularly during the early stages of an investigation. And trade associations often serve an important compliance function, by holding meetings and seminars and inviting speakers from the antitrust enforcement agencies or the antitrust bar. We often tell members of the private bar that they are the first line of defense for preserving competition in our economy, because the advice they give their clients to keep them in compliance with the antitrust laws amounts to far more effective and efficient law enforcement than trying to prosecute violators after the fact. That goes equally well for trade associations, whose antitrust compliance activities can help keep both the associations themselves and their members out of trouble. Indeed, last summer and fall, Assistant Attorney General Bingaman wrote to the executive directors of a wide range of trade associations, offering them the opportunity to have an Antitrust Division staff attorney attend any of their meetings in Washington, D.C. to give a brief presentation concerning our enforcement program. In response, about a dozen presentations have been given or scheduled, and we expect the program to continue. That brings me to the subject of the potential antitrust pitfalls in trade association activities themselves.

Let me first stress the fact that the Division regards most trade association activity as procompetitive or at least competitively neutral. The association may, for example, perform an important information-gathering function that would be difficult for the members to carry out on their own. Or it may have as a principal function the establishment of standards that protect the public or allow the interoperability of components made by different manufacturers. Or the association may represent its members before legislative bodies and governmental agencies, a competitively-neutral activity that may serve the socially desirable function of improving the information upon which governmental decisions are made. If done carefully and with adequate antitrust advice, all of these worthy goals can be accomplished without undue antitrust risk.

The caveat is an important one, however, because trade associations and their members sometimes fail to take account of antitrust concerns, and consequently end up engaging in illegal conduct. The most obvious example is outright price-fixing, bid-rigging, or market division by members at trade association meetings—or, more likely, rump sessions around a bar or at dinner. Sometimes this happens because business people erroneously assume that they haven't engaged in price-fixing unless they have fixed a specific price. Here, compliance programs can help. At other times it happens because of the sheer perversity of human nature. I don't know what you can do about that except try to make your members aware of the severe penalties involved.

Closely related are the instances in which the trade association itself goes beyond its legitimate functions and organizes anticompetitive activity. The Division brought a case involving such activity last October, *United States v. Association of Retail Travel Agents.* In that case, the Division charged ARTA in connection with ARTA's efforts to orchestrate a boycott of travel providers that did not conform to ARTA's vision of an appropriate travel agent compensation system. ARTA's Board of Directors had adopted a document called "ARTA Objectives for the Travel Agency Community." That document called for a minimum ten percent commission on hotel and car rental sales by travel agents, the elimination of all

distribution outlets for airline tickets other than travel agents, and the payment of commissions based on full fares rather than the actual discounted prices. A few days later, ARTA hosted a press conference, where it announced the content of the ARTA Objectives. Shortly thereafter, one of ARTA's board members announced that his travel agency would cease doing business with certain travel providers whose commission and sales practices did not comport with the ARTA Objectives, and invited other travel agents to do likewise. Thereafter, at least one other ARTA board member made a similar announcement.

This is the kind of trade association activity that is of serious competitive concern. ARTA developed a position for its travel agent members on the prices and terms upon which they should be compensated, and then invited and encouraged members not to deal with travel providers that did not follow its prescription. This amounted, in effect, to an invitation to engage in price-fixing.

Probably the best way of thinking of a trade association is that it is a form of joint venture. Like a joint venture, a trade association can serve procompetitive ends even though it involves collective action by horizontal competitors. At the same time, the association can operate in ways that have significant adverse effects on competition, and such conduct can readily be challenged under the antitrust laws.

In the context of joint ventures generally, such conduct usually involves either overinclusiveness or collateral restraints. That is, either the venture includes too many of the competitors, and hence creates market power, or it imposes rules that restrict competition more broadly than reasonably necessary to achieve the procompetitive aims of the venture. In the specific context of trade associations, we are more often focusing on the collateral restraints aspect, rather than on overinclusiveness. The fact that almost all doctors in a given specialty wish to belong to the same professional association, for example, would likely not set off the same kind of alarm bells that would be rung by the same doctors wishing to belong to the same

HMO or PPO, to the exclusion of other, competing HMO's or PPO's. Of course this generalization may fail to the extent the association begins to resemble a traditional, economically-motivated joint venture, but I think as a generalization it is reasonably sound.

So what kind of collateral restraints might give rise to concerns in the trade association context? One broad class consists of rules designed to restrict members from competing against each other. The most egregious form is price-fixing, which we have touched on already. Less extreme, but also likely to be unlawful, are industry codes of conduct that restrain competition. The classic Supreme Court case is *Professional Engineers*.[1] There, the Supreme Court upheld the Justice Department's challenge to an ethical rule of the National Society of Professional Engineers, a rule forbidding its members from engaging in competitive bidding. I would also include in this class boycotts used to enforce a price-fixing or similar arrangement. In such cases, the enforcement mechanism is generally treated in the same manner as the rule it enforces.[2] A boycott in aid of a naked restraint on price or output is treated as unlawful per se, or at the very least presumptively unlawful.[3]

The other major class of restraints are those designed to restrict competition, not within the group, but between favored firms and disfavored firms. The theme here is exclusion rather than collusion. An example is a seal of approval or other standards-setting activity.

I'm not going to dwell at length on standards-setting because I know you have other speakers that will be addressing the subject later. I want to touch on it, however, because it is a subject that seems to give rise to a great deal of concern and confusion in the standards-making community.

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[1] *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978).

[2] *See, e.g., FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 433 (1990); *Wilk v. American Medical Ass'n*, 719 F.2d 207, 221-22 (7th Cir. 1983), *cert. denied*, 467 U.S. 1210 (1984).

[3] *See id., see also NCAA v. Board of Regents*, 468 U.S. 85, 109-110 (1984).

The first point to make about standards-setting is that it will almost invariably be analyzed under the rule of reason, unless it is merely a device to enforce a price-fixing agreement by excluding new entrants or by punishing members who deviate from the cartel.[4] Standards have many procompetitive benefits to consumers by providing consumers with information, by ensuring that products of different manufacturers are compatible with each other, and by keeping unsafe products out of the marketplace. As such, rule of reason treatment is generally appropriate.

The second point is that market power is an important factor in determining whether a standard can have an anticompetitive effect and therefore can be unlawful. If certification by a particular group is only one among many ways to be recognized by consumers as acceptable, deprivation of that certification is unlikely to have a significant competitive effect.[5] If, on the other hand, failure to adhere to the particular standard would result in effective exclusion from the market, then there is much greater reason to be concerned about the appropriateness of such exclusions as do take place.[6]

The third point is that exclusion by an entity with market power is not necessarily unlawful, depending on the legitimacy of the reasons for exclusion. And one important proxy for the legitimacy of the exclusion is the fairness of the process by which it was reached. It is no coincidence, therefore, that the two most significant recent Supreme Court cases in this area arose from processes that were fundamentally flawed. In *American Society of Mechanical Engineers v. Hydrolevel Corp.*,[7] a manufacturer of safety devices for water boilers made

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[4] For an example of the latter, see *United States v. Trenton Potteries*, 273 U.S. 392 (1927).

[5] *See, e.g., Clamp-All Corp. v. Cast Iron Soil Pipe Institute*, 851 F.2d 478 (1st Cir. 1988, cert. denied, 109 S. Ct. 789 (1989).

[6] *See American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556 (1982); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988).

[7] 456 U.S. 556 (1982).

competitive use of the position of one of its employees as a vice-chair of the relevant standards-setting subcommittee of ASME. To meet a competitive threat from another company, the employee worked with the chair of the subcommittee to request an opinion from ASME concerning the competitor's product. The chair then responded to the letter that he himself had helped draft, erroneously suggesting, on ASME stationery, that the competitor's product was unsafe and in violation of ASME's code. The employee was later commended in his personnel file for "efforts and skill in influencing the various code making bodies to 'legislate' in favor of [the manufacturer's] products."[8] The Supreme Court upheld a finding of liability against ASME.

Similarly, in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*,[9] a manufacturer of steel conduit for electrical wiring defeated an attempt by a competitor to get plastic conduit approved as safe for use in electrical wiring. It did so by "packing" a meeting of the National Fire Protection Association at which the relevant provisions of the National Electrical Code were to be discussed and voted upon. The Supreme Court held that the *Noerr-Pennington* doctrine[10] could not protect the manufacturer from liability for this abuse of the standards-setting process.

I've spent a fair bit of time this morning expounding hornbook law on the antitrust treatment of trade associations. This is not an accident. The law in this area is fairly straightforward and settled. It strikes a proper balance between encouraging the many procompetitive activities of trade associations and ensuring that those activities do not spill over into actions that can restrain competition. I have no dramatic new initiatives to announce. Rather, our goal at the Antitrust Division is to enforce that settled law—vigorously, fairly, and

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[8] 456 U.S. at 571 n.8.

[9] 486 U.S. 492 (1988).

[10] The *Noerr-Pennington* doctrine protects a defendant from liability for anticompetitive government actions and incidental anticompetitive effects resulting from the defendant's petitioning the government for such actions. *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

efficiently, and with appropriate attention to keeping your members out of trouble in the first place, which is the most efficient enforcement of all. We hope you will assist us in that endeavor.