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October 17, 1997

Joel I. Klein, Esq.
Assistant Attorney General
Department of Justice
Antitrust Division
Main Justice Building
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Re: Request for Department of Justice Business Review

Dear Mr. Klein:

On behalf of our client the Interactive Travel Services Association (the "Association"), we respectfully request issuance of a business review letter pursuant to the Department of Justice's Business Review Procedure, 28 C.F.R. § 50.6. The Association requests a statement of the Department's current enforcement intentions with respect to the contemplated activities of the Association which are described in this letter. In short, the Association desires to undertake activities directed towards the goal of encouraging the growth of the online travel business. The basis for the Association's request and the information supporting it are set forth in this letter.

I. FORMATION OF THE ASSOCIATION

The proposed Association is the product of the rapidly developing online travel services industry. This new medium offers tremendous new opportunities for innovation, increased consumer choice, and enhanced competition in the marketing of travel services. This industry is now in its infancy. Since electronic commerce has itself only become feasible recently, many complex technical, legal and policy issues have arisen and remain unresolved. How these issues are addressed will determine whether consumers will realize the potential benefits which this new medium promises. In addition, there is only limited consumer and supplier awareness of this medium as a potential alternative for the purchase and sale of all types of travel related services. The founding members intend the Association to provide a legitimate forum for providers of online travel services and other interested parties to develop positions regarding issues of common concern to the future growth of the

online travel services industry and to educate the public about this new medium. All Association agendas, discussions, and activities, including both Association and committee meetings, will be closely monitored by experienced antitrust counsel to ensure that the Association strictly limits its activities to appropriate matters. The Association intends to develop written antitrust guidelines and to maintain a regular antitrust compliance program.

The proposed founding members of the Association are as follows: American Express Travel Related Services Company, Inc. ("AMEX")(amexp.com), Biztravel.com, Inc. ("Biztravel")(biztravel.com), Internet Travel Network ("ITN")(itn.net), Microsoft, Inc. ("Expedia")(expedia.msn.com), Preview Travel, Inc. ("Preview")(previewtravel.com), America Online, Inc. ("AOL")(aol.com), Excite, Inc. ("Excite")(excite.com), Pegasus Systems, Inc. ("Pegasus")(travelweb.com), Sun Microsystems ("Sun")(sun.com) and TheTrip.com, Inc. ("TheTrip")(thetrip.com). Each of these proposed founding members join in this business review request. To gain a better understanding of the variety of services now offered by online travel services companies, we encourage the Department to visit the websites listed above for each of the member companies which provide travel services.

The Association will be organized as a non-profit, tax-exempt corporation pursuant to I.R.C. § 501(c)(6). The Association intends to request non-profit tax exempt status from the Internal Revenue Service. Membership will be voluntary. All companies actively involved in the sale of travel related services online would be eligible to become full members. All companies otherwise involved or interested in the industry would be eligible to become associate members. As such, associate members would include hardware and software companies whose products enable online commerce, traditional travel agencies, commercial online services, internet service providers and internet content providers. The Association will have no control over its members' actions or ability to set prices. Nor will the Association have the right or ability to force its members to comply with or adhere to positions the Association may take before any legislative body. Once formed, the Association intends to locate and hire an independent Executive Director with no ties to any of its members to coordinate the Association's activities. The Association has not commenced activities pending the Department's action on this business review request.

II. THE ASSOCIATION'S CONTEMPLATED ACTIVITIES

The Association's goals will be those typical of a trade association -- to provide a forum whereby industry members have an opportunity to voice their opinions about issues which concern them and to promote the industry to the public. The following are the specific activities which the Association proposes to undertake, listed in order of importance:

1. Identify Problems within the Industry. The Association plans to identify and propose solutions to issues of common industry concern presented by the borderless nature of commerce over the Internet. All industry members (as well as all persons engaged in electronic commerce) face common issues presented by jurisdictional differences, cross-border issues, the challenge of finding ways to serve customers globally, and proposed local, state, national and international efforts to regulate and/or tax electronic commerce.

2. Promote Consumer Protection. The Association will work with its members to promote consumer protection in the online travel business through development and support of anti-fraud measures, ethical practice standards and steps to insure the security of financial transactions over the Internet. Such efforts will seek to eliminate false and misleading forms of marketing but shall not, in any way, limit or ban truthful and non-deceptive advertising of the price, quality or availability of online travel services.

3. Educate Consumers. The Association plans to educate consumers regarding the benefits and features of the online purchase of travel services. The Association's education programs will seek to increase consumer awareness and acceptance of this new medium, and decrease consumer skepticism and reluctance to utilize online computer networks for financial transactions in general, and travel reservations in particular.

4. Educate Travel Suppliers. The Association plans to educate travel suppliers regarding the unique requirements and features of the online medium and to encourage the growth of the online travel business. This education effort will include outreach to airlines, hotels, cruise lines, resorts, car rental companies, and their related trade associations to promote the online travel industry.

5. Present views on matters of concern to the industry. The Association plans to express its views on matters of common concern before federal and state legislatures, administrative agencies, and courts. The Association may seek, support, or oppose legislation or regulations affecting the industry or online commerce in general. Given the attention which online commerce is now receiving, many governmental bodies are or shortly will be considering measures which could greatly impact the online travel business. It is critical for the industry to have a voice in this dialogue. From time to time, important issues may also arise in litigation. In such cases, the Association would seek to participate on behalf of the industry as an amicus curiae. Legislative issues may include, but not be limited to issues affecting consumer privacy, security of financial transactions, ethical and non-discriminatory dealings in online transactions and availability of products and services. The Association may lobby with respect to legislation concerning each of these areas.

6. Information Clearinghouse. The Association plans to provide a central source of information about the industry for government, industry members, the media, suppliers and consumers. This function would not include the exchange of company specific competitively sensitive information. All proposed information gathering and dissemination activities would be reviewed and approved in advance by experienced antitrust counsel to ensure compliance with traditionally accepted protocols in this area. At present, the Association plans to make such information available to members and nonmembers alike, through a Web site, where the information will be accessible free of charge.

7. Research. The Association plans to conduct appropriate market research regarding industry composition, trends, and future directions with respect to electronic commerce. Once again, this function would not include the exchange of company specific competitively sensitive information. All proposed information gathering and dissemination activities would be reviewed and approved in advance by experienced antitrust counsel to ensure compliance with traditionally accepted protocols in this area. This research will be made available to all interested parties through the Association's Web site.

8. Forum. The Association will provide a forum for legally appropriate discussions of common industry issues with vigorous supervision by experienced antitrust counsel.

III. GUIDELINES TO ENSURE ANTITRUST COMPLIANCE

To ensure strict compliance with the antitrust laws, the Association's legal counsel will prepare written guidelines to govern all Association activities. The written guidelines will enunciate the permissible scope of discussions among members and, among other things, will specify that, in the course of the Association's discussions, no participant will seek or disclose competitively sensitive nonpublic information or data from which such information might be discerned. The guidelines will be provided to all Association members at the time they join the Association and thereafter will be sent to all members on a regular basis.

A written agenda and minutes will also be produced for each Association meeting. Legal counsel will attend all Association meetings (including those of working groups and other substantive discussions involving competitors) and will be responsible to ensure that the group's discussions are restricted to legally appropriate topics. Participation of experienced antitrust counsel at all meetings will ensure that the discussions will not facilitate or result in anti-competitive conduct. General discussions of the topics discussed above will not involve the disclosure of competitively sensitive, non-public information or otherwise run afoul of the antitrust laws.

The Association also intends to develop a formal antitrust compliance program which will be reviewed with the Association's Board of Directors on an annual basis. Through these steps and others, the Association is determined to ensure full compliance of its activities with the antitrust laws.

IV. PROCOMPETITIVE BENEFITS OF THE ASSOCIATION

The risk of anti-competitive harm is small here. The Association's efforts to enhance the security, convenience and awareness of online commerce and the dissemination of such information will have substantial pro-competitive benefits. Consumer interest in the Internet and the electronic marketplace as a tool of commerce is in its infancy, but clearly on the rise. "Although online travel services will account for as much as half of all online retail purchases at the end of 1996, profitability is still years away, and the field is bracing for what it expects to be an intensely competitive 1997." Roberts, "Opportunities Appear Robust for Online Travel Services," WebWeek Vol. II, Issue 20, at 21 (December 16, 1996). In addition to AMEX, Biztravel, ITN, Preview and Expedia, other online travel services abound. Full-service travel Web sites compete vigorously with traditional travel agents and travel service suppliers for customers in this growing market. In addition, each of the major U.S. air carriers has entered the online travel business by offering direct ticket sales via their own branded Web sites. Unlike the airlines, online travel agents directly promote interbrand competition by offering consumers tickets on all carriers. Increased consumer awareness of online travel services will result in more, not less, competition. The gathering and dissemination of accurate information about online travel services and providers (as well as the derivative dissemination of accurate information about the security of online credit card transactions) will help promote competition.

Online travel services are only a very small fraction of the multi-billion dollar American travel market. The relevant market here is the total travel market. The Association's members hold relatively minor shares in the multibillion dollar U.S. travel industry. The Association's largest member, AMEX, accounts for an less than 10 percent of sales of travel services in the United States.¹ Preview's, Expedia's, ITN's and Biztravel's shares of the total U.S. travel market individually are less than .05 percent. Moreover, online travel services are not a submarket of the travel market but, rather, simply a means of delivering a wide variety of travel services.

¹ According to the U.S. Travel Industry Association, the U.S. travel industry generated approximately \$420 billion in revenues in 1995 and of that, \$101 billion was booked through travel agents. Airlines tickets alone generated \$60 billion in gross travel agent billings. There are over 33,000 travel agencies in the United States. The top 50 travel agencies account for less than 31% of airline bookings.

The geographic market here, such as it is, is at least national. See, e.g., Thompson v. Metropolitan Multi-List, Inc., 934 F.2d 1566, 1573 (11th Cir. 1991) ("The process of defining a geographic market is more difficult when the courts, are attempting to define a geographic market for something as intangible as information contained in data banks and conveyed via computers"). The worldwide scope of the Internet by its nature suggests a potentially worldwide market.

No member of the Association has market power in the provision of travel services. Competition in the travel industry is robust and the barriers to entry are low -- any established travel agency can enter the market simply by creating a web page. The Association will not lessen or injure competition.

V. LEGAL ANALYSIS

The Association's members may lawfully meet to discuss the topics addressed in this letter. The Supreme Court has held that formation of a trade association is not the sort of business practice which is per se anti-competitive. Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284, 295 (1985). (A trade association is "not a form of concerted activity characteristically likely to result in predominantly anticompetitive effects.") Indeed, the Supreme Court held in Maple Flooring Manufacturers Ass'n v. United States, 268 U.S. 563, 586 (1925), that trade associations which merely "gather and disseminate information" but do not "reach[] or attempt[] to reach any agreement or [engage in] any concerted action with respect to prices or production or restraining competition, do not thereby engage in unlawful restraint of commerce." The Association is being formed for the purpose of educating consumers about online travel services and to enable the industry to express its views on matters of common concern before the U.S. Congress, governmental agencies, state legislatures and the courts. Under Maple Flooring Manufacturers Ass'n, 268 U.S. at 586, the Association poses no restraint of trade concern.

Furthermore, the law is well-settled that "when a trade association provides information . . . but does not constrain others to follow its recommendations, it does not violate the antitrust laws." Schachar v. American Academy of Ophthalmology, Inc., 870 F.2d 397, 399 (7th Cir. 1989), (citing Consolidated Metal Products, Inc. v. American Petroleum Institute, 846 F.2d 284 (5th Cir. 1988) (summary judgment for petroleum industry trade association which refused to certify certain equipment manufactured by plaintiff); see also Clamp-All Corp. v. Cast Iron Soil Pipe Institute, 851 F.2d 478, 486-89 (1st Cir. 1988). In contrast, trade association cases in which a restraint of trade was found typically involve "enforcement devices." Schachar, 870 F.2d at 399 (citing National Society of Professional Engineers, Inc. v. United States, 435 U.S. 679 (1978); Wilk v. American Boating Association, 719 F.2d 207 (7th Cir. 1983); Moore v. Boating Industry Associations, 819 F.2d 693 (7th Cir. 1987); Hydrolevel Corp. v. American Society of Mechanical

Engineers, 635 F.2d 118, 124-27) (2nd Cir. 1980), affirmed on other grounds, 456 U.S. 556 (1982); and Indian Head, Inc. v. Allied Tube & Conduit Corp., 817 F.2d 938, 946-47 (2nd Cir. 1987), affirmed on other grounds, 486 U.S. 492 (1988)). Generally, the enforcement mechanism is what constitutes the restraint of trade. Schachar, 870 F.2d at 399.

Here, the Association does not intend to and will not have the ability to enforce compliance with standards or engage in industry self-regulation. Each member of the Association, along with other companies in the travel and electronic commerce industries, will have the unilateral right to determine whether to adopt potential voluntary anti-fraud measures, consumer education methods and responses to proposed legislation. Members' adoption of the Association's recommendations will be strictly voluntary -- there will be no enforcement mechanism to compel members to comply with the recommendations. Furthermore, none of the Association's proposed activities is intended to result in a boycott by the Association of, or a concerted refusal by the Association to deal with any person.

The trade association proposed here is unlike that of United States v. Container Corp., 393 U.S. 333 (1969). The association in Container Corp. consisted of a highly concentrated industry which produced a fungible product, the demand for which was inelastic. The association members exchanged information related only to this product. Id. Neither the travel services industry in general, nor the online travel services industry in particular, is concentrated. Travel covers an enormous variety of services with potential offerings limited only by the imagination. The barriers to entry in online travel services are low. Moreover, unlike the product involved in Container Corp., demand for travel services is relatively elastic and the product is not fungible.

VI. CONCLUSION

On behalf of the Association, we respectfully request that the Department issue a business review letter pursuant to 28 C.F.R. § 50.6 confirming that the Department has no antitrust enforcement intentions with respect to the proposed formation of the Association and the activities specifically identified in this letter. We appreciate your prompt attention to this matter and will be pleased to provide you with any further information you require.

Very truly yours,



Leonard R. Stein