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**Information Exchanges, Benchmarking and Other Collaborative Efforts
Among Competitors to Protect the Nation's Computer
Infrastructure -- What are the Antitrust Concerns?
By Lawrence I. Fox¹**

It is clear that the national need to address cyber-terrorism and protect the nation's computer infrastructure networks will require a substantial level of collaboration and information sharing, not only between the public and private sectors, but also among industry competitors. Such competitor collaborations, while generally viewed as pro-competitive by the Supreme Court, the Federal Trade Commission and the Department of Justice, do have significant potential to facilitate anti-competitive communications among competitors or to provide a facilitating mechanism for collusion. Hence, a significant level of antitrust vigilance in the establishment, participation and operation of any information exchange is essential.

I. RECENT CYBER SECURITY INITIATIVES OF THE FEDERAL GOVERNMENT

A. Presidential executive order

President George W. Bush has issued a call to action to the private sector and government through the President's October 16, 2001 Executive Order creating the Critical Infrastructure Protection Board (the "Board"), which is comprised of top level government officials of the executive branch, departments, agencies and cabinet members. The Board is called upon to work together with other government agencies and departments and the private sector to enhance information sharing to prevent, detect, mitigate and recover from the effects of a compromise to the nation's critical infrastructure, i.e., sectors of the economy involved in banking and finance, transportation, energy, telecommunications, emergency services, and defense. The order further establishes the National Infrastructure Advisory Council, comprising 30 members appointed by the President, to provide advice on the security of information systems supporting the critical infrastructure of the country. This Council will monitor and work with industry organizations, which are referred to as Industry Sharing and Analysis Centers (ISACs), and will act to facilitate the sharing of industry information about threats, warnings and analysis of infrastructure vulnerabilities.

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B. Congressional acts

There are bills in various stages of progress in Congress that include provisions promoting improvements in cyber security practices and capabilities. HR 2435, "The Cyber Security Information Act," and S1456, "The Critical Infrastructure Information Security Act of 2001," and S1765 and HR 3448, "Bioterrorism Preparedness Act of 2001" each have provisions to insulate competitors from antitrust concerns which arise from industry and government collaborative efforts to share information aimed at warning of threats to computer systems and communication networks and to develop remedial approaches to protecting systems and correcting problems that occur.

For example, the types of information contemplated as subject to sharing was identified in S1456 as follows:

(3) CRITICAL INFRASTRUCTURE INFORMATION-

The term 'critical infrastructure information' means information related to--

(A) the ability of any protected system or critical infrastructure to resist interference, compromise, or incapacitation by either physical or computer-based attack or other similar conduct that violates Federal, State, or local law, harms interstate commerce of the United States, or threatens public health or safety;

(B) any planned or past assessment, projection, or estimate of the security vulnerability of a protected system or critical infrastructure, including security testing, risk evaluation, risk management planning, or risk audit;

(C) any planned or past operational problem or solution, including repair, recovery, reconstruction, insurance, or continuity, related to the security of a protected system or critical infrastructure; or

(D) any threat to the security of a protected system or critical infrastructure.

S1456 specifically calls for the establishment of Information Sharing and Analysis Organizations headed by private sector entities and organizations to gather, analyze and disseminate industry information. Moreover, the Act provides for antitrust exemption. Importantly, excepted from the exemption are activities that involve or result in "an agreement to boycott any person, to allocate a market, or to fix prices or output."

S1765 -- the Bioterrorism Preparedness Act of 2001 -- provides for a limited antitrust exemption. Title IV, Sec. 401, provides an exemption from the antitrust laws only concerning specific activities. Importantly excepted from the activities exempted and therefore activities covered by the antitrust laws under the Act are expressly set forth:

(B) EXCEPTION - The term "covered activities shall not include the following activities involving 2 or more persons:

(i) Exchanging information among competitors relating to costs, sales, profitability, prices, marketing, or distribution of any product, process, or service if such information is not reasonably necessary to carry out the purposes of covered activities.

(ii) Entering into any agreement or engaging in any other conduct --

(I) to restrict or require the sale, licensing, or sharing of inventions, developments, products, processes, or services not developed through, produced by, or distributed or sold through such covered activities; or

(II) to restrict or require participation by any person who is a party to such covered activities in other research and development activities, that is not reasonably necessary to prevent the misappropriation of proprietary information contributed by any person who is a party to such covered activities or of the results of such covered activities.

(iii) Entering into any agreement or engaging in any other conduct allocating a market with a competitor that is not expressly exempted from the antitrust laws by a determination under subsection (i)(4).

(iv) Exchanging information among competitors relating to production (other than production by such covered activities) of a product, process, or service if such information is not reasonably necessary to carry out the purpose of such covered activities.

(v) Entering into any agreement or engaging in any other conduct restricting, requiring, or otherwise involving the production of a product, process, or service that is not so expressly exempted from the antitrust laws by a determination under subsection (i)(4).

(vi) Except as otherwise provided in this subsection, entering into any agreement or engaging in any other conduct to restrict or require participation by any person who is a party to such activities, in any unilateral or joint activity that is not reasonably necessary to carry out the purpose of such covered activities.

HR 2435 contained an antitrust exemption and an exception as follows:

SEC. 5. ANTITRUST EXEMPTION.

(a) EXEMPTION- Except as provided in subsection (b), the antitrust laws shall not apply to conduct engaged in, including making and implementing an agreement, solely for the purpose of and limited to--

(1) facilitating the correction or avoidance of a cyber security-related problem; or

(2) communication of or disclosing information to help correct or avoid the effects of a cyber security-related program (sic, most probably should have read "problem").

(b) EXCEPTION TO EXEMPTION- Subsection (a) shall not apply with respect to conduct that involves or results in an agreement to boycott any person, to allocate a market, or to fix prices or output.

II. THE BASIC LAW CONCERNING HORIZONTAL CONDUCT AMONG COMPETITORS²

A. Section 1 of the Sherman Act

Section 1 of the Sherman Act prohibits any "contract, combination. . . , or conspiracy" which is in "restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. This section could if read literally prohibit almost any business agreement, but it has long been interpreted as only prohibiting unreasonable restraints. *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977). Such restraints may also be scrutinized under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, which broadly prohibits "unfair methods of competition in or affecting commerce." Courts have generally limited Section 5's application in the area of horizontal restraints to conduct prohibited by Section 1 or Section 2 (conspiracies to monopolize).

A Section 1 violation has two key elements:

1. a contract, combination, or conspiracy and
2. that (unreasonably) restrains trade.

² For the antitrust basics portion of this outline, the author gratefully acknowledges selective use of an outline entitled "Horizontal Restraints," prepared by Maureen K. Ohlhausen of the Federal Trade Commission for the ABA Antitrust Section's 48th Annual Spring Meeting held in April 2000.

III. A CONTRACT, COMBINATION, OR CONSPIRACY

A. An Agreement Between Two or More Economic Actors is Required?

The first element of a Section 1 violation requires an agreement between at least two independent economic actors.

The very essence of a section 1 claim, of course, is the existence of an agreement. Section 1 does not cover purely unilateral conduct. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984). Unilateral conduct may be covered by Section 2 of the Sherman Act, which addresses monopolization, but is not covered by Section 1.

An agreement between a parent corporation and its wholly owned subsidiary, even if it otherwise unreasonably restrains trade, is not a Section 1 violation. Because a "parent and its wholly owned subsidiary have a complete unity of interest," their joint activity "must be viewed as that of a single enterprise" and the parent and subsidiary "are incapable of conspiring with each other for purposes of § 1 of the Sherman Act." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771, 777 (1984). Lower courts have extended this doctrine to other corporate relationships, such as sister corporations owned by the same parent corporation. *See, e.g., Advanced Health-Care Services, Inc. v. Radford Community Hosp.*, 910 F.2d 139, 146 (4th Cir. 1990) (citing cases).

B. What is an "Agreement"?

Section 1 does not require any formal oral or written agreement. Agreements can be formally expressed in writings or oral communications, or can be implied and informal, such as a handshake or a "knowing wink." *See Esco Corp. v. United States*, 340 F.2d 1000, 1007 (9th Cir. 1965). The key element is a conscious commitment to a common scheme to achieve an unlawful purpose. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. at 764.

C. What Serves as Proof of an Agreement? (Direct vs. Circumstantial Evidence)

Agreements can be proven either by direct evidence, such as written contracts or eyewitness testimony about oral agreements, or by circumstantial evidence from which the court can infer "a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement." *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946).

1. Direct Evidence

Many restraints are embodied in written documents, such as licensing or joint marketing agreements, and also can be found embodied in a settlement agreement. In cases such as price fixing, the government has often been able to develop direct evidence of agreement through the testimony of co-conspirators.

2. Circumstantial Evidence

Circumstantial proof of an agreement among competitors requires, at a minimum, evidence of parallel conduct by the competitors. However, parallel conduct, especially in regard to pricing, occurs in very competitive markets as well as in markets with fewer sellers and less competition. Thus, such parallelism of conduct alone is insufficient to prove the existence of an agreement under Section 1. *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954). Also, the fact that one competitor independently chooses to copy the actions of another competitor usually is not enough to establish the existence of an agreement between the one competitor and its copied counterpart. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 237 (1993) ("Even in a concentrated market, the occurrence of a price increase does not in itself permit a rational inference of conscious parallelism.").

All consideration of circumstantial evidence is subject to an important caveat. In *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986), the Supreme Court held that "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." Accordingly, to sustain an inference of an illegal agreement, the circumstantial evidence must "tend[] to exclude the possibility that the alleged conspirators acted independently" rather than pursuant to an agreement. *Id.* at 588. "[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.*

IV. CHARACTERIZATION OF A RESTRAINT AS HORIZONTAL OR VERTICAL

Horizontal restraints are restrictions established by agreements among actual or potential competitors at the same level of distribution, for example, between manufacturers or between distributors. By contrast, vertical restraints involve restrictions imposed by a firm at one level of the market on firms at a different level, for example, restrictions imposed by a manufacturer on its distributors. Characterizing a restraint as horizontal or vertical can be critical because horizontal restraints are more likely than vertical restraints to be deemed per se illegal; that is unlawful itself without inquiry into the restraints competitive purpose or effect.

While distinguishing between horizontal and vertical restraints may seem easy, application of a straightforward test can become more complicated when a restraint operates at more than one competitive level. In *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 730 n.4 (1988), the Supreme Court held that the characterization of a restraint as either horizontal or vertical depends solely on the parties' relationship and not on the restraint's purpose or effect: "Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints."

V. EVALUATING WHETHER A RESTRAINT IS UNREASONABLE: APPLICATION OF THE RULE OF REASON OR THE PER SE DOCTRINE

Section 1 does not prohibit all agreements that in some degree restrains trade. As the Supreme Court observed, "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918).

A. The Rule of Reason

The rule of reason is the principal analytical tool for evaluating the lawfulness of horizontal restraints under Section 1. It is a judicially created model that has never been fully defined by the Supreme Court but, instead, embodies a flexible analytical approach. The Supreme Court first enunciated the rule of reason in *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911):

[Section 1 prohibits] all contracts or acts which [are] unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances [are] such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary [are] of such a character as to . . . restrain[] the free flow of commerce and tend[] to bring about the evils, such as enhancement of prices, which were considered to be against public policy.

The rule of reason is concerned with the competitive effect of the alleged restraint. It does not allow arguments as to whether the competition is good or bad in terms of broader public interests but rather "focuses directly on the challenged restraint's impact on competitive conditions." *National Soc. of Professional Engineers v. United States*, 435 U.S. 679, 688 (1978). Accordingly, courts will not accept arguments that the horizontal restraints were reasonable because they were intended to maintain jobs, keep smaller competitors in business, or pursue some other broad social benefit. *FTC v. Superior Court Trial Lawyers' Ass'n*, 493 U.S. 411, 424 (1990) ("The social justifications proffered for respondents' restraint of trade thus do not make it any less unlawful. The statutory policy underlying the Sherman Act precludes inquiry into the question whether competition is good or bad.").

Under the rule of reason, courts examine the reasonableness of the restraint in terms of the facts of the particular industry, the history and purpose of the restraint, and, most important, its probable effect on competition. This is a broad and comprehensive inquiry that includes numerous factors.

B. The Per Se Doctrine

The Supreme Court has carved out from the Rule of Reason a category of restraints "which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). Such restraints are deemed illegal per se and are often criminally prosecuted for a felony with punishments of imprisonment up to three years and fines of up to \$10 million for corporation and \$350,000 for individuals.

Per se treatment avoids the "incredibly complicated and prolonged economic investigation into the entire history of the industry involved" required by the rule of reason inquiry and also "makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned." *Northern Pacific Ry. Co.*, 356 U.S. at 5.

1. Examples of Per Se Illegal Restraints

Per se treatment has been applied to:

- agreements to fix prices (*United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940));
- agreements to limit production or restrict output (*Hartford-Empire Co. v. United States*, 323 U.S. 386 (1945); *United States v. American Linseed Oil Co.*, 262 U.S. 371 (1923));
- division of markets (*Palmer v. BRG of Georgia Inc.*, 498 U.S. 46 (1990); *United States v. Topco Assoc.*, 405 U.S. 596 (1972); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967));
- agreements to prohibit competitive bidding (*National Soc. of Professional Engineers v. United States*, 435 U.S. 679 (1978));
- agreements to fix the ingredients of a product (*National Macaroni Mfrs. Ass'n v. FTC*, 345 F.2d 421 (7th Cir. 1965));
- agreements to standardize credit terms (*Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980));
- group boycotts intended to fix prices or harm competitors (*FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990); *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941)).

2. Consequences of Per Se Treatment

Characterizing a restraint as per se illegal has great significance. Not only are the penalties usually more severe, the competitor's defenses are greatly restricted. "Whatever economic justifications particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224-26 n.59 (1940). Broader societal justifications are not permitted. Market power is irrelevant and actual harm need not be shown. It does not matter that defendants failed in their efforts, lacked the ability to succeed in any case, or never actually tried to implement it. *Id.* The mere fact that the defendants entered into a per se illegal agreement is sufficient.

3. Other Agreements Related to Price

Ancillary Price Restraints

As part of the trend to consider whether suspect restraints are justified by their role in making possible some procompetitive integration of economic activity, the Supreme Court has recognized that horizontal agreements that literally "fix" prices may be lawful under some circumstances, such as where they are ancillary to procompetitive joint activity.

The seminal decision on ancillary pricing arrangements is *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979) ("BMI"), which concerned a member-owned organization that granted blanket licenses for the performance of its members' copyrighted musical works. In creating the blanket licenses, the member composers and musical artists jointly agreed on the licenses' prices. The lower court held that this was horizontal price fixing and thus per se illegal. The Supreme Court acknowledged that the blanket licenses might be deemed price fixing in some literal sense. The Court upheld the practice, however, on the ground that the price fixing was reasonably necessary to enable the organization to market its product, which was the blanket license. Rejecting a mechanical application of the per se label to arrangements that literally fix prices, the Court stated that in deciding whether to characterize the agreement as per se illegal or subject to the rule of reason, a court first had to determine "whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." 441 U.S. at 20.

Thus BMI stands for the important proposition that

[j]oint ventures and other cooperative arrangements are . . . not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all.

441 U.S. at 23; *see also SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 964 (10th Cir. 1994), *cert. denied*, 515 U.S. 1152 (1995).

Price Exchanges

Any exchange of pricing information among competitors that -- expressly or implicitly -- includes an agreement to adhere to specific prices or pricing levels is likely to be deemed illegal per se. *United States v. United States Gypsum Co.*, 438 U. S. 422 (1978); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 906 F.2d 432, 446-47 (9th Cir. 1990), *cert. denied*, 500 U.S. 959 (1991).

Generally, however, the exchange of commercial information between competitors has been recognized by the Supreme Court as a practice that does not inevitably have anti-competitive effect. In fact, such exchanges may help markets perform more competitively, not less. As a result, information exchanges alone (with no express or implied agreements among competitors regarding price or the use of the exchanged information) are not treated as per se unlawful. *United States v. Citizens & Southern Nat'l Bank*, 422 U.S. 86, 113 (1975), *Maple Flooring Mfg. Ass'n v. U.S.*, 268 U.S. 563 (1925) ("Competition does not become less free merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all essential factors entering into the commercial transactions." A price exchange may still violate Section 1 if its purpose or effect is to increase or stabilize prices. *See, e.g., United States v. Container Corp.*, 393 U.S. 333 (1969). Also, price exchanges channeled through a third party, such as a trade association, may be as unlawful as a direct price exchange among competitors.

Several of the key factors considered by courts in determining whether price exchanges are illegal are:

- whether the prices exchanged are current or historical;
- whether the prices exchanged are specific prices charged by individual firms or aggregated price data;
- whether the industry is concentrated;
- whether the products are fungible; and
- whether there is a legitimate, procompetitive reason for the price exchange.

Sharing nonprice information, such as costs, is generally less risky than sharing price information, although such exchanges may nevertheless be deemed unlawful if their purpose or effect is to stabilize prices.

Benchmarking

A relatively new concept involving competitors is benchmarking. As defined by FTC Commissioner Azcuenaga, benchmarking is the practice of examining some aspect of the business of another firm as a reference point against which to evaluate and improve one's own capabilities. Typically, benchmarking involves collecting

information from excellent companies inside the industry as well as outside the industry, either directly or through third parties.

So significant is benchmarking as a stimulus to improvement that the Malcolm Bridge National Quality Award identifies benchmarking as a characteristic of excellent companies.

Benchmarking forces companies to compare themselves with best-in-class companies, quantify difference in performance, explain these differences, and identify steps to catch and surpass. Various types of benchmarking can be identified. "Strategic benchmarking" involves the comparison of different market strategies and a correlation of those strategies to marketplace success. "Operational benchmarking" focuses on a specific aspect of a company's functional operations and identifies ways to achieve best-in-class status. The analysis generally focuses on one or both of competitive cost and competitive differentiation. Cost benchmarking is perhaps the most common type of operational benchmarking.

Like information exchanges, benchmarking also can lead to improved performance, higher quality of products and services and lower prices to consumers. But similar to information exchanges, benchmarking may also be abused by being used to facilitate anti-competitive communications among competitors or provide a vehicle for collusion.

Therefore, when implementing an information exchange or benchmarking program, the following safeguards should be followed:

General Safeguards

Price Information and Benchmarking

- The purpose of the program should be clearly articulated and routinely followed. For example, under Section 4(4) of S1456, the Critical Infrastructure Information Security Act of 2001, the purpose of the proposed information disclosure and exchange was identified as providing "enhanced analysis, prevention and detection of attacks on critical infrastructures or to enhance the recovery from such attacks."
- Surveys conducted by independent third parties minimize the risk of allegations of direct exchange of price information by competitors. Independent third parties, such as accounting firms, insulate members from such direct exchanges.
- If surveys are conducted by the staff of a trade association or an "Information Sharing and Analysis Organization"(an ISAG is a private or public entity or organization created to gather information pursuant to S1456), written internal safeguards should

- A survey of historical data is less risky than an exchange of current price information, the latter of which should clearly be avoided.
- Access to underlying and individual company commercial data by association members or ISAG should be prohibited.
- Data, where appropriate, should be public or made available to the public.
- Meetings to review and discuss data should be subject to legal supervision.
- Projection or estimates of future prices should be prohibited.
- Circulation of aggregated price information presents the lowest antitrust risk; publication of disaggregated data resembles a direct exchange of pricing information among competitors, particularly if the data can readily be attributed to particular firms.
- Exchange of other terms of sale, such as credit terms, hours of sale, hours of service, production data, transportation charges, commissions, warranties, etc. present the same concerns and considerations as circulating price data.

Industry Codes and Standards

- Restrictions on advertising of price or other competitively sensitive terms, other than to discourage false, deceptive or misleading claims, are viewed with suspicion by antitrust agencies.
- Exchange of sensitive information during consideration of proposed industry codes can be challenged as an invitation or agreement to restrain trade.
- Peer review programs with authority over fee schedules, competitive bidding, credit practices, salaries and contracts are subject to challenge as unreasonable restraint on trade.
- Do not rely on industry or perceived antitrust exemptions.

Factors Affecting Antitrust Risks of Information Exchanges

- Purpose of exchange and use of data.

- Availability of data to public, third parties.
- Actual or potential effect on competitive behavior.
- Frequency of meetings and nature of discussions on data collected.
- Alternatives to methods of collection or uses to which data applied.
- Does information facilitate entry, increase availability of useful market information, enhance informed customer or consumer choice and economic efficiency.
- Costs/penalties for participation/non-participation.
- Market Structure.
- Product fungibility.
- Inelastic consumer demand.

The DOJ in approving an information exchange among energy industry participants applied the above criteria -- see page 14 of this outline.

4. Standardization, Certification Programs

It is common for trade associations to develop voluntary industry standards and methods to certify compliance with those standards, but if the standards and certifications favor some competitors over others, the association and its members may encounter antitrust liability. Both the Supreme Court and the FTC have indicated their skepticism of trade association adopted industry standards, and monitor them closely. For example, the Supreme Court has stated that an “agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products.” *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 US 492, 500 n5 (1988). Similarly, the FTC has stated that it discourages the adoption of specific standards “except in exceptional circumstances and never when performance standards can be developed” as well as certification procedures that employ pass/fail systems instead of graded systems. *Advisory Op. No 457*, 78 FTC 1628 (1971).

The courts will examine the underlying reasons that justify the necessity of a particular standard and will then evaluate whether the standard is reasonably and objectively calculated to achieve that purpose. (*See Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 685 (1961)(emphasizing that standards must be objective.) Key factors to determine whether industry standards and certification procedures restrain trade are the breadth of restrictions in relation to their need, and how the standards are applied. Whether the trade association members that adopt and apply the technical, quality or safety standards are actually competitors of the parties

disadvantaged by the standards, is also a significant factor in evaluating a standard's reasonableness.

5. Restraints Unrelated to Price

Agreements Not to Compete (Market Allocation)

"One of the classic examples of a per se violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition." *United States v. Topco Assoc.*, 405 U.S. 596, 608 (1972); *see also United States v. Sealy, Inc.*, 388 U.S. 350 (1967) (holding per se illegal an agreement among competing manufacturers under which a jointly-held subsidiary gave a license to each competitor to sell the trademarked product in a specific territory). Also, in *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49-50 (1990), in finding per se illegal a market allocation agreement between two bar review courses, the Supreme Court noted that agreements between competitors not to compete in each other's territory are "anticompetitive regardless of whether the parties split a market within which both do business or whether they merely reserve one market for one and another for the other."

Ancillary Agreements Not to Compete

Agreements not to compete that are part of an integration of the economic activities of the competitors and seem to be procompetitive by likely enhancing the competitors' efficiency can escape per se treatment and instead be analyzed under the rule of reason. *See, e.g., Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 229 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987).

6. Group Boycotts and Concerted Refusals to Deal

Another type of horizontal restraint that has been held per se unlawful consists of agreements among competitors not to do business with certain competitors, customers or suppliers, or to deal with them only on specified terms. *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963); *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). It is important to note, however, that unilateral refusals to deal are generally not illegal. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) ("In the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.").

Not all horizontal boycotts are illegal, however, and the Supreme Court clarified the scope of the per se rule for horizontal boycotts in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985). This case involved a buying cooperative, composed of competing wholesalers, and its expulsion of one of its members. Although the lower court held that the expulsion was an illegal group boycott, the Supreme Court disagreed on the ground that the buying cooperative's decision involved the enforcement of a reasonable membership rule by a legitimate buying group and was not a per se anticompetitive restraint.

The Court explained that boycotts subject to per se condemnation typically involve:

- a joint effort by competitors
- to harm another competitor
- by refusing to provide products or services that the targeted firm needs to compete (or by coercing suppliers or customers to stop doing business with the targeted firm)
- where the boycotting firms possessed market power, and
- the boycott was not justified by plausible efficiency arguments.

Northwest Wholesale Stationers, Inc., 472 U.S. at 293-95. See also *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 458 (1986) (horizontal boycotts usually held illegal per se only where "firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor").

However, if the horizontal boycott is intended to fix prices, it is illegal per se regardless of whether the boycotting competitors had market power. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990).

VI. SOMEWHERE BETWEEN PER SE AND THE RULE OF REASON: THE "QUICK LOOK" DOCTRINE

Starting in the mid 1980s, there has been a general trend toward assessing horizontal restraints under the rule of reason rather than condemning them automatically as per se violations. In some cases, this has taken the form of the so-called "quick look" doctrine, which is also known as the "truncated rule of reason."

The "quick look" doctrine can be summarized as follows:

- (1) where a restraint is of a type that is ordinarily anticompetitive (e.g., a horizontal restraint that is usually deemed illegal per se)
- (2) but there are extenuating circumstances suggesting that there may be procompetitive benefits arising from the restraint
- (3) the court then will not immediately conclude that the restraint is illegal per se
- (4) but will instead take a "quick look" at the purported justifications for the restraint.

See, e.g., *NCAA v. Board of Regents*, 468 U.S. 85 (1984); *U.S. Healthcare, Inc. v. HealthSource, Inc.*, 986 F.2d 589 (1st Cir. 1993); cf. *United States v. Brown Univ.*, 5 F.3d 658 (3d Cir. 1993).

The quick look doctrine has been applied where horizontal restraints were employed by medical or professional associations, *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), and sports leagues, *NCAA v. Board of Regents*, 468 U.S. 85 (1984). It has also been applied where the horizontal restraint is arguably ancillary to a legitimate business purpose. See *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185 (7th Cir. 1985); *General Leaseways, Inc. v. National Truck Leasing Ass'n*, 744 F.2d 588, 595 (7th Cir. 1984).

The quick look doctrine is meant to bridge the gap between the harshness of the per se rule and the considerable burdens that come with a full-blown rule of reason analysis. If the proffered justifications are plausible, the court will conduct a more in-depth analysis of the restraint under the rule of reason. If the proffered justifications are not plausible, the court will condemn the restraint summarily.

The Federal Trade Commission in *Massachusetts Bd of Registration in Optometry*, 110 F.T.C. 549 (1988), also used a similar three-part approach, examining whether the restraint is inherently suspect, whether there are plausible efficiency justifications for the restraint, and, if so, whether the justifications are valid. The continuing vitality of this approach is unclear, however. See *California Dental Ass'n v. FTC*, 121 F.T.C. 190 (1996).

Overall, the permissible contours of the "quick look" doctrine are still somewhat murky. The Supreme Court overturned the Ninth Circuit's affirmance of an FTC decision that employed a "quick look under the rule of reason" in condemning a dental association's restrictions on certain types of truthful advertising. See *California Dental Ass'n v. FTC*, 119 S. Ct. 1604 (1999). The Court observed that a "quick look" analysis is appropriate when an observer with even a rudimentary understanding of economics could conclude that the arrangement in question had an anticompetitive effect. *Id.* at 1612. The Court stressed, however, that there is no categorical line between restraints giving rise to an obvious inference an anticompetitive effect and those that call for more detailed treatment. Instead, the Court emphasized, "What is required . . . is an inquiry meant for the case, looking to the circumstances, details and logic of a restraint." *Id.* at 1618.

VII. DOJ AND FTC COMPETITOR COLLABORATION GUIDELINES

Horizontal restraints are a complex area of law, in which jurisprudence has not always been consistent. However, business activities that include horizontal agreements have proliferated in recent years. In response to these factors, the Department of Justice and the Federal Trade Commission issued Competitor Collaboration Guidelines in April 2000. *FTC/DOJ Antitrust Guidelines -- Antitrust Guidelines for Collaborations Among Competitors*, 4 Trade Reg. Rpts. CCH P13,161 (2000). Guidelines such as these, though not binding on courts, inform the agencies'

enforcement decisions and are therefore useful to business people and antitrust practitioners in evaluating the antitrust implications of proposed agreements.

VIII. DOJ BUSINESS REVIEW LETTERS APPROVING INFORMATION EXCHANGES AND OTHER COLLABORATIVE PROCOMPETITIVE JOINT EFFORTS BY COMPETITORS

The Department of Justice, under its Business Review Procedure, 28 C.F.R. §50.6, has set forth in a variety of matters its intention not to proceed against specific collaboration efforts by competitors including information exchanges. Under the Department's procedure, an organization may submit a proposed action to the Antitrust Division and receive a statement regarding whether the Division currently intended to challenge the action under the antitrust laws.

Electrical Power Research Infrastructure Exchange Approved

The Department approved a proposed by the Electric Power Research Institute (EPRI), a non-profit organization committed to providing and disseminating science and technology-based solutions to energy industry problems, to exchange information that was intended to improve the way electric power industries protect themselves against cyber threats. (Oct. 20, 2000.)

The EPRI's proposal contemplated that two principle types of information would be exchanged.

First:

- "best practices" for cyber-security methodologies for vulnerability assessment;
- plans to identify, alert, and rebuff breaches;
- plans to restore capability after an attack;
- methods for stress testing the infrastructure.

Second, information concerning:

- cyber-security vulnerabilities in electronic information and communications systems on a product by product basis;
- possible product specific information exchanges leading to security requirements and features for the development of commonly accepted security specifications for future equipment and systems.

The DOJ in approving the proposal made clear and specific reference to the measures designed to lessen the possibility that the exchanges would have anticompetitive effects. The DOJ approval letter in this regard stated:

"The information to be exchanged will be strictly limited in nature; all information exchanged will relate directly to physical and cyber-security. There will not be any discussion of specific prices for equipment, electronic information or communications systems. No company-specific competitively sensitive information, i.e., prices, capacity or future plans, will be exchanged through the EIS program. The program will not serve as a conduit for discussions or negotiations between or amongst vendors, manufacturers or security service providers with respect to any participant or group of participants. Neither the EPRI nor any participant will recommend in favor of or against any product or systems of particular manufacturers or vendors. On the contrary, it will be left to each participant to determine the effect of the exchanged information on its individual purchasing and related decisions.

On the basis of the information and assurances that EPRI has provided to us, it does not appear that the proposed information exchange will restrict competition in any of the energy-related markets in which the participants do business. As long as the information exchanged is limited, in the manner discussed above, to physical and cyber-security issues, the proposed interdictions on price, purchasing and future product innovation discussions should be sufficient to avoid any threats to competition. Indeed, to the extent that the proposed information exchanges result in more efficient means of reducing cyber-security costs, and such savings redound to the benefit of consumers, the information exchanges could be procompetitive in effect." (See attached Press Release and DOJ approval letter.)

Association of Fund-Raising Distributors and Suppliers

- Association of fund-raising distributors and suppliers were allowed to established a uniform product ordering format for products sold to non-profit organizations for resale in their fund raising activities. (Dec. 21, 2001.) The DOJ noted that (i) information to be exchanged in developing and implementing the program would not contain pricing or competitively sensitive information; (ii) access to program was to all suppliers and distributors; and (iii) utilization of the proposed format was voluntary.

Promotion Marketing Associations

- Promotion marketing association effort to enhance an information sharing program designed to reduce mail-order rebate fraud (false claims that merchandise had not been received) was approved by the DOJ. The PMA would use a centralized data base, to which members would report suspected fraudulent claims and the data would be reported to law enforcement officials, and in aggregated form to its members. The DOJ approval noted that the proposal limited the level of competitor cooperation - no discussion of pricing or other sales related conduct and no cooperative utilization of the aggregated information - and would thus preclude the risk of concerted pricing or collective refusals to deal.

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