THE PRESIDENT'S EXPORT COUNCIL
WASHINGTON, D.C. 20230

August 23, 2007

The President of the United States
The White House
Washington, DC 20500

Dear Mr. President:

A recent study comparing the structural cost burden shouldered by American companies with the burden shouldered by our trading partners showed an increase from 22% to 32% over the last three years alone. Chief among the causes of this differential is the excessive amount and cost of civil litigation in the United States. Despite the mandate in Federal Rule of Civil Procedure 1 for "the just, speedy, and inexpensive determination of every action," our courts, federal and state, have gained the reputation around the world as venues for abusive, lengthy, and excessively costly litigation. The Members of your Export Council commend your leadership as an advocate for systemic reforms such as the Federal Class Action Fairness Act and the recently adopted electronic discovery amendments to the Federal Rules of Civil Procedure, but much more is needed if our exports are to compete, and the United States is to continue to attract foreign direct investment.

To this end, the Council recommends that your Administration promote common sense civil justice reforms including the following:

1) Rationalize pretrial discovery. The cost and disruption of pretrial discovery in US courts is so excessive that defendants are often forced to settle meritless cases. Information gathering and production in significant cases can run into the hundreds of thousands or even millions of dollars. Such excessive discovery is unnecessary. Civil justice systems in other industrialized nations obtain evidence sufficient to resolve cases fairly without American-style pretrial discovery. Similarly, parties resolve disputes by international arbitration without abusive discovery. In our federal system and in most state court systems, the general rule is that the party producing information pays the costs of production. This practice creates an incentive for adversaries to make expansive discovery requests. Shifting at least some of the cost of producing information to the party requesting the information would place the cost-benefit decision on the proper party. We urge that the Administration propose and support enactment of a statute mandating cost-shifting when a party requests discovery of information that is not reasonably accessible in the ordinary course of business.

2) Eliminate "junk science" from the courtroom. The Supreme Court decisions of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) and *Kumho Tire, Co. v. Carmichael,* 526 U.S. 137 (1999), and the subsequent amendment of the Federal Rules of Evidence with respect to expert evidence have gone part way to set standards that reduce the risk that juries will hear so-called "expert" evidence based on unreliable theories and

methodologies; nevertheless, legislation clarifying the standards for the admission of expert evidence to ensure that it reflects sound principles is needed. We recommend that the Administration propose and support passage of legislation that would require that expert evidence be based on valid analysis and methodology generally accepted in the relevant area of expertise.

3) Enact a federal standards defense. Even when products and warning labels meet all federal government standards, manufacturers are subject to claims for compensatory and punitive damages for allegedly defective products or warnings. The problem is particularly acute in state courts. The unpredictability that arises from the inability to rely on federal standards inhibits the creation and introduction of new products. We urge that the Administration propose and support enactment of a federal standards defense that would protect manufacturers and sellers of products that meet federal manufacturing and labeling standards. The federal standards should apply in federal courts and preempt any other standard that a state court might attempt to apply.

4) Develop policies and practices to limit use of US courts by foreign claimants for claims arising out of acts committed in foreign countries by governments of those countries. Citizens of foreign countries are using US courts to assert claims under the Alien Tort Statute or under US state law against American companies for allegedly aiding and abetting foreign government security forces to commit wrongful acts. To defend itself on the merits, the American company may be faced with the virtually impossible task of obtaining documents and testimony from foreign government and security officials. Exposure to such claims is a major disincentive for American companies to invest in developing countries and puts our companies at a competitive disadvantage with their foreign competitors. Many of these cases have foreign policy implications. We urge the Administration to continue to provide its views to courts on the legal and policy issues raised by these cases.

Clearly, having a legal system that exposes U.S. companies to significant litigation risk, inhibits creation of new products and services, discourages investment, and puts American companies at a competitive disadvantage with respect to foreign competitors. Mr. President, the PEC applauds your unwavering commitment to a fair civil justice system and to the competitiveness of this nation. The foregoing recommendations do not impede litigants with valid claims. They would lead to a fairer, more predictable, less expensive system for resolving such claims and would help maintain American competitiveness in the global marketplace.

Sincerely,

Bill Marriott