Testimony

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before the Federal Trade Commission

on Hearings Regarding Joint Ventures & Other Forms of Competitor Collaborations

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TESTIMONY OF THE
NATIONAL ASSOCIATION OF MANUFACTURERS
FEDERAL TRADE COMMISSION HEARINGS REGARDING
JOINT VENTURES & OTHER FORMS OF COMPETITOR
COLLABORATIONS
EXECUTIVE SUMMARY

In this testimony, the National Association of Manufacturers responds to several of the questions posed by the Federal Trade Commission (FTC) regarding its Joint Venture Project. Specifically, the NAM:

- Questions the apparent assumption that all "competitor collaborations" lessen or eliminate actual or potential competition.

- Agrees that joint ventures and other collaborations have increased over time. This reflects a combination of a more realistic legal climate as well as the continuing pressure to reduce costs in a global economy.

- Has seen an increase in -- rather than a lessening of -- competition despite the increase in collaboration..

- Believes that the general rules regarding competitor collaborations are well established. There is some uncertainty as a result of a trend toward rule of reason but most experienced antitrust practitioners are able to accurately assess the legality of most proposed collaborations. This is not to say, however, that there have been no surprises regarding enforcement decisions.

- Believes that guidelines can be helpful, if they are flexible and accurately reflect the law. However, the variety of potential markets and other relevant facts involved in specific competitor collaborations render very detailed or inflexible guidelines inadvisable.

- Believes that advisory opinions are desirable to have, despite some disadvantages.

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My name is Rick Rogers. I am a lawyer employed by Ford Motor Company in Dearborn, Michigan, specializing in antitrust law. I had the privilege of testifying on behalf of the National Association of Manufacturers (NAM) at the previous Federal Trade Commission's (Commission) hearings regarding Antitrust & Consumer Protection Laws in a Global Economy. I am appearing again on behalf of the NAM. As you know, the NAM is a voluntary business association representing nearly 14,000 manufacturing and related businesses. I serve as chairman of the NAM Subcommittee on Competition, which has jurisdiction over NAM antitrust matters. On the NAM's behalf, I would again like to thank the Commission for requesting our views on joint ventures and other competitor collaborations.

In preparing for my testimony, the NAM Subcommittee on Competition followed the same methodology employed in preparation for the commission's previous hearings. The subcommittee reviewed the commission's published notice of the topics it wished to address and we discussed our proposed response. Our draft testimony was then circulated to the subcommittee members for comment. The resulting testimony represents the views of representatives of various industries, including motor vehicle manufacturing, pharmaceuticals, oil and gas, telecommunications, computer manufacturing and other consumer electronics, as well as steel, construction equipment and forest products. As was the case during the commission's 1995 round of hearings, I will attempt to answer any questions the commission may have. Given the scope of the topics on the commission's agenda, however, my answers may necessarily reflect my own personal experience and opinions, rather than the collective experience of the NAM' s large and diverse membership.

1. Nature, Frequency and Motivations for Competitor Collaborations

At the outset, we examined the commission's definition of "competitor collaborations," *i.e.*, all collaborations, short of merger, between or among entities that would have been actual or likely potential competitors in a relevant market absent that collaboration. That definition appears broad enough to encompass all forms of collaboration, ranging from joint ventures involving the acquisition of stock or assets requiring prenotification, to contractual arrangements involving routine purchases and sales, to informal benchmarking exercises. The NAM, however, believes that the definition's apparent assumption that most or all such competitor collaborations extinguish actual or likely potential competition among the participants ("which would have been actual or likely potential competitors," *etc.*) is a more theoretical than real concern, as I further detail.

With respect to the commission's questions regarding the prevalence of joint ventures and other competitor collaborations, there is no question that such transactions have increased substantially over time. When virtually all horizontal and most vertical restraints were unlawful or at least questionable, as was the case when I entered practice, many competitor collaborations were then prohibited or inhibited that are today recognized as procompetitive and perfectly lawful. The NAM believes that the easing of actual and perceived antitrust constraints, which now permit a substantial number and variety of competitor collaborations to proceed without fear of legal challenge, is one major reason why various forms of competitive collaboration have increased.

Of course, a more realistic legal climate would not be expected to result in increased competitor collaboration absent business motivations for joint, as opposed to independent,

activity. The NAM believes that one very powerful motivation favoring joint activity is that many firms are faced with the ongoing necessity of reducing costs to remain competitive, often in response to competition from abroad. Indeed, many of our member companies operate today in a global economy, which necessitates not only the ability to compete effectively with both domestic and imported products sold in the United States, but also to produce goods that are fully competitive in overseas markets. As a result, there has been -- and continues to be -- a seemingly endless necessity to reduce costs to assure adequate profitability, if not financial survival.

Stated differently, resources are increasingly scarce, while the demand for new products and services has increased. One solution to this dilemma is some form of joint activity, which permits scarce resources and financial risks to be shared. Of course, the potential candidates for joint activity include not only competitors, but also suppliers and firms in different industries that may share common problems, such as the need to develop new technology, meet regulatory requirements, or use raw materials more efficiently. The pressure to do more with less has resulted in substantially increased joint activity, including competitive collaborations, which the NAM believes to be a continuing trend. How much competitor collaboration is occurring appears to vary from industry to industry.

While it is the NAM's impression that the frequency of competitive collaborations has increased, the legal forms of collaboration, ranging from equity joint-ventures to contractual arrangements to less formal exchanges of information, do not appear to have changed. It is, however, the sense of the NAM Subcommittee on Competition that joint research among competitors to attempt to resolve common problems has substantially increased, relative to other

forms of competitor collaboration. Joint research appears to be a logical response to the problem of scarce resources, and that form of competitor collaboration has received some legal encouragement in the form of passage of the National Cooperative Research and Production Act (NCRPA or "Act"). The commission's own records should reflect an increase in joint research, at least to the extent that the parties elect to avail themselves of the limited antitrust exposure offered under the NCRPA.

Despite the increase in competitive collaborations, none of the NAM's Subcommittee on Competition members could detect any lessening of competition for the sale of products or services within their industries. Stated differently, while competitive collaborations have increased, subcommittee members were hard pressed to come up with concrete examples of competitor collaborations that actually extinguished competition -- or even likely potential competition -- in any relevant market in which goods and services are sold. For example, there have been some large equity and contractual joint ventures in the motor vehicle industry, involving the shared design and production of specific motor vehicles. None of these (short of a few transactions involving mergers), however, have involved joint marketing or sales of finished products. In most instances, the motor vehicles resulting from such production joint-ventures have increased output, creating additional products that might otherwise have come to market later or not at all.

2. Policy and Legal Questions Relating to Competitor Collaborations

With respect to the state of the law regarding competitor collaborations, the NAM believes that the general rules are well-established: agreements involving some form of economic integration that may generate procompetitive efficiencies -- and that thus involve more than mere

coordination of price or output -- are properly analyzed under the rule of reason. Naked restrictions on price or output remain *per se* unlawful. With respect to competitive collaborations analyzed under the rule of reason, collaborations that would create, enhance or facilitate the exercise of "market power" may be unreasonable if the risk of anticompetitive effect is not outweighed by the potential for procompetitive benefits such as efficiencies.

Such general rules are, of course, sometimes difficult to apply in practice, but some uncertainty is inherent in the trend away from *per se* condemnation. Most experienced antitrust practitioners seem able to apply the law to accurately assess the legality of the vast majority of competitor collaborations. Likewise, although occasional commission or judicial decisions are made condemning competitive collaborations, the sense of the NAM's membership is that the vast majority of competitive collaborations are procompetitive and lawful. Since the number of government investigations has increased in recent years, but the prosecution of competitive collaborations remains relatively infrequent, we assume that the government's experience is similar to our own.

In terms of traditional analysis, the commission has listed six issues, and requested views on which of those issues government agencies should <u>not</u> focus on when analyzing the permissibility of competitor collaborations. While we do not suggest that any of the six issues listed should be placed totally out of bounds, government action is unwarranted absent strong evidence of probable competitive harm. The NAM believes that the principal focus should be on investigating how a competitor collaboration may harm competition, however, by affecting price and output, and the effects of restrictions on competition among the participants (collateral restraints). Some risk of so-called spill-over effects is inherent in any competitor collaboration,

no matter how routine and no matter how beneficial. Unless there is some real evidence or risk of serious wrongdoing, however, we suggest that investigation of spill-over effects will be a costly diversion. Likewise, we believe that instances of competitive harm arising from raising rivals' costs or where the participants lack market power will be rare. Finally, antitrust concerns arising from denial of membership in or access to a competitor collaboration will usually depend on whether the collaboration has or will obtain market power.

With respect to protecting confidentiality, the NAM's experience is that competitors who collaborate for some specific purpose remain competitors, with the result that participants are not eager to give away more confidential information than necessary to accomplish the specific collaborative purpose intended. My own test is that information that must be exchanged to accomplish a joint purpose assessed to be lawful may be exchanged between the parties to a competitive collaboration, but should be kept to the minimum necessary to accomplish the desired result. Absent some unusual circumstance, I leave the substance of what is, in fact, necessary to the best business judgment of participating employees, who are almost always reluctant to share unnecessarily for business reasons. The NAM rejects the apparent belief of some that competitors will collaborate "too much" without close and constant supervision. Of course, exchanges of information will often involve the use of confidentiality agreements. These agreements not only prevent unauthorized disclosure to third parties, but also frequently limit use of the information to the subject of the collaboration.

With respect to the benefits and harms of treating certain types of conduct as *per se* unlawful, the NAM believes that there is some continuing use to maintaining the *per se* rule in the limited circumstances to which it is properly applied today: to condemn naked restraints on

price or output with which the commission and the courts feel they have sufficient experience to prohibit summarily. Here again, it is our belief that antitrust practitioners are able to define the dividing line between *per se* and rule-of-reason analysis in the vast majority of cases. In those rare factual circumstances in which the dividing line is unclear even to experienced antitrust lawyers, prudence would dictate proceeding with great care -- and perhaps only after reviewing the proposed collaboration, formally or informally, with government enforcement agencies to minimize the risk of subsequent criminal prosecution. In rare instances in which the line between lawful and possibly criminal conduct cannot be divined with reasonable certainty, perhaps the best course of conduct would be to explore less adventurous ways of accomplishing the desired result.

In assessing the validity of whether price or non-price restrictions are related to the procompetitive purpose of a competitive collaboration, we believe that the good-faith opinions of the participants, as experts in the business involved, should be given substantial weight by government enforcement agencies. Of course, that approach assumes that the parties are able to explain the relationship between proposed restrictions and allegedly procompetitive outcomes in a convincing manner. Especially in situations where the participants clearly lack market power, participants should not be second-guessed regarding whether proposed restrictions are reasonably related to the success of a specific competitor collaboration.

With respect to application of the rule of reason, the NAM Subcommittee on Competition does not believe that competitor collaborations ordinarily will present some unique phenomenon requiring special rules. In applying the rule of reason, the markets involved first must be defined, and some assessment then must be made of whether the participants have or

will obtain market power. If market-power concerns are present, then a careful examination of the restraints involved -- balanced against procompetitive justifications -- is required. If there is no realistic threat of the participants obtaining or maintaining market power, detailed examination of competitive effects should not be required.

In applying the rule of reason to competitor collaborations involving the production of goods, the customary rule-of-reason analysis should be reasonably straight forward. When collaboration occurs at some phase well in advance of production and sale, however, such as joint research or the development and sourcing of components, defining the relevant market or ascertaining the existence of market power will often be more difficult. Care should be taken not to define some theoretical market or the existence of hypothetical market power where any effect on the production and sale of goods may be divorced from reality. For example, interfering with joint research because of the theoretical market power of participants in some hypothetical R & D market can have the harmful effect of inhibiting or preventing the development of desirable new technologies and products.

NAM Subcommittee on Competition members were unable to cite any instance in which beneficial competitor collaborations were frustrated because of uncertainty over antitrust rules, or the costs of investigation or litigation. Likewise, we were unable to cite any instances in which legal uncertainty or litigation costs prevented legal challenge to an anticompetitive competitor collaboration. Most NAM subcommittee members, however, are of the opinion that the NCRPA has operated to encourage competitor collaboration. They have used the Act's notification procedure and could not recall any instance in which they were prevented from obtaining the benefits contemplated by the Act.

3. Questions Relating to FTC/DOJ Guidelines

Antitrust practitioners at NAM member companies, as well as their outside counsel, must be aware of Department of Justice and Federal Trade Commission guidelines and policy statements regarding antitrust enforcement. Probable government reaction to a proposed transaction is a necessary part of informed antitrust analysis, and guidelines that accurately reflect government enforcement intentions are a useful tool. The NAM's consensus is that the most frequently used government antitrust guidelines were the Merger Guidelines. Since acquisitions and mergers of any size must be presented to the government for review in advance of closing, an accurate assessment of probable government reaction is important. It is recognized, however, that the Merger Guidelines represent only a first step in antitrust analysis. The government permits many acquisitions that exceed the thresholds specified in the Merger Guidelines to proceed without challenge if the facts involved negate any realistic threat to competition. Guidelines other than the Merger Guidelines were consulted occasionally by NAM members to assess potential government reaction, but are not accorded the same weight as the Merger Guidelines.

With respect to all government guidelines, including the Merger Guidelines, NAM subcommittee members do not believe that they have, in general, operated to prevent firms from competing more effectively, although individual firms may have had an unhappy experience with respect to some specific transactions. Of course, our members recognize that government guidelines, while useful to the extent they accurately reflect government enforcement intentions, do not have the force of law. If guidelines do not take into account exonerating facts regarding a proposed transaction, or do not accurately reflect the law as applied by the courts, sophisticated firms will rely on the advice of expert antitrust counsel in determining whether or not to proceed.

Since no set of guidelines, no matter how artfully drafted, can possibly cover the range of factual variations present in a specific transaction, government guidelines are regarded as helpful -- but limited -- analytical tools. Predicting government reaction in all situations, with or without guidelines, has never been an exact science, and creative market definitions or new enforcement theories can sometimes lead to unanticipated results. On balance, however, the current situation is preferable to attempting to draft very specific guidelines rigidly adhered to by government enforcement agencies, which would chill potentially procompetitive conduct and result in substantial and unnecessary litigation.

4. Questions Relating to FTC Advisory Opinions

Obviously, some parties regard advisory opinions as desirable, or else FTC advisory opinions or Department of Justice business reviews would never be requested. NAM subcommittee members, however, have used these advanced-review mechanisms only rarely, since the disadvantages were assessed to outweigh the advantages in most situations. Disadvantages include the cost of investigation, delays and the narrow and cautious scope of favorable government reviews.

Most of our members also believe that transactions assessed to be lawful by expert antitrust counsel will ordinarily suffice to protect them against unanticipated government investigation or legal challenge.

Thank you, again, for the opportunity to testify.