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STATEMENT OF  
 EARL W. KINTNER, GENERAL COUNSEL,  
 FEDERAL TRADE COMMISSION,  
 BEFORE THE  
 ANTITRUST SUBCOMMITTEE OF THE  
 SENATE COMMITTEE ON THE JUDICIARY  
 SEPTEMBER 13, 1955.

It is a pleasure to appear before you today in response to your invitation. This committee has consistently conducted its hearings with a sense of fairness, objectivity and studiousness that is most exceptional. I appreciate the opportunity to discuss aspects of the Federal Trade Commission's work in the field of foreign trade, particularly with reference to its administration of the Webb-Pomerene Export Trade Act.

The Webb-Pomerene law was the direct outgrowth of a broad-scale inquiry by the Federal Trade Commission, in 1915-16, into foreign trade conditions. In June 1916 the Commission presented to Congress its exhaustive report on "Cooperation in American Export Trade." The report focused attention on entrenched combinations and cartels in foreign countries with whom American exporters were forced to compete. It stated:

"In seeking business abroad, American producers must meet aggressive competition from powerful foreign combinations ... sometimes aided by their governments .... In various markets American manufacturers and producers must deal with highly effective combinations of foreign buyers .... These combinations naturally make individual American producers bid against each other ....

"If Americans are to enter the markets of the world on more nearly equal terms with their organized competitors and their organized customers, and if small American producers and manufacturers are to engage in export trade on profitable terms, they must be free to unite their efforts."1/

The Commission recommended passage of remedial legislation permitting cooperative efforts in export trade by competing American exporters and removing any doubt as to antitrust implications of such cooperation. It urged that appropriate safeguards be provided against misuse of cooperative export associations, declaring its confidence that these protective measures could be enacted "without sacrificing any of the essential advantages of concentrated action and without altering the fundamental policy of the antitrust laws or interfering with their enforcement."2/

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1/Report on Cooperation in American Export Trade, Vol. I, pp. 4, 7, 8 (1916).

2/Id., p. 379.

The Commission's report provided the impetus for bills introduced by Senator Pomerene and Representative Webb in the succeeding session of Congress. In 1918 the Webb-Pomerene Act, reflecting closely the recommendations of the Commission, was passed. The Division of Export Trade was established in the Commission to administer its provisions.

The Act authorizes cooperative activity among American exporters within certain closely circumscribed bounds for the purpose of promoting American foreign trade. Section 2 of the Act provides that nothing contained in the Sherman Act

"shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association: And provided further, That such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein."

At the time of their formation, export associations are required to file with the Commission association papers or articles of incorporation and full descriptions of their organizational structure. On January 1 of each year thereafter, they are required to make a similar report to the Commission bringing up-to-date their original submittals. The Commission on its own initiative may require submission of any additional information pertaining to an association's organization and practices. Failure to supply requested information subjects association to suit for forfeiture in Federal courts.

Under Section 5 of the Act, the Commission is charged with supervisory authority over export trade associations and with the correlary duty of inquiring into, and recommending reform of, activities outside the Act's permissive area. Where an association fails to comply with Commission recommendations for readjustment of its practices, the Commission will refer the matter to the Attorney General for appropriate action.<sup>3/</sup>

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<sup>3/</sup>Section 5 of the Act reads, in part: "Whenever the Federal Trade Commission shall have reason to believe that an association or any agreement made or act done by such association is in restraint of trade within the United States or in restraint of the export trade of any domestic competitor of such association, or that an association either in the United States or elsewhere has entered into any agreement, understanding, or conspiracy, or done any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein, it shall summon such association, its officers, and agents to appear before it, and thereafter conduct an (continued on page 3)

Since the passage of the Webb-Pomerene Act in 1918, a total of 162 associations have been formed, representing 2,658 member exporters. Peak years in terms of numbers of associations (though not in terms of total exports) were 1929-1931 when 57 associations were in existence. At present 42 associations are registered with the Commission representing 436 members.

For administrative purposes the Commission has traditionally divided these associations into five categories representative of five broad classes of exports: metals and metal products, products of mines and wells, lumber and wood products, foodstuffs, and miscellaneous products (including motion picture films, abrasives, rubber tires and tubes, paper, pencils, drugs, textiles, typewriters, and scientific instruments). In these classifications, current association activity is as follows:

	<u>Associations</u>	<u>Members</u>
Metal and Metal Products	10	95
Mines and Wells	3	21
Lumber and Wood	7	86
Foodstuffs	10	119
Miscellaneous	12	115

Indication of the extent of association activity and a key to the significance of the Webb Act in foreign trade may be found in a comparison of the dollar value of exports in the years 1920 to 1954. These show a high of \$1,083,788,921 in 1947, a peacetime low of \$91,180,000 in 1921 (during World War II exports were below that figure), and over-all, a strong post World War II comeback.

These are dollar values by classes of products:

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3/(continued from page 2) investigation into the alleged violations of law. Upon investigation, if it shall conclude that the law has been violated, it may make to such association recommendations for the readjustment of its business, in order that it may thereafter maintain its organization and management and conduct its business in accordance with law. If such association fails to comply with the recommendations of the Federal Trade Commission, said Commission shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper."

Year	Metals and Metal Products	Products of Mines and Wells	Lumber and Wood Products	Foodstuffs	Other Manufactured Products	Total
1920	\$152,000,000	\$8,000,000	\$17,000,000	50,000,000	\$36,000,000	\$221,000,000
1921	67,557,000	5,556,000	3,894,000	5,839,000	2,334,000	71,180,000
1922	68,227,000	14,500,000	26,000,000	32,400,000	16,573,000	153,500,000
1923	43,092,000	1,000,000	24,700,000	35,300,000	18,122,000	142,000,000
1924	43,287,000	14,000,000	33,000,000	40,000,000	27,934,000	165,500,000
1925	56,500,000	14,000,000	31,000,000	35,000,000	59,000,000	200,500,000
1926	137,000,000	18,000,000	35,400,000	53,000,000	67,000,000	371,500,000
1927	267,600,000	17,500,000	23,200,000	80,400,000	21,500,000	470,200,000
1928	271,000,000	270,000,000	26,000,000	67,100,000	90,000,000	724,100,000
1929	208,000,000	215,000,000	21,500,000	40,500,000	75,000,000	661,000,000
1930	100,000,000	73,000,000	35,400,000	32,500,000	71,200,000	311,000,000
1931	21,000,000	56,000,000	8,000,000	24,000,000	35,000,000	144,000,000
1932	29,000,000	44,000,000	8,000,000	28,000,000	34,000,000	143,000,000
1933	27,000,000	53,000,000	8,500,000	21,300,000	36,000,000	143,800,000
1934	20,250,000	55,000,000	7,450,000	18,500,000	38,610,000	137,685,000
1935	40,507,335	42,780,283	6,533,374	21,250,423	38,225,100	149,296,525
1936	93,958,850	32,530,210	7,456,227	19,821,243	43,958,423	197,875,832
1937	67,000,000	20,920,491	5,381,028	21,487,274	45,356,027	161,244,820
1938	134,950,000	18,750,000	6,590,000	20,210,000	56,760,000	237,060,000
1939	207,498,000	16,587,000	7,364,000	14,297,000	63,028,000	307,354,000
1940	145,849,238	13,598,777	6,720,425	6,995,000	70,296,222	244,159,668
1941	116,022,502	7,552,132	7,332,569	12,723,390	12,389,401	162,036,000
1942	73,146,380	11,003,013	8,751,202	21,383,615	20,303,789	134,793,000
1943	19,445,263	11,582,586	10,071,372	5,321,425	29,257,770	75,738,416
1944	16,303,330	20,003,356	8,207,702	9,450,422	40,207,612	94,172,483
1945	93,435,347	22,320,916	9,636,851	131,623,782	58,570,722	322,597,224
1946	59,304,442	38,043,675	18,351,866	233,969,556	732,919,382	1,083,788,921
1947	38,580,731	43,247,220	11,799,541	142,165,390	464,389,220	700,183,502
1948	45,243,575	43,279,155	2,702,272	106,660,000	418,176,331	623,061,333
1949	50,778,293	43,863,159	7,892,288	22,467,160	305,427,247	490,423,147
1950	49,529,368	41,314,591	16,450,567	72,346,110	569,146,841	748,787,477
1951	32,270,831	19,465,614	12,095,662	72,277,796	434,565,343	570,675,246
1952	34,514,538	16,988,102	6,498,570	108,454,676	379,281,949	545,717,835
1953	83,656,619	23,618,855	5,625,932	108,357,541	619,340,517	841,099,464

Whatever the proper role of Webb-Act associations in foreign trade, there would appear to be no support in these figures for the suggestion made in some quarters that export association activity has sharply declined since the end of World War II.

Associations form for a variety of reasons and operate in a variety of ways. The Temporary National Economic Committee in 1940, in its extensive monograph on Webb-Act associations, listed these three general types of associations:

(1) The association that serves as a central agent for the members, taking orders, negotiating sales, and handling shipment of the goods to foreign countries.

(2) The association that directs the exportation of the members and retains certain functions in export trade, but permits the members to take the orders through their already established agents abroad; and

(3) The export company formed for the purpose of buying the members' products and reselling them in foreign markets. [TNEC Monograph No. 6, p. 136 (1940)]

The first of these, the joint sales agency, was the primary structural device contemplated by Congress in enacting the Webb-Pomerene Act. A House Committee, reporting favorably on the Webb-Pomerene bill, stated:

"The object of this bill is to aid and encourage our manufacturers and producers to extend our foreign trade.

"The bill seeks to do this by permitting the organization of cooperative selling agencies or associations among American exporters in order that they may meet foreign competition on equal terms in international commerce." (H.R. Rep. 118, 64th Cong., 1st Sess. 1916)

The economies which such a joint and centralized selling agency may effect in the cost of its members' export activities are considerable and in the first years after passage of the Webb-Pomerene Act, associations formed under the Act were uniformly of this type.

In 1924, the Federal Trade Commission issued its Silver Letter in response to a series of inquiries put by a group of silver producers contemplating establishment of a Webb-Pomerene Association. The principles there announced constituted the basic policy statement during the first 20 years of the Act's administration. The Commission stated, in part:

"The Act does not require that the association shall perform all the operations of selling its members' product to a foreign buyer.... It would seem, therefore, that an association may without necessarily involving conflict with the Act, engage in allotting export orders among its members and in fixing prices at which the individual members sell in export trade."

Thereafter, the nature of association activity diversified sharply. Associations act as exclusive selling agents for their members' products, or as central intelligence headquarters funneling export information to individual members who continue to sell through their own agents abroad (although sales policies may be controlled in varying degrees by the associations), or the association itself purchases from the individual members -- usually according to some pre-arranged quota system -- and thereafter negotiates its own foreign sales.

Within these broad categorical operations, association functions are varied. Agency-type associations must maintain extensive United States facilities for handling orders and overseas facilities for exploiting sales. Joint activity to exploit members' foreign sales may properly be a function of any type of association. Elaborate quota systems may be administered by the association for allocating members' sales (usually in the case of the agency type of association, or the association buying for its own resale.) In many cases prices established by the association are fixed on all sales; in others, minimum prices are fixed or price information is exchanged.

Intelligence functions may cover a broad range: Supplying members with information on foreign market conditions, credit data, warehousing costs and availability, insurance requirements, shipping rates, cargo availability, import restrictions, tariffs, exchange requirements, etc. The association may seek to standardize and improve products, eliminate sales of inferior products, reduce deception in sales, inspire technological improvement. And it may serve as a ready device for processing foreign claims against individual members and for adopting uniform sales contracts and procedures.

The advantages which exporters have found in Webb associations are derivative of these varied functions: centralizing sales efforts, eliminating destructive price competition between members inspired by economically potent foreign buyers, supplying foreign market information to members, exploiting members' products abroad, improving product quality. The association format often provides added prestige for dealing with official or quasi-official foreign buyers and for gaining access to new markets. Traditionally, associations have reported these broad advantages under the Act: meeting centralized buying by centralized selling, gaining sufficient economic stature to meet the competition of entrenched foreign combines or cartels, capturing and consolidating new markets. One association reported to the TNEC in 1940:

"Only by combination under the Webb law and acting as a unit, can the American producers in this industry meet the competition of foreign producers. There is little doubt, we think, that if the American producers had not been able or had neglected to take full advantage of the provisions of the Webb-Pomerene law, to combine and make joint efforts, this American product would have been driven out of the foreign markets many years ago."

And another said:

"[The association has] followed a consistent policy year in and year out in good times and in poor times of maintaining a foreign field organization.

Through such organization we have been enabled to build up and maintain a recognition of the quality of our brand. This quality reputation, together with the goodwill created by the maintenance of a continued foreign sales force, has enabled us to continue to secure business even in the face of foreign price competition of a very serious type."

In 1955, many Webb-Pomerene associations reiterated these same conclusions. Statements made to the Commission indicate that, in the view of many associations, foreign cartels and joint bidding by foreign competitors, importers, and buyers still constitute a real factor in foreign trade, and that State trading has increased.

These statements fairly present the case for the Webb-Pomerene Act as stated by those most desirous of retaining its benefits. But any authority by which competitors are permitted to combine is, in technical terms, contrary to the main thrust of the antitrust laws and must be strictly administered, for the antitrust implications of such activity are heavy.

The framers of the Webb-Pomerene Act were at pains to stress that the Act's permissive features were not intended to weaken over-all antitrust prohibitions. During the Congressional debates on the bill, Senator Pomerene stated:

"Although an association organized under the pending bill should enter into some agreement or perform some act in a foreign country which met the requirements of law there, if at the same time the effect of it were such as to materially interfere with the policy of the United States under its antitrust laws, then it would be subject to the jurisdiction of the authorities of this country, including the Federal Trade Commission and the Department of Justice." (56 Cong. Rec. 170 (1917))

and again:

". . . this bill does not repeal the Sherman Act." (56 Cong. Rec. 172 (1917))

Yet the permissiveness of the Webb-Pomerene Act has been abused. Webb Act associations have been classified as cartels by European economists and lawyers; and the guise of an export association has been used, in more than one instance, to legitimize participation in international cartels.

Under Section 5 of the Webb-Pomerene Act the Federal Trade Commission has, on eight separate occasions, proceeded against Webb-Pomerene associations for activities in violation of the law, and the Department of Justice has successfully brought Sherman Act proceedings against four other associations. Most recently the Federal Trade Commission has ruled that price fixing agreements by the associations and their foreign competitors are not within the exemptions of the Webb-Pomerene Act, thereby repudiating the opposite contention long considered valid under the Commission's 1924 Silver Letter.

This antitrust activity, over a period of years, has served to curb association excesses and to underscore what the Attorney General's Committee termed "alertness to confine export association activities within congressionally intended exemptions."

The Federal Trade Commission does not promote the Webb-Pomerene Act nor does it derogate its importance. These are critical activities beyond our statutory assignment. We do not feel that it is properly the Commission's function to engage in debates on the policy merits of the Act. These are essentially legislative functions.

Under the terms of the Act, the Federal Trade Commission is charged with supervising the operations of export associations and, concurrently with the Department of Justice, with seeking to eliminate abusive association conduct. To this end, the Commission is, for the first time in Webb Act history, reviewing the lawfulness of the activities of every export association with a view to spotlighting antitrust violations. At the same time, we have strengthened liaison ties with the Department of Justice and to the best of our understanding, have eliminated conceptual disagreements between the two agencies which in the past have hobbled effective administration of the Act.

The limitations of time have necessarily made this review of the Webb-Pomerene Act brief, but I am ~~hoping~~<sup>hoping</sup> that it has been of some value to you. The operations of export associations are complicated and antitrust problems are ever-present. The Act has in the past engendered fierce ideological conflicts and, I suspect these hearings will show, continues to do so. The assessment which you finally place on the worth of export associations in the over-all scheme of America's foreign trade will probably go far in fixing the Webb-Pomerene Act's ultimate role in our system of antitrust.