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Report on Antitrust Implications of Joint Industry Activities under Price Controls

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APPENDIX

REPORT ON ANTITRUST IMPLICATIONS OF JOINT INDUSTRY ACTIVITIES UNDER PRICE CONTROLS*

Pursuant to the authority of the Economic Stabilization Act of 1970,[1] the nation has recently experienced "Phase IV" of a program of price controls. This statutory authority expired on April 30, 1974, except as to certain petroleum products.[2]

Phase IV, to a greater extent than the preceding three phases of controls, gave rise to a need and an opportunity for joint industry efforts to influence and guide governmental authorities in shaping pricing policies in the economy. This report, therefore, examines the legal basis for such joint industry activities within the purview of Section 1 of the Sherman Act. If authority is granted by Congress for any extension of controls, this report may be of use to antitrust practitioners in assessing the future conduct of their clients; absent such extension, it is hoped that this report will have historical value through documentation of some of the problems and considerations involved in the relationship between government price controls and antitrust laws.

Historical Perspective of Price Controls

Prior to implementation of the Economic Stabilization Act of 1970, the federal government had initiated economic control programs during four separate periods in this century: World War I, the Depression, World War II, and the Korean War. As part of each of these controls programs, competing members of various industries found themselves required by regulation or necessity to engage in activities which normally ranged from being "questionable" under the Sherman Act to being what today would constitute

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[1]Act of August 15, 1970, 84 Stat. 799, *as amended,* 12 U.S.C. §1904 (1973).

[2]The Federal Energy Administration continues to control certain petroleum products pursuant to the Emergency Petroleum Allocation Act of 1973, 87 Stat. 628 (1973); 15 U.S.C. §§751-786 (1975); *see also* FEA Ruling 1975-2, 40 Fed. Reg. 10655-60 (March 7, 1975), and *Mobil Oil Corp. v. Wm. E. Simon,* (C.D. Calif. Civ. No. 73-2091-WMB), with regard to the relationship between price controls and the Robinson-Patman Act (15 U.S.C. §13 (1970) as to competitive discounts.

per se violations. A review of the history of these four periods of control raises a warning flag as the nation moves back to a free market economy: (i) a program of cooperation and exchange of information among competitors once established by government encouragement can have a tendency to continue when the crisis for which the program was established ends; and (ii) the government will not hesitate to attack any such programs which are so continued. As a prelude to a consideration of the current problems of antitrust law as it relates to the economic stabilization program, it is useful to examine briefly the four prior controls periods.

Shortly after the United States entered World War I the federal government created the War Industries Board in 1917 to establish a cooperative effort between the federal government and private industry which was to function principally through industry trade associations. Bernard M. Baruch, who was instrumental in the establishment of the War Industries Board, described this cooperative effort as follows:

> In line with the principle of united action and cooperation, hundreds of trades were organized for the first time into national associations, each responsible in a real sense for its multitude of component companies and they were organized on the suggestion and under the supervision of the Government. Practices looking to efficiency in production, price control, conservation, control in quantity of production, etc., were inaugurated everywhere. Many business men have experienced during the war, for the first time in their careers, the tremendous advantage both to themselves and to the general public of combination, of cooperation and common action with their natural competitors.[3]

However, the intent of the antitrust laws was to limit such cooperative efforts among competitors, and a number of trade associations and their members found themselves under attack in the 1920's by the same government that had blessed them for cooperative efforts in 1917 and 1918.

The efforts of the Justice Department resulted in four major Supreme Court decisions in the 1920's which established the general parameters for trade association activities and contacts among competitors which continue to prevail. The first two decisions, in the cases of *American Column & Lumber Co. v. United States*[4] and *United States v. American Linseed Oil Co.*,[5] involved classic "open competition" plans. Manufacturers in the respective industries exchanged information through their trade association on production, demand, supply, past and future prices, expansion plans, market trends, customers, and all manner of other pertinent business data. The members of the association held regular meetings to discuss market areas, production, demand and prices.

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[3]B. BARUCH, AMERICAN INDUSTRY IN THE WAR (1921), *as quoted in* FTC, OPEN-PRICE TRADE ASSOCIATIONS, S. DOC. NO. 226, 70th Cong., 2d Sess. 13 (1929).

[4]257 U.S. 377 (1921).

[5]262 U.S. 371 (1923).

The Supreme Court in both the *Hardwood* and the *Linseed Oil* cases was sweeping in its condemnation of the "open competition" programs and the Justice Department was spurred to bring a host of cases against trade associations, many of which led to the termination of "open competition" programs through consent decrees.[6] The next two major Supreme Court decisions limited the impact of the *Hardwood* and *Linseed Oil* cases.

The Justice Department brought actions against the Cement Manufacturers Protective Association and the Maple Flooring Manufacturers Association in which it argued that the information exchange programs in those industries necessarily resulted in "uniformity of prices and limitation of production."[7] The Supreme Court rejected the government's arguments in both *Cement Mfrs. Protective Ass'n v. United States*[8] and *Maple Flooring Mfrs. Ass'n v. United States.*[9] The effect of the Court's opinions was that trade associations would be allowed to collect and to disseminate information on costs, production, prices and similar matters provided that the information was not identified by company, that it related only to past transactions, and that it was also made available to customers of the association's members and to others with whom such members had business dealings.

Some eleven years later the Supreme Court reaffirmed the general principles of its *Maple Flooring* and *Cement Manufacturers* decisions in *Sugar Institute v. United States.*[10,11]

The history of government controls programs and their relationship to government enforcement of the antitrust laws during the Depression, World War II, and the Korean War reflects the general history of the World War I program and its aftermaths. The overall purpose of each instance was to stabilize various sectors of the economy and to insure the proper allocation of materials and the proper production of goods to meet the specific necessities of the moment. The needs of the Depression period and the needs of World

[6]*See generally* G. LAMB & C. SHIELDS, TRADE ASSOCIATION LAW AND PRACTICE 9 (rev. ed. 1971) [hereinafter cited as LAMB & SHIELDS]; and *see, e.g.,* United States v. Atlanta Terra Cotta Co., indictment returned Sept. 28, 1921, S.D.N.Y., guilty pleas by some entered Dec. 15, 1921, *nolle prosequi* entered as to others, Nov. 20, 1923 and Aug. 29, 1927; United States v. Hiram Norcross, petition filed Oct. 25, 1921, W.D. Mo., decree dissolving the combination, April 2, 1924, *modified,* Feb. 14, 1927; United States v. Mid-West Cement Credit & Statistical Bureau, petition filed Oct. 1921, N.D. Ill., dismissed Jan. 21, 1926; United States v. Central Foundry Co., indictment returned Dec. 28, 1921, S.D.N.Y., *nolle prosequi* entered Aug. 10, 1925; United States v. Tile Mfrs. Credit Ass'n, petition filed Feb. 14, 1922, S.D.N.Y., consent decree dissolving the combination entered the same day, *modified,* May 1, 1924 and Nov. 23, 1927; United States v. Wickwire Spencer Steel Corp., petition filed Mar. 20, 1922, S.D.N.Y., consent decree entered same day, dissolving the association.

[7]Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588, 592 (1925).

[8]*Id.*

[9]Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925).

[10]Sugar Institute v. United States, 297 U.S. 553 (1936).

[11]*See also,* cases collected at 2 TRADE REG. REP. ¶ 4730 re exchange of information, and particularly *see* United States v. Container Corp. of America, 393 U.S. 333 (1969).

War II and the Korean War were quite different, but the general method adopted by the government in each instance was centered around industrial cooperation programs subject to the overall control of the government.

The most far reaching of these programs in its theoretical scope was the National Industrial Recovery Act,[12] which was enacted in 1933. It designated trade associations as agents to draft Codes of Fair Competition for their various industries. Trade groups were established for those industries which did not have active associations. Although the NIRA, by its terms, did not modify or amend the Sherman Act, it did exempt from the impact of the antitrust laws any action which was in compliance with an approved Code of Fair Competition.[13] These Codes, as approved by the National Recovery Administration for various industries, established limitations on production, set prices, required retail price maintenance, prohibited secret pricing methods, sought to prohibit price cutting, required cost, production and price disclosures, and required compliance with a host of other regulations some of which were permissible and some of which were patently illegal under the antitrust laws. A violation of an approved code was a misdemeanor[14] and an unfair trade practice under Section 5 of the Federal Trade Commission Act.[15]

The Supreme Court in 1935 held in *Schechter Poultry Corp. v. United States*[16] that the NRA involved an unconstitutional delegation of legislative authority and the NIRA was terminated in June of that year. A number of trade associations and industries were left with Codes that contained unprotected antitrust violations. Some associations were disbanded, others rid themselves of activities that were questionable under the antitrust laws, and others just kept on with their programs.[17] Not surprisingly, this resulted in lawsuits. The landmark case arising out of the NRA period was *United States v. Socony-Vacuum Oil Co.*[18]

The extent to which trade association activities continued which were in violation of the antitrust laws is shown by the statistics on cases brought by the Justice Department. Between 1939 and 1943 the Justice Department brought 72 criminal actions and 58 civil actions against trade associations and their members. Only seven of the criminal actions went to trial and in four of those the defendants were found guilty. Only one of the civil actions actually went to trial, and the government won it. The rest were settled by means short of trial.

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[12]Act of June 16, 1933, ch. 90, 48 Stat. 195.

[13]*Id.* §5(a).

[14]*Id.* §3(f).

[15]*Id.* §3(b).

[16]295 U.S. 495 (1935).

[17]LAMB & SHIELDS at 15.

[18]310 U.S. 150 (1940).

The Emergency Price Control Act of 1942 authorized organizations somewhat akin to a trade association but more closely tied to the government and known as "industry advisory committees." These committees were designed to provide a source of statistical information and an analysis of business needs to particular industries in order to facilitate government price regulation and allocation programs.

The price and wage controls established during World War II lasted for a longer period of time and were more comprehensive in their scope than any system of government economic regulation before or since. The controls system, as such, does not appear to have given rise to antitrust litigation which was as clearly an outgrowth of the system as did the activities of the War Industries Board and of the NRA. Nevertheless, there were some 652 industry advisory committees formed during the Second World War and in conjunction with the OPA they set up detailed regulations and elaborate pricing formulas for their various industries.

During the Korean War, an Office of Price Stabilization was created by statute in 1950,[19] and controls were established over allocations of materials, production capacity, prices, and wages. Again the government relied on business advisory committees, but this time it was made clear that the advisory committees were to do nothing more than advise the OPS. The Act did require the OPS to consult with the industry representatives before issuing regulations unless such consultation was impractical or impossible for security reasons. In order to minimize subsequent difficulties with the antitrust laws, the Justice Department formulated stringent standards to be followed by industry advisory committees and the Korean War economic controls program did not produce the antitrust problems of earlier programs.

Controls Under the Economic Stabilization Act of 1970

In sharp contrast to the prior control systems, for the first time under Phases I–IV, the government did not rely on private industrial advisory or rate setting boards in administering prices.[20] Further, unlike earlier controls, and the usual regulated industry rate-making practice, the Government did not fix specific industry-wide prices for specific commodities or services, nor, except for energy, did it try to regulate production or supply. Current price controls have been on a company-by-company basis and have been primarily confined to (1) establishing and regulating profit margins with reference to a specific base period and (2) substantially limiting price increases to actual net cost increases.

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[19]Defense Production Act of 1950, 64 Stat. 798, 50 U.S.C. App. §§2061-2166 (1951).

[20]Address by Deputy Assistant Attorney General Walker B. Comegys, Jr., *Phase In, Phase Out,* before Wage and Price Control Institute, New York City, Nov. 29, 1971 [hereinafter cited as Comegys Address].

TABLE 22.—*Regulations of the controls program, Phases II, III, and IV*

Program	Phase II Nov. 14, 1971 to Jan. 11, 1973	Phase III Jan. 11, 1973 to June 13, 1973	Phase IV Aug. 12, 1973 to date
General Standards:			
Price increase limitations	Percentage pass-through of allowable cost increases since last price increase, or Jan. 1, 1971, adjusted for productivity and volume offsets. Term limit pricing option available.	Self-administered standards of Phase II.	In most manufacturing and service industries dollar for dollar pass-through of allowable cost increase since last fiscal quarter ending prior to Jan. 11, 1973.
Profit margin limitations	Not to exceed margins of the best 2 of 3 fiscal years before Aug. 15, 1971. Not applicable if prices were not increased above base level, or if firms "purified" themselves.	Not to exceed margins of the best 2 fiscal years completed after Aug. 15, 1969. No limitation if average price increase does not exceed 1.5 percent.	Same years as Phase III, except that a firm that has not charged a price for any item above its base price, or adjusted freeze price, whichever is higher, is not subject to the limitation.
Wage increase limitations	General standard of 5.5 percent. Exceptions made to correct gross inequities, and for workers whose pay had increased less than 7 percent a year for the last 3 years. Workers earning less than $2.75 per hour were exempt. Increases in qualified fringe benefits permitted raising standard to 6.2 percent.	General Phase II standard, self-administered. Some special limitations. More flexibility with respect to specific cases. Workers earning less than $3.50 per hour were exempted after May 1.	Self-administered standards of Phase III. Executive compensation limited.
Prenotification:			
Prices	Prenotification required for all firms with annual sales above $100 million, 30 days before implementation, approval required.	After May 2, 1973, prenotification required for all firms with sales above $250 million whose price increase has exceeded a weighted average of 1.5 percent.	Same as Phase II except that prenotified price increases may be implemented in 30 days unless CLC requires otherwise.
Wages	For all increases of wages for units of 5,000 or more; for all increases above the standard regardless of the number of workers involved.	None.	None.
Reporting:			
Prices	Quarterly for firms with sales over $50 million.	Quarterly for firms with sales over $250 million.	Quarterly for firms with sales over $50 million.
Wages	Pay adjustments below standard for units greater than 1,000 persons.	Pay adjustments for units greater than 5,000 persons.	As Phase III.
Special areas	Health, insurance, rent, construction, public utilities.	Health, food, public utilities, construction, petroleum.	Health, food, petroleum, construction, insurance, executive and variable compensation.
Exemptions to price standards	Raw agricultural commodities, import prices, export prices, firms with 60 or fewer employees.	Same as Phase II plus rents.	Same as Phase III plus manufactured feeds, cement, public utilities, lumber, copper scrap, long-term coal contracts, automobiles, fertilizers, nonferrous metals except aluminum and copper, mobile homes, and semiconductors.

[1] In some of these sectors wages were also exempted.

Source: Cost of Living Council (CLC).

The following is a brief description of federal price and wage controls during Phases II–IV as set forth in President Nixon's 1974 Economic Report to Congress:[21]

A somewhat more detailed review of the policies and major regulatory requirements of Phases I–IV is provided in an Appendix accompanying this report, entitled "Phase I To Phase IV—A Look At Price Controls."

Due to the fact that under Phases I–IV, specific prices for commodities were not established on an industry-wide basis but rather were controlled indirectly, on a company-by-company basis, through regulation of profit margins and price increases, the whole scheme of control resulted in different ceiling prices and profit margins applicable to individual companies. These differences created a variety of possible dislocations or problems within different industries depending particularly on the spread of profitability. Price controls, in some instances, tended to aggravate existing industry imbalances in this area. Firms with a higher level of profitability, for example, were allowed to retain that level. This feature was potentially most oppressive competitively in industries where the market leader enjoyed the highest profitability.[22] Controls on profit margins also tended to favor firms with the greatest prospects for sales growth, an increase in which became a potential means of increasing profits notwithstanding the applicable profit margins. Such regulation penalized efficiencies, whether brought about through reduced costs, vertical integration or otherwise, where such cost reductions caused profit margins to exceed the allowable base period margins.

Further, since price controls did not apply to export sales by domestic companies, the firms with the better developed foreign sales operations had a potential advantage. In addition there was an incentive for domestic manufacturers to do more exporting to overseas markets where there were no price controls.

While the Antitrust Division has allocated a considerable part of its overall budget to intervening in regulatory proceedings, there is no record that it reviewed the rules and regulations promulgated pursuant to the Economic Stabilization Program for their potential anticompetitive effects or recommended changes intended not to impair existing market structures. On the other hand, price regulation has been influenced by factors unrelated to competition or inflation.[23]

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[21]ANNUAL REPORT OF THE COUNCIL OF ECONOMIC ADVISORS 91 (1974).

[22]The Cost of Living Council, as did the Price Commission, provided a means by which a firm with a loss or low profit history could potentially acquire an applicable profit margin that could be higher than that otherwise permitted by the regulations. Cost of Living Council (Phase IV) Regs. §105.201–202.

[23]Grayson, *Let's Get Back to the Competitive Market System,* 51 HARV. BUS. REV 103.107 (1973).

The Cost of Living Council: Joint and Individual Presentations

Officials of the Antitrust Division of the Department of Justice indicated very early in the Economic Stabilization Program that the Antitrust Division was at least suspicious of concerted industry activity in respect to the Economic Stabilization Program.[24] Discernment of this attitude by industry may have acted as a deterrent to joint industry activity in the area of the Economic Stabilization Program. However, it must be emphasized that joint industry presentations were not practical in many instances due to the necessity of an individual company approach to compliance with the Economic Stabilization Program.

Nonetheless, in many instances the Cost of Living Council appears to have acted on an industry-wide basis, or to have cooperated with industry groups such as trade associations. Perhaps one of the best examples was in the Council's exercise of its authority to promulgate regulations. When the Council first issued its proposed Phase IV regulations, interested persons were invited to submit written data, views, or arguments.[25] Subsequent thereto, it was reported that the Council received approximately 671 formal comments on the proposed regulations, some of which were submitted by trade associations.[26]

This same procedure of inviting public, and in effect industry, comment on proposed rules and regulations was also followed by the Council on November 7, 1973, when proposed rules on health care were promulgated[27] and again when proposed rules modifying the petroleum regulations were issued,[28] and in other instances.[29]

Decontrol, or the granting of at least partial exemptions from the Economic Stabilization Program, constitute another area where the Cost of Living Council acted on an industry-wide basis. By illustration, on January 30, 1974, the Council exempted many petrochemical feedstocks from Phase IV price regulations, and eliminated cost justification requirements, yet retained profit margin constraints for other petrochemical products.[30] A multitude of other exemptions were granted.[31]

Some of the early exemptions granted by the Council appear to be the direct result of activities of trade associations or other concerted industry

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[24]Comegys Address.

[25]38 Fed. Reg. 19464 (1973).

[26]CCH ECONOMIC CONTROLS, Report Letter, Aug. 14, 1973.

[27]38 Fed. Reg. 30850 (1973).

[28]Cost of Living Council Release No. 464, Nov. 16, 1973.

[29]*See* 38 Fed. Reg. 32628.

[30]Cost of Living Council Release No. 512, Jan. 30, 1974.

[31]*See* Cost of Living Council News Release of April 1, 1974.

action.[32] Others appear to have resulted from separate negotiations by individual members of an industry with the Council.[33]

An interesting example is the well-publicized conditional exemption from wage and price controls of the automobile, truck and bus manufacturing operations of four major companies.[34] This conditional exemption was granted by the Council in return for *individual* company commitments (one company made no commitment) to limit their price increases for the rest of the model year.[35] However, in this instance, the commitments given by the companies were in the form of a pledge not to raise prices on certain automobiles by more than $100.00 or $150.00, depending on the company and vehicle involved, notwithstanding the fact that prenotification of price increases had previously been filed by the companies for increases that, on the average, were above those subsequently agreed upon.[36]

The exemption granted the cement industry is a good example of the Council working with individual companies and with the industry as a whole. In the announcement, John Dunlop, Director of the Cost of Living Council, stated that " . . . on the basis of communications with individual companies . . ." it was anticipated that prices would remain essentially stable during the first half of 1974.[37] However, the Release also stated that the Portland Cement Association would inform the Council on a regular basis of individual company plans for capital expenditures and net additions to capacity in the industry.[38]

Areas for Joint Industry Activity

Industry-wide meetings or presentations on the subject of future pricing levels have not been practical or necessary because of the structure of the regulatory scheme and its focus on profit margin levels and cost pass through. However, a brief inspection of the industry exemption or partial exemption announcements that the Council issued under Phase IV, citing economic reasons or justifications for their decisions, and an examination of the Eco-

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[32]*See* CCH ECONOMIC CONTROLS—Stabilization Program Guidelines ¶ 41,161. The First Amendment protects the right to advocate, either individually or through an association, and also the association's right to engage in advocacy on behalf of its members. Local 1954 Fed. of Teachers v. Hanover Community School Corp., 457 F.2d 456, 459 (7th Cir. 1972).

[33]CCH ECONOMIC CONTROLS—Stabilization Program Guidelines, ¶ 41,161.

[34]These firms were not exempted from compliance with the Cost of Living Council's regulations concerning executive and variable compensation. Cost of Living Council Release No. 482, Dec. 10, 1973.

[35]Cost of Living Council Release No. 482, Dec. 10, 1973.

[36]*Id.*

[37]Cost of Living Council Release No. 472, Nov. 27, 1973.

[38]*Id.*

nomic Stabilization Program in general, reveal a number of categories of possible joint industry activities. Some of these areas are:

(1) A meeting of industry leaders, initiated by the Council, to discuss collection of industry statistics which were not otherwise available but were essential to the administration of the price control law.

(2) An industry-wide political effort to abolish or modify price controls over the industry through legislative action, involving a combination of lobbying efforts and promotional campaigns.

(3) Industry intervention in pricing proceedings applicable to supplier companies to better assure that its own raw material costs were satisfactorily controlled.

(4) An industry recommendation to the Council of common accounting procedures to assure an equitable appraisal of each company's costs and profits within the industry.

(5) An industry application or petition for an exemption from price controls under Phase IV. A White House Press Release dated July 18, 1973, specified that one objective of Phase IV controls included "procedures to consider decontrol industry by industry."[39]

(6) An industry effort to modify regulations in an effort to insure that it was at least possible for an industry to comply with regulations promulgated in their final form. Such an effort might have involved educating the Council as to the pricing structure or methods of operation within such industry.

The Economic Stabilization Act of 1970 directs in Section 207 that procedures be available to any person to seek interpretation, modification, rescission, exception or exemption from rules, regulations and orders, and also provides for formal hearings. In this respect it appears that Act itself anticipated some industry-wide comments on proposed regulations and requests for exemption.

The antitrust implication inherent in all the above-listed activities comes from their basic intent to affect in some way the pricing mechanism in the particular industry affected. Each of the activities, if successful, *could* result in an effect upon price levels within the industry. The clearest example of this point would be a successful petition for an exemption from price controls where in the very act of petitioning, industry officials almost necessarily convey to each other a desire or even intent to raise prices upon decontrol. Any one of the listed activities could require the discussion or exchange of price or cost information which under any other circumstances

[39]White House Press Release, July 18, 1973, CCH Economic Controls, ¶ 49,003.

would not take place within a particular industry.[40] However, this is not to say that any of the activities of necessity involve any violation of Section 1 of the Sherman Act. In short, these activities offer a vehicle or opportunity for combination or conspiracy and the possibility of an effect upon price levels resulting thereform. The key question therefore is the extent to which such activities must be protected under First Amendment rights to respond to or influence governmental action.

The View of the Antitrust Enforcement Agencies

The Antitrust Division appears to be suspicious of any joint industry action in the price control area, especially in regard to the establishment of any price ceilings.[41]

At the beginning of the price control program one Antitrust Division representative concluded broadly that in view of the Price Commission's early decision not to approve a joint industry presentation for a price increase,

> . . . there seems to be little excuse for private, concerted action of competitors on price issues. There would now seem to be absolutely no justification for meetings of competitors to devise a collective pitch to Price Commission.[42]

Of course it must be again emphasized that this statement was made early in the Economic Stabilization Program, well before the Cost of Living Council adopted a policy of inviting public comment on proposed regulations, and well before the policy of granting a least partial industry exemptions was liberalized.

While the Department has not pointed to any overriding antitrust prohibition against all joint industry contacts with government regulators, it may have discouraged many such contacts by advising regulatory departments and commissions of the Executive Branch in what the Division admits to be non-legal areas. With the rising apprehension of government regulators in dealing with companies on an industry-wide basis, there is less room for industry associations and other groups to act in this area.

In general, the antitrust division's approach is that trade associations and other industry groups should not interfere with an area of great public interest.[43] The Department's position was specifically described recently by an official of the Antitrust Division:

> Finally, while this is not exclusively an antitrust problem, we also encourage the agencies as a general rule to proceed to gather information on

[40]*See, e.g.,* United States v. Container Corp. of America, 393 U.S. 333 (1969).

[41]Comegys Address.

[42]*Id.*

[43]Clearwaters, *Trade Associations and the Antitrust Laws—A View from the Justice Department,* 18 ANTITRUST BULL. 233, 239–40 (1973) [hereinafter cited as Clearwaters].

> a company-by-company basis. This minimizes the risks that competitively sensitive information will be exchanged, and it permits the agency to test the submission of one firm against another. At times in the past, government agencies, seeking to determine the feasibility of a particular federal action were told by trade associations that what the government sought to do could not be done or could be done only at great expense. With a united industry front, the government has no way of testing such assertions. By proceeding on a company-by-company basis, we may come upon one firm which not only believes that the proposed action is feasible for the industry, and will not pose unusual financial hardships, it may have developed the means of getting the job done.[44]

Assistant Attorney General Thomas Kauper in a letter to the new Consumer Product Safety Commission, restated the policy as it applies to technical know-how:

> The third course of action contemplated would involve joint industry presentations of technical information and advice to the Bureau to assist the Bureau in developing mandatory safety standards. Neither the antitrust laws nor the outstanding decree prevent the match manufacturers from consulting with a government agency for the purpose of assisting the latter to develop safety standards. The Department believes, however, that the Bureau when attempting to determine the present state of the art or the technical feasibility of a standard should discuss such matters with the manufacturers on an individual basis rather than with the industry as a whole. By acting in this manner the Bureau might find that, by considering a variety of viewpoints, it can develop its mandatory standards from a broader data-base.[45]

Certain exceptions have been carved out of the Antitrust Division's usual position on joint presentations. These exceptions are best illustrated by the "Smog" consent decree since this decree involved a most important public issue and represents the genesis of the Division's policy. The Division agreed to certain joint industry presentations to government regulatory agencies. The consent decree specifically authorized:

> Joint statements relating to (i) the authority of the agency involved, (ii) the draftsmanship of or the scientific need for standards or regulations, (iii) test procedures or test data relevant to standards or regulations, or (iv) the general engineering requirements of standards or regulations based upon publicly available information; provided that no joint statement shall be filed which discusses the ability of one or more defendants to comply with a particular standard or regulation or to do so by a particular time, in the absence of a written agency authorization for such a joint statement, and provided also that any defendant joining in a joint statement shall also file a statement individually upon written request by the agency involved.[46]

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[44] *Id.*

[45] Letter from Assistant Attorney General Kauper to Bureau of Product Safety, Mar. 28, 1973, 5 TRADE REG. REP. ¶ 50,182.

[46] United States v. Automobile Mfrs. Ass'n, 1969 Trade Cas. ¶72,907 at 87,458 (C.D. Cal. 1969).

Congress also has indicated certain areas where it believes that it is appropriate for regulatory agencies to work with industry associations. The legislative history of the new Consumer Product Safety Act indicates an intent that industry participate in the development of safety standards.[47] Similarly, under the Fair Packaging and Labeling Act, the Department of Commerce has the responsibility to seek industry cooperation in reducing the number of packages for a product where it has determined there is an undue proliferation of same.[48]

The Federal Trade Commission, which is an independent agency and does not function as the legal advisor to government regulatory commissions and departments, has not taken so firm a position on joint industry-government communications.[49] It generally has confined itself to the problem of industry self-regulation.

The Constitutional Issue

One might argue that if competing companies may not themselves agree on maximum prices under the Sherman Act,[50] the same end may not be lawfully attained by petitioning the government to do it for them. It could also be argued that short of actually agreeing on price levels, joint activities of the types described above could have a "necessary effect" which is the equivalent of a price agreement.[51] Such conclusions, however, cannot be reached without taking into account the First Amendment right which persons have jointly to ask the government to adopt any law or regulation that serves their common interests, or to repeal regulations and laws, includ-

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[47]CCH CONSUMER PRODUCT SAFETY GUIDE ¶ 150. *But see* Clearwaters.

[48]TRADE REG. REP. No. 382 (Dec. 8, 1968).

[49]Dietrich, *The Role of Antitrust During Phase II,* 17 ANTITRUST BULL. 419-22 (1972) In Rodgers v. FTC, 492 F.2d 228 (9th Cir. 1974), the FTC considered a combination among competing grocery chains and certain suppliers to engage in a publicity campaign directed at the public for the purpose of defeating an item on the ballot in an impending election. The ballot item, if passed, would have imposed additional packaging and handling costs on these companies. The companies apparently jointly threatened price increases on the related goods if the ballot item were passed. The combined effort was an indirect approach to the legislature. The Ninth Circuit determined that the decision in *Eastern Railroad Presidents Conf.* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961) (see text *infra*), was controlling. Significantly, the FTC, in a letter to the plaintiff dated January 26, 1971, indicated a rather broad interpretation of *Noerr.* The letter stated in part:

> Even assuming a wrongful motive, for purposes of consideration of your complaint, and the willful use of distortion or deception, it is our view that actionable violation of Section 5 of the FTC Act is not indicated due to the overriding public interest in preservation of uninhibited communication in connection with political activity, particularly in connection with legislative processes. Nor would illegality attach because joint action may have been here undertaken on the premise of economic advantage, not merely political interest.

[50]United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

[51]Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939).

ing antitrust laws, which do not serve their interests.[52] The right to petition the government is of equal dignity with the rights of free speech and press. As stated in *Thomas v. Collins*:[53]

> It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights . . . and therefore are united in the First Article's assurance.

Further, under Phases I–IV it was the government alone which regulated prices, and no one has successfully maintained that such regulation has been beyond the scope of government power, even though price competition is adversely affected, if not eliminated, in the process. This is lawful.[54] It is unlike the situation in *Georgia v. Pennsylvania R.R.*[55] There, railroads themselves were authorized under the Interstate Commerce Act to establish just and reasonable rates, fares, charges and classifications. The Court held that the defendant companies had gone beyond this point. It stated:

> It is sufficient here to note that we find no warrant in the Interstate Commerce Act and the Sherman Act for saying that the authority to fix joint through rates clothes with legality a conspiracy to discriminate against a State or a region, to use coercion in the fixing of rates, or to put in the hands of a combination of carriers a veto power over rates proposed by a single carrier. The type of regulation which Congress chose did not eliminate the emphasis on competition and individual freedom of action in rate making.[56]

The case illustrates the potential Sherman Act risks companies encounter in attempting to deal with government price regulation on an industry basis. The case led to enactment of a statutory exemption over the subject matter.[57] This risk is heightened with the type of price regulation used in Phases I–IV. For example, the Cost of Living Council was concerned with maximum prices, leaving companies free to charge lower prices. If an industry association proposed a particular ceiling price to the Council (perhaps pursuant to a request for exemption from the Economic Stabilization Program) which the Council adopted, and all of the industry members thereafter increased their prices up to that level (a most logical thing to do economically), there is still a risk of an argument that the companies tacitly agreed to so raise their prices within the ceiling set by government action.

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[52]United States v. Rock Royal Co-op., Inc., 307 U.S. 533 (1939).

[53]323 U.S. 516 (1945).

[54]*See, e.g.*, Parker v. Brown, 317 U.S. 341 (1943, Wainwright v. National Dairy Prods. Corp., 304 F. Supp. 567 (N.I.) Ga. 1969).

[55]324 U.S. 439 (1945).

[56]*Id.* at 458-59.

[57]49 U.S.C. §b(a) (1970).

The fact that the industry association's records of agendae and minutes of the meetings at which the association's proposals to the Council were formulated and agreed upon contain no evidence of any agreement to raise prices and, indeed, contain actual declarations against any such agreement, might not be sufficient to successfully rebut the inference of wrongdoing. Such companies would then be confronted with the traditional problem of attempting to rebut such an inference through evidence of industry-wide cost increases and the absence of abnormally high industry profits.[58]

This difficulty, and the related expenses involved, must have persuaded some companies not to assume the risk of jointly proposing price levels. The risk level seems considerably lower, however, for such subject areas as proposed changes in the existing law or regulations and proposals for exemptions or decontrol, as they would normally have a somewhat remote relationship to actual pricing. The activities described in Items 1 through 6 set forth above would often seem to fit into such a risk-level category. In this connection, there is some question whether immunity is obtained simply because regulatory officials are present during joint industry deliberations, whether or not at their invitation.[59]

Noerr-Pennington Doctrine

Apart from the defense that no agreement in fact was ever entered into, expressly or tacitly, the types of joint activities discussed above should be protected under the First Amendment as communications reasonably necessary to the exercise of consitutional rights. In *Eastern Railroad Presidents Conf. v. Noerr Motor Freight Inc.*,[60] the United States Supreme Court held that a railroad association's efforts to influence the passage and enforcement of state legislation harmful to truckers who competed with the railroads were exempt from the Sherman Act, even though deception, misrepresentations, and unethical tactics were utilized and the sole purpose was to destroy the truckers as competitors for the long-distance freight business. The Court stated that "[t]he Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly."[61]

The *Noerr* Court discerned an essential dissimilarity between an agreement jointly to seek legislation or law enforcement and the agreements traditional-

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[58]Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537 (1954).

[59]Consumers Union of U.S., Inc. v. Rogers, 352 F. Supp. 1319 (D. D.C. 1973), *modified and aff'd sub nom.* Consumers Union of U.S., Inc. v. Kissinger, 506 F.2d 136 (D.C. Cir. 1974), *cert. denied*, 43 U.S.L.W. 3636 (June 2, 1975).

[60]365 U.S. 127 (1961).

[61]*Id.* at 136.

ly condemned by Section 1 of the Sherman Act. The Court felt that the question of inapplicability of the Sherman Act was conclusively settled when this factor was considered along with other difficulties that would be presented by a holding that the Act forbids associations for the purpose of influencing the passage or enforcement of laws and observed:

> In the first place, such a holding would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade. In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act. Secondly, and of at least equal significance, such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms . . . . .
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> * * * *
>
> The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors . . . .[62]

Four years after the *Noerr* decision, in *UMW v. Pennington*,[63] the Court's attention was focused upon an alleged effort by large coal mine operators and union officials to eliminate small companies by seeking to persuade the Secretary of Labor to set higher minimum wage standards for companies selling coal to the TVA on long-term contracts. The Court in *Pennington* stated even more explicitly:

> Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.[64]

The *Noerr-Pennington* doctrine was reiterated and, in certain respects, broadened by the Court in *California Motor Transp. Co. v. Trucking Unlimited*,[65]

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[62] *Id.* at 137–38, 139.

[63] 381 U.S. 657 (1965).

[64] *Id.* at 670.

[65] 404 U.S. 508 (1972).

decided in 1972. There the claim was that a group of trucking companies conspired to resist and defeat before state and federal regulatory commissions all applications by their plaintiff competitors for the issuance, transfer or registration of operating rights. Most importantly, the Court expressly extended the *Noerr-Pennington* doctrine to administrative agencies and to the courts. The Court stated that "[c]ertainly the right to petition extends to all departments of the Government."[66] It was stated by the Court that "it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors."[67]

There are certain exceptions, however, to the basic doctrine of the *Noerr-Pennington-Trucking Unlimited* trilogy. The Supreme Court in *Noerr* pointed out that there might be instances where what appear to be bona fide attempts to influence governmental action are a "mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified."[68]

Subsequently the Supreme Court in *Trucking Unlimited* held that alleged abuses of the judicial and administrative processes were actionable as within the "sham" exception to *Noerr*. The Court there observed that the complaint relied upon the sham theory, alleging that the power, strategy, and resources of the defendants were used to harass and deter the plaintiffs in their use of administrative and judicial proceedings so as to deny them "free and unlimited access" to those tribunals, with the results that the machinery of the agencies and the courts was effectively closed to the plaintiffs and that the defendants had become the "regulators of the grants of rights, transfers, and registrations to plaintiffs."[69] The Court viewed the allegations as being that defendants sought to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp the decisionmaking process, not that the conspirators had sought "to influence public officials."[70] The Court pointed up the distinction between the "political" campaign in *Noerr* and a pattern of baseless, repetitive claims which would constitute abuse of administrative and judicial processes, effectively barring parties from access to the agencies and the courts and thereby producing an illegal result.

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[66] *Id.* at 510.

[67] *Id.* at 510–11.

[68] 365 U.S. at 144.

[69] 404 U.S. at 511.

[70] *Id.* at 511–12.

The Court declared, "Insofar as the administrative or judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of 'political expression.' "[71]

Exceptions to the doctrine have also emerged or been recognized with respect to commerical dealings between government and industry and, perhaps ancillary to or as part of the "sham" exception, as to all forms of "illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations",[72] such as misrepresentations, perjury, fraud, coercion or bribery. Certain of these exceptions find recognition in the first decision by the Court of Appeals for the First Circuit in *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc*[73] (purely commercial dealings); *Sacramento Coca-Cola Bottling Co. v. Teamsters Local 150*[74] (threats, intimidation, and other coercive measures against public officials); and *Woods Exploration & Producing Co. v. Aluminum Co. of America*[75] (submission of false reports).

In the case of *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., supra,* decided by the First Circuit in 1970, the court elucidated the distinction between the so-called *Parker v. Brown*[76] immunity and the *Noerr-Pennington* immunity. The court characterized these two doctrines as separate but related principles of antitrust exemption and summarized Paddock's reliance upon them as follows:

> First, drawing on Parker v. Brown, 317 U.S. 341. . ., Paddock argues that restraints of trade which *result from valid governmental action* cannot give rise

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[71] *Id.* at 513. Possible application of the "sham" exception has also been recognized in the context of resistance to an air carrier's petition for subsidy before the Civil Aeronautics Board which allegedly was made with the predatory intent and purpose of eliminating plaintiff as a competitor. Aloha Airlines, Inc. v. Hawaiian Airlines, Inc., 349 F. Supp. 1064 (D. Haw. 1972), *aff'd,* 489 F.2d 203 (9th Cir. 1973), *cert. denied,* 415 U.S. 991 (1974). Similarly, recognition has been given to possible application of the "sham" exception in the context of an alleged conspiracy to keep a drug product off the market by the alleged influencing of the Food and Drug Administration to deny fair consideration of new drug applications filed by plaintiffs. Israel v. Baxter Labs., Inc., 466 F.2d 272 (D.C. Cir. 1972).

[72] California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 512, 513 (1972). However, the presence of malice in using the government processes is not an exception to the *Noerr* doctrine, since it merely goes to the intent of those who utilize those processes. *See* Sierra Club v. Butz, 349 F. Supp. 934, 938 (N.D. Cal. 1972). This matter of intention, of course, is to be distinguished from fraud, coercion, perjury, misrepresentations, and the like.

[73] 424 F.2d 25 (1st Cir.), *cert. denied,* 400 U.S. 850 (1970); on remand, trial resulted in judgment for the defendants. George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 376 F. Supp. 125 (D. Mass.), *aff'd,* 508 F.2d 547 (1st Cir. 1974), *cert. denied,* 43 U.S.L. W. 3636 (U.S. June 2, 1975). The immunity question, having been disposed of in the first Court of Appeals decision, was not in issue in the appeal from the judgment entered after trial.

[74] 440 F.2d 1096 (9th Cir.), *cert. denied,* 404 U.S. 826 (1971).

[75] 438 F.2d 1286 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972).

[76] 317 U.S. 341 (1943).

> to private antitrust liability. Second, relying primarily on Eastern Railroad Presidents' Conference v. Noerr Motor Freight, *supra,* and United Mine Workers of America v. Pennington, . . . , Paddock maintains that *joint efforts to influence public officials* are beyond the scope of the antitrust laws. (Emphasis added.)[77]

For purposes of the appeal from the trial court's summary judgment dismissing the complaint, the Court of Appeals assumed that the defendant Paddock had combined with architects and others to write the specifications for pipeless swimming pools bought by public bodies in a way that would exclude competitors. The Court concluded that the *Parker v. Brown* immunity did not apply, and observed that if the suit had been brought by certain school boards rather than a competitor, it would be anomalous to dismiss the school boards' suit on the grounds that, by adopting Paddock's specifications, they had conferred immunity on monopolistic practices which they had never considered, which they lacked the authority to approve, and which undermined the entire process of competitive bidding.

In analyzing the *Noerr-Pennington* immunity, the *Paddock Pool* court construed the scope of the immunity within a rather narrow dimension. The court's analysis read into the *Noerr* doctrine a requirement that a significant policy determination be involved. The court stated that it felt the key to the *Noerr* decision was the Supreme Court's heavy emphasis on the political nature of the railroads' activities and its repeated reference to the "passage or enforcment of laws." The *Paddock Pool* court declared:

> But the efforts of an industry leader to impose his product specifications by guile, falsity, and threats on a harried architect hired by a local school board hardly rise to the dignity of an effort to influence the passage or enforcement of laws. By 'enforcement of laws' we understand some significant policy determination in the application of a statute, not a technical decision about the best kind of weld to use in a swimming pool gutter. Noerr alone, then, does not support Paddock's position.[78]

Continuing its focus on *Noerr's* stress of the importance of free access to public officials vested with a significant policy-making discretion, the court in *Paddock Pool* stated that it doubted "whether the [Supreme] Court, without expressing additional rationale, would have extended the *Noerr* umbrella to public officials engaged in purely commercial dealings when the case turned on other issues."[79] The Appeals Court in *Paddock Pool* also pointed out that the First Amendment does not provide the same degree of protection to purely commercial activities as it does to matters of political persuasion.

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[77]424 F.2d at 29.

[78]*Id.* at 32.

[79]*Id.* at 33.

The United States Supreme Court decision in *Trucking Unlimited,* which was issued subsequent to the *Paddock Pool* decision, tends to erode *Paddock Pool's* emphasis on joint efforts toward influencing significant policy determinations as a sine qua non to application of the *Noerr-Pennington* doctrine. *Trucking Unlimited* establishes that the *Noerr-Pennington* philosophy governs the approach of citizens or groups of citizens to administrative agencies and to courts and that the right to petition extends to all departments of the government. Fundamental to this judicial antitrust exemption is whether the governmental mechanism involved provides adequate safeguards such as hearing and appeal rights. While it may be doubtful that the court in *Paddock Pool* would have characterized judicial and agency determinations as significant policy determinations in the application of a statute or application of significant policymaking discretion; nonetheless, to the extent that *Paddock Pool* holds the *Noerr-Pennington* doctrine inapplicable in the context of commercial dealings with the government, it seems to be grounded upon firm footings.

Persons contemplating the use of cooperative efforts or joint presentations before governmental agencies are advised to keep in mind the parameters of the *Noerr-Pennington-Trucking Unlimited* doctrine. The antitrust immunity conferred only covers joint efforts to influence the governmental body whose resulting action may operate to impose restraints upon trade or commerce. The mantle of immunity does not in any other respect cloak or protect any contract, combination, or conspiracy in unreasonable restraint of trade or commerce. The joint efforts to influence the public officials may be immune, even if "part of a broader scheme itself violative of the Sherman Act",[80] but this does not render the "broader" portion of the scheme immune. To the extent such a scheme extends beyond such joint efforts to influence public officials, such scheme and its results will fall under antitrust sanctions.

Thus, for example, cooperative efforts toward joint presentations before price regulating authorities will not immunize companies from antitrust liability if in the course, or as a result, of such cooperative efforts, they engage in price-fixing or other schemes tampering with the price mechanism, market division, or agreements to limit production. The following words of an official of the Antitrust Division of the Department of Justice serve as a warning of temptations which may attend such joint efforts:

> Our nation's prior experiences with price controls most clearly demonstrate that meetings of competitors to present a common front in governmental decision making have tended to degenerate into agreements to restrict production, raise prices or retard innovations. Firms might exchange sensi-

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[80]UMW v. Pennington, 381 U.S. 657, 670 (1965).

tive information on costs, customers and suppliers with their competitors. This, of course, can have a dampening effect on competition . . . .

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During Phase II, we are also concerned that firms, acting in the name of compliance with price controls, will independently exchange price information . . . .

Unless otherwise authorized by the Price Commission, joint discussions involving prices, changes in product lines and sensitive cost data should be absolutely avoided.

For trade associations, I think it is perfectly clear that the safest course is 'business as usual.' Associations are well advised to adhere to standards of antitrust compliance established prior to Phases I and II . . . .

I think that competitors engaging in *otherwise unlawful* joint activity will find little protection in the *Noerr-Pennington* Doctrine, which exempts certain joint activities from the antitrust laws. (Emphasis added.)[81]

Another danger to be avoided in addition to that of engaging in illegal combinations or conspiracies in connection with lawful joint presentations would be the use of joint presentations to price regulating authorities as a sham device to accomplish some anticompetitive design. For instance, the "sham" exception to the *Noerr-Pennington-Trucking Unlimited* doctrine would apply to any industry group that would attempt to exclude any industry member from access to the price regulating authority through use of governmental processes. Further, any resort in presentations to price regulating authorities to illegal or reprehensible practices, such as misrepresentation, perjury, fraud, coercion, or bribery, or other activities which tend to corrupt or abuse the administrative, executive, or judicial processes, will fall outside the purview of the *Noerr* immunity.

As has been indicated above in this Report, some areas are far more appropriate than others for joint presentations to price regulating authorities. For instance, such matters as the ceiling prices for particular entities are items which can only be properly resolved on an individual, one-by-one, company-by-company approach. One could reasonably assume that meetings of competitors for joint efforts by them or on their behalf where such items are concerned would be particularly suspect. And, whatever the economic-controls subject-matter area of combined efforts of competitors, and irrespective of their success before the price regulating authorities, there is serious danger that their cooperation, if followed by subsequent parallel pricing or other parallel activity in the competitive context, will provide circumstantial evidence that the joint efforts were productive of concerted actions in addition to those involved in simply making a joint presentation to the price regulating authorities.

[81]Comegys Address.

Accordingly, in assessing the desirability of launching joint presentations to price regulating or other governmental officials, careful consideration must be given not only to the legality of the anticipated joint effort itself, but also to whether concerted activity is appropriate to the type of objective sought and whether pricing or other activities which may ensue in the competitive context, when coupled with the cooperative effort, will generate circumstantial evidence of antitrust violations separate and apart from the concerted approach to the price regulating authority.

Conclusion

Based on the above, it is reasonable to conclude that in most instances concerted industry efforts to obtain government action or inaction under Phases II–IV would in themselves be protected from the antitrust laws. This is not to say, of course, that simultaneous purely commercial activities would be immunized or that concurrent unlawful concerted action that bears a companion or ancillary relationship to the protected activities would escape antitrust sanction, for quite the contrary is true. And the antitrust counselor must be vigilant for possible circumstances which would warrant application of *Noerr's* sham exception or one of the possible varieties or hybrids thereof as refined by subsequent decisions. In all events, this is an area where competent legal analysis must be applied in a case-by-case approach, based on a thorough review of relevant information.

The initial general conclusion set forth above, however, should not be disturbed by the fact that regulatory decisions may arise out of government conferences with industry groups. A conference is supposed to result in some solution and a solution can hardly materialize without some understanding between industry members and the government. Further, such conferences may fail unless preceded and followed by discussion among the companies regulated which is reasonably related to compliance with such regulation.

While it may be impossible to achieve complete harmony between the regulators, the regulated, and the Antitrust Division in this area, the prospect of fostering a more efficient government and improved government-industry relations would seem to commend increased accommodation of First Amendment guaranties in the Antitrust Division's philosophy as to joint industry presentations.

Finally, the obvious fact must be stated that joint activities protected during the existence of price controls lose that protection when the controls end. History demonstrates that cooperative attitudes among competitors engendered during periods of control may be difficult to eradicate in the post-control period. Vigilance by the antitrust counselor is necessary to avoid an aftermath of litigation.

PHASE I TO PHASE IV—A LOOK AT PRICE CONTROLS

[This appendix was prepared during Phase IV which expired April 30, 1974]

Temporary Freeze I—August 15, 1971

"The time has come for decisive action—action that will break the vicious circle of spiraling prices and costs."[1]

With this statement, President Nixon proceeded to unveil his plan for a freeze on all prices and wages throughout the U.S. for a period of 90 days.

Along with this freeze, a Cost of Living Council (CLC) was set up within the Government. This Council was to work with leaders of labor and business to set up the proper mechanism for achieving continued price and wage stability after the 90-day freeze.

Nixon emphasized two characteristics of his action. "First, it is temporary. To put the strong vigorous American economy into a permanent straitjacket would lock in unfairness . . . and second, while the wage-price freeze will be backed by Government sanctions, if necessary, it will not be accompanied by the establishment of a huge price-control bureaucracy."[2]

Phase II—November 13, 1971

"I am announcing tonight (October 7, 1971) that when the 90-day freeze is over on November 13, we shall continue our program of wage and price restraint."[3]

The following steps were taken in attempting to achieve the Administration goal of a 2.5% ceiling on price increases for the economy as a whole. (A figure arrived at by the following calculations: The maximum wage increase was set at 5.5%. Since productivity increased for the whole economy at approximately 3% yearly, businesses would only have to raise prices 2.5% (5.5–3.0) in order to cover increased wage costs.)

A Price Commission and a Pay Board, both to be backed up by the CLC, were established to set the guidelines in their respective sectors of the economy. They were to seek voluntary cooperation with business and labor; however, both were backed by the authority of law to make their

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[1]Address by President Nixon, *A New Economic Policy,* 37 VITAL SPEECHES OF THE DAY 675 (1971).

[2]*Id.* at 675.

[3]Address by President Nixon, *The Economic Plan,* 38 VITAL SPEECHES OF THE DAY 3 (1971).

decisions binding. Violations of their guidelines could result in civil or criminal penalties.[4]

The focus of the government regulators was going to be on big business. Companies were classified into three categories:

1) Price Category I firms: Generally, firms with annual sales or revenues in excess of $100 million—these firms had to prenotify the Price Commission of most price increases and had to receive at least tacit approval of the increases from the Commission.[5]

2) Price Category II firms: Generally, firms with annual sales or revenues between $50-$100 million—these firms could raise prices without prior Price Commission approval, but had to file quarterly reports concerning prices, costs and profits.[6]

3) Price Category III firms: Generally, a firm with annual sales or revenues of less than $50 million—not subject to prenotification or reporting but subject to monitoring or spot checks.[7]

A company that contemplated charging a price in excess of the base price had to consider the following factors:

1) Manufacturers, using the date of their last price increase, or January 1, 1971 (whichever was later) had to determine the amount of increases in "allowable cost".[8] "Allowable cost" was defined as any cost not disallowed by the Price Commission.[9] Any resulting price increase had to be reduced to reflect productivity gains, and could not result in an increase in the firm's applicable profit margin.[10]

2) Retailers and wholesalers were permitted to charge a price in excess of the base price whenever the customary initial percentage markup after November 13, 1971, with respect to the property sold, was equal to or less than the last customary initial percentage markup before November 14, 1971, or, at the option of the company, its customary initial percentage markup during its last fiscal year ending before August 15, 1971. Any price increase was only permissible to the extent that it did not result in an increase in the firm's applicable profit margin.[11]

3) Alternatively, a Price Category I firm might decide to use the Term Limit Pricing option, whereby firms agreed to limit their overall weighted

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[4]Economic Stabilization Act Amendments 1971, Pub. L. No. 92-210, 85 Stat. 748.

[5]Cost of Living Council (Phase II) Regs., 6 C.F.R. §101.11, *superseded* 6 C.F.R. §130 (1974); Price Commission Regs., 6 C.F.R. §300.51, *superseded* 6 C.F.R. §130 (1974).

[6]Cost of Living Council (Phase II) Regs., 6 C.F.R. §101.13, *superseded* 6 C.F.R. §130 (1974); Price Commission Regs., 6 C.F.R. §300.52, *superseded* 6 C.F.R. §130 (1974).

[7]Cost of Living Council (Phase II) Regs., 6 C.F.R. §101.15, *superseded* 6 C.F.R. §130 (1974).

[8]Price Commission Regs., 6 C.F.R. §300.12, *superseded* 6 C.F.R. §130 (1974).

[9]Price Commission Regs., 6 C.F.R. §300.5, *superseded* 6 C.F.R. §130 (1974).

[10]Price Commission Regs., 6 C.F.R. §300.12, *superseded* 6 C.F.R. §130 (1974).

[11]Price Commission Regs., 6 C.F.R. §300.13, *superseded* 6 C.F.R. §130 (1974).

average price increases over base prices to 2 percent or less, per fiscal quarter, for a one year period.[12]

Profits were also subject to limitations:

> Using the weighted average of the best two of the three fiscal years ending before August 15, 1971, a firm determined its "base period" profit margin. During Phase II, if a firm raised any price above the base price, it could not exceed this applicable profit margin unless such firm "purified" itself (a procedure which involved rescinding price increases above base price levels and remitting to customers the revenues derived in the fiscal year from charging prices in excess of base prices.)

The administration hoped that by limiting profits, firms would respond by increasing productivity, increasing sales volume, and reducing costs.

President Nixon also asked Congress for a one-year extension of the Stabilization Act of 1970. This is the Act which is the President's source of power to control the economy.

Phase III—January 11, 1973

"After reviewing the results of . . . the experience gained from operating the present system, it is clear that the burdens of a control system will mount in the coming period if the present system continues for long unchanged in an expanding economy."[13]

In what was to be the first step toward restoring a free market economy, President Nixon replaced the strict controls of Phase II with the more flexible, self-administered controls of Phase III.

The Pay Board and Price Commission were terminated, and the management of Phase III was to be handled by the Cost of Living Council. The Government still retained the authority to set rules controlling future conduct where it appeared that voluntary conduct was inconsistent with the goals of the program. To this end, the President again asked for a one-year extension of the Economic Stabilization Act.

Prenotification and reporting requirements were relaxed under Phase III. Prenotification was only required of manufacturing and service organizations with annual sales or revenues in excess of $250 million, and then only if the weighted average of price increases exceeded 1.5%.[14] However, all

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[12]CCH ECONOMIC CONTROLS, Phase II Rules ¶1231.

[13]*New Shape of Controls—The Official Outline,* U.S. NEWS & WORLD REPORT, January 22, 1973, at 58.

[14]Cost of Living Council (Phase III) Regs., 6 C.F.R. §130.130 (1974).

firms with annual sales or revenues in excess of $250 million were required to file quarterly reports of profit margin and price changes.[15]

The definition of the "base period" for purposes of profit margin calculations was expanded to, in effect, include any fiscal year ending on or about August 15, 1971.[16] A firm was also permitted to raise prices to reflect increased cost, without regard to its applicable profit margin, if its average price increases would not exceed 1.5% in a year.[17] These changes gave companies more flexibility in regard to pricing.

In four special areas (food, health, construction, interest and dividends), the Government was not yet ready to allow self-administered enforcement, and government regulation was maintained at a higher level.[18]

However, price behavior did not prove to be satisfactory under Phase III.

Phase III 1/2—June 13, 1973

On June 13, 1973, President Nixon brought the Economic Stabilization Program in full turn by promulgating Executive Order No. 11723, which froze prices at the level charged during the first eight days of 1973. This second freeze was essentially a reinstitution of the Phase I 90-day freeze, except that its duration was only for 60 days, and it applied only to prices. Wages and dividends and interest continued to be subject to the Phase III rules and regulations.

One of the purposes of this new freeze was to provide time for development of a fresh approach—Phase IV of the Economic Stabilization Program.

Phase IV—August 12, 1973

In July of 1973 the Cost of Living Council issued regulations and proposed regulations for Phase IV, which eventually became effective for most businesses on August 12, 1973. These new regulations were stated to have resulted, at least in part, from extensive consultations by members of the Cost

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[15]Cost of Living Council (Phase III) Regs., 6 C.F.R. §130.21 (1974).

[16]Cost of Living Council (Phase III) Regs., 6 C.F.R. §130.110 (1974).

[17]Cost of Living Council (Phase III) Regs., 6 C.F.R. §130.13 (1974).

[18]*See* Cost of Living Council (Phase III) Regulations, Part 130, Subparts F, G, & H, *CCH Economic Controls—Stabilization Program Guidelines* ¶31, 405.

of Living Council staff with consumers, businessmen, farmers, Congressional leaders, and government officials.[19]

Phase IV marked a return to more mandatory, stringent controls. Some of its key features included a sector by sector approach, with controls tailored around particular economic conditions of each sector, and a reportedly more flexible exceptions policy to permit relief in cases of hardship or to permit necessary supply increases.[20]

Prenotification and reporting requirements are similar to Phase II. Many firms with annual sales or revenues exceeding $100 million must give 30 days' advance notice of price increases. Approval may thereafter be assumed unless the Cost of Living Council suspends, denies or cuts back the prenotified increases.[21] All firms with annual sales or revenues exceeding $50 million must file quarterly reports with the Cost of Living Council.[22]

Business certainly was given very little new leeway within which to raise prices. Subpart E of the Cost of Living Council Regulations applies to manufacturing and service activities, and permits a company to charge any price which does not exceed the higher of the "adjusted freeze price" or the "base price". Essentially, the "adjusted freeze price" is the maximum charge permitted during the 60-day prior freeze, and the "base price" is the average price at which an item was priced during the last fiscal quarter which ended before January 11, 1973. Prices can only be increased to cover, on a dollar for dollar basis, net increases in allowable costs incurred subsequent to the last fiscal quarter which ended before January 11, 1973. As before, all proposed price increases must be reduced to reflect productivity gains.

Retailers and wholesalers were controlled by Subpart K of the Cost of Living Council Regulations. Very generally, these regulations provided that a retailer or wholesaler must control his prices so that for any fiscal quarter his "customary initial percentage markup" or "gross margin" for each merchandise category does not exceed the higher of (1) his customary initial percentage markup or gross margin for each merchandise category during

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[19]"Fact Sheet—Economic Stabilization Program—Phase IV," issued by the Office of the White House Press Secretary, July 18, 1973; *Phase IV Regulations and Questions and Answers,* Cost of Living Council Publication S-3066 (8-73) 41.

[20]"Fact Sheet—Economic Stabilization Program—Phase IV," issued by the Office of the White House Press Secretary, July 18, 1973.

[21]Cost of Living Council (Phase IV) Regs., 6 C.F.R. §150.151-155 (1974).

[22]Cost of Living Council (Phase IV) Regs., 6 C.F.R. §150.161 (1974).

the same quarter of the base period or (2) his base period customary initial percentage markup or gross margin. Additionally, the customary initial percentage markup or gross margin for any fiscal year may not exceed the base period customary initial percentage markup or gross margin.

Generally speaking, the profit margin limitations imposed during Phase IV were the same as those contained in the regulations promulgated pursuant to Phase III.

Phase IV controls were supposed to provide more flexibility than the Phase II "across-the-board" rules. Decontrol of the economy would be industry by industry. Methods of "indirect" government control of inflation were being investigated and used. For example, certain import quotas were raised, and export limitations tightened in order to increase supply. Phase IV is to expire on April 30, 1974.

In the final stages of Phase IV, the Cost of Living Council is primarily using negotiated agreements with business as an economic control. The threat of being subject to more stringent Congressional controls, after the Economic Stabilization Act expires April 30, 1974, has led many industries to cooperate in committing to price constraints beyond April 30, 1974, and up to the end of the calendar year.

For example, the cement industry, by agreeing to keep cement prices stable through June 1974, boosting output and capacity, and reporting prices to Washington, will be exempt from controls until June 30, 1974.

In conducting the negotiations, CLC Director John T. Dunlop says he is looking for:

1) Price restraints by companies, for as long as six months.

2) Pledges of production increases, if possible, through startup or marginal or discontinued operations, as well as commitments for capital expansion, with regular reports on capital expansion filed with the CLC.

3) Business and labor actions designed to improve industrial relations.

4) Better industry statistics, with greater disclosure of information in order to monitor agreements as well as improve the overall government data base for economic analysis.

There is discussion by Mr. Dunlop that all of these procedures would be continued in a Phase V. However, it is not expected that the Council will have any authority to roll back prices, order refunds, or impose fines; this could be done only by Congressional action on a case by case basis.[23]

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[23] *Dunlop Works Some Phase V Deals*, BUSINESS WEEK, Feb. 16, 1974, at 47.