ROOM ENOUGH FOR THE DO-GOODERS: CORPORATE SOCIAL ACCOUNTABILITY AND THE SHERMAN ACT

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I. INTRODUCTION

Congress passed the Sherman Act in 1890 to combat the monopolies, trusts, and pooling arrangements that arose as businesses expanded in the wake of the Industrial Revolution. The purpose of the Act was to prohibit the price gouging effects that resulted from the cartel-like behavior of rapidly growing businesses, best represented by the controlling—and later, declared illegal—position of the Standard Oil Company. The nation resented growing corporations that "[s]eemingly at will . . . could raise prices to consumers, cut the wages of labor, favor some customers over others, and control the supply of basic commodities."[1] President Cleveland emphasized the need for legislation to protect average consumers stating, "Corporations, which should be the carefully restrained creatures of the law and the servants of the people, are fast becoming the people's masters."[2] Legislators hoped that the Sherman Act would be a solution to these ills and that consumers, and later workers, would be protected from the power

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1. Elinor Hoffman, *Labor and Antitrust Policy: Drawing a Line of Demarcation*, 50 BROOK. L. REV. 1, 10 (1983).

2. *Id.* at 12–13 (quoting E. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 58 (1978) (quoting Grover Cleveland, Fourth Annual Presidential Address (Dec. 3., 1888))).

being amassed by corporations.[3]

These Populist sentiments resonate over a hundred years later as activists, nongovernmental organizations ("NGOs"), and multinational corporations ("MNCs") seek solutions to similar backlashes against the activities of behemoth companies. President Cleveland's concerns are discernable as consumers demand greater accountability and protection from major corporations. The demands for reform, however, now come directly from consumers and NGOs, rather than legislators. Moreover, the sought after regulations to limit corporate excesses are being self-imposed in the wake of such pressure. The private sector is developing creative solutions to address the abuses that resulted from the rapid globalization of commerce and production.

Ironically, these efforts to make corporations more accountable may push the boundaries of the antitrust laws that Congress constructed to curtail other corporate excesses. As corporations form organizations to develop global standards defining responsible practices, such associations may raise antitrust issues. While none of the aims or means of the accountability movement are proscribed by the Sherman Act, competitors or enforcement agencies may be concerned that the effects of collaborations may be anticompetitive. Corporate social responsibility is far from price-fixing or market manipulation, but discussions of business practices among competitors may trigger red flags for lawyers seeking to ensure that companies stay within their legal bounds.[4] Companies are pushing forward with joint programs to address social and environmental concerns—albeit carefully.

This Note argues that current antitrust law provides sufficient space for companies to address social and environmental issues without running afoul of the law. The federal courts' hesitancy to apply the per se rule should lead future courts to employ the rule of reason, under which organizations pursuing sustainable business practices can demonstrate that the procompetitive benefits and efficiencies gained through collaboration offset any negative effects that antitrust law may perceive. Part II of this Note provides a brief history of the type of work companies are pursuing, focusing on the apparel industry as one of the most scrutinized sectors. In particular, the Fair Labor Association is used as a case study. Part III reviews the Sherman Act's application to standard-setting organizations and the actions of standard-setting in light of the antirust laws. Part IV

3. *See id.* at 15–18.

4. Sarah Murray, *Alliances Heed Antitrust Traps*, FIN. TIMES, Jan. 5, 2006, at B1.

discusses *Noerr-Pennington* immunity for NGOs like the Fair Labor Association. Section Five notes the potential implications of the emergence of international tort law for socially responsible endeavors. Lastly, this Note concludes that the Sherman Act should not prevent accountability initiatives from developing further programs to address exploitation given the procompetitive benefits that such organizations provide.

II. GLOBAL SUPPLY CHAIN MANAGEMENT: FROM "IGNORANCE IS BLISS" TO "MEA CULPA"

Sneakers, apparel, diamonds, coffee, oil, logging: the list of industries under scrutiny continues to grow. Hazardous working conditions, unpaid wages, sexual harassment, and the persecution of union leaders are typical violations of human rights, MNC, and NGO codes of conduct, and often national laws.[5] These violations continue despite the increasing success of NGO, labor rights organizations, and consumer education campaigns, as well as the rise in attention by multinational manufacturers and a proliferation of codes of conduct aimed at raising international working standards.[6] NGOs initially gained leverage by using high-profile campaigns to attract consumer and company attention.[7] While the shock of those events may have dissipated, NGOs have forced major brands to talk more openly about their relationships with the factories that produce the tee-shirts, computers, toys, and sneakers that consumers find at their local

5. *See* SUMI DHANARAJAN, OXFAM GB, PLAY FAIR AT THE OLYMPICS 18–26 (2004), *at* http://www.fairolympics.org/background/olympicreporteng.pdf (documenting abuses suffered by workers in the apparel industry).

6. JOHN RUGGIE, U. N. SPECIAL REPRESENTATIVE ON BUSINESS AND HUMAN RIGHTS, DRAFT INTERIM REPORT OF THE SECRETARY GENERAL'S SPECIAL REPRESENTATIVE ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES 6 (2006) [hereinafter INTERIM REPORT], *at* http://www.bsr.org/meta/BSR_Ruggie-Interim-Report_200603.pdf. Similar abuses plague the diamond trade, coffee retailers, toy markers, and even computer chip manufactures; however, the use of sweatshop labor is most often associated with the apparel industry. *Id. See also* Joint Initiative on Corporate Accountability and Worker's Rights, http://www.jo-in.org/ (last visited July 14, 2007) [hereinafter JO-IN]. The Joint Initiative on Corporate Accountability and Worker's Rights ("JO-IN") is a collaborative effort between six organizations, each involved in the effort to improve labor standards in global supply chains through the implementation and/or enforcement of codes of conduct. JO-IN is comprised of the Clean Clothes Campaign, Ethical Trading Initiative, Fair Labor Association, Fair Wear Foundation, Social Accountability International and Workers Rights Consortium. *Id.* For a discussion about the impact of raising wages in California, see Erica Muñoz, *Raising the California Minimum Wage is not Enough: Creating a Sustainable Wage by Accounting for Inflation through Indexing*, 16 S. CAL. INTERDISC. L.J. 423 (2007).

7. JILL ESBENSHADE, MONITORING SWEATSHOPS 8 (2004) (describing events such as Kathie Lee Gifford breaking into tears on national television upon learning her apparel line was being produced by child labor and the National Labor Campaign's crusade against Nike sweatshops in the early 1990s).

retailers. Correspondingly, in the forestry and petroleum sectors, companies are talking about sustainable logging and energy.[8]

As NGOs now possess the influence to change the business decisions of major companies, MNCs increasingly accept that their stakeholders are not their shareholders. Businesses increasingly pursue dialogues with the labor and consumer NGOs that are critical of their business practices. The negotiations between the World Wildlife Fund and Asia Pacific Resources International Holdings Ltd. to preserve natural forests in Indonesia are demonstrative of this trend.[9] So too is KKR's consultation of the National Resource Defense Council before closing its recent purchase of TXU.[10] Milton Friedman might cringe at these developments,[11] but companies understand that in this era responsible practices are required to remain profitable. No company learned this lesson better than Nike, whose sales dropped significantly in the wake of the National Labor Campaign's boycott during the 1990s. To combat the negative effects of its poor social record on its profits,[12] Nike rebounded from pariah status by implementing a host of responsible practices and environmental initiatives[13] and is now a leader in corporate social responsibility.[14]

Such dedication to responsible business practices is leading companies to seek creative forums through which to systematically engage NGOs. The

8. Steve Stecklow, *Paper Mates: Environmentalists, Loggers near Deal on Asian Rainforests*, WALL ST. J., Feb. 23, 2006, at A1. *See* BRITISH PETROLEUM, BP SUSTAINABILITY REPORT (2004), *available at* http://www.bp.com/liveassets/bp_internet/globalbp/STAGING/global_assets/downloads/S/Sustainability_Report_2004.pdf.

9. Stecklow, *supra* note 8, at A1.

10. Jim Fuquay, *Two Old Friends, One Goal: Support of Green Groups*, FORT WORTH STAR-TELEGRAM, Feb. 27, 2007, at C3.

11. *See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (1962) ("Few trends could so thoroughly undermine the very foundations of our free society as the acceptance by corporate officials of a social responsibility other than to make as much money for their stockholders as possible.").

12. *See* Bruce Meyerson, *Tech Companies Needn't Boycott China to Combat Censorship*, SAN JOSE MERCURY NEWS, Feb. 17, 2006. "Nike prospered consistently through years of negative publicity before a sharp pullback in profits in 1998 prompted it to admit the labor controversy was crimping sales. It was that year that Nike finally addressed the sweatshop issue head-on with a series of initiatives to improve factory working conditions. Since then, Nike's profits have risen at a steady clip, jumping 28 percent in the last fiscal year to $1.2 billion." *Id.*

13. *See* NIKE, CORPORATE RESPONSIBILITY REPORT 24–28 (2004), *available at* http://www.nike.com/nikebiz/gc/r/fy04/docs/FY04_Nike_CR_report_full.pdf [hereinafter NIKE CR REPORT].

14. Melanie Kletter, *Labor Cites Nike Study as Model*, WOMEN'S WEAR DAILY, Apr. 14, 2005, at 14 (noting that last year, Nike became the first apparel company to publish a full list of every factory producing Nike labeled clothing and apparel, along with addresses for public inspection). Sharing this information represented a break with the apparel industry's assertion that factory information should be protected as a trade secret. Aaron Bernstein, *A Major Swipe At Sweatshops: If a Project in Turkey Succeeds, Long-Sought Global Labor Standards Could Emerge*, BUS.WK., May 23, 2005, at 98.

informal and unplanned methods that companies patched together when required to quell protests are no longer satisfactory. MNCs are looking to create long-term change, and companies recognize they lack the knowledge, resources, and influence to do so alone.[15] Instead, the various initiatives working to generate fair trade solutions are public-private ventures, consisting of permutations of companies, NGOs, faith-based organizations, supragovernmental agencies, and other organizations. For example, Hewlett-Packard, Dell, and IBM are writing a joint code of conduct for suppliers, while Mattel and Hasbro demand that their suppliers meet standards articulated by the International Council of Toy Industries.[16] Meanwhile, Kraft and Nestle are part of the Common Code for the Coffee Community, which is a "joint initiative of coffee producers, trade [and] industry, trade unions and social as well as environmental NGOs to develop a global code of conduct aiming at overall sustainability in the production, post-harvest processing and trading of mainstream green coffee."[17] Developing usable, effective, and meaningful standards that all stakeholders will accept is a major hurdle. Slowly, disagreements are being overcome and global standards are emerging, which hopefully will attract laggard companies.[18]

A. THE NEED FOR REGULATION: GLOBAL SUPPLY CHAINS AND SUBCONTRACTING

Despite major efforts, the apparel industry remains one of the most notorious violators of workers' rights both domestically and internationally.[19] Fierce competition among brands, fickle consumers, and pressure from price-demanding retailers contribute to the "race to the

15. Murray, *supra* note 4, at B1.

16. Murray, *supra* note 4, at B1.

17. Murray, *supra* note 4, at B1. *See also* Common Code for the Coffee Community, List of Partners, http://www.sustainable-coffee.net/project/index.html (last visited July 15, 2007).

18. *See* Bernstein, *supra* note 14. Bernstein notes that in 2005 Wal-Mart and Target, companies with massive supply chains, were yet to join industry initiatives. *Id.*

19. INTERIM REPORT, *supra* note 6, at 6. While apparel may be the most often cited industry, in a recent survey tracking abuses across industries, the apparel industry's ranked third. *Id.* The extractive industry has the worst record on human rights and the food and beverage industry has the second worst. *Id.*

bottom."[20] To maintain quick turnaround times and low prices, brands[21] rarely assemble their own products, and instead "rely on dozens to hundreds of contractors to actually produce their apparel."[22] While the development of this complex system has increased efficiency, the expansive networks have correspondingly increased the challenges that companies face in managing their supply chains.[23] Under the subcontracting system, manufacturers relinquish control over production, and with it, legal liability for distressing factory conditions. Globalization has increased not only the physical distance between worker and retailer, but also the gap between the former's labor and the latter's legal accountability.[24] As one scholar notes, "the challenge for workers, government officials, and anti-sweatshop crusaders has been to hold the real profit makers (the manufacturers and retailers) accountable for the conditions under which their products are made."[25] This complex production web presents the greatest challenge to corporate accountability.

Brands, however, can no longer plead ignorance and take a "not me" attitude, even though they are not legally responsible for the conditions of factories they do not own or operate. These networks have become sales liabilities and are multiple "entry points through which civil society actors can seek to leverage a company's brand and resources in the hope of improving not only the firm's performance, but the social environment in which it operates as well."[26] Major brands recognize that their sourcing policies and price demands fuel substandard working conditions and

20. The "race to the bottom" refers to the systematic deregulation of industry to encourage investment, which often leads to worker exploitation. "Developing countries adopt neo-liberal policies to attract FDI and therefore trade off citizen's rights to investors or capitalists to be able to get the highest profit by paying the minimum for all costs, taxes, labour[sic] wages and welfare while carrying out practises[sic] harmful to the environment." JUNYA YIMPRASERT & PETTER HVEEM, NORWEGIAN CHURCH AID THE RACE TO THE BOTTOM: EXPLOITATION OF WORKERS IN THE GLOBAL GARMENT INDUSTRY 7 (2005), *at* www.kirkensnodhjelp.no/filemanager/download/797/op-race%20to%20bottom%20final%202_enspalte.pdf.

21. "Brand" and "manufacturer" are used interchangeably to refer to the major labels such as Nike, Gap, Puma, Champion, and others. "Contractor" and "factory" refer to the factories and factory owners that produce apparel.

22. ESBENSHADE, *supra* note 7, at 5.

23. INTERIM REPORT, *supra* note 6, at 5.

24. *Id.* (describing the sourcing issue across industries, stating "[n]etworks, by their very nature involve divesting control over significant operations, substituting negotiated relationships for hierarchical structures").

25. ESBENSHADE, *supra* note 7, at 5.

26. INTERIM REPORT, *supra* note 6, at 5. The pressure that WFF placed on Proctor & Gamble to influence the decisions of Asia Pacific Resources International Holdings Ltd. to change its logging practices is one example of this influence. Stecklow, *supra* note 8, at A1.

excessive overtime.[27] Corporate recognition of the impact of their policies on workers represents a seismic shift in a manufacturer's willingness to address a major cause of sweatshop conditions and is a crucial first-step to changing the demands placed on contractors that lead them to cut corners, creating sweatshop conditions.[28]

B. DEVELOPING CODES, MONTIORING, AND ENFORCEMENT

1. Confusion Reigns

Corporate efforts to address labor exploitation began with the voluntary adoption of codes of conduct.[29] Such codes were also voluntarily enforced by internal brand managers who were assigned to monitor contractor compliance.[30] During the 1990s, over thirteen different codes—written by individual companies, business support groups, international labor groups, and NGOs—were promulgated for the apparel sector alone.[31] The content, focus, and standards of the codes written by the top brand companies looked very similar, as did the poorly developed compliance mechanisms and complete lack of sanctions for violators.[32] Meanwhile, codes written by NGOs such as the Clean Clothes Campaign ("CCC") anticipated enforcement problems and included independent monitoring by multi-stakeholder groups and harsh sanctions for both manufacturers and contractors found in violation of the code.[33] The differences in the approach to enforcement between MNCs and NGOs highlighted the credibility and accountability problems that plagued companies.

Brands quickly grasped that promulgating codes was insufficient to change conditions—as well as stave off continuing publicity nightmares—and began enforcing those standards through monitoring.[34] As monitoring

27. NIKE CR REPORT, *supra* note 13, at 24–28.

28. *See* Bernstein, *supra* note 14.

29. *See generally* Rob van Tulder & Ans Kolk, *Multinationality and Corporate Ethics: Codes of Conduct in the Sporting Goods Industry*, 32 J. INT'L BUS. STUD. 267, 268 (2001).

30. *Id.* at 268. Contractors were expected to abide by the code endorsed by a manufacturer and publicize those standards among their workers. *Id*.

31. Van Tulder & Kolk, *supra* note 29, at 268–69. The thirteen codes include the International Labor Organization's Tripartite Declaration of Principles that was adopted in 1979, and two codes that were undated. All other codes were written and adopted between 1992 and 1998. Thirteen identifies the major codes and does not include a number of others that were proffered. *Id. See also* ESBENSHADE, *supra* note 7, at 69–81 (discussing the variety of monitoring practices and standards).

32. *See* Van Tulder & Kolk, *supra* note 29, at 272–74 (using Puma, Nike and Reebok as examples because the companies had the most well-developed codes and large market shares).

33. Van Tulder & Kolk, *supra* note 29, at 277.

34. *See* Van Tulder & Kolk, *supra* note 29, at 274 (noting that revisions of Nike's code include

efforts grew, experience revealed inefficiencies and informational gaps in this auditing model. First, audits[35] were largely carried out by internal brand management or companies paid by the brands, which represented a conflict of interest.[36] Second, duplication of efforts and variations in standards were rampant.[37]

Initially, companies on their own or in conjunction with an NGO set out to monitor their own individual supply chains.[38] Since the subcontracting system often results in one factory producing for multiple brands, brands invest time and money into monitoring the same factory. For example, one contract factory may be turning out different product lines for Reebok, Nike, and Puma during the same period of time. This arrangement means that the factory is subject to being monitored by each company and must comply with each manufacturer's individual policies. As most apparel companies utilize different internal or third-party standards, this overlap means that factories will be audited on different principles, by different monitors, and can produce contradicting results. Each audit has different expectations for how records should be kept or how safety measures should be arranged. Those disparities can be the difference between a contractor receiving a passing and a failing compliance score. While companies see these discrepancies as wasteful, the disparities also represent a disservice to consumers. Consumers rely on monitoring efforts to be coherent so that they can make appropriate purchasing decisions. Additionally, consumers should not have to absorb the additional costs of redundant monitoring efforts.

Further audits, a time intensive process, slow production and multiple audits appear as targeted attacks on one contractor. In an industry with quick turnaround times, these delays can have a major impact on a contractor's ability to meet deadlines. Slowed production has two major consequences for brands and contractors. First, their product lines may not be ready on time to meet retailer deadlines or brand launches. Second, to make up lost time, workers are often forced to work overtime, which puts

mechanisms for internal monitoring and mention the possibility of the third party monitoring). The first widespread monitoring program was pioneered in Los Angeles under President Clinton's Department of Labor. Although short lived, that program demonstrated that monitoring may increase compliance. ESBENSHADE, *supra* note 7, at 58.

35. Social auditing or monitoring means performing a comprehensive review of the working conditions, payrolls, hours, and overall conditions at a factory to ensure compliance with the law, a given code of conduct, or both.

36. ESBENSHADE, *supra* note 7, at 97.

37. Van Tulder & Kulk, *supra* note 29, at 268–69; NIKE CR REPORT, *supra* note 13, at 11.

38. ESBENSHADE, *supra* note 7, at 120.

the factory at risk of being out of compliance with audits or the local law; either of which can have serious economic consequences for the factory and the manufacturer.[39] Also, audits are costly and each manufacturer may be paying to audit the same factory. Since these costs are often shared with the contractor, one supplier may receive an unfair burden of compliance costs.[40] These costs lead contractors to cut corners, creating a cyclical process that cannot solve exploitation.

Also, a single company has little impact on this global problem. Nike explains in its Corporate Responsibility Report that despite its household name and commanding market share in the athletic wear industry, Nike represents a small share of the global apparel industry.[41] On its own, Nike cannot eradicate sweatshop conditions or develop a prevailing code of conduct. Rather, the industry as a whole needs to commit to finding collaborative solutions that all companies can agree to implement.[42] Group efforts are particularly necessary to address remediation. If a brand finds a factory out of compliance on its own, its remedy is often either inadvertently too forceful or woefully ineffective.[43] If the company pulls out of a factory where it is the dominant client, hundreds or thousands of workers can lose their jobs, provoking additional criticisms.[44] On the other end, a company may only place a small quantity of orders with a factory such that losing a single brand's business does little to sanction the offending contractor.[45] NGOs emphasize that remedial efforts are best achieved through collaboration and multi-stakeholder support of trade unions.[46]

39. DHANARAJAN, *supra* note 5, at 38–42. Since workers are paid by the piece, if they lose time during an audit to meet targets, laborers often opt to work overtime to make up the lost wages. *Id.*

40. NIKE CR REPORT, *supra* note 13, at 31–32.

41. *Id.* at 2. This Note relies heavily on Nike's 2004 CR Report because of the company's unique experience and familiarity with the issues. Additionally, Nike's CR Report is recognized as one of the most forthcoming in the industry. Bernstein, *supra* note 14.

42. DHANARAJAN, *supra* note 5, at 9. The CCC report advocates that "the sportswear industry should make the effort to address these problems collectively, given that they are endemic in the industry, by jointly developing a sector-wide approach with trade unions and NGOs." *Id.*

43. *See* DHANARAJAN, *supra* note 5, at 64–65 (noting that one brand is insufficient to change the behavior of a given supplier); David Montero, *Nike's Dilemma: Is Doing the Right Thing Wrong? A Child Labor Dispute Could Eliminate 4,000 Pakistani Jobs*, THE CHRISTIAN SCI. MONITOR, Dec. 22, 2006, at World 1.

44. *See* David Montero, *Nike's Dilemma: Is Doing the Right Thing Wrong? A Child Labor Dispute Could Eliminate 4,000 Pakistani Jobs*, THE CHRISTIAN SCI. MONITOR, Dec. 22, 2006, at World 1.

45. DHANARAJAN, *supra* note 5, at 65–66 ("Where a given brand is only one of the many customers of a supplier, its ability to encourage observance of labour[sic] standards is weakened, since the supplier is more likely to prioritize the demands of other customers.").

46. *See id.*

These conflicts of interest and inefficiencies led companies to reexamine their auditing processes and to seek a more independent and consistent monitoring model. Industry and stakeholder efforts are focused on eliminating duplicate efforts and standards. While some overlap between NGOs and corporate monitoring may be useful, the overlap among company efforts raises the price of entry to social reporting.[47] Today, top brands no longer rely solely on internal practices to manage compliance programs but increasingly seek third-party monitors and apply third-party standards.[48]

2. Creating Cohesion

Recognizing the need for greater consistency, credibility, and capacity, industry members and NGOs collaborated to form the Apparel Industry Partnership ("AIP") in 1996.[49] The AIP working group consisted of manufacturers, labor organizations, and human rights groups and convened to agree on a code of conduct, and more remarkably, to determine a process for implementation.[50] The group sought the creation of an effective and independent strategy for monitoring to replace internal monitoring by manufacturers.[51] The AIP gave birth to the Fair Labor Association ("FLA"), which was positioned to leverage the weight of multiple brands and an independent third-party monitoring system to place greater pressure on contractors.[52] The FLA's major strengths are the promulgation of a single code of conduct, the ability to coordinate monitoring, the participation of multiple brands, and the development of an independent entity that could provide the process with greater accountability.

Today, the FLA's mission is "to combine the efforts of industry, civil society organizations, colleges and universities to protect workers' rights

47. *See* NIKE CR REPORT, *supra* note 13, at 19–24.

48. *See id.* at 22–24 (describing Nike's reliance on the FLA as independent monitors); Bernstein, *supra* note 14 (listing the FLA, Social Accountability International ("SAI"), and the Ethical Trading Initiative ("ETI") as groups often utilized to oversee monitoring for MNCs).

49. ESBENSHADE, *supra* note 7, at 177–83. The White House meeting was chaired by Labor Secretary Robert Reich and convened in response to consumer displeasure over the discovery of child labor in Kathie Lee contract factories in Latin America and also the discovery of seventy-two Thai workers virtually enslaved in El Monte, California. *Id*.

50. *Id.* at 177–79.

51. *See id.* at 181. Internal monitoring was haphazard, riddled with conflicts of interest, and overall ineffective to address the dire conditions facing workers. *See id.* at 61–69.

52. Some members of the AIP felt the FLA framework was insufficiently stringent to address conditions and did not join the FLA. Instead, the FLA was founded by a smaller group of participating companies and NGOs. Alexander Cockburn, *The Way the World Works*, NATION, July 3, 2000, at 8.

and improve working conditions by promoting adherence to international labor standards."[53] The FLA strives to provide consumers with credible information on the conditions in which its affiliates' products are manufactured through "independent monitoring and verification to ensure that the FLA's Workplace Standards are upheld."[54] The FLA oversees the implementation of the Workplace Code and coordinates the entire monitoring process for each of its members.[55] The FLA selects the factories to be audited from comprehensive lists of suppliers that each company shares with the FLA.[56] When the FLA produces its public reports, factory names and locations are not shared with the public or among the companies.[57] Replacing private and independent monitoring efforts, the FLA driven process makes the process more efficient and effective.

III. THE SHERMAN ACT

A. ANTITRUST OVERVIEW FOR CORPORATE COMBINATIONS

Constantly changing factory conditions require local expertise and support and contractor commitment in order to create long term change. Those requirements cannot be achieved by companies acting individually. As companies work together to improve monitoring efforts and the disclosure of information they must be aware of the antitrust laws.[58] For example, if "a group of competitors agrees on a code of conduct for their

53. Fair Labor Association, http://www.fairlabor.org (last visited July 15, 2007) [hereinafter FLA].

54. *Id.* To view the FLA Workplace Standards, see Fair Labor Association, Workplace Code of Conduct, http://www.fairlabor.org/all/code/ (last visited July 15, 2007) [hereinafter FLA Workplace Code of Conduct].

55. Clean Clothes Campaign, Recent Developments in the FLA (May 1, 2002), http://cleanclothes.org/codes/02-05-01.htm. "[T]he most far reaching change in the FLA's revised code monitoring program is that the Association itself will now select the factories to be audited and choose and directly contract the accredited compliance verification organizations to carry out those audits. All verification will be reportedly unannounced." *Id.*

56. *See* FAIR LABOR ASSOCIATION, FLA CHARTER DOCUMENT 11, 21 (2005), *available at* http://fairlabor.org/all/about/FLACharteramended12.1.05.pdf. These visits are unannounced and each company must have at least 5 percent of its contractors audited each year to remain a member in good-standing. *Id.* at 22.

57. *Id.* at 25. Recently other groups such as the Fair Factories Clearinghouse also are pioneering efforts to consolidate this information. *See* Fair Factories Clearinghouse, http://www.fairfactories.org (last visited July. 28, 2007).

58. Murray, *supra* note 4. Scott Greathead, chief executive of World Monitors, which is leading the Fair Factories Clearinghouse, one effort to lead the exchange of pertinent factory information, says, "'Whenever companies get into a room to talk about their business, there is always an antitrust issue.'" *Id.*

sector, and a day later, prices change for their products[, a]ntitrust alarm bells might well start to ring, even though those price shifts were unrelated to the agreement."[59] Other possible antitrust violations arise if companies enter discussions about wages, refuse to place orders with noncompliant factories,[60] or expel a company from a trade group for its own noncompliance.[61] This section explains, however, that the application and interpretation of the antitrust laws should not prevent the FLA from pursuing commitment to a comprehensive code of conduct and its implementation. Arguing that a court will shun the per se rule in favor of the rule of reason, this section explains that the market efficiencies created by such ventures outweigh potentially anticompetitive effects.

1. The Statute

The antitrust laws are meant to deter anticompetitive behavior that harms consumer well-being. To that end, antitrust law fosters competition based on the rationale that competition will best protect consumers and the national economy.[62] Accordingly, antitrust laws seek to encourage procompetitive practices and to discourage or outlaw anticompetitive practices.

Specifically, Sherman Act § 1 proscribes "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce."[63] This section makes it illegal for groups of companies to pursue agreements or activities that unreasonably restrict normal market competition.[64] The effects of a trade restraint on competition form the basis of a court's antitrust investigation, and restraints with unreasonable anticompetitive effects are declared illegal.[65] Reasonable trade restraints, however, that

59. Murray, *supra* note 4.

60. *See* Murray, *supra* note 4.

61. FLA CHARTER DOCUMENT, *supra* note 56, at 26 (stating a company may be terminated if it fails to effectively implement and monitor the Workplace Code).

62. *E.g.*, Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978) ("The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. The heart of our national economic policy long has been faith in the value of competition.") (internal citations omitted). *See also* Stephen Breyer, *The Cutting Edge of Antitrust: Lessons from Deregulation*, 57 ANTITRUST L.J. 771 (1989) (explaining that the policy of antitrust laws is to help society achieve efficiency and innovation).

63. Sherman Antitrust Act, 15 U.S.C. § 1 (2000).

64. Standard Oil Co. v. United States, 221 U.S. 1, 63–65 (1911) (establishing the rule of reason test and holding that the statute shall not be construed literally and reasonable restraints on trade will be upheld).

65. *See* Chi. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918). *See also* Christopher R. Leslie, Note, *Achieving Efficiency Through Collusion: A Market Failure Defense to Horizontal Price-fixing*, 81 CAL. L. REV. 243, 247 (1993).

regulate the market and promote competition are legal.[66]

2. Rules of Construction

Federal courts consider challenged trade restraints under one of two rules of construction. The court may determine that the agreement is illegal under the per se rule without considering the context of the combination or the court may give a combination an in-depth analysis under the "rule of reason."[67] Each rule and its outcome are dependant on the court's interpretation of the challenged restraint's promotion of market efficiencies and impact on competition.

a. Per Se Rule

The per se rule applies to restraints that have proven to be anticompetitive in substantially all contexts.[68] More specifically, the per se rule is applied to "certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[69] Thus, courts may declare a type of restraint per se illegal once they have ample experience with that restraint and it repeatedly has unreasonable anticompetitive results.[70] If a restraint is characterized as part of a category that is per se illegal, the defendant cannot rebut a court's conclusion that the practice is anticompetitive. Today, the per se rule is mostly applied to naked price fixing and naked market divisions, where the impacts of the restraints should be clear. If a practice has complex effects on the market and might increase competition or market efficiency the practice is analyzed under the rule of reason.[71]

66. Broad. Music, Inc. v. Columbia Broad. Sys., 441 U.S. 1, 23–25 (1979).

67. *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692 ("In either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry.").

68. Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 289–90 (1985).

69. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958). While the per se rule developed after the rule of reason, to simplify inquiry, courts usually begin their analysis by determining whether any aspect of an agreement may be categorically illegal under the per se rule. Per se rejection of a combination or contract is an administrative convenience that enables courts to avoid the delays of a full economic analysis of a challenged restraint under the rule of reason. *Id.*

70. *See* United States v. Brown Univ., 5 F.3d 658, 670 (3d Cir. 1993). In short, the employment of the per se rule is not a rejection of the rule of reason, but rather a short hand application of that test. *See Nw. Stationers*, 472 U.S. at 289.

71. *Nw. Stationers*, 472 U.S. at 289–90 (footnote omitted).

b. Rule of Reason

The rule of reason eschews a literal reading of § 1, which would render all business agreements illegal. Instead, as laid out in *Standard Oil Co. v. United States*, Sherman Act § 1 proscribes only those agreements that are "unreasonable." Thus, where the impact of a trade restraint is not directly apparent, a court will perform an industry specific review of the agreement as "antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful."[72]

The Court applies the rule of reason in light of market conditions and weighs a lengthy list of factors as announced in *Chicago Board of Trade v. United States*.[73] In applying the rule, Justice Brandeis famously wrote:

> [T]he court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.[74]

Those lengthy instructions have become a step-by-step analysis when applying the rule of reason. First, the court examines the alleged adverse effects within the industry, and the plaintiff must prove that the restraint has reduced output, increased prices, or created another anticompetitive harm.[75] Since the effects of certain conduct may be difficult to isolate, in some circumstances, the market power of the defendant may serve as a proxy.[76] If a plaintiff can successfully demonstrate such adverse impact or the ability to have an adverse impact, the burden shifts to the defendant who may rebut the presumption of harm by demonstrating the procompetitive effects of the restraint.[77] The plaintiff can rebut those benefits by showing that the restraint is not the least restrictive method for

72. Texaco, Inc. v. Dagher, 547 U.S. 1, 3 (2006).

73. Chi. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

74. *Id.*

75. *See Brown Univ.*, 5 F.3d at 668–69.

76. *See id.* Market power is defined as the ability to charge a higher price than a company could otherwise obtain in a competitive market. NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 109 (1984) (internal citations omitted).

77. *Brown Univ.*, 5 F.3d at 668–69.

producing those benefits.[78] The court is then saddled with the task of balancing those factors.[79] If the procompetitive effects within the relevant market outweigh the anticompetitive impacts of a specific restraint, a court should find the restraint reasonable.

In short, when deciding which rule to apply—and in its application—courts heavily weigh the efficiencies gained or lost due to a challenged restraint. Efficiency in antitrust is used broadly to describe multiple market benefits that may be achieved by a firm's strategies.[80] If such strategies provide information, accurate prices, and better goods for consumers and can thus be said to increase allocative, productive, and/or innovative efficiencies, the restraint is most likely procompetitive.[81] In contrast, conduct that decreases such benefits is usually anticompetitive and, as such, illegal. Courts seek efficiencies to create more competitive markets, thus serving the antitrust law's purpose to enhance consumer well-being.[82]

B. THE FLA IS LEGAL UNDER THE SHERMAN ACT

1. Trade Associations

Voluntary business associations are not facially anticompetitive and trade associations can increase competition.[83] While the FLA is an agreement among companies to adhere to certain standards, the Association's functions are within legal limits. However, the law's focus on the consequences of an agreement means that business collaborations must avoid practices and the corresponding effects that unreasonably harm competitors. Trade associations may set standards, control membership, and publish pertinent industry information that helps members function more effectively in a given market.[84] Such combinations should not draw antitrust actions unless the activities that a group undertakes harm the marketplace and unreasonably retrain trade.[85]

2. Nonprofit Status Does Not Shield an Organization's Activities from

78. *Id.*
79. *See* Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 769–81 (1999).
80. *See* Leslie, *supra* note 65, at 251–57.
81. *Id.*
82. *See generally* Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696 (1986).
83. Nw. Wholesale Stationers, Inc. v. Pac. Stationary & Printing Co., 472 U.S. 284, 295 (1985).
84. *Id.*
85. *See, e.g.*, *Nw. Stationers*, 472 U.S. at 294; Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688–91 (1978).

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Regardless of the organization's legal status, it is not exempt from antitrust laws.[86] Nonprofit organizations must comply with the Sherman Act despite their lack of profit seeking motivation.[87] Courts analyze the activities of trade associations as it would agreements between any commercial enterprises. Thus, when the standards or codes promulgated by nonprofits are challenged under the antitrust laws, a court evaluates the standard's impact on competition and does not focus on the organization's purpose.[88] When an organization operates in a commercial environment, social welfare goals will not shield an otherwise illegal restraint from being declared illegal, unless the restraint has procompetitive consequences that outweigh the anticompetitive effects. Nonprofits cannot serve as a cover for illegal price-fixing schemes, information exchanges, or concerted refusals to deal, which commercial organizations could not pursue under the Sherman Act.[89]

3. Seeking DOJ Approval: Business Review Process

The crucial question trade associations must heed under the antitrust laws is: what are the competitive consequences of our collaborative effort? The Antitrust Division of the Department of Justice ("DOJ") has a system to help companies answer this inquiry when pursuing questionable business activities. Called the Business Review Process, businesses or collaborations may request that that the DOJ provide a letter describing its current opinion on the activities of a venture under antitrust law.[90] Thus, the Business

86. Although the FTC Act does not apply to nonprofits, the Supreme Court has construed that exemption narrowly. Federal Trade Commission Act § 4, 15 U.S.C. § 44 (2000) (defining "corporation" as being for "its profit or that of its members"). *But see* Cal. Dental Assn' v. Fed. Trade Comm'n, 526 U.S. 756, 767 (1999) (explaining that the Court had jurisdiction over the CDA because it engages in activities for the economic benefit of its members).

87. Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 576 (1982). Nonprofits often argue that their conduct is exempt from the Sherman Act because their activities do not implicate the requisite "trade or commerce" required by the Act. Given the FLA's high-earning members, as well as the association's focus on monitoring manufacturing conditions, there is little merit to the argument that the FLA does not implicate commercial transactions. Additionally, the members pay the FLA for a service: accreditation, publicity. *See* Brown Univ. v. United States, 5 F.3d 658, 665–66 (3rd Cir. 1993) ("The exchange of money for services is a quintessential commercial transaction.").

88. *See Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692.

89. *See, e.g.*, *Nw. Stationers*, 472 U.S. 284; *Nat'l Soc'y Prof'l Engineers*, 435 U.S. 679; *Brown Univ.*, 5 F.3d 658.

90. Antitrust Division's Business Review Procedure, 28 C.F.R. § 50.6 (2007). The FLA applied for their letter as the Apparel Industry Partnership. Request for Business Review Letter of Apparel Industry Partnership, to Department of Justice Antitrust Division, Dec. 13, 1999, [hereinafter Request Letter] (on file with author).

Review Process provides the DOJ with helpful information regarding the nature of the combination, and provides the organization with knowledge of the DOJ's present intentions regarding prosecution of that conduct. The DOJ describes this process as "an important opportunity to receive guidance from the Department with respect to the scope, interpretation, and application of the antitrust laws to particular proposed conduct."[91]

The FLA utilized this process and received a Business Review Letter in April 2000.[92] The FLA's request letter describes the process of developing the initial Workplace Code of Conduct, including the participation of industry members, as well as NGOs and activist organizations.[93] The letter explains that the involvement of the human rights community makes the group an unlikely forum for sharing anticompetitive information.[94] Additionally, the development of the standards does not require discussions of sensitive information such as prices or wage scales and the letter carefully catalogues the format of the collaboration and how it minimizes the risk of sharing such anticompetitive information.[95]

Moreover, the application for review explains that the effects of the implementation of the Workplace Code are highly unlikely to affect consumer prices. First, despite the participation of large companies like Nike and Reebok, the market share of the members is small compared to the size of the apparel and footwear industry.[96] Second, the focus of the Code on labor conditions will not have a discernable impact on price as labor costs are a small fraction of what consumers pay.[97] Third, the Workplace Code is based largely on the standards written by the International Labor Organization,[98] which are recognized as an independent international standard. These factors led the DOJ to conclude: "to the extent that a firm's ability to advertise compliance with the Code

91. Antitrust Division, Department of Justice, http://www.usdoj.gov/atr/public/busreview/201659a.htm (last visited July 15, 2007).

92. Business Review Letter from Joel I. Klein, Assistant Att'y Gen., Antitrust Div., to Fair Labor Ass'n (Apr. 7, 2000) [hereinafter Klein BRL], *at* http://www.usdoj.gov/atr/public/ busreview/4513.htm.

93. Request Letter, *supra* note 90, at 3 ("[The FLA standards] by no means a set of standards that was developed by, and at the initiative of, industry—but rather a set of standards that reflects the broad diversity of the industry, labor, consumer, human rights and religious members of the Partnership.").

94. *Id.* at 2.

95. *See id.*

96. NIKE CR REPORT, *supra* note 13, at 11 ("Nike may be a prominent brand, but we account for under 2% of the global $800 billion footwear and apparel industry.").

97. *See* Klein BRL, *supra* note 92.

98. FAIR LABOR ASSOCIATION, 2005 ANNUAL PUBLIC REPORT 24 (2005), *available at* http://www.fairlabor.org/2005report/print/pdf/flaProgram.pdf.

provides useful purchasing information to a substantial number of consumers, it is possible that development of the Code and Monitoring Principles will have a net procompetitive effect."[99]

The DOJ analysis emphasizes the competitive results of the collaboration. The process that the Department used in reaching that conclusion is similar to the scrutiny that courts utilize when reviewing combinations. Understanding a court's process more thoroughly informs the meaning of the DOJ's conclusion. That analysis follows below.

C. ANTITRUST CONCERNS FOR STANDARD-SETTING ORGANIZATIONS

Standard-setting can increase efficiency and the quality of information in the marketplace and is not per se illegal.[100] An organization's activities may be examined under antitrust laws if those undertakings have anticompetitive consequences. Like other government functions, however, standard-setting is increasingly a private affair and courts are becoming more comfortable with private organizations functioning in that manner.[101] When standards contain the necessary safeguards to ensure procedural and substantive fairness, courts allow private organizations to undertake important functions that the government cannot or has not addressed.[102] Therefore, nonprofit associations may promulgate standards, rules, and regulations, including methods to ensure compliance with an organization's code.[103] The Supreme Court has noted the positive impact of such codes, stating "[e]thical norms may serve to regulate and promote . . . competition."[104]

The FLA coordinates regulatory activities to fill the power vacuums left by national governments, particularly in developing countries.[105] The basis for the Association is the development of a single code of conduct and its uniform implementation and evaluation.[106] As a standard-setting organization, the FLA must take precautions to ensure that it does not unreasonably restrain its members' abilities to compete in the apparel

99. *Id.*

100. *See generally* David J. Teece & Edward F. Sherry, *Standards Stetting and Antitrust*, 87 MINN. L. REV. 1913 (2003) (explaining the benefits that standards have in the technology industry).

101. *See id.* at 1927–41.

102. *Cf.* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 504–06 (1988).

103. *See* Nw. Wholesale Stationers, Inc. v. Pac. Stationary & Printing Co., 472 U.S. 284, 289–90 (1985).

104. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695–96 (1978).

105. INTERIM REPORT, *supra* note 6, at 6–7 (describing the unwillingness of many national governments to take control in regard to human rights).

106. *See* FLA, *supra* note 53.

industry.[107] The Workplace Code of Conduct is based on universally accepted principles and is written to apply to all members equally.[108] The Workplace Code represents corporate commitment to responsible sourcing standards, which is increasingly a platform for competition and competitive advantage.

Rules that decrease price competition, however, are subject to invalidation under the Sherman Act. For example, in *Society of Professional Engineers v. United States*, a restriction in the Society's code of ethics that prohibited engineers from competitive bidding was struck down as price-fixing.[109] Although the code's goal was to promote ethical practices, the prohibition on competitive bidding eliminated competition based on price, and was therefore anticompetitive and illegal.[110]

In contrast, the FLA Workplace Code does not prohibit members from competing on any factor that its code addresses. The Workplace Code is a baseline to which members voluntarily commit given the importance of code compliance to their bottom line. Companies are free to implement practices on their own that go beyond the minimum provisions in the FLA's code. For example, in 2005 Nike unilaterally released a list of all its contract factories to demonstrate its commitment to and leadership on responsible sourcing.[111] The release of that information and the positive response it garnered in the press[112] demonstrates that the FLA does not impinge upon companies' ability to compete individually on labor standards.

Further, substantively and procedurally, the Code is applied fairly and equally to each member. The FLA is not solely an industry initiative but draws on the expertise of relevant NGOs to increase its competence and independence. Although, the FLA's corporate members must be consulted before changes are made to the Code, safeguards are in place to confirm the

107. Teece & Sherry, *supra* note 100, at 1918 ("[The] principal antitrust concern with regulatory standards is that interested parties may be able to co-opt the regulatory process to protect their market position against potential competitors.").

108. FLA Workplace Code of Conduct, *supra* note 54.

109. *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692–93.

110. *Id.* at 695–96.

111. *See* Nike Responsibility, Workers/Factories, Active Factories List, http://www.nike.com/nikebiz/nikeresponsibility/ (last visited July 15, 2007) (this year Nike also released its auditing tools while this Note was in the publication process). *See also* MAQUILA SOLIDARY NETWORK, NIKE CORPORATE RESPONSIBILITY REPORT 2005 (Apr. 13 2005), *at* http://en.maquilasolidarity.org/issues/policy/disclosure/NikeRelease2).

112. *See, e.g.*, Kletter, *supra* note 14.

impartiality and fairness of any modifications.[113] This format ensures that the FLA principles will not be used to disadvantage a member against its competitors.

Such structures are regarded favorably by the Court when businesses are involved in self-regulation. In *Hydrolevel*, the Court castigated the American Society of Mechanical Engineers, Inc. ("ASME") for allowing its agents to publicize a letter that falsely discouraged use of a product manufactured by Hydrolevel as unsafe. The ASME violated the antitrust laws by informing consumers that Hydrolevel's new low-water fuel cutoff mechanism for boilers was dangerous and thus encouraged consumers to purchase competitor's products.[114] This bad faith application of the ASME's safety code was anticompetitive and highly detrimental to Hydrolevel's sales.[115] The Court held that ASME abused its "powerful influence" in the industry by misleading government regulators and Hydrolevel's customers who relied on ASME's expertise.[116]

By comparison, the FLA increases transparency, equally rewarding brands that meet responsible standards equally. Brands that do not meet FLA standards are not prevented from competing on socially responsible indicators by the FLA's actions. Their choice to forgo competing for socially responsible consumers is self-imposed and any harm to their profits cannot be attributed to the FLA, as Hydrolevel's losses could be to ASME.

1. Direct Agreements on Price Are Per Se Illegal

More specifically, the FLA is not a price-fixing agreement. Although nothing in the FLA charter suggests an agreement among companies to fix prices, a court may infer an agreement to set prices if evidence of price-fixing is found in the market. Precedent demonstrates that agreements within the FLA—or similar standard-setting organizations—should not merit per se treatment. Furthermore, analysis under the rule of reason should validate the DOJ's assertion in its Business Review Letter that the FLA has a net competitive effect within the market.[117]

113. FLA CHARTER DOCUMENT, *supra* note 56, at 6–10. The Charter requires that the FLA Board of Directors will be comprised of six industry representatives, six labor/NGO board members, and three university representatives. For critical decision making, a supermajority is often required. *Id.*

114. Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 562–63 (1982). *See also* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500–01 (1988).

115. *Hydrolevel*, 456 U.S. at 573. *See also Indian Head*, 486 U.S. at 499-500.

116. *Hydrolevel*, 456 U.S. at 559, 573.

117. *See* Klein BRL, *supra* note 92.

Price-fixing is especially susceptible to antitrust attack because it is the quintessential example of an activity that is per se illegal.[118] The standards set by the FLA do not include commitments to price or wage scales; however, the law may also analyze the demonstrable effects of the FLA's standards. In particular, the law's virulent distaste for price-fixing means that the standards set by the FLA must not illegally impact resale prices.

Unlawful price-fixing is defined as any "combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce."[119] The Court has stated that it does not look to the particular form of the restraint employed but rather focuses on the impact of an agreement.[120] In sum, to prove price-fixing, a court looks for an actor's general intent to engage in conduct with the intent to affect prices, and effectuation of that intent.[121] In the few situations where competitive benefits are obvious and necessary, however, the restraint should be evaluated under the rule of reason.[122]

In *Catalano v. Target Sales, Inc.* the Court invalidated an agreement among beer wholesalers to eliminate credit sales to retail purchasers by equating the pact with price-fixing.[123] The practice was invalidated under the per se rule because abolishing a method of purchase was plainly anticompetitive.[124] The defendants asserted that the agreement was in fact competitive because if it did result in higher prices, it lowered the barrier to market entry, and therefore, increased competition.[125] The Court rejected that explanation, holding that the "obvious risk of anticompetitive impact[,] with no apparent potentially redeeming value" rendered the agreement illegal per se.[126] Further, the Court criticized the agreement for

118. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5–6 (1958). Naked horizontal restraints on business decisions, whether originating from a trade association or through other agreements, are usually invalid under the per se rule. *Id.*

119. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).

120. *Id.*

121. Ronald A. Cass & Keith N. Hylton, *Antitrust Intent*, 74 S. CAL. L. REV. 657, 667 (2001).

122. *See* Broad. Music, Inc. v. Columbia Broad. Sys., 441 U.S. 1, 20–22 (1979); NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 100–01 (1984) (explaining that price fixing restraints may be necessary to make a product available at all).

123. Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 648–49 (1980) (per curium).

124. *Id.* (explaining that retailers may prefer to deal with one wholesaler over another based on the details of a credit agreement offered by a wholesaler).

125. *Id.* at 649.

126. *Id.*

"extinguishing one form of competition among sellers."[127] Thus, the Court highlighted that eliminating an element of price is unreasonably anticompetitive, which is the basis for applying the per se rule.

If a court finds coordinated pricing by agreement–even if companies do not have a formal agreement to fix prices–companies are per se in violation of § 1.[128] In *Socony-Vacuum v. United States*, a plan by oil companies during the Great Depression to stabilize prices and prevent oil surpluses from being dumped on the market at distressed prices to calm losses was per se illegal.[129] "[T]here was abundant evidence that the combination had the purpose to raise prices"[130] and the Court refused to consider market failure, lack of market share or the setting of a reasonable price as mitigating factors.[131] Rather, the Court emphasized the demonstrable effects of the agreement: similar, more stable, and higher pricing in applying the per se rule to the conduct.[132]

The Court should not impose per se illegality on the FLA because its actions do not have facially anticompetitive effects or an intent to disadvantage competitors or consumers. The FLA does not eliminate a form of competition nor does the organization facilitate agreements that enable price fixing. The FLA does facilitate its affiliates' ability to compete on corporate responsibility indicators—which attracts socially conscious consumers—since even major brands are "limited in what they can achieve independently."[133] Thus, sharing practices means that companies can more efficiently monitor and publicly report on their supply chains, as well as more effectively remedy problems.[134] Those benefits do not disadvantage competitors or consumers in a manner similar to the elimination of payment methods or coordination of prices that merited the application of the per se rule in *Catalano* and *Socony-Vacuum*.

The DOJ's Business Review Letter agrees that "it is far from clear that adherence to the Code will have any adverse effect on the prices paid by

127. *Id.* at 648–49.

128. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 219 (1940).

129. *See id.*

130. *Id.* at 219.

131. *Id.* at 223–24 (stating in part that the actual power to raise prices is tangential to the intent to engage in behavior that affects prices).

132. *Id.*

133. NIKE CR REPORT, *supra* note 13, at 11.

134. *Id.* ("[D]isclosure should enable brands to share information about compliance performance and minimize duplication of efforts. Lowering the price of entry into corporate responsibility means that more can and must join and commit.").

United States consumers of apparel or footwear."[135] The only mention of cost indicators in the Workplace Code is a reference to wages. Members must commit to pay "at least the minimum wage required by local law or the prevailing industry wage, whichever is higher, and shall provide legally mandated benefits."[136] This provision requires compliance with the law or payment of the market wage; neither measure can be called facially anticompetitive. Moreover, as labor is only a fraction of the cost of products sold in the U.S., this provision has no effect on price.[137] In per se cases, like *Catalano* and *Socony-Vacuum*, the elimination of competition on factors that affect price were obvious but the same cannot be said of the FLA.

Further, the FLA does not coordinate price-fixing and has no explicit or implied agreement to do so.[138] While the lack of a formal agreement did not prevent the Court from imposing per se liability in *Socony-Vacuum*, in that case, the Court pointed to the obvious effects of the tacit agreement among oil companies before employing the per se rule.[139] In contrast, the FLA does not have the intention or motivation to increase or stabilize prices as did the oil companies during the Great Depression. The FLA's members' commitment to common standards is not an unstated price fixing agreement and their activities will not result in consequences similar to the effects of the conversations in *Socony-Vacuum*.[140] Rather, the FLA strives to monitor that companies pay legally mandated minimum wages in countries where enforcement is lacking and report that information for consumer use.

Furthermore, the FLA declared its intentions to the government before proceeding.[141] The FLA's application for a Business Review Letter makes the Association's purpose clear: to work with NGOs and labor and religious organizations to "respon[d] to the President's challenge by convening to develop fair and responsible labor standards" and discuss methods to ensure consumers that products are manufactured in compliance

135. Klein BRL, *supra* note 92.

136. FLA Workplace Code of Conduct, *supra* note 54.

137. Request Letter, *supra* note 90 ("[L]abor typically accounts for less than 3% of the United States retail price of clothing made in domestic sweatshops and as little as 0.5% for garments sewn abroad."). *See also* Klein BRL, *supra* note 92 (asserting that based on the representations of the AIP, specifically the costs the Business Request Letter cites, "it is far from clear that adherence to the Code will have any adverse effect on the prices paid by United States consumers of apparel or footwear").

138. As there are no discernable effects on price, a court may next turn to intent to determine if there is an illegal conspiracy.

139. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).

140. *See* Klein BRL, *supra* note 92.

141. Request Letter, *supra* note 90.

with those standards.[142] The presence of independent third parties attests to the validity of that goal and cautions against interpreting any change in price as a result of the FLA efforts.[143] Again, the Court should hesitate to apply the per se rule to the FLA's humanitarian motives.

2. Price-fixing Revisited: The Court Prefers the Rule of Reason

Despite the administrative ease that per se categories bring to antitrust evaluations, the rule of reason remains the dominant form of analysis and most agreements are analyzed under the rule of reason because they are not facially anticompetitive.[144] Therefore, the Court remains hesitant to employ the per se rule. Most recently, in February 2006, the Court described the per se rule as "narrow" and explicitly affirmed that per se condemnation is reserved for cases where the anticompetitive impact of an agreement is obvious.[145] The Court recognizes the value that context brings when analyzing a restraint, writing "there is often no bright line separating *per se* from Rule of Reason analysis . . . " considerable inquiry into market conditions may be required before per se condemnation is justified.[146] Given the Court's discomfort with the per se rule's shorthand analysis and the DOJ's approval of the plan in its Business Review Letter, one can predict that if challenged as a price-fixing agreement, the FLA will be analyzed under the rule of reason. The complexities of accurate and efficient global monitoring efforts deserve such contextual analysis.

When analyzing restraints in context, procompetitive benefits that increase efficiencies have even led the Court to sanction a price fixing agreement when that agreement was necessary to market a product. In *Broadcast Music, Inc. v. Columbia Broadcasting Systems* ("*BMI*"), the Court overturned the Court of Appeals' application of the per se rule to BMI's issuance of blanket licenses for copyrighted musical compositions to television and radio corporations.[147] Although the defendants' policies constituted price fixing in the literal sense, the Court wrote "[l]iteralness is

142. *Id.*

143. Klein BRL, *supra* note 92.

144. Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977) (citing *Standard Oil's* "rule of reason" as the "prevailing standard of analysis"); Texaco Inc. v. Dagher, 547 U.S. 1, 3 (2006)("[T]his Court presumptively applies rule of reason analysis.").

145. *Texaco*, 547 U.S. at 3. ("[W]e have expressed reluctance to adopt *per se* rule . . . 'where the economic impact of certain practices is not immediately obvious.'" (quoting State Oil Co. v. Khan, 522 U.S. 3, 10 (1997))).

146. NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 104 n.26 (1984).

147. *See* Broad. Music, Inc. v. Columbia Broad. Sys., 441 U.S. 1, 24–25 (1979).

overly simplistic."[148] Instead, the Court examined the specific market in which copyrighted music is purchased, and found that the defendants' conduct created a more effective, efficient, and manageable system to sell, trade, and enforce copyrights.[149] Blanket agreements created a centralized forum to purchase an otherwise highly dispersed product, as well as "accompanie[d] the integration of sales, monitoring, and enforcement against unauthorized copyright use."[150] Thus, despite the price fixing ramifications, the restrictions were viewed as a method by which to enhance competition and the Court remanded the case for review under the rule of reason.[151] On remand, the Court of Appeals held that the restraints did not unreasonably restrict competition.[152]

While the situation in *BMI* is unique,[153] it does inform the Court's analysis of efficiencies and procompetitive benefits. Although, the FLA does differ from *BMI*—the FLA standards are not a price fixing agreement, without which the product could not be marketed—*BMI* informs how a court should analyze procompetitive restraints.[154] In regards to the FLA, the organization's conduct and standards similarly produce benefits by eliminating overlapping monitoring, reducing monitoring costs, and increasing the ability of the FLA to address labor problems in an integrated manner. Further, the *BMI* Court emphasized that "[n]ot all arrangements among actual or potential competitors that have an impact on price are *per se* violations of the Sherman Act or even unreasonable restraints" under the rule of reason.[155] Again, since the FLA is not price fixing, the organization should have an even easier time convincing a court to analyze restraints under the rule of reason. Thus, even if the FLA has a tangential impact on prices, a court should analyze the total circumstances, market conditions, and note the positive commercial benefits that an organization holds for its

148. *Id.* at 9. BMI and ASCAP are associations comprised of composers and publishers who are the original copyright holders of music licensed by CBS. *Id.* at 4-5. These composers and publishers are potential competitors, leading CBS to argue that their combination under umbrella organizations to jointly sell the rights to their music is an elimination of price competition and a violation of the Sherman Act. *See id.* at 9.

149. *Id.* at 19–21 ("[W]e would not expect that any market arrangements reasonably necessary to effectuate the rights that are granted [under copyright laws] would be deemed a *per se* violation of the Sherman Act.").

150. *Id.* at 20.

151. *Id.* at 23–25.

152. Columbia Broad. Sys. v. Am. Soc'y of Composers, Authors & Publishers, 620 F.2d 930, 939 (2d Cir. 1980).

153. *See* KEITH N. HYLTON, ANTITRUST LAW: ECONOMIC THEORY & COMMON LAW EVOLUTION 122 (2003).

154. *See Broad. Music, Inc.*, 441 U.S. at 23.

155. *Id.*

members and the market by increasing the availability of an additional feature for competition.[156]

In applying the rule of reason, first, a court will look for actual adverse impact from corporate commitment to the FLA code. In a private suit against the FLA or a member corporation for price-fixing, the plaintiff must establish that adherence to the Workplace Code results in price fixing. Commitment to the Workplace Code would therefore have to collusively increase prices. As described, however, the FLA is dedicated to raising working standards, and in some cases, wages, and no part of membership is geared toward fostering anticompetitive behavior such as agreements to control market prices.[157] Any minor impact on price from paying minimum wages is offset by efficiencies gained through cooperation, and thus, competitors will have a hard time establishing a cognizable harm.

Furthermore, as noted above, a suit by the government for price-fixing is unlikely given the DOJ's analysis in its Business Review Letter.[158] Neither the goals nor the effects of the FLA's polices are to raise prices. In practice, apparel manufacturers operate in a fiercely competitive market. The largest sector, women's apparel, while trend driven, is also highly price sensitive and any agreement on behalf of manufacturers to raise prices would be unstable. Fickle consumers may seek products from other brands, and retailers, who truly drive prices, would not accept the price increase.[159] In short, the market is disciplined by fierce competition despite the household status of some brands and anticompetitive conduct, such as coordinate pricing, would be difficult to sustain.

Even if no impact on price could be found the court may allow the plaintiff to substitute a finding of market power for the actual harm. Such ability to cause harm may sometimes serve as a proxy for actual harm. The FLA, however, does not have requisite market power to impact prices. Despite the membership of major brands like Puma, Nike, and Reebok, the

156. Response to Apparel Industry Partnership Request for Business Review Letter, *at* http://www.usdoj.gov/atr/public/busreview/215727.htm (last visited Apr. 23, 2007) ("[AIP discussions] could lead to procompetitive benefits. Consumers have expressed a desire to know the conditions under which products are manufactured, and the dissemination of accurate information about these conditions could meet this marketplace demand.").

157. FLA, *supra* note 53.

158. Klein BRL, *supra* note 92. Furthermore, while Business Review Letters have no binding power over a court's interpretation of a corporation's business activities, the Supreme Court recently favorably relied on the DOJ's interpretation of the implication of a joint venture between Shell and Texaco. Texaco v. Dagher, 547 U.S. 1, 3 (2006).

159. ESBENSHADE, *supra* note 7, at 37. Giant retailers have the greatest power in the supply chain to drive prices. *Id.*

enormous size of the apparel industry makes it unlikely that even the participation of these brands would impact prices.[160] Furthermore, a finding of ability to raise prices alone cannot result in the invalidation of an agreement.[161]

If any negative effects are found, under the rule of reason, the FLA may then demonstrate that the procompetitive effects of its partnership outweigh those negative impacts. The FLA's benefits are many. First, joint monitoring efforts are more efficient. The FLA's knowledge of its members' contract factories enables the Association to eliminate duplicate monitoring efforts.[162] Contract factory managers are able to spend less time preparing for required audits. A U.N. report on human rights and MNCs makes the same observation about monitoring: "[t]he proliferation of different codes and their imposition on the same suppliers is part of the problem; it imposes excessive burdens on suppliers and leads them to game the system."[163] With the FLA's coordination, more factories are monitored, while costing corporations and their suppliers less. Under the FLA, companies can disburse costs and create an economy of scale for social auditing—such efficiency is looked upon favorably by the Court when applying the rule of reason.[164] Further, multiple codes and organizations proliferated in the last two decades, making it difficult for increasingly conscious consumers to determine what information is accurate. The FLA provides its member brands with certification that increases their ability to compete on this new platform. Adherence to the Workplace Code and implementation of consistent monitoring practices earns credibility among consumers that need access to accurate audit information.[165]

As monitoring moves into its next incarnation, the FLA is creating further value for its members. The FLA has acknowledged that monitoring alone is insufficient to create the desired changes in global supply chains.[166] To achieve the benefits that NGOs and MNCs believed monitoring would bring, joint efforts among organizations addressing labor problems are being developed. The FLA is a key member of the Joint Initiative on Corporate Accountability and Worker's Rights, which is pioneering a multi-stakeholder effort to increase sustainable code

160. NIKE CR REPORT, *supra* note 13, at 2.
161. *See* Toys "R" Us, Inc. v. Fed. Trade Comm'n, 221 F.3d 928, 932–37 (7th Cir. 2000).
162. *See* NIKE CR REPORT, *supra* note 13, at 32.
163. INTERIM REPORT, *supra* note 6, at 9.
164. Nw. Wholesale Stationers, Inc. v. Pac. Stationary & Printing Co., 472 U.S. 284, 295 (1985).
165. *See* Klein BRL, *supra* note 92.
166. INTERIM REPORT, *supra* note 6, at 9.

compliance.[167] Corporations on their own are unable to implement such in-depth and long term projects. Alone, each MNC lacks the experience, knowledge, and influence to lead such a project, but together, companies have a greater impact.

In sum, a contextual analysis demonstrates that the FLA should not be found to violate the Sherman Act. The FLA does not harm the apparel market and the benefits that it brings to the market are obvious. Joint efforts will make monitoring more efficient and effective by eliminating overlap, leveraging the weight of multi brands, and better engaging governments and other stakeholders, which individual companies cannot do on their own. Hopefully such success will lead to the faster development of a fairer trade system.

3. Improper Exchange of Information

Section 1 also prohibits the exchange of certain trade information when used for anticompetitive purposes.[168] Competitors sharing price information are susceptible to an antitrust attack but such behavior is not per se illegal.[169] The Court considers "[a] number of factors[,] including most prominently the structure of the industry involved and the nature of the information exchanged."[170] Where the allegations are improper information exchange, the Court requires evidence of actual information sharing, its results, and the intent to fix prices through the exchange.[171] "Since showing similar or even identical prices is not necessarily enough to discharge that burden" proving that a combination's purpose was to fix prices "can prove to be a real stumbling block for the plaintiff in this type of case."[172] Rather, the Court insists that plaintiffs show that anticompetitive effects existed "separate from proof of the intent to share information."[173] Additionally, the Court looks favorably at competitor's efforts to stay within the confines of the law.[174] As in other antitrust cases, analyzing such intent is another means to determine what effects the

167. *Id*. *See also* JO-IN, *supra* note 6.

168. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY §5.3 (3d ed. 2005).

169. United States v. Container Corp., 393 U.S. 333, 338 (1969) ("Price is too critical, too sensitive a control to allow it to be used even in an informal manner to restrain competition."). *Compare* United States v. U. S. Gypsum Co., 438 U.S. 422, 441–43 (1978) (explaining that per se rules do not apply to the exchange of trade information).

170. *Gypsum Co.*, 438 U.S. at 442–43 n.16 (citing *Container Corp.*, 393 U.S. at 338 (Fortas, J., concurring)).

171. *Gypsum Co.*, 438 U.S. at 442–43 n.16.

172. Ronald A. Cass & Keith N. Hylton, *Antitrust Intent*, 74 S. CAL. L. REV. 657, 669 (2001).

173. *Id.* at 670.

174. *See* Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563, 583 (1925).

activity might have on commerce.

The Court recognizes that in some circumstances the exchange of price information may promote competition.[175] Thus, the Court looks to the effect that the exchange of information has on the market before finding the practice illegal.[176] For example, in *Maple Flooring Manufacturer's Association v. United States*, the Court held that the gathering and circulation of price information to all competitors in a trade association for already closed sales could not affect prices and was therefore permissible.[177] Even though the "[e]xchange of price quotations of market commodities tends to produce uniformity of prices[,]" sharing this information could not be anticompetitive without proof that the information was used to fix prices.[178]

The Court re-expressed this principle in *United States v. Container Corporation*, writing, "[p]rice information exchanged in some markets may have no effect on a truly competitive price."[179] In this case, however, the market structure of the container industry made it likely that the exchange of price information would result in price-fixing, and the Court held that such an information exchange was improper.[180] Based on the container industry structure, the compulsion to offer uniform prices was great; that finding was in contrast to the relationship between competitors in *Maple Flooring*, who remained free to determine their own prices. Thus, the particular circumstances and the specific effects on a particular market of sharing information will be weighed by the Court before determining that such interactions have a price-fixing effect.[181]

The organizational structure of the FLA prevents the exchange of company specific information that could result in price-fixing or other anticompetitive behavior. As first described in the FLA's Business Review Letter, precautions are taken to ensure that such exchanges do not take place.[182] The FLA charter also notes that all company information provided to the FLA to coordinate monitoring is not shared with other participating

175. *Container Corp.*, 393 U.S. at 338–339 (Fortas, J., concurring).

176. *See Maple Flooring*, 268 U.S. at 567–68.

177. *See id.* at 586.

178. *Id.* at 582.

179. *Container Corp.*, 393 U.S. at 337.

180. *Id.* (describing the product as fungible, competition as price dependant, and the demand as inelastic).

181. United States v. U. S. Gypsum Co., 438 U.S. 422, 442 n.16 (1978) (citing *Container Corp.*, 393 U.S. at 338 (Fortas, J., concurring)).

182. *See* Klein BRL, *surpa* note 92.

companies.[183] While some information is made public, none of it includes specific information that would influence pricing. Thus, even if prices look similar, a plaintiff should have a difficult time proving the corporations are liable.

Furthermore, if any similarities in price result from FLA actions, that convergence should be legal under *Maple Flooring*. Any information that would be shared is from already conducted audits that include information on wages, hours, and conditions in the past. No exchange of future intentions would occur privately or publicly. The focus of FLA discussions is on augmenting the capacity of organizations to monitor and improve sweatshop conditions that plague the supply chain, not setting prices. Furthermore, the FLA companies serve varying consumers who purchase at a wide range of price points. The vast apparel industry is not similar to the insular container market where sharing information was likely to lead to price-fixing.

4. Refusals to Deal: Possible Scenarios

Under the Sherman Act, organizations like the FLA must also take care when admitting and certifying members, as well as when members pursue remediation with suppliers that are out of compliance. The FLA is a voluntary organization that companies may join as long as they meet the required certification standards governed by the Workplace Code.[184] The voluntary nature of the FLA's self-imposed restrictions demonstrates that each company is choosing for itself to participate. As an organization, the FLA does not illegally regulate the other business entities with which members may deal.

Member companies should understand that concerted refusals to deal with competitors are often subject to antitrust scrutiny. The Court balances antitrust concerns with a company's right to choose the firms with which it wishes to deal.[185] While naked concerted refusals to deal are subject to per se treatment, when refusals to deal occur in the context of a joint venture the Court will apply the rule of reason where procompetitive benefits are

183. FLA CHARTER DOCUMENT, *supra* note 56, at 25.
184. *Id.* at 11.
185. United States v. Colgate & Co., 250 U.S. 300, 306–07 (1919).

achieved.[186] Since many concerted refusals to deal occur in such a context, those restraints are examined under the rule of reason.[187] Naked concerted refusals to deal, however, remain per se illegal.[188]

In *Northwest Stationers Wholesalers v. Pacific Stationary and Printing Company* the Court delineated the narrow application of the per se rule to concerted refusals to deal. The Court explained that application of the per se rule is reserved for "joint efforts by a firm or firms to disadvantage competitors by 'either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.'"[189] The Court elaborated that for an alleged boycott to receive per se treatment one of following conditions must exist: the restraint denies a competitor access to an otherwise available competitive advantage; the boycotter holds a dominant market position; or the boycotter cannot establish offsetting procompetitive benefits.[190] Additionally, the plaintiff must present substantial evidence that the defendants acted collusively and not independently.[191] Proving such prima facie purpose and effect is difficult, meaning that only naked restraints receive per se invalidation while most horizontal restraints receive a full economic analysis under the rule of reason because they may improve efficiency.[192]

More specifically, in *Northwest Stationers*, the Court upheld the expulsion of a member from a wholesale purchasing cooperative as a

186. Nw. Wholesale Stationers, Inc. v. Pac. Stationary & Printing Co., 472 U.S. 284, 294 (1985); HOVENCAMP, *supra* note 168, §5.4(a). *See also* Donald L. Beschle, *Doing Well, Doing Good and Doing Both: A Framework for the Analysis of Noncommercial Boycotts Under the Antitrust Laws*, 30 ST. LOUIS U. L.J. 385, 391 (1986) (discussing other circumstances where the Court has struggled to balance the application of bright line rules with noneconomic justifications).

187. HOVENCAMP, *supra* note 168, §5.4(a) (noting that in that in the context of joint ventures, refusals to deal are "rule of reason with a few exceptions").

188. *Nw. Stationers*, 472 U.S. at 295 (reserving the per se rule for restraints that are "characteristically likely to result in predominately anticompetitive effects"); HOVENCAMP, *supra* note 168, §5.4(a); Beschle, *supra* note 186, at 396.

189. *Nw. Stationers*, 472 U.S. at 294 (quoting L. SULLIVAN, LAW OF ANTITRUST 229–230 (1977)).

190. *Id.* The Court emphasizes that the "likelihood of predominately anticompetitive consequences" is the key factor triggering the per se rule but does not specify which of the named factors is weighted most heavily. *Id.* at 295 (noting that not all listed characteristics need to be present for a boycott to be per se illegal).

191. Toys "R" Us, Inc. v. Fed. Trade Comm'n, 221 F.3d 928, 934 (7th Cir. 2000).

192. Many horizontal restraints govern integrations that are aimed at achieving greater efficiencies, meaning that the Court will most likely find that restraints are legal in the context of joint ventures where procompetitive effects are demonstrable. *See generally* U.S. DEPT. OF JUSTICE & FED. TRADE. COMM'N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPANIES COMPETITOR (Apr. 2002), *available at* http://ftc.gov/os/2000/04/ftcdojguidelines.pdf.

reasonable exercise of the cooperative's power.[193] The member's expulsion was not a naked restraint with immediately ascertainable anticompetitive effects; therefore, the Court applied the rule of reason.[194] The Court's rule of reason analysis found that the cooperative increased market efficiency by creating economies of scale, increasing the supply of goods, and offering members other cost-savings.[195] Given these benefits, the Court believed the agreement was procompetitive. Furthermore, the Court held that the association may regulate the enjoyment of these benefits by "reasonable rules," under which members may be expelled for noncompliance.[196]

In contrast, in *Toys "R" Us, Inc. v. Federal Trade Commission*, the toy retailer violated the antitrust laws by coercing its suppliers not to sell certain toy lines to Toy "R" Us' discount competitors.[197] The defendants were liable under both per se and rule of reason analysis. First, the orchestration of these horizontal agreements resulted in a naked horizontal refusal to deal, which is per se illegal.[198] Second, the Court addressed the vertical restraints and found that those agreements flunked scrutiny under the rule of reason.[199] The Court rejected the argument that the restraints were the kind of vertical agreements that are often sanctioned when the retailer's and the supplier's interest align, fostering competition within a market.[200] Looking for actual anticompetitive effect, the Seventh Circuit cited sales statistics to demonstrate that the agreements negatively impacted other retailers' sales.[201] Those figures further demonstrated that the defendant had sufficient market power for those agreements to adversely impact competitors.[202] Here, the manufacturers acted against their own interests; also evidenced by their unwillingness to undertake the behavior Toys "R" Us advocated unless their competitors also agreed.[203] The manufacturers reluctantly boycotted Toys "R" Us' competitors given the

193. *Nw. Stationers*, 472 U.S. at 295–98.

194. *Id.*

195. *Id.* Such effectiveness is heavily weighed by the Court, as it highly values all types of market efficiencies. *See* Leslie, *supra* note 65, at 251–57.

196. *Nw. Stationers*, 472 U.S. at 295–98. A boycott where the "anticompetitive effects were merely ancillary to achievement of some legitimate goal" have not been struck down. Beschle, *supra* note 186, at 394.

197. Toys "R" Us, Inc. v. Fed. Trade Comm'n, 221 F.3d 928, 934–36 (7th Cir. 2000).

198. *Id.* at 936.

199. *Id.* at 936–38.

200. *Id.*

201. *Id.* at 933.

202. *Id.* at 936–37 (explaining that a showing of actual anticompetitive effects is one way to demonstrate market power).

203. *Id.* at 936.

knowledge that their own competitors would similarly limit sales.[204] Toys "R" Us' direction of a boycott that had wholly anticompetitive effects and rationales made it liable under the Sherman Act.

Applying these principles to the efforts and requirements of the FLA, two possible scenarios arise of which member companies must be aware. First, if a participating company fails to maintain the compliance standards as outlined in the FLA Charter, the company may be terminated as an FLA member.[205] The credibility of the FLA and the value of FLA certification depend upon the FLA's ability to maintain the integrity of its principles. Participation in the Association is predicated on a member's willingness to apply FLA standards and seek remediation where appropriate.[206] Thus, if a company fails to meet the FLA's expectations its expulsion will be made public by the FLA.[207]

Such expulsion is almost identical to that in *Northwest Stationers*. The FLA makes monitoring more effective and makes a desired product—socially responsible goods—more accessible; these benefits parallel those listed in *Northwest Stationers*.[208] Additionally, the Court sanctioned an association's ability to expel members who do not abide by the collaboration's regulations in order to maintain the benefits for other members.[209] The FLA's termination process is a logical extension of that rule. Additionally, terminated companies have the ability to seek re-entrance into the FLA after substantial means are pursued to correct violations.[210] In these circumstances, termination should not be an antitrust violation. In order to promote the advantages of membership, the FLA must be able to decertify members to maintain its reliability. Case law demonstrates that the Court values the procompetitive effects of such management.

A second scenario that raises antitrust concerns is the alleged

204. Toys "R" Us was the dominant retailer of toys at the time that it demanded competitors to limit sales to discount retailers. *Id.* at 930.

205. FLA CHARTER DOCUMENT, *supra* note 56, at 26.

206. *See id.* While the termination process does incorporate steps that can be called "due process," such safeguards do not factor into the competitive analysis that the Court will apply. *See* Nw. Wholesale Stationers, Inc. v. Pac. Stationary & Printing Co., 472 U.S. 284, 295–96 (1985).

207. FLA CHARTER DOCUMENT, *supra* note 56, at 26.

208. *Nw. Stationers*, 472 U.S. at 295.

209. *Id.* at 297–99 (approving expulsion except in the limited circumstances when "the cooperative possesses market power or unique access to a business element necessary for effective competition").

210. *See* Fair Labor Association, Rescinding Gildan Terminations, http://fairlabor.org/all/news/gildan-rescind.html (last visited July 15, 2006) (rescinding the termination of Gildan for taking steps towards remedying noncompliance).

boycotting of a supplier that is out of compliance. If multiple participating companies use the same contractor and that factory continues to fail inspection, brands risk termination from the FLA if they continue to source from that factory. Under pressure from the FLA, multiple brands might hypothetically discontinue orders with that supplier. Facially, this example is reminiscent of the boycotts organized by Toys "R" Us; one organization orchestrating a concerted refusal to deal among horizontal competitors.[211] The situation with the FLA, however, can be easily distinguished since it occurs in the context of a joint venture and is not a naked boycott. The FLA's participants actively sought membership in the organization and the FLA's oversight increases its members' abilities to compete on socially conscious indicators, while its members retain independence to make sourcing decisions. In contrast, the suppliers under the Toys "R" Us agreement acquiesced only with the knowledge that other competitors would similarly limit their wholesale markets. Conversely, the interests of the FLA and member MNCs align to create long-term value for both the FLA and its participants. Additionally, the FLA does not limit its members' achievements, and companies may pursue independent sustainability measures to compliment their efforts within the FLA.

Moreover, the antitrust laws allow companies to use an independent third party to measure the performance of their suppliers. Seeking and following the advice of an independent third party, outside a company's competitive market, is not a violation of the Sherman Act.[212] Thus, if companies choose not to deal with a supplier that the FLA deems noncompliant, that decision is independent of the other members of the FLA. That independence was a crucial factor lacking in *Toys "R" Us*, as the suppliers looked to each other's participation in the boycott before partaking themselves.[213] FLA companies have no guarantee that other members will stop using uncooperative contractors, but rather rely on the benefits of membership to increase their competitive advantage.

Furthermore, a de facto boycott by FLA members of a noncompliant supplier is unlikely to occur. The practices of the FLA and other labor-related NGOs counsel against MNCs pulling orders from a factory. For any brand working to improve its labor record, pulling out of a factory is often a last resort. Discontinuing a relationship with a problematic supplier can lead to massive layoffs, which create the bad publicity that companies have been actively working to avoid. Instead, companies usually seek the

211. Toys "R" Us, Inc. v. Fed. Trade Comm'n, 221 F.3d 928, 934–36 (7th Cir. 2000).
212. PHILLIP E. ARREDA & HERBERT V. HOVENCAMP, ANTITRUST LAW §1402 (2000).
213. *Toys "R" Us*, 221 F.3d at 936.

assistance of a labor NGO, such as the FLA, to work with the supplier on remediation efforts such as implementing grievance procedures, training factory management, and providing comprehensive orientations to new employees regarding their rights.[214]

This analysis reveals that the FLA retains space in which to operate effectively despite its sanctions for noncompliance. In either circumstance described, the FLA is not denying competitors an otherwise readily available relationship. Instead, the FLA seeks to create new value for its members, in turn attracting others.

III. NOERR-PENNINGTON IMMUNITY: SEEKING GOVERNMENT ACTION

Trade associations can also seek immunity from the antitrust laws under the *Noerr-Pennington* doctrine. The doctrine protects activities that aim to influence governmental action on issues of interest to the petitioners.[215] When joint efforts are undertaken with the purpose to influence legislation, they are treated differently from similar—or even identical—combinations that operate only within the commercial market.[216] Derived from the petition clause of the First Amendment, this well-established exception to the Sherman Act is broadly construed.[217] *Noerr-Pennington* protects the political activity of associations that seek to influence any branch of the government: legislative, executive, or administrative.[218] As long as the parties seek some governmental action, the doctrine will be applied to the challenged conduct.

Further, *Noerr-Pennington* protects collaborators' activities even if the means chosen to lobby government officials have anticompetitive results.[219] In *Noerr*, the Court immunized direct communications with

214. Clean Clothes Campaign, *supra* note 55.

215. E. R.R. Presidents Conference v. Noerr Motor Freight Inc., 365 U.S. 127, 135 (1961) ("No violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws.").

216. *See id.* at 137.

217. This breadth was recently reaffirmed and extended outside of the antitrust context. The Ninth Circuit recently immunized petitioning the courts from the application of RICO writing, "the *Noerr-Pennington* doctrine stands for a generic rule of statutory construction, applicable to any statutory interpretation that could implicate the right protected by the Petition Clause." Sosa v. DirecTV, 437 F.3d 923, 931 (9th Cir. 2006). There is some debate about whether the *Noerr-Pennington* doctrine is an immunity, an exception, or a statutory limit on the Sherman Act; the weight of those distinctions is irrelevant here.

218. *Noerr*, 365 U.S. at 138–39.

219. *Id.*

legislators as well as the Railroads' broad public relations campaign, "because [it was . . .] part of the general plan to make a case to the government for the legislation that the antitrust defendant desired."[220] Although the Railroads' intended result was anticompetitive, the Court held that the basis of the right to petition the government cannot be predicated on the intent of the petitioner.[221] In other words, as long as the conduct is directed at influencing government action, tangential effects that unreasonably harm competition cannot form the basis of an action under the Sherman Act.

In foreign jurisdictions, MNCs most likely may petition foreign governments under the *Noerr-Pennington* doctrine as well. While this question remains unresolved, there are strong indications that petitioning foreign governments is also immunized.[222] First, the DOJ Antitrust Enforcement Guidelines for International Operations state that the enforcement agencies will apply the *Noerr-Pennington* doctrine to foreign sovereigns in the same manner in which the Courts have applied the doctrine domestically.[223] Following this cue, the Fifth Circuit held "[w]e see no reasons why acts that are legal and protected if done in the United States should in a United States court become evidence of illegal conduct because performed abroad."[224] While commentators have debated whether the *Noerr-Pennington* doctrine relies on the representative and democratic character of the U.S. government, the Fifth Circuit also concluded that this right is not dependant on the form of government of the host country.[225] Thus, while the issue has not reached the Supreme Court, scholars, the enforcement agencies, and the appellate courts agree that *Noerr-*

220. HOVENKAMP, *supra* note 168, §§ 21.2, 18.2.

221. *Noerr*, 365 U.S. at 138–39.

222. HOVENKAMP, *supra* note 168, § 18.2.

223. U.S. DEPT. OF JUSTICE & FED. TRADE. COMM'N, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS §3.34 (1995), *available at* http://www.usdoj.gov/atr/public/guidelines/internat.htm ("Whatever the basis asserted for *Noerr-Pennington* immunity (either as an application of the First Amendment or as a limit on the statutory reach of the Sherman Act, or both), the Agencies will apply it in the same manner to the petitioning of foreign governments and the U.S. Government.").

224. Coastal States Mktg., Inc. v. Hunt, 694 F.2d 1358, 1366–67 (5th Cir. 1983).

225. *Id.* ("We also reject the idea that the availability of petitioning immunity turns on the political 'persuasion' of the government involved. The political character of the government to which the petition is addressed should not taint the right to enlist its aid."). The Court also seems to have the support of preeminent scholar Phillip Areeda. The Fifth Circuit notes that while Areeda once advocated for the doctrine to apply only to democratic governments, he revised that opinion. Areeda later wrote "every government, whether representative or not, is privileged to set the terms on which persons within its borders may seek its legislation, decrees, or other sovereign action." *Id.* at 1367 n.29 (quoting AREEDA & D. TURNER, ANTITRUST LAW 174–75 (1978)).

Pennington immunity is applicable to activities aimed at inspiring action on the part of a foreign government regardless of the anticompetitive consequences of those actions.

Any activities the FLA takes to spur further regulatory action by the U.S. government or the governments of the counties in which its members operate, should similarly be immunized under the *Noerr-Pennington* doctrine. The FLA has ample experience working with the U.S. government given its birth through White House meetings led by the Secretary of Labor. Further, as a participant in JO-IN, the FLA seeks support from the U.S. Department of State and the European Commission.[226] Within and outside those meetings, the FLA is free to pursue action that informs and inspires government regulators to take action. That conduct could include lobbying the Departments of Labor and State to set minimums for labor standards and monitoring both domestically or in international trade agreements.

More helpful, if the FLA chooses to seek action from local foreign governments to enforce local law, those efforts are also protected under *Noerr-Pennington*. Reports continue to cite the inability or unwillingness of governments to create enforcement mechanisms for local labor laws.[227] Even if agitating for those regulations results in an increase in price, the companies participating should be immunized from Sherman Act prosecution under the *Noerr-Pennington* doctrine. In *Noerr*, the Court explicitly stated that as long as the activities are directed at promoting government action, even if the outcome is anticompetitive, the petitioner cannot be held liable under the Sherman Act.[228] The Court stated that preventing those with financial interest in an issue from encouraging the government to take a position on that issue "would thus deprive the government of a valuable source of information and . . . deprive the people of their right to petition in the very instance in which that right may be of the most importance to them."[229]

Applying this interpretation of the Sherman Act to companies seeking improved labor standards should be clear. Companies have an obvious financial interest in the implementation and development of labor standards. The experience the private sector has gained in this arena can assist governments. The experience and information that the FLA and

226. JO-IN, *supra* note 6.

227. *See* DHANARAJAN, *supra* note 5, at 45; YIMPRSERT & HVEEM, *supra* note 20, at 7.

228. E. R.R. Presidents Conference v. Noerr Motor Freight Inc., 365 U.S. 127, 139–40 (1961).

229. *Id.* at 139.

MNCs garnered through internal monitoring and partnerships with other NGOs over the last two decades can be incredibly useful to government regulators—particularly those in developing countries where violations occur most often. That expertise is the type of information the Court wanted parties to be able to bring to governments.

IV. MOVING FORWARD: CHANGING INTERNATIONAL TORT STANDARDS

New legal developments could have an important impact on corporate collaborations that strive to set international social and environmental standards. International displeasure with human rights abuses is leading to the development of more stringent tort standards, which could have a major impact for MNCs.

In addition to *Noerr-Pennington* immunity, corporations might soon be looking for immunity under the doctrine of government compulsion.[230] Under that doctrine, companies cannot be liable for anticompetitive conduct that is required by law. As international tort standards change, the law may close the current gap between brand liability and legal violations in contract factories. In particular, foreign citizens are increasingly pursuing litigation under the Alien Tort Statute of 1789.[231] Recent cases such as *Kiobel v. Royal Dutch Petroleum Company* and *Sarei v. Rio Tinto* demonstrate U.S. courts' acceptance of such actions.[232] The evolution of international tort law and international standards should be of great interest to those MNCs pursing closer collaborations. As they become liable in a court of law—and not just that of public opinion—efforts like the FLA may be best positioned to enforce the standards brands will need to have in place. Establishing relationships with such NGOs and working for creative and innovative solutions, such as capacity building, should be on MNCs' priority lists. Tort law may eclipse the issues corporations face under antitrust law, but the penalties may be more severe.

V. CONCLUSION

The development of single codes of sustainable practices does not raise the same concerns that the antitrust laws are meant to address.

230. HOVENKAMP, *supra* note 168, § 21.2(d).

231. Edward E. Potter, *The Growing Significance of International Labor Standards on the Global Economy*, 28 SUFFOLK TRANSNAT'L L. REV. 243, 255 (2005).

232. Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457, 467 (S.D.N.Y. 2006), Sarei v. Rio Tinto, 2007 WL 1079901 (9th Cir. 2007) (rehearing en banc).

Congress passed the Sherman Act to promote competition and limit the tremendous power of newly formed corporations. The current push towards industry self-regulation complements the original goals of the Sherman Act. Furthermore, these efforts do not unreasonably restrain trade under the rule of reason. The FLA is not an agreement to restrict price competition, but an agreement to meet externally determined recognized standards of production. The FLA increases brands' ability to compete for consumers who want responsibly and legally made goods. With the FLA's assurance, consumers know that the items they buy meet a standard set of requirements.

As responsible practices have become necessities for companies to remain competitive, corporations are increasingly forming business alliances to address the ills of globalization. The Fair Labor Association is not necessarily a unique venture. Similar organizations exist in the coffee, diamond, toy, and cotton farming industries. To address the antitrust concerns of those partnerships, organizations should ensure that membership is voluntary and available to all competitors. Additionally, partnering with NGOs can give independent credibility to standards set by trade organizations. Lastly, pursuing a Business Review Letter from the DOJ should also allay companies' antitrust concerns. Like the FLA, such organizations should be encouraged to continue working together to systematically address the inequalities that result from globalization.