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October 26, 2000

The Honorable A. Douglas Melamed  
Acting Assistant Attorney General, Antitrust Division  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530

Re: Request for Business Review – Truckload Carriers  
Association Benchmarking Project

Dear Mr. Melamed:

On behalf of the Truckload Carriers Association ("TCA"), I would like to request, pursuant to 28 C.F.R. § 50.6, an expedited business review letter regarding TCA's proposed Benchmarking Project to improve truckload motor carriers' efficiency, safety, and competitiveness.

TCA is the national nonprofit trade association of for-hire motor carriers that haul freight in full truckloads. Headquartered in Alexandria, Virginia, TCA provides information, training, policy advocacy, and other traditional trade association services to its members.

As discussed in more detail below and in the enclosed Concept Paper,<sup>1</sup> TCA would like to launch a Benchmarking Project to help its motor-carrier members address significant inefficiencies (Part I) and improve their services to shippers and the public. The Benchmarking Project would involve, first, periodically surveying and publishing selected operating costs and other measures of superior truckload carrier performance (Part II(A)). Second, TCA would convene best-practice discussion groups of truckload carriers to review the survey results, identify the methods and processes that gave rise to the most efficient performances, and discuss how to improve their own methods and processes in an effort to match the best in the

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<sup>1</sup> "Truckload Carriers Association Benchmarking Project" (Feb. 7, 2000), (Enclosure 1 of this letter).

industry (Part II(B)). TCA has adopted *TCA Benchmarking Project Antitrust Safeguards*, to be applied to both the surveys and the discussion groups (Part VI below).

In the highly unconcentrated and competitive trucking market (Part III(B)), the proposed TCA Benchmarking Project would heighten efficiency, lower freight transportation cost, and benefit motor carriers' shipper-customers and the general public through increased safety and competition (Part III(A)-(C)). Antitrust authorities view benchmarking of costs and other non-price/non-output items as a procompetitive activity -- a way to help individual companies drive down costs, compete more vigorously on price, and deliver better service -- and the proposed TCA Benchmarking Project itself has received strong endorsements from a leading shipper, S.C. Johnson & Son, Inc., and an academic expert in trucking, Professor Frederick J. Stephenson of the University of Georgia Terry College of Business (Part IV).

**I. The Inefficiency Challenge for Truckload Motor Carriers.** Eager to manage their supply chains more efficiently, shippers today are demanding ever-increasing safety, reliability, and technological sophistication from the truckload carriers they do business with. Carriers are in no position to raise their freight rates to fund such service improvements. They face brisk competition from within their own ranks -- truckload carriage has among the lowest concentration levels and barriers to entry of any American industry -- and from tens of thousands of private motor carriers, less-than-truckload carriers, railroads, air freight carriers, and others. The only answer for truckload carriers is to improve their operating methods and processes so as to cut transaction costs and increase their overall efficiency.

Targets for improvement include cutting the number and severity of highway accidents; reducing worker's compensation, cargo loss-and-damage, and other risk management costs; addressing clean-air, clean-water, and energy conservation needs more effectively; making driver recruitment and retention more successful and less expensive; decreasing the number of miles their trucks run empty; and reducing inefficiencies in technology use, customer service, legal compliance, and other aspects of trucking operations.

Individual carriers could best attack these inefficiencies -- and promote competition that would benefit shippers and consumers -- if they could, first, identify the lowest cost or other best-performance measure in selected areas of management or operations; second, discover what "best practices" had led to those best performances; and, finally, apply the findings to their own operations. Unfortunately, no source of reliable survey data on truckload industry costs now exists. Nor do carriers have an approved forum in which they can identify and discuss the "best-

practice" methods and processes to achieve cost savings, safety improvements, and other efficiencies.

**II. A Way to Address the Problem.** The proposed Truckload Carriers Association Benchmarking Project would provide just such reliable data and approved forums. The Project would help truckload carriers of all sizes and types reduce costs and inefficiency and enhance customer service by benchmarking their performance against the best in the industry. Specifically, the Project would conduct and publish the results of periodic surveys of selected truckload carrier costs and other performance measures, and then establish discussion groups for 15 or so carriers each to discuss best practices related to the data from the surveys.

**A. Surveys of Best-Performance Data.** Through member questionnaires and discussions, TCA would first determine which 15-20 cost and other items would be most useful to benchmark. These might include, for example, the ratio of safety-related expenditures to number of highway accidents, worker's compensation cost, tractor maintenance cost, tire cost, environmental management cost, driver to non-driver ratio and cost, driver turnover rate, recruitment cost per driver hired, and advertising cost per revenue dollar. *Omitted altogether from the survey would be freight rates, surcharges, credit terms, revenue or total expense per mile, service volumes or capacity, future sales or marketing strategies, new-service plans, and customer or supplier lists.*

Once a set of costs and other items to survey had been decided on, focus groups of carriers, shippers, receivers, and others would seek consensus on a uniform definition of each item. TCA or an expert outside organization retained by TCA would then design and conduct periodic surveys of the selected items among truckload carriers. TCA members and all other for-hire truckload carriers would be eligible to submit survey responses. The results of the surveys would be made available in aggregate form for purchase by all that had participated, with a discount for TCA members. The surveys would be conducted in compliance with the safe-harbor rules in Statement 6(A) of the Justice Department and Federal Trade Commission's *Statements of Antitrust Enforcement Policy in Health Care* (Aug. 1996).<sup>2</sup>

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<sup>2</sup>TCA has retained an outside survey consultant and sought the advice of selected motor carrier-members in exploring the possible design of a benchmarking survey, including such complexities as defining, in a manner meaningful to all survey-respondents, the cost and other carrier-performance items that might eventually be surveyed. In deference, however, to the Justice

**B. Best-Practice Discussion Groups.** TCA would host periodic meetings of Best-Practice Discussion Groups to gain insights from the top performances shown in the surveys. Each Discussion Group of 15 or so truckload carrier executives would seek to identify the "best-practice" methods and processes that resulted in the top performances and to discuss how to bring their own operations closer to the highly-efficient level of the top performers. Each Discussion Group would have an announced focus on carriers in a particular annual-revenue bracket (for example, \$1 million-\$14 million, \$15 million-\$49 million, \$50 million-\$99 million, \$100 million-\$249 million, and \$250 million and above) and type of truckload operation (for example, long-haul van, regional van, refrigerated, flatbed, independent-contractor, etc.). Each Group, however, would be open to for-hire truckload carriers of all revenue-brackets and types of operation, on a voluntary, first-come, first-served basis.

Membership in the Discussion Groups would be completely voluntary and limited to CEOs and other top, non-sales-and-marketing executives of truckload carriers. Each company would be allowed to participate in only one Discussion Group. From time to time, government officials, shippers, suppliers, academic experts, and other individuals would be invited to attend and offer presentations to Discussion Groups.

Discussion Group meetings would follow agendas reviewed by an antitrust attorney and distributed in advance, be memorialized in minutes to be distributed afterwards, and have an attorney present to ensure adherence to antitrust procedural safeguards. All attendees would be permitted, but never required, to speak, provide information, or otherwise participate.

**C. Recommended Practices.** Individual carriers would be able to use the published survey data and, if they participated in the Best-Practice Discussion Groups, the results of those discussions to reduce inefficiencies, safety shortcomings, and other problems in their own operations. If a Discussion Group believed it had identified a new approach that would benefit truckload carriers in general, it would formally suggest that TCA launch a public, recommended-practices proceeding. TCA would then formulate and publish the proposed new approach for comment by carriers, shippers, suppliers, and

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Department's policy of considering "only requests with respect to proposed business conduct" (28 C.F.R. § 50.6), TCA has refrained from conducting any of the proposed surveys or Discussion-Group meetings.

others; appoint a committee to review the comments; publish a revised recommended practice; and provide an appeals process to further review the recommended practice if challenged.

**III. Benefits to Shippers and Consumers.** The TCA Benchmarking Project would benefit shippers and consumers by:

**A. Equipping truckload carriers to achieve lower costs and greater efficiency by measuring their performances against the best in the industry.** The widely respected, Congressionally-chartered Baldrige National Quality Program includes in its *2000 Criteria for Performance Excellence* for companies the required use of "competitive comparisons and benchmarking information to help drive performance improvement."<sup>3</sup> Specifically, the Baldrige Program notes in its instructions to companies seeking its annual quality award:

The use of competitive and comparative information is important to all organizations. The major premises for using competitive and comparative information are: (1) your organization needs to know where it stands relative to competitors and to best practices; (2) comparative and benchmarking information often provides the impetus for significant ("breakthrough") improvement or change; and (3) preparation for comparing performance information frequently leads to a better understanding of your processes and their performance. Benchmarking information also may support business analysis and decisions relating to core competencies, alliances, and outsourcing.

Your effective selection and use of competitive comparisons and benchmarking information require: (1) determination of needs and priorities; (2) criteria for seeking appropriate sources for comparison – from within and outside your organization's industry and markets; and (3) use of data and information to set stretch targets and to

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<sup>3</sup>National Institute of Standards and Technology, Baldrige National Quality Program, *2000 Criteria for Performance Excellence* 34 (2000) [available at [www.quality.nist.gov](http://www.quality.nist.gov)].

promote major, non-incremental improvements in areas most critical to your organization's competitive strategy.<sup>4</sup>

For these same reasons, truckload carriers would benefit from a regular, TCA-sponsored Benchmarking Project to assist them in measuring their performance against that of their peers and looking for ways to heighten their efficiency.<sup>5</sup>

**B. Enabling carriers to use efficiency gains to compete more aggressively for shippers' business, resulting in downward pressure on freight rates, a wider range of trucking services, and improved customer service.** The Truckload Carriers Association would be launching its Benchmarking Project in one of the most unconcentrated and competitive markets in the United States -- trucking. Of the estimated \$486.1 billion in total trucking revenue nationwide in 1998,<sup>6</sup> the top 10 U.S. trucking companies accounted for only approximately 13 percent, and the top 25 for only approximately 16 percent.<sup>7</sup> Within the truckload (including refrigerated) sector, the top 10 truckload companies accounted for only an estimated 7 percent of that sector's total revenues and the top 25, only approximately 11 percent.<sup>8</sup> New entry is extensive. Between April 1997 and March 2000, the number of interstate motor carriers in the United States increased 19 percent, from 423,153 to 501,744.<sup>9</sup> The number of such carriers that operated over 20 trucks each went from 93,940 to 98,843, a 5 percent increase.<sup>10</sup>

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<sup>4</sup>*Id.* at 35 (emphasis added).

<sup>5</sup>Interest in benchmarking as an avenue to greater business efficiency has increased sufficiently that there is now an Internet online service devoted to facilitating companies' benchmarking efforts: [www.benchnet.com](http://www.benchnet.com).

<sup>6</sup>American Trucking Associations, Inc., *American Trucking Trends* 8 (2000 ed.) (Enclosure 2).

<sup>7</sup>See Tables A and B of Enclosure 3.

<sup>8</sup>See Tables C and D of Enclosure 3.

<sup>9</sup>American Trucking Associations, Inc., *American Trucking Trends* 9 (2000 ed.) (Enclosure 2); American Trucking Associations, Inc., *American Trucking Trends* 2 (1997 ed.) (Enclosure 4).

<sup>10</sup>See sources cited in note 9 *supra*.

Consistent with the unconcentrated, competitive structure of the trucking industry, in each of the instances in which the Surface Transportation Board and its predecessor the Interstate Commerce Commission reviewed proposed motor carrier pooling agreements (joint ventures) over the past five years, the agency found that the horizontal agreement posed no threat to the market's vigorously competitive condition.<sup>11</sup> A recent statistical study of freight transportation trends likewise found that "price competition...in both the truckload and less-than-truckload sectors [has] been exerting significant pressure on prices and revenues."<sup>12</sup> Finally, the huge role played by private motor carriage in the overall trucking market -- 52 per cent of all general freight truck shipments in 1998<sup>13</sup> -- as well as significant competition from railroads and air carriers,<sup>14</sup> only intensifies the fierce competitive forces faced by truckload and other for-hire motor carriers.

Benchmarking has been recognized as a highly procompetitive activity. As antitrust commentators Jorde and Teece observed several years ago, "[b]enchmarking, by bringing in external information to the firm, has a salutary effect in galvanizing companies to compete once they recognize how far behind they are, and what they can do to improve.... [K]nowledge of how competitors achieved success can help guide a company committed to renovating its structures and systems, lowering costs, and achieving maximum efficiency.... [O]ur own assessment of the benefits of benchmarking led us to

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<sup>11</sup>E.g., *Consolidated Freightways Corp. of Delaware and Tri-State Express, Inc. - Pooling Agreement*, No. MC-F-20680, 1995 ICC Lexis 23, at 10 (I.C.C., served Feb. 10, 1995) (referring to "the competitiveness of the motor carrier industry"); *North American Van Lines, Inc. and the Fortress Corp. d/b/a/ Fortress FAE Worldwide - Pooling Agreement*, No. MC-F-20920, 1998 STB Lexis 173, at 6 (S.T.B., served June 29, 1998) (noting "there is substantial competition from a large number of motor carriers, freight forwarders and brokers that can serve this market"); *Groendyke Transport, Inc. et al. - Pooling Agreement*, No. MC-F-20941, 1999 STB Lexis 331, at 9 & nn. 8, 9 (S.T.B., served June 7, 1999) (approving joint venture of five large competing bulk motor carriers on grounds, among others, that "competitive service alternatives will be available to ensure that the actions of these carriers do not have an adverse effect on the rates and services available to shippers. There are at least 144 other motor carriers transporting bulk commodities. In addition to service from competing motor carriers, shippers are readily able to use private carriage and competing modes of transportation").

<sup>12</sup>Standard & Poor's DRI, *U.S. Freight Transportation Forecast...to 2007* at 12 (American Trucking Associations, Inc., July 1999) (Enclosure 5).

<sup>13</sup>*Id.*, Figure 3, at 12.

<sup>14</sup>See generally *id.* at 9-11. See also *Groendyke Transport, Inc. et al. - Pooling Agreement*, 1999 STB Lexis 331, *supra* note 11.

the conclusion that in almost all circumstances there will be no significant anticompetitive harm."<sup>15</sup>

A former senior official of the Antitrust Division has written that "[a]n information exchange among competitors concerning cost items can be critical to establishing the position of one firm against an industry.... Legitimate benchmarking activities are the antithesis of collusion. Their purpose is to adopt the cost-cutting and quality-improvement techniques of competitors within an industry as well as techniques from other industries in order to beat the competition (or at least stay up with it)."<sup>16</sup>

Similarly, the Areeda & Hovenkamp *Antitrust Law* treatise concludes that "[c]ost information exchange is generally beneficial" because it "enable[s] firms to check the efficiency of their own operations against a relevant benchmark – the efficiency of their rivals."<sup>17</sup> The treatise goes on to explain:

Firms compete with one another not only by cutting their prices closer to their costs, but also by reducing their costs; finding a lower cost source of supply than one currently has is an activity that antitrust policy generally favors. Industrywide production of cost data through trade associations should generally be regarded as inoffensive to competition. Such data enable a firm to compare its own costs against the market average, regional averages, or even against specific other firms. Thus a firm that seems unable to make a profit at current market prices can compare its costs with those of other firms in the market and determine that its costs for labor or some other input are unreasonably high. Having identified the problem, the firm may be able to correct it.

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<sup>15</sup>Jorde & Teece, *Rule of Reason Analysis of Horizontal Arrangements: Agreements Designed to Advance Innovation and Commercialize Technology*, 61 Antitrust L.J. 579, 597-98 (1993) (emphasis added).

<sup>16</sup>Gidley, "The Antitrust Treatment of Cost Information Exchanges," *Computer Industry*, ABA Section of Antitrust Law Computer Industry Committee Newsletter (Fall 1994) at 11.

<sup>17</sup>XIII H. Hovenkamp, *Antitrust Law* ¶ 2114c at 100 (1999).



Indeed, even for one firm to call its closest competitor to find out if the competitor has found a lower-cost source for some input should not be regarded as inherently harmful.<sup>18</sup>

Finally, in a decision affirmed without opinion by the U.S. Supreme Court and noted in the *Antitrust Law* treatise, a federal district court dismissed Justice Department price-fixing claims against competing rail equipment manufacturers that exchanged cost information and made visits to each other's plants to study new machinery and methods.<sup>19</sup> The court concluded that:

There was no chance to get labor and material costs down, so they checked costs with each other to see what else they could get down, and they gave pertinent examples of it to me. I find that plant visitation was all for the same ultimate purpose, to improve their work, to observe new machinery, to observe new methods. All done ultimately to reduce costs, because these defendants must compete with each other even in efficiency....

I find getting costs down by ... imitating the other fellow to cut costs or learning more efficient methods to better compete with him ultimately keeps prices down, too.

I find that cost information was here exchanged to improve productive efficiency and to lower costs.<sup>20</sup>

The same pro-efficiency, procompetitive consequences would flow from the proposed TCA Benchmarking Project's surveying and discussion-group treatment of comparative costs and other non-price, non-output items.

**C. Increasing compliance with safety, environmental, and other laws, resulting in fewer accidents, cleaner air, and other benefits to the**

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<sup>18</sup>*Id.* at 100 (emphasis added)

<sup>19</sup>*United States v. National Malleable & Steel Castings Co.*, 1957 U.S. Dist. Lexis 4209 at 45-47, 1957 Trade Cas. (CCH) ¶ 68,890 at 73,596-73,597 (N.D. Ohio 1957), *aff'd mem.*, 358 U.S. 38 (1958), cited in XIII H. Hovenkamp, *Antitrust Law* at 100 n.9.

<sup>20</sup>*Id.* (emphasis added).

**public.** The TCA Benchmarking Project would make it possible for truckload carriers to share data on highway accidents, preventive safety and maintenance programs, safety aspects of driver recruitment and training, risk-management costs, and other safety-related activities. The same would be true with respect to data concerning truckload carriers' management of their empty miles, air emissions, fuel use, and handling of hazardous materials. In both arenas, the benchmarking/information exchange would help lagging carriers improve their safety and environmental compliance by giving them the benefit of best-practices surveys and discussions.

**IV. Endorsements from Shipper and Academic Community.** Based on their review of TCA's Concept Paper (Enclosure 1), a major shipper and a business school expert on trucking have strongly endorsed the TCA Benchmarking Project:

**A. S.C. Johnson & Son, Inc.,** a leading shipper by truck of its consumer products, which include Windex, Pledge, Raid, and Saran Wrap, wrote, with respect to the TCA Benchmarking Project, that "[w]e think that motor carriers' participation in discussion groups will lead to a wealth of benefits for shippers and consumers, including lower costs; improved service, capacity, and service options; and, to the extent that discussions address safety issues, greater compliance with safety regulations."<sup>21</sup>

S.C. Johnson official Milton Morris noted that his company deals with approximately 30 motor carriers and:

[a]s a large user of services provided by the truckload segment of the trucking industry, S.C. Johnson has observed inefficiencies experienced by motor carriers in transporting freight. One observation is that truckload carriers often lack the ability to identify inefficiencies or excess costs in their operations, and to implement strategies to contain or reverse them.

Mr. Morris went on to state that "[c]arriers can derive obvious benefits from the opportunity to discuss operational issues with carriers of similar sizes, and by drawing a correlation between one carrier's solution to a given inefficiency and

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<sup>21</sup>Letter from Milton E. Morris, General Transportation and Import/Export Manager, S.C. Johnson & Son, Inc., Racine, Wisconsin, to Gary Baumhover, Chairman, Truckload Carriers Association (Mar. 27, 2000) (Enclosure 6).

the cost savings that might be realized if a similar solution were widely adopted." His letter concluded that:

[t]he ability to participate in an information database and discussion group program would allow motor carriers to periodically compare the efficiency of a number of aspects of their business with those of other motor carriers. This would likely lead to a reduction of costs and a passage of cost savings on to users of motor carrier services, and the shipping public would ultimately benefit through lower overall transportation costs. Accordingly, S.C. Johnson & Son, Inc. believes that a favorable business review letter on TCA's proposed Benchmarking Project should be issued by the Department of Justice (emphasis added).

**B. Professor Frederick J. Stephenson of the University of Georgia Terry College of Business** echoed the S.C. Johnson views in his own letter emphasizing that the proposed TCA Benchmarking Project would serve the interests of both motor carriers and their customers. He, too, wrote his letter after reviewing the enclosed concept paper.<sup>22</sup> Professor Stephenson has extensive experience with trucking management and operations, in part through his service as Conference Director for the University of Georgia's Trucking Profitability Strategies conferences. In his enclosed letter, Professor Stephenson notes that these conferences have "focused on teaching executives how to manage and lead their businesses more productively ... and have helped hundreds of small, medium, and large trucking companies to be more competitive, to drive costs out of their operations...."

Professor Stephenson suggested that the TCA Benchmarking Project would carry the productivity-enhancing objectives of the University of Georgia conferences a beneficial step further:

The ability to participate in an information database and discussion group program would allow motor carriers to periodically compare the efficiency of their businesses with that of other motor carriers including best-in-class trucking

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<sup>22</sup>Letter from Frederick J. Stephenson, Associate Professor of Distribution and Conference Director, The University of Georgia Terry College of Business, to Gary Baumhover, Chairman, Truckload Carriers Association (Mar. 8, 2000) (Enclosure 7).

companies.... I hope TCA will be given a green light to move forward with both endeavors, benchmarks and 20-groups (discussion groups).... Benchmarking will spur competition in the trucking industry. That in turn will help trucking's customers, the general public, and the economy (emphasis added).

Professor Stephenson closed by saying he would "strongly urge the Department of Justice to issue a favorable business review of this proposal. Benchmarking is long overdue and will really help a huge number of carriers and their customers."

**V. Consistent with DOJ/FTC Health Care Guides and Past Business Review Letters.** The survey components of the TCA Benchmarking Project would be kept within the safe harbors set forth by the Justice Department and the FTC in Statement 6(A) of their *Statements of Antitrust Enforcement Policy in Health Care* (Aug. 1996). This intent is reflected in TCA's incorporation of the DOJ/FTC safe harbors in its *Woh TCA Benchmarking Project Antitrust Safeguards* (see Part VI(A) below).

With respect to the proposed best-practice Discussion Groups, two business review letters issued several years ago involving the transportation intermodal industry lend support to issuance of a business review letter here. One such letter was issued to the Intermodal Council of the American Trucking Associations on February 22, 1995.<sup>23</sup> In its request, the Intermodal Council had indicated that there were "substantial inefficiencies in the way carriers participate with one another in connection with intermodal hauls."<sup>24</sup> The Intermodal Council had proposed, for the Department's consideration, a series of "discussion forums...to address these inefficiencies by identifying industry best practices for carriers and shippers to consider or implement on an individual basis."<sup>25</sup> The Department's favorable letter in response imposed no restrictions on the proposed information exchange other than the procedural safeguards that the Intermodal Council itself had put forward.

In a second such letter the following year, the Department indicated it had no intention of taking enforcement action against a proposal by four intermodal

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<sup>23</sup>U.S. Dep't of Justice, Antitrust Div., Business Review Letter *re* Intermodal Council of the American Trucking Associations, Inc., 1995 DOJBRL Lexis 1 (Feb. 22, 1995).

<sup>24</sup>*Id.*, slip op. at 4.

<sup>25</sup>*Id.*, slip op. at 4-5

marketing companies to "discuss among themselves common problems facing their segment of the intermodal industry and...thereafter present their consensus views on such issues to railroads and truckers...."<sup>26</sup> (The proposed TCA Benchmarking Project would not go as far, in that it would not involve the reaching of any "consensus" or agreement nor the presenting of any collective views to vendors or customers.) The Department's business review letter went on to state, "[i]t is possible that the proposal will have procompetitive effects. To the extent that it promotes a more efficient utilization of intermodal equipment or facilities, or lowers costs in some other manner, the proposed activities could advance consumer interests."<sup>27</sup>

**VI. Planned Antitrust Safeguards.** To help ensure that the proposed TCA Benchmarking Project does not become a vehicle for inappropriate activities, TCA has adopted the following *TCA Benchmarking Project Antitrust Safeguards*:

**A. Surveys.**

**1.** The TCA Benchmarking Project surveys will *not* collect or distribute data on freight rates, surcharges, credit terms, revenue or total expense per mile, service volumes or capacity, future sales or marketing strategies, new-service plans, and customer or supplier lists.

**2.** The surveys will be open to all for-hire truckload carriers (not just TCA members), and the survey results will be made available in aggregate form for purchase by at least all carriers that had participated, with a discount for TCA members.

**3.** In accordance with the safe harbor rules in Statement 6(A) of the Justice Department and FTC *Statements of Antitrust Enforcement Policy in Health Care* (August 1996), the TCA Benchmarking Project surveys must meet the following conditions:

**a.** Each survey will be managed by TCA or an independent survey organization retained by TCA;

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<sup>26</sup>U.S. Dep't of Justice, Antitrust Div., Business Review Letter *re* GST Corp. *et al.*, 1996 DOJBRL Lexis 18 (Feb. 23, 1996), slip op. at 4.

<sup>27</sup>*Id.*, slip op. at 6.

b. The information provided by motor carriers participating in the survey will be based on data more than 3 months old; and

c. There will be at least five carriers reporting data upon which each disseminated statistic will be based; no individual carrier's data will represent more than 25 percent on a weighted basis of that statistic; and any information included in the published survey results will be sufficiently aggregated that it will not allow recipients to identify the costs incurred by any particular carrier.

**B. Best-Practice Discussion Groups.**

1. Each Best-Practice Discussion Group will be voluntary and limited to representatives of 20 motor carriers. While each Discussion Group will have an announced focus on carriers in a particular annual-revenue bracket and type of truckload operation, each will be open to for-hire truckload carriers of all revenue-brackets and types of operation on a first-come, first-served basis. Participation will be limited to chief executive officers and other top, non-sales-and-marketing executives, and each company will be allowed to participate in only one Discussion Group.

2. Discussion Group meetings (including any Discussion Group-related telephone call in which two or more motor carriers participate) will follow agendas approved by an inside or outside TCA attorney and then be distributed to all participants before or at the start of the meeting; begin with the person chairing the meeting drawing the participants' attention to these *Benchmarking Project Antitrust Safeguards*; have any actions taken during the meeting summarized in minutes to be approved in advance by a TCA attorney and distributed to the participants afterwards; and have a TCA attorney present who will monitor all discussions and ensure adherence to these *Safeguards*.

3. Discussion in each Group will be limited to how to improve processes, procedures, and methods and thereby reduce transactional and other costs and increase efficiency, safety, environmental responsiveness, and competitiveness. While attendees may, from time to time, disclose to the Group their companies' costs or benchmarked items, *no disclosures or discussion will be permitted of any of the items to*

*be omitted from the surveys – namely, freight rates, surcharges, credit terms, revenue or total expense per mile, service volumes or capacity, future sales or marketing strategies, new-service plans, and customer or supplier lists. All attendees will be permitted, but never required, to speak, provide information, or otherwise participate.*

4. Neither the Discussion Groups nor TCA as a whole will reach any agreements as to any cost, process, procedure, method, vendor, or anything else or make adoption of any such item a condition of membership in the Discussion Group or in TCA. Any use of a cost, process, procedure, method, vendor, or anything else discussed will be left to the unilateral, voluntary decision of each participant.

### C. Recommended Practices.

If a Discussion Group believes it has identified a new approach that might benefit truckload carriers in general, it may formally suggest that TCA launch a public, recommended-practices proceeding. If TCA decides to follow such a suggestion, TCA will then formulate and publish the proposed new approach for comment by carriers, shippers, suppliers, and others; appoint a committee to review the comments; publish a revised recommended practice; and provide an appeals process to further review the recommended practice if challenged. TCA will refrain from making adoption of any recommended practice a condition of membership in either a Discussion Group or TCA. Any use of a recommended practice will be left to the unilateral, voluntary decision of each TCA member or other carrier.

**Conclusion.** For all of the above reasons, the TCA Benchmarking Project would be efficiency-enhancing, procompetitive, and beneficial to carriers, shippers, and the public -- and therefore deserving of a business review letter. We would greatly appreciate your giving this request the expedited treatment (60-90 days) offered in the Antitrust Division's press release of December 1, 1992, entitled "Pilot Program Announced to Expedite Business Review Process."<sup>28</sup> If you have any questions or need

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<sup>28</sup>In accordance with the December 1, 1992 Pilot Program press release, TCA has undertaken a good faith search for the documents and information specified in "B. Information Exchanges" of the press release and, where applicable and except as indicated below, has provided all responsive material via the text of this letter and its enclosures. While no specific "agreement among the parties to exchange information" has been found, TCA is supplying its February 7, 2000 Concept Paper (Enclosure 1), as the most complete and recent description of the proposed TCA Benchmarking

The Honorable A. Douglas Melamed  
October 26, 2000  
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additional information, please do not hesitate to call me at (202) 783-9222 or Robert Rothstein, General Counsel of TCA, at (703) 838-1950. Thank you.

Sincerely,



Daniel R. Barney

Enclosures

cc: Robert A. Potter, Esq., Chief, Legal Policy Section, U.S.D.O.J. Antitrust Div.  
Barry Grossman, Esq., Legal Policy Section, U.S.D.O.J. Antitrust Div.  
Robert Rothstein, Esq., Truckload Carriers Association

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Project. TCA has not identified any documents "[d]iscussing or relating to the legality or illegality under the antitrust laws of the information exchange" other than previous drafts of this request letter and a few other such documents that would be protected by the attorney-client privilege and/or the attorney work product doctrine. In addition, while having identified certain conclusory references in TCA committee minutes or newsletters to TCA's plan to seek a business review letter from the Justice Department and antitrust advice concerning the proposed Project, TCA is not providing them now because they are not documents directly "discussing or relating to the legality or illegality" of the proposed Benchmarking Project. Finally, to minimize production burdens, TCA has refrained at this stage from supplying (1) copies of documents relating to its outside survey consultant's and selected carriers' exploration of which cost-related and other items might be most appropriate for benchmarking and how such items might best be defined for accurate data-collection and measurement purposes in the event the proposed Benchmarking Project receives a business review letter, or (2) copies of brief TCA newsletter items and the like that have reported from time to time on the current design phase of the proposed Project. If you decide that any of the above-described documents would in fact be of interest, TCA will review them more closely and provide you with any that are relevant and non-privileged.