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TO: FILE

FROM: RAPHAEL S. MOORE, JD, LL.M.,
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RE: SUMMARY OF ANTITRUST FINDINGS RELATED TO AVMA'S ACCREDITATION OF FOREIGN COLLEGES

Due to AVMA's assertion that they could not stop accreditation of foreign colleges without violating US antitrust laws, we asked VIN's antitrust counsel Downey Brand LLP in Sacramento to analyze the application of US antitrust laws to action by US trade associations in foreign markets in general, and the AVMA in particular. Specifically, they were asked to opine on whether the AVMA would face legal challenge if they stopped accrediting foreign colleges.

Our antitrust attorneys reviewed AVMA's policies and procedures regarding accrediting foreign colleges and conducted a broad overview of how the US antitrust laws affect US trade associations. They then conducted in-depth research in several areas. First, they looked more closely at the principles applicable to antitrust liability for US trade associations in the context of group boycotts/refusals to deal. Next, they researched and analyzed case law involving the application of the US antitrust laws to accreditation organizations (*Marjorie Webster Junior College, Inc. v. Middle States Assoc. of Colleges*, 432 F.2d 650 (U.S. App. D.C. 1969) and its progeny, including *Jung v. Assoc. of Am. Medical Colleges*, 300 F.Supp.2d 119 (D. D.C. 2004)). Finally, they looked at the application of US antitrust laws to action on foreign soil.

They opined as follows:

1. There is no immunity doctrine or general exemption from the antitrust laws for nonprofit organizations engaged in accreditation activities. As such, to the extent antitrust laws are implicated by AVMA's foreign accreditation activities, they are not exempt from such application.

2. Similarly, it is indeed the case that the reach of US antitrust laws is not limited to conduct and transactions that occur within the boundaries of the United States ("it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States" *Hartford Fire Ins. Co. v. California* 509 U.S. 764, 796, (1993)). Rather, anticompetitive conduct that affects domestic or foreign commerce of the US may violate the US antitrust laws even when the conduct occurs outside the United States.

3. However, the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) can act as a jurisdictional bar to the extraterritorial application of the US antitrust laws in some cases.

By way of background, the FTAIA amended the Sherman and FTC Acts to exclude from their reach certain anticompetitive commercial activity in foreign markets - specifically, "non-import commerce" that does not have a direct, substantial, and reasonably foreseeable anticompetitive effect in the United States. (See 15 USC § 6(a); 15 USC § 45(a)(3).)

4. For instance, the case of *Turicentro v. Am. Airlines, Inc.*, 303 F.3d 293 (3rd Cir. 2002) is instructive, in so far as it confirms that trade association conduct generally falls outside the realm of "importing" goods and services, meaning that such conduct is only subject to US antitrust regulation if it meets the FTAIA's "direct, substantial, and reasonably foreseeable effect" test. In *Turicentro*, the plaintiffs sued a trade association whose primary purpose was the regulation and licensing of travel agents. The conduct at issue was the association's setting of rates that foreign-based travel agents could charge for their services. The court determined that the disputed conduct did not involve an "import" as that term generally denotes a product or service is being brought into the US from abroad. Id. at 303. Consequently, the conduct was only subject to the US antitrust laws if the conduct met the FTAIA test of directly and substantially affecting US commerce in a reasonably foreseeable way. See id. at 304. Unfortunately, because *Turicentro* involved the appellate court affirming the district court's granting of the defendant's motion to dismiss, the court did not elaborate on the FTAIA standard - i.e., what exactly constitutes a direct, substantial, and reasonably foreseeable effect. The court did find, however, that the complaint in *Turicentro* was defective because plaintiffs failed to allege that defendant's action had any negative impact on US commerce. Id. at 305. The court concluded that plaintiffs' allegations that the conduct had "substantially reduced their business values, forcing at least one [plaintiff] out of business" was insufficient to amount to any effect on US commerce, thereby failing to satisfy the FTAIA requirements. Id. at 304.

5. There have been differing interpretations of the meaning of "direct". A ninth circuit court interpreting the FTAIA requirements determined that "an effect is 'direct' if it follows as an immediate consequence of the defendant's activity." *United States v. LSL Biotechnologies*, 379 F.3d 672, 680 (9th Circ. 2004), while other courts have come to different conclusions. Courts also have disagreed over whether the effect has to be both "direct" and "substantial."

Our antitrust attorneys concluded that the FTAIA may afford protection to the AVMA in connection with its foreign accreditation activities. While by no means an exhaustive analysis of how this highly complex and specialized area of antitrust law applies to AVMA's situation, the above identifies a statutory scheme as fodder for further research and development. Unfortunately, all attempts to have any serious discourse regarding the above with AVMA's counsel, has been rebuffed. That is especially disconcerting, considering that the foreign accreditation efforts of the AVMA were taken on voluntarily in the first place, that foreign colleges have a multitude of alternative accreditation options, and that their graduates have multiple means of entering the US marketplace even without AVMA's accreditation policies. The stated fear of the AVMA that stopping accreditation will bring an onslaught of litigation is thus disingenuous at best.