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MEMORANDUM

DATE: March 17, 2008

TO: Judiciary Committee

FROM: Dennis F. Kerrigan, Jr., Esq.

RE: **H.B. 5834 An Act Concerning Antitrust Documents Voluntarily Submitted to the Attorney General**

Senator McDonald, Representative Lawlor and distinguished members of the Judiciary Committee, thank you for the opportunity to submit written testimony on **H.B. 5834, An Act Concerning Antitrust Documents Voluntarily Submitted to the Attorney General**. I regret that I am unable to attend today's hearing due to a scheduling conflict. Because I cannot be present at the hearing, I am submitting written comments to assist you in your deliberations.

I am an attorney in private practice and devote a substantial portion of my practice to the representation of individuals and business entities in connection with state and federal governmental inquiries, including the recent investigations of the insurance industry related to broker compensation practices, coastal zone underwriting, and the use of finite reinsurance. In that regard, I have represented many companies in connection with investigative demands served by dozens of regulatory authorities from across the country, including the Attorney General of the State of Connecticut, other state Attorneys General, State Insurance Departments, and various federal agencies. In the course of that work, I have become intimately familiar with the breadth and scope of the materials typically sought by these investigations, as well as the confidential and often sensitive nature of the information provided to regulators by entities under investigation.

I have also served as counsel to several state and national industry organizations in connection with a number of appeals before the Connecticut Supreme Court concerning the confidentiality of materials provided to the State of Connecticut Office of the Attorney General. (See Mass. Mutual Life Ins. Co. v. Blumenthal (SC 17602) decision issued on April 3, 2007; Brown & Brown v. Blumenthal (SC 17920) argued on Feb. 15, 2008, decision pending). As a result, I am also quite familiar with Connecticut's current statutory scheme governing the handling of confidential documents submitted in the course of state antitrust investigations.

Put simply, H.B. 5834 will address a vital concern of businesses across the state, including the insurance industry, by ensuring that documents submitted voluntarily to the Office of the Attorney General will be treated as confidential, even if those documents are not

technically responsive to an existing subpoena. Such confidentiality will encourage voluntary cooperation with the Office of the Attorney General and help prevent the public disclosure of sensitive business documents without justification.

Public policy clearly encourages cooperation with government investigations. Absent the enactment of H.B. 5834, our current statutory scheme, as interpreted by our trial courts, actually encourages companies to minimize their responses to state governmental investigations. As a result, recipients of informal inquiries by our Attorney General have no choice but to either: (a) require the service of formal subpoenas and only produce the bare minimum of documents in response; or (b) file legal challenges to the Attorney General's authority to investigate certain activities, the sufficiency of the actual subpoena, and whether each category of information sought is closely enough related to the investigation to fall within the Attorney General's antitrust jurisdiction. Mobil Oil Corp. v. Killian, 30 Conn. Supp. 87, 92 (Conn. Super. Ct. 1973) (recognizing that a strict interpretation of the section 35-42(c) subpoena requirement "would only breed litigation and encourage everyone investigated to challenge the sufficiency of the notice"). Without regard to which path companies choose to follow, the current narrow interpretation of section 35-42(c) by the courts limits the government's receipt of information and documents to which it may be entitled, and therefore likely hampers the government's efforts to discharge its duties.

Under current law, recipients of an information request from the Attorney General should refuse to comply until the Attorney General issues a formal subpoena, ostensibly so that the information submitted is protected under section 35-42(c). Companies choosing this course, however, could be sabotaging their financial performance because "the very issuance of a subpoena under the statute clearly implies reason to believe a violation has occurred." Mobil Oil, 30 Conn. Supp. at 92 (internal quotations marks and citations omitted). Financial markets, and equity, bond and credit rating agencies might understandably become concerned when a company is accused of violating antitrust laws.

Thus, if the Attorney General, hypothetically, were to contact a business via telephone and ask to see a document so he could determine whether the document is related to a potential antitrust violation, the responding business will be forced to either: (a) require that the Attorney General issue a subpoena to preserve confidentiality, thereby self-creating a negative presumption on the part of the company; or (b) choose the path taken by an insurance company last year – "voluntarily" submitting the documents to the Attorney General, which under a trial court's interpretation resulted in the forfeiture of the disclosure protections of section 35-42(c). This "Catch 22" would not be necessary if the State were to adopt H.B. 5834, thereby confirming the policy of encouraging cooperation with Connecticut antitrust investigations.

Federal courts have long recognized these confidentiality principles. In A. Michael's Piano, Inc., 18 F.3d at 141, the Second Circuit recognized the importance of assuring nondisclosure of material submitted in an antitrust investigation and how that assurance encourages cooperation. "[I]f every document in the possession of a [governmental] agency was freely available to the press or public, not many documents would be voluntarily submitted." Id. Having access to documents is vital if the government is going to properly and effectively investigate potentially illegal activity, as courts should not limit "the ability of the Government to make intelligent, well informed decisions." See Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 873 (D.C. Cir. 1992).

A reasoned course, therefore, would be to adopt H.B. 5834 so as to protect voluntarily disclosed materials. Under that rule, the government would have access to relevant information without cumbersome and taxing legal challenges, the company would be assured of protection from public disclosure during the course of an investigation, and the public's right to government access would not be hindered because the public would gain access to the documents if the Attorney General were to bring a civil action as a result of the investigation. See Mobil Oil, 30 Conn. Supp. at 96-97 (stating the public may access information provided to the Attorney General during the course of an antitrust investigation only after the Attorney General institutes a civil action).

Protecting documents the Attorney General obtains during an antitrust investigation from public disclosure, without regard to the source of those documents, is a sensible approach because companies will have an incentive to cooperate in an informal manner without the saddle of a negative presumption. Moreover, our government will benefit from the cooperation of these entities, particularly from businesses merely in possession of materials related to the possible anticompetitive behavior of others.

Thank you for the opportunity to submit written testimony on H.B. 5834.