



REQUEST FOR PUBLIC COMMENT

Immunities and Exemptions

(Comments Requested by July 15, 2005)

A. *General Immunities & Exemptions*

1. In what circumstances, and with what limitations, should Congress provide antitrust immunities and exemptions? In your response, please address the following questions:
 - a. What generally applicable methodology, if any, should Congress use to assess the costs and benefits of immunities and exemptions?
 - b. Should Congress analyze different types of immunities and exemptions differently? Are those that do not protect core anticompetitive conduct (*e.g.*, price fixing) preferable to those that exempt all joint activities? Are those that eliminate, for example, treble damages, but retain single damage liability acceptable? For example, does the National Cooperative Research and Production Act, 15 U.S.C. §§ 4301-06, provide a helpful alternative approach to blanket exemptions?
 - c. Should Congress subject immunities and exemptions to a “sunset” provision, thereby requiring congressional review and action at regular intervals as a condition of renewal?
 - d. Should the proponents of an immunity or exemption bear the burden of proving that the benefits exceed the costs?
2. The Commission intends to conduct a general evaluation of antitrust immunities and exemptions, and currently contemplates focusing, for illustrative purposes, on the first eight immunities and exemptions listed below (a.-h.). Please provide any relevant information about any of the immunities and exemptions below, including their costs, benefits, and impact upon commerce.
 - a. Capper-Volstead Act. 7 U.S.C. §§ 291-92
 - b. Non-profit agricultural cooperatives exemption. 15 U.S.C. § 17.
 - c. Agricultural Marketing Agreement Act. 7 U.S.C. §§ 608b, 608c.
 - d. Fishermen’s Collective Marketing Act. 15 U.S.C. §§ 521-22.
 - e. Webb-Pomerene Export Act. 15 U.S.C. §§ 61-66.
 - f. Export Trading Company Act. 15 U.S.C. §§ 4001-21.
 - g. McCarran-Ferguson Act. 15 U.S.C. §§ 1011-15.
 - h. Shipping Act. 46 U.S.C. app. §§ 1701 *et seq.*

- i. Anti-Hog-Cholera Serum and Hog-Cholera Virus Act. 7 U.S.C. § 852.
- j. Airline flight schedule exemption. 49 U.S.C. § 40129.
- k. Air transportation exemption. 49 U.S.C. §§ 41308-09.
- l. Baseball exemption. *See, e.g., Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953); *Flood v. Kuhn*, 407 U.S. 258 (1972); Curt Flood Act, Pub. L. No. 105-297, § 2, 112 Stat. 2824 (1998).
- m. Charitable Donation Antitrust Immunity Act. 15 U.S.C. §§ 37-37a.
- n. Defense Production Act. 50 U.S.C. app. § 2158.
- o. Filed rate/*Keogh* doctrine. *See, e.g., Keogh v. Chicago & N. W. Ry. Co.*, 260 U.S. 156 (1922).
- p. Health Care Quality Improvement Act. 42 U.S.C. §§ 11101-52.
- q. Labor exemptions (statutory and non-statutory). *See, e.g.,* 15 U.S.C. § 17; 29 U.S.C. §§ 52, 101-10, 113-15, 151-169; *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975).
- r. Local Government Antitrust Act. 15 U.S.C. §§ 34-36.
- s. Medical resident matching program exemption. 15 U.S.C. § 37b.
- t. Motor transportation exemption. 49 U.S.C. § 13703.
- u. National Cooperative Research and Production Act. 15 U.S.C. §§ 4301-06.
- v. Natural Gas Policy Act. 15 U.S.C. § 3364(e).
- w. Need-Based Educational Aid Act. 15 U.S.C. § 1 note.
- x. Newspaper Preservation Act. 15 U.S.C. §§ 1801-04.
- y. Railroad transportation exemption. 49 U.S.C. § 10706.
- z. Small Business Act. 15 U.S.C. §§ 638(d), 640.
- aa. Soft Drink Interbrand Competition Act. 15 U.S.C. §§ 3501-03.
- bb. Sports Broadcasting Act. 15 U.S.C. §§ 1291-95.
- cc. Standard Setting Development Organization Advancement Act. 15 U.S.C. §§ 4301-05, 4301 note.
- dd. Television Program Improvement Act. 47 U.S.C. § 303c.
- ee. United States Postal Service exemption. *See, e.g., United States Postal Serv. v. Flamingo Indus. Ltd.*, 540 U.S. 736 (2004).

B. *State Action Doctrine*

- 1. Should courts change or clarify the application of the state action doctrine?

- a. Do courts currently interpret the “clear articulation” prong of the state action doctrine so as to immunize conduct only in circumstances in which the state intended to displace competition? Do courts unduly rely on “foreseeability” analysis in applying the “clear articulation” prong?
 - b. Should courts rely on the elements proposed by the FTC Staff’s State Action Task Force (state authorization of conduct at issue and deliberate adoption of a policy to displace competition in the manner at issue) to determine whether the “clear articulation” prong is satisfied? *See Federal Trade Commission Staff, Report Of The State Action Task Force* 51 (Sept. 2003) (“FTC Report”).
 - c. Should there be other changes to interpretation and application of the “clear articulation” prong?
2. Should courts change or clarify application of the active supervision prong?
- a. Do courts currently interpret the “active supervision” prong of the state action doctrine so as to subject immunized activity to meaningful state oversight?
 - b. Should courts rely on the elements proposed by the FTC Staff’s State Action Task Force (development of adequate factual record, written decision, and specific assessment) to determine whether the “active supervision” prong is satisfied? Are these elements workable in practice? *See* FTC Report at 55.
 - c. Should courts make any other changes when interpreting and applying the “active supervision” prong?
3. Should courts require different degrees of “clear articulation” by legislators and different levels of “active supervision” by executive or regulatory entities depending upon the circumstances (a “tiered approach”)?
4. Do courts in applying the state action doctrine currently account for spillover effects (anticompetitive conduct immunized by one state that has a deleterious effect on consumers in other states)? If not, should courts address spillover effects under the state action doctrine? What standards should govern that analysis?
5. How should courts apply the state action doctrine to various governmental entities?
- a. Should state agencies and departments be subject to the “active supervision” prong of the state action doctrine? If so, who should actively supervise these state entities?
 - b. When should courts treat “quasi-governmental” entities as a private actor (subject to the “active supervision” prong) or as a municipality (potentially not subject to the “active supervision” prong)?
 - c. Should courts apply the “active supervision” prong to a municipality or state entity when it acts as a “market participant”? If so, how should that

entity's activities as a regulator be distinguished from its activities as a "market participant"?

- d. Should Congress repeal the Local Government Antitrust Act of 1984?

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