

PREPARED STATEMENT OF

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Before the

ANTITRUST MODERNIZATION COMMISSION

on

STATUTORY IMMUNITIES AND EXEMPTIONS

December 1, 2005

Thank you for inviting me to speak today. The staff of the Federal Trade Commission is pleased to respond to your request for comments on statutory exemptions and immunities. I should note that this statement and my responses to questions reflect the views of the staff and do not necessarily represent the views of the FTC or any individual Commissioner, but the Commission has voted to authorize this statement.

As a baseline proposition, we strongly believe that an economy based on vigorous competition, protected by the antitrust laws, does the best job of promoting consumer welfare and a vibrant, growing economy. This conclusion is supported by expert economic studies, both domestic and international, and most of our economy is based on this competitive model.<sup>1</sup>

The antitrust laws are an important component of this economic system. Indeed, the Supreme Court has declared that “[a]ntitrust laws in general, and the Sherman Act in particular,

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<sup>1</sup> For an overview, *see, e.g.*, Richard A. Posner, *The Effects of Deregulation on Competition: The Experience of the United States*, 23 *Fordham Int’l L.J.* 7 (2000).

are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.”<sup>2</sup> This suggests that laws or regulations authorizing departures from this competitive model should be disfavored, and proponents of such departures should bear a heavy burden of demonstrating, with factually-supported reasons, why such a regime is necessary.

Congress over the years has adopted a wide range of measures that partially or fully immunize certain sectors of the American economy from antitrust review. The AMC has compiled an extensive list of these provisions, some of which involve industries and products and services that are very familiar to us, while other provisions deal with more obscure matters.<sup>3</sup> Collectively, these sectors of the economy cover a substantial volume of commerce.

It is not my purpose today to argue about the original merits of Congress's decision to displace the antitrust laws in certain industries.<sup>4</sup> Nor do I intend to comment on how well (or

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<sup>2</sup> *United States v. Topco Associates, Inc.*, 405 U.S. 596, 619 (1972).

<sup>3</sup> Memorandum from Immunities and Exemptions Study Group to AMC Commissioners, May, 2005, available at <http://www.amc.gov/pdf/meetings/ImmunitiesExemptionsStudyPlan.pdf>; *see also* ABA Section of Antitrust Law, II ANTITRUST LAW DEVELOPMENTS (5<sup>th</sup> ed. 2002) at Ch. XIII (General Exemptions and Immunities).

<sup>4</sup> Some scholars have contended that antitrust immunities, like regulation, may in certain circumstances have been the byproduct of special interest regulations spawned by well-organized groups. *See, e.g.*, Frank H. Easterbrook, *The Court and the Economic System*, 98 Harv. L. Rev. 4, 15 (1984) (“One of the implications of modern economic thought is that many laws are designed to serve private rather than public interests”). For example, the school of political economy called “public choice” theory seeks to explain how, among other things, such regulations can arise. *See, e.g.*, James M. Buchanan, *Public Choice – Politics Without Romance*, 19 Policy 13, 15 (2003); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 Va. L. Rev. 285, 285-89 (1988). I do not

poorly) particular exemptions serve the public interest. Many of these exemptions involve industries that the FTC does not monitor on an ongoing basis (because the exempted activities are beyond our jurisdiction), and we would have to undertake considerable study before we could comment on them with any specificity. I do believe, however, that it is important to consider whether the continued existence of these exemptions in their current form fosters the goal of a strong, innovative, growing American economy – or, rather, undermines it. The AMC, charged with examining how the antitrust laws can or should be modernized to benefit the American economy, is an appropriate forum for a study of that important question. What I would like to do today is to offer some basic observations on why it is important to undertake such a review.

More specifically, why might antitrust exemptions harm the economy? Many exemptions (albeit in different ways, depending upon the statute) allow firms to agree to limit the terms of competition among themselves and impose restrictions on entry into the affected sector. To put it more bluntly, such exemptions foster legal cartels. From an antitrust perspective, such agreements – “horizontal restraints” – generally present the greatest risk of competitive harm. Unless the restraint is reasonably necessary to the generation of countervailing efficiencies, consumers are likely to be worse off.

Basic economic theory teaches that an unregulated competitive market generally leads to the economically efficient level of output.<sup>5</sup> In contrast, a restraint that effectively raises price

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think it necessary to get into that debate here, but will simply note the possibility of special-interest motivations.

<sup>5</sup> See, e.g., Robert S. Pindyck & Daniel L. Rubinfeld, *MICROECONOMICS* 294 (5<sup>th</sup> ed. 2001). There are three important exceptions to this proposition: (1) the market is affected by “externalities” (costs or benefits that do not show up as part of the market price and therefore result in deviations from the economically efficient level of output); (2) the market involves a

above the competitive level (or, equivalently, reduces output below the competitive level) generally will result in consumers purchasing less of the product or service, and firms producing less, at the higher price, than would be the case under competitive conditions. Consequently, such a restraint results in a decrease in economic welfare.<sup>6</sup> Further, it is well accepted that competition itself is an engine that drives economic efficiency. Therefore, logic suggests that antitrust exemptions may well handicap the economic progress of industries they are intended to protect. Individual firms may enjoy the benefits of antitrust exemptions, but consumers and the economy bear the harm – and the sheltered sector is rendered less efficient overall.

Concerns about the adverse economic impact of laws that limit competition are more than mere theory. There is a considerable empirical literature that suggests that industries sheltered from competition do not perform as well as those that are subject to vigorous competitive forces. For example, numerous studies of sectoral deregulation in the United States show that the unleashing of market forces has resulted in greater economic efficiency and benefits for consumers.<sup>7</sup> Similarly, an often-cited study by Michael Porter of the Harvard School of Business

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“public good” that can be provided to additional consumers at zero marginal cost and the consumption of which by additional consumers cannot readily be prevented; and (3) consumers lack sufficient information about the quality or nature of a product, and, therefore, cannot make utility-maximizing purchase decisions. *See id.* at 595-653 for a discussion of these exceptions.

<sup>6</sup> For a discussion of the social costs of monopoly (price above the competitive level) and monopsony (price below the competitive level, *see, e.g.*, Pindyck & Rubinfeld, *supra* note 5, at 347-359.

<sup>7</sup> For surveys, *see, e.g.*, Clifford Winston, *Economic Deregulation: Days of Reckoning for Microeconomists*, 31 *J. of Economic Literature* 1263 (1993) (comprehensive survey of empirical evidence on the United States deregulation experience showed that society has gained at least \$36-\$46 billion annually (in 1990 dollars) from deregulation, primarily in the transportation industries); Clifford Winston, *U.S. Industry Adjustment to Economic Deregulation*, 12 *J. of Economic Perspectives* 89, 98-102 (1998) (each industry studied –

points out that industries sheltered from international competition (e.g., Japanese retailing and distribution) are less vigorous and successful than industries subject to such competition (e.g., Japanese auto industry and robotics).<sup>8</sup> Based on those and other findings, Porter concludes that “[f]ew roles of government are more important to the upgrading of an economy than ensuring vigorous domestic rivalry,” and that “policies that protect inefficient or lagging competitors should be abolished.”<sup>9</sup> Further, Porter writes that “[i]t is hard to find examples of true competitive advantage in industries where there are cartels.”<sup>10</sup> The adverse effects that Porter and others ascribe to governmental policies that shelter inefficient competitors and condone cartels may well result from certain antitrust exemptions.

In attempting to assess the magnitude of harm caused by antitrust exemptions, we cannot directly examine the “but for” world that would exist in the absence of such exemptions. Nevertheless, it is instructive to look at the positive welfare effects of deregulation in certain industries, because antitrust exemptions are like economic regulation in the sense that they, too, produce a more constrained form of competition. For example, the positive welfare effects of transportation deregulation (trucking, airlines), well documented by economists, may be a sort of “natural experiment” that highlights the benefits that flow from introducing more vigorous

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airlines, trucking, railroads, banking, natural gas – substantially improved its productivity and achieved real operating cost reductions ranging from 25% to 75%, and consumers have been the principal beneficiaries); Elizabeth E. Bailey, *Price and Productivity Change Following Deregulation: The US Experience*, *The Economic Journal* 96 (March 1986).

<sup>8</sup> Michael Porter, *THE COMPETITIVE ADVANTAGE OF NATIONS* 117-20, 225-38, 416, 708 (1990).

<sup>9</sup> *Id.* at 662-63.

<sup>10</sup> *Id.* at 663.

competition when it previously existed in a much more constrained form.<sup>11</sup>

Therefore, both economic theory and real world data support a standard that requires proponents of an exemption to bear the burden of demonstrating that the exemption will benefit consumers. This burden should exist both at the time the exemption first is considered, and at regular intervals thereafter.

I would note in that respect that a number of the existing exemptions are many decades old, and represent a time when the American economy was very different. Revolutions in communications (computers, the Internet), transportation, and business methods have lowered transactions costs and substantially changed the ways in which firms and industries operate.<sup>12</sup> Furthermore, international competition also has affected scores of industries; much more than in the past, the U.S. participates in a global economy. Thus, even if one assumes, for the sake of argument, that there may have been valid economic justifications for specific industry exemptions in the past, it is not at all clear that those justifications still hold water.

Furthermore, even if one believes that some of the matters currently protected by antitrust exemptions are efficient, socially useful forms of conduct, it does not follow that an antitrust exemption is necessary to realize those efficiency gains. The antitrust laws do not prohibit *all*

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<sup>11</sup> For an overview, *see, e.g.*, sources cited in note 6, *supra*; *see also* Richard A. Posner, *The Effects of Deregulation on Competition: The Experience of the United States*, 23 *Fordham Int'l L.J.* 7 (2000); Giuseppe Nicoletti, *Cross-country regulation patterns and their implications for macroeconomic and sectoral performance*, in Giuliano Amato & Laraine L. Laudati, *THE ANTICOMPETITIVE IMPACT OF REGULATION* 278 (2001).

<sup>12</sup> For example, one study finds that technological advances in transportation and storage have changed the nature of competition in the dairy industry and “bolstered the market power enhancing effects of regulation.” *See* David L. Baumer and Robert T. Masson, *Curdling the Competition: An Economic and Legal Analysis of the Antitrust Exemption for Agriculture*, 31 *Vill. L. Rev.* 183, 210 (1986).

restraints of trade, only those that are unreasonable,<sup>13</sup> and unreasonableness is assessed by weighing efficiency justifications against anticompetitive effects to determine the overall effect. Admittedly, for a long period of time, antitrust's commitment to efficiencies was honored in the breach, and numerous judicial decisions exhibited an inadequate appreciation of, if not marked hostility to, efficient business conduct.<sup>14</sup> For at least the past 25 years, however, post-*Sylvania*,<sup>15</sup> antitrust analysis has been refined to take into account sound economics and allow for efficient forms of cooperation (*see, e.g., BMI*<sup>16</sup>). Modern mainstream antitrust analysis does not condemn efficient collaborations, only those agreements that diminish competition and harm consumers. In short, antitrust law today is not an impediment to economically desirable forms of collaboration by firms in exempt industries.

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<sup>13</sup> *Standard Oil Co. v. United States*, 221 U.S. 1, 60-70 (1911).

<sup>14</sup> *See generally, e.g.,* Robert H. Bork, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1993); Richard B. Posner, *Antitrust Policy and the Supreme court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 Colum. L. Rev. 282 (1975).

<sup>15</sup> *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (in a case considering the legality of distributional restrictions imposed by a manufacturer upon its franchisees, the Court held that such vertical restraints should be evaluated under the rule reason in light of substantial scholarly and judicial authority supporting the economic justifications for such restraints, overruling the rule of *per se* illegality announced by the Court only ten years earlier in *United States v. Arnold Schwinn and Co.*, 388 U.S. 365 (1967)).

<sup>16</sup> *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1 (1979) (a blanket license for public performance of musical compositions by numerous competing artists, while involving price fixing "in the literal sense," was not a practice that facially appeared to be one that would always or almost always tend to restrict competition and decrease output, but, rather, appeared to be one designed to "increase economic efficiency and render markets more, rather than less, competitive" by reducing transaction costs for obtaining licenses for numerous compositions, and, therefore, should be evaluated under the rule of reason rather than the rule of *per se* illegality).

Finally, it is instructive to note that foreign jurisdictions are broadening the scope of their antitrust laws and subjecting to antitrust scrutiny formerly exempt sectors.<sup>17</sup> This should help invigorate the competitive process overseas. It would be quite ironic if the U.S. government, which has argued strenuously in multiple fora about the benefits of antitrust to foreign economies, should (like the physician who fails to take the medicine he prescribes) fail to heed the implications of this argument for American law. Congress highlighted the importance of antitrust modernization to the soundness of the American economy when it authorized the creation of the AMC. Congress may well wish to take note of these recent international developments.<sup>18</sup>

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<sup>17</sup> See OECD, *Regulatory Reform: Stock-Taking of Experience with Reviews of Competition Law and Policy in OECD Countries – and the Relevance of Such Experience for Developing Countries* (CCNM/GF/COMP (2004)1, January 21, 2004), Annex at ¶¶ 20-55. Paragraph 55 notes that “the US, with a reputation for aggressive [antitrust] enforcement, has more exemptions and special regimes than most.”). Specific examples of major foreign nations’ removal of antitrust exemptions are impressive in scope. For example, Japan eliminated about 90 percent of its statutory antitrust exemptions through omnibus 1997 legislation (Japan has abolished additional exemptions since 1997; for example, it lifted electricity, gas, and railroad sector exemptions in 2002). Korea currently applies its antitrust law to all economic sectors; it did away with implicit exemptions for a few industries (notably agriculture, fisheries, forestry, and mining) in 1999. Earlier this year, Germany repealed its statutory exemptions covering agreements in the insurance industry, and the central marketing of rights to television broadcasting of sports events. The European Commission recently proposed narrowing the block exemption enjoyed by the International Air Transport Association for air passenger tariff conferences so that it would not apply to tariffs for short flights within the European Union as of January 1, 2007. See <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/1432&format=HTML&aged=0&language=EN&guiLanguage=en>.

<sup>18</sup> Recent deregulatory action by the United States – specifically, the 1998 enactment of the Ocean Shipping Reform Act – is viewed positively in a recent report (at ¶¶ 21, 28-29, 561-600) to the European Commission in furtherance of its consideration whether to eliminate its block exemption for liner shipping conferences. The report is available at: [http://europa.eu.int/comm/competition/antitrust/others/maritime/shipping\\_report\\_26102005.pdf](http://europa.eu.int/comm/competition/antitrust/others/maritime/shipping_report_26102005.pdf).

In sum, although the FTC has not studied, and does not pretend to have expertise with respect to, individual statutory antitrust exemptions, the FTC staff as a general matter believes that derogations from vigorous competition tend to harm the American economy and the consumer. Accordingly, we believe that it may well be time for the AMC – and Congress, to which the AMC will report – to address the question of whether individual statutory antitrust exemptions continue to make sense. Specifically, Congress and the AMC may wish to examine critically the current validity of whatever justifications may be offered in support of each exemption and to assess the overall impact of each exemption on consumers and the economy.

Thank you very much.