

## Immunities and Exemptions Discussion Outline

*Note:* Italicized text is based on questions on which the Commission requested comment from the public.

I. *In what circumstances, and with what limitations, should Congress provide antitrust immunities and exemptions? What generally applicable methodology should Congress use to assess the costs and benefits of immunities and exemptions? Should the proponents of an immunity or exemption bear the burden of proving that the benefits exceed the costs?*

[1] In general, immunities and exemptions from the antitrust laws should be disfavored. They should be granted rarely, if ever, and only where, and for so long as, a clear case has been made that the conduct in question would subject the actors to antitrust liability *and* is necessary to satisfy a specific societal goal that trumps the benefit of a free market to consumers and the U.S. economy in general.

[2] Recommend that courts construe all immunities and exemptions narrowly and against the beneficiary claiming protection by the immunity or exemption.

[3] Recommend that Congress employ an approach to immunities and exemptions similar to that of the ABA Antitrust Section Proposal:

- Apply three principles: grant only (1) narrow immunities, (2) after considering their likely impact on consumers, (3) when a particular social, political, or other goal trumps the goals of antitrust;
- Use two procedural safeguards: (1) the proponents of an immunity should be required to submit evidence to show that competition has less value than the goal promoted by the immunity, and that the immunity is the least restrictive means to achieve that goal; (2) Congress should consult with FTC and DOJ about the competitive effects of the immunity and the justification for an immunity under existing antitrust standards.

[4] Recommend that Congress employ an approach to immunities and exemptions similar to that of the Framework Proposal by AMC Consultants Bush, Leonard, and Ross.

- Initial information gathering, consisting of hearings and creation of a full record;
- Identification of all justifications for the immunity. Proponents of an immunity should bear the burden of explaining why the proposed immunity is both in the public interest and possibly in violation of antitrust law under existing standards, addressing the ancillary effects of the immunity on consumer welfare, and demonstrating that the proposed immunity is both necessary and the least restrictive means to achieve the desired outcome;
- Balancing of the costs and benefits of the immunity;

- Tailoring the immunity to minimize anticompetitive effects; and
- Creating renewal requirements (or sunset provisions) to ensure periodic reevaluation by Congress.

[5] Recommend that Congress direct the FTC to study (and provide sufficient funds for such study) the competitive effects of and justifications for all immunities and exemptions and report on whether they appear to meet the standards set forth in option 1, above.

[6] Recommend that Congress delegate oversight of all immunities and exemptions not associated with particular regulatory agencies to the Federal Trade Commission, which should have the power to terminate an immunity or exemption if it is not serving its stated goals.

II. *Should Congress analyze different types of immunities and exemptions differently? Are there other helpful alternative approaches to blanket exemptions?*

[7] Recommend that, if Congress determines a particular immunity or exemption may be justified, that Congress first consider limited forms of immunity, such as a limitation of damages available in private civil actions to actual damages, and/or a disclosure requirement similar to that of the National Cooperative Research and Production Act.

[8] Recommend that Congress adopt a rule of statutory construction that makes competition the fundamental economic policy of the United States and requires statutes that grant an immunity or exemption to be construed consistently with that policy to the maximum extent possible.

III. *Should Congress subject immunities and exemptions to a “sunset” provision?*

[9] Make no recommendation regarding sunset provisions.

[10] Recommend that Congress include a sunset provision on all immunities and exemptions, pursuant to which the provision would terminate at the end of some period of time unless specifically renewed.

If so, the default sunset period should be:

[a] 5 years.

[b] 10 years.