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November 30, 2005

Via Express Mail and E-mail

Antitrust Modernization Commission
Attention: Public Comments
1120 G Street, N.W.
Suite 810
Washington, DC 20005

Re: Comments Regarding Immunities and Exemptions

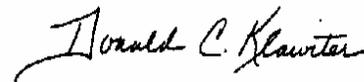
Ladies and Gentlemen:

On behalf of the Section of Antitrust Law of the American Bar Association, I am pleased to submit the enclosed comments to the Antitrust Modernization Commission in response its request for public comments relating to Immunities and Exemptions.

Please note that these views are being presented only on behalf of the Section of Antitrust Law and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the position of the American Bar Association.

If you have any questions after reviewing this report, we would be happy to provide further comments.

Sincerely,



Donald C. Klawiter
Chair, Section of Antitrust Law

Comments of the ABA Section of Antitrust Law on
General Immunities and Exemptions
In Response to Request for Public Comment
by the Antitrust Modernization Commission

The Antitrust Modernization Commission has requested comment on the following four questions: (1) what generally applicable methodology should be used to assess the costs and benefits of immunities and exemptions? (2) Should Congress analyze different types of immunities and exemptions differently? (3) Should Congress subject immunities and exemptions to "sunset provisions" thereby requiring congressional review and action at regular intervals as a condition of renewal? (4) Should the proponents of an immunity or exemption bear the burden of proving that the benefit exceeds the cost? We are pleased to submit this response on behalf of the Section of Antitrust Law of the American Bar Association (the "Section"). The views expressed in these comments have been approved by the Section's Council. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

I. What Methodology Should be Used for Exemptions and Immunities?

The Antitrust Modernization Commission poses the following questions: "What generally applicable methodology, if any, should Congress use to assess the costs and benefits of immunities and exemptions? Should Congress analyze different types of immunities and exemptions differently?" The Section submits that any decision to allow immunity or exemption from the antitrust laws should be made reluctantly and only after thorough consideration of each particular situation. The inquiry with respect to immunities and exemptions should focus narrowly on the fundamental principles and objectives of antitrust law, namely promoting competition and consumer welfare. Exemptions and immunities should be recognized as decisions to sacrifice competition and consumer welfare, and should accordingly be authorized

only when some countervailing value outweighs the general presumption in favor of competitive markets. Different “types” of exemptions and immunities should not be analyzed differently: rather, the same exacting review should be applied to all requests for immunity, with the particular facts and circumstances of each case considered carefully.

A. Antitrust Immunities and Exemptions Generally

The Section is inherently skeptical of exemptions and immunities, whether created judicially or by statute. The reason for this skepticism is obvious. Whether justified or not, broad exemptions and immunities from antitrust laws are harmful to consumer welfare almost by their very definition. The Section recently expressed this view in its comments on the FTC’s report regarding the state action doctrine:

The Section has long and consistently resisted the creation or expansion of exemptions that shield whole areas of market activity or sectors of commerce from rigorous antitrust enforcement. The antitrust laws are designed to provide general standards of conduct for the operation of our free enterprise system, and in the Section’s considered view, special exemptions from these standards rarely are justified. Whatever their expressed purposes, antitrust exemptions often impair consumer welfare.

Comments of ABA Section of Antitrust Law on FTC Report Re State Action Doctrine (May 6, 2005) at 2-3.

The common law process through which the antitrust laws promote allocative efficiency and consumer welfare is flexible and evolutionary.¹ It adapts to various markets and industries, to changing technologies and circumstances, and to the development and growth of legal and

¹ William J. Baer, *FTC Perspectives on Competition Policy and Enforcement Initiatives in Electric Power 2* (Dec. 4, 1997), available at www.ftc.gov/speeches/other/elec1204.htm (“another strength of the antitrust laws is that they are capable of being applied to a wide variety of contexts, from basic industries to health care and innovation markets. The basic principles remain constant, but the rules are flexible enough to be applied to widely different factual situations. I think that has contributed to the enduring quality of the antitrust laws.”); *Billing v. Credit Suisse First Boston, Ltd.*, 2005 U.S. App. LEXIS 21019, at *96-*98 (2d Cir. Sept. 28, 2005).

economic theory. Exemptions and immunities not only shelter certain industries or forms of behavior from the immediate procompetitive reach of the antitrust laws, but also freeze in place the incremental development of antitrust analysis and theory.²

Thus, claims that a proposed exemption or immunity is necessary for competition to flourish should be rejected as are claims that competition is itself harmful or undesirable. Over a century of development, the antitrust laws have shown not only that they are the best present guardians of competition, but also that they are capable of growing to accommodate the shape of new and evolving forms of competition. Exemptions and immunities from the antitrust laws should almost never be granted based on a claim that antitrust itself is impeding competition, and should never be granted because of a fear of competition itself.³

That is not to say that exemptions and immunities are never warranted. To the contrary, an exemption or immunity may be appropriate in the rare instances where an important value unrelated to competition, such as free speech, federalism or national security, trumps the need for competition. Antitrust, while vigilant regarding every nuance of competition, deliberately turns a blind eye to concerns outside that scope.⁴ The state action exemption, which is based on the values of federalism and state sovereignty, and the *Noerr-Pennington* doctrine, developed to protect free speech, epitomize exemptions founded upon important interests unrelated to

² Moreover, both antitrust agencies provide opportunities for concerned businesses and citizens to obtain advice on the antitrust implications of proposed actions without risking antitrust liability. The DOJ offers its Business Review letter program, see 28 C.F.R. § 50.6, and the FTC its Advisory Opinion procedure, see 16 C.F.R. § 1.1. Use of these tools can significantly reduce uncertainty, and thus the perceived or real need to seek exemptions from the antitrust laws.

³ We note that although not conferring antitrust immunity, the Justice Department's very successful leniency policy, see United States Department of Justice Corporate Leniency Policy at www.usdoj.gov/atr/public/guidelines/lencorp.htm has enhanced law enforcement through targeted reduction in penalties sought.

⁴ *National Soc'y of Professional Engineers v. U.S.*, 435 U.S. 679, 688-90 (1978).

competition. The legislature may determine that, in a particular case, competition and the free-market system it animates may be limited to advance some other purpose.

On the other hand, several long-standing antitrust exemptions and immunities arguably do not pass this test. For instance, the Shipping Act (exemption for ocean shipping carriers to enter into rate and price-fixing agreements) and the Capper-Volstead Act (exemption for agricultural cooperatives) do not appear to be justified by any non-competition related value. If, in fact, no non-competition related value justifies an antitrust exemption, there is nothing appropriate for Congress to balance and the exemption is not justified.

To understand the problem posed by antitrust exemptions, the Section turns to an analysis of the dynamic that underpins most if not all antitrust exemptions and immunities: the asymmetric distribution of such exemptions' costs and benefits.

B. The Costs and Benefits of Antitrust Exemptions

Generally speaking the benefits associated with statutory antitrust exemptions apply to very small, concentrated interest groups. The statutory exemptions mentioned above are good examples of this point. The Shipping Act and the Capper-Volstead Act are designed to benefit narrowly defined groups. The exemption of the Shipping Act benefits only ocean shipping carriers, and Capper-Volstead provides immunity from the antitrust laws only to agricultural cooperatives. Of course, those industries or groups of entities covered by a statutory exemption receive substantial benefits, and such benefits tend to accrue proportionally to all competitors within the favored industry or interest group.

Unlike the benefits, the costs associated with statutory exemptions are diffuse. The consumer welfare costs imposed by antitrust immunities and exemptions are largely passed

through to individual consumers in the form of higher prices, lower output, reduced quality or reduced innovation. Rarely does a single, separate group of consumers alone absorb the costs of a statutory exemption. Instead, the costs tend to be spread among vast numbers of consumers. The result is that typically no one consumer or group of consumers is impacted enough to spur public opposition to the exemption.

C. Cost Benefit Analysis and Public Choice Theory

The asymmetry between the distribution of costs and benefits bestowed by antitrust immunities renders legislative consideration of such immunities challenging and fraught with difficulties. Legislative decisions, while driven by many concerns and issues, are inevitably influenced by the vehemence of the advocates of competing policies.⁵

When immunity is granted, the benefits to those few receiving immunity are substantial, and will likely continue indefinitely absent some sunset provision. Therefore, interest groups seeking exemptions have strong incentives to lobby Congress for the desired immunity. Consumers, on the other hand, have little incentive to challenge an exemption because they are not impacted by the exemption in any material way.⁶ The costs associated with antitrust exemptions are so diffuse and insignificant to individual consumers that they are likely unaware

⁵ See James M. Buchanan, *Public Choice: The Origins and Development of a Research Program* 8 (2003), available at <http://www.gmu.edu/centers/publicchoice/Booklet.pdf>.

⁶ Public choice theory describes voters as a group as self-interested, yet generally uninformed about political issues. This circumstance is referred to as “rational ignorance.” Having only a single vote to cast, voters generally perceive themselves as having no impact on any particular election. The theory suggests that since the voter cannot determine the outcome of the election, he has no incentive to become an educated voter or to monitor government action. In that sense, the voter’s ignorance of political issues is rational.

The “rationally ignorant” voter of public choice theory has a counterpart in the consumer unwittingly victimized by antitrust exemptions and immunities. Like the disinterested voter, the consumer who personally incurs only small costs from an antitrust exemption has no incentive to oppose the grant of the exemption. Because the costs associated with the exemptions are spread so diffusely, the individual consumer does not feel the costs to a degree that would justify opposing the exemption. Instead, the consumer will choose the path of rational ignorance.

the exemptions even exist. Thus, consumer opposition against antitrust exemptions is extremely unlikely.

Under the principles of public choice theory, legislators have little reason to reject an exemption for the sake of consumer welfare when the consuming public has raised no objection. Legislators may have strong incentives to grant exemptions if they are urged to do so by powerful and strongly motivated interest groups or lobbyists.⁷ This “capture” of the legislature by special interest groups may also extend to the relevant, industry-specific regulators, on whose advice Congress may rely in assessing proposed immunities:

Capture occurs because bureaucrats do not have a profit goal to guide their behavior. Instead, they usually are in government because they have a goal or mission. They rely on Congress for their budgets, and often the people who will benefit from their mission can influence Congress to provide more funds. Thus interest groups -- who may be as diverse as lobbyists for regulated industries or leaders of environmental groups -- become important to them. Such interrelationships can lead to bureaucrats being captured by interest groups.

The potential for abuse inherent in the cost/benefit structure of antitrust immunities begs the question whether Congress should permit statutory immunities at all. After all, many statutory antitrust immunities appear to be no more than naked economic protectionism. For example, the statutes discussed earlier (the Shipping and Capper-Volstead Acts); certainly seem to fit the mold of economic protectionism. Also, some statutory exemptions arose in a legal era (before the development of the consensus antitrust policy that has governed antitrust enforcement

⁷ As described in a text on public choice theory:

There is no direct reward for fighting powerful interest groups in order to confer benefits on a public that is not even aware of the benefits or of who conferred them. Thus, the incentives for good management in the public interest are weak. In contrast, interest groups are organized by people with very strong gains to be made from governmental action. They provide politicians with campaign funds and campaign workers. In return they receive at least the “ear” of the politician and often gain support for their goals.

Jane S. Shaw, *Public Choice Theory*, in The Library of Economics and Liberty, The Concise Encyclopedia of Economics, at <http://www.econlib.org/library/Enc/PublicChoiceTheory.html>.

in recent decades⁸) that considered economic protectionism pro-competitive in certain industries and the protection of certain individual competitors to be socially beneficial. Government intervention was generally thought a useful tool to improve market efficiency. Antitrust policy has since evolved to focus on allocative efficiency, consumer welfare, and the protection of the competitive process rather than individual competitors. By unshackling markets from the costs imposed by harmful intervention in the name of antitrust, modern consensus antitrust law has contributed to the robust economic growth of the last several decades while simultaneously undermining the rationale for providing shelter from antitrust's reach. As a result, although there are certain circumstances under which a temporary or partial immunity may be in the public interest, it would be appropriate to re-evaluate whether statutory immunities and exemptions are consistent with advancing the true objectives of antitrust law, namely promoting consumer welfare and allocative efficiency. That brings us to the heart of the Antitrust Modernization Commission's question: what standard or methodology should Congress apply to evaluate when it is appropriate to grant antitrust immunity?

D. Summary: The Standard to Evaluate Immunities and Exemptions

Like all antitrust laws, the main consideration with respect to immunities must be promoting competition and consumer welfare. We believe that complex standards and detailed methodologies will not achieve the desired effect. Generally-applicable bright line tests and rigid thresholds are ill-suited to the essential task of ensuring that, in each particular situation, the proposed exemption not only serves to promote an important public value, but also is the least restrictive means of achieving that value. So the short answer to the Antitrust Modernization

⁸ See Thomas B. Leary, *The Essential Stability of Merger Policy in the United States*, 70 Antitrust L.J. 1005 (2003).

Commission’s question is that no generally applicable methodology should be used by Congress to evaluate immunities.

Instead, immunity decisions by Congress should be based on the rigorous and consistent application of three basic principles. First, Congress should grant antitrust immunities and exemptions rarely and only after careful consideration of the impact of the proposed immunity on consumer welfare. The operating presumption Congress should apply is that the immunity will harm competition and consumer welfare, and the claimed non-competition benefits of the proposal should be evaluated against that injury. Congress should give short shrift to claims that immunities will benefit consumer welfare in its antitrust sense; Congress should not engage in balancing the anticompetitive and claimed procompetitive effects of a proposed exemption. This inquiry and analysis are already part of the antitrust laws, and are subsumed in the goal of consumer welfare and allocative efficiency. The claimed benefits that Congress should weigh against an exemption’s presumptive anticompetitive effects are benefits, as we discuss below, that the exemption provides outside of the scope of consumer welfare.

Second, Congress should only grant those immunities that are drafted narrowly, so that competition is reduced only to the minimum extent necessary to achieve the intended goal. This is consistent with the presumption that immunities are disfavored and must be narrowly read. *See Southern Motor Carriers Rate Conference, Inc. v. U.S.*, 471 U.S. 48 (1985) (Stevens, J., dissenting) (citing *United States v. Philadelphia National Bank*, 374 U.S. 321, 348 (1963)) (“[A]ny exemptions from the antitrust laws are to be strictly construed. These ‘canons of construction reflect the felt indispensable role of antitrust policy in the maintenance of a free economy.’”).

To further the requirement that new exemptions be drafted narrowly, Congress should also direct courts to construe each such exemption strictly and against those claiming its protection. This is consistent with the current case law governing exemptions generally. *See Otter Tail Power Co. v. U.S.*, 410 U.S. 366 (1973) (finding no implied repeal of the Federal Power Act); *United States v. Philadelphia National Bank*, 374 U.S. 321, 350-51 (1963) (“Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions.”) (footnotes omitted); *United States v. Nat’l Ass’n of Sec. Dealers*, 422 U.S. 694 (1975) (finding no implied repeal of the Securities and Exchange Act); *MCI Communications Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir. 1983) (finding no implied repeal of the Federal Communications Act); *Jarvis, Inc. v. American Tel. & Tel. Co.*, 481 F. Supp. 120, 123 (D.D.C. 1978) (“Implied antitrust immunity can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory statutes where feasible.”). Though stringent, these safeguards are necessary to preserve what the Supreme Court aptly described in *Midcal* as “the national policy in favor of competition.” *California Retail Liquor Dealers’ Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980).

In addition, if Congress determines that an exemption or immunity is appropriate, Congress should prefer exemptions and immunities that only restrict antitrust remedies, rather than entirely shield conduct from antitrust scrutiny. For example, exemptions which merely eliminate treble damages are likely to provide relief where needed without unduly limiting the ability of antitrust (particularly in the form of agency action) to check harmful behavior. The National Cooperative Research Act/National Cooperative Research and Production Act, 15 U.S.C. §§ 4301-4306, and the Standards Development Organization Act of 2004, 15 U.S.C. §

4301 (note), provide useful examples of this. Exemptions that eliminate antitrust damages but leave intact the ability of private parties or the agencies to seek injunctive relief are less desirable, but still superior to complete immunity, as are exemptions that prohibit private causes of action but permit the antitrust agencies to seek prospective relief.⁹ Only in truly extraordinary circumstances should Congress entirely suspend antitrust enforcement by affording complete immunity.

Third, Congress should grant antitrust immunities only when the proposed immunity achieves a Congressional goal that trumps the aims of the antitrust laws in a particular situation. For instance, a statutory immunity might be appropriate where an important value such as free speech (*Noerr-Pennington*), federalism (state action doctrine), or national security, is deemed more important than the need to promote or protect competition. An immunity might also be justifiable, despite its anticompetitive effects, if it otherwise serves the public interest.¹⁰ For example, the grant of immunity deemed necessary to enable the provision of financial aid to low income students might be appropriate under the right circumstances.

In addition to these principles, two procedural safeguards will assist Congress in considering proposed antitrust immunities. First, to enable Congress to conduct a thorough balancing of the values (competition vs. other Congressional values or public interest objectives), proponents of an antitrust immunity should be required to submit evidence and analysis to demonstrate (i) that the need for competition is in fact less important than the particular value

⁹ Indeed, the Federal Trade Commission's ability to seek injunctive relief without creating subsequent private antitrust liability for violators was designed with just this in mind. Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission, April 7, 1989 at 17.

¹⁰ As we noted earlier, the judgment that an immunity is beneficial for the simple fact that it reduces competition in a particular market or protects a particular competitor is not sufficient, in the Section's view, to justify the immunity.

promoted by the immunity, and (ii) that the proposed immunity is the least restrictive means to achieve that important value. We elaborate on this point below.

Second, no immunity or exemption should be granted by Congress without consultation with and comment from the Federal Trade Commission and the Department of Justice. The two antitrust agencies possess the institutional expertise to assess exemptions and immunities, and are likely to provide valuable counterweights to the analysis.

II. Should exemptions and immunities have sunset provisions and should proponents have the burden of proving the need for exemptions or immunities?

This section addresses two questions: (1) should all newly enacted immunities and/or exemptions contain a “sunset provision,” requiring subsequent affirmative action from Congress at regular intervals as a condition of renewal?; and (2) should the proponents of an immunity or exemption bear the burden of proving the social utility of that exemption, preferably within an antitrust framework and philosophy? For the reasons set forth below, we propose that all exemptions and immunities be subject to a sunset provision, and, consistent with our suggestions above, that the proponent of the exemption bear the burden of justifying the harm to competition that would result from the exemption.

A. History of Sunset Provisions

Our third President, Thomas Jefferson, believed that all laws were a product of the generation that enacted them and should expire before they would bind subsequent generations. His beliefs were based on Rousseau’s “social contract” theory. *See generally*, JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT (Charles Frankel ed. & trans. 1947). Jefferson felt that a subsequent generation had not assented to the prior law: “Every Constitution then, and every

law, naturally expires at the end of 19 years.” Thomas Jefferson to James Madison, 6 Sept. 1789. Papers 15:392-97.

More recently, University of Chicago political theorist Theodore J. Lowi argued that sunset clauses should bear special application to statutes that create a federal agency. In his 1969 book, *The End of Liberalism*, he proposed the “Tenure of Statutes Act”, which would require any law that created a federal agency to expire within 5-10 years. He felt this would avoid “agency capture,” the phrase he used to refer to regulators being captured by the regulated industry. He argued that sunset provisions would not necessarily result in the agency being dissolved, but he did feel that such provisions would spark effective legislative oversight by making the agency more responsive to Congress.

Theory aside, “sunset laws” have appeared in numerous contexts throughout American history. Examples include: (1) the infamous Sedition Act of 1798, which terminated upon President Adams’ departure from office; (2) the Federal Violent Crime Control Act of 1994, which banned the manufacture and import of “Assault Weapons” and “high capacity” magazines, expired on September 13th, 2004; (3) the 1996 Welfare Reform Act, which required subsequent reenactment to remain effective; and (4) the 2001 Economic Growth and Tax Relief Reconciliation Act, which terminates at the close of Fiscal Year 2010. The states have aggressively employed sunset provisions to keep legislation current; Colorado started the trend of routinely incorporating sunset provisions in 1976, and 34 states have followed. Chris Mooney, *A Short History of Sunsets*, LEGAL AFFAIRS, January/February 2004.

B. Examples of Sunset Provisions in the Antitrust Context

We have identified only one use of a sunset provision in the antitrust laws: Section 568(d) of the Improving America's Schools Act of 1994. That provision exempted the award of need-based educational aid from antitrust scrutiny, but the exemption was to expire in 2001 per the text of the original legislation. That sunset date was extended until 2008 in 2001 legislation, but the Comptroller General was also directed to study the impact of the exemption. Need-Based Educational Act of 2001, H.R. 768, § 3. The Congressional Research Service summarized the directive to the Comptroller General as follows:

[T]o conduct a study of the effect of the exemption, including by examining the needs analysis methodologies used by participating institutions and identifying trends in undergraduate costs of attendance and institutional undergraduate grant aid among participating institutions. Requires that such study assess what effect the exemption has had on institutional undergraduate grant aid and parental contribution to undergraduate costs of attendance, including consideration of any changes in institutional undergraduate grant aid and parental contribution to undergraduate costs of attendance over time for institutions of higher education.

Bill Summary and Status for the 107th Congress, H.R. 768 (Oct. 3, 2001).

It is noteworthy that the Comptroller General was directed to study the effect of the exemption on consumer welfare by way of prices, that is, by “identifying trends in undergraduate costs of attendance.”

While not strictly a sunset provision, the Shipping Act Exemption contained in section 7 of 46 U.S.C. app. 1706(a), was subjected to a similar examination of its continued utility in light of the presumptions that led to its initial passage in 1916. *See e.g.*, John Longstreth, *The U.S. Antitrust Exemption for International Liner Shipping*, at III.B, part of the Course Materials of the 2005 Spring Meeting, ABA Antitrust Section. When the exemption was reenacted in 1984, the reenacting legislation required a five-year study by the Federal Maritime Commission, in concert with other interested agencies into the continued functioning of the exemption. *Id.* That study

ultimately concluded that the exemption should continue. Subsequent legislative reviews continued to consider the exemption, though none led to repeal. The European Commission also reviewed similar exemptions (regulation 4056/86) in 2003 and issued a report titled the Erasmus Report that continuing the exemption was justified. White Paper on the Review of Regulation 4056/86, Applying the EC Competition Rules to Maritime Transport [SEC (2004) 1254].

C. Sunset Provisions Should be Routinely Included in Exemptions

While conditions may continue to justify particular exemptions, inserting sunset clauses in exemptions is consistent with economic dynamism. Policies that bestow benefits or exemptions on favored industries in the name of the public interest based on current considerations may quickly become outdated. Put another way, today's Internet technologies may be tomorrow's railroad. By way of example, the above-referenced Shipping Act exemption may now be outdated due to efficiencies from general cargo containerization that have developed within the last twenty years. See Peter C. Carstensen, *Antitrust Immunity for Transportation Industries: The Old Rules and the New Realities*, at III.A.3, part of the Course Materials of the 2005 Spring Meeting, ABA Antitrust Section.

Sunset provisions also promote Congressional oversight of agency action, a particularly useful safeguard in cases where an exemption's implementation is delegated to industry specific agencies that may be susceptible to agency capture. The sunset termination date sparks effective legislative oversight and encourages agency attention. Further, a sunset provision "allows Congress to evaluate whether [the exemption] is serving its purpose and whether there is a continuing need for [the exemption]." See 9 AM. JUR. 2D *Bankruptcy* Section 46 (2004) (discussing the rationale for the sunset provision appearing in Chapter 12 of the Bankruptcy

Code, which provides an exemption to family farmers to allow them the opportunity to reorganize their debts and keep their land) (citing 132 Cong. Rec. H8998, H8999 (Oct. 2, 1986)). Subsequent consideration of whether the exemption remains justified requires a detailed accounting that will compare the results with the enumerated justifications in the original enactment.

A sunset provision requires an appropriate time frame. As noted above, Jefferson preferred a generational 19 years, while Lowi suggested a range from 5 to 10, and Chapter 12 of the bankruptcy code prescribed a period of seven years. If there is no standard timeframe, each determination will raise the possibility of industry-specific lobbying. We do not here suggest any specific number, only that Congress adopt one, and that it be shorter rather than longer.

D. Proponents of Exemptions Should Bear the Burden to Justify Their Passage

The proponent of a proposed exemption must bear the burden of providing competent evidence justifying the exemption. This allocation of burden is consistent with the antitrust laws being the “Magna Carta of free enterprise,” ensures that competition is not swallowed in an avalanche of exemptions, and is consistent with the judicial treatment of exemptions in litigation. *United States v. Topco Assoc., Inc.*, 405 U.S. 596, 610 (1972); *see also Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 22 F.3d 1260 (3d Cir. 1994) (proponent of state action immunity bears burden of proving application of immunity). It is also consistent with judicial analysis of exemptions outside of the realm of antitrust; for example, a person claiming a tax exemption bears the burden to prove his entitlement and any reasonable doubt must be resolved against the exemption and in favor of the taxing power.

As we suggested above, this burden would likely apply in litigation, and this should be made a certainty by the statutory mandate creating any exemption. Moreover, proponents of exemptions in the legislative process should shoulder a heavy burden in convincing Congress to overrule the “national policy in favor of competition.” We do not suggest that Congress apply some sort of quasi-judicial rule of evidence or formal burden of proof to legislative advocacy, but rather that Congress treat requests for immunity with great skepticism and impose such burdens on the requestors as may be consistent with the legislative process. (Compare the evidentiary burdens that the Administrative Procedure Act imposes on those participating in rulemaking, *see* Administrative Procedure Act § 553 (requiring “interested persons” to submit “written data, views, or arguments”).)

By way of example, Congress would likely find it helpful to require an exemption’s proponents to provide specific economic analysis, consisting of standardized cost and benefit definitions, with a presumption of indefiniteness (not sunset) when analyzing costs and benefits to reflect true costs. This would help prevent manipulation of the true cost and/or benefit of the exemption. Standardized definitions of “cost” and “benefit” appear in the United States Code and the Code of Federal Regulations. *See, e.g.*, 7 C.F.R. § 702.2 (2005) (defining “actual cost” in the context of planning conservation measures that will reduce the salt load in the Colorado River); 46 U.S.C. § 5101 (2004) (defining “economic benefit” in the context of regulating shipping and load lines of vessels). These analyses should quantify the negative effect of the exemption on consumers as well as whatever positive benefits it is supposed to generate.

The cost/benefit analyses, along with supporting data, should be provided to the Federal Trade Commission and Department of Justice to assist in their review. Both agencies maintain highly qualified staffs of economists trained and experienced in evaluating the costs and effects

of various practices on competition and consumer welfare, and lawyers skilled in interpreting the economists' analyses. The agencies' review of the costs and benefits associated with proposed exemptions would provide valuable information for Congress.

III. Conclusion

The antitrust laws are crucial safeguards of free markets. Exemptions and immunities come at significant cost to that system and its beneficiaries—consumers and competition. Thus, Congress's approach to exemptions and immunities should be cautious and parsimonious. Exemptions and immunities should not be granted without careful consideration of the specific facts; without acknowledging and accounting for the cost of the exemptions in terms of sacrificed consumer welfare; and without procedural safeguards such as input from the antitrust agencies and sunset provisions designed to force the pointed reexamination of any immunity that may be provided.