Immunities and Exemptions Discussion Memorandum

Appendix A

Summary of Comments on Specific Immunities & Exemptions[1]

[1] **Note:** No comments were received regarding any specific immunity or exemption not listed here.

A. Capper-Volstead Act

Overview

- *Description*: Provides limited immunity from the antitrust laws for persons engaged in the production of agricultural products acting together in associations to process, prepare, handle, or market such products. There is no immunity, however, for conduct violating Section 2 of the Sherman Act or for "unduly enhancing prices" of agricultural products.
- *Reason established*: Capper-Volstead was designed to clarify the non-profit agricultural cooperatives exemption set forth in Section 6 of the Clayton Act, 15 U.S.C. § 17, and to extend the exemption to cooperatives that have capital stock and operate for profit. *See Maryland & Va. Milk Producers Ass'n v. United States*, 362 U.S. 458, 466 (1960) (holding that the legislative intent of the Capper-Volstead Act was to provide agricultural cooperatives with "the same unified competitive advantage—and responsibility—available to businessmen acting through corporations as entities").

Summary

- Pursuant to the Capper-Volstead Act, "farmers, planters, ranchmen, dairymen, nut or fruit growers" are allowed to organize together, set association policy, fix prices at which their cooperative will sell their produce, and otherwise carry on like a business corporation without violating the antitrust laws. 7 U.S.C. § 291. Both the cooperative and its members may avail themselves of this exemption. *Id*.

Comments in support or neutral: Eleven

- Congressional Farmer Cooperative Caucus ("CFCC");[2] Keith Collins, Chair of USDA Capper-Volstead Committee and Chief Economist, USDA; Katy Coba, Director of the Oregon Department of Agriculture; National Council of Farmer Cooperatives ("NCFC"); National Farmer's Union; National Milk Producers' Federation; Perennial Ryegrass Bargaining Association; Prof. Peter Carstensen; Prof. Willard Mueller; Randal K. Stoker; Prof. Bruce Anderson.
- Major points:
    - The CFCC states that the immunity is necessary for farmers "to maintain access to competitive markets and to achieve a reasonable return on their productivity and investment;" it "provides farmers with greater opportunity to become more involved in value-added production, processing, and marketing." *CFCC Letter*.
    - USDA noted the benefits mentioned in the legislative history of the Capper-Volstead Act: (1) giving farmers equal right to bargain on price as corporations; (2) creating a civic force that protects farming communities; (3) creating effective farmer-oriented production management; and (4) providing a higher percentage of the profit directly to the producer rather than to an intermediary. *Collins at 6.*

[2] The letter was signed by the co-chairs of the caucus: Senator Blanche Lincoln, AR; Senator Larry Craig, ID; Congressman Sam Graves, MO-06; and Congressman Earl Pomeroy, ND.

- According to USDA, cooperatives strengthen market access for farmers, help improve rural life through a democratization of production, and provide leadership development and education to their members. *Collins at 5*. *See also* NCFC Executive Summary ("Joint action through cooperatives . . . promotes entry into agricultural processing, thereby increasing competition.")

- The Act limits the potential for anticompetitive effect. "The Act gives the Secretary of Agriculture authority to prevent cooperatives from using their market power to unduly enhance the price of products they market; the framework and operation of the Act places limits on cooperatives' growth; and cooperatives are subject to inherent practical limitations relating to obtaining capital." *NCFC Executive Summary*. *See also CFCC*. *Collins at 5-6*.

- "[F]arm cooperatives as such pose little threat to competition even when they seek primarily to act as pure bargaining agents for farmers (i.e., as a cartel manager). Absent the cartel protecting and empowering provisions of the [Agricultural Marketing Agreement Act, discussed below], cooperatives have little power to control market prices." *Carstensen at 7*. The Capper-Volstead Act "has not and is unlikely in itself to create serious inefficiency." *Id.*

- Professor Mueller contends that two extensive economic studies conducted by himself and his colleagues show "that even when cooperatives market a substantial share of the products sold in a market, they lack market power because of their policies of open membership, [and] their inability to control the supply of their individual members, and [they] are unable to prevent free riding by non-members." *Mueller Letter*.

- Growers need to be able to act cooperatively to level the playing field in their bargaining with buyers. *Coba* at 1-2; *Anderson* at 1-2; *American Farm Bureau Federation* at 3; *National Milk Producers' Federation* at 3. "The limited antitrust immunity provided by the Capper-Volstead Act enables farmers to join together to collectively process and market their products and strengthens their bargaining power in an economy increasingly dominated by relatively few, large buyers." NCFC Executive Summary.

- "Cooperatives allow the individual farmer to capture a premium available in the market for branded products. Without cooperatives, most individual farmers would have insufficient volume of production to permit them to regularly supply a large number of retail outlets with a variety of dairy products carrying the same brand name." *National Milk Producers Federation* at 5.

- "Cooperatives are usually the alternative of last resort for agricultural producers. Often there are no other marketers or they are charging high commissions." *Anderson* at 2.

- According to the Perennial Ryegrass Bargaining Association, the courts have failed to acknowledge changes in modern farming, by failing to expand the definition of "producer" in the Capper-Volstead Act to allow vertically integrated producers to benefit from the exemption. It accordingly asks the AMC to consider recommending that the Capper-Volstead Act be “modernized” to expand those who can benefit from it.

Comments specifically criticizing: None**.**

B. Non-profit agricultural cooperatives exemption

Overview

- *Description*: Section 6 of the Clayton Act provides a limited exemption from the antitrust laws to agricultural organizations instituted for the purposes of mutual help. The organizations must be non-profit and may not have capital stock.
- *Reason established*: The reference to non-profit agricultural cooperatives was included in Section 6 of the Clayton Act in order to prevent the antitrust laws from being used against farmers who formed cooperatives for mutual aid. *See Maryland & Va. Milk Producers Ass'n v. United States*, 362 U.S. 458, 464 (1960). Prior to the passage of this provision, all states had passed similar antitrust exemptions for cooperatives at the state level. *Id*. Passage of this provision was designed to provide the exemption to farmers engaged in interstate commerce, who were, as such, exposed to antitrust liability at a federal level. *Id.*

Summary

- Section 6 does not clearly identify the types of activity exempt from antitrust liability; it merely provides that agricultural organizations cannot be liable under the antitrust laws for carrying out their "legitimate objects." 15 U.S.C. § 17. Uncertainty regarding what actions might be considered legitimate objects of such organizations, combined with the desire to have capital stock cooperatives also exempt from the antitrust laws, led to the push for Capper-Volstead in the 1920s. *See Northern Cal. Supermarkets, Inc. v. Central Cal. Lettuce Producers Coop.*, 413 F. Supp. 984, 989-90 (N.D. Cal. 1976).

Comments received: Same as those described in response to the Capper-Volstead Act, which was passed to clarify and expand the scope of the exemption for non-profit agricultural cooperatives.

C. Agricultural Marketing Agreement Act

Overview

- *Description*: Provides antitrust immunity to marketing agreements (binding on only voluntary signatories) formed by the Secretary of Agriculture with agricultural producers, handlers, and associations. Some courts have also held that the antitrust immunity applies to marketing orders (binding on all agricultural entities in the covered geographic area).
- *Reason established*: The Agricultural Adjustment Act was a centerpiece of FDR's New Deal legislation and was passed in 1933 to help farmers during the Great Depression by limiting the output of agricultural products, thereby raising prices. *See generally* Daniel Bensing, *The Promulgation and Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops under the Agricultural Marketing Agreement Act,* 5 SANJALR 3, 5-6 (1995).

Summary

- The Agricultural Marketing Agreement Act of 1937 provides an antitrust immunity to marketing agreements formed under the direction of the Secretary of Agriculture ("Secretary"). 7 U.S.C. § 608b. Pursuant to the Act, the Secretary has the power to "enter into marketing agreements with processors, producers, associations of producers and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity of product thereof." *Id*. All such marketing agreements and the making thereof are exempt from the antitrust laws. *Id.* Marketing agreements are binding only on handlers who are voluntary signatories of the agreement. *See* http://www.ams.usda.gov/fv/moview.html.

Comments in support or neutral: Four.

- Katy Coba, Director of the Oregon Department of Agriculture (July 13, 2005); Keith Collins, Chair of USDA Capper-Volstead Committee and Chief Economist, USDA (July 15, 2005); National Council of Farmer Cooperatives (July 15, 2005); National Milk Producers Federation (July 15, 2005).
- Major points:
    - Marketing agreements and orders are overseen by the USDA, which requires that producers and others requesting new marketing orders or amendments to existing marketing orders meet the burden of "proving that the regulatory benefits exceed the costs." To answer this question, the USDA conducts impact analyses. The Secretary of Agriculture then issues a proposal with an opportunity for public comment and for the relevant producers to vote on the proposal; if 2/3 of the producers voting (by number or volume) approve the proposal, the USDA issues the new or amended marketing order. *Collins* at 8.
    - "Several independent economic studies validate the benefits of the AMAA programs, and the Federal Agricultural Improvement and Reform Act of 1996

requires independent evaluation of the marketing orders with promotion and advertising programs every five years." *Collins* at 8. "A recent study determined that orders do not prevent entry into the industry and 'do not allow producers to set prices directly or even to set limits on pricing such as price floors.'" *NCFC* at 4 (footnote omitted).

- o With respect to milk, "[t]he [AMAA], in essence, ensures that the benefits of the Congressionally-mandated minimum price system for dairy products flows equitably to all producers regardless of the region of the country in which they live, or the particular use to which a farmer's milk is put." *National Milk Producers Federation* at 9. For example, the milk marketing orders "ensure an adequate supply of fluid milk to consumers and provide more consistent and stable prices for handlers and producers." *Collins* at 8.
- o The AMAA is necessary to enable farmers to counter buyer power. Coba, at 1; *National Milk Producers Federation* at 1, 10.

Comments specifically criticizing: Two.

- Randal K. Stoker; Professor Peter Carstensen.
- Major points:
  - o The AMAA allows the creation of cartels that can raise prices. Although these government-authorized cartels generally lack significant market power due to low entry barriers in both producing and processing agricultural commodities, in some cases the powers conferred by the AMAA have been used to exploit downstream buyers or otherwise harm competition. "[T]he commodity order system should be modified to remove the ability of such organizations to exclude independent marketing of commodities." *Carstensen*, at 8.
  - o With respect to milk price and marketing orders under the AMAA, "serious issues of price manipulation by both sellers and buyers of milk and milk products exist, and some large cooperatives are allegedly exercising the powers conferred by the AMAA to exclude competition and attempt to control the market for fluid (bottled) milk." *Carstensen* at 8. Although the AMC "is not well-positioned to propose a comprehensive plan for the reorganization of dairy subsidies," it should "encourage Congress to revisit the entire system of dairy pricing when it next considers major farm legislation." *Carstensen* at 9.
  - o Adverse social and economic externalities result from the milk price regulating provisions of Section 608c(5) of the AMAA that "far exceed any benefit." These externalities include: (1) an excessive concentration of market power; (2) restrictions, obstructions, and inequities in the commercial trade of milk and dairy products; (3) inefficiencies in the transportation, marketing, and pricing of milk and dairy products; (4) an unnecessary administrative bureaucracy with its unnecessary unpredictability and economic costs; (5) suppressed product innovation and market flexibility; (6) unnecessary restrictions to economic and entrepreneurial freedom; and (7) misallocation of capital resources. *Stoker* at 1-3.

- o Previous government studies have recommended the elimination of milk price regulation – e.g., DOJ in 1977 and GAO in 1988. In a 2004 report, USDA concluded that federal dairy programs likely raise the "all-milk" price by about 1 percent. *Id.*, at 2-3.

Additional background information:

- DOJ (Economist Sheldon Kimmel) testified before the USDA in 1998 on the anticompetitive effects of the regulatory scheme involved in milk marketing orders:

> The result of the imposition of [the milk marketing] regulatory system is to encourage dairy farmers to expand their milk production until their cost of producing more milk has risen to the price they receive. Since the system artificially raises the price of fluid milk, it limits the amount of milk that can be sold in fluid form, so the excess production that the regulations encourage must be used in manufactured products whose value is much less than what farmers in most areas receive. . . . Milk marketing regulation is one of the most extreme cases of government control in agriculture in this country and has imposed enormous economic costs on society. In 1988, USDA's Economic Research Service ("ERS") estimated that the costs of milk regulation outweighed its benefits, with a net waste of over $1 billion each year . . . . Since Federal regulation of milk marketing began (with the passage of the Agricultural Marketing Agreement Act of 1937), the U.S. population has doubled, but U.S. milk production has increased by only about 50%, and U.S. fluid milk use has increased by only about a third. Thus, the factors that have made it much easier to supply fluid milk (e.g., the interstate highway system and enormous improvements in farm productivity and refrigeration) have not been enough to counteract other factors, such as the market order system, that have tended to limit sales of fluid milk and have led to the decline in per capita fluid milk use . . . . The only growth in the U.S. dairy sector in the last 60 years has come from cheese sales . . . . Since the population doubled in this period in which milk production for non-cheese uses has been flat, it is clear that, except for milk production for cheese, there has been a tremendous decline in the U.S. dairy sector in spite of all the technological advances that tended to increase the supply of milk.[3]

[3] Testimony of Sheldon Kimmel, February 12, 1998, USDA Hearings on the proposal of the Dairy Farmers of America to raise the regulatory floor price for class I and class II milk, at 2-3; *see also* Executive Summary: Testimony of Sheldon Kimmel, November 15, 1990, USDA Hearings on Proposed Changes in Milk Marketing Orders.

- In 1988, the General Accounting Office (GAO) recommended that milk price regulation be phased out.[4]
- Recently, the Wall Street Journal reported estimates that a maverick California milk processor and producer not bound by federal and state milk marketing regulations was able to sell to retailers for 20 cents less per gallon than competitors.[5]

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4 Stoker Comment at 2, *citing* Milk Marketing Orders – Options for Change, March 1988, at 66-67.

5 "Small Dairyman Shakes Up Milk Industry," *Wall Street Journal*, 02/02/2006, at B1.

D. Fishermen's Collective Marketing Act

Overview

- *Description*: Provides limited immunity from the antitrust laws for fishermen to catch, produce, prepare, process, handle, or market all products of aquatic life. There is no immunity, however, for "unduly enhancing prices" of fish or aquatic products.
- *Reason established*: The Fishermen's Collective Marketing Act was enacted in order to provide fishermen the same antitrust exemption that the Capper-Volstead Act provides to farmers. *See* 78 CONG. REC. 9175 (1934) (statement by Congressman Bland).

Summary

- The Fishermen's Collective Marketing Act ("FCMA") provides a limited antitrust exemption to "[p]ersons engaged in the fishery industry, as fishermen, catching, collecting, or cultivating aquatic products, or as planters of aquatic products on public or private beds" who act together in associations in "collectively catching, producing, preparing for market, processing, handling, and marketing in interstate and foreign commerce, such products of said persons so engaged." 15 U.S.C. § 521.

Comments in support or neutral: One.

- Katy Coba, Director, Oregon Dept. of Agriculture
- Major points:
    - Fishermen need to be able to counter buyer and seller power by joining together to negotiate with buyers and input suppliers.

Comments specifically criticizing the Fishermen's Collective Marketing Act: One.

- Professor Peter Carstensen.
- Major points:
    - The exemption should be repealed because it was "largely construed out of existence in the 1950s and appears to be irrelevant." *Carstensen* at 6.

E. Webb-Pomerene Act

<u>Overview</u>

- *Description*: Provides a limited exemption from the Sherman Act for companies who form associations with the sole purpose of engaging in export trade in goods and are actually engaged solely in such exportation.
- *Reason established*: The purpose of the Act was to aid and encourage American manufacturers and producers to expand foreign trade and to give such companies the power to compete more effectively with foreign cartels without depriving American consumers of the main advantages of competition. *See United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 206 (1968).

<u>Summary</u>

- The Webb-Pomerene Act provides a limited antitrust exemption to export trade associations "entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association." 15 U.S.C. § 62. This exemption is limited to goods, wares, or merchandise. *Id.* § 61.

Comments in support or neutral: Thirty.

- Most of the commenters that supported the Export Trading Company Act (see below) also supported the Webb-Pomerene Act for the same reasons for which they supported the Export Trading Company Act; in addition, the National Farmers Union and the Paperboard Export Association commented in support of the Webb-Pomerene Act for the same reasons.

Comments specifically criticizing: One.

- Professor Carstensen proposed repeal of the Webb-Pomerene Act because: (1) registrations reported at the FTC's website indicate that very few U.S. companies now use the Webb-Pomerene Act; (2) only cartels seeking to exploit foreign markets would need an antitrust exemption, and such cartels should not be protected, given the U.S. commitment to global, competitive markets; (3) collective action to market globally through efficient joint ventures would not be condemned under current judicial standards and so requires no exemption. *Carstensen* at 6-7.

F. Export Trading Company Act

Overview

- *Description*: Title III of the Export Trading Company Act creates a limited exemption shielding from treble damage liability U.S. companies that jointly export not only goods, but also services (such as licensing of technology), provided that there is no substantial lessening of competition within the United States and that the companies have disclosed their formation and received an Export Trading Company Act certificate from the U.S. Department of Commerce.
- *Reason established*: To further benefit export trade by extending the Webb-Pomerene exemption to cover more than goods and to apply to state as well as federal law. Joel Davidow, *The Sherman Act and Outward Bound Commerce*, 6 Geo. Mason L. Rev. 447, 448-49 (1993). Congress believed that this Act would address a growing trade deficit by creating "well-developed export trade intermediaries which can achieve economies of scale and acquire expertise enabling them to export goods and services profitably, at low per unit cost to producers." 15 U.S.C. § 4001(a).

Summary

- Title III provides that any person engaged in export trade may apply for a Certificate of Review ("ECTR") from the Department of Commerce in order to gain limited immunity for certain activities from both civil and criminal antitrust actions. 15 U.S.C. §§ 4002-16.
- Within 90 days after receiving the application, the Secretary of Commerce must determine, with concurrence of the Attorney General, whether the applicant's export trade activities meet the requirements set out in the Act. *Id*. § 4013(b).
- The exemption limits an ETCR holder's civil or criminal antitrust liability "based on conduct which is specified in, and complies with the terms of, a certificate." *Id.* § 4016(a). Advantages enjoyed by an ECTR holder in defending itself against lawsuits concerning the activities that had been approved in the ECTR include: (1) damages in such lawsuits are limited to actual, not treble, damages; (2) there is a rebuttable presumption of immunity from civil and criminal antitrust actions for the conduct approved in the ECTR; and (3) an ECTR holder may recover attorneys fees if it prevails in an antitrust action brought by a private party. *Id*. § 4016(b). Title III also applies broadly to federal and state antitrust laws, in contrast to the Webb-Pomerene Export Act exemption, which applies only to the Sherman Act. *Id*. §§ 4002(a)(7), 4016(a).

Comments in support or neutral: Thirty-two.

- John J. Sullivan, General Counsel, Dept. of Commerce (Dec. 1, 2005); Eleanor Roberts Lewis and Jeffrey Anspacher, Dept. of Commerce; Grant Aldonas, Under Secretary for International Trade, Dept. of Commerce; Richard Gilmore, Virginia Apple Trading Company, GIC; J.B. Penn, USDA; David Hardquist, Committee to Support U.S. Trade Laws; Michael Wade, President, China Trade Development Corp.; John Chinn, Executive Director, U.S. Shippers Association; Northwest Fruit Exporters; American Natural Soda Ash Corp. (ANSAC); California Kiwi Fruit Commission (CFC) and California Kiwi Fruit Exporters Association (CFEA); National Chicken Council (NCC); California Dried Fruit Export Association (CDFEA); USA Poultry & Egg Export Council; Wood Machinery

Manufacturers of America (WMMA); American Cotton Exporters Association (ACEA); Phosphate Chemicals Export Association (PhosChem); National Association of Manufacturers (NAM); Corn Refiners Association (CRA); Rice Economics Group (REG); American Commodity Company, LLC (ACC); Association for Administration of Rice Quotas, Inc. (AARQ); Far West Rice Inc.; USApple Association (USApple); Water & Wastewater Equipment Manufacturers Association Inc. (WWEMA); Laurence Lasoff, Counsel to the American Pork Export Trading Company (APEX); Lasoff, Counsel to the Outdoor Power Equipment Institute (OPEI); Joint Export Trade Alliance (JETA); Mutual Trade Services; National Foreign Trade Council; U.S. Rice Producers Association; U.S. Surimi Commission.

- Major points:
    - The Act particularly benefits small and medium-sized producers by allowing them jointly to develop new markets in other countries. *Sullivan (DOC)* at 7-8; *Gilmore, VATC* at 1; *Lewis & Anspacher* at 1; *Wade* at 2; *Chinn* at 4; *Northwest Fruit Exporters* at 2; *NAM* at 1; *USApple* at 1; *WWEMA* at 1; *JETA* at 1, 8-9; *Mutual Trade Services; National Foreign Trade Council* at 1; *U.S. Surimi Commission* at 2.
    - The Act promotes the export competitiveness of U.S. firms by allowing ETC members to (1) pool their resources to make large volume export sales they otherwise could not fill; (2) consolidate shipments and negotiate volume discounts to reduce export unit costs; and (3) share costs such as market research and developing new export business. *Sullivan (DOC)* at 7-8; *Aldonas DOC* at 2; *Penn, USDA* at 1; *Hartquist* at 1; *Northwest Fruit Exporters* at 2; *ANSAC* at 6-7; *CKC & CKEA* at 1; *NCC* at 2; *WMMA* at 1; *ACEA* at 1-2; *PhosChem* at 1; *NAM* at 1; *USApple* at 1; *WWEMA* at 1; *JETA* at 8-9; *Mutual Trade Services; U.S. Surimi Commission* at 2.
    - ETC members are not exempt from U.S. antitrust laws and so may not harm U.S. consumers. *Sullivan (DOC)* at 2, 4-5; *Aldonas DOC* at 2; *Penn*, *USDA* at 1; *Chinn* at 203; *PhosChem* at 2; *AARG* at 2; *JETA* at 16-18; *National Foreign Trade Council* at 1.
    - Use of the ETC Act can assist in administering certain trade agreements, such as trade quotas, with other countries. *Sullivan (DOC)* at 8; *Aldonas DOC* at 2; *NCC* at 1; *USA Poultry & Egg Export Council; CRA* at 1; *ACC* at 1; *AARQ* at 1-2; *Lasoff (APEX)* at 1; *U.S. Rice Producers Association* at 1; *U.S. Surimi Commission* at 2.
    - Under an ECTR, an association may develop procedures for handling contract defaults that have a recognized status by foreign businesses and their governments. *Sullivan (DOC)* at 8; *ACEA* at 2-3.
    - Under an ETCR, exporters have assurance that their proposed activities in working together with firms in other countries to develop consistent international standards, such as environmental and safety standards, or lobbying foreign officials, have been reviewed and authorized by antitrust authorities. *OPEI* at 1-2; *U.S. Surimi Commission* at 2.

- Eliminating the ETC would disadvantage U.S. export firms that must compete with firms from at least 12 other countries that provide explicit antitrust exemptions for joint export activities, as well as other subsidies to particular industries. *Aldonas DOC* at 2; *Penn, USDA* at 1; *ANSAC* at 5; *PhosChem* at 2.
- Some foreign buyers prefer buying from a small U.S. business with an ETCR, so the ETC increases export opportunities for small U.S. companies. *Wade* at 2.
- An ETCR provides certainty to an ETC as to what activities are and are not permitted under the antitrust laws. The DOJ and DOC review and set limits on the activities of an ETC under a particular ETCR, maintain ongoing oversight, and require annual reports. This provides the members of an ETC legal assurance that they do not operate at an unacceptable level of antitrust risk. *Sullivan (DOC)* at 1, 4-6; *Chinn* at 2-3; *ANSAC* at 3-4; *CKC & CKEA* at 1; *NCC* at 2; *CDFEA* at 2; *ACEA* at 2-3; *PhosChem* at 1.
- Because applications for ECTRs are published in the Federal Register, any party may review and comment before an ECTR is issued. *Sullivan (DOC)* at 5.
- Having an ETCR and the clarity of the ETC exemption protects companies from protracted, ill-founded litigation. Baseless cases can be decided on a motion to dismiss, rather than following years of discovery and trial. *Sullivan (DOC)* at 6; *ANSAC* at 4; *WWEMA* at 1; *JETA* at 16-18.
- The increased trade made possible by the ETC program provides significant benefits to the U.S. economy and is particularly important at a time when the U.S. trade deficit is extremely large. *Northwest Fruit Exporters* at 2; *ANSAC* at 6-7; *NCC* at 1; *CDFEA* at 1; *PhosChem* at 1; *CRA* at 2; *REG* at 1; *ACC* at 2; *Far West Rice* at 1; *USApple* at 1-2; *WWEMA* at 1; *JETA* at 9-10; *OPEI* at 2; *U.S. Surimi Commission* at 3.
- The ETC Act does not impede "antitrust diplomacy," because (1) most foreign governments have programs or policies similar to the ETC Act; (2) the ETC Act shows respect for foreign law by avoiding any interference with the jurisdiction of other governments to attack unlawful U.S.-based export cartels under their own laws; and (3) federal antitrust agency officials have not cited any instance of U.S. international antitrust objectives being impeded by the ETC Act. *JETA* at 12-16; *Sullivan (DOC)* at 9-10.
- JETA asserts that DOJ has sometimes vetoed the issuance of ECTRs based on "conjecture," rather than hard evidence, about existing demand elasticities. It suggests that the AMC should consider recommending that Congress (1) require that ETCR applications cannot be blocked on the basis of conjecture; (2) require the government to collect and evaluate data within a reasonable time frame; and (3) provide increased resources so that empirical studies can be undertaken if unusual scenarios are suspected. *JETA* at 19.

Comments specifically criticizing: None.

G. McCarran-Ferguson Act

Overview

- *Description*: The McCarran-Ferguson Act generally grants "the business of insurance" immunity from federal antitrust law to the extent it is "regulated by State law." There is no immunity from the Sherman Act, however, for "any agreement to boycott, coerce, intimidate, or act of boycott, coercion, or intimidation."
- *Reason established*: This immunity was enacted in response to the Supreme Court's decision in *United States v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533 (1944), holding that the business of insurance is interstate commerce and that Congress had not intended to exempt it from the Sherman Act. *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 217 (1979).

Summary

- The McCarran-Ferguson Act generally grants "the business of insurance" immunity from federal antitrust law to the extent it is "regulated by State law." 15 U.S.C. §§ 1011, 1012(b). There is no immunity from the Sherman Act, however, for "any agreement to boycott, coerce, intimidate, or act of boycott, coercion, or intimidation." 15 U.S.C. § 1013(b).

Comments in support or neutral: Three.

- American Insurance Association (AIA); National Council on Compensation (NCCI); Property Casualty Insurers Association of America (PCI).
- Major reasons:
  - The McCarran-Ferguson antitrust exemption is necessary to achieve the statute's primary goal of delegating regulatory authority over insurance to the states. *AIA* at 2.
  - States regulate insurance broadly, including matters such as imposing government price controls and approving policy forms. *AIA* at 3. Without immunity, insurers would be in "the impossible position" of potential antitrust liability for compliance with a state regulatory scheme. AIA at 2-3.
  - Immunity allows insurers to pool and use aggregated loss data, which is essential to the operation of insurance markets. *PCI* at 2. *See also NCCI* at 2-3 (access to aggregate data "improves underwriting capability and thus provides "more competition in the marketplace with greater options for employers seeking workers compensation insurance."
  - A "safe harbor" approach to replace current McCarran-Ferguson immunity is infeasible; it is impossible to develop a list of all safe harbors that may needed now or in the future for the industry's data and informational needs. The approach would invite litigation. *PCI* at 3.
  - Any changes to the McCarran Ferguson Act should occur only in the context of overall insurance regulatory reform. *AIA* at 4.

Comments specifically criticizing: Three.

- Office of the Attorney General of New York State; ABA Antitrust Section; Vehicle Information Services, Inc. (VIS).
- Major points:
    - *NY State Attorney General*: New York State's investigations have alleged instances of bid rigging and market allocation by insurers that should be subject to federal, as well as state, antitrust enforcement. *NYS AG* at 8-10. Insurance companies operate on a national basis. Leaving antitrust enforcement to the states "tends to create inefficient multiple proceedings, under disparate laws, brought by diverse sets of public and private plaintiffs, with a clear potential for inconsistent results." *Id.* at 10.
    - Insurance companies can achieve any necessary and legitimate information sharing in the same manner as it is achieved in other industries. *NYS AG* at 10. To the extent there is doubt about whether the antitrust laws prohibit certain non-anticompetitive activity, Congress should consider enacting "savings clauses" to provide clarity. *Id.* at 10, 12.
    - Repealing the McCarran Ferguson Act would not interfere with state regulation of insurance, which comprehends much more than antitrust considerations. *NYS AG* at 11.
    - *ABA:* In 1989, the ABA adopted a policy recommending that the McCarran Ferguson Act exemption be repealed and replaced with certain, detailed "safe harbor" exemptions that would "deter unwarranted private litigation testing the limits of permissible insurer conduct absent an exemption." *ABA* at 2. The ABA Antitrust Section agrees with the following arguments often advanced in support of this "middle ground" position: 1) McCarran Ferguson's blanket exemption creates anticompetitive concerns. The exemption is overbroad and should not protect conduct such as price fixing and market allocations. 2) Repeal without safe harbors, however, would create too much uncertainty. "Because there is no case-law on the insurance-related issues that would arise, it is not entirely clear what forms of collective action would be allowed if the [McCarran Ferguson Act] was repealed in all respects. Faced with such uncertainty, many companies might avoid collective action that could be procompetitive for fear of civil or criminal penalties." *Id*. at 4.
    - Examples of the safe harbors that the ABA proposes include the following: 1) "Insurers should be authorized to cooperate in the collection and dissemination of past loss-experience data so long as those activities do not unreasonably restrain competition but should not be authorized to cooperate in the construction of advisory rates or the projection of loss experience in such a manner as to interfere with competitive pricing;" 2) "Insurers should be to authorized to cooperate to develop standardized policy forms in order to simplify consumer understanding, enhance price competition and support data collection efforts, but state regulators should be given authority to guard against the use of standardized forms to

unreasonably limit choices available in the market;" 3) "Insurers should be authorized to participate in voluntary joint-underwriting agreements and in connection with such agreements to cooperate with each other in making rates, policy forms, and other essential insurance functions, so long as these activities do not unreasonably restrain competition." *ABA* at 3.

  - The ABA further recommends, among other things, that: 1) states should retain the authority to regulate the business of insurance; and 2) the state action doctrine should not exempt insurers from the antitrust laws except as set forth in statutory safe harbors such as those proposed by the ABA. *ABA* at 3.
  - *VIS:* Insurance companies are exercising market power with respect to suppliers, such as collision repairers. *VIS* at 2. The vague definition of "business of insurance" has deterred DOJ and the State Attorneys General from investigating abusive insurance company practices. *Id.* at 2. In addition, State Departments of Insurance often have ties to the insurance industry and weak powers to protect insureds or third-party claimants. State regulation therefore does not reliably "fill the gap" left in the absence of federal antitrust enforcement. *Id.* at 2.

Additional background information:

- On June 20, 2006, the Senate Judiciary Committee held a hearing on possible repeal of the McCarran Ferguson Act. The following witnesses testified as noted below:
  - The Honorable Marc Racicot, Former Governor of Montana, President, American Insurance Association: Against repeal, unless enacted in the context of overall insurance regulatory reform that would allow insurers to choose between federal and state regulation, among other things;
  - Elinor R. Hoffman, Assistant Attorney General, New York State: Favors repeal (as in comment to the AMC).
  - Michael McRaith, Illinois Director of Insurance, Chair, Broker Activities Task Force, National Association of Insurance Commissioners (NAIC): NAIC believes that the McCarran Ferguson Act exemption has worked well and should continue.
  - Bob Hunter, Insurance Director, Consumer Federation of America: Urges repeal.
  - Kevin Thompson, Senior Vice President, Insurance Services Office: Repeal of the McCarran Ferguson exemption would likely create legal uncertainty and have a chilling effect on procompetitive information sharing activities, so no repeal should be considered without proof that it is necessary and will help, not harm, consumers.
  - Donald Klawiter, Chair, ABA Antitrust Section: In favor of repeal and replacement with specific, detailed safe harbors (testimony to same effect as that to AMC).

- Two bills currently pending in Congress address the McCarran-Ferguson Act specifically:

<u>H.R. 2401—Insurance Competitive Pricing Act of 2005</u>

1. **Sponsor:** Representative Peter A. Defazio
2. **Co-Sponsors: 6**
3. **Current Committee Status:** Referred to the House Committee on the Judiciary on May 17th, 2005
4. **Hearings Held:** 0
5. **Summary:**
   - The bill would amend the McCarran-Ferguson Act to eliminate the insurance antitrust exemption when the conduct involves: 1) Price fixing; 2) Geographical market allocation between competitors; 3) Unlawful tying arrangements; and 4) Monopolizing or attempting to monopolize any part of the insurance business.
   - The bill would retain the exemption for conduct involving 1) the collection/dissemination of historical loss data; 2) determining loss development factors; 3) performing actuarial services that do not restrain trade; and 4) determining a trend factor during a specified period.

<u>S. 1525—Medical Malpractice Insurance Antitrust Act of 2005</u>

1. **Sponsor:** Senator Patrick J. Leahy
2. **Co-Sponsors: 10**
3. **Current Committee Status:** Senate Committee on the Judiciary. Introductory remarks on July 28th, 2005.
4. **Hearings Held:** Hearings held on June 20th, 2006
5. **Summary:**
   - The bill provides that the McCarran-Ferguson Act shall not be construed "to permit commercial insurers to engage in any form of price fixing, bid rigging, or market allocations in connection with the conduct of the business of providing medical malpractice insurance."

H. Shipping Act

<u>Overview</u>

- *Description*: Provides limited antitrust immunity to groups of competing ocean common carriers ("carriers") and marine terminal operators ("terminal operators").
- *Reason established*: To set U.S. shippers on an equal footing with foreign competitors that were not subject to U.S. antitrust laws. *United States v. Gosselin World Wide Moving N.V.*, 411 F.3d 502 (4th Cir. 2005).

<u>Summary</u>

- The Shipping Act defines a "conference" as an association of ocean common carriers permitted, pursuant to an approved or effective agreement, to engage in concerted activity and to utilize a common tariff. 46 U.S.C. app. §§ 1702(7). Typically there is at most one conference for each shipping route.
- The Shipping Act applies to carriers within a conference, permitting them to reach collective agreements on details about the conference's shipping route. This statute covers agreements among carriers, *inter alia*, to (1) discuss or fix transportation rates; (2) pool or apportion traffic, earnings or losses; (3) allot ports or restrict the number and character of sailings between ports; and (4) control, regulate, or prevent competition in international shipping transportation. *Id*. § 1703(a). The antitrust laws do not apply to covered agreements, provided the parties have satisfied the reporting requirements. *Id*. § 1706(a).
- All agreements formed by the carrier conferences or terminal operators must be filed with the FMC. *Id.* § 1704(a). If the FMC takes no action within 45 days, the carriers or terminal operators who are party to the agreement become immune from the antitrust laws to the extent that their actions are covered in the agreement; no affirmative approval of the agreement by the FMC is required. *Id*. §§ 1704-05; 1 Admiralty & Mar. Law § 10-2(B)(2)(b) (4th ed. 2004).

Comments in support or neutral: One.

- World Shipping Council (WSC) (first comment, filed July 15, 2005).
- Major points:
    - The immunity is limited, and carriers are subject to oversight by the Federal Maritime Commission, which has broad investigative and enforcement powers.
    - Congress has regularly reviewed the Shipping Act and, in 1998, amended the Act in a "carefully crafted legislative compromise involving all industry segments, including labor, ports, and the major users of ocean carrier services." *WSC* at 2.

Comments specifically criticizing: Three.

- Intermodal Motor Carriers Conference (IMCC); ABA Antitrust Section; Professor Peter Carstensen.
- Major points:

- o Ocean carriers are permitted to discuss and collectively set rates that include the inland transportation rates they will charge their customers. In this way, ocean carriers dictate unfavorable terms to truckers through agreements protected by the Shipping Act. *IMCC* at 2-3. These terms not only create significant additional costs for truckers, but also create inefficient deployment of scarce driver resources. *Id.*
- o The empirical evidence developed since partial deregulation suggests that the industry does not need horizontal collusion to perform and its performance has been better in a deregulated state. *ABA* at 5.
- o The collusive conduct still permitted under the exemption continues to harm shippers and consumers. *ABA Antitrust Section* at 5. Information sharing allowed under the Act would likely violate U.S. antitrust law were it not for the exemption. *ABA Antitrust Section* at 29.
- o There is no justification for retaining the general exemption for shipping companies that want to enter into cartels, given the fundamental changes in the industry. *Carstensen* at 1, 9. The AMC may wish to consider whether revisions to DOJ's business review procedures might be necessary to reduce concerns by shippers about exposure to ill-founded litigation without the exemption. *Id*. at 9.
- o Based on the 1998 amendment to the Act, which permitted ocean carriers to negotiate with shippers for independent service contracts, it is estimated that as much as 80 to 90 percent of the cargo on major routes is now outside the conference system." *Carstensen* at 9; *World Shipping Counsel* at 5-6.

Additional Background Information:

- The EU Parliament recently voted (534-89) to abolish a 20-year exemption from European Union competition rules for ocean liner conferences. After a two-year transition period, all carriers will no longer be allowed to fix prices and regulate capacity on trade routes to and from the EU. See http://pubs.bna.com/ip/bna/atr.nsf/eh/a0b2z2e8m4.

- Since 1999, there have been several efforts to eliminate the U.S. antitrust exemption in this area almost entirely. Chairman Sensenbrenner and the Antitrust Division under both Presidents Clinton and George W. Bush supported those efforts. *See ABA Antitrust Section* at 10 & n. 24. Specifically, Rep. Sensenbrenner proposed the following bill in 2001:

H.R. 1253—Free Market Antitrust Immunity Reform (FAIR) Act of 2001

1. **Sponsor:** Representative James F. Sensenbrenner, Jr.
2. **Co-Sponsors: 2**.
3. **Committee Status:** Referred to the House Committee on the Judiciary and the Committee on Transportation and Infrastructure. March 27th, 2001.
4. **Hearings Held:** Judiciary Committee hearings held on June 5, 2002.
5. **Summary:**
   - The bill would amend the Shipping Act of 1984 to restore the applicability of the antitrust laws to matters such as agreements among marine terminal operators to fix,

discuss or regulate rates and other service conditions, and to engage in exclusive working arrangements, and assessment agreements pertaining to such conditions.

I. Anti-Hog-Cholera Serum and Hog-Cholera Virus Act

<u>Overview</u>

- *Description*: Provides antitrust immunity to marketing agreements formed by the Secretary of Agriculture with manufacturers and handlers of anti-hog-cholera serum.
- *Reason established*: Until 1978, the hog-cholera virus infected many hogs in the United States and resulted in serious financial losses for hog farmers. For example, it was estimated that hog cholera resulted in $6 million in losses in 1917. *See* http://www.nadc.ars.usda.gov/about/history/bhistory.asp. The purpose of this act was to insure the maintenance and supply of the anti-hog-cholera serum by regulating the marketing of such serum and preventing "undue and excessive fluctuations and unfair methods of competition and unfair trade practices in such marketing." 7 U.S.C. § 851. In order to ensure adequate supplies of the serum, the Act required all manufacturers who participated in the marketing agreement to have a significant amount of reserve serum available. *See id.* at § 853.

<u>Summary</u>

- The Anti-Hog-Cholera Serum and Hog-Cholera Virus Act of 1935 provides an antitrust immunity to marketing agreements formed by the Secretary of Agriculture ("Secretary") with manufacturers and handlers of anti-hog-cholera serum. Pursuant to the Act, the Secretary has the power to "enter into marketing agreements with manufacturers and others engaged in the handling of anti-hog-cholera serum and hog-cholera virus . . . ." 7 U.S.C. § 852. All such marketing agreements and the making thereof are exempt from the antitrust laws. *Id.*

Comments in support or neutral: One

- The American Farm Bureau Federation stated that continuance of the immunity furthers a valuable public purpose.

Comments specifically criticizing: None.

O. Filed rate/*Keogh* Doctrine: [See also discussion in Regulated Industries Discussion Memorandum]

Overview

- *Description*: Provides limited antitrust immunity to defendants from private treble damage actions that are based upon published tariff rates.
- *Reason established*: Absent the filed rate doctrine, the Supreme Court believed that the congressional goal of preventing unjust price discrimination might be defeated because different customers would recover different amounts from a defendant in litigation and their rates or net rates of those recoveries would be different. *Keogh*, 260 U.S. at 163. Other reasons for the *Keogh* Court's decision were the speculative nature of damages and the difficulty of determining whether hypothetical lower prices also would have been discriminatory. *Id*. at 163-65.

Summary

- The filed rate doctrine, also known as the *Keogh* doctrine, provides limited antitrust immunity to defendants from private treble damage actions that are based upon published tariff rates. *See Keogh v. Chicago & N. W. Ry. Co.*, 260 U.S. 156, 162 (1922); *see also Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 422 (1986). The filed rate doctrine also precludes private damage actions based upon non-antitrust claims. *See, e.g.*, *Evanns v. AT&T*, 229 F.3d 837 (9th Cir. 2000) (breach of contract and tort claims); *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 21 (2d Cir. 1994) (RICO claims).

Comments in support or neutral: One.

- The filed rate doctrine "properly balances the need to preserve regulatory authority over regulated rates, the interest in ensuring nondiscriminatory treatment of rate-payers, and the legitimate enforcement concerns underlying the antitrust laws;" it "encourages transparency and uniformity of treatment." *USTelecom*, at 1, 8.

Comments specifically criticizing: Three.

- American Antitrust Institute ("AAI"); Western Coal Traffic League ("WCTL"); Washington State Attorney General Robert McKenna (*Reg. Indus. Submission*)
- Major Points:
    - o *AAI*: "Any antitrust exemption that arises indirectly out of regulatory statutes, but in the absence of any express statutory language creating the exemption, raises all of the issues relating to public choice and lack of legislative due process . . . ." *AAI*, at 5. "[R]ote application of the filed rate doctrine to ban all antitrust scrutiny of rates filed with a regulatory agency opens up substantial remedial gaps, to the detriments of counterparties and consumers." *Id*. at 15.
    - o *WCTL*: The regime in which "federal rate regulation [was] based primarily on principles of rate equalization and non-discrimination in rates and services" no longer exists, as the industry is now deregulated. *WCTL*, at 8."Immunizing the railroads from the antitrust laws is detrimental to consumers, the economy, technological innovation, and service improvements." *Id.*, at 9.

- *Washington State Attorney General*: Regulating agencies do not always have procedures in place to review rates and address and remedy tariff violations. *McKenna*, at 7-9. The immunity impairs complementary enforcement by regulators and antitrust enforcers in the areas of their respective greatest expertise. *Id*.

R. Local Government Antitrust Act

Overview

- *Description*: Precludes antitrust damage actions against local governments.
- *Reason established*: Congress passed the Local Government Antitrust Act in response to two Supreme Court decisions calling into question applicability of the *Parker* state action doctrine to local government entities. *See City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982); H.R. Rep. No. 98-965, at 2, *as reprinted in* 1984 U.S.C.C.A.N. 4602, 4603. Congress believed that such antitrust suits could "undermine a local government's ability to govern in the public interest." *Id*.

Summary

- In passing the Local Government Antitrust Act ("LGAA"), Congress intended that state action doctrine, embodied in *Parker v. Brown*, 317 U.S. 341 (1943), and subsequent cases interpreting it, would apply "by analogy to the conduct of a local government in directing the actions of non-governmental parties, as if the local government were a state." H.R. Conf. Rep. No. 98-1158, at 3, *as reprinted in* 1984 U.S.C.C.A.N. 4626, 4627.

Comments supporting or neutral: None.

Comments specifically criticizing: One.

- The "acting in an official capacity" requirement has been too broadly applied, and plaintiffs at least should be allowed to obtain injunctive relief. *AAI*, at 9-10.

T. Motor transportation exemption

Overview

- *Description*: There are three forms of antitrust exemptions relating to motor transportation. First, certain agreements among motor carriers are immune from the antitrust laws, provided the Surface Transportation Board ("STB") finds that the agreements are in the public interest. Second, mergers between motor passenger carriers (buses) are exempt from HSR filing requirements. Third, certain pooling agreements among motor carriers are also immune from the antitrust laws. 49 U.S.C. §§ 13703, 14302-03.

Summary

- An exemption covers most motor carriers carrying passengers or property and applies to agreements concerning through and joint rates, rules, classifications, etc. *See* 49 U.S.C. § 13703; *see also* 49 U.S.C. §§ 13501, 13702.
- Agreements must be filed with and approved by STB, which may approve agreements only if it finds that the agreement is in the public interest. *Id*. § 13703(a)(2).
- An agreement must be reviewed every five years in order to ensure that it is still consistent with the public interest, although STB may also review agreements on its own initiative. *Id*. § 13703(c). If STB determines that an agreement is not consistent with the public interest, the antitrust exemption will be withdrawn. *See id*. § 13703(c)(1).
- Parties to an agreement may not preclude fellow motor carriers from establishing independent rates, classification, etc. *Id*. § 13703(a)(4).

Comments in support or neutral: Two.

- National Motor Freight Traffic Association, Inc. ("NMFTA") & the National Classification Committee ("NCC"); and Southern Motor Carriers Rate Conference ("SMC")
- Major points:
  - o The commodity classification system serves as a useful tool, imparting common understanding among shippers, transporters, and receivers. *NMFTA* and *NCC*, at 1. The classification system contributes to efficient and economical transportation system. *Id.*

Comments specifically criticizing.

- National Small Shipments Traffic Conference, Inc. ("NASSTRAC").
- Major points:
  - o Those making the decisions about freight classifications stand to benefit: increase in class rating often equates to increase in freight rates. Shippers that could challenge the classifications want to avoid litigation/arbitration. *NASSTRAC*, at 2.
  - o There is no need for the exemption, given that the industry is deregulated. *Id.*

- Rate bureaus establish baseline class rates to benefit shippers making the decisions. *Id.* at 2-3.
- Shippers lacking the leverage and/or sophistication to mitigate the negative effects of class ratings and rate bureau increases via contracts are more susceptible to harm. *Id.* at 3.

X. Newspaper Preservation Act

Overview

- *Description*: Provides limited antitrust immunity to certain agreements between newspapers.
- *Reason established*: Congress passed this Act in reaction to the Supreme Court's decision in *Citizen Publ'g. Co. v. United States*, 394 U.S. 131 (1969), holding that joint operating agreements between newspapers were *per se* illegal. *See* H.R. Rep. No. 91-1193, *reprinted in* 1970 U.S.C.C.A.N. 3547. Congress desired to preserve diversity of editorial content and reporting that results from the existence of multiple newspapers in a community by allowing newspapers which otherwise might not be able to operate on a stand-alone basis to share operational assets.. *See* 15 U.S.C. § 1801.

Summary

- Congress passed the Newspaper Preservation Act ("NPA") in 1970 with the aim of maintaining a newspaper press that is independent and competitive in its reporting and editorials in all parts of the United States. 15 U.S.C. § 1801. The idea behind the legislation was that it would be better to have highly-integrated operating joint ventures between newspapers than to have those newspapers go out of business, or merge outright. Although these joint ventures allow for price coordination and other forms of integration, the reporting and editorial content remains independent. *Id*. § 1802(2).

Comments in support or neutral: One.

- Newspaper Association of America
- Major points:
    - The immunity staves off business failure of the weaker newspapers and preserves competition and diversity in news and opinion "even after the economic basis for commercial competition has ceased." *NAA* at 1, 9.

Comments specifically criticizing: None.

Y. Railroad Transportation Exemption: [See also discussion in Regulated Industries Discussion Memorandum]

Overview

- *Description*: There are two forms of antitrust immunity for rail carriers. The first provides limited immunity for rate, rules, and classification agreements formed by rail carriers. The other exempts railroads mergers from HSR filing requirements.

Summary

- Agreements between or among railroads relating to "rates . . ., classifications, divisions, or rules related to them, or procedures for joint consideration, initiation, publication, or establishment of them" are exempt if approved by the STB. 49 U.S.C. § 10706(a)(2)(A). The STB may approve only agreements and procedures that "will further the transportation policy of section 10101 of this title and may require compliance with conditions necessary to make the agreement further that policy as a condition of its approval." *Id*. This latter provision would eliminate any divergence from agreements made by the competing rail carriers, and requires STB to enforce the agreements.

Comments in support or neutral: One.

- Association of American Railroads ("AAR").
- Major points:
    - o Immunity "exists to avoid dual and potentially conflicting regulation by the STB and the courts or other agencies . . . and to promote national transportation policy." *AAR*, at 6.
    - o Regarding classifications and freight rates, immunity helps to create a uniform set of *rules*, not rates, which aids in: (i) apportionment of financial responsibility for payments; (ii) government collection; (iii) adjustment accounts; and (iv) handling of claims. *Id.* at 10.
    - o Agreements to pool equipment improve efficiency. The TTX agreement (i) promotes R&D and innovative new equipment; (ii) permits standardized fleet repair/maintenance, reducing cost; and (iii) spreads the risk of investment. *Id.* at 13-14.

Comments specifically criticizing: Two.

- Western Coal Traffic League ("WCTL"); Joint Comments by "Subscribing Shippers" (17 associations).
- Major points:
    - o Immunity results in a lack of competition and lack of reliable service; rail customers are held captive, subject to duopoly pricing and service power. *WCTL*, at 2.
    - o There are only two major carriers in the eastern United States, and two in the western United States. *Id.* at 4.

- Immunity fosters anticompetitive practices, including: (i) refusals to provide rates for “bottleneck” segments of rail movements; (ii) the imposition of “paper barriers” suppressing competition by short-line carriers; (iii) lacking of competition in service requirements; (iv) higher cost; and (v) lower quality and more erratic service. *Id*. at 5-6.

AA. Soft Drink Interbrand Competition Act

Overview

- *Description*: Provides a limited antitrust exemption to soft drink trademark holders who grant exclusive territories to soft drink bottlers.
- *Reason established*: This statute was prompted by FTC decisions against Coca-Cola and PepsiCo in 1978, in which the FTC held that exclusive territory allocations to bottlers from trademark holders violated Section 5 of the FTC Act.[6] *See* H.R. Rep. No. 96-1118, *reprinted in* 1980 U.S.C.C.A.N. 2373.

Summary

- The Soft Drink Interbrand Competition Act provides that the antitrust laws do not apply to territorial restrictions in trademark licensing agreements. Specifically, the Act states that the antitrust laws do not apply to trademark licensing contracts or agreements in which the licensees are allowed to manufacture, distribute, and sell trademarked soft drink product only in exclusive geographic areas. 15 U.S.C. § 3501. Such exclusive territorial restrictions prevent intrabrand competition among bottlers of identical trademarked products. *Id*.
- The House Report states that the legislation merely "restate[d] the rule of reason approach followed by the Supreme Court [in *Sylvania*]." *Id*. at 2. In fact, the Act reduced the rule of reason analysis to requiring plaintiff to show that there is a lack of "substantial and effective competition" among bottlers. *See Pennsylvania* ex rel. *Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173 (3d Cir. 1988).

Comments in support or neutral: None

Comments specifically criticizing.

- American Antitrust Institute, Statement of Professor Warren Grimes (AAI).
- Major points:
    - The immunity provided by this bill seemed likely to raise consumer prices by eliminating intrabrand competition within a bottler's territory. Because the bottlers not owned by the soft drink manufacturers were bought or went out of business, however, the actual impact of the immunity is unclear. *AAI*, at 3. Its enactment did encourage other special interest industry groups to seek antitrust exemptions, some of which Congress granted. *Id.*, at 13.

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[6] *See In re Coca-Cola*, 91 F.T.C. 517 (1978), *rev'd and remanded*, 642 F.2d 1387 (D.C. Cir. 1981); *In re PepsiCo, Inc.*, 91 F.T.C. 680 (1978), *rev'd and remanded*, 642 F.2d 1387 (D.C. Cir. 1981).