MEMORANDUM

From: Immunities and Exemptions Working Group

To: All Commissioners

cc: Andrew J. Heimert and Commission Staff

Date: December 21, 2004

Re: Immunities and Exemptions Issues Recommended for Commission Study

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The Antitrust Modernization Commission assigned to the Immunities and Exemptions Working Group the responsibility to analyze issues relating to antitrust immunities and exemptions, and, based on that analysis, to make recommendations to the Commission as to the issues within that category that warrant substantive review. This memorandum outlines those recommendations. The memorandum addresses the issues the Working Group recommends for substantive consideration. The Working Group has not identified any issues that it does not recommend for study. In each instance, comments are provided to allow insight into the Working Group's analysis. The issues are listed in approximate order of priority that the Working Group believes each issue should have for Commission study.

This memorandum reflects the consensus of a majority of the Working Group members. Some members of the Working Group may disagree with a recommendation and/or with aspects of the discussion and comments associated with a recommendation. In addition, a recommendation that the Commission should not study a particular issue at this time does not constitute a recommendation on the merits of the issue, nor does it preclude the possibility that the Commission report ultimately will endorse any particular recommendation.

SUMMARY OF RECOMMENDATIONS

Issues recommended for study. The Working Group recommends that the Commission study the following issues:

1. **Should industry-specific antitrust immunities and exemptions be eliminated if not justified by the benefits they provide, or should they otherwise be time-limited?**

2. **Should the state action doctrine be clarified or otherwise changed?**

3. **Should the *Noerr-Pennington* doctrine be clarified or otherwise changed?**

DISCUSSION OF RECOMMENDATIONS

Issues recommended for study

The Working Group recommends that the Commission study the following issues:

1. **Should industry-specific antitrust immunities and exemptions be eliminated if not justified by the benefits they provide, or should they otherwise be time-limited?**

The Commission should consider the following questions: 1) What are the costs and benefits of each industry-specific immunity and exemption? 2) Should industry-specific immunities and exemptions be eliminated unless the benefits clearly exceed the costs? 3) Should there be a presumption that all industry-specific immunities and exemptions be limited in duration?

Numerous comment submitters have expressed their views that many, if not all, of the industry-specific immunities and exemptions should be reconsidered because they create inefficiencies, disrupt competitive markets, and harm consumer welfare. Currently, there are more than twenty separate industry-specific immunities or exemptions, including the following.

- Air transportation exemption, 49 U.S.C. §§ 41308-09 (provides limited antitrust exemption for certain agreements between U.S. and foreign air carriers that are filed with the government).
- Capper-Volstead Act, 7 U.S.C. §§ 291-92 (provides limited antitrust exemption to both for-profit and non-profit agricultural cooperatives).
- Charitable Donation Antitrust Immunity Act, 15 U.S.C. §§ 37-37a (provides limited antitrust immunity for charitable gift annuities and charitable remainder trusts).
- Defense Production Act, 50 U.S.C. app. § 2158 (provides limited exemption to companies working together or entering into agreements if certain conditions are met, including, *inter alia*, whether the President finds that "conditions exist which may pose a direct threat to the national defense or its preparedness programs").
- Export Trading Company Act, 15 U.S.C. §§ 4001-21 (provides limited antitrust exemption for companies that jointly export goods or services).

- Filed rate/*Keogh* Doctrine (common law doctrine precluding the award of damages, including antitrust damages, against firms for their rate setting activities if the defendant's rates were approved by a regulatory agency).

- Fishermen's Collective Marketing Act, 15 U.S.C. §§ 521-22 (provides limited antitrust exemption to participants in fishing industry cooperatives).

- Health Care Quality Improvement Act, 42 U.S.C. §§ 11101-52 (provides that professional medical review bodies shall not be liable for damages under any federal or state law, including treble damages under the antitrust laws).

- Major league baseball exemption (common law antitrust exemption for professional baseball for all conduct except that affecting the employment of major league baseball players).

- McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15 (exempts from federal antitrust law practices regulated by state law that are part of the "business of insurance," except for acts of boycott, coercion, or intimidation).

- Motor transportation exemption, 49 U.S.C. § 13703 (provides limited antitrust exemption to motor carriers that form agreements with other motor carriers).

- Need-Based Educational Act; Need-Based Educational Aid Antitrust Protection Act; Improving America's School Act, 15 U.S.C. § 1 note (provides limited antitrust exemption for universities and colleges regarding student aid, but exemption expires in 2008 pursuant to a sunset provision in the statute).

- Newspaper Preservation Act, 15 U.S.C. §§ 1801-04 (provides limited immunity to newspaper publishers that are parties to joint operating agreements).

- Non-profit agricultural cooperatives exemption, 15 U.S.C. § 17 (provides limited antitrust exemption for non-profit agricultural cooperatives).

- Postal Reorganization Act, 39 U.S.C. §§ 101 *et seq*. (interpreted in *United States Postal Service v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736 (2004), to immunize the U.S. Postal Service from antitrust liability).

- Railroad transportation exemption, 49 U.S.C. § 10706 (provides limited antitrust exemption to rail carriers that form agreements with other rail carriers).

- Resident matching program exemption, 15 U.S.C. § 37b (provides limited antitrust exemption to participants in National Resident Matching Program, which matches graduate medical students with residency programs).

- Small Business Act, 15 U.S.C. § 638(d) (provides a limited antitrust exemption to small businesses below a certain size that engage in research and development joint ventures).

- Soft Drink Interbrand Competition Act, 15 U.S.C. §§ 3501-03 (provides a limited antitrust exemption for soft drink trademark holders to grant exclusive territories to soft drink bottlers).
- Sports Broadcasting Act, 15 U.S.C. §§ 1291-95 (provides a limited antitrust exemption to professional football, baseball, basketball, or hockey teams that enter into agreements to pool their telecast rights for sale as a package, and also exempts the merger of football leagues).
- Webb-Pomerene Export Act, 15 U.S.C. §§ 61-65 (provides limited exemption from the Sherman Act for associations exporting goods).

The very existence of each of these immunities and exemptions suggests that each benefits at least a small group of private actors or interested parties. Sound public policy, however, requires a reckoning of the costs associated with each one as well. Accordingly, a valuable contribution of the Commission might be to assess the costs and benefits of each of these industry-specific immunities or exemptions. In addition to producing a particularized assessment of each one, the Commission could develop a generally applicable methodology that would be available to policymakers in the future as an analytical tool to assess other industry-specific immunities or exemptions.

The Commission also could address the issue of whether any immunity or exemption for which the benefits do not exceed the costs should be eliminated. Moreover, the Commission could consider whether it is appropriate to make all immunities and exemptions time-limited unless Congress actively reconsiders whether there is competitive utility in renewing such special treatment. For example, it would be possible to include a sunset provision like the one contained in the Need-Based Educational Act of 2001 in all legislation establishing an immunity or exemption. *See* 15 U.S.C. § 1 note (limiting duration of the Need-Based Educational Act exemption to seven years). This would be analogous to DOJ's current policy that generally limits the duration of consent decrees to ten years. *See Antitrust Division Manual*, IV-55 (3d ed. 1998) ("the Division's standard decree language requires that the consent decree expire on the

tenth anniversary of its entry by the court"), *available at* http://www.usdoj.gov:80/atr/foia/divisionmanual/ch4.pdf.

It should be noted that in contrast to these industry-specific immunities and exemptions, there are also other provisions of the antitrust laws that reduce or eliminate damage recoveries and apply to multiple industries in an effort to serve broader policy goals. Examples of such provisions include protections granted to cooperative research and production joint ventures, collective bargaining by labor unions, and standards development activity.

Comments: Given its independent and bipartisan nature, the Commission is particularly well suited to address these issues. In this regard, the Senate Committee on the Judiciary's Subcommittee on Antitrust, Competition Policy, and Consumer Rights submitted a public comment requesting that the Commission undertake a "comprehensive review" of these industry-specific immunities and exemptions. Although limited resources may require the Commission to devote more attention to a representative subset of industry-specific immunities and exemptions than it can to all of them, every one of these provisions potentially undermines the general applicability and flexibility of this nation's antitrust laws, and the Working Group recommends that all industry-specific immunities be considered and none be considered inappropriate for review.

2. **Should the state action doctrine be clarified or otherwise changed?**

The state action doctrine provides that a state government can immunize the conduct it regulates from antitrust liability, provided that two tests are met: (1) the restraint at issue must be "clearly articulated and affirmatively expressed as state policy" and (2) "the policy must be 'actively supervised' by the State itself." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (citation omitted); *see also Parker v. Brown*, 317 U.S.

341 (1943). The Commission could study this doctrine to address the following questions: 1) How should the "clear articulation" prong be applied to ensure that the immunity is applicable only in circumstances in which the state intended to displace competition? 2) How should the "active supervision" prong of the test be applied to ensure that immunized activity is subject to meaningful state oversight? 3) Does the doctrine appropriately account for harmful effects that anticompetitive conduct immunized by one state has on neighboring states? 4) Should an exception to the immunity exist when a state or municipality is acting as a "market participant"?

Although there is broad support for the state action doctrine in general, concerns have been expressed about its application and scope. An FTC task force established to review the state action doctrine recently issued a report that raises the same issues that have been identified by commenters. *See* Federal Trade Commission Staff, *Report of the State Action Task Force* (Sept. 2003) ("FTC Report"), *available at* http://www.ftc.gov/os/2003/09/stateactionreport.pdf.

First, some courts may be interpreting the "clearly articulated" prong too broadly by immunizing any anticompetitive conduct that even arguably flows from a general grant of authority or regulatory scheme enacted by the state. The criticism is that this interpretation improperly immunizes practically any conduct that can be characterized as an even remotely foreseeable consequence of such a generalized state policy. Instead, critics suggest that the "clearly articulated" prong should be interpreted to require a determination of whether the state has deliberately and intentionally adopted a policy to immunize the specific anticompetitive conduct at issue.

Second, there is concern that the paucity of specific guidance in the case law regarding the "active supervision" prong poses a risk of inconsistent application of the state action doctrine. For example, some courts focus their analysis under this prong on factors such as the

defendant's status as a non-profit entity, even though that factor is not probative of whether there is danger the defendant will pursue its own economic interests (albeit possibly not profit maximization) instead of the state's policy.

Third, in its current form, the state action doctrine may fail to give sufficient weight to adverse interstate effects of anticompetitive conduct that is immunized under the doctrine. One result can be that policymakers permit anticompetitive conduct within their own state without considering the adverse effects of that conduct on citizens and firms in neighboring states, with that conduct immunized from challenge under the antitrust laws. Recent research by the FTC, for example, shows that state regulation impacts interstate e-commerce in automobiles, contact lenses, wine, and other goods. *See E-Commerce: The Case of Online Wine Sales and Direct Shipment: Hearing Before Subcomm. on Commerce, Trade, & Consumer Protection of the House Comm. on Energy & Commerce*, 108th Cong. 12 (2003) (Prepared Statement of Todd Zywicki, Director, Office of Policy Planning, Federal Trade Commission), *available at* http://energycommerce.house.gov/108/action/108-51.pdf; *see also* Federal Trade Commission Staff, *Possible Anticompetitive Barriers to E-Commerce: Contact Lenses* (Mar. 2004), *available at* http://www.ftc.gov/os/2004/03/040329clreportfinal.pdf.

Finally, there is concern that the doctrine does not adequately take into account participation in the marketplace by state instrumentalities or municipalities. One proposed solution is to establish a "market participant exception" to the state action doctrine that would apply the "active supervision" prong to state instrumentalities or municipalities when they compete with private firms in the marketplace.

Comments: Numerous commenters have identified the state action doctrine as an appropriate topic for Commission study. Because the FTC Report already contains

thoughtful analysis of the relevant issues, however, a primary challenge facing the Commission if it addresses the state action doctrine is to avoid duplicating the FTC's work to date. Accordingly, the Commission's efforts should focus on building upon the FTC Report by further investigating the relevant facts, analyzing the general recommendations contained in that report, and proposing specific new recommendations based upon the Commission's own work. Another consideration is that it may be challenging to propose easy legislative solutions both because this is a common law doctrine and because it is necessary to be sensitive to principles of state sovereignty and federalism that are central to the state action doctrine.

3. **Should the *Noerr-Pennington* doctrine be clarified or otherwise changed?**

The *Noerr-Pennington* doctrine shields private parties from antitrust liability for petitioning for government action. *See Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965). The Commission could study this doctrine to address the following questions: 1) Should the scope of conduct immunized as "petitioning" be narrowed to exclude ministerial filings and other activities that do not call for an exercise of governmental authority or discretion? 2) Should the exception established in *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965), be expanded beyond the PTO context to include analogous non-legislative proceedings? 3) Should the "sham" exception be expanded to include deliberate and verifiable misrepresentations that undermine the legitimacy of a government proceeding?

There are concerns that this immunity has been broadened inappropriately to the point of harming competition and consumer welfare. One specific concern is that what constitutes "petitioning" under the doctrine may be interpreted so broadly that conduct not intended to seek

governmental action, but rather undertaken solely to harm competitors, is immunized. For example, should merely ministerial filings and other conduct that does not call for an exercise of governmental authority or discretion be immunized as "petitioning" for government action? Similarly, concerns are frequently voiced that the exceptions to the *Noerr-Pennington* doctrine — such as the *Walker Process* exception for fraud on the Patent and Trademark Office and the sham exception set forth in *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49 (1993) — are too narrow. There are arguments that the *Walker Process* exception should be expanded beyond the PTO context and that there should be exceptions for deliberate and verifiable misrepresentations that undermine the legitimacy of a government proceeding, even if those misrepresentations do not constitute a sham under *PREI*.

Comments: Numerous commenters have recommended that the Commission study *Noerr-Pennington* immunity. The FTC also appears to consider this an important area to study, as it has established a task force to examine the *Noerr-Pennington* doctrine. This FTC task force has not yet finished its report, but when the report is published it should be considered carefully if the Commission studies *Noerr-Pennington*, both to benefit from the FTC's analysis and to avoid any duplication of work. As with the state action doctrine, the fact that *Noerr-Pennington* is a common law doctrine presents a challenge in crafting legislative solutions. Additionally, to the extent the *Noerr-Pennington* doctrine derives from First Amendment considerations, any changes are subject to constitutional limitation.