

**Summary of Antitrust Modernization Commission Hearings on
Immunities and Exemptions
December 1, 2005**

The Antitrust Modernization Commission (“AMC” or the “Commission”) held hearings on December 1, 2005 to obtain testimony regarding immunities and exemptions from the antitrust laws. The AMC heard from three panels of experts on this topic.

The first panel focused on the Export Trade Certificate of Review Program administered by the Department of Commerce. John J. Sullivan, General Counsel for the Department of Commerce, defended the exemption provided under that program (the “Export Exemption”) on the grounds that it applies only to conduct that would not violate the antitrust laws in the first place. The Commission appeared to accept this contention, but there was no consensus as to whether this fact weighed in favor of retaining the exemption or instead suggested that the exemption should be jettisoned. The Commission also expressed concern that the continued existence of the Export Exemption might hinder U.S. efforts to encourage other countries to adopt and vigorously enforce antitrust laws.

The second and third panels focused on the appropriate framework for evaluating exemptions and immunities more generally. The second panel focused on the report prepared by three consultants to the Commission entitled, “A Framework for Policymakers to Analyze Proposed and Existing Antitrust Immunities and Exemptions” (“the Framework”). Two of the authors of that report presented a summary of the Framework and fielded questions from the Commission. The third panel of experts, including the third author of the Framework, commented on the Framework and presented other suggestions for evaluating exemptions. There appeared to be a consensus that the Framework provided a sound procedural approach for evaluating exemptions.

Panel I

I. Summary of Written Testimony:

John J. Sullivan. General Counsel for the United States Department of Commerce.

John Sullivan presents a passionate defense of the Export Trade Certificate of Review Program, which allows companies wishing to engage in specified export activities to obtain antitrust pre-clearance (and de-trebling of damages in any private lawsuits challenging conduct within the scope of the certificate) by applying to the Commerce Department for an Export Trade Certificate. Mr. Sullivan argues that this program creates opportunities for small and medium-sized companies that would not otherwise engage in export activities without creating any risk of harm to U.S. markets.

Mr. Sullivan argues that the Export Exemption presents no risk of harm to domestic markets for two reasons. First, the certificates only cover conduct that is purely export related, and thus not covered by state or federal antitrust laws in the first place. Second, the statute

authorizing the certification program provides that certificates may only be issued upon a determination that the activity covered by the certificate will not harm United States markets.¹ Additional protection for United States markets is provided by continual monitoring and annual review of the export activities covered by the certificate.

Mr. Sullivan also addresses concerns that the Export Exemption may have a negative effect on foreign markets. First, he argues that, as a factual matter, competition in foreign markets is bolstered, not harmed by the program because it facilitates entry of new competitors into those markets. Second, Mr. Sullivan emphasizes that the program does not immunize certificate holders from liability under foreign antitrust laws.

II. Highlights from Questions and Answers (Paraphrased):

- A. *You say in your written testimony that the certificates do not confer an exemption from the antitrust laws, but do you agree that certificate holders are treated differently?*

Sullivan: The certificates do not create an exemption from the antitrust laws because they only cover conduct that would not violate those laws in the first place. It would be more accurate to say that they provide for a limited immunity.

- B. *You mention in your written testimony that there has never been a successful private lawsuit challenging conduct covered by a certificate. Do you think that is because suits are not being brought because treble damages are not available?*

Sullivan: That might be part of it. But the bigger reason is that the conduct that is covered by the certificate has already been reviewed to ensure it does not present antitrust issues.

- C. *In your testimony, you focus on the benefits to small and medium-sized companies, but is there anything that prevents larger companies from taking advantage of the program?*

Sullivan: No. But as companies get larger it becomes less likely that a certificate will issue because it becomes more likely that even export activity by such companies could have a negative effect on U.S. markets.

- D. *How do we reconcile the fact that at the same time that we are encouraging other countries to bolster their antitrust laws, we have this certificate program in place that allows companies to engage in cartel-like behavior in foreign markets?*

¹ See 15 U.S.C. § 4013(a).

Sullivan: The certificate program actually encourages competition in foreign markets because it promotes entry of new competitors in those markets. And the certificates do not immunize companies for violations of foreign antitrust laws. Most countries that have antitrust laws do not apply those laws to foreign export activities.

E. If the certificates only cover conduct that does not violate the antitrust laws why do we need it?

Sullivan: The program is part of a larger effort to encourage export trade. It provides assurance to smaller companies that may not be able to afford sophisticated antitrust counsel or that cannot take the financial risk of a treble-damages lawsuit that their conduct does not violate the antitrust laws.

F. I sense in my colleagues some desire to jettison this program. If we were to do that, should existing certificate holders be grandfathered?

Sullivan: As a matter of fairness, existing certificate holders should be grandfathered based on the investments they have made in reliance on the program.

Panel II

I. Summary of Written Testimony:

A. Darren Bush, Gregory K. Leonard, & Stephen R. Ross,² A Framework for Policymakers to Analyze Proposed and Existing Antitrust Immunities and Exemptions. Darren Bush is an Assistant Professor of Law at the University of Houston Law Center. Gregory K. Leonard is Vice President of NERA Economic Consulting. Stephen F. Ross is a Professor at the University of Illinois College of Law.

Darren Bush, Gregory Leonard, and Stephen Ross present a proposed framework (“the Framework”) for evaluating exemptions. There are three key procedural elements to the Framework. First, the Framework calls for a process that is open and inclusive. Second, under the Framework, the proponent of an exemption bears the burden of justifying the exemption under a cost/benefit analysis and in persuading Congress that there is not a less restrictive alternative. Third, all exemptions should contain a sunset provision.

The Framework recommends a five-stage process for evaluating exemptions. The first stage is the information gathering stage in which input on the exemption is sought through public hearings and comment. In the second

² Stephen Ross testified on the third hearing panel.

stage, the justifications for the exemption are identified. These justifications might include pro-consumer justifications, justifications based on social policy, or justifications on the grounds that a regulator should have complete control of competitive issues in the industry at issue. Stage Three involves balancing the benefits identified in Stage Two against the costs, both economic and social. In Stage Four, the immunity is tailored to minimize anticompetitive effects. These tailoring measures could include, for example, evaluating less restrictive alternatives, drafting the exemption as narrowly as possible, or imposing reporting and approval requirements. Stage Five deals with renewal. Every exemption should contain a sunset clause, and the original justifications for the exemption should be carefully reevaluated before the exemption is renewed.

B. Supplemental Statement of Darren Bush

Darren Bush also offered supplemental written testimony on three topics – express immunities, implied immunities, and primary jurisdiction – implicated but not fully addressed by the Framework. Mr. Bush notes that the Framework acknowledges that express immunities may be justified when Congress has empowered a regulatory agency to displace competition in an industry. In the past, when regulation sometimes completely displaced market competition, such express immunities may have made sense. However, today, regulation is more likely to focus on creating conditions necessary to foster competition, not on displacing it. For this reason, regulation and antitrust often serve complementary, not antagonistic purposes, and express immunities are generally unnecessary.

Adoption of the Framework would not completely eliminate the need for implied immunities since, even in today’s world of limited regulation, it is possible that regulatory goals could be frustrated by application of the antitrust laws. However, implied immunities should be rare and should only be granted when (1) a regulatory agency has exercised control over the very practice challenged and application of the antitrust laws would interfere with agency regulation or (2) agency control over the industry is so pervasive that it can be assumed that Congress intended agency regulation to displace competition.

Finally, Mr. Bush argues that adoption of the Framework would increase the importance of the doctrine of primary jurisdiction because immunities and exemptions would be more limited. However, Mr. Bush emphasizes that primary jurisdiction should be used as a tool for courts to get the benefit of agency expertise in particular cases, not as a method of conferring immunity.

II. Highlights from Questions and Answers (Paraphrased):

- A. *Does the consumer welfare analysis in your proposal take midstream consumers into account, or does it only consider end-consumers?*

Leonard: The consumer welfare analysis only addresses end-consumers. Other portions of the Framework address the interests of other market participants.

B. *What do you think about statutory exemptions that just say that conduct that is already lawful is lawful?*

Bush: A number of exemptions are unnecessary. Whether they are still useful depends on what the risk of liability is.

Leonard: The Framework is pretty clear that if conduct is not unlawful, it shouldn't be immune. But to the extent this type of exemption reduces litigation or other transaction costs, it could be useful.

C. *Why should we care about immunizing conduct that is already lawful?*

Bush: That is one reason for having sunset provisions – so we can evaluate whether the immunity affected actions.

Panel III

I. Summary of Written Testimony:

A. Alden F. Abbott, Associate Director for Policy and Coordination at the Federal Trade Commission, Bureau of Competition.

Alden Abbott argues that the antitrust laws are critical for the preservation and efficient operation of our free-enterprise economic system. Thus, any exemptions from these laws should be strictly scrutinized, with the proponents of such exemptions bearing a heavy burden of persuasion. Economic theory and history both suggest that exemptions have the potential to harm competition. Many exemptions allow firms to impose horizontal restraints on competition, despite the fact that economic theory teaches that such restraints are generally harmful. In addition, exemptions may harm the very industry they were designed to protect by depriving them of competition that would otherwise foster economic efficiency. Empirical studies of formerly regulated industries demonstrate that industries sheltered from competition do not perform as well as competitive industries.

Mr. Abbott argues that the Commission should undertake a review of the current exemptions to determine if they are still necessary or beneficial. Many of these exemptions were created many years ago when economic conditions were much different than they are now. Moreover, antitrust law has evolved in a way that may make many of these exemptions unnecessary. Because modern antitrust

analysis balances pro-competitive effects of challenged conduct against any anticompetitive effects, it does not prevent efficient collaborations.

B. Peter C. Carstensen. Young-Bascom Professor of Law at the University of Wisconsin Law School.

Peter Carstensen begins by generally praising the Framework. However, he argues that the Framework does have two serious shortcomings. First, the Framework does not adequately address the problem of buyer power. Second, many of the illustrations used in the Framework involve collaborative conduct that would not be deemed to violate the antitrust laws in the first place because it is, on the whole, pro-competitive. Because the conduct is not unlawful, there is no need for an exemption. To the extent some form of antitrust protection is necessary to encourage companies to engage in this type of conduct, the business review clearance process is a more appropriate way to provide that assurance.

Mr. Carstensen offers three suggestions for the Commission to consider in evaluating exemptions in general. First, he argues that Congress should adopt a general sunset provision that would require reevaluation of all exemptions on a regular basis. Second, Congress should consider adopting a statutory rule of construction that would instruct the courts to construe exemptions narrowly. Third, Congress should codify (or at least cross-reference) all exemptions in a single place in the United States Code.

Finally, Mr. Carstensen offers his evaluation of several of existing exemptions. He argues that the exemptions related to fishing and foreign trade should be repealed because they are rarely used. Similarly, the Shipping Act exemption is becoming increasingly irrelevant now that the vast majority of cargo is being shipped at privately negotiated rates. Most of the exemptions related to insurance are also outdated and rest on market assumptions that have been discredited. The exemptions for farmer cooperatives can be maintained because, as a factual matter, they pose very little threat to competition. The Agricultural Marketing Agreement Act, however, needs to be scrutinized because it raises serious efficiency concerns, particularly in the dairy market.

C. James C. Miller III. Chairman of the CapAnalysis Group, an affiliate of Howrey, Simon, Arnold, & White, LLP. Mr. Miller was formerly Chairman of the Federal Trade Commission.

James Miller argues that if antitrust laws are beneficial to the economy (which he believes they are), then it is difficult to justify exemptions from the application of those laws. Mr. Miller places current exemptions into four different categories. First, there are exemptions that were adopted at a time when it was believed that some industries were so important and prone to failure that they should be monitored closely by regulators, who should be the ones to determine what antitrust principles should apply. Second, there are exemptions

(such as the farm and labor exemptions) that were adopted to promote wealth and income distribution. Third, there are exemptions that were adopted to promote research and development. Finally, there are exemptions (such as exemptions related to shipping and fishing) that can only be explained as protections for special interest groups.

Mr. Miller suggests that none of these exemptions are justified from a purely economic standpoint. Even the exemptions for research and development, which govern conduct that may be economically efficient, are not justified since current antitrust enforcement policies already allow such collaborations. Nevertheless, Mr. Miller believes that some exemptions, particularly those related to organized labor, are unlikely to be changed.

II. Highlights from Questions and Answers (Paraphrased):

- A. *I would like to know if there is a consensus that (1) proponents of an immunity should have the burden of persuasion, (2) exemptions should be subject to public comment and should have a transparent record and legislative history, (3) exemptions should have a time limit after which they would sunset, (4) some type of cost/benefit analysis should be performed before adopting an exemption, (5) the exemptions should all be codified in one place, and (6) Congress should look at less restrictive alternatives before adopting an exemption. Do you all agree?*

Ross: I agree with all of those statements. As for legislative history, at minimum, the sponsor of the exemption should get up and make the case for the exemption on the record.

Miller: Yes, yes, yes, yes, yes, and yes.

Abbott: I believe that the burden of persuasion should be on the proponent of the exemption and that Congress should scrutinize proposed exemptions closely. All of those recommendations are consistent with this.

Carstensen: I concur

- B. *What should we do about exemptions that already exist? Should there be a different test for repealing them? Should old exemptions that aren't hurting anything be left alone?*

Ross: Paradoxically, it is the worst exemptions that need more fairness. Exemptions, such as the Export Exemption, that do not do much harm need less in terms of a transition. For those exemptions that may be harming competition, such as the insurance exemptions, a transitional period is needed.

Miller: The basic screen should be the same for existing and new exemptions. Even though most of them aren't hurting anything they still ought to go.

Abbott: I agree that the same screen should apply for existing and new exemptions. In both cases, the burden of persuasion should be on the proponent of the exemption.

Carstensen: The point to focus on is whether there are investments that need to be recovered or whether repeal of the exemption would expose companies to unexpected risks.

C. *What, if anything, do we do with the big immunities, such as labor and farming, that it would be nearly impossible for Congress to even look at, much less change?*

Miller: I think you can chip away at them and lop off the extremes.

Ross: The Framework addresses exemptions based on social policy and explains how social policy justifications can be incorporated into the cost/benefit analysis.