PREPARED STATEMENT OF

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ANTITRUST MODERNIZATION COMMISSION

on

STATUTORY IMMUNITIES AND EXEMPTIONS

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Thank you for inviting me to speak today. The staff of the Federal Trade Commission is pleased to respond to your request for comments on statutory exemptions and immunities. I should note that this statement and my responses to questions reflect the views of the staff and do not necessarily represent the views of the FTC or any individual Commissioner, but the Commission has voted to authorize this statement.

As a baseline proposition, we strongly believe that an economy based on vigorous competition, protected by the antitrust laws, does the best job of promoting consumer welfare and a vibrant, growing economy. This conclusion is supported by expert economic studies, both domestic and international, and most of our economy is based on this competitive model.[1]

The antitrust laws are an important component of this economic system. Indeed, the Supreme Court has declared that "[a]ntitrust laws in general, and the Sherman Act in particular,

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[1] For an overview, *see, e.g.*, Richard A. Posner, *The Effects of Deregulation on Competition: The Experience of the United States,* 23 Fordham Int'l L.J. 7 (2000).

are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."[2] This suggests that laws or regulations authorizing departures from this competitive model should be disfavored, and proponents of such departures should bear a heavy burden of demonstrating, with factually-supported reasons, why such a regime is necessary.

Congress over the years has adopted a wide range of measures that partially or fully immunize certain sectors of the American economy from antitrust review. The AMC has compiled an extensive list of these provisions, some of which involve industries and products and services that are very familiar to us, while other provisions deal with more obscure matters.[3] Collectively, these sectors of the economy cover a substantial volume of commerce.

It is not my purpose today to argue about the original merits of Congress's decision to displace the antitrust laws in certain industries.[4] Nor do I intend to comment on how well (or

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[2] *United States v. Topco Associates, Inc.*

above the competitive level (or, equivalently, reduces output below the competitive level) generally will result in consumers purchasing less of the product or service, and firms producing less, at the higher price, than would be the case under competitive conditions. Consequently, such a restraint results in a decrease in economic welfare.[6] Further, it is well accepted that competition itself is an engine that drives economic efficiency. Therefore, logic suggests that antitrust exemptions may well handicap the economic progress of indus

restraints of trade, only those that are unreasonable,[13] and unreasonableness is assessed by weighing efficiency justifications against anticompetitive effects to determine the overall effect. Admittedly, for a long period of time, antitrust's commitment to efficiencies was honored in the breach, and numerous judicial decisions exhibited an inadequate appreciation of, if not marked hostility to, efficient business conduct.[14] For at least the past 25 years, however, post-*Sylvania*,[15] antitrust analysis has been refined to take into account sound economics and allow for efficient forms of cooperation (*see, e.g., BMI*[16]). Modern mainstream antitrust analysis does not condemn efficient collaborations, only those agreements that diminish competition and harm consumers. In short, antitrust law today is not an impediment to economically desirable forms of collaboration by firms in exempt industries.

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[13] *Standard Oil Co. v. United States*, 221 U.S. 1, 60-70 (1911).

[14] *See generally, e.g.*, Robert H. Bork, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1993); Richard B. Posner, *Antitrust Policy and the Supreme court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 Colum. L. Rev. 282 (1975).

[15] *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (in a case considering the legality of distributional restrictions imposed by a manufacturer upon its franchisees, the Court held that such vertical restraints should be evaluated under the rule reason in light of substantial scholarly and judicial authority supporting the economic justifications for such restraints, overruling the rule of *per se* illegality announced by the Court only ten years earlier in *United States v. Arnold Schwinn and Co.*, 388 U.S. 365 (1967)).

[16] *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1 (1979) (a blanket license for public performance of musical compositions by numerous competing artists, while involving price fixing "in the literal sense," was not a practice that facially appeared to be one that would always or almost always tend to restrict competition and decrease output, but, rather, appeared to be one designed to "increase economic efficiency and render markets more, rather than less, competitive" by reducing transaction costs for obtaining licenses for numerous compositions, and, therefore, should be evaluated under the rule of reason rather than the rule of *per se* illegality).

Finally, it is instructive to note that foreign jurisdictions are broadening the scope of their antitrust laws and subjecting to antitrust scrutiny formerly exempt sectors.[17] This should help invigorate the competitive process overseas. It would be quite ironic if the U.S. government, which has argued strenuously in multiple fora about the benefits of antitrust t

In sum, although the FTC has not studied, and does not pretend to have expertise with respect to, individual statutory antitrust exemptions, the FTC staff as a general matter believes that derogations from vigorous competition tend to harm the American economy and the consumer. Accordingly, we believe that it may well be time for the AMC – and Congress, to which the AMC will report – to address the question of whether individual statutory antitrust exemptions continue to make sense. Specifically, Congress and the AMC may wish to examine critically the current validity of whatever justifications may be offered in support of each exemption and to assess the overall impact of each exemption on consumers and the economy.

Thank you very much.