Comments of the Office of the Attorney General of New York State In Response to the Request for Public Comments on Immunities and Exemptions[1]

Submitted July 15, 2005

We thank the Commission for the opportunity to submit comments in connection with its hearings on the topic of immunities and exemptions from the antitrust laws. We have focused our comments on some of the questions raised by the Commission in Sections A(1) of its Request for Public Comment on this topic, and specifically discuss the reasons for repealing the McCarran-Ferguson exemption for the business of insurance.[2]

SUMMARY

The antitrust laws embody our society's belief that competition in the commercial marketplace enhances consumer welfare and promotes our economic and political freedoms. Unrestricted competition, however, may not be consistent with other significant public policies or regulatory schemes that also serve the public interest. Thus, we exempt conduct from antitrust scrutiny to the extent necessary to attain other important goals. When considering an exemption, Congress should take into account the commercial sector that it affects most directly, examine carefully the public policy to be advanced, craft a limited exemption to achieve identified goals, and periodically reexamine industry-specific exemptions in light of changing market conditions.

The McCarran-Ferguson exemption to the federal antitrust laws for the business of insurance illustrates an industry-specific exemption that is ripe for reexamination, and, in our view, repeal. The exemption has interfered with the ability of public and private enforcers to readily use the full panoply of federal antitrust remedies to correct, deter and obtain compensation for abuses in the insurance sector. A uniform federal antitrust standard would facilitate antitrust enforcement and benefit plaintiffs and defendants alike, in contrast to disparate actions, under different laws, that may yield inconsistent results.

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[1] These Comments are submitted by the Office of Attorney General Eliot Spitzer, Jay Himes, Chief, Antitrust Bureau. Please direct questions or comments to Elinor R. Hoffmann, Assistant Attorney General, Antitrust Bureau, 120 Broadway, 26th Fl., New York, NY 10271. 212-416-8269 [redacted] Drafts of these comments have been widely circulated among the Attorneys General and antitrust attorneys within those offices for review and comment, and the authors thank them for their suggestions and insights

[2] These Comments represent New York's elaboration on the Resolution on Principles of Antitrust Enforcement adopted by the National Association of Attorneys General (including New York's Attorney General) in March 2005. There, the Attorneys General emphasized that NAAG "consistently has opposed legislation that weakens antitrust standards for specific industries because there is no evidence that any such exemptions would either promote competition or serve the public interest" and that NAAG would continue to do so. The NAAG Resolution is available at http://www.abanet.org/antitrust/committees/state-antitrust/pdf/naag-sp2005-res.pdf

Further, repeal of the exemption should not require preemption of state regulatory systems, which comprehend far more than antitrust policy, and are consistent with a preference for competition in this critical sector of the nation's economy.

I. RELATIONSHIP BETWEEN EXEMPTIONS AND IMMUNITIES AND THE ANTITRUST LAWS

Antitrust policy and other strong public policies sometimes appear to be inconsistent with one another, but the ultimate goal is the same: to promote our economic, political and social well-being. Congress and the courts have created exemptions and immunities to address unavoidable tensions between the antitrust laws and other significant public policies or regulatory systems. In some cases, the courts shield conduct from antitrust scrutiny in the face of potential conflicts with constitutional mandates.[3] In other cases, Congress has enacted explicit exemptions to further industry-specific goals.[4] And, in still other cases, courts have created implied immunities when faced with a plain repugnancy between the antitrust laws and a pervasive regulatory scheme.[5]

Although complete harmony may not be possible, Congress may adjust the degree of dissonance as contexts change over time. In the case of industry-specific exemptions, reevaluation of purpose and effect may often be appropriate in the light of current market conditions.

A. How Should the Antitrust Laws Be Balanced With Competing Policies?

The courts apply a set of general principles in construing the scope of immunities and exemptions, whether express or implied. Likewise, Congress has taken into account the significance of the antitrust laws to our economy in evaluating the need for statutory exemptions. But beyond generally applicable principles, there is no uniform standard that Congress has applied or should apply in creating an exemption. Each statutory exemption must be customized: narrowly drawn to serve an identified public interest.

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[3] *See, e.g.*, Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers v. Pennington, 381 U.S. 657 (1965) (antitrust immunity for petitioning the government, regardless of anticompetitive motive).

[4] *E.g.*, Capper-Volstead Act, 7 U.S.C. §§ 291-292 (agricultural producers' cooperatives); Agricultural Marketing Agreement Act, 7 U.S.C. §§ 608(b), 608(c) (agricultural marketing agreements sanctioned by Secretary of Agriculture); non-profit agricultural cooperatives' exemption (not for profit agricultural producers' cooperatives); 15 U.S.C. § 17; Fishermen's Collective Marketing Act, 15 U.S.C. §§ 521-522 (fishermen's collective action); McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (business of insurance); Shipping Act, 46 U.S.C. app. § 1701 et seq. (shipping conferences).

[5] *E.g.*, Gordon v. New York Stock Exchange, 422 U.S. 659 (1975) (agreements subject to the jurisdiction of the SEC). See generally, II AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS (FIFTH) at 1238-42 (2002) (hereinafter cited as ALD(5)).

B. General Principles, Market-Specific Inquiries

Judicial opinions emanating from different philosophical wings of the Supreme Court consistently have made clear that fostering competition in the business world is a critical national policy.[6] Exemptions and immunities from the antitrust laws are disfavored,[7] but a narrowly tailored exemption or immunity may be appropriate in order to make a regulatory scheme work, or to achieve an important public policy objective. Antitrust should be fully applicable, though, when those entitled to the benefits of an exemption or immunity exceed the limits of the exemption.

Despite the applicability of these general principles, however, regulatory schemes differ from one another, and public policy goals even more so. It would be unwise to cast all exemptions from one mold, or even to adhere to a single set of evaluative criteria.

A broad, express immunity is appropriate in some situations. In creating a statutory exemption for unilateral labor conduct, for example, Congress wrote a sweeping exemption to protect the formation and operation of labor unions from antitrust attack.[8] Its purpose was to preclude antitrust litigation against nascent labor organizations, because, as Congress declared, "[t]he labor of a human being is not a commodity or article of commerce."[9] The statutory labor exemption was enacted because anything less than a broad immunity from antitrust prosecution might chill cooperation among members of labor organizations, and create imbalances in collective bargaining relationships, interfering with our national labor policy.

In some other contexts, Congress has limited the risk of exposure under the antitrust laws to create incentives to engage in behavior deemed pro-competitive. Under the National Cooperative Research and Production Act (the "Act"), a research joint venture that meets the Act's criteria is subject to antitrust review under the rule of reason, and joint venture defendants may recover attorneys' fees if they substantially prevail in antitrust litigation that is frivolous or unfounded. Further, a joint venture that notifies the enforcement agencies of its formation and activities is protected from treble damage liability under federal and state antitrust law.[10] The Act was amended in 2004 to extend

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[6] "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise." United States v. Topco Associates, Inc., 405 U.S. 596, 610 (1972) (opinion by Justice Marshall), *quoted in* Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko LLP, 540 U.S. 398, 415 (2004) ("The Sherman Act is indeed the 'Magna Carta of free enterprise'") (opinion by Justice Scalia).

[7] Southern Motor Carriers Rate Conf. v. United States, 471 U.S. 48, 67 (1985).

[8] 15 U.S.C. § 17.

[9] The statute continues: "Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." *Id.*

[10] 15 U.S.C. §§ 4301-4306.

its protections to standard-setting organizations.[11] Unlike the broad immunity granted by the statutory labor exemption, the Act simply mitigates risk for joint ventures that are perceived to be pro-competitive and that have been notified to the enforcement agencies; it does not insulate conduct from antitrust scrutiny. The Act, designed to further antitrust policy, would not be an appropriate model for a broad labor exemption; and the statutory labor exemption, designed to further labor policy, would not be an appropriate model for a qualified immunity for research joint ventures.

From time to time, industry groups have persuaded Congress to exempt collective conduct within a sector to circumvent the effects of a recent judicial decision, or to preempt interference with customary industry practices that may not pass antitrust muster.[12] In each instance, the key question that Congress must address is whether the exemption only benefits a special interest group, or whether the benefit to the public is such that it makes sense to tolerate economic favoritism. Further, because these exemptions are market-specific, and markets evolve, sunset provisions are likely to be a good tool for forcing periodic legislative review.

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II. SPECIFIC IMMUNITIES AND EXEMPTIONS: McCARRAN-FERGUSON

The questions set forth in A (1) of the Commission's Request for Comments relate to statutory exemptions. Below, we focus on one of the statutory exemptions that the Commission has chosen as illustrative: the McCarran-Ferguson Act.[13] McCarran-Ferguson is an industry-specific exemption, intended to protect state regulation and taxation of the insurance industry as well as the customary practices of insurers. But insurers have, from time to time, engaged in anticompetitive conduct that does not serve any discernible public interest. A decade after a comprehensive reform of the liability insurance industry flowing from antitrust litigation prosecuted by the states (including New York),[14] the New York State Attorney General is investigating conduct by participants in the insurance sector and has discovered new and pervasive instances of abuse.

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[11] U.S. Dep't of Justice, Antitrust Division, Press Release, *Justice Department Implements the Standards Development Organization Advancement Act of 2004* (June 24, 2004), available at www.usdoj.gov.atr/public/press_releases/2004/204345.htm.

[12] *E.g.*, Medical resident matching program exemption, 15 U.S.C. § 37b (prior to enactment, matching program attacked as price-fixing); Soft Drink Interbrand Competition Act, 15 U.S. C. §§ 3501-3503 (prior to enactment, soft drink industry attacked under antitrust laws for establishing exclusive territories for distributors); Health Care Quality Improvement Act, 42 U.S.C. §§ 11101-11152 (protects those engaged in peer review from antitrust damages provided the peer review meets certain due process criteria; no insulation from injunctive relief).

[13] 15 U.S.C. §§ 1011-1015.

[14] *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993), discussed below.

A. History of the McCarran-Ferguson Exemption

The 19th century witnessed the growth of the insurance business, primarily fire insurance. States reaped solid revenues from taxing fire insurance companies and charging out-of-state insurers fees to do business within state borders. Insurance companies began to pool loss experience data to facilitate the insurance of prudent risks and to guard against insolvencies. States built administrative systems to regulate the industry. After the Civil War, the insurers challenged pervasive state regulation, but the Supreme Court upheld the states' rights to regulate, holding in *Paul v. Virginia*[15] that an insurance contract was not subject to the Commerce Clause. Free from the threat of prosecution under the federal antitrust laws, insurance companies engaged in price-fixing and other anticompetitive conduct.[16] In 1944, the Court effectively overruled *Paul* in *United States v. South-Eastern Underwriters Ass'n*, finding that the business of insurance was indeed interstate commerce, and noting the explosive growth of the marine and fire insurance business nationwide since *Paul* had been decided.[17]

The states and the insurance industry alike were disappointed with the result in *South-Eastern Underwriters*. The states feared that the Court's ruling threatened their power to tax insurance companies, especially out-of-state insurance companies. And the insurers wanted to continue to engage in collective conduct that might be questioned under the federal antitrust law. Congress enacted the McCarran-Ferguson Act as a compromise between those who advocated a blanket exemption for the business of insurance and those who favored no exemption from antitrust scrutiny.[18] McCarran-Ferguson thus preserves the power of the states to regulate and tax insurers, but provides only a limited exemption from the antitrust laws.[19]

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[15] 75 U.S. (8 Wall.) 168 (1969). For a general description of the historical background of the insurance industry, *see* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 545-47 (1944).

[16] Alan M. Anderson, *Insurance and Antitrust Law, The McCarran-Ferguson Act and Beyond*, 25 WM AND MARY L. REV. 81, 83-86 (1983).

[17] United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944). In *South-Eastern Underwriters*, the government had indicted members of an insurance association for violating the Sherman Act by fixing rates and monopolizing insurance in six states.

[18] Alan M. Anderson, *Insurance and Antitrust Law: The McCarran-Ferguson Act and Beyond*, 25 WM. & MARY L. REV. 81, 85-86 (1983).

[19] The McCarran-Ferguson Act provides, in pertinent part:

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
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> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That . . . the Sherman Act, . . . Clayton Act, and . . . Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

B. Scope of the Exemption: How Applied

The McCarran-Ferguson exemption is phrased in the negative: it states that the federal antitrust laws apply to the "business of insurance" to the extent such business is not regulated by state law. Agreements and actions taken to boycott, coerce, and intimidate are not exempt. [20]

1. The Business of Insurance

Consistent with precedent that antitrust exemptions should be narrowly construed, the Supreme Court has narrowly defined the "business of insurance," distinguishing between practices that constitute the business of insurance and entities that engage in the business of insurance. The exemption applies to the former, but not to all of the activities of the latter. A practice that is the business of insurance must have "the effect of transferring or spreading a policyholder's risk; [be] an integral part of the policy relationship between the insurer and the insured; and [be] limited to entities within the insurance industry."[21] Thus, an agreement between an insurance company and pharmacies on reimbursement rates is not the business of insurance, because it meets none of the above criteria;[22] nor is a peer review arrangement between an insurer and a professional association used to determine the reasonableness of practitioners' charges.[23] On the other hand, collaboration among insurers involving the setting of rates has been deemed the business of insurance.[24]

2. Regulated by State Law

When it enacted McCarran-Ferguson, Congress made explicit its intention that the business of insurance would continue to be subject to state regulation and taxation, and that the Sherman Act would only apply "to the extent that [the business of insurance] is not regulated by State law."[25] Subsequent judicial interpretation has established that the degree of state insurance regulation needed to avoid antitrust scrutiny is less than that

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15 U.S.C. § 1012.

[20] 15 U.S.C. § 1013(b) provides that "[n]othing contained in this Act shall render the . . . Sherman Act inapplicable to any agreement to boycott, coerce or intimidate, or act of boycott, coercion or intimidation." *See also* Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).

[21] Union Labor Life Ins Co. v. Pireno, 458 U.S. 119 (1982); Group Life & Health Ins. Co. v. Royal Drug Co, 440 U.S. 205 (1979).

[22] Group Life & Health Ins Co. v. Royal Drug Co, 440 U.S. 205 (1979).

[23] Union Labor Life Ins Co. v. Pireno, 458 U.S. 119 (1982).

[24] ALD5 at 1369-73 and cases cited therein.

[25] 15 U.S.C. § 1012 (b). Congress' declaration of policy stated "that the continued regulation and taxation by the several States of the business of insurance is in the public interest . . . ." 15 U.S.C. § 1011.

needed for state action immunity to apply. A state administrative scheme is sufficient regulation to remove the business of insurance from antitrust scrutiny, and, unlike the more general test for state action immunity, active supervision by the state is not required.[26]

3. Exception for Boycotts, Coercion or Intimidation

That Congress only intended a limited immunity from application of federal antitrust law is reinforced by McCarran-Ferguson's exception for conduct constituting boycotts, coercion or intimidation.[27] In such cases, the antitrust laws apply with full force.[28]

State antitrust enforcers have demonstrated that when they have authority to challenge anticompetitive conduct in the insurance industry, they are able to achieve significant reforms. The case that later became known as *Hartford Fire Insurance Co. v. California* in the Supreme Court[29] began when cities, towns and counties complained to state Attorneys General that they were unable to obtain insurance for pollution and certain other risks. The states brought the matter to the attention of the Antitrust Division of the Department of Justice, which declined to pursue it. The investigation by the state Attorneys General revealed that collusion not only was possible, but it was present. Customers lacked coverage because of collusion among major commercial liability carriers, a trade association that issued standard forms, and reinsurers who refused to reinsure certain risks. After the Supreme Court upheld our claims, the case settled. The states and a group of the defendants used some of the settlement funds to create a state and municipal database of loss experience by risk, enabling state and municipal agencies to negotiate more effectively with insurers. Another result of the settlement was that all parties joined to establish the Public Entity Risk Institute ("PERI"), an organization that serves as an educational, training and general resource for private, public and non-profit entities involved in risk management.[30] The industry trade association also adopted important governance reforms.

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[26] *See, e.g., In re* Workers' Compensation Ins. Antitrust Litig., 867 F.2d 1552, 1557-58 (8th Cir. 1989) (repeal of statute authorizing collective ratemaking did not make the exemption unavailable because the insurance commissioner still had general authority over rating practices); Mackey v. Nationwide Ins. Cos., 724 F.2d 419, 420-21 (4th Cir. 1984) (agent's antitrust challenge to insurer's redlining practices barred by McCarran-Ferguson Act where insurance was subject to state regulation).

[27] 15 U.S.C. §1013(b).

[28] *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993) (collusion by primary and secondary insurers and trade association to preclude other insurers from covering "long-tail" risks constituted boycott, unprotected by McCarran-Ferguson exemption from antitrust scrutiny).

[29] *Id.* The Supreme Court opinion, arising from a dismissal of plaintiffs' case at the trial court level, defined the parameters of the boycott exception to the McCarran Ferguson exemption and held that conduct having a substantial effect on United States commerce is subject to the Sherman Act.

[30] The database eventually was merged into PERI. Additional information about PERI may be found at www.riskinstitute.org

C. How Has the McCarran-Ferguson Act Hindered Antitrust Enforcement?

During the past two years, New York's Attorney General has investigated and challenged practices in the insurance industry under the antitrust laws, as well as under the securities laws. Our investigation has disclosed, among other things, evidence of bid-rigging and customer allocation. Although we have been able to pursue our antitrust claims criminally and civilly under New York's antitrust law, the Donnelly Act, that statute also has an insurance industry-related exemption.[31] Several individuals have pleaded guilty to our charges, and our civil settlement with one of the world's largest insurance brokers, Marsh & McClennan Companies and Marsh Inc. (collectively, "Marsh"), required Marsh to pay $850 million in restitution.

New York's Investigation

On October 14, 2004, the New York Attorney General filed suit against Marsh in state court, alleging that Marsh had steered unsuspecting clients to insurers with which it had lucrative payoff agreements, often called contingent commissions. While Marsh had disclosed the existence of contingent commission agreements since 1998, the true nature of these agreements remained secret. In fact, Marsh moved business to the insurance companies that paid it the highest commission, and, to make the scheme work, Marsh solicited fictitious or cover bids to make the incumbent insurer's rates appear competitive. Three insurance company executives (two from AIG and one from ACE Ltd.) pleaded guilty to criminal charges in connection with the scheme.[32] On November 16, 2004, two employees from Zurich American Insurance Company also pleaded guilty to criminal charges in connection with the bid rigging scheme.[33]

On January 6, 2005, a senior executive of Marsh pleaded guilty to criminal charges and admitted that during a period from 2002 to 2004, he had instructed insurance companies to submit noncompetitive bids for insurance business and conveyed these bids to Marsh clients.[34] On January 30, 2005, the Attorney General and Marsh settled the lawsuit, with Marsh agreeing to pay $850 million in restitution and to institute certain business reforms.[35] Marsh also issued a public apology, stating that "the recent admissions by former employees of Marsh and other companies have made clear that

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[31] N.Y. GEN. BUS. LAW § 340(2) (McKinney 2004).

[32] Complaint and Exhibits, available at http://www.oag.state.ny.us/press/2004/oct/oct14a_04_attach1.pdf and http://www.oag.state.ny.us/press/2004/oct/oct14a_04_attach2.pdf

[33] Press Release, available at http://www.oag.state.ny.us/press/2004/nov/nov16a_04.html

[34] Press Release, available at http:// www.oag.state.ny.us/press/2005/jan/jan06a_05.html

[35] Press Release and Settlement, available at http://www.oag.state.ny.us/press/2005/jan/marshsettlement_pr.pdf and http://www.oag.state.ny.us/press/2005/feb/marsh_settlement.pdf

certain Marsh employees unlawfully deceived their customers."[36] Contemporaneously with the settlement, Marsh released a copy of a memorandum summarizing an internal investigation by Davis Polk & Wardwell that discusses bid rigging within a unit of Marsh.[37]

On March 4, 2005, the Attorney General simultaneously filed a complaint in state court and, together with the Attorneys General of Connecticut and Illinois, announced a settlement agreement with Aon Corporation.[38] In April 2005 the Attorney General announced an agreement with Willis North America, Inc. [39] The Aon and Willis settlements both resolved concerns about fraud and anti-competitive practices.

In short, our investigation of the insurance industry disclosed serious, well-substantiated evidence of bid-rigging that resulted in artificial inflation of commercial insurance rates in the absence of real competition. Our state court suit against Marsh pleaded various state law claims, including ones under New York's Donnelly Act, which, when read together with the New York Insurance Law, does not exempt brokers from the constraints of state antitrust law. The Donnelly Act provides that state antitrust law "shall apply to licensed insurers . . . licensed insurance brokers . . . and other persons and organizations subject to the provisions of the insurance law, to the extent not regulated by provisions of article twenty-three of the insurance law."[40] Article 23 prohibits insurers – but not insurance brokers - from agreeing on rates (although it permits the exchange of statistical information).[41] The same Insurance Law provision authorizes the state to sue price-fixing insurers for injunctive relief and fines (at the maximum rate of $1,000 per occurrence), and permits injured customers to sue individually for treble damages.[42] Thus, New York's antitrust exemption for insurance is in some ways more favorable to insurers than McCarran-Ferguson, and in some ways less so.

Had we prosecuted our case in federal court under federal antitrust law, we likely would have encountered a defense under the McCarran-Ferguson Act, delaying, or maybe precluding, settlement. Indeed, the *Hartford Insurance Co.* case, discussed earlier, involved just such an objection to federal jurisdiction, producing a trip to the United States Supreme Court and years of delay before a settlement was reached. Federal antitrust enforcers and private litigants would face the same obstacle.

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[36] *Id*. (Settlement Agreement, Ex. 1.)

[37] Marsh Press Release and Davis Polk Memorandum from Internal Investigation, available at http://www.mmc.com/news/pressReleases_222.pdf

[38] Press Release, available at http://www.oag.state.ny.us/press/2005/mar/mar04a_05.html.

[39] Press Release, available at http://www.oag.state.ny.us/press/2005/apr/apr08b_05.html

[40] N.Y. GEN. BUS. LAW § 340(2) (McKinney 2004).

[41] N.Y. INS. LAW § 2316((a)(2) (McKinney 2004).

[42] Id., § 2316(b) , § 2320(c) (McKinney 2004).

This is not just a New York State problem: it is a pervasive national problem. As the Supreme Court found in 1944, insurance unquestionably is interstate commerce, and, but for McCarran-Ferguson, would be fully subject to federal antitrust law. Currently, the business of insurance comprises approximately 10% of the national economy in terms of premium dollars.[43] Yet the McCarran-Ferguson exemption precludes federal antitrust enforcement of serious anticompetitive conduct in the insurance sector, and requires state enforcement agencies and private litigants to examine each state's laws to determine whether that state exempts the business of insurance or any part of it from state antitrust scrutiny. Some states follow federal law, others exempt insurance from state antitrust law to the extent it is subject to any other state law, and still others have no exemption.[44] The impact of McCarran-Ferguson is plain. The statute 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.

D. Does the McCarran-Ferguson Exemption Continue to Serve an Important Goal that Outweighs Any Potential Anticompetitive Effect?

The McCarran-Ferguson exemption from the antitrust laws had a general purpose and a specific purpose. The general goal, discussed below, was to reinforce the rights of the states to regulate and tax the business of insurance. The specific goal was to enable insurers to continue to exchange loss data and protect themselves in the commercial marketplace through collaborative activities. We are aware of no good reason, however, to enable insurers to agree on rates for insurance and thereby eliminate price competition between them. Indeed, the policy of New York State, expressed in its Insurance Law, forbids such agreements. If exchange of information, such as loss experience data, promotes prudent business practices, that information may be shared in the same manner as it is shared in many industries. It is not unusual to have unaffiliated third parties collect historical data from market participants, aggregate it, and disseminate the information in an anonymous but useful format.[45] Similarly, standards designed to

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[43] Insurance companies wrote a total of approximately $1.1 trillion in premium in 2003, or approximately 10 cents of every dollar of the $11 trillion Gross Domestic Product. Insurance Information Institute, *citing* U.S. Department of Commerce, Bureau of Economic Analysis, available at http://www.financialservicesfacts.org/financial2/chartindex/chart/ppartid.723300/

[44] *Compare, e.g.,* Cal. Ins. Code § 790 (regulates trade practices in the business of insurance "in accordance with the intent of Congress") *and* 740 Ill. Comp. Stat. § 10/5(5) (2005) (insurance-related activities are exempted from the Illinois Antitrust Act to the extent insurance activities are subject to the Insurance Code or any other law of Illinois) *with* Ohio v. Ohio Medical Indemnity, Inc. 1976 U.S. Dist. LEXIS 13206 at *9 (S. D. Ohio 1976) ("[t]he question really is whether the State of Ohio has preempted the regulation of the business of insurance by its statutory scheme. The Court holds that the State has done so, albeit by a system of non-regulation.")

[45] The Federal Trade Commission and Justice Department have offered guidance on this issue:

> Other things being equal, the sharing of information relating to price, output, costs, or strategic planning is more likely to raise competitive concern than the sharing of information relating to less competitively sensitive variables.

enhance consumer understanding of insurance policies and practices may be jointly established in a manner that does not adversely affect commercial competition among insurers.

E. Would Application of the Federal Antitrust Laws to the Business of Insurance Require Preemption of a State Regulatory Regime?

The more general goal of McCarran-Ferguson relates to preserving state regulation of the business of insurance. New York State's regulatory regime, like that of other states, comprehends far more than antitrust considerations. It governs insurance operations, reserves, notices to policy holders, forms of policies, and other matters affecting the day-to-day business of insurance. Repeal of the McCarran-Ferguson exemption from the federal antitrust laws should not affect these aspects of state regulation. Repeal simply would permit federal enforcement agencies, as well as state enforcement agencies, to police violations of the antitrust laws, without impairing the states' overarching regulatory authority.

III. RECOMMENDATIONS

Application of the general principle that antitrust exemptions are disfavored requires a strong showing that an exemption will benefit the public at large, not simply a special interest group or industry. Congress should examine the following matters in considering an exemption:

- What is the relevant sector of the economy? How does it operate?
- What is the conduct proposed to be exempted from antitrust review?
- What purpose would the exemption serve? Would the exemption enhance consumer welfare?
- Is the exemption strictly tailored to achieve a defined objective?
- Is there any alternative to a statutory exemption?
- Are there inconsistent state or federal regulations applicable to the industry in question?

> Similarly, other things being equal, the sharing of information on current operating and future business plans is more likely to raise concerns than the sharing of historical information. Finally, other things being equal, the sharing of individual company data is more likely to raise concern than the sharing of aggregated data that does not permit recipients to identify individual firm data.

Federal Trade Commission and Department of Justice, Antitrust Division, Antitrust Guidelines for Collaborations Among Competitors § 3.31(b) (April 7, 2000).

- If yes, should the legislation include a savings clause?

- Would a sunset provision be appropriate?

In a sunset review, Congress should consider the questions set forth above, focusing on whether the purpose for the exemption still exists, whether the exemption has achieved the goals it was designed to reach, and whether the exemption has been abused or expanded in a way that unreasonably restrains competition.

Application of the foregoing inquiries to McCarran-Ferguson supports repeal of the exemption. An important original purpose of the exemption was limited: it was to protect an exchange of information regarding loss experience and other important industry data – exchanges that should still be possible, post-repeal, to the extent they do not restrain competition. Congress should examine whether a specific exemption is necessary, or whether insurance companies should be subject to the same collective exchange of information standards that have developed through case law and that are applicable to other industries.

When considering the advisability of repealing the McCarran-Ferguson exemption, Congress also should pay careful attention to the particular requirements of the insurance industry. It may be necessary, for example, to include targeted savings clauses in the legislation to enable insurers to participate in joint underwriting agreements and ancillary activities in a manner that does not restrain competition, and to cooperate in the development of standards that would enhance consumer understanding of their insurance policies, such as standards for the use of plain language and simplified forms for insurance policies. Congress should consider savings clauses for other cooperative activities by insurers provided they would not unreasonably restrain competition, and if necessary be subject to specific authorization and active supervision by the state regulatory authorities.[46]

Finally, because state regulation of insurance is complex and reaches far beyond the concerns of antitrust law, state regulation should not be pre-empted. By the same token, state regulation should not exempt insurers from the federal antitrust laws. Rather, the state action doctrine, as it is applied generally, should be adequate to deal with the insurance industry as well.

Experience with McCarran-Ferguson indicates that there is a need to reexamine industry-specific exemptions periodically. Markets change, in many cases eliminating the need for broad exemptions. McCarran-Ferguson is one example of an exemption that has no apparent business justification and impedes free and open competition in a major sector of the U.S. economy.

[46] Many of the recommendations set forth in these Comments are similar to those adopted by the American Bar Association House of Delegates in 1989. *See* AMERICAN BAR ASSOCIATION, *Report of the Commission to Improve the Liability Insurance System (Report No. 107)* (February 6-7, 1989).