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The Open Markets Institute welcomes the opportunity to participate in the Justice Department's roundtable discussion about antitrust exemptions and immunities.

America's liberty and democracy depend on competition. Open and competitive markets promote innovation, resiliency, and prosperity. For this reason, we generally view exemptions and immunities from the antitrust laws with skepticism. But we believe that, in select and narrow circumstances, exemptions and immunities can play an important role in promoting open markets and fair competition, and in protecting the authority of states and municipalities to structure local markets.

Distinguishing between instances where exemptions and immunities are wrongfully serving powerful private entities and instances where they are rightfully promoting greater public ends is key. A failure by courts to view exemptions and immunities as part of a larger anti-monopoly framework has resulted in misguided judicial opinions, effectively shielding swaths of economic activity from robust application of the antitrust laws. This lack of a coherent vision has also resulted in perverse enforcement and policy actions by the antitrust agencies, with the Federal Trade Commission devoting resources to targeting workers and professionals that lack any significant economic power while leaving uninspected dominant firms with growing market power and increasing control over key arteries of American commerce.[1]

Below we offer our views on DOJ's specific prompts. We look forward to continuing to engage with the Antitrust Division on these important topics.

1. **The impact of express statutory exemptions and implied immunities from the antitrust laws. We will explore how segments of the economy with express exemptions may be unique, review justifications for those exemptions, and determine whether they are, and continue to be, warranted. We will also evaluate whether such exemptions harm consumer welfare.**

The effects of express statutory exemptions must be assessed on a case-by-case basis. Our comments will focus on two categories: (i) exemptions that enable powerful industry players to engage in anti-competitive practices that enrich their interests at the public's expense, and (2) exemptions that enable players with no market power to engage in collective activity as a way of creating countervailing power and of enabling forms of organization that Congress has sought to protect.

The first set of exemptions are unjustified and should be repealed. The clearest example is the McCarran-Ferguson Act.[2] Passed by Congress following intense lobbying campaigns by powerful industry players, the Act immunizes state-regulated "business of insurance" from federal antitrust scrutiny. This exemption has proved especially problematic in the health insurance industry, where 69 percent of metropolitan-area markets are "highly concentrated."[3] Shielded from antitrust scrutiny, health insurers have engaged in anti-competitive practices, such as conscious parallelism, price-fixing, and the fixing of coverage,[4] contributing to skyrocketing costs for the public. Although insurers claim that the

exemption is necessary to allow them to collect, aggregate, and share data on losses so that they can more accurately assess risk and set their rates accordingly, repealing McCarran-Ferguson Act would not jeopardize publicly beneficial forms of information-sharing. As the Antitrust Modernization Commission observed, this practice would be assessed by courts and enforcers under a rule-of-reason analysis, which would consider any pro-competitive effects.[5] The 70-year immunity enjoyed by the oligopolistic industry should be repealed.

The second set of statutory exemptions and immunities carry significant public benefits and should be maintained and strengthened. These include the Capper-Volstead Act and Section 6 of the Clayton Act.[6] Unfortunately, changes in underlying market realities have meant that these exemptions are failing to fully achieve their original purpose. Policymakers and legislators should consider how to realign these exemptions with their original purposes.

In 1922 Congress passed the Capper-Volstead Act to empower farmers to organize agriculture cooperatives. Efforts to organize cooperatives took off in the late 1800s, as farmers confronted the rise of local railroad monopolies and growing consolidation among food processors. These middlemen often abused their gatekeeper power and their buyer power, squeezing farmers and jeopardizing the country's food supply.[7] By immunizing certain activities undertaken by farmers collectively, Capper-Volstead enabled farmers to bargain collectively with food processors and retailers to get a fair price. In short, it sought to redress the effects of monopsony power. As a House Report stated, "[i]nstead of granting a class privilege, [the Act] aims to equalize existing privileges by changing the law applicable to the ordinary business corporation so the farmers can take advantage of it."[8] For decades, the law helped level the playing field between farmers and middlemen, and ultimately helped keep wealth in the community rather than transferred to absentee owners afar.

Today, however, that co-op landscape looks very different. In recent decades, the cooperative movement has been co-opted by dominant companies that prey off the very small-scale producers that they're meant to protect.[9] For example, Dairy Farmers of America—the largest dairy co-op in the country—has morphed into an agribusiness giant in its own right, controlling a third of the nation's dairy supply. DFA was created through the merger of four regional dairy co-ops, and has vertically integrated across the supply chain, engaging in the business of production, processing distribution, trucking, and marketing.[10] Although DFA claims this level of consolidation was necessary to compete with massive industry players, in practice it has created a conflict of interest whereby the co-op cannot be trusted to bargain faithfully on behalf of its members.[11] As farmers alleged in a lawsuit, exclusive agreements between DFA and Dean's Foods enriched top executives at the organizations but suppressed prices for raw milk, sending farmer incomes plummeting.[12] And amid significant regional concentration, farmers face few options for where to sell their milk. As a longtime reporter for a dairy industry publication stated, "The management of DFA is consistently working against the rank-and-file members."[13] While Capper-Volstead does not immunize co-ops engaging in predatory conduct in violation of Section 2 of the Sherman Act, no public enforcement action has targeted DFA's anti-competitive practices, despite a 26-month investigation that reportedly recommended enforcement action.[14] As a result, DFA continues to enjoy antitrust immunity as a co-op, even as it no longer fully serves the function of a co-op.

Capper-Volstead recognized the importance of guaranteeing farmers countervailing power. It should be reviewed to ensure that the immunity that sought to *protect* farmers against buyer power is not being exploited to subject farmers to monopsony. It's critical that the exemption be limited to actual farmers, not to giant agribusinesses. We have been disappointed by DOJ's decision in the past to devote resources to targeting bona fide cooperatives for output restriction while failing to take action against anti-competitive conduct by massively consolidated and integrated firms.[15] While DOJ's joint agriculture

workshops with USDA in 2010 were a step in the right direction, its decision not to act following this information-gathering exercise was a failure.[16]

Another statutory exemption that must be strengthened is Section 6 of the Clayton Act. While legislative history shows that the Sherman Act was passed in order to police aggregations of capital, not labor, the antitrust law was initially used against workers. To rectify this perverted use of the law, Congress enacted Section 6 of the Clayton Act as an express exemption for labor, stating "labor of a human being is not a commodity or an article of commerce."[17] The statute exempted all union activity, including secondary actions, from the purview of the antitrust laws. The Norris-La Guardia Act, passed by Congress during the New Deal, explicitly protected collective action and organizing, bolstering the Section 6 exemption.[18]

Today, however, federal enforcers and courts are once against harnessing antitrust law to target workers.[19] While courts recognize the Section 6 exemption for organized labor, this provision protects only workers classified as employees. Given that employers routinely misclassify workers as independent contractors across the political economy—one report estimated that 30 percent of workers are misclassified[20]—the Clayton Act exemption fails to reach a sizable segment of the population it was meant to protect, leaving them exposed to antitrust investigations and lawsuits. For example, the FTC has targeted independent drivers' associations representing low-income workers and physician groups bargaining with oligopolistic health insurers, as well as electricians and public defenders.[21] Recently the FTC has made actions against professionals and independent contractors a priority.[22]

To be sure, professional licensing groups can engage in cartel-like behavior that enriches private interests at the public's expense. But these instances constitute a small sliver of the anti-competitive activity in our economy. Devoting agency resources to targeting independent contractors—while neglecting to address monopolization and abuse of oligopoly power, and overseeing highly permissive merger enforcement—signals misuse of public resources and a misunderstanding of the purpose of antitrust. Expanding the Section 6 exemption to apply to independent contractors and individual professionals, in addition to organized workers, would help restore the ability of laborers to collectively organize and refocus the antitrust agencies on more appropriate targets.

2. How implied immunities and exemptions have affected antitrust enforcement. We will examine the appropriate roles of Congress and the courts in creating immunities and exemptions from antitrust laws. We will discuss whether the "implied repeal" doctrine in Credit Suisse v. Billing, 551 U.S. 264 (2007), helps or hampers competition.

Our view is that immunities and exemptions should be created by Congress. Although certain judge-made immunities and exemptions have proven useful in the past, courts in recent decades have expanded these doctrines significantly, delivering doctrinal formulations that are largely untethered from the doctrine's original purpose. In both *Trinko* and *Credit Suisse*, the Court limited the courts' traditional role in antitrust enforcement in the context of regulated industries.[23] We believe this is misguided and that antitrust enforcers have a critical role to play in industries that are separately overseen by regulatory agencies. Specifically, it is short-sighted to view the existence of a regulatory structure alone as presenting a conflict with the antitrust laws; the central question is whether Congress created the regulatory system in order to displace competition or to promote it. In *Trinko*, for example, the Court assumed that—when a regulatory structure exists—antitrust enforcement has a limited role to play. But this analysis ignored the fact that the 1996 Telecommunications Act and the attendant regulatory structure

seek to *promote* competition in the telecommunications sector, such that antitrust enforcement would complement the goals of the regulatory regime rather than override or undermine them.

Primary jurisdiction doctrine and filed-rate (or Keogh) doctrine also warrant review. Originally, primary jurisdiction did not serve as an implied immunity; it addressed whether a court should suspend or defer a question until reviewed by a regulator that oversaw the underlying activity. This deference was viewed as beneficial when (1) the regulator had expertise necessary to resolve certain complex factual inquiries raised by the case, and (2) interpreting the regulatory statute involved a policy judgment within the purview of the regulator.[24] Today, however, courts tend to use primary jurisdiction as a basis for concluding that certain conduct is exempt from antitrust laws. This is dangerous and risks shielding from effective antitrust review a host of industries that Congress sought to govern through competition. Primary jurisdiction should be applied only where resolving the antitrust issue depends on an agency determination, *or* where agency action would significantly inform and further the court's antitrust analysis, and it should not be applied as an implied immunity.

Courts have also unjustifiably expanded the filed-rate doctrine beyond its intended purposes.[25] The doctrine emerged in the context of a plaintiff seeking to recover treble damages from rail companies acting in concern to set prices.[26] The Court ruled that antitrust damages were not available to the plaintiff, because (i) the rates became effective only if approved by the Interstate Commerce Commission, and (ii) the Interstate Commerce Act provided a separate means for obtaining a remedy for the "exaction of any illegal rate." Since then, courts have expanded the filed-rate doctrine to contexts where there is no filed rate—namely, where rates are set by firms without agency approval ex ante, only agency authority to review ex post. Since treble damages help deter abuse of market power, denying antitrust damages in industries where firms possess markets power and are subject to limited agency oversight is a problem.

3. **Whether the state action doctrine in its current form strikes the appropriate balance between state sovereignty and the federal policy favoring competition in interstate commerce. We will assess policies and regulations states are adopting that may be considered exempt from antitrust scrutiny, and consider the resultant harm to competition and consumers. We will also query whether the dormant Commerce Clause can or should provide a meaningful limit on states' ability to reduce competition involving interstate commerce.**

We think the state action immunity doctrine protects an important right of states to structure local markets and to promote policy goals that may conflict with federal antitrust law. We recognize that state action immunity may be misused or abused, but we think the source of this threat is regulatory capture, not state autonomy. For this reason, we think efforts to prevent abuse of state action immunity should target capture by special interests rather than limit state authority to promote non-competition policy goals.

We think the state action doctrine as articulated by the Supreme Court in *North Caroline State Board of Dental Examiners v. Federal Trade Commission* strikes the appropriate balance between state sovereignty and federal antitrust.[27] Specifically, we think the Court was right to focus not on an entity's formal relation with the government but on its incentive to self-deal or otherwise serve private interests. While greater clarity on what constitutes adequate "active supervision" by the state would be helpful, we strongly reject calls to eliminate or soften this requirement.

Finally, we are skeptical of attempts to use the dormant Commerce Clause to sidestep state action. States have legitimate public policy goals that may conflict with federal antitrust law. We should encourage these laboratories of democracy, not undermine them.

[1] For a deeper discussion of this trend, *see* Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages* (2018) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3046302).
[2] McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (2006).
[3] American Medical Association, *Competition in Health Insurance* (2017), https://www.ama-assn.org/about/competition-health-insurance-research.
[4] Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 219d, at 31 (3d ed. 2006).
[5] Antitrust Modernization Comm'n, Report and Recommendations 351 (2007) (footnotes omitted), available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.
[6] 7 U.S.C. §§ 291-292 (2012); Act of Oct. 15, 1914, ch. 323, § 6, 38 Stat. 730, 731 (codified as amended at 15 U.S.C. § 17 (2012)).
[7] 62 CONG. REC. 2059 (1922).
[8] H.R. REP. NO. 67-24 at 2 (1921)
[9] Leah Douglas, *How Rural America Got Milked*, WASH. MONTHLY (Jan/Feb/Mar. 2018).
[10] *Id*. *See also* Andrew Martin, *Yes, It's a Cooperative. But for Whom?*, N.Y. TIMES (May 18, 2008) ("To expand the cooperative, Mr. Hanman used a strategy that gave dairy farmers little choice but to join and, in the process, helped push competing cooperatives out of business. In some instances, they merged with the Dairy Farmers of America.").
[11] *Id*.
[12] Andrew Martin, *In Dairy Industry Consolidation, Lush Paydays*, N.Y. TIMES (Oct. 27, 2012).
[13] Douglas, *supra* note 9.
[14] Martin, *supra* note 12.
[15] *See, e.g.*, Complaint, U.S. v. Eastern Mushroom Marketing Cooperative, Inc., 2005 WL 3412413 (E.D. Pa. 2005) (No. 2:04-CV-5829).
[16] The stories that farmers and producers shared with DOJ and USDA at the public workshops—often at the risk of retaliation by meat processors—portrayed highly concentrated local markets where processors exercised significant monopsony power. *See* U.S. Dep't of Justice, Public Workshops: Agriculture and Antitrust Enforcement Issues in Our 21st Century Economy (updated Apr. 26, 2017), https://www.justice.gov/atr/events/public-workshops-agriculture-and-antitrust-enforcement-issues-our-21st-century-economy-10. For additional discussion of the industry practices that farmers endure and the retaliation they faced for taking part in the workshops, *see* Lina Khan, *Obama's Game of Chicken*, WASH. MONTHLY (Nov./Dec. 2012); Christopher Leonard, THE MEAT RACKET (2014).
[17] Act of Oct. 15, 1914, ch. 323, § 6, 38 Stat. 730, 731 (codified as amended at 15 U.S.C. § 17 (2012)).
[18] Act of Mar. 23, 1932, ch. 90, 47 Stat. 70 (codified as amended at 29 U.S.C. §§ 101–115 (2012)).
[19] Vaheesan, *supra* note 1. *See also* Warren S. Grimes, *The Sherman Act's Unintended Bias Against Lilliputians: Small Players' Collective Action as a Counter to Relational Market Power*, 69 ANTITRUST L.J. 195 (2001); Sanjuka M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969 (2016); Sandeep Vaheesan & Frank A. Pasquale, *The Politics of Professionalism: Reappraising Occupational Licensure and Competition Policy*, ANN. REV. OF L. & SOC. SCI. (forthcoming 2018); Marshall Steinbaum, *The Feds Side Against Alt-Labor*, ROOSEVELT INST. BLOG (Nov. 11, 2017).
[20] Danny Vinick, *The Real Future of Work*, POLITICO MAG. (Jan./Feb. 2018).
[21] Paul, *supra* note 19, at 980-84.
[22] Jared Meyer, *FTC Sets Its Sights on Occupational Licensing*, FORBES (Apr. 17, 2017).
[23] *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004); *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264 (2007).
[24] *See, e.g.*, Alpharma, Inc. v. Pennfield Oil Co., 411 F.3d 934, 938 (8th Cir. 2005).
[25] For an excellent discussion of this trend, *see* Darren Bush, *Mission Creep: Antitrust Exemptions and Immunities*, 2006 UTAH L. REV. 761, 792-801 (2006).
[26] Keogh v. Chicago & Northwest Railway Co., 260 U.S. 156 (1922).
[27] N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101 (2015).