ABA SECTION OF ANTITRUST LAW
COMMENTS ON
THE COMPREHENSIVE ALCOHOL REGULATORY EFFECTIVENESS ACT

The Section of Antitrust Law of the American Bar Association (the "Antitrust Section" or "Section") is pleased to submit these views regarding the Comprehensive Alcohol Regulatory Effectiveness Act of 2010, H.R. 5034 (the "CARE Act" or "Act").

The views expressed in these comments have been approved by the Antitrust Section's Council. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

SUMMARY

The Antitrust Section respectfully submits that the CARE Act should not be enacted. The Section believes that any decision to allow an exemption or immunity from the antitrust laws should be made reluctantly and only after thorough consideration of each particular situation. The inquiry with respect to exemptions and immunities should focus narrowly on the fundamental principles and objectives of antitrust law, namely promoting competition and consumer welfare. Exemptions and immunities should be recognized as decisions to sacrifice competition and consumer welfare, and should accordingly be authorized only when some countervailing value—such as free speech or national security—significantly outweighs the general presumption in favor of competitive markets.

The Antitrust Section frequently has noted its opposition to industry-specific exemptions and immunities from the antitrust laws based on claims that such protection is necessary given unique market conditions, believing that the antitrust laws are sufficiently flexible to account for particular market circumstances. The Section's general opposition to exemptions and immunities was endorsed by the 2007 report of the Congressionally-mandated Antitrust Modernization Commission ("AMC"), which concluded that "statutory immunities from the antitrust laws should be disfavored" and that "[t]hey should be granted rarely, and only where, and for so long as . . . is necessary to satisfy a specific societal goal that trumps the benefit of a free market to consumers and the U.S. economy in general."[1]

The Section recommends that exemption and immunity decisions by Congress be based on three basic principles. First, Congress should grant antitrust exemptions and immunities rarely and only after rigorous consideration of the impact of the

[1] ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 350, Recommendation 57 (2007) (hereinafter AMC REPORT).

proposed exemption or immunity on consumer welfare. Second, Congress should only grant those exemptions and immunities that are drafted narrowly, so that competition is reduced only to the minimum extent necessary to achieve the intended goal. Third, Congress should enact antitrust exemptions and immunities only when the proposed exemption or immunity achieves a Congressional goal that significantly outweighs the aims of the antitrust laws in a particular situation. Finally, the Section proposes that no exemption or immunity should be granted or renewed unless it contains a sunset provision. The Section believes that the CARE Act does not meet these requirements.

Given the significant hurdles that the CARE Act would impose on federal preemption challenges to state alcohol laws, the Section believes that the Act would effectively immunize anticompetitive trade practices in the alcohol industry from scrutiny under federal antitrust law. The Twenty-first Amendment already provides significant protection for state sovereignty and the right to regulate. In addition, federal challenges to state alcohol laws must overcome the protections offered to such laws by the state action doctrine. Unless Congress determines that the social goals served by the Act significantly outweigh the goals served by competitive markets, Congress should not enact the proposed legislation. The Section is not aware of sufficient evidence to support the conclusion that the social goals supposedly promoted by the CARE Act justify the suspension of competition. The Section therefore believes that passage of the CARE Act would be, on net, harmful to consumers. For this reason, the Section urges Congress not to enact the legislation.

COMMENTS

I. THE CARE ACT WOULD EFFECTIVELY ENACT AN ANTITRUST EXEMPTION FOR THE ALCOHOL INDUSTRY.

The CARE Act would amend two federal statutes addressing the regulation of alcohol by the states: the so-called Webb-Kenyon[2] and Wilson Acts.[3] The stated purpose of the CARE Act is to "(1) recognize that alcohol is different from other consumer products and that it should be regulated effectively by the States according to the laws thereof; and (2) reaffirm and protect the primary authority of States to regulate alcoholic beverages."[4] The primary objective of the CARE Act appears to be to clarify Congressional intent regarding the extent to which state alcohol laws can be challenged under the Commerce Clause of the U.S. Constitution.[5]

[2] 27 U.S.C. §§ 122 *et seq*.

[3] 27 U.S.C. § 121.

[4] H.R. 5034, 111th Cong. § 2 (2010).

[5] The Section takes no position regarding the various Commerce Clause issues raised by the proposed bill.

The CARE Act would accord a presumption of validity to, and impose a heightened burden to successfully challenge, any state law that regulates alcohol. Whether challenging such law under the Commerce Clause or federal preemption doctrine, the Act provides that the party challenging a state law must demonstrate "by clear and convincing evidence that the law has no effect on the promotion of temperance, the establishment or maintenance of orderly alcoholic beverage markets, the collection of alcoholic beverage taxes, the structure of the state alcoholic beverage distribution system, or the restriction of access to alcoholic beverages by those under the legal drinking age."[6]

The CARE Act as introduced does not expressly exempt state alcohol laws from the federal antitrust laws, as, the Section understands, a draft of the proposed legislation did. Nonetheless, the CARE Act effectively would provide for a reverse preemption of the Sherman Act and other federal antitrust laws in the area of state alcohol regulation. More specifically, even if a court were to find that a state alcohol law is in direct conflict with the Sherman Act, preemption of the state law would be found only if the plaintiff showed by clear and convincing evidence that the state law at issue has no effect on any of the several enumerated areas—such as promotion of temperance and collection of taxes—which have been historically identified as concerns underlying state alcohol laws. Given the significant hurdles that the Act would impose on any preemption challenge to state alcohol laws, the Section is concerned that the Act would effectively immunize anticompetitive trade practices in the alcohol industry from scrutiny under federal antitrust law.

Just as the Commerce Clause has been applied to state alcohol regulations,[7] so has federal antitrust law. State alcohol laws have been invalidated under the Sherman Act— notwithstanding the Twenty-First Amendment's grant of power to the states to regulate intra-state sales of alcohol. For example, in *324 Liquor Corp. v. Duffy*,[8] the Supreme Court invalidated a New York statute that required a minimum markup of alcohol at the retail level, while in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*,[9] the Court invalidated California's wine-pricing system, which required producers to file "fair trade contracts" or post resale price schedules. To the extent that the Act would effect an implied repeal of federal antitrust law in the area of state alcohol regulation, the Act may serve to exempt the alcohol industry and its various participants from any federal antitrust challenge.

II. THE ANTITRUST SECTION DISCOURAGES STATUTORY EXEMPTIONS AND IMMUNITIES.

[6] H.R. 5034 § 3(c)(3).

[7] *See, e.g.*, *Granholm v. Heald*, 544 U.S. 460 (2005) (invalidating discriminatory wine direct-shipping statutes in Michigan and New York).

[8] 479 U.S. 335 (1987).

[9] 445 U.S. 97 (1980).

The Antitrust Section believes that the economy is best served by promoting competition in the marketplace, and statutory exemptions and immunities from the antitrust laws should be strongly disfavored. The Antitrust Section frequently has noted its opposition to antitrust exemptions and immunities, whether created judicially or by statute, finding them rarely to be justified. The Section expressed this view in 2005 comments to the Federal Trade Commission:

> The Section has long and consistently resisted the creation or expansion of exemptions that shield whole areas of market activity or sectors of commerce from rigorous antitrust enforcement. The antitrust laws are designed to provide general standards of conduct for the operation of our free enterprise system, and in the Section's considered view, special exemptions from these standards rarely are justified. Whatever their expressed purposes, antitrust exemptions often impair consumer welfare.[10]

The Section also expressed its position on exemptions and immunities to the Antitrust Modernization Commission, a blue-ribbon Commission appointed in 2002 by the President and majority and minority leadership of the House of Representatives and the Senate. The AMC issued its report in 2007 and made recommendations concerning antitrust exemptions and immunities that are aligned with the Section's positions discussed in these comments. As the AMC commented in its report:

> Statutory immunities from the antitrust laws should be disfavored. They should be granted rarely, and only where, and for so long as, a clear case has been made that the conduct in question would subject the actors to antitrust liability *and* is necessary to satisfy a specific societal goal that trumps the benefit of a free market to consumers and the U.S. economy in general.[11]

The common law process through which the antitrust laws promote both allocative efficiency and consumer welfare is flexible and evolutionary. The antitrust

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[10] Comments of ABA Section of Antitrust Law on FTC Report on the State Action Doctrine, at 2-3 (May 6, 2005). The Antitrust Section recently provided comments and testimony to Congress in support of the repeal of antitrust exemptions in the insurance and railroad industries. The Antitrust Section also has supported repeal of antitrust exemptions in testimony before the Antitrust Modernization Commission, and has opposed other exemptions. *See* ABA Antitrust Section Testimony on The Health Insurance Industry Antitrust Enforcement Act of 2009 and the Railroad Antitrust Enforcement Act of 2009; ABA Antitrust Section Comments to the Antitrust Modernization Commission on General Immunities and Exemptions, the Shipping Act Antitrust Exemption, and the McCarran-Ferguson Act; Reports of the ABA Antitrust Section on the Free Market Antitrust Immunity Reform Act of 1999, the Quality Health-Care Coalition Act of 1999, the Antitrust Health Care Advancement Act of 1997, and the Television Improvement Act of 1977 (all available at http://www.abanet.org/antitrust/at-comments/comments.shtml).

[11] AMC REPORT at 350, Recommendation 57.

laws adapt over time to various markets and industries, to changing technologies and circumstances, and to the development and growth of legal and economic theory.[12] Accordingly, claims that a proposed exemption or immunity is necessary for competition to flourish or because competition is itself harmful or undesirable, or does not work in some particular industry, should be rejected. Over a century of development has shown that the antitrust laws are the best guardian of competition, and are capable of growing to accommodate the unique characteristics of particular industries.

The Section believes that certain exemptions and immunities from the antitrust laws have survived as long as they have because of the asymmetry of costs and benefits created by such exemptions and immunities.[13] The benefits associated with statutory antitrust exemptions and immunities typically apply to small, concentrated interest groups. Industries or groups of firms covered by a statutory exemption or immunity receive substantial benefits, and the benefits tend to accrue proportionally to all competitors within the favored industry or interest group.

Unlike the benefits, however, the costs associated with statutory exemptions and immunities are diffuse. Consumer welfare costs imposed by antitrust exemptions and immunities are usually passed through to individual consumers in the form of higher prices, lower output, reduced quality, or reduced innovation. These costs tend to be spread among vast numbers of consumers. Therefore, in most cases no single consumer or group of consumers is sufficiently adversely affected to initiate effective opposition to the exemption or immunity.

The Section believes that these risks are raised by the CARE Act. It appears that there could be a group of industry participants who would enjoy the primary benefits from this legislation. The cost of this legislation, however, will be borne by consumers in the form of higher prices.

III. THE STANDARD FOR ASSESSING EXEMPTIONS AND IMMUNITIES FROM THE ANTITRUST LAWS

Exemption and immunity decisions by Congress should be based on a rigorous and consistent application of three basic principles. First, Congress should grant antitrust exemptions and immunities rarely and only after rigorous consideration of the impact of the proposed exemption or immunity on consumer welfare. The

[12] *See, e.g., Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 687-88 (1978) ("Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition."); AMC REPORT at 38 (listing as its first recommendation the following: "There is no need to revise the antitrust laws to apply different rules to industries in which innovation, intellectual property, and technological change are central features.").

[13] *See* Comments of the ABA Section of Antitrust Law on the Railroad Antitrust Enforcement Act, at 3 (Dec. 10, 2008).

operating presumption Congress should start with is that the exemption or immunity will harm competition and consumer welfare,[14] and the claimed non-competition benefits of the proposal should be evaluated against that injury. Congress should not countenance any claims that exemptions and immunities will benefit consumer welfare in an economic sense. That inquiry and analysis are already part of the antitrust laws and within the expertise of courts applying those laws. The claimed benefits that Congress should weigh against an exemption's presumptive anticompetitive effects are the purported benefits that lie outside of the scope of consumer welfare.

Second, Congress should only grant those exemptions and immunities that are drafted narrowly, so that competition is reduced only to the minimum extent necessary to achieve the intended goal. This is consistent with the presumption that exemptions and immunities are disfavored and must be narrowly construed.[15] To further the requirement that new exemptions and immunities be drafted narrowly, Congress should also direct courts to construe them strictly and against those claiming their protection. This is consistent with the current case law governing exemptions and immunities generally.[16] Though stringent, these safeguards are necessary to preserve what the Supreme Court aptly described in *Midcal* as "the national policy in favor of competition."[17]

In addition, if Congress determines that an exemption or immunity is appropriate, it should, where feasible, prefer exemptions and immunities that restrict antitrust remedies only, rather than ones that entirely shield conduct from antitrust scrutiny. For example, exemptions that merely eliminate the exempt party's exposure to treble damages are likely to provide relief where needed without unduly limiting the ability of antitrust laws to deter harmful behavior. The National Cooperative Research Act/National Cooperative Research and Production Act[18] and the Standards

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[14] *See Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695 ("The Sherman Act reflects a legislative judgment that, ultimately, competition will produce not only lower prices but also better goods and services.").

[15] *See Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 67-68 (1985) (Stevens, J., dissenting) (citing *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 348 (1963)) ("[A]ny exemptions from the antitrust laws are to be strictly construed. These 'canon[s] of construction . . . reflec[t] the felt indispensable role of antitrust policy in the maintenance of a free economy.'"); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979) ("It is well settled that exemptions from the antitrust laws are to be narrowly construed.").

[16] *See, e.g., United States v. Nat'l Ass'n of Sec. Dealers*, 422 U.S. 694 (1975) (finding no implied repeal of the Securities and Exchange Act); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) (finding no implied repeal of the Federal Power Act); *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir. 1983) (finding no implied repeal of the Federal Communications Act); *see also* AMC REPORT at 356, Recommendation 61 ("Courts should construe all immunities and exemptions from the antitrust laws narrowly.").

[17] *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980).

[18] 15 U.S.C. §§ 4301-4306.

Development Organization Act of 2004[19] provide useful examples of this. Exemptions that eliminate all antitrust damages but leave intact the ability of private parties or the antitrust enforcement agencies to seek injunctive relief are less desirable, but are still superior to complete immunity, as are exemptions that prohibit private causes of action but permit the antitrust agencies to seek prospective relief.[20] Only in truly extraordinary circumstances should Congress entirely suspend antitrust enforcement by affording complete immunity.

Third, Congress should enact antitrust exemptions and immunities only in the presumably rare instances in which it is determined—based on a fully developed record—that an important value unrelated to competition, such as free speech or national security, would be impeded by competitive forces in the marketplace.[21] Even so, an exemption or immunity should only be allowed if rigorous analysis demonstrates that the benefits of advancing that value significantly outweigh the harm to competition. In addition, as we noted above, the judgment that an exemption or immunity is beneficial for the simple fact that it reduces competition in a particular market or protects a particular competitor is not sufficient, in the Section's view, to justify it.

Further, the Section proposes that no exemption or immunity should be granted or renewed unless it contains a sunset provision.[22] While conditions may continue to justify particular exemptions and immunities, inserting sunset clauses in exemptions and immunities is consistent with economic dynamism. Policies favoring exemptions and immunities for particular industries may quickly become outdated. Sunset provisions also promote Congressional oversight of agency action, a particularly useful safeguard in cases where an exemption's or immunity's implementation is delegated to industry-specific agencies that may be susceptible to agency capture. The sunset termination date sparks effective legislative oversight and encourages agency attention. Further, a sunset provision "allows Congress to evaluate whether [the exemption or immunity] is serving its purpose and whether

[19] 15 U.S.C. § 4301.

[20] Indeed, the Federal Trade Commission's ability to seek injunctive relief without creating subsequent private antitrust liability for violators was designed with just this in mind. *See* Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission, April 7, 1989, at 17.

[21] The state action doctrine, which is based on the values of federalism and state sovereignty, and the *Noerr-Pennington* doctrine, developed to protect free speech, epitomize judicially-created exemptions founded upon important interests unrelated to competition.

[22] Likewise, any exemptions or immunities that are repealed should not expose the previously exempted or immunized parties to retroactive antitrust liability or penalties. Regardless of whether an exemption or immunity merits continuation, it would be unfair to subject parties that have relied upon the presence of an exemption or immunity to liability or penalties because that exemption or immunity has been taken off the books.

there is a continuing need" for it.[23] Subsequent consideration of whether the exemption or immunity remains justified requires a detailed accounting that will compare the results with the enumerated justifications in the original enactment.

In addition to these principles, the Section suggests two procedural safeguards to assist Congress in considering proposed antitrust exemptions and immunities. First, to enable Congress to conduct a thorough balancing of the values (competition versus other political or social values or public interest objectives), proponents of an antitrust exemption or immunity should be required to submit evidence and analysis to demonstrate (i) that the benefits of competition are in fact less important than the particular value promoted by the exemption or immunity, and (ii) that the proposed exemption or immunity is the least restrictive means to achieve that important value. Proponents of exemptions and immunities should shoulder a heavy burden in convincing Congress to overrule the "national policy in favor of competition." This allocation of burden is consistent with the antitrust laws' role as the "Magna Carta of free enterprise," ensures that competition is not swallowed in an avalanche of exemptions, and is consistent with the judicial treatment of exemptions in litigation.[24]

Second, Congress should not grant any exemption or immunity without consultation with and evaluation by the Federal Trade Commission and the Department of Justice. These enforcement agencies possess the institutional expertise to assess the economic impacts of exemptions and immunities from the antitrust laws, and are likely to provide valuable insight to the analysis. The agencies' review of the costs and benefits associated with proposed exemptions would provide valuable information for Congress.

IV. APPLYING THE SECTION'S RECOMMENDED STANDARDS TO THE CARE ACT ESTABLISHES THAT THE CARE ACT SHOULD NOT BE ENACTED

As discussed below, the Section is concerned that the CARE Act would effectively immunize anticompetitive trade practices in the alcohol industry from the federal antitrust laws. The state action doctrine already provides a substantial hurdle to federal antitrust challenges of state alcohol laws. Those state laws that are not saved from federal preemption by the state action doctrine often involve anticompetitive conduct by private parties; such conduct could very well be exempt from the federal antitrust laws under the CARE Act. Further, the Section notes that the closest analogue to the CARE Act, the McCarran-Ferguson Act, provides much

[23] *See* 9 AM. JUR. 2D *Bankruptcy* § 46 (2004) (discussing the rationale for the sunset provision appearing in Chapter 12 of the Bankruptcy Code, which provides an exemption to family farmers to allow them the opportunity to reorganize their debts and keep their land) (citing 132 CONG. REC. H8998, H8999 (Oct. 2, 1986)).

[24] *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972); *see also Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 22 F.3d 1260 (3d Cir. 1994) (proponent of state action immunity bears burden of proving application of immunity).

less protection from the federal antitrust laws to the insurance industry than the broad exemption that the CARE Act would appear to provide to the alcohol industry.

The Section recognizes that the sale of alcoholic beverages may raise unique social issues that are not involved in the sale of other products or services in our economy. The Section does not take a position as to whether the various goals underlying state alcohol laws should override the national competition goals served by the federal antitrust laws. Rather, the Section believes that such determination should be conducted by Congress in accordance with the principles identified above in Section III.

A. The CARE Act Does Not Meet the Section's Recommended Standards for Granting Immunities

In the case of the proposed legislation at issue, Congress should not grant an antitrust exemption for the alcohol industry unless it determines that the social goals served by such an exemption significantly outweigh the goals served by free-market competition. To date, the record does not include sufficient evidence to make such a determination in favor of the alcohol industry and against the interests of competition and consumer welfare.

First, the Section is not aware of any, let alone rigorous, analysis of the impact of the proposed legislation on consumer welfare. Indeed, a recent study found that post-and-hold statutes, while reducing alcohol consumption levels, appear to have no effect on two significant social harms typically associated with alcohol consumption: drunk-driving accidents and underage drinking. According to the authors, the study demonstrates that post-and-hold statutes merely reduce consumer welfare rather than the social ills at which such statutes are nominally targeted.[25]

Second, the Section believes that the proposed exemption sweeps broadly and goes far beyond what may be necessary to protect the stated social goals underlying the CARE Act.

Third, the Section is not aware of any record, let alone a fully developed one, that would indicate that a value unrelated to competition would be impeded by competitive forces in the marketplace. While proponents of the legislation should convincingly demonstrate this, the Section is not aware of any compelling evidence to support such a proposition.

Finally, although the federal antitrust agencies have not commented specifically on the CARE Act, given their long-standing opposition to industry-specific antitrust exemptions, it seems unlikely that the agencies would support enactment of the proposed legislation. The FTC, in particular, has been advocating

[25] *See* James C. Cooper & Joshua D. Wright, *State Regulation of Alcohol Distribution: The Effects of Post & Hold Laws on Consumption and Social Harms* 23-25 (FTC Bureau of Econ., Working Paper No. 304, 2010), *available at* http://www.ftc.gov/be/workpapers/wp304.pdf.

against anticompetitive state alcohol laws for at least the past twenty-five years.[26] For example, the FTC has testified before Congress in opposition to a proposed federal law that would have granted the malt beverage industry "an unjustified exemption from the antitrust laws."[27] In addition, FTC staff has criticized post-and-hold statutes,[28] overly restrictive wholesaler franchise laws,[29] and discriminatory direct shipping statutes,[30] arguing in each case that consumer welfare would be reduced as a result of such state laws.

B. Role of the State Action Doctrine in Immunizing State Alcohol Laws

To the extent that there are concerns that could be impeded by competition, the state action doctrine already serves to protect state alcohol laws from challenge under the federal antitrust laws. The Section believes that the state action doctrine provides more than sufficient protection of states' rights to regulate alcohol.

The judicially-created state action doctrine is grounded in principles of federalism and state sovereignty.[31] The doctrine, as developed by the courts, respects a state's sovereign power to take action that displaces competition with respect to economic activity within its lawful sphere of governing authority. Courts evaluating Sherman Act preemption challenges to state laws generally apply preemption analysis to the state law first; then, if a state law is found to be in conflict with the Sherman

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[26] The FTC's advocacies from the past twenty-five years in the area of alcohol regulations are available at http://www.ftc.gov/opp/advocacy_subject.shtm.

[27] *See* Statement of the Federal Trade Commission before the United States Senate Committee on the Judiciary Regarding S. 412, the Malt Beverage Interbrand Competition Act (May 14, 1985) ("strongly" opposing proposed bill that would have provided for a new antitrust standard for review of wholesale agreements in the malt beverage industry).

[28] *See, e.g.*, Statement of Phoebe Morse, Director, Federal Trade Commission Boston Regional Office to the Commonwealth of Massachusetts Alcoholic Beverages Control Commission (June 26, 1996) (arguing in favor of the repeal of price posting regulations); Comments of George I. Zweibel, Director, Federal Trade Commission Seattle Regional Office to the Oregon Liquor Control Commission (Mar. 7, 1988) (arguing in favor of repeal of price posting requirements).

[29] *See, e.g.*, Letter from Andrea Foster, Acting Director, Federal Trade Commission Atlanta Regional Office to the Honorable Hamilton C. Horton, Jr. of North Carolina (Mar. 22, 1999) (arguing that a proposed bill involving exclusive territorial wholesale arrangements "may provide an unnecessary exemption to the antitrust laws").

[30] *See, e.g.*, Letter from FTC Staff to the Honorable Paula Dockery of Florida (Apr. 10, 2006) (arguing in favor of a statute that would allow wineries of all sizes to engage in interstate direct shipping of wine).

[31] *See, e.g., Parker v. Brown*, 317 U.S. 341, 351-52 (1943) (interpreting the Sherman Act as "a prohibition of individual and not state action"); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992) ("Our decision [in *Parker v. Brown*] was grounded in principles of federalism.").

Act, courts apply the state action doctrine to determine whether the state law should be "saved" from preemption.[32]

Under the state action doctrine, a private party is protected from federal antitrust liability if two conditions are met: (1) the party acts pursuant to a clearly articulated and affirmatively expressed state policy to displace competition, and (2) the act is actively supervised by the state.[33] Political subdivisions of a state need satisfy only the first, clear articulation requirement.[34]

As the Section observed in its comments to the FTC regarding its state action report, "some lower courts have been lax in applying the clear articulation test, and thus have favored states' rights over national competition policy to a degree beyond that required by principles of federalism."[35] The AMC, in its final report and recommendations, raised similar concerns regarding the unwarranted expansion of the state action doctrine in the courts.[36]

The state action doctrine currently represents an additional hurdle that a party must overcome to successfully challenge a state law as preempted under the federal antitrust laws. Further, given the expansion of the state action doctrine in recent years, state alcohol laws—much like state laws and regulations covering other highly regulated areas of the economy—already appear to be subject to a decreasing risk of being deemed preempted by federal antitrust laws.

C. Treatment of State Alcohol Laws as Hybrid Restraints of Trade

The distinction between unilateral and hybrid restraints of trade also underscores the lack of need for any new exemption or immunity for alcohol regulations. Federal antitrust preemption analysis typically involves a determination as to whether the state law at issue is a "unilateral" restraint imposed by the state or a "hybrid" restraint that involves delegation of decision-making authority by the state to private parties.[37] Unilateral restraints imposed solely by states or subdivisions of a state generally are upheld under preemption analysis.[38] Hybrid restraints involving

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[32] *See, e.g.*, *324 Liquor Corp.*, 479 U.S. at 343-45 (finding first that New York statute was a per se violation of Sherman Act and then finding lack of active supervision under state action doctrine).

[33] *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

[34] *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 44 (1985).

[35] Comments of ABA Section of Antitrust Law on FTC Report on the State Action Doctrine, at 10-11 (May 6, 2005).

[36] *See* AMC REPORT at 370-77 (recommending more rigorous application of the state action doctrine).

[37] *See, e.g.*, ABA SECTION OF ANTITRUST LAW, STATE ACTION PRACTICE MANUAL 78-82 (2d ed. 2010).

[38] *See, e.g.*, *Fisher v. City of Berkeley*, 475 U.S. 260 (1986) (upholding rent control ordinance imposed by municipality).

private parties, however, are subject to the more searching preemption scrutiny and to state action analysis as discussed above in Section IV.B.

In the area of state alcohol regulation, courts have struck down hybrid restraints of trade, finding them to be in direct conflict with the federal antitrust laws. In particular, courts have found state "post-and-hold" statutes and regulations preempted by the Sherman Act and not protected by the state action doctrine. For example, in *TFWS, Inc. v. Schaefer*,[39] the Fourth Circuit Court of Appeals addressed Maryland's post-and-hold alcohol pricing system, which mandated the exchange of price information by wholesalers through public posting and dissemination, as well as adherence to the publicly announced prices. The Fourth Circuit ruled that the system "mandates activity that is essentially a form of horizontal price fixing, which has been called 'the paradigm of an unreasonable restraint of trade.'"[40] The court further held that the state's pricing system failed to satisfy the active supervision prong of the state action doctrine because, among other reasons, the wholesalers set their own prices, the state comptroller had no authority to review such prices for reasonableness, and the state did not monitor or engage in any "pointed reexamination" of the alcohol pricing program.[41] Other courts have similarly struck down state post-and-hold statutes.[42]

The Section is concerned that any reverse preemption of the federal antitrust laws in the area of state alcohol regulation—such as that contemplated by the CARE Act—would allow states to establish anticompetitive regulatory schemes that would go unchecked by the courts. The end result could very well be that states are able to rubber stamp—or even compel—private activity that amounts to collusion in the market for alcoholic beverages, to the detriment of competition and consumer welfare.

D. Analogy to the McCarran-Ferguson Act

The nearest analogue to the antitrust exemption that the CARE Act would provide likely is the protection that the McCarran-Ferguson Act[43] provides to the insurance industry. The McCarran-Ferguson Act exempts conduct from the federal antitrust laws only if such conduct (1) constitutes "the business of insurance," (2) is "regulated by State Law," and (3) does not amount to an "agreement to boycott,

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[39] 242 F.3d 198 (4th Cir. 2001).

[40] *Id.* at 209 (quoting *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 100 (1984)).

[41] *Id.* at 211.

[42] *See, e.g.*, *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987) (striking down New York state statute); *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874 (9th Cir. 2008) (striking down Washington state statute); *Miller v. Hedlund*, 813 F.2d 1344 (9th Cir. 1986) (striking down Oregon state statute).

[43] 15 U.S.C. §§ 1011 *et seq.*

coerce, or intimidate, or act of boycott, coercion, or intimidation."[44] With respect to the third prong, the Supreme Court held, in *Hartford Fire Ins. Co. v. California*,[45] that a boycott occurs, thus subjecting insurer conduct to the federal antitrust laws, when a refusal to deal is designed to pursue an objective "collateral" to the terms of the transaction in which the refusal to deal occurs. All three prongs of the McCarran-Ferguson Act must be satisfied for the exemption to attach to an insurer's conduct; thus, conduct by insurance providers is not categorically exempt from the federal antitrust laws.

Nonetheless, over the last twenty years the American Bar Association has consistently maintained that the McCarran-Ferguson Act should be repealed and replaced with certain, narrower "safe harbor" protections. In 1989, following two years of discussion and debate, the ABA adopted a resolution recommending the repeal of the McCarran-Ferguson exemption to the antitrust laws, to be replaced by a series of safe harbors defining certain categories of exempt conduct. The safe harbors are not intended to alter existing antitrust policy; rather, they are intended to serve the important objective of deterring private litigation that might, post-exemption, challenge conduct that, in the unique circumstances of the insurance industry, may actually promote competition. For all other conduct, the American Bar Association position is that the insurance industry should be subject to the same antitrust rules as other industries.

The American Bar Association has testified before Congress in support of repealing McCarran-Ferguson and replacing it with safe harbors in the past, most recently in October of 2009, in testimony before the House Judiciary Committee. Ilene Gotts, the Chair of the Antitrust Section, provided testimony concerning The Health Insurance Industry Antitrust Enforcement Act of 2009, H.R. 3596,[46] which would repeal the McCarran-Ferguson Act with respect to the health insurance and medical malpractice insurance industries.

Finally, the Section notes that the McCarran-Ferguson Act is a limited exemption from the antitrust laws, applicable only to certain conduct specific to the business of insurance to the extent that it is both regulated by a state and does not constitute a boycott. The CARE Act, in contrast, would provide a broader exemption, excusing states and alcohol industry participants from compliance or consistency with every federal statute and effectively providing the alcohol industry with a categorical exemption from scrutiny under the federal antitrust laws.

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[44] *Id.* § 1012(b).

[45] 509 U.S. 794 (1993).

[46] H.R. 3596, 111th Cong. (2009).

CONCLUSION

The antitrust laws are a crucial safeguard of free markets. Exemptions and immunities come at significant cost to the free market system and impose significant costs on consumers who are its main beneficiaries. The Antitrust Section maintains its longstanding disapproval of statutory exemptions and immunities from antitrust laws. To the extent that the CARE Act would result in a reverse preemption of the federal antitrust laws in the alcohol industry, the Section respectfully submits that Congress has not been provided with a sufficient basis upon which to enact such preemption. The Antitrust Section appreciates the opportunity to provide these comments.