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Thank you for inviting me to speak today. Let me emphasize that I am appearing today in my personal capacity. The views I express today are solely attributable to me, and should not be taken to represent that views of the Heritage Foundation.

An economy based on vigorous competition, protected by the antitrust laws, does the best job of promoting consumer welfare and a vibrant, growing economy. This conclusion is supported by expert economic studies, both domestic and international, and most of our economy is based on this competitive model.

Antitrust is a key component of the competitive free market system. The Supreme Court has stated that the antitrust laws are "the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."[1] This suggests that laws or regulations authorizing departures from the competitive model should be disfavored, and proponents of such departures should bear a heavy burden of demonstrating, with robust empirical support, why such a regime is necessary.

Congress over the years has adopted a wide range of measures that partially or fully immunize certain sectors of the American economy from antitrust review. Collectively, these sectors of the economy cover a substantial volume of commerce. I believe that it is important to consider whether the continued

[1] *United States v. Topco Associates, Inc.*, 405 U.S. 596, 619 (1972).

existence of these exemptions in their current form fosters the goal of a strong, innovative, American economy – or, rather, undermines it.

Why might antitrust exemptions harm the economy? Many exemptions (albeit in different ways, depending upon the statute) allow firms to agree to limit the terms of competition among themselves and impose restrictions on entry into the affected sector. To put it more bluntly, such exemptions tend to foster legal cartels. From an antitrust perspective, such agreements – "horizontal restraints" – generally present the greatest risk of competitive harm. Unless the restraint is reasonably necessary to the generation of countervailing efficiencies, consumers are likely to be worse off.[2]

Concerns about the adverse economic impact of laws that limit competition are more than mere theory. There is a considerable empirical literature that suggests that industries sheltered from competition do not perform as well as those that are subject to vigorous competitive forces. For example, numerous studies of sectoral deregulation in the United States show that the unleashing of market forces has resulted in greater economic efficiency and benefits for consumers.[3] Similarly, an often-cited study by Michael Porter of the Harvard Business School points out that industries sheltered from international competition are less vigorous and successful than industries subject to such competition.[4] The adverse effects that Porter and others ascribe to governmental policies that shelter inefficient competitors and condone cartels may well result from certain antitrust exemptions.

In attempting to assess the magnitude of harm caused by antitrust exemptions, we cannot directly examine the "but for" world that would exist in the absence of such exemptions. Nevertheless, it is instructive to look at the positive welfare effects of deregulation in certain industries, because antitrust exemptions are like economic regulation in the sense that they, too, produce a more constrained form of competition. For example, the positive welfare effects of transportation deregulation (trucking, airlines), well documented by economists, may be a sort of "natural experiment" that highlights the benefits that flow from introducing more vigorous competition when it previously existed in a much more constrained form.[5]

Therefore, both economic theory and real world data support a standard that

[2] Basic economic theory teaches that an unregulated competitive market generally leads to the economically efficient level of output. See, e.g., Robert S. Pindyck & Daniel L. Rubinfeld, MICROECONOMICS 294 (5th ed. 2001).
[3] *See, e.g.*, Clifford Winston, U.S. Industry Adjustment to Economic Deregulation, 12 J. of Economic Perspectives 89, 98-102 (1998).
[4] Michael Porter, THE COMPETITIVE ADVANTAGE OF NATIONS 117-120, 225-38, 416, 708 (1990).
[5] *See, e.g.*, Giuseppe Nicoletti, *Cross-country regulation patterns and their implications for macroeconomic and*

requires proponents of an exemption to bear the burden of demonstrating that the exemption will benefit consumers. This burden should exist both at the time the exemption first is considered, and at regular intervals thereafter.

I would note in that respect that a number of the existing exemptions are many decades old, and represent a time when the American economy was very different. Revolutions in communications (computers, the Internet), transportation, and business methods have lowered transactions costs and substantially changed the ways in which firms and industries operate. Furthermore, international competition also has affected scores of industries; much more than in the past, the U.S. participates in a global economy. Thus, even if one assumes, for the sake of argument, that there may have been valid economic justifications for specific industry exemptions in the past, it is not at all clear that those justifications still hold water.

Furthermore, even if one believes that some of the matters currently protected by antitrust exemptions are efficient, socially useful forms of conduct, it does not follow that an antitrust exemption is necessary to realize those efficiency gains. The antitrust laws do not prohibit *all* restraints of trade, only those that are unreasonable,[6] and unreasonableness is assessed by weighing efficiency justifications against anticompetitive effects to determine the overall effect. Modern mainstream antitrust analysis does not condemn efficient collaborations, only those agreements that diminish competition and harm consumers. In short, antitrust law today is not an impediment to economically desirable form of collaboration by firms in exempt industries.

Finally, it is instructive to note that foreign jurisdictions are broadening the scope of their antitrust laws and subjecting to antitrust scrutiny formerly exempt sectors.[7] This should help invigorate the competitive process overseas. It would be quite ironic if the U.S. Government, which has argued strenuously in multiple forums about the benefits of antitrust to foreign economics, should (like the physician who fails to take the medicine he or she prescribes) fail to heed the implications of the argument for American law.

Thank you very much.

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sectoral performance, in Giuliano Amato & Laraine L. Laudati, THE ANTICOMPETITIVE IMPACT OF REGULATION 278 (2001).

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

[7] *See* OECD, *Regulatory Reform: Stock-Taking of Experience with Reviews of Competition Law and Policy in OECD Countries – and the Relevance of Such Experience for Developing Countries* (CCNM/GF/COMP (2004)1, January 21, 2004), Annex at ¶¶ 20-55.