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**VIA OVERNIGHT MAIL**

December 10, 2008

**Honorable Nancy Pelosi**  
Speaker of the House  
U.S. House of Representatives  
H-232 Capitol Building  
Washington, D.C. 20515

**Honorable John Boehner**  
House Minority Leader  
U.S. House of Representatives  
H-204 Capitol Building  
Washington, D.C. 20515

**Honorable John Conyers, Jr.**  
Chairman, Committee on the Judiciary  
Chairman, Antitrust Task Force  
U.S. House of Representatives  
2138 Rayburn House Office Building  
Washington, D.C. 20515

**Re: Comments Regarding the Railroad Antitrust Enforcement Act, H.R. 1650**

Madam Speaker and Gentlemen:

On behalf of the Section of Antitrust Law of the American Bar Association, I am pleased to submit the enclosed comments regarding H.R. 1650.

Please note that these views are being presented on behalf of the Section of Antitrust Law. 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 position of the American Bar Association.

If you have any questions regarding these comments, please contact me.

Sincerely,



James A. Wilson  
Chair, Section of Antitrust Law

Enclosure

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**VIA OVERNIGHT MAIL**

December 10, 2008

**Honorable Harry Reid**  
Senate Majority Leader  
S-221 Capitol Building  
Washington, D.C. 20510

**Honorable Mitch McConnell**  
Senate Minority Leader  
S-230 Capitol Building  
Washington, D.C. 20510

**Honorable Patrick J. Leahy**  
Chairman, U.S. Senate Committee  
on the Judiciary  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

**Honorable Arlen Specter**  
Ranking Member, U.S. Senate Committee  
on the Judiciary  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

**Honorable Herbert Kohl**  
Chairman, Subcommittee on  
Antitrust Competition Policy and  
Consumer Rights  
U.S. Senate Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

**Honorable Orrin G. Hatch**  
Ranking Member, Subcommittee on  
Antitrust Competition Policy and  
Consumer Rights  
224 Dirksen Senate Office Building  
Washington, D.C. 20510-6150

**Re: Comments Regarding the Railroad Antitrust Enforcement Act, S. 772**

Gentlemen:

On behalf of the Section of Antitrust Law of the American Bar Association, I am pleased to submit the enclosed comments regarding S. 772.

Please note that these views are being presented on behalf of the Section of Antitrust Law. 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 position of the American Bar Association.

If you have any questions regarding these comments, please contact me.

Sincerely,



James A. Wilson  
Chair, Section of Antitrust Law

Enclosure

**ABA SECTION OF ANTITRUST LAW**  
**COMMENTS ON THE RAILROAD ANTITRUST ENFORCEMENT ACT**

The Section of Antitrust Law of the American Bar Association (the “Antitrust Section” or “Section”) is pleased to submit these views regarding the Railroad Antitrust Enforcement Act, S. 772 reported favorably by the Senate Judiciary Committee on December 19, 2007, and H.R. 1650, reported favorably by the House Judiciary Committee on September 18, 2008 (the “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 submits that any decision to allow an immunity or exemption from the antitrust laws should be made reluctantly and only after thorough consideration of each particular situation. The inquiry with respect to immunities and exemptions 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 federalism – outweighs the general presumption in favor of competitive markets.

The Antitrust Section has frequently noted its opposition to industry-specific exemptions from the antitrust laws based on claims that such immunity 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,” “[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.”

The Railroad Antitrust Enforcement Act would remove railroads from the protection of the judicially-created “filed-rate” or *Keogh* Doctrine, which insulates firms from antitrust damages actions, and allow private parties to seek injunctive relief against railroads under the antitrust laws. The Act would also place review of railroad industry mergers, like those in other industries, in the hands of the Federal antitrust agencies – the Department of Justice and the Federal Trade Commission – removing the Surface Transportation Board’s exclusive authority.

The Section supports these steps and encourages Congress to move forward quickly to dismantle the antitrust exemption for the railroad industry, through the Railroad Antitrust Enforcement Act, and to consider additional legislation to eliminate antitrust exemptions applicable to other industries.

## Comments

### **I. The Antitrust Section Discourages Statutory Exemptions and Immunities**

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

Comments of ABA Section of Antitrust Law on FTC Report on the State Action Doctrine, at 2-3 (May 6, 2005).<sup>1</sup>

The Section believes that the common law process through which the antitrust laws promote both allocative efficiency and consumer welfare is flexible and evolutionary. It adapts to the unique circumstances of markets and industries, to changing technologies and circumstances, and to the development and growth of legal and economic theory.<sup>2</sup> The antitrust laws today do not prohibit the vast bulk of business conduct, including competitor collaborations that generate pro-competitive efficiencies or that have not harmed or are not likely to harm the competitive process and consumer welfare. They do prohibit, however, mergers that are likely to raise price or reduce quality, service or innovation, naked collusion among competitors to fix prices or allocate territories, and conduct that excludes rivals to the detriment of consumers.

Exemptions and immunities shelter industries or forms of behavior from the procompetitive reach of the antitrust laws, and thus are likely to harm the economy by reducing competitiveness and efficiency. They also often freeze in place the development of economic theory. Claims that an exemption or immunity is necessary for competition to flourish or because

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<sup>1</sup> The Antitrust Section has supported repeal of antitrust exemptions in testimony before the Antitrust Modernization Commission, and has opposed other exemptions. *See* Comments to the Antitrust Modernization Commission on General Immunities and Exemptions, the Shipping Act Antitrust Exemption and the McCarran-Ferguson Act and Reports of the Antitrust Section on the Free Market Antitrust Immunity Reform Act of 1999, the Quality Health-Care Coalition Act of 1999, Antitrust Health Care Advancement Act of 1997, the Television Improvement Act of 1977, the Major League Baseball Antitrust Reform Act of 1997, the Curt Flood Act of 1996, and the Major League Baseball Antitrust Reform Act of 1995 (all available at [www.abanet.org/antitrust](http://www.abanet.org/antitrust)).

<sup>2</sup> *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.").

competition is itself harmful or undesirable, or does not work in some particular industry should not prevail. 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 antitrust laws have been described as “the Magna Carta of free enterprise . . . 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.”<sup>3</sup>

The Antitrust Section recognizes that exemptions and immunities are occasionally warranted – but only where an important value unrelated to competition, such as free speech or federalism, trumps the need for competition. As the Section noted to the AMC, “[a]ntitrust, while vigilant regarding every nuance of competition, deliberately turns a blind eye to concerns outside that scope.”<sup>4</sup> Thus, the *Noerr-Pennington* doctrine, developed to protect free speech and the right to petition the government, and the state action doctrine, based on the values of federalism and state sovereignty, epitomize exemptions founded upon important interests unrelated to competition. Certainly, the legislature may determine that, in a particular case, competition and the free-market system may be limited to advance some other purpose.

Antitrust exemptions for the railroad industry – and other long-standing exemptions and immunities – do not appear to be justified by any non-competition related value. Instead, they appear to be no more than “naked economic protectionism,” adopted in a legal era that considered economic protectionism in certain industries to be socially beneficial – before the consensus antitrust policy that has largely governed antitrust enforcement in recent decades. It is now appropriate to re-evaluate whether statutory immunities and exemptions are consistent with promoting efficiency and consumer welfare.<sup>5</sup>

The Section believes that these exemptions have survived as long as they have because their benefits apply to small, concentrated interest groups that receive substantial benefits – such as railroads, ocean shipping carriers and agricultural cooperatives. On the other hand, the costs from such statutory exemptions are generally passed on to individual consumers. Thus, statutory exemptions from the antitrust laws create an asymmetry of costs and benefits. It is consumers that suffer the most from higher prices, lower output, reduced quality and reduced innovation.<sup>6</sup> While some shippers may complain about railroad industry practices that they allege violate the antitrust laws, consumers are the biggest losers.

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<sup>3</sup> *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972).

<sup>4</sup> Comments of the ABA Section of Antitrust Law on General Immunities and Exemptions to the Antitrust Modernization Commission at 3 (Nov. 30, 2005). See also *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 695 (1978) (“The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. ‘The heart of our national economic policy long has been faith in the value of competition.’”) (quoting *Standard Oil Co. v. FTC*, 340 U.S. 231, 248).

<sup>5</sup> Comments of the ABA Section of Antitrust Law on General Immunities and Exemptions to the Antitrust Modernization Commission at 6-7 (Nov. 30, 2005).

<sup>6</sup> *Id.* at 4-6.

Courts have generally construed exemptions to the antitrust laws narrowly, respecting Congress's desire "to strike as broadly as [possible] in § 1 of the Sherman Act."<sup>7</sup> While Congress of course remains free to exempt behavior from the reach of the antitrust laws, the Antitrust Section believes the onus of an exemption's ongoing justification ought to be on those favoring its preservation and the Section has supported including a sunset provision in any new exemption.<sup>8</sup>

That there should be a presumption against antitrust exemptions is particularly true where an industry is being deregulated, and there is uncertainty as to whether activity is exempted from regulation and is shielded from the antitrust laws. If anything, activities exempted from regulation should become subject to antitrust scrutiny even if potentially subject to re-regulation. Thus, the Antitrust Section supports repeal of remaining antitrust exemptions for the railroad industry, completing the industry's transition to competition.

## **II. The Antitrust Modernization Commission Recommends Dismantling Exemptions**

The Antitrust Modernization Commission Act of 2002<sup>9</sup> mandated the formation of a blue-ribbon Commission appointed by the President and majority and minority leadership of the House of Representatives and the Senate. The AMC was tasked with reviewing the country's antitrust laws to determine whether and how they should be modernized.

The AMC recently reported that the economic principles that guide antitrust law remain relevant to and appropriate for the antitrust analysis of industries in which innovation, intellectual property and technological change are central features. Properly interpreted, the antitrust laws promote innovation and dynamic efficiency as well as price competition, serving consumer welfare in the global, high-technology economy that exists today.<sup>10</sup>

Nonetheless, there are numerous industry-specific areas where Congress has explicitly stated that the antitrust laws do not apply. Statutory exemptions exist for everything from anti-hog-cholera serum to sports broadcasting. The Antitrust Section has chronicled these exemptions in a recently-published monograph entitled *Federal Statutory Exemptions from Antitrust Law* (2007).

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<sup>7</sup> *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975). One leading judge has argued: "[An antitrust exemption is] special interest legislation, a single-industry exception to a law designed for the protection of the public. When special interests claim that they have obtained favors from Congress, a court should ask to see the bill of sale. . . . [Because] special interest legislation enshrines results rather than principles . . . courts read exceptions to the antitrust laws narrowly, with beady eyes and green eyeshades." *Chicago Prof'l Sports v. Nat'l Basketball Ass'n*, 961 F.2d 667, 671-72 (7th Cir. 1992).

<sup>8</sup> See ABA Antitrust Section Amended Comments on the Shipping Act Antitrust Exemption at 3 (Mar. 17, 2006); Comments of the ABA Section of Antitrust Law on General Immunities and Exemptions to the Antitrust Modernization Commission at 11-17 (Nov. 30, 2005).

<sup>9</sup> Pub. L. No. 107-273, § 11054(h), 116 Stat. 1856, 1857 (2002).

<sup>10</sup> AMC, *Report and Recommendations* (2007) (hereafter *AMC Report*).

During the course of the AMC study, the Commission invited comment and held several days of hearings addressing exemptions. The AMC report issued last year advised:

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.<sup>11</sup>

The AMC urged that even “[w]hen the government decides to adopt economic regulation, anti-trust law should continue to apply to the maximum extent possible, consistent with that regulatory scheme [and] antitrust should apply whenever regulation relies on the presence of competition or the operation of market forces to achieve competitive goals.”<sup>12</sup>

The AMC specifically concluded that no immunity should be granted to stabilize prices in order to provide an industry with certainty and predictability for purposes of investment or solvency – one of the arguments sometimes made in the railroad industry based on its need for capital investment. The AMC noted that the costs of price stability typically fall on consumers, resulting in inflexibility that undermines economic growth. Arguments that carriers need an antitrust exemption to adopt practices such as sharing equipment given the costs of investments was also specifically rejected by the AMC.<sup>13</sup>

### **III. Antitrust Exemptions in the Railroad Industry**

#### ***A. Deregulation and the Role of the Surface Transportation Board***

Railroads today benefit from several antitrust exemptions and immunities which are legacies of a bygone era. The AMC advised that “[d]uring the early part of the twentieth century, a belief that certain industries [such as railroads] were either ‘natural’ monopolies . . . or were at risk for ‘excessive competition’ led to government regulation of prices, costs, and entry into those industries.”<sup>14</sup> Thus, instead of relying on antitrust laws to prevent unfair competition, regulatory agencies were given responsibility for monitoring competition. For more than a hundred years, under the Interstate Commerce Act of 1887, the Interstate Commerce Commission (“ICC”) and later the Surface Transportation Board (“STB”) regulated the railroad industry. Technological changes and recognition of the costs and market distortion of economic regulation, however, have led to changes over time.<sup>15</sup>

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<sup>11</sup> *Id.* at 335, Recommendation 57.

<sup>12</sup> *Id.* at 338, Recommendation 63.

<sup>13</sup> *Id.* at 351-52.

<sup>14</sup> *Id.* at 333.

<sup>15</sup> *Id.*

The antitrust exemptions in the railroad industry derive from the Transportation Act of 1920 under which the ICC developed a plan for consolidation,<sup>16</sup> and the Reed-Bulwinkle Act of 1948 (passed over President Truman's veto), under which the ICC approved rate bureaus.<sup>17</sup> Even if, in a regulated environment where all rates were subject to oversight, antitrust exemptions may have made some sense, deregulation has eroded the basis for continuing exemptions. Pervasive regulation of the railroad industry has been eliminated over the last 30 years. In 1976, Congress passed the Railroad Revitalization and Regulatory Reform Act (the "4R Act"), which reduced rate regulation and provided carriers with some flexibility in setting rates.<sup>18</sup> The 1980 Staggers Rail Act further limited the authority of the ICC, to regulate rates only for traffic where insufficient competition existed to protect shippers.<sup>19</sup> The 1995 Interstate Commerce Commission Termination Act replaced the ICC with the STB and further deregulated the industry.<sup>20</sup>

The STB today has limited statutory authority, *inter alia*, to resolve railroad rate and service disputes involving traffic that is subject to the agency's jurisdiction and to review railroad restructuring transactions, including line sales, line constructions and line abandonment. In addition, the agency oversees mergers between railroads.<sup>21</sup> Under the ICC's and the STB's administration and approval, however, the number of large (or Class I) U.S. railroads has dropped from sixty-three to seven, through a series of mergers over the past four decades and the agency's stewardship of competition has been challenged.<sup>22</sup>

#### ***B. Statutory and Judicially-Created Exemptions and Immunities for Railroads***

While the railroad industry today is not immune from all antitrust actions, the industry does benefit from several express statutory and judicially-created immunities from antitrust law, which would be eliminated by the Railroad Antitrust Enforcement Act. Specifically, the industry today benefits from the following antitrust exemptions:

- Mergers and acquisitions are exclusively within the purview of the STB. If approved by the STB, they are exempt from challenge under Section 7 of the Clayton Act.<sup>23</sup>

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<sup>16</sup> Ch. 91 § 407, 41 Stat. 456, 482 (1920).

<sup>17</sup> Ch. 491, 62 Stat. 472 (1948).

<sup>18</sup> Pub. L. No. 94-210, 90 Stat. 31 (1976).

<sup>19</sup> Pub. L. No. 96-448, 94 Stat. 1895 (1980).

<sup>20</sup> Pub. L. No. 104-88, 109 Stat. 803 (1995).

<sup>21</sup> 49 U.S.C. § 11324.

<sup>22</sup> Testimony of Charles D. Nottingham, Chairman, Surface Transportation Board, before the Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy and Consumer Rights (Oct. 3, 2007).

<sup>23</sup> 49 U.S.C. § 11321(a).



- The STB is also authorized to review line sales, and its approval immunizes the transaction from the antitrust laws.<sup>24</sup>
- Certain STB-approved agreements relating to leases, trackage rights, pooling arrangements, and agreements to divide traffic, are exempted from the antitrust laws to the extent necessary to carry out the approved agreement.<sup>25</sup>
- Railroads are also immune for certain rate-related agreements approved by the STB, such as agreements establishing rules governing charges that one railroad must pay to use another's equipment.<sup>26</sup>
- Private parties may not obtain injunctive relief under the antitrust laws against a common carrier subject to STB jurisdiction.<sup>27</sup>
- Conferences among railroads, shippers, labor, consumer representatives and government agencies may be convened by the Secretary of Transportation, and discussions or agreements entered into with the Secretary's approval through these conferences are exempted from antitrust laws.<sup>28</sup>
- The STB and not the FTC has authority to enforce compliance with the Federal Trade Commission Act against railroads and other common carriers subject to STB jurisdiction.<sup>29</sup>
- Under the judicially-created *Keogh* doctrine,<sup>30</sup> railroads are immune from treble damages for filed rates.

The Railroad Antitrust Enforcement Act would eliminate these exemptions and place railroads on an equal footing with most other industries.

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<sup>24</sup> 49 U.S.C. § 10901(c).

<sup>25</sup> 49 U.S.C. § 10706; 15 U.S.C. § 18.

<sup>26</sup> 49 U.S.C. § 10706.

<sup>27</sup> 15 U.S.C. § 26.

<sup>28</sup> 49 U.S.C. § 333.

<sup>29</sup> 15 U.S.C. § 21(a).

<sup>30</sup> *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922). See also *AMC Report, supra* note 10, at 340 (“At the time this doctrine was created, members of a regulated industry were typically required to file their proposed rates with regulators who reviewed the rates to ensure they were ‘fair and reasonable.’ In creating the doctrine in *Keogh*, the Supreme Court explained that only the relevant regulatory authority could change these rates, even if the rate was higher than it otherwise would be due to a price fixing conspiracy.”).

#### IV. The Railroad Antitrust Enforcement Act

The Railroad Antitrust Enforcement Act would make a number of specific changes to current law to limit existing antitrust immunities applicable to the freight railroad industry. It would amend the Clayton and Federal Trade Commission Acts, as well as various sections of the federal transportation code (Title 49), to eliminate most of the antitrust exemptions and immunities that now apply to the freight railroad industry. The House and Senate bills would:

- Make railroad mergers and acquisitions subject to Section 7 of the Clayton Act;
- Amend Section 16 of the Clayton Act to allow private parties to seek injunctive relief against railroads in federal courts under the antitrust laws;
- Add a new section to the Clayton Act providing that district courts would no longer be required to defer to the primary jurisdiction of the STB in civil actions against a common carrier railroad;
- Amend Section 11(a) of the Clayton Act to remove the STB’s exclusive jurisdiction over rate agreements and mergers involving railroads;
- Amend Section 5 of the FTC Act to make railroads subject to its provisions;
- Amend the Clayton Act to overturn the “filed-rate” or *Keogh* Doctrine, and allow treble damages actions against railroads for antitrust violations; and
- Make conforming amendments to the STB statute to remove antitrust exemptions for rate agreements and exclusive jurisdiction for the STB over railroad mergers and acquisitions.

Thus, while some rail shipments are already subject to the antitrust laws – because they are either under private contracts or exempted from regulation – the proposed legislation would extend antitrust coverage to the remaining freight rail traffic.

##### A. *Jurisdiction over Mergers and Acquisitions*

Importantly, the Railroad Antitrust Enforcement Act would bring railroad mergers within the ambit of Section 7 of the Clayton Act and empower the Federal antitrust enforcement agencies to sue to block acquisitions the effect of which may be substantially to lessen competition.<sup>31</sup> That change would be consistent with the AMC’s recommendation that “even in industries subject to economic regulation, the antitrust agencies generally should have full merger enforcement authority under the Clayton Act.”<sup>32</sup> The AMC recognized that the Department of Justice and Federal Trade Commission regularly examine mergers and acquisitions noti-

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<sup>31</sup> S. 772, Sec. 3; H.R. 1650, Sec. 3.

<sup>32</sup> *AMC Report*, *supra* note 10, at 341, 363-66.

fied pursuant to the Hart-Scott-Rodino Act to determine whether such proposed transactions may substantially lessen competition, and the agencies apply the same standards to all industries.

The STB would, however, continue to approve mergers and acquisitions under its “public interest” test. Thus, transactions would be subject to dual review, as they are in certain other industries, including transactions in the telecommunications industry subject to Federal Communications Commission (“FCC”) review and oil and gas industries subject to Federal Energy Regulatory Commission (“FERC”) review. The House Report on the Act suggests: “[p]assage of the bill would subject railroads to the same kind of concurrent oversight by both a Federal enforcement agency and a regulatory body found in other partially-regulated industries.”<sup>33</sup>

The AMC identified only four industries in which regulatory agencies still review proposed transactions under a statutory “public interest” standard, and where the agency can allow transactions to proceed if it concludes “public interest” benefits outweigh likely anticompetitive effects. These industries include (1) certain aspects of electricity and natural gas regulated by FERC, (2) telecommunications/media regulated by the FCC, (3) banking entities regulated by various banking agencies, and (4) railroads regulated by the STB. In the first two industries – electricity and telecommunications – the DOJ has full enforcement authority to investigate and challenge mergers, regardless of the agency’s public interest review. In banking, the DOJ provides its analysis to the banking agency, and in practice the DOJ and the banking agencies work closely together. While the banking agency has authority to depart from the DOJ’s recommendation, the DOJ can challenge the banking agency’s decision in court.<sup>34</sup>

Only in the railroad industry does the regulatory agency have complete discretion to ignore the DOJ. While the STB by statute must give “substantial weight” to the DOJ’s views, the STB makes the final decision on whether to allow a merger.<sup>35</sup> Indeed, in 1996, the STB approved the merger of Union Pacific and Southern Pacific, despite the DOJ’s objections that the merger was anticompetitive.<sup>36</sup>

The AMC recognized that concurrent merger review by the antitrust agencies and a regulatory agency can impose “significant and duplicative” costs on both the merging parties and the agencies, and can lead to conflicts between the agencies. The AMC suggested that Congress therefore periodically consider whether regulatory agency review under the “public interest” standard is necessary, or whether the antitrust agency’s review under the Clayton Act will adequately protect consumers’ interests.<sup>37</sup> We, too, are concerned about the costs of dual

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<sup>33</sup> H.R. Rep. No. 110-860, at 6 (2008).

<sup>34</sup> *AMC Report*, *supra* note 10, at 341-42, 363-64.

<sup>35</sup> 49 U.S.C. § 11324(d).

<sup>36</sup> *Union Pac. Corp., et al. – Control and Merger – Southern Pac. Rail Corp., et al.*, 1 S.T.B. 233 (1996), *aff’d sub nom. Western Coal Traffic League v. Surface Trans. Bd.*, 169 F.3d 775 (D.C. Cir. 1999).

<sup>37</sup> *AMC Report*, *supra* note 10, at 342, 365-66, Recommendation 74. Other organizations studying the interrelationships between regulatory and antitrust review of mergers have also recommended that antitrust agencies

enforcement, but recognizing the federal antitrust agencies' expertise in reviewing the competitive effects of mergers and acquisitions, the Antitrust Section endorses federal antitrust agency review of future railroad mergers and at least removing the STB's exclusive merger review authority.

### ***B. The Filed-Rate Doctrine***

The Railroad Antitrust Enforcement Act would specifically abolish the judicially-created "filed-rate" or *Keogh* Doctrine with respect to railroads.<sup>38</sup> Derived from the Supreme Court's 1922 decision in *Keogh v. Chicago & Northwestern Railway*, the doctrine prohibits private plaintiffs from pursuing an antitrust action seeking treble damages where the plaintiff is claiming that a rate submitted to, and approved by, a regulator resulted from an antitrust violation, such as collusion among carriers. The Court reasoned that only the regulatory authority could change the rates, even if those rates were higher than they might be due to a price-fixing conspiracy.<sup>39</sup>

The *Keogh* Doctrine was created at a time when members of regulated industries were required to file their proposed rates with the appropriate regulatory agency.<sup>40</sup> The agency would then review the rates to make sure they were fair and reasonable. In *Keogh*, the Court held that an award of treble damages was not available to a private plaintiff who claimed that rates approved by the regulatory agency violated antitrust principles. While technically neither an exemption nor an immunity, this doctrine effectively protects railroads that file their rates with the STB. Courts have applied the doctrine to preclude antitrust claims where a tariff has been filed with a regulatory agency regardless of whether the agency has actually reviewed and approved the rate.<sup>41</sup> The Supreme Court, in 1986, suggested that a variety of factors "seem[ed] to undermine" the doctrine's continuing validity, but nonetheless concluded it was for Congress to determine whether to abolish it.<sup>42</sup>

The AMC concluded that the time has come for Congress to address the issue. It advised: "Congress should evaluate whether the filed-rate doctrine should continue to apply in regulated industries and consider whether to overturn it legislatively where the regulatory agency no longer specifically reviews proposed rates."<sup>43</sup> The Antitrust Section agrees that deregulation within the rail industry, eliminating STB review of most rates, has undermined the *Keogh*

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have exclusive jurisdiction. *See generally id.* at 365 (discussing recommendations of the International Competition Policy Advisory Committee and the Organization for Economic Cooperation and Development).

<sup>38</sup> S. 772, Sec. 6; H.R. 1650, Sec. 2.

<sup>39</sup> 260 U.S. 156, 162-64 (1922).

<sup>40</sup> *AMC Report*, *supra* note 10, at 340.

<sup>41</sup> *See, e.g., California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 852-53 (9th Cir. 2003); *Utilimax.com, Inc. v. PPL Energy Plus, LLC*, 378 F.3d 303, 306 (3d Cir. 2004).

<sup>42</sup> *Square D Co. v. Niagra Frontier Tariff Bureau, Inc.* 476 U.S. 409, 423 (1986).

<sup>43</sup> *AMC Report*, *supra* note 10, at 340-41, 362-63, Recommendation 68.

Doctrine. The proposed legislation overruling the *Keogh* Doctrine in the railroad industry is therefore consistent with the AMC's recommendation. While the Antitrust Section believes Congress should consider similar legislation in other industries, that is a step in the right direction, toward curtailing the exemption.

### ***C. Primary Jurisdiction***

The Act would also remove any requirement that federal district courts defer to the primary jurisdiction of the STB in any civil antitrust action against a railroad.<sup>44</sup> The doctrine of "primary jurisdiction" is not an immunity. Rather, it addresses the question of whether a court should *suspend* resolution of some questions of fact or law over which the court has jurisdiction, until passed upon by the regulatory authority whose jurisdiction encompasses the activity involved. Such deference may occur when (1) resolution of the case involves complex factual inquiries within the province of the regulatory body's expertise; (2) interpretation of administrative rules is required; or (3) interpretation of the regulatory statute involves a broad policy determination within the special expertise of the regulatory agency.<sup>45</sup> The effect of a court invoking the primary jurisdiction doctrine is referral to the administrative agency and then further court action. While the agency action might be dispositive it will be reviewed by the court applying antitrust standards. Such action is distinct from a court making a finding of express or implied immunity, in which case the agency action would be reviewed on the standards set forth in the regulatory statute, with deference to the agency's fact finding.

The Antitrust Section supports the proposed legislation, which would allow but not require courts to defer to the primary jurisdiction of the STB. District courts currently must defer to the primary jurisdiction of the STB in civil actions against railroads arising under the antitrust laws, and private parties are not permitted to seek redress for their injuries through injunctive relief. The Act would remove these limitations, and would allow successful plaintiffs to recover treble damages in appropriate circumstances.

### ***D. Other Exemptions; Other Provisions of the Legislation***

The Railroad Antitrust Enforcement Act would remove other exemptions as well. For instance, the Act would allow private parties to sue railroads under the antitrust laws for injunctive relief by amending Section 16 of the Clayton Act, which currently exempts common carriers subject to STB regulation from injunctive relief in private antitrust actions.<sup>46</sup> The Antitrust Section supports this change, and would urge Congress to consider legislation, in addition to this bill, to eliminate the exemption for other common carriers subject to STB regulation.

The Senate bill would also remove any exemption from FTC jurisdiction, so that the FTC may enforce the Clayton Act and FTC Act against railroads. The House bill is limited to FTC

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<sup>44</sup> S. 772, Sec. 4; H.R. 1650, Sec. 6.

<sup>45</sup> See *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289 (1973).

<sup>46</sup> S. 772, Sec. 2; H.R. 1650, Sec. 5.

jurisdiction under its “unfair method of competition” authority, so that the agency could not exercise consumer protection authority over railroads.<sup>47</sup>

The Act would also eliminate exemptions from the antitrust laws for leases, trackage rights agreements and ratemaking agreements approved by the STB.<sup>48</sup> The legislation would thereby give authority to the DOJ, FTC and State Attorneys General to enforce the antitrust laws with respect to such transactions notwithstanding any action taken by the STB.

The Section notes that both the Senate and House bills contain provisions to protect conduct that was previously exempted by the STB from antitrust actions. The Senate bill, however, would allow suits after 180 days, if such conduct continued after enactment of the legislation. The House bill would make clear that mergers and acquisitions consummated before the bill’s enactment remain exempt and firms that engaged in conduct previously exempted by STB approval would have 180 days to discontinue such conduct, and would only be liable thereafter to the extent such conduct were to continue.<sup>49</sup> The House bill would appear to take a more sound approach, to avoid re-opening long-consummated mergers.

The Section also notes that supporters of the Act plead for a more competitive landscape in the railroad industry, claiming that “the absence of competition and apparent allocation of markets have allowed railroads to preserve market share even while eliminating performance guarantees and dramatically raising prices.”<sup>50</sup> They assert that current conditions often hold participants “captive” – i.e., they are forced to rely on a single rail provider for their needs and are unable to protect themselves “through normal business negotiations.”<sup>51</sup> The STB has been criticized for allowing railroads to adopt so-called “paper barriers” – when major railroads sell or lease segments of their tracks to short line carriers under contractual terms that indefinitely restrict the ability of the short line to do business with any other major connecting rail carrier – and to refuse to provide their “captive” customers with rates to points where the customer can gain access to a competing railroad. Whether such agreements and pricing practices have legitimate business justifications or will be found to violate the Sherman Act remains to be seen, but they will be subject to scrutiny under the antitrust laws as they would be in any other industry, under the proposed legislation.

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<sup>47</sup> S. 772, Sec. 5; H.R. 1650, Secs. 4, 7.

<sup>48</sup> S. 772, Sec. 7; H.R. 1650, Sec. 8. Pursuant to an amendment adopted during the Senate Judiciary Committee’s consideration, the reported bills would continue to exempt railroad car pooling arrangements from antitrust scrutiny.

<sup>49</sup> S. 772, Sec. 8; H.R. 1650, Sec. 9.

<sup>50</sup> Testimony of William L. Berg, President & CEO, Dairyland Power Cooperative, before the Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy and Consumer Rights (Oct. 3, 2007).

<sup>51</sup> Testimony of Ken Vander Schaaf, Director, Supply Chain Mgmt., Alliant Techsystems Ammunition & Energetics Systems, before the Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy and Consumer Rights (Oct. 3, 2007).

## **Conclusion**

The Antitrust Section believes that the changing nature of the rail industry justifies a corresponding change in the way allegedly anticompetitive activity among railroads is addressed. The Section therefore supports Congress's decision to take a closer look at railroad operations in light of the deregulation of the industry.

The Antitrust Section maintains its longstanding disapproval of statutory exemptions and immunities from antitrust laws and supports the legislature's consideration to reevaluate the *Keogh* Doctrine and the role of antitrust agencies in enforcing healthy competition within the rail industry. The Antitrust Section appreciates the opportunity to provide these comments.

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