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ON BEHALF OF
THE UNITED STATES DEPARTMENT OF JUSTICE

ANTITRUST MODERNIZATION COMMISSION
HEARING ON ANTITRUST AND REGULATED INDUSTRIES

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The Role of Federal Antitrust Enforcement in Regulated Industries

The Antitrust Division is pleased to participate in the Commission's hearings on antitrust enforcement in regulated industries. In particular, the Commission has asked the Division to testify on the role of antitrust enforcement in regulated industries and the extent, if any, to which antitrust immunity should be implied as the result of a regulatory structure. The following summarizes the Division's views on these important issues.

A. Overview

The federal antitrust laws provide the general framework for the protection of competition. The fundamental premise of the federal antitrust laws is that free and open competition is the most effective means to ensure lower prices, increased quality and quantity of goods and services, and greater innovation. In some markets, however, Congress has determined that goals other than competition need to be promoted. In these situations, Congress has supplemented – or, in a few limited cases, supplanted – competition with regulation.

In the current U.S. economy, it is exceedingly rare that an industry is subject to such extensive economic regulation that competition under the antitrust laws has been completely displaced. In those rare instances, antitrust enforcement agencies can be advocates for increased competition where appropriate. Over time, a number of formerly regulated industries, such as motor carriers and airlines, have

been deregulated. Effective antitrust enforcement is critical in industries being deregulated. The goal of deregulation is to promote and protect competition, not to replace regulated monopolies or cartels with unregulated ones. The best way to achieve this goal is through vigilant antitrust enforcement by the federal agencies with expertise in competition – the Antitrust Division and the Federal Trade Commission ("FTC").

In certain industries, antitrust enforcement and regulatory oversight co-exist. While it often makes sense for antitrust enforcement and regulatory agencies to coordinate their efforts whenever possible, it is important to remember that they each have their own jurisdictional authority and separate responsibilities. The antitrust laws are designed to protect competition, not to serve regulatory goals; and the regulatory agencies are tasked by Congress with considering issues beyond competition.

B. Competition Advocacy

Where conduct is subject exclusively to regulatory review, antitrust enforcers can, in appropriate instances, advocate that the regulatory agencies avoid approving conduct that may harm competition and consumers, or that the agencies eliminate obstacles that prevent competition in the markets they oversee. The Division actively pursues this important role.

For example, the Division recently recommended to the Department of Transportation ("DOT") that an alliance among two U.S. airlines and three foreign carriers to combine their international operations should not be granted immunity from the antitrust laws, as the airlines had not demonstrated that immunity was necessary to achieve the alliance's public benefits. The DOT has the authority to exempt airlines participating in an international airline alliance from the antitrust laws if it finds doing so is required in the public interest. In its filing, the Division pointed out that the participation of two major U.S. airlines in the immunized alliance would pose risks to competition on both domestic and non-transatlantic international routes. This filing, as well as past Division filings regarding other airline alliances, shows how the Division's competition advocacy can help ensure that competition plays an appropriate role even as to the few aspects of the airline industry that remain subject to economic regulation.

Similarly, the Division this year filed comments with the Federal Maritime Commission ("FMC") and the Surface Transportation Board ("STB"). The Division urged the FMC to extend competitive freedom that ocean shipping carriers that operate their own ships currently enjoy to carriers that do not operate their own ships.[1] Currently, under the Ocean Shipping Reform Act,[2] carriers that operate

[1] Dep't of Justice Comments to the FMC in Docket No. 04-12 (RIN 3072-AC30), Notice of Proposed Rulemaking on Non-Vessel-Operating Common Carrier Service Agreements (Dec. 3,

their own vessels may carry the cargoes of shippers under contracts that are negotiated separately and with terms that can be kept confidential rather than published in a tariff. The Division believes that giving non-vessel-operating carriers the same right to negotiate confidential contracts would strengthen their ability to offer competitive rates and terms to shippers, as has been the case with vessel-operating carriers.

The Division filed comments with the STB urging it to impose conditions on approval of Canadian National's acquisition of railroad assets from Great Lakes Transportation.[3] The Division concluded that the threat of potential entry by a second railroad must be preserved to constrain the merging railroads' market power. The Division recommended that the STB preserve the current competitive discipline that Canadian National provided pre-merger by conditioning its approval on guaranteeing sufficient trackage and interconnection rights to enable a replacement railroad to compete effectively.

C. Complementary Enforcement and Regulation

When conduct is subject to both the antitrust laws and regulatory review, the

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2004), *available at* http://www.usdoj.gov/atr/public/comments/206675.pdf.

[2] Ocean Shipping Reform Act of 1998, Pub. L. No. 105-258, 112 Stat. 1902 (1998).

[3] Dep't of Justice Reply Comments to the STB in Finance Docket No. 34424, Canadian National Railway Co. (Feb. 24, 2004), *available at* http://www.usdoj.gov/atr/public/comments/202651.pdf.

antitrust enforcement and regulatory agencies may work closely together in reviewing the likely consequences of such conduct. However, they do so under distinct legal standards. The Antitrust Division and the FTC apply the antitrust laws to regulated industries in the same way they apply the laws elsewhere, although the analysis must also take into account any impact regulation may have on competition in the market. The regulatory agencies, in turn, apply their public interest mandate, which may – or may not – coincide with antitrust principles.

1. Dual Merger Review

Complementary antitrust enforcement and regulation is exemplified by the telecommunications industry, where both the Antitrust Division and the Federal Communications Commission ("FCC") review mergers and acquisitions between telecommunications firms. The Division enforces Clayton Act § 7, which prohibits mergers in any industry whose "effect may be substantially to lessen competition" or to "tend to create a monopoly" in any relevant market.[4] The FCC has authority under the Communications Act to review any transaction that requires transfer of an FCC license, which typically is required in the acquisition or merger of television broadcast, telephone, satellite, or microwave signal transmission

[4] 15 U.S.C. § 18.

providers.[5] The Division's focus is solely on competition. The FCC focuses more broadly on whether the proposed merger affirmatively serves the "public interest," considering not only the competitive effects of the merger, but also other factors, including spectrum efficiency, universal service, diversity of views and content, technological innovation, and national security.

We recognize that there has been some criticism of this system of dual merger review. For example, some critics point to the divergent outcomes in the 1997 proposed merger of Bell Atlantic and NYNEX – where the Division determined that the proposed merger would not substantially lessen competition and did not challenge it, while the FCC imposed conditions on its approval.

As a general rule, however, we believe that there is much more consonance than dissonance between the Division's review and the FCC's. More typical than Bell Atlantic/NYNEX is the recent proposed merger of DirectTV and EchoStar, the country's two largest satellite video broadcasters, where both the Division and the FCC opposed the transaction. Indeed, in the vast majority of cases, the Division and the FCC reach a similar outcome when reviewing the same merger.

Although each agency reaches its own decision, there is informal cooperation in reviewing mergers. This cooperation is important because it ensures more

[5] 47 U.S.C. § 214(a).

efficient use of resources and lessens the likelihood of conflicting enforcement decisions. It also allows us better to share our respective expertise – the Division with competition issues and the FCC with the regulatory framework and technical knowledge of the telecommunications industry as a whole.

Finally, it is important to remember that even where the Division and the FCC reach different conclusions, those conclusions are reached within very different frameworks and from very different perspectives. The Division asks, "Is there a violation of the antitrust laws?" The FCC asks, "Have the parties shown a positive effect for the public?" Congress has concluded that both of these considerations are important for protecting American consumers in these specific industries.

2. The *Trinko* Decision

The Supreme Court's recent decision in *Verizon v. Trinko*,[6] further highlights the relationship between antitrust enforcement and regulation.

The *Trinko* case involved the relationship between the federal antitrust laws and the Telecommunications Act of 1996 (the "1996 Act").[7] The 1996 Act imposes extensive obligations on market participants to change the competitive structure of

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[6] *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

[7] Pub. L. No. 104-104, 110 Stat. 56 (47 U.S.C. 251 et seq.)

the telecommunications industry. However, the 1996 Act also includes an antitrust savings clause providing that, except for two specific amendments contained in the Act, "nothing in this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws."[8]

The Supreme Court ruled that telecommunications firms must comply with both the 1996 Act and the Sherman Act. Importantly, however, the Court recognized that conduct that violates the 1996 Act does not *ipso facto* violate the antitrust laws. The Court observed that, while both statutes seek competitive markets, the 1996 Act "attempts to *eliminate* the monopolies enjoyed by the inheritors of AT&T's local franchises," whereas the Sherman Act "seeks merely to *prevent* unlawful monopolization."[9]

Trinko makes clear that the general principles of competition embodied in the Sherman Act are not necessarily coextensive with regulatory requirements designed to change or oversee the competitive structure of an industry. The Court stated that the goals of the 1996 Act and the goals of Sherman Act § 2 are not the same, and "[i]t would be a serious mistake to conflate" them.[10]

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[8] Section 601(b), 110 Stat. 143 (47 U.S.C. 152 note).

[9] *Trinko*, 540 U.S. at 415 (emphasis altered) (internal quotation marks and citations omitted).

[10] *Id.*

In *Trinko*, the Supreme Court recognized that the antitrust savings clause in the 1996 Act makes clear that the Act does not displace or preempt the antitrust laws, nor does it modify those laws. The federal antitrust laws continue to apply to telecommunications markets in the same way they apply to other markets, notwithstanding that the regulatory agency also has some responsibility for competitive concerns.

Antitrust savings clauses clearly preserve the applicability of the antitrust laws. This can be particularly helpful where Congress in legislation substantially revises an industry's regulatory scheme, as it did with the 1996 Act. It can make sense for Congress to consider, on a case-by-case basis, whether to include an antitrust savings clause in particular pieces of regulatory legislation. However, it should also be clear that the mere absence of an antitrust savings clause does not mean that a piece of legislation should be read as an implied repeal of the antitrust laws.

Implied Repeal of the Antitrust Laws

Regulatory approval, pursuant to a regulatory scheme established by Congress, of conduct that would otherwise violate the antitrust laws may preclude application of the antitrust laws to that conduct. However, the law is clear that where there is no such conflict, implied repeal is not presumed.

The Division frequently has cautioned against courts too quickly concluding that the antitrust laws have been implicitly repealed simply because of the existence of an overlapping regulatory scheme.[11] It is well settled that "[t]he antitrust laws represent a fundamental national economic policy," and that, as a consequence, "[i]mplied immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system."[12]

The proper approach to immunity questions requires "reconcil[ing] the operation of both statutory schemes with one another rather than holding one completely ousted."[13] Moreover, even where there is conflict between the antitrust laws and the regulatory scheme, repeal of the antitrust laws is implied "only if necessary to make the [regulatory scheme] work" and even then "only to the minimum extent necessary."[14]

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[11] *See* Dep't of Justice Letter Brief Response to Request for Views on the Issue of Implied Antitrust Immunity, *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130 (2d Cir. 2005) (Nos. 03-9284 and 03-9288), *available at* http://www.usdoj.gov/atr/cases/f208800/208898.pdf [hereinafter Dep't of Justice Letter]; Brief for United States as Amicus Curiae Supporting Plaintiff-Appellants, *In re Stock Exchanges Options Trading Antitrust Litigation*, 317 F.3d 134 (2d Cir. 2003) (No. 01-7371), *available at* http://www.usdoj.gov/atr/cases/f8700/8715.pdf.

[12] *Nat'l Gerimedical Hosp. and Gerontology Ctr. v. Blue Cross of Kansas City*, 452 U.S. 378, 388 (1981) (emphasis added) (internal quotation marks and citations omitted).

[13] *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963).

[14] *Nat'l Gerimedical Hosp.*, 452 U.S. at 389 (internal quotations and citations omitted).

The inquiry into whether implied immunity protects particular conduct from antitrust challenge is highly fact-specific. The inquiry must consider whether enforcement of the antitrust laws would interfere with the regulator's ability to regulate the proposed conduct. Absent a demonstration of such a conflict, it is presumed that Congress intended both the regulatory scheme and the antitrust laws to apply.[15] In this regard, I note that the Second Circuit recently agreed with the Division's assessment that the securities laws did not impliedly repeal the antitrust laws with respect to certain antitrust claims in *Billing v. Credit Suisse First Boston Ltd.*,[16] notwithstanding the SEC's extensive regulation of the general area.

Conclusion

Antitrust enforcement and regulation often share a common goal – the protection of consumers. Except in those very rare cases where Congress expressly provides antitrust immunity or immunity is clearly implied, antitrust enforcement is essential to ensure that consumers benefit from the influence of healthy market forces.

We appreciate being invited to discuss this important area of antitrust enforcement.

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[15] *See* Dep't of Justice Letter at 3.

[16] *Billing*, 426 F.3d at 168-70.