

Supplemental Regulated Industries Discussion Outline

Note: Indications of support for particular recommendations are based on AMC Staff's consultation of deliberation meeting transcripts, notes regarding discussions during deliberation meetings, and views conveyed to Staff by Commissioners. No Commissioner is bound by the indications reflected in this document, and it is understood that Commissioners may change their positions from those tentatively indicated during previous deliberations.

I. *General*

Note: A majority of Commissioners approved the following recommendations at previous deliberations meetings:

- ✓ In general, competition is the fundamental economic policy of the United States. Statutes that create regulatory regimes (including any savings clauses) should be construed consistently with that policy to the maximum extent possible.
- ✓ Antitrust should apply wherever regulation relies on the presence of competition or the operation of market forces to achieve competitive goals.¹
- ✓ Statutory regulatory regimes should clearly state whether and to what extent Congress intended to displace the antitrust laws, if at all.²
- ✓ The federal antitrust enforcement and other regulatory agencies should consult on the effect of regulation on competition.
- ✓ Antitrust enforcement agencies and courts should take account of the competitive characteristics of regulated industries, including the effect of regulation.³

II. *Implied immunities and Savings Clauses*

Note: A majority of Commissioners approved the following recommendations at previous deliberations meetings (recommendations with only 6 votes in italics):

- ✓ Courts should continue to apply current legal standards in determining when an immunity from the antitrust laws should be implied, creating implied immunities only when there is a plain repugnancy between the antitrust and regulatory provisions, as stated in cases such as *National Geremedical* and *Credit Suisse First Boston*.⁴
- ? *Recommend that Congress pass a statute stating that, in statutes dealing with regulatory regimes, absent a provision expressly providing otherwise, the antitrust laws continue to apply absent a plain repugnancy between the antitrust and regulatory provisions.*⁵

¹ Commissioners Jacobson, Kempf, and Shenefield do not join.

² Commissioner Warden does not join.

³ Commissioners Cannon, Kempf, Litvack, and Valentine do not join.

⁴ Commissioner Delrahim does not join.

⁵ Commissioners Cannon, Carlton, Delrahim, Garza, Kempf, and Yarowsky join.

Commissioners Burchfield, Jacobson, Litvack, Shenefield, Valentine, and Warden do not join.

- ? *Recommend that Congress craft savings clauses carefully to delineate clearly and specifically what antitrust claims remain in light of the regulatory regime.*⁶
- ✓ Recommend that courts interpret savings clauses to give deference to the antitrust laws.⁷
- ✓ Confirm that *Trinko* is best understood only as a limit on refusal-to-deal claims under Section 2 of the Sherman Act and that it does not displace the role of the antitrust laws in regulated industries.⁸
- ✓ Recommend that Congress evaluate whether the filed-rate doctrine should continue to apply in regulated industries and consider whether to overrule it legislatively where the regulatory agency no longer specifically reviews proposed rates.⁹

III. <i>Industry-specific standards</i>

- ✓ Recommend that Congress and regulatory agencies decline to set industry-specific standards for particular antitrust violations.¹⁰

IV. <i>Mergers in Regulated Industries</i>
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Note: *Deliberations on the following potential recommendations were not completed at previous deliberation meetings.*

- A. Exceptions from Clayton Act and Hart-Scott-Rodino Act
 - [1] Recommend no change to the current exceptions to the Clayton Act and Hart-Scott-Rodino pre-merger filing requirements for certain regulated industries (*e.g.*, banking, certain forms of surface transportation).
 - [2] No mergers should be exempt from the Clayton Act and/or the Hart-Scott-Rodino pre-merger filing requirements based on the industry or whether the company is subject to a regulatory regime.
- B. Performance of Competition Assessment Under Clayton Act and/or Relevant Public Interest Standard
 - [3] Regulatory agencies should conduct an independent public interest analysis for any merger that they have the authority to review. They should accord whatever weight they wish to any analysis of competitive effects of a merger conducted by one of the antitrust agencies.

⁶ Commissioners Burchfield, Cannon, Kempf, Litvack, Shenefield, and Yarowsky join. Commissioners Carlton, Delrahim, Garza, Jacobson, Valentine, and Warden do not join.

⁷ Commissioners Garza and Warden do not join.

⁸ Commissioner Kempf does not join.

⁹ Commissioners Burchfield and Warden do not join.

¹⁰ Commissioner Shenefield does not join.

- [4] The antitrust agencies should be exclusively responsible for undertaking a competitive analysis and reaching a conclusion regarding a proposed merger's likely effect on competition. That analysis and conclusion should be given presumptive weight by (or be binding upon) any regulatory agency that has authority to review the merger under a public interest standard that also considers factors other than competitive effects. Regulatory agencies should not "redo" the competition analysis in conducting their public interest assessment.

C. Authority to Challenge/Block Mergers

- [5] The antitrust agencies should have authority to challenge any merger under Section 7 of the Clayton Act regardless of whether a regulatory agency also has authority to impose conditions on or prohibit a merger under a separate public interest standard.
- [6] In regulated industries, the regulatory agency should have exclusive authority to prohibit or impose conditions on a merger or acquisition under the applicable public interest standard.

If so:

- [a] The antitrust agencies should have no independent authority to challenge the merger or acquisition.
- [b] The antitrust agencies should be able to petition for review, or participate in any review sought by another, of the regulatory agency's conclusions under the applicable public interest standard regarding the proposed merger.