

### Third Supplemental Regulated Industries Discussion Outline

#### IV. *Mergers in Regulated Industries*

[1] Reliance on the free market, reinforced by antitrust enforcement against unreasonable restraints of trade and anticompetitive mergers, generally is a preferable means of promoting consumer welfare than “command and control” regulation. Economic regulation should be reserved for clear cases of market failure or where free-market competition could not achieve a particular, identified interest that economic regulation could achieve.

[2] The trend toward deregulation, particularly over the last 25 years, has benefited consumers and the economy, and should be furthered.

[3] As is the general rule today, the antitrust agencies should have full merger enforcement authority under the Clayton Act, even in industries that continue to be subject to some form of economic regulation.

[4] Congress should reevaluate all instances in which a regulatory agency reviews proposed mergers or acquisitions under the agency’s “public interest” standard to determine whether such regulatory review in fact is necessary. In its reevaluation, Congress should consider whether particular, identified interests exist that an antitrust agency’s review of the proposed transaction’s likely competitive effects under Section 7 of the Clayton Act would not adequately protect. Such “particular, identified” interests would be interests other than those consumer interests—such as competitive prices and quality—served by maintaining competition. If such interests exist, Congress should consider whether protecting those interests outweigh the costs to the merging parties from requiring review of a proposed transaction by two agencies.

[a] If Congress determines that such particular, identified interests exist, Congress should revise the “public interest” standard under which the relevant regulatory agency reviews mergers to require the agency to address only those particular, identified interests in its merger review. In such circumstances, Congress should retain or provide for full enforcement authority for the antitrust agencies to investigate and challenge the merger pursuant to Section 7 of the Clayton Act.

[b] As part of those reevaluations, Congress should consider whether any benefits from the protection of such particular, identified interests could ever outweigh the costs to consumers from approval of an anticompetitive transaction. If not, then Congress should eliminate regulatory review of proposed mergers under the relevant “public interest” standard.

[c] If Congress determines that circumstances may exist in which the benefits of particular, identified interests could outweigh the costs to consumers from approval of an anticompetitive transaction, Congress should specify the particular, identified interests that are to be taken into account and how they are to be weighed if they conflict with consumers’ interests in preventing an anticompetitive transaction.

[i] In such circumstances, Congress should first consider eliminating the regulatory agency's "public interest" review and directing the antitrust agencies to obtain and consider input from the regulatory agency regarding such particular, identified interests, as well as input regarding other features of the industry that could assist the antitrust agency in its review of likely competitive effects.

[ii] If Congress concludes that the antitrust agencies cannot evaluate properly the particular, identified interests in conjunction with the agency's analysis of likely competitive effects, then Congress should consider reposing the final agency decision-making authority regarding the proposed transaction in the regulatory agency. In such instances, Congress should consider using a consistent statutory structure. The preferred arrangement should include the following elements:

- All mergers should be subject to the Hart-Scott-Rodino pre-merger filing requirements, regardless of the industry or whether the company is subject to a regulatory regime.
- 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 any regulatory agency that has authority to review the merger under a public interest standard that calls for consideration of factors other than a merger's competitive effects. That is, regulatory agencies should not "redo" the competition analysis in conducting their public interest assessment.
- Absent a specific congressional directive to the contrary, regulatory agencies, in conducting their public interest assessment of a merger, should give substantial weight to the effects on competition (or lack thereof) that would result from the merger.
- The regulatory agency should have exclusive authority to prohibit or impose conditions on a merger or acquisition under the applicable public interest standard. 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.