MEMORANDUM

From: Regulated Industries Working Group

To: All Commissioners

cc: Andrew J. Heimert and Commission Staff

Date: December 21, 2004

Re: Regulated Industries Issues Recommended for Commission Study

---

The Antitrust Modernization Commission assigned to the Regulated Industries Working Group the responsibility to analyze antitrust issues relating to regulated industries, and, based on that analysis, to make recommendations to the Commission as to the issues within that category that warrant substantive review. This memorandum outlines those recommendations. The memorandum addresses first the issues the Working Group recommends for substantive consideration and then addresses those issues not recommended for further study at this time. In each instance, comments are provided to allow insight into the Working Group's analysis. The issues are listed in approximate order of priority that the Working Group believes each issue should have for Commission study.

This memorandum reflects the consensus of a majority of the Working Group members. Some members of the Working Group may disagree with a recommendation and/or with aspects of the discussion and comments associated with a recommendation. In addition, a recommendation that the Commission should not study a particular issue at this time does not constitute a recommendation on the merits of the issue, nor does it preclude the possibility that the Commission report ultimately will endorse any particular recommendation.

SUMMARY OF RECOMMENDATIONS

Issues recommended for study. The Working Group recommends that the Commission study the following issues:

1. **How should responsibility for the enforcement of antitrust laws in regulated industries be divided between the antitrust agencies and other regulatory agencies?**
2. **How should the presence or absence of antitrust savings clauses in regulatory legislation be interpreted?**
3. **Should Congress and regulatory agencies set industry-specific standards for particular antitrust violations that may conflict with general standards for the same violations?**

Issues not recommended for study. The Working Group recommends that the Commission not address the following issues:

4. **Do any industry-specific regulations impose restrictions on competition so costly that the regulations should be reconsidered?**
5. **How should horizontal combinations of competitors created for industry self-regulation be treated under the antitrust laws?**
6. **Should the antitrust agencies be granted explicit statutory authority to comment upon the potential competitive effects of proposed federal regulations?**
7. **Should the antitrust agencies have authority to challenge "state aids"?**

DISCUSSION OF RECOMMENDATIONS

Issues recommended for study

The Working Group recommends that the Commission study the following issues:

1. **How should responsibility for the enforcement of antitrust laws in regulated industries be divided between the antitrust agencies and the regulatory agencies?**

Many federal regulatory agencies have authority to enforce the antitrust laws, or a specific competition regime, within the industry each regulates. Generally, the division of responsibility is one of two types.

- *No antitrust enforcement by the antitrust agencies*. The relevant regulatory agency has exclusive responsibility for policing anticompetitive conduct within the regulated industry, and the antitrust agencies are precluded from enforcing the antitrust laws against the firms in that industry. This approach currently is used in the railroad industry, where the Surface Transportation Board has jurisdiction over railroad acquisitions, but the antitrust agencies do not. *See* 49 U.S.C. §§ 11321, 11323 (Board has exclusive jurisdiction to approve and authorize consolidations, mergers, or acquisitions of rail carriers and participants in such approved transactions are "exempt from the antitrust laws").
- *Dual antitrust enforcement*. The relevant regulatory agency and antitrust agencies share enforcement responsibilities. This approach currently is used in the telecommunication, media, aviation, and banking industries, although its specific form varies. *See, e.g.*, 12 U.S.C. § 1849(b); U.S. Department of Justice, *Bank Merger Competitive Review — Introduction and Overview* (1995), *available at* http://www.usdoj.gov/atr/public/guidelines/6472.pdf (banking agencies and the Department of Justice both review the competitive impact of bank and bank holding company mergers).

The Commission should study whether it is more sensible to allocate antitrust enforcement solely to the antitrust agencies. By granting the antitrust agencies exclusive responsibility for enforcing the antitrust laws, the relevant regulatory agency could focus more on non-antitrust issues. Using this approach in a merger between telecommunications companies, for example, the FCC could continue to address non-antitrust issues like viewpoint diversity under the "public interest" standard, but the antitrust agencies would be responsible for traditional merger enforcement. Additionally, the antitrust agencies could complement a

regulatory agency's non-antitrust analysis of other issues, such as the FCC's media concentration rules, by applying traditional tools of antitrust analysis to ensure that competition is not diminished and to determine if there are any specific attributes of the regulated industry (*e.g.*, heightened potential for anticompetitive effects of vertical integration) that may require careful antitrust treatment.

Comments: The choice of approach (and the specific form it takes) is important because it can affect the proper allocation of agency resources, the burden on the regulated firms, and the consistency with which the antitrust laws are applied. In light of these crucial effects and the substantial proportion of the economy subject to regulation, examining how the responsibility for enforcing the antitrust laws should be divided in regulated industries is an important issue for the Commission to address.

2. **How should the presence or absence of antitrust savings clauses in regulatory legislation be interpreted?**

Under the doctrine of implied immunity, participants in an industry subject to a detailed regulatory scheme ordinarily are shielded from antitrust scrutiny unless the regulatory legislation contains an antitrust savings clause that bars such immunity. *See, e.g.*, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 878 (2004). In *Trinko*, the Supreme Court noted that the existence of an antitrust savings clause in the Telecommunications Act of 1996 barred a finding of implied immunity, subjecting defendant Verizon to antitrust scrutiny for its alleged denial of "interconnection services to rivals in order to limit entry" into the New York market for local telephone service. *Id.* After engaging in an antitrust analysis, the *Trinko* Court held that "Verizon's alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court's existing refusal-to-deal precedents." *Id.* at 878-81. Justice Scalia also concluded, however, that antitrust analysis must be attuned to the regulatory

setting of the industry at issue and that in this case the regulatory regime alone "was an effective steward of the antitrust function." *Id.* at 881-82. Justice Scalia cautioned against "antitrust intervention" in this type of case, where "[j]udicial oversight under the Sherman Act would seem destined to distort investment and lead to a new layer of interminable litigation." *Id.* at 882-83.

Comments: In light of the Court's decision in *Trinko*, it would be useful to clarify the appropriate interpretation of antitrust savings clauses in regulatory legislation as well as the boundaries of the implied immunity doctrine absent such a savings clause. These issues are pertinent to regulated industries, industries in transition to deregulation, and even independent government entities. *See U.S. Postal Service v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736 (2004) (addressing whether the Postal Reorganization Act of 1971 subjects the U.S. Postal Service to antitrust liability). The Commission received several suggestions that it study this issue, including from House Judiciary Chairman James Sensenbrenner.

3. **Should Congress and regulatory agencies set industry-specific standards for particular antitrust violations that may conflict with general standards for the same violations?**

Statutes, rulemakings, and even formal agency interpretations can set industry-specific standards for particular antitrust violations that conflict with generally applicable and well-established standards for the same violations. For example, the DOJ noted last year that the prohibitions on tying in the banking industry — set forth in both section 106 of the Bank Holding Company Act Amendments of 1970 and the Federal Reserve Board's proposed interpretation and supervisory guidance regarding that statutory provision — are much broader than the prohibitions on tying under general antitrust law. *See* Letter from R. Hewitt Pate, Assistant Attorney General, Department of Justice, to Jennifer J. Johnson, Secretary, Board of

Governors of the Federal Reserve System (Nov. 7, 2003), *available at* http://www.usdoj.gov/atr/public/comments/201459.pdf. As explained by the DOJ, such a difference in standards for this particular antitrust violation can chill competition and harm consumers.

Comments: Although Congress and regulatory agencies appropriately have the authority to establish industry-specific rules governing a wide range of activity, use of this authority to set standards for particular antitrust violations could conflict with generally applicable standards for the same violations. Given the potential harm to competition and consumers resulting from such inconsistencies in the law, it is important for the Commission to address whether Congress and regulatory agencies should set industry-specific standards for particular antitrust violations.

Issues not recommended for study

The Working Group recommends that the Commission not address the following issues:

4. **Do any industry-specific regulations impose restrictions on competition so costly that the regulations should be reconsidered?**

The costs of government regulations that restrict competition — including those in the health care and defense industries — may exceed the benefits. The Commission could identify costly restrictions on competition, engage in cost-benefit analysis for each, and recommend reconsideration of those that are most problematic.

Comments: Although undoubtedly useful to rooting out the most pernicious and costly restraints on competition, even the initial step of identifying costly restrictions on competition would require a substantial effort if the Commission wanted to review all government regulations. Thus, while Commission analysis of this issue could prove a useful input in any future review of these regulations by policy makers, the scope of the

Commission's effort likely would have to be severely limited. Accordingly, the Working Group does not recommend that the Commission study this issue.

5. **How should horizontal combinations of competitors created for industry self-regulation be treated under the antitrust laws?**

Industries often seek to collaborate to advance efforts at self-regulation. In many instances, such self-regulation can provide consumer benefits. Any collaboration among competitors, however, raises the specter of anticompetitive collusion. The Commission could study whether industry self-regulation calls for an analysis different from that called for generally when considering joint ventures and other collaborations between competitors. *See generally* Federal Trade Commission & the U. S. Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (Apr. 2000).

Comments: The Commission could consider giving this particular type of collaboration some sort of special treatment under the antitrust laws in light of the social benefits such regulation may have (and which are not easily quantified). However, there is a strong argument that industry self-regulation simply should be treated the same as any other type of competitor collaboration. Moreover, there does not appear to be any significant consensus that current approaches do not sufficiently value the consumer benefits (of whatever type) that arise from collaborations, such that the current enforcement regime could be said to over-deter beneficial collaborations. Accordingly, the Working Group recommends that the Commission not address this issue.

6. **Should the antitrust agencies be granted explicit statutory authority to comment upon the potential competitive effects of proposed federal regulations?**

Given their expertise in antitrust analysis, the FTC and DOJ are well-positioned to comment on the potential anticompetitive effects of federal regulations. Ensuring the antitrust

agencies' participation in rulemaking would help other agencies avoid costly, anti-competitive regulations.

Comments: Although such comments provide substantial benefits, there is no evidence that the antitrust agencies face any bar to submitting such comments currently. Accordingly, while their continued participation in regulatory matters should be encouraged, it is unclear if there would be any benefit to legislation that formally grants these antitrust agencies authority to participate, as they do so already. The Working Group, therefore, recommends that the Commission not study this issue.

7. **Should the antitrust agencies have authority to challenge "state aids"?**

"State aids" are government subsidies to industries that may bias competition. This issue has had particular prominence in the European Union, where member states have been charged with subsidizing domestic industry to the disadvantage of competitors in other member states. *See generally* Treaty Establishing the European Community, March 25, 1957, arts. 87-89. Similar subsidies in the United States could also be viewed as altering the competitive balance such that competition and consumers are harmed.

Comments: While state aids undoubtedly exist within the United States, they do not appear to present the same types of concerns as in the European Union. First the dormant commerce clause limits the enactment by states of protectionist laws; second, the state action doctrine limits the extent to which a state may displace competition. More generally, the United States for the most part has an open domestic economy, whereas the EU faced the challenge of forming a unified economic entity in place of numerous national barriers to trade. Although the Immunities and Exemptions Working Group has recommended study of the state action doctrine, the Regulated Industries Working Group

does not recommend a broader study of state aids and mechanisms to combat them, as the topic is neither pressing nor limited to antitrust issues.