



## MEMORANDUM

From: Regulated Industries Study Group  
To: All Commissioners  
cc: Andrew J. Heimert and Commission Staff  
Date: May 4, 2005  
Re: Regulated Industries Study Plan

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### **Issues Adopted by the Commission for Study**

- A. How should responsibility for enforcement of antitrust laws in regulated industries be divided between antitrust agencies and the regulatory agencies?
- B. What is the appropriate standard for determining the extent to which the antitrust laws apply to regulated industries where the regulatory structure contains no specific antitrust exemption and/or contains a specific antitrust savings clause?
- C. Should Congress and regulatory agencies set industry-specific standards for particular antitrust violations that may conflict with general standards for the same violations?

### **Questions for Public Comment**

- 1. What role, if any, should antitrust enforcement play in regulated industries, particularly industries in transition to deregulation? How should authority be allocated between antitrust enforcers and regulatory agencies to best promote consumer welfare in regulated industries?
- 2. How, if at all, should antitrust enforcement take into account regulatory systems affecting important competitive aspects of an industry? How, if at all, should regulatory agencies take into account the availability of antitrust remedies?
- 3. What is the appropriate standard for determining the extent to which the antitrust laws apply to regulated industries where the regulatory structure contains no specific antitrust exemption? For example, in what circumstances should antitrust immunity be implied as a result of a regulatory structure?
- 4. How should courts treat antitrust claims where the relevant conduct is subject to regulation, but the regulatory legislation contains a "savings clause" providing that the antitrust laws continue to apply to the conduct?
- 5. Should Congress and regulatory agencies set industry-specific standards for particular antitrust violations that may conflict with general standards for the same violations?

6. When a merger or acquisition involves one or more firms in a regulated industry, how should authority for merger review be allocated between the antitrust agencies (DOJ and FTC) and the relevant regulatory agency?
- A. Are there additional costs and delay when two agencies (one antitrust, one regulatory) both analyze the antitrust effects of the same merger? Are there benefits to such dual review?
- B. Should regulatory agencies defer to antitrust analysis by the antitrust agencies, or should both the antitrust and regulatory agencies conduct separate antitrust analyses in performing merger reviews? Should the antitrust agencies have primary responsibility or simply an advisory role with respect to antitrust analysis in merger review?

In your response, please refer specifically to the following contexts:

- i. Mergers or acquisitions involving financial institutions. *See* 12 U.S.C. §§ 1467a, 1828, 1842.
- ii. Mergers or acquisitions involving certain media companies (*e.g.*, radio or television broadcasters, satellite, and cable companies) and common carriers. *See* 47 U.S.C. §§ 214, 310.
- iii. Mergers or acquisitions of rail carriers subject to approval by the Surface Transportation Board. *See* 49 U.S.C. §§ 11321, 11323-24.
- iv. Mergers or acquisitions involving motor carriers of passengers. *See* 49 U.S.C. § 14303.
- v. Pooling agreements among certain motor carriers. *See* 49 U.S.C. § 14302.
- vi. Acquisitions of assets of natural gas companies. *See* 15 U.S.C. § 717f.
- vii. Mergers or acquisitions of electric power companies. *See* 16 U.S.C. § 824b.
- viii. License applications subject to the approval of the U.S. Nuclear Regulatory Commission. *See* 42 U.S.C. § 2135.
- ix. Issuance of federal coal leases. *See* 30 U.S.C. § 184(*l*).
- x. Issuance or transfer of licenses for exploration of hard minerals in deep seabed sites. *See* 30 U.S.C. § 1413(d).
- xi. Issuance of oil and gas leases on submerged lands of the Outer Continental Shelf. *See* 43 U.S.C. § 1337(c).

## Hearings

- Three panels of approximately three to four hours each.
- 1-2. Antitrust enforcement in regulated industries (two panels).
- Scholar(s)
  - Representative(s) from various regulatory agencies
  - Industry representative(s)

- Representative(s) from DOJ
- Practitioner(s) familiar with antitrust enforcement in regulated industries

3. Allocation of merger review authority between antitrust agencies and regulatory agencies.

- DOJ and/or FTC representative(s)
- Scholar(s)
- Representative(s) from the regulatory agencies
- Industry representative(s)
- Practitioner(s) familiar with antitrust enforcement in regulated industries