MEMORANDUM

From: AMC Staff

To: Commissioners

Date: December 1, 2006

Re: Supplemental Regulated Industries Discussion Memorandum—Merger Review in Regulated Industries

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In light of the discussion at the Commission's November 14, 2006, meeting on merger enforcement in regulated industries, the following provides a brief overview of the models reflected in current law and comments on those models, as well as the applicability of Hart-Scott-Rodino (HSR) pre-merger notification requirements to regulated industries.

Merger Review Authority

Only four industries are left in which a regulatory agency has merger review authority.[1] In two of those four industries, telecommunications/media and wholesale electric power transmission, DOJ has full enforcement authority to investigate and challenge a proposed merger under the Clayton Act, regardless of the regulatory agency's authority to consider implications of a merger in accordance with its own regulatory mission. In those two industries, the regulatory agency considers competition as one part of its broader public interest review. For example, in telecommunications/media, the merging parties must obtain FCC approval for the transfer of

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[1] Those industries are banking (regulated by various federal banking agencies); wholesale electric power transmission (regulated by FERC); telecommunications/media (regulated by the FCC); and railroads (regulated by the STB). Industries in which regulatory agencies previously had, but no longer have, authority to review mergers include trucking, airlines, and natural gas.

certain FCC licenses, and the FCC's review of a proposed transfer considers likely effects on competition, along with diversity-of-views and universal service goals, under the agency's public interest standard.

A slightly different approach controls in the area of banking. There, the federal banking agency considers likely competitive effects, along with financial soundness and other banking-specific concerns. DOJ gives its competitive analysis to the banking agency, and, in practice, the banking agency usually works closely with DOJ and defers on competition concerns. The banking agency can depart from DOJ's recommendations, however, and has done so a few times, although not in the recent past. If the banking agency approves the merger over DOJ's objections, DOJ has full independent authority to challenge the banking agency's decision in court. Pursuant to the Bank Merger Act,[2] the court applies a standard that differs slightly from section 7 of the Clayton Act: a merger can overcome an otherwise successful challenge on competition grounds if the merging parties demonstrate the anticompetitive effects are "clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served."[3] No submissions to the Commission argued that this procedure was inefficient and warranted change.

The final industry is railroads, where Congress, in abolishing the Interstate Commerce Commission in 1995, transferred the ICC's historical railroad merger review authority to the Surface Transportation Board. The STB reviews mergers under a public interest standard that

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[2] 12 U.S.C. § 1828(c).

[3] United States v. First City National Bank of Houston, 386 U.S. 361, 366 (1967). To the best of our knowledge, no court has ever found that a bank merger challenged by the Department of Justice was anticompetitive under section 7 of the Clayton Act, but permissible nonetheless on the basis of the convenience and needs defense—although in *United States v. First National Bank of Jackson*, 301 F. Supp. 1161 (S.D. Miss. 1969), the court found the merger did not violate section 7 of the Clayton Act, but that even if it had, the defendants had met the convenience and needs defense.

incorporates several considerations, including whether the proposed transaction would have an "adverse impact on competition." The STB must give "substantial weight" to the Justice Department's views on whether the transaction will adversely affect competition, but the STB makes the final decision on the merger. In 1996, the STB approved the merger between Union Pacific and Southern Pacific, despite DOJ's strenuous objections that the merger was anticompetitive. It is unclear whether the "substantial weight" requirement gives DOJ authority to petition for review of an STB decision and pursue its objections to the merger since DOJ did not seek review of STB's decision in this matter.

No witness or commenter before the Commission recommended eliminating or reducing the antitrust agencies' current merger enforcement authority in any regulated industry. Even the STB and the railroads recommended only preservation of the status quo in their industry. Rather, witnesses and commenters focused on whether the regulatory agencies' merger review authority should be curtailed, especially as to competition issues. For example, the ABA Antitrust Section recommended that FERC's independent authority to review wholesale electric power mergers be eliminated, and that FERC be encouraged to share whatever perspective it has on a proposed merger with DOJ.[4] The ABA Antitrust Section's Comment states that FERC's review typically is not as precise and focused as DOJ's, adds nothing useful to DOJ's analysis, and results in divestitures simply to bring down HHI levels, not to address specific competitive concerns.[5] (FERC's exercise of authority in this regard, however, merely requires more relief than the antitrust analysis would call for, rather than permitting an otherwise anticompetitive transaction.)

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4 *See* Comments of ABA Antitrust Section re Regulated Industries, at 2.

5 *See id.* at 2, 4-7.

The witnesses and commenters all agreed—again, with the exceptions of the STB and the railroad industry—that no regulatory agency should be able to *approve* a merger over the antitrust agencies' objections. Likewise, no one (except the STB and the railroad industry) suggested that the antitrust agencies should not be able to challenge in court mergers in regulated industries. The focus of witnesses and commenters was on preserving the regulatory agency's authority to *disapprove*, or place conditions on, a merger in the public interest, beyond what the antitrust agencies have required to resolve competitive concerns, or despite the antitrust agencies finding no concerns warranting challenge on purely antitrust grounds.

HSR Filing

The three exemptions from HSR filing are found in section 7A(c) of the Clayton Act. One exemption is for the banking mergers discussed above. This exemption has been in the HSR Act since its original enactment, because Congress determined that requiring HSR pre-merger notifications in banking would be redundant. A pre-merger review process in the banking agencies pre-dates the HSR Act; it includes an assessment of likely competitive effects and requires the parties to submit essentially the same information as in an HSR filing.

A second exemption covers transactions that are exempt if approved by another federal agency. This exemption is conditioned on the antitrust agencies receiving all documents and other information contemporaneously as filed with the other agency, so that the antitrust agency can participate in the regulatory agency's review. The only situation where this exemption may currently apply appears to be railroad mergers.

Finally, there is a blanket exclusion for transactions that are exempt from the antitrust laws. There may in fact be no mergers that are beyond the antitrust agencies' authority to

challenge—the major treatises do not identify any—but if there are, it probably makes sense to exclude them from HSR.