Chapter V. Competition Advocacy

In addition to enforcing the antitrust laws, the Antitrust Division also acts as an advocate for competition, seeking to promote competition in sectors of the economy that are or may be subject to government regulation. This chapter will set forth the major policies and practices of the Division in these competition advocacy activities.

A. The Division's Role as a Competition Advocate

Competition is the central organizing principle of the American economy, and its preservation and promotion are the goals toward which the Antitrust Division's efforts are directed. In most sectors, market forces are the regulators of business activities, subject to the restrictions of the antitrust laws. There are, however, important exceptions in such major industries as communications, banking, agriculture, securities, transportation, energy, and international trade, where federal regulation—sometimes accompanied by antitrust immunity—has been wholly or partially substituted for the discipline of market forces as the arbiter of output and pricing decisions.

In addition to these federally regulated industries, economic regulation at the state or local level affects other industries. Some significant examples include professional and occupational licensing, insurance, housing, health care, public utilities, certain aspects of banking, and real estate. The Division's competition advocacy efforts primarily focus on federal, state, and local regulatory schemes that unnecessarily impede competition.

While the competitive problems raised in regulated sectors of the economy are numerous and factually diverse, the Division's role in this area is relatively simple: to promote reliance on competition rather than on government regulation wherever possible under the circumstances and to ensure that necessary regulation is well designed to achieve its objectives and disrupts natural market forces no more than necessary. These goals should be reflected in the Division's competition advocacy efforts across the entire range of regulated industries.

1. The Division's Analytical Model

Many regulatory schemes are products of the Depression years, and reflect economic assumptions and conditions that are not valid today. Moreover, regulation can be an imperfect and very costly substitute for market forces. Accordingly, exceptions to the general rule of free market competition, protected by antitrust enforcement, should be permitted only on compelling evidence that competition cannot work or is inimical to some overriding social objective.

Through its competition advocacy program, the Division seeks to further four goals:

- To eliminate unnecessary and costly existing regulation.
- To inhibit the growth of unnecessary new regulation.
- To minimize the competitive distortions caused where regulation is necessary by advocating the least anticompetitive form of regulation consistent with the valid regulatory objectives.
- To ensure that regulation is properly designed to accomplish legitimate regulatory objectives and inhibit as little as possible competitive market forces.

In analyzing the need for new or continued regulation, the Division focuses on the comparative benefits of free competition, on the one hand, and the proposed method of regulation, on the other, by asking a number of basic questions:

- What are the costs or disadvantages of free competition in the market or industry at issue?
- If the regulatory scheme is an existing one, has regulation fulfilled its purpose; and, do the underlying economic and social conditions justifying regulatory interference with the marketplace still exist?
- What are the costs and benefits associated with the existing or proposed regulatory scheme? *See National Commission for the Review of Antitrust Laws and Procedures, Report to the President and the Attorney General* 188 (1979).
- If existing regulation is to be eliminated, what are the necessary elements of a transition from a regulated to a competitive, unregulated market?
- If regulation is appropriate, is the particular regulatory scheme well-tailored to achieve its purpose?

Asking these questions requires that those who favor regulation demonstrate that the benefits to the public of regulation outweigh its anticompetitive effects; that such benefits cannot be achieved by some less anticompetitive alternative; and that, where regulation is needed, it can be wisely crafted to accomplish its objectives with no unintended consequences. Where these showings cannot be made, the case for regulatory reform, up to and possibly including the elimination of regulation, is compelling.

Competition advocacy is also particularly important when an industry is being deregulated. Procompetitive regulation may play a critical role in a transition

from monopoly to competition. Skillful regulation in transitions to competition can help determine whether competition will be able to flourish.

2. The Methodology of Competition Advocacy

The Antitrust Division conducts its program of competition advocacy through a collaboration between its economists and attorneys, particularly those with expertise in various regulated industries. This advocacy includes participation on Executive Branch policy-making task forces, preparation of testimony on a wide variety of legislative initiatives, publication of reports on regulated industry performance, review of proposed licensing and leasing applications, and intervention in regulatory agency proceedings.

a. Activities within the Executive Branch

The Division's activities within the Executive Branch have included, for example, its ongoing participation in White House and interagency task forces dealing with a variety of regulatory issues arising in areas such as telecommunications, intellectual property, ocean shipping, energy, healthcare, crop insurance, and export policy. Whether by informal advice or formal comment, the Division's role in this regard is to advise the President and other government agencies regarding the competitive impact of proposed policy, legislation, and agency action.

Under 40 U.S.C. § 559, Executive Branch agencies must obtain the Attorney General's antitrust advice before selling government property to a private interest, with exceptions for real or personal property (other than a patent, process, technique, or invention) with an estimated fair market value less than $3 million. The Attorney General is required to furnish the advice within 60 days after receiving notice from the agency. If assigned to review a proposed disposition of property by an executive agency to a private interest, staff should ensure that the agency has competitive procedures in place for the sale. Staff should draft a letter from the Assistant Attorney General to the executive agency and the Administrator of General Services with advice on whether the proposed disposal of property would be inconsistent with antitrust law.

b. Testimony and Comments on Legislative and Regulatory Initiatives

Division officials routinely testify concerning the competitive impact of proposed federal legislation. Such testimony may support legislation designed to reduce or eliminate unnecessary economic regulation or require regulatory agencies to consider competition in their evaluation of the need for new or

continued regulation. It may also oppose efforts to extend regulation to previously unregulated markets.

Similarly, the Division, both individually and jointly with the FTC, has submitted comments to state legislatures, other state regulatory boards, and state officials, urging the rejection of proposed state legislation or regulations that would restrict competition. For example, the Division has filed comments on proposed restrictions on competition between lawyers and non-lawyers. *See*, *e.g.*, Letter from R. Hewitt Pate, Assistant Att'y Gen., Antitrust Div., and Deborah Platt Majoras, Chairman, FTC, to Jeffery Alderman, Executive Dir., Kan. Bar Ass'n (Feb. 4, 2005). The Division has also filed comments on proposed restrictions on competition in real estate closings, *see*, *e.g.*, Letter from Charles A. James, Assistant Att'y Gen., Antitrust Div., and Timothy J. Muris, Chairman, FTC, to John B. Harwood, Speaker of the R.I. House of Representatives, et al. (Mar. 29, 2002), and on proposed restrictions on the provision of limited service real estate brokerage. *See*, *e.g.*, Letter from R. Hewitt Pate, Assistant Att'y Gen., Antitrust Div., and Deborah Platt Majoras, Chairman, FTC, to Loretta R. DeHay, Gen. Counsel, Tex. Real Estate Comm'n (Apr. 20, 2005); Letter from R. Hewitt Pate, Assistant Att'y Gen., Antitrust Div., to Todd Hiett, Speaker of the Okla. House of Representatives, et al. (Apr. 8, 2005).

c. Publication of Reports on Industry Performance

The Division has authored a number of in-depth studies of the competitive performance of various regulated industries, including airlines, insurance, milk marketing, ocean shipping, and numerous energy industries. *See*, *e.g.*, *Competition in the Oil Pipeline Industry: A Preliminary Report* (1984); *Competition in the Coal Industry* (1983); *Antitrust Advice on the License Application of the Texas Deepwater Port Authority* (1979) (pursuant to Section 7 of the Deepwater Port Act of 1974); *Outer Continental Shelf Federal/State Beaufort Sea Oil and Gas Lease Sale No. BF* (1980); *1985 Report of the Department of Justice to Congress on the Airline Computer Reservation System Industry* (1985). The purpose of such reports was to create greater public awareness of the costs of regulation and thereby to advance reform efforts.

d. Intervention in Regulatory Agency Proceedings

The Division's major competition advocacy effort involves submitting comments and intervening in the proceedings of federal regulatory agencies in an effort to focus attention on competitive issues and to suggest adoption of the least anticompetitive and best designed forms of regulation where continued regulation is deemed necessary. When filing public comments with independent regulatory agencies, the Division must coordinate, in advance, the content and

timing of the comments with the relevant White House policy council. This policy is designed to ensure that Executive Branch departments do not take contradictory positions in their filings. Such issues do not apply to situations where only the Department of Justice is mandated to make filings, such as competitive factor reports with bank regulatory agencies.

In the communications area, for example, the Division participates in proceedings before the Federal Communications Commission. The Division also serves as a competition advocate in the banking, finance, and securities industries, submitting comments to and appearing as necessary before such agencies as the Federal Reserve Board, Securities and Exchange Commission, and Commodity Futures Trading Commission.

In addition, the Division appears before or files comments with the Department of Transportation, the Federal Maritime Commission, and the Surface Transportation Board on a wide variety of issues including proposed mergers and acquisitions, conference agreements, pooling agreements, airline code share agreements, and other various rulemakings. Through comments, consultation, or otherwise, the Division also participates in proceedings before the Federal Energy Regulatory Commission, the Nuclear Regulatory Commission, the Environmental Protection Agency, and the Interior Department on competitive issues raised by agency action concerning electricity, the interstate transmission of natural gas, and other issues involving energy policy. And the Division participates in regulatory proceedings involving USDA marketing orders, which regulate the production of various agricultural commodities.

While the Division's competition advocacy cuts across a vast and diverse cross section of industries in regulated sectors of the economy, the issues raised in regulatory proceedings tend to involve the same types of questions, e.g., whether competition is feasible, whether an industry is naturally monopolistic, whether cross subsidies exist and, if so, whether they are desirable, whether economies of scale are substantial, and whether particular regulations are likely to accomplish their stated objectives.

e. Procedures for Filing Pleadings Before Federal Agencies

There are a number of means by which legal and economic sections may become aware of agency proceedings in which the Division should become involved. Primarily, each section should review the Federal Register and the trade press to identify important regulatory matters. At times, the Division may be invited by the agency to participate in rulemaking proceedings. Either the legal or economic staff may lead the effort to develop appropriate pleadings, but both legal and

economic staffs should be assigned to support the effort and ensure that the Division makes an important contribution to the proceedings.

When preparing to file any pleading in a regulatory matter, the legal and economic staff should prepare a memorandum for the Assistant Attorney General ("AAG memo"). The AAG memo should set forth the nature of the regulatory matter, the reasons for becoming involved, the Division's role in the proceedings, and a summary of the position taken in the pleading. The AAG memo should also describe the Division's prior positions, if any are relevant. Unless the pleading is noncontroversial, the AAG memo should be accompanied by a draft press release announcing the pleading. The press release should contain a concise description of the regulatory matter and the Division's position.

Because most regulatory proceedings have short time limits, it is vital that the staff prepare pleadings promptly. The legal and economic staff should consult with the relevant Deputy Assistant Attorneys General regarding the substance of any pleading well in advance of the filing deadline. No later than two weeks before the filing date, the legal and economic staff should forward to the relevant Deputy Assistant Attorneys General a copy of the AAG memo and the draft press release. In addition, no later than one week before the filing deadline, the relevant legal and economic staff should forward the filing, in final form, to the relevant Deputy Assistant Attorneys General.

The legal and economic staffs should be conscious of prohibitions on *ex parte* contacts with agencies. Many agencies' regulations prohibit any contact with outside parties, including the Department of Justice (e.g., Department of Transportation regulations, 14 C.F.R. § 300.2), and may require such contacts to be placed on the public record. Attorneys and economists should avoid any agency contacts that may violate these regulations. Economists should consult with the lead attorney before making any contacts.

f. Litigation Activities

Sections that are primarily concerned with competition advocacy in regulated industries also have the responsibility for enforcing the antitrust laws in these industries through litigation. Civil antitrust litigation can complement the Division's competition advocacy role. Cases under the Sherman or Clayton Act can ensure that the regulatory scheme does not protect or vindicate a wider scope of anticompetitive activity than is necessary or intended. For example, the Division was successful in litigation to establish that mergers between ocean carriers were not subject to Federal Maritime Commission approval and antitrust immunity under Section 15 of the Shipping Act.

Litigation activities are described generally in Chapter IV, *supra*. Litigation activities in regulated industries are reviewed by the appropriate Director of Enforcement, the appropriate Deputy Assistant Attorney General, and the Assistant Attorney General.

B. Procedures Affecting the Regulatory Sections

To ensure the consistent quality of the Division's advocacy before regulatory agencies and to coordinate its varied efforts, all Division regulatory filings must be reviewed by the appropriate Deputy Assistant Attorneys General. Each pleading that commences the Division's participation in a regulatory proceeding, states the Department's position on the merits, or raises significant policy issues is reviewed and signed by one of the supervising Deputy Assistant Attorneys General or, in some cases, by the Assistant Attorney General. Except for litigation matters, which first go through the appropriate Director of Enforcement, all memoranda, filings, and reports made in regulatory proceedings should be transmitted directly from the section chief to the appropriate Deputy Assistant Attorneys General.