

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 2 on Competition and Regulation

THE REGULATED CONDUCT DEFENCE

-- United States --

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The attached document is submitted to Working Party No. 2 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 14 February 2011.

Please contact Mr. Sean Ennis if you have any questions regarding this document [phone number: +33 1 45 24 96 55 -- E-mail address: sean.ennis@oecd.org].

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1. This submission responds to the chair’s letter of December 17 calling for submissions for the Roundtable on the Regulated Conduct Defense. The submission discusses express statutory immunities from the U.S. antitrust laws, with examples of how such immunities apply in particular sectors, implied statutory immunities, along with state action and federalism issues, and the role of the Antitrust Division of the U.S. Department of Justice (“Division”) and the Federal Trade Commission (“FTC”), (collectively, “the agencies”) in addressing competition issues that arise as a result of these immunities.

1. Introduction

2. There is no general “regulated conduct” defense in U.S. antitrust law. The antitrust laws – which the Supreme Court has called “the Magna Carta of free enterprise”¹ – generally apply to interstate commerce or any activity affecting interstate commerce, whether or not the conduct at issue is subject to state or federal regulation. The Supreme Court consistently has held that the mere existence of regulation does not give rise to antitrust immunity. In most contexts, regulation serves goals that Congress has determined are distinct from, but not inconsistent with, the competition standards of the antitrust laws. For example, Congress may, without displacing the antitrust laws, provide for environmental and safety regulations, or regulation of the prices and practices of utilities and other providers of critical services. Congress may also enact legislation that promotes activity that the antitrust laws neither prohibit nor require.

3. Some regulatory statutes, however, do displace the antitrust laws to a limited extent, either expressly or by implication. The nature and extent of such exemptions or immunities is a policy decision made by Congress; the role of the courts is to interpret the relevant statutes. Congress may provide an express statutory exemption when it determines that specific anticompetitive conduct otherwise prohibited by the antitrust laws should be permitted or required to further non-antitrust goals, or that competition should be “balanced” with other factors that can best be evaluated by a specialized regulatory agency. Even absent express statutory exemptions, the Supreme Court has held, in limited situations, regulatory statutes may be construed as intended by Congress to create implied exemptions from the antitrust laws to the extent necessary to avoid conflict with a regulatory scheme. In addition, relying on “principles of federalism and state sovereignty,” the Supreme Court has long held that the Sherman Act does not apply to “anticompetitive restraints imposed by the States ‘as an act of government.’”²

4. This submission first discusses express immunity from the antitrust laws, using examples from statutes that apply to the U.S. ocean shipping, railroad, and civil aviation sectors. It then summarizes the principles the Supreme Court has articulated to govern implied immunity and discusses the Court’s most recent decisions applying those principles. The submission next describes the state action doctrine, which is based on federalism concerns and distinct from immunities based solely on federal law. In each of these areas, the basic legal principles are well established. The application of those principles to particular fact patterns and allegations involving a range of complex regulatory schemes, however, is a subject of much litigation and debate. Of course, the conclusion that particular conduct is not immune or exempt from the antitrust laws does not mean that it violates the antitrust laws. If there is no immunity, established antitrust standards apply. Regulation, however, remains a relevant part of the fact pattern in determining whether a violation has occurred, and must be taken into account in fashioning or modifying injunctive relief.

5. The submission concludes with examples of how the agencies, through competition advocacy and participation in regulatory proceedings, seek to ensure that government regulators properly analyze

¹ Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 415 (2004) (quoting United States v. Topco Associates, Inc., 405 U.S. 596, 610 (1972)).

² City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 370 (1991) (quoting Parker v. Brown, 317 U. S. 341, 352 (1943)).

and weigh competition in carrying out their responsibilities to execute and enforce regulatory statutes through rulemaking and adjudication.

2. Examples of express statutory immunities

6. Over the past century, Congress has enacted a number of express statutory exemptions from the full application of the federal antitrust laws in certain regulated sectors.³ Some of these exemptions have been narrowed or eliminated over time, but today this category includes agricultural and fishermen's cooperatives, insurance, and various transportation services.⁴ In some cases the exemption is dependent on action taken by the regulatory authority. The exemption may also be limited to particular activities or types of agreements. Determining whether particular conduct falls within the relevant immunity can also raise difficult questions of statutory construction. The following section discusses three examples of express statutory immunity in the transportation sector.

2.1 Ocean shipping

7. The Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 ("OSRA"),⁵ exempts ocean common carrier agreements from the antitrust laws and subjects them to oversight by the Federal Maritime Commission ("FMC"), an independent regulatory agency.

*The resulting regulatory system has always permitted fixing of price, output, and service terms by horizontal cartels, subject to the oversight of a federal regulatory agency. The agency, the FMC and its predecessors, has had varying roles in reviewing and approving conference agreements, and the agreements have always been required to be on file with the agency and available to the public. ... The FMC and its predecessors have always had some degree of power to investigate and prosecute abuses in the system, and shipping law has always provided for certain special restrictions on conference agreements to prevent anticompetitive conduct.*⁶

8. The passage of OSRA was a significant deregulatory step. Although carrier agreements retain their antitrust immunity, and members can still publish voluntary collective service guidelines, OSRA permits individual members to negotiate independent confidential service contracts with shippers, and prohibits the group from taking any retaliatory action against shippers or carriers that do so. As a result, independent service contracts now dominate the traffic carried by carriers that belong to conferences and rate agreements. Despite these shipper benefits from the independent service contracts, the exemption still denies the full benefits of competition, and the Division has twice testified before Congress in favor of elimination of the exemption.⁷ Note that the immunity provided by the Shipping Act does not extend to mergers and acquisitions involving ocean carriers, which remain subject to the antitrust laws.

³ Congress also has authority to create exemptions for non-regulated conduct.

⁴ See ABA Section of Antitrust Law, *Federal Statutory Exemptions From Antitrust Law* (2007).

⁵ Shipping Act of 1984, 46 U.S.C. App. §§ 1701-1719, as amended by the Ocean Shipping Reform Act of 1998, Pub. L. 105-258, 112 Stat. 1902 (1998).

⁶ *Supra* n.4, at 168-69.

⁷ See James, 2002, <http://www.justice.gov/atr/public/testimony/11244.htm>; Nannes, 2000, <http://www.justice.gov/atr/public/testimony/4377.htm>.

2.2 Railroads

9. A substantial responsibility for competition law and policy relating to the railroad industry lies with the Surface Transportation Board (“STB”), a “decisionally independent” economic regulatory agency administratively affiliated with the Department of Transportation, and the successor agency to the Interstate Commerce Commission. The STB has authority over mergers and acquisitions, and transactions approved by the Board receive antitrust immunity. In addition, if the STB determines that a railroad possesses “market dominance” over a particular shipment, it has the authority to regulate the rate for that shipment. The STB also has the authority to approve, and thereby immunize from the antitrust laws, certain limited agreements among railroads subject to strict statutory limits. The Division may prosecute railroads for antitrust violations that are not within the STB’s jurisdiction, *e.g.*, price-fixing.

10. Congress’s stated reasons for giving jurisdiction over mergers and dominant firm rate regulation to the STB are technical expertise and the need to review mergers using a “public interest” standard that takes into account such factors as public benefits, labor conditions, environmental issues, and effects on competition.

11. The differences between STB and Division approaches to competition issues can be seen clearly in the 1996 Union Pacific/Southern Pacific merger, which involved the combination of two of the three major railroads in the Western United States. The Division concluded that the transaction would significantly reduce competition in numerous markets where the number of carriers dropped from two to one or from three to two, and that the remedy proposed by the carriers (granting trackage rights⁸ to the third major western railroad) was unworkable and, in any case, insufficient to remedy the harm. The Division also found that the efficiencies claimed did not outweigh the competitive harms. The Division therefore recommended that the STB deny the merger application.⁹ The STB did not accept the Division’s recommendation, instead giving great weight to the benefits claimed by the carriers. The Board also found that trackage rights were sufficient to replace direct competition where the number of carriers fell from two to one, and that a reduction from three competitors to two was not of concern. Unfortunately, following implementation of the merger, there was a massive service breakdown in the West, resulting in billions of dollars in losses to shippers. In addition, there were numerous complaints that the trackage rights were ineffective in replacing competition lost because of the merger. In 2001, the STB promulgated new rules for rail mergers that require a stronger showing of public benefits to future major mergers.¹⁰

2.3 Civil aviation

12. From 1938 to 1978, air carriers were extensively regulated in the U.S. by the Civil Aeronautics Board (CAB), which had broad powers to regulate entry and exit, rates, mergers, agreements, and methods of competition. The CAB was eliminated in 1985, at which point the U.S. Department of Transportation (DOT) took over its remaining regulatory responsibilities (*e.g.*, fitness to provide service, ownership, advertising), including several relating to competition. The Division has enforcement authority under the antitrust laws, while the DOT has concurrent explicit authority to prohibit unfair and deceptive practices and unfair methods of competition;¹¹ air carriers are exempt from the jurisdiction of the FTC.

⁸ “Trackage rights” grant to the trains of a third railroad access over the tracks of the merged railroad, in order to serve shippers adversely affected by the merger.

⁹ See press release available at http://www.justice.gov/atr/public/press_releases/1996/0673.htm.

¹⁰ 49 C.F.R. § 1180.

¹¹ 49 U.S.C. § 41712.

13. Statutory changes moved antitrust review of airline mergers from the CAB to DOT, and, since 1989, to the Division. Apart from merger review, however, DOT has explicit authority to review agreements among airlines that affect international air transportation, and to confer upon such agreements immunity from the U.S. antitrust laws. Because of DOT's power to grant immunity, the Division consults with the DOT and often brings its expertise to bear in formal comments in DOT regulatory proceedings. Over the years, the Division has commented on various code-sharing arrangements between U.S. and foreign carriers, and many of the Division's recommended limits on such arrangements have been accepted and implemented by DOT. DOT employs a public interest standard in approving such agreements and in granting antitrust immunity to them.¹²

3. Implied Statutory Immunity

14. In some circumstances, federal regulatory statutes may be deemed to express congressional intent to limit the applicability of the antitrust laws. Under this doctrine of "implied immunity" the Supreme Court has made clear that the "proper approach" to a claim that a federal regulatory statute impliedly repeals the antitrust laws with regard to challenged conduct "is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted."¹³ The Court has described this admonition to give effect to both regulatory policies as the "guiding principle" for resolving claims of implied antitrust immunity.¹⁴ "[A] cardinal principle of construction [is] that repeals by implication are not favored,"¹⁵ and "can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system,"¹⁶ "Repeal is to be regarded as implied only if necessary to make the [regulatory statute] work, and even then only to the minimum extent necessary."¹⁷ Thus, the Court has repeatedly rejected the view that all conduct regulated under another statutory scheme enjoys "a blanket exemption" from antitrust law.¹⁸

15. The Supreme Court's most recent decision on a question of implied antitrust immunity, *Credit Suisse Securities (USA) v. Billing*,¹⁹ involved the extent to which alleged conduct that is subject to the regulatory scheme governing public offerings of securities is immune from liability under the federal antitrust laws. The Court reaffirmed the basic principle that "an implied repeal of the antitrust laws" should "be found only where there is a plain repugnancy between the antitrust and regulatory provisions."²⁰ The Court noted that determinations of implied immunity "may vary from statute to statute depending upon the relation between the antitrust laws and the regulatory program" and "the relation of the specific conduct at issue to both sets of laws."²¹ The private treble damage complaint in this case alleged violations

¹² 49 U.S.C. § 41309.

¹³ *Silver v. NYSE*, 373 U.S. 341, 357 (1963).

¹⁴ *National Gerimed. Hosp. & Gerontology Ctr. v. Blue Cross*, 452 U.S. 378, 392 (1981) (National Gerimed.).

¹⁵ *Silver*, 373 U.S. at 357 (quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)).

¹⁶ *United States v. National Ass'n of Securities Dealers, Inc.*, 422 U.S. 694, 719-20 (1975) (NASD); *National Gerimed.*, 452 U.S. at 388.

¹⁷ *Silver*, 373 U.S. at 357.

¹⁸ *National Gerimed.*, 452 U.S. at 392. See also *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372 (1973) ("Activities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws.").

¹⁹ 551 U.S. 264 (2007).

²⁰ *Id.* at 272.

²¹ *Id.* at 271.

of regulatory and antitrust laws in connection with “underwriters’ efforts jointly to promote and to sell newly issued securities” – an activity “central to the proper functioning of well-regulated capital markets.”²² Drawing on earlier implied immunity decisions involving securities markets, the Court considered the extent to which the complaint involved (1) an area of conduct squarely within the heartland of securities regulations; (2) clear and adequate SEC authority to regulate; (3) active and ongoing agency regulation; and (4) a serious conflict between the antitrust and regulatory regimes. Based on the extensive regulatory authority exercised by the Securities and Exchange Commission over the initial public offering process, the Court found that, in this particular context, even assuming that the SEC had disapproved the alleged conduct, the private litigation was “likely to prove practically incompatible with the SEC’s administration of the Nation’s securities laws.”²³ Such a “serious conflict” between “application of the antitrust laws” and “proper enforcement of the securities law,” the Court held, requires implied antitrust immunity.²⁴ The Court’s opinion did not address the scope of implied antitrust immunity for other securities-related conduct or in other regulated industries.

16. The Court’s 2004 decision in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*²⁵ also touched, indirectly, on the relationship between regulatory law and antitrust law. The Telecommunications Act of 1996 (“1996 Act”), among other things, required that incumbent local exchange carriers “open” their networks to new entrants, under rules established by the Federal Communications Commission, in order to facilitate competition. The question in *Trinko* was whether a complaint alleging breach of such a duty stated a claim of illegal monopolization under Section 2 of the Sherman Act. The Court held that it did not. The 1996 Act contains an express antitrust “savings clause”; it “preserves claims that satisfy existing antitrust standards,” but “it does not create new claims that go beyond existing antitrust standards.”²⁶ It was unnecessary, therefore, for the Court to consider whether, absent that savings clause, “a detailed regulatory scheme such as that created by the 1996 Act” would raise the question whether the regulated entities would be “shielded from antitrust scrutiny by the doctrine of implied immunity.”²⁷

17. For the most part, the substantive scope of the antitrust laws is the same in government enforcement actions and in private treble damage actions. When regulated rates are alleged to be the subject of a price-fixing conspiracy, however, the “filed rate doctrine” limits private treble damage actions, but not government enforcement actions or actions seeking injunctive relief.²⁸ Because filing makes the rates the only “legal” rates, the legal rights of a customer against the regulated entity defendant are measured by the published tariff. The plaintiff could not have been “injured in his business or property” within the meaning of § 7 of the Sherman Act by paying the rate that had been filed with the regulatory agency, and thus has no right to bring a private treble damage action. The Court refused in its Square D decision (1986) to overrule this long-standing statutory construction that Congress has consistently refused to disturb, emphasizing that the filed rate doctrine should not be viewed as an “immunity” question. The alleged collective activities of the defendants in such cases are subject to scrutiny under the antitrust laws by the government and to possible criminal sanctions or injunctive relief. Square D – and its predecessor,

²² Id. at 276.

²³ Id. at 277.

²⁴ Id. at 284.

²⁵ 540 U.S. 398 (2004).

²⁶ 540 U.S. at 407.

²⁷ 540 U.S. at 406 (citing *United States v. National Ass’n of Securities Dealers, Inc.*, 422 U.S. 694 (1975); *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975)).

²⁸ *Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156 (1922); *Square D Co. v. Niagra Frontier Tariff Bureau*, 476 U.S. 409 (1986).

Keogh – “simply held that an award of [antitrust] damages is not an available remedy for a private shipper claiming that the rate submitted to, and approved by, the [regulatory agency] was the product of an antitrust violation.”²⁹

4. State action

18. In contrast to express and implied regulatory immunities, which involve the relationship between the federal antitrust laws and federal regulatory statutes, the “state action” doctrine involves the relationship between federal antitrust laws and conduct by – or subject to regulation under the laws of – the fifty states. In *Parker v. Brown*,³⁰ the Supreme Court held that even assuming that “that Congress could, in the exercise of its commerce power, prohibit a state from maintaining a[n anticompetitive price-] stabilization program,” there was “no hint” in the Sherman Act’s language or history “that it was intended to restrain state action or official action directed by a state.” Thus, while “a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful,”³¹ the state agricultural marketing program at issue in that case did not violate the antitrust laws.

19. Subsequent Supreme Court decisions have developed distinctions among actions by a state acting in its sovereign capacity, which are not subject to the federal antitrust laws, and actions by subordinate state entities or private parties claiming “state action immunity.” For example, municipalities, the Court has held, are not sovereign, and they may claim “state action” immunity from the Sherman Act for particular conduct only if they can “demonstrate that their anticompetitive activities were authorized by the State ‘pursuant to state policy to displace competition with regulation or monopoly public service.’”³² “The principle of freedom of action for the States, adopted to foster and preserve the federal system,” the Court noted,³³ led to the two-part test, announced in *California Retail Dealers Assn. v. Midcal Aluminum, Inc.*,³⁴ that applies where private parties participate in a price fixing regime. “First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself.”³⁵ Applying that test, the Court has held, for example, that the state action doctrine did not provide immunity for the state-mandated resale price schedules at issue in *Midcal*, or for the medical peer review committees challenged in *Patrick v. Burgett*.³⁶

20. In *Southern Motor Carriers Rate Conference v. United States*,³⁷ the Court held that state action immunity barred a case brought by the Antitrust Division. The legislatures of the relevant states, while not compelling the private rate bureaus to set prices, had each clearly articulated an intent to displace competition with respect to the rates of intrastate carriers,³⁸ and “the Government ha[d] conceded that the relevant States, through their agencies, actively supervise the conduct of private parties,”³⁹ so that the two

²⁹ Square D, 476 U.S. at 422.

³⁰ 317 US. 341, 351 (1943).

³¹ Id.

³² *Town of Hallie v. City of au Claire*, 471 U.S. 34, 38-39 (1985) (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978)).

³³ *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992).

³⁴ 445 U.S. 97 (1980).

³⁵ 445 U.S., at 105 (internal quotation marks omitted).

³⁶ 486 U.S. 94 (1988).

³⁷ 471 U.S. 48 (1985).

³⁸ Id. at 65.

³⁹ Id. at 66.

requirements of the state action doctrine were satisfied. The Court made it clear that, acting alone, the subordinate state agencies could not immunize private anticompetitive conduct. Only the state legislatures could articulate the requisite policy to displace competition.⁴⁰

21. The most recent state action case to reach the Supreme Court is *FTC. v. Ticor Title Ins. Co.*,⁴¹ decided nearly twenty years ago. In *Ticor*, the FTC ruled that title insurance companies had fixed prices for title searches and examinations, thereby violating Section 5(a)(1) of the FTC Act, which prohibits “unfair methods of competition,” as well as Section 1 of the Sherman Act. The Supreme Court explained that the purpose of the active supervision inquiry is “to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties.”⁴² It therefore held that in order to establish “active supervision” where prices or rates are set by private practices, subject only to a possible veto by the State, the party claiming immunity must show “that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or rate-setting scheme,”⁴³ and that such a showing had not been made in this case.

22. Aside from clear state entities, a question has arisen as to the status of certain ‘hybrid’ organizations that have characteristics of both state actors and private organizations. For example, the FTC recently issued a complaint, in the matter of *The North Carolina Board of Dental Examiners*,⁴⁴ alleging that a state regulatory board consisting of persons with a financial interest in the subject matter regulated by the board was not entitled to state action protection of its anticompetitive acts because it did not satisfy the ‘clear articulation’ nor the ‘active supervision’ prong of the Doctrine.

5. Competition advocacy and participation in regulatory proceedings

5.1 Competition advocacy directed at antitrust exemptions

23. The agencies have a long history of competition advocacy directed at the elimination or circumscribing of exemptions from the antitrust laws. In recent remarks on antitrust immunities, AAG Christine Varney explained that

*the changing dynamics of many industries coupled with the increasing analytical rigor that courts and antitrust enforcement agencies apply should alleviate the concerns that have been cited by advocates of exemptions. Free market competition is a fundamental and core principle of this country. As the bi-partisan Antitrust Modernization Commission recognized, just as private constraints on competition can be harmful to consumer welfare, so can government restraints. Thus, the use of such restraints should be minimized.*⁴⁵

24. AAG Varney has testified on the express statutory immunity for the “business of insurance” contained in the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.*:

⁴⁰ Id. at 62-63.

⁴¹ Supra note 33.

⁴² Id. at 634-34.

⁴³ Id. at 638.

⁴⁴ See <http://www.ftc.gov/os/adjpro/d9343/index.shtm>.

⁴⁵ Christine Varney, Antitrust Immunities (June 24, 2010), available at <http://www.justice.gov/atr/public/speeches/262745.htm>.

[T]he application of the antitrust laws to potentially procompetitive collective activity has become far more sophisticated during the 62 years since the McCarran-Ferguson Act was enacted. Some forms of joint activity that might have been prohibited under earlier, more restrictive doctrines are now clearly permissible, or at very least analyzed under a rule of reason that takes appropriate account of the circumstances and efficient operation of a particular industry. Thus, there is far less reason for concern that overly restrictive antitrust rulings would impair the insurance industry's efficiency.⁴⁶

25. As part of health care reform during the 111th Congress, the Antitrust Division worked with Congress by providing this testimony along with analysis⁴⁷ of legislation that included repeal of the McCarran-Ferguson Act as it applies to the business of health insurance, and worked with the White House to issue a Statement of Administration Policy in support of the legislation⁴⁸ that passed the House of Representatives overwhelmingly by a vote of 406 to 19.

26. Former FTC Chairman Deborah Platt-Majoras has testified before the Antitrust Modernization Commission, noting that

Over time, the reach of the antitrust laws has been narrowed by a large number of formal statutory exemptions and immunities. Most of these “exceptions” to the antitrust laws may have had sound policy justifications when they were enacted, but advancements in technology and the increased mobility of capital likely have rendered many of them inconsistent with the core principles underlying our nation’s economic policy..... [S]ome exemptions that were needed to correct market failures when enacted likely no longer serve consumers and the economy. There also probably are less restrictive ways than antitrust immunity to allow efficiency-enhancing collaborations among competitors in some of the industries to which the exemptions apply.⁴⁹

27. The agencies have testified on many other occasions in favor of legislative proposals to reduce or eliminate antitrust exemptions,⁵⁰ and in opposition to legislation creating new immunities.⁵¹ For example,

⁴⁶ Christine A. Varney, Statement before the Senate Judiciary Committee for Its Hearing Entitled “Prohibiting Price Fixing and Other Anticompetitive Conduct in the Health Insurance Industry” 4 (Oct. 14, 2009), available at <http://www.justice.gov/atr/public/testimony/250917.htm>.

⁴⁷ Letter of the Department of Justice to Chairman John Conyers, Committee on the Judiciary, U. S. House of Representatives, providing views on H.R. 3596, the Health Insurance Industry Antitrust Enforcement Act of 2009 (October 20, 2009).

⁴⁸ Statement of Administration Policy, H.R. 4626—Health Insurance Industry Fair Competition Act (February 23, 2010), available at http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/111/saphr4626r_20100223.pdf.

⁴⁹ Statement of then FTC Chairman Deborah Platt Majoras before The Antitrust Modernization Commission (March 21, 2006) available at <http://www.ftc.gov/speeches/majoras/060321antitrustmodernization.pdf>.

⁵⁰ See n. 2 above; Donna Patterson, Statement Before the Subcommittee on Postal Service, House Government Reform Committee (March 4, 1999), available at <http://www.justice.gov/atr/public/testimony/2285.htm>; Steven Sunshine, Statement Before the Subcommittee on Railroads, Committee on Transportation and Infrastructure, House of Representatives (January 26, 1995), available at <http://www.justice.gov/atr/public/testimony/0056.htm>; FTC Statement Before the U.S. Senate Committee on Commerce, Science, and Transportation pp. 16-18 (April 8, 2008) available at <http://www.ftc.gov/os/testimony/P034101reauth.pdf>; FTC Statement Before the U.S. Senate Committee on Commerce, Science, and Transportation, p. 12 (September 12, 2007) available at <http://www.ftc.gov/os/testimony/070912reauthorizationtestimony.pdf>.

in a statement to Congress, FTC Commissioner Kovacic expressed concern that any diminution of the FTC's existing jurisdiction over the internet access services market would restrict the Commission's ability to continue to play the integral role it has in protecting consumers from harm and ensuring robust competition in this market.⁵² The agencies have also been active in working on amicus curiae briefs filed with appellate courts, arguing for limits on the scope of antitrust immunities.⁵³

5.2 *Competition advocacy directed at federal regulatory agencies*

28. As illustrated above in the section on express statutory immunities, the antitrust agencies work closely with regulatory agencies on issues relating to antitrust immunity. The antitrust agencies have developed good working relationships with their regulatory counterparts, at both senior and staff levels, and have had staff exchanges and joint seminars and workshops. In some cases, e.g. applications for immunity for international aviation agreements, the antitrust agency – in this case, the Division – participates formally in the regulatory agency's rule-making; in others, coordination and consultation can be informal. Congress can provide a particular statutory role for the antitrust agency; for example, in the telecommunications sector, Section 271 of the Telecommunications Act of 1996 required the FCC to consult with the Attorney General regarding proposed Bell company entry into long distance and to accord "substantial weight" to the Attorney General's evaluation. Even where there is no explicit authorization, regulatory agencies regularly request the antitrust agencies' views on competition issues.⁵⁴

5.3 *Competition advocacy directed at state entities*

5.3.1 *Health care*

29. The agencies have long engaged in competition advocacy in the health care industry.⁵⁵ One area of concern has been state certificate of need (CON) laws, which prevent firms from entering certain areas of the health care market unless they can demonstrate to state authorities that there is an unmet need for their services. The agencies have submitted advocacy letters to a number of state legislative bodies urging

⁵¹ FTC Statement on "The Importance of Competition and Antitrust Enforcement to Lower-Cost, Higher-Quality Health Care," Before the Senate Subcommittee On Consumer Protection, Product Safety, And Insurance, Committee On Commerce, Science & Transportation, (July 16, 2009), page 4, available at <http://www.ftc.gov/os/2009/07/090716healthcaretestimony.pdf>; Joel Klein, Statement Before the House Judiciary Committee on H.R.1304, The Quality Health-Care Coalition Act of 1999(June 22, 1999), available at <http://www.justice.gov/atr/public/testimony/2502.htm>;

⁵² FTC Commissioner William E. Kovacic, Statement on "FTC Jurisdiction Over Broadband Internet Access Services" before the U.S. Senate Judiciary Committee p. 2 (June 14, 2006) available at <http://www.ftc.gov/os/2006/06/P052103CommissionTestimonyReBroadbandInternetAccessServices06142006Senate.pdf>

⁵³ See briefs in *Credit Suisse First Boston v. Glen Billing* (November 9, 2006), available at <http://www.justice.gov/atr/cases/f221000/221024.htm>; *Gosselin World Wide Moving N.V. and The Pasha Group v. U.S.* (January 30, 2006), available at <http://www.justice.gov/atr/public/appellate/index.html#page=page-5>; *Jackson, Tennessee Hospital Co. v. West Tennessee Healthcare* (June 1, 2004), available at <http://www.justice.gov/atr/cases/f203800/203897.htm>.

⁵⁴ For a listing of Division competition advocacy work directed at federal regulatory agencies, see <http://www.justice.gov/atr/public/comments/comments.htm>; FTC competition advocacy directed at regulatory agencies is available at http://www.ftc.gov/opp/advocacy_date.shtm.

⁵⁵ For a listing of FTC advocacy work see http://www.ftc.gov/opp/advocacy_date.shtm; more specifically, for a listing of FTC health care advocacy filings see <http://www.ftc.gov/bc/healthcare/outreach/advofilehealthcare.htm>.

the repeal or rejection of CON laws. In 2008, for example, the agencies issued a joint statement to the Illinois Task Force on Health Planning Reform regarding CON laws.⁵⁶ The agencies argued that these laws: undercut consumer choice, stifle innovation, weaken the ability of markets to contain health care costs, impede the efficient performance of health care markets by creating barriers to entry and expansion, and create opportunities for existing competitors to exploit the CON process to thwart or delay new competition, i.e., the laws can facilitate anticompetitive agreements among providers and the CON process itself may be susceptible to corruption.

30. Other FTC advocacy examples in this area include a letter to Louisiana state policy makers recommending rejection of proposed legislation that would impose costs on dental offices that bring dental services directly to underserved children in a school setting;⁵⁷ and a letter to the Georgia state policy makers advising rejection of a proposal that would prohibit dental hygienists from providing basic preventive dental services in public health settings except under the indirect supervision of a dentist, because the proposed amendments were likely to raise the cost of dental services in Georgia and reduce the number of consumers receiving dental care.⁵⁸

5.3.2 *Legal Services*

31. In recent years, the agencies have engaged in competition advocacy at the state level to oppose occupational and professional licensing requirements that unnecessarily restrict competition. Such restrictions often are protected under the state action doctrine from challenges under the antitrust laws. For example, some states require that all real estate closing services be performed by licensed attorneys, prohibiting non-attorneys from competing to provide these services. The Division and the FTC have jointly taken the position that such restrictions unduly restrict competition and reduce consumer welfare without providing any offsetting benefits that consumers value. The agencies have submitted advocacy letters or briefs opposing such restrictions to several state legislatures (which pass laws defining the profession of law), state bar agencies (which formulate rules on the practice of law for court approval), state courts (which implement and oversee rules on the practice of law), state bar associations (which are private organizations of lawyers licensed to practice in the state), and the American Bar Association. The agencies have also submitted amicus curiae briefs outlining their views in two state litigation proceedings. Since the agencies began their competition advocacy efforts in this area, several states have rescinded, modified, or rejected provisions that would prohibit non-attorneys from competing with attorneys to provide real estate closing services, although some states have rejected this position.⁵⁹

5.3.3 *Real Estate*

32. In recent years, the agencies have engaged in both enforcement activities⁶⁰ and competition advocacy to oppose unnecessary restrictions on competition in the provision of real estate brokerage services. The emergence of new Internet-based and other innovative business models in this industry have led some traditional realtors and their various trade associations to urge state lawmakers and regulators to

⁵⁶ Available at <http://www.justice.gov/atr/public/comments/237351.htm>.

⁵⁷ See <http://www.ftc.gov/os/2009/05/V090009louisianadentistry.pdf>, press release available at <http://www.ftc.gov/opa/2009/05/ladentistry.shtm>.

⁵⁸ See <http://www.ftc.gov/os/2010/12/101230gaboaraddentistryletter.pdf>, press release available at <http://www.ftc.gov/opa/2011/01/dentists.shtm>.

⁵⁹ See http://www.justice.gov/atr/public/comments/comments_states.htm for examples of competition advocacy before state and other organizations.

⁶⁰ For a listing of FTC case filings in the real estate sector see <http://www.ftc.gov/bc/realestate/cases/index.htm>.

enact legislation or regulations that would block or impede these new forms of competition from the market. For example, a number of states have considered so-called “minimum services” rules, which require that real estate brokers provide a prescribed package of services, regardless of whether the consumer actually wants all of the services in the package. Such laws prevent the development of new business models that aim to offer smaller, often custom-tailored, packages of services, in exchange for a smaller total fee. Likewise, other states have considered legislation or regulation that would prohibit brokers from giving clients rebates on their commissions.

33. Through competition advocacy, the agencies have urged state legislatures, agencies, and officials to reject proposed legislative or regulatory provisions that would inhibit competition in real estate brokerage services. The agencies have submitted comments to state legislatures, agencies, and officials in over a dozen states regarding enacted or proposed regulation or legislation in this industry. Since the agencies began these competition advocacy efforts, 11 states have rescinded, modified, or rejected proposals to implement legislative or regulatory restrictions that the agencies advised would harm competition, although some states have rejected this position. The agencies continue to work regularly with state officials to educate them on the competitive impact of proposed policy initiatives.⁶¹

6. Conclusion

34. U.S. antitrust laws generally apply to interstate commerce or any activity affecting interstate commerce, whether or not the conduct at issue is subject to state or federal regulation. However, although there is no general “regulated conduct” defense in U.S. antitrust law, Congress has enacted a number of express statutory exemptions from the full application of the federal antitrust laws, and in some cases the courts have found a limited implied repeal by Congress of the antitrust laws when there is a “plain repugnancy” between them and certain regulatory provisions. Under the state action doctrine, the Supreme Court has interpreted the antitrust statutes as inapplicable to action by one of the 50 states acting in its capacity as a sovereign, or to private action pursuant to state policy and actively supervised by the state. The U.S. antitrust agencies have publicly advocated the elimination or limitation of many of these immunities, and have worked with regulatory agencies and state legislatures, courts, and agencies to protect competition and consumers and to reconcile the antitrust laws with federal and state regulatory laws in a manner consistent with Congressional intent.

⁶¹ See http://www.justice.gov/atr/public/real_estate/index.html for a description of Division activity in the real estate sector.