The Role of Antitrust Analysis in the Regulatory Process

Thomas F. Zych*

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* Partner, Thompson Hine LLP, Cleveland, OH, and Secretary and Communications Officer, American Bar Association Section of Antitrust Law.

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I. Introduction

At a most basic level, regulation and antitrust have the capacity to play complementary roles. Antitrust law and policy seeks to ensure that private market actors compete and that they do not gain or maintain market power other than by competition on the merits. As Justice Thurgood Marshall famously put it, "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."[1] The ABA Section of Antitrust long has stated its position that competitive market forces and structures are best suited to maximize consumer welfare. The experience of the past forty years in the United States has shown that deregulation has provided significant economic benefits, and regulatory disruptions of markets should be avoided and, where determined to be necessary, should be designed and implemented in as narrow a fashion as possible.

Regulation (to varying degrees) seeks to directly achieve desired market outcomes and further non-economic policy goals through (more or less) direct interventions that are designed to correct market failures.[2] Among the recognized market failures that may justify regulatory intervention are "the existence of monopolies and oligopolies, externalities, information failure, and inability to provide for the public or collective good."[3] The regulatory process also may involve political or ethical considerations (or both) not adequately captured by free-market processes.[4]

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1 *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

2 See generally Michael E. Kraft & Scott R. Furlong, PUBLIC POLICY: POLITICS, ANALYSIS, AND ALTERNATIVES 22-27 (6th ed. 2018) (describing purposes of government intervention).

3 *Id*. at 24.

4 *Id*. at 22-23

Like any endeavor, regulation can have both positive and negative efforts. As then-Judge Stephen Breyer observed, regulation can suffer from excessive focus on a single goal ("tunnel vision"), random agenda selection, and inconsistency.[5] At the same time, well-designed regulatory regimes administered by dedicated and expert public servants can provide the "rationalization, expertise, insulation, and authority" necessary to effectively tackle social problems.[6] A major decision in any regulatory consideration is how far the government should go in directly regulating conduct to achieve a desired outcome as opposed to allowing free markets subject to antitrust law to operate and come to socially optimal outcomes without government intervention.[7]

While antitrust responds to certain types of market failures (particularly the tendency of unpoliced markets to give rise to collusion, monopolization, and merger and acquisition activity that represents an attempt to avoid competition on the merits) it has evolved in the United States as a set of more or less discrete criminal and civil offenses rather than as a comprehensive body of regulation. This is reflected in the antitrust agencies' view of themselves as principally law-enforcement agencies rather than regulators. That means antitrust does not necessarily have the capacity to achieve specific regulatory goals.[8]

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5 Stephen Breyer, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 10 (1993).

6 *Id*. at 61.

7 See Richard H. Thaler & Cass R. Sunstein, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 183-96 (2008) (discussing more and less interventionist approaches to environmental regulation).

8 See, e.g., Michael Boudin, *Regulation & Competition*, 49 U. CHI. L. REV. 1098, 1107 (1982) ("Regulation has long been seen as a substitute for policing industries through antitrust laws. . . . Existing antitrust doctrine, however, is not always well suited to industries that have evolved under classical regulation.").

Regulation often can account for competitive concerns, and a key issue for regulatory decision making is whether regulation or competition will best achieve the desired policy goals. Regulation tends to have a more comprehensive character with reliance on rulemaking processes and institutional expertise of regulatory agencies to provide more detailed guidance and direction to market participants, but it can also be the case that deregulation paired with antitrust enforcement, changes in tax policy, systems of marketable rights, and other approaches can achieve policy goals more effectively and with less distortion of the competitive process.[9]

The comments presented here focus on how antitrust analysis can productively interact with regulatory policy making. Part II of this submission discusses the role competition analysis can play in the regulatory process, both with respect to formal antitrust enforcement actions and as regards competition advocacy. Part III discusses certain examples of regulatory goals and how antitrust considerations may be incorporated into different types of regulatory activities. Part IV provides suggestions on priorities for competition advocacy based on recent comments from the American Bar Association ("ABA") Section of Antitrust Law. Part V offers a brief conclusion.

II. The Role of Antitrust & Competition Analysis in Assessing Regulations

(a) Antitrust law can police the use of delegated regulatory authority by industry participants in certain situations

One role for antitrust in the regulatory process is for enforcement actions to interdict anticompetitive regulatory interventions. To further this important enforcement priority, the ABA Section of Antitrust Law has consistently argued for keeping exemptions and immunities to the antitrust laws associated with regulatory interventions tightly cabined. For example, in a statement to the Antitrust Modernization Commission, the Section argued that "Congress should grant

[9] See Stephen Breyer, REGULATION AND ITS REFORM 191 (1982).

antitrust immunities and exemptions rarely and only after careful consideration of the impact of the proposed immunity on consumer welfare," that "Congress should only grant those immunities that are drafted narrowly, so that competition is reduced only to the minimum extent necessary to achieve the intended goal," and that "Congress should grant antitrust immunities only when the proposed immunity achieves a Congressional goal that trumps the aims of the antitrust laws in a particular situation," as well as advocating for narrow construction of immunities and for the antitrust agencies to have input into any immunity proposal.[10] This is consistent with the view that free markets protected by antitrust enforcement are generally preferable to regulation, and that regulation should be used sparingly and deregulation and elimination of antitrust immunities should be pursued wherever possible.[11]

Nevertheless, it is well established that *Parker* immunity precludes imposition of antitrust liability if the conduct is the product of state action.[12] However, what constitutes state action is not always clear. Courts must evaluate whether "the challenged restraint [is] clearly articulated and affirmatively expressed as state policy [and] the policy must be actively supervised by the State itself."[13] This is necessary to ensure that states do not exempt certain activities or interest groups from scrutiny under the federal antitrust laws by simply granting broad exemptions. At the same

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10 ABA Section of Antitrust Law, *Comments of the ABA Section of Antitrust Law on General Immunities and Exemptions In Response to Request for Public Comment by the Antitrust Modernization Commission* 7-11 (2005), available at https://govinfo.library.unt.edu/amc/public_studies_fr28902/immunities_exemptions_pdf/051130_ABA_Immunities_final.pdf.

11 *Id*. at 5-7.

12 See, e.g., *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 104 (1980).

13 *Id.* at 100.

time, *Parker* immunity preserves the state's ability to pursue its own policy and regulatory objectives without undue federal interference.

Recently, the Supreme Court has reiterated the necessity of the active monitoring requirement by the State for a finding of *Parker* immunity. The Court has emphasized that "[w]hen a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest," meaning that "a state board on which a controlling number of decision makers are active market participants in the occupation the board regulates must satisfy [the] active supervision requirement in order to invoke state-action antitrust immunity."[14] Absent such continuous supervision by the State, the private market actors cannot avail themselves of the *Parker* immunity defense and they will face the same scrutiny under the antitrust laws as unregulated private market actors. This opens the door to significant enforcement activity in the area of occupational licensing and in certain healthcare markets that feature heavy state regulation.[15] It has also opened the door to antitrust-based challenges to municipal regulations against new platforms and business models.[16] Here, then, antitrust provides a useful check on potentially protectionist regulation while respecting sharing of powers inherent in our federal system.

(b) Antitrust Analysis Can Inform Regulatory Decision Making In The Appropriate Contexts

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[14] *North Carolina State Bd. of Dental Examiners v. F.T.C.*, 135 S. Ct. 1101, 1114 (2015) (internal citations omitted).

[15] *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 236 (2013).

[16] *U.S. Chamber of Commerce v. City of Seattle*, No. 17-35640, --- F.3d ----, Slip. Op. at 16-37 (9th Cir. 2018) (holding local ordinance allowing collective bargaining for Uber and Lyft drivers is subject to scrutiny for Sherman Act preemption).

The analyses relevant to enforcement of the antitrust laws can also provide key insights into the economic costs and benefits associated with any proposed regulatory policy even in the absence of a basis for an enforcement action. While economics cannot inform how non-economic policy objectives should be valued by policymakers, economics can inform the discussion about the economic costs and benefits of proposed regulatory action or inaction. This measuring of expected economic costs and benefits then can be used by policymakers when weighing all of the consequences to arrive at the ultimate decision regarding the implementation or continuation of the regulation.

A "[r]egulation is broadly defined as imposition of rules by government, backed by the use of penalties that are intended specifically to modify the economic behaviour of individuals and firms in the private sector."[17] The tools and targets of regulation typically include "[p]rices, output, rate of return (in the form of profits, margins or commissions) . . . ."[18] A regulation's rules disrupt the natural market for goods and services by restricting the market participants' ability to undertake certain activities in much the same way that anticompetitive conduct affects market participants' activities in an effort to affect prices, output, rate of returns, and the like. The economics analysis undertaken in antitrust matters focuses on the same economic factors, price, output levels, and rates of return as are relevant to regulations.

Antitrust economics provides us with a deep understanding of how certain actions by private market participants affect competition, barriers to entry, market concentration, the likelihood of collusion, and pricing and output decisions by firms. Given the substantial overlap in subject matter, antitrust economics can be applied to the regulatory context to inform

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17 OECD Definition, available at https://stats.oecd.org/glossary/detail.asp?ID=3295.

18 *Id.*

expectations about the effects of the regulation on barriers to market entry, market concentration, pricing and output decisions, etc. Policymakers can utilize these insights afforded by the antitrust analysis to determine the expected economic costs and benefits of a given regulation, which then will be considered in light of the value of the policy objective sought.

The evaluation of the distorted market incentives resulting from the regulation also may inform whether the regulation affects market participants in such a way that the regulation leads to unintended effects that may frustrate the overall policy objective or reduce overall economic welfare. All of these considerations must then be weighed by the policymaker when making a determination about the desirability of the regulation.

(c) Antitrust Economics and Competition Analysis Cannot Assess Non-Competitive Effects and How They Should Be Weighed Relative to Competitive Effects

Strictly speaking, Antitrust economics and competition analysis have little to say on the relative weight that should be given to various policy priorities. They can, however, provide insight into the expected economic costs and benefits to consumers and firms from a proposed regulation and perhaps identify any unintended economics effects that may arise.

Regulatory action undertaken by states can be for myriad of moral, social, economic or political reasons. While antitrust analysis can provide needed insight into the costs and benefits of a potentially anticompetitive regulation, it has no special brief in assessing the value of achieving the associated non-economic objectives. Antitrust analysis only focuses on the economic effects and consequences of particular actions taken by market participants.

In antitrust, the Rule of Reason[19] analysis, broadly speaking, weighs the pro-competitive and anti-competitive effects on a particular market. If the former outweighs the latter, then the challenged conduct is deemed reasonable. However, antitrust does not provide a determinative tool for evaluating the competitive harms of a proposed regulation against the non-competition benefits. In fact, antitrust analysis tells us very little about how to evaluate these consequences to determine whether a regulation is desirable. This is because antitrust analysis cannot determine the economic value of non-economic policy objectives. Furthermore, even if it could, antitrust analysis cannot tell us how to weigh the various economic effects against the non-economic policy objectives.

Policymakers ultimately must weigh various economic costs and benefits against their own valuations of the moral, social, and political objectives, which are not economically quantifiable. Thus, the policymaker must engage in a complex weighing of the non-economic benefits and costs of regulatory intervention against the economic benefits and costs of the regulatory intervention. The complex weighing of these competing interests and values is relatively uninformed by antitrust analysis. Antitrust commentators and enforcers therefore should not assume a finding of likely anticompetitive effects necessarily rings the death knell for a regulation. A suitable degree of humility must exist on the part of those who employ the tools of antitrust analysis to regulations given the multitude of other relevant considerations in play beyond merely the competitive effects.

While these limitations of antitrust analysis are important to identify and consider, they should not be construed as undermining the utility of antitrust analysis to assess the competitive and economic consequences of a particular regulation. Rather they should be construed as adding

[19] See, e.g., *Nat'l Soc. of Prof'l Engineers v. United States*, 435 U.S. 679, 691 (1978).

economic information to the policymaker's calculus when weighing the economic and non-economic effects of the regulation.

III. Regulatory Issues Implicating Competition Law Concerns

a. Regulation can have a wide variety of purposes and effects

As already noted, policymakers can give effect to a broad set of moral, social, economic, and political goals through regulatory intervention. Some regulatory efforts, such as the Pure Food and Drug Act, had a distinctly moral character in transposing the common law's traditional exceptions to private ordering—health, safety, and morals—into the then emerging administrative state. Other regulatory programs, such as the Federal Trade Commission's consumer protection mission, have a more social purpose in ensuring that consumers are protected from fraud and other deceptive conduct that undermines market efficiency by distorting the information consumers use in making purchase decisions. Further still, some regulation is economically focused and aimed at fostering economic growth and technological progress. Of course, other regulation has a readily discernable political nature, and seeks to pick winners and losers in the market in the service of a purported national interest.

These various forms of regulatory purposes—moral, social, political, and economic—are not mutually exclusive, and can have a wide variety of effects—some of which might undermine other policy preferences. In an attempt to address issues related to poverty and basic notions of human decency, morally based regulation can risk negative effects on overall economic efficiency and innovation. Fraud based regulatory schemes in turn risk negative moral consequences, such as restricting an individual's rights to economic autonomy. Efforts at promoting economic growth, in turn, may sufficiently account for political concerns, such as the distribution of wealth. Finally,

industrial policy regulation, in addition to resulting in inefficient market outcomes, often risks offending basic social notions about fraud and fairness by enabling regulatory capture.

In addition to tensions among high-level regulatory objectives, regulation may also conflict with competition law principles. Morals based regulatory regimes that impose heavy-handed requirements on business can create barriers to entry that indirectly hinder a competitive process that could have cured the ills at issue through the introduction of new products. The same is true of consumer protection regulation which, in the case of occupational licensing, directly restricts entry. In seeking to promote long run growth, some economic regulation may fail to strike the optimal balance between long-run and short-run economic welfare and undermine competition law's consumer welfare objectives. Indeed, industrial policy measures often directly frustrate competition law's goal of protecting the competitive process to maximize consumer welfare. As discussed in more detail below, competition analysis can aid in assessing these categories of regulation, even if it cannot be the sole measure for determining whether a regulatory intervention makes sense.

b. Health and Safety Regulation

Health and safety regulations were one of the first policies to arrive as a result of the reformist spirit of the Progressive Era and the subsequent rise of the administrative state. Today, they include a broad set of policies ranging from agriculture and limits on the allowable level of contaminants in food products, to protecting the environment by limiting the ability of private actors to build nuclear power facilities. However, by imposing costs upon firms that must comply with these regulations, even the most morally sound regulatory scheme to promote health and safety raises the costs of firms seeking to enter these regulated markets, which can reduce the introduction of new and safer products that might also yield to a morally superior market outcome.

Still, the recognition of health, safety, and morals as exceptions to private ordering is deeply rooted in the common law, and there is broad consensus that these values and the corresponding regulatory regimes that embody them provide benefits to society that outweigh competitive concerns.

However, the existence of a regulatory regime purporting to serve the interests of health, safety, and morals, should not necessarily be immunized from the important scrutiny competition law can provide policy. Indeed, finding that the benefits to health and safety outweigh harms to competition can involve a highly complex analysis, and may not always be evident from the perspective of public consensus and accepted norms. In these types of cases, rigorous economic analysis of the competition implications of a regulatory regime can be useful in assessing the costs and benefits of a particular regulation aimed at promoting health and safety. In general, however, regulatory policies aimed at achieving a healthier or safer society are the least likely to be heavily scrutinized on competition policy grounds.

c. Consumer Protection Regulation

Regulation aimed at protecting consumers from fraud or other deceptive practices has a long history at all levels of American government. Consumer protection or fraud based regulatory schemes serve a crucial purpose of ensuring that consumers have adequate information to engage in welfare enhancing market transactions. Much of the interaction between consumer protection regulation and competition law has involved occupation licensing imposed at the state level. As a general matter, licensing requirements for learned professions help ensure that anyone holding themselves out as a practitioner of, for example, law or medicine has at least a minimum level of knowledge, training, and moral character in a way that would be difficult for non-specialist consumers to verify otherwise.

Another established example of consumer protection regulation are labeling requirements. These regulations make sure that consumers are aware of what products contain and, in some contexts, what their proper uses are. Simply put, whereas occupational licensing requirements ensure that consumers have adequate information when purchasing services, labeling requirements ensure that they are adequately informed when purchasing goods. In both cases, therefore, consumer protection law and antifraud regulation serve a crucial social role in correcting market failures such as incomplete information and helping markets and the competitive process to function effectively.

For this reason, when done properly, consumer protection regulations can promote competitive outcomes by ensuring that buyers have the information they need to make rational purchasing decisions. Accordingly, state licensing schemes are generally given antitrust immunity pursuant to the *Parker* doctrine as discussed above.

However, like health and safety regulations, consumer protection laws can also create barriers to entry and therefore hinder a competitive process that could provide increased quality or, more relevant today, greater privacy in a way that would effectively negate the need for regulation. Indeed, because competition itself functions as a discovery process that brings information to the marketplace, as a general economic matter, consumer protection regulations are typically open to a higher level of scrutiny than those aimed at health and safety. As such, many have questioned whether the proliferation of requirements in areas such as occupational licensing is necessary or beneficial. Importantly, the FTC as both a competition and consumer protection agency has been taking an active role in shining light on licensing regulations that are consumer welfare reducing.

d. Long-Run Economic Policy Regulation

In addition to moral or social concerns, regulation often involves measures to encourage long-run economic growth. Economic policies aimed at promoting dynamic competition through grants of intellectual property are, for example, fundamental to the values of the Constitution and promoting the innovation crucial to long run economic growth. However, at the core of intellectual property rights is the limiting the ability of others to make use of ideas and inventions for some period of time, which is justified in order to ensure a sufficient incentive for innovation. Other economic regulations aimed at spurring long-run growth include tax incentives for behaviors like home purchasing, to incentivize the continued growth of the labor force through the family unit, and lower capital gains rates, to ensure that capital is put to good productive use.

The economic and welfare maximizing orientation of these policies gives competition law a greater role for scrutiny than in either the case of consumer protection, and certainly health and safety. To achieve the optimal legal environment for maximizing overall economic welfare, non-competition economic policies must be balanced with competition policies. Achieving this balance is particularly important in the area of intellectual property law. While an owner of intellectual property may exercise market power that is contained within the scope of the patent, they may not leverage that market power to harm competition in a way that is beyond the scope of that allowed by the intellectual property. That is, competition law plays an important and direct role in ensuring that the intellectual property rights—just as with other property rights—are not used to extend market power into other areas, as distinct from extracting the market power lawfully obtained.

e. National or Industrial Policy Regulation

Regulation can also be used in the service political or geopolitical ends, such as distributive justice or industrial policy respectively. Examples of these types of regulations include price controls, bans or onerous requirements on certain industries or business models, subsidies for

favored industries, and other direct dictation of market outcomes by governments. In so doing, these regulations tend to, in one form or another, pick winners and losers—whether it is helping consumers against producers, upstream producers against downstream firms, or even a particular producer against a competitor. For this reason, regulations furthering political ends represent the most dramatic and problematic interventions from the perspective of competition policy. The directly supplant *ex post* the competitive process itself rather than, in the case of long-run economic policy such as intellectual property rights, promoting dynamic welfare through *ex ante* grants of property rights. Thus, by their very nature, these regulations are justified by non-economic and political values and can have substantial unintended consequences.

Whereas measuring tradeoffs between long run dynamic and short run static welfare gains can be difficult, the economic inefficiencies of politically motivated regulatory interventions are readily cognizable using the analytical tools of antitrust economics—specifically, neoclassical price theory. In so doing, competition law can greatly help to illuminate the extent to which regulations like price controls or subsidies may result in negative economic consequences. As such, regulations aimed at serving political ends should be subjected to rigorous competitive effects analysis so as to protect consumers and the competitive process.

f. Regulatory Capture Problem

Even when taking competition concerns into account, it is without question true that all the forms of regulation discussed above can be used to advance the common good and have a role in the political economy. However, the harms resulting from a broad view of the permissible scope of regulation can be magnified by—and indeed, facilitates—regulatory capture. As political economic literature has highlighted, individual policymakers can act as rent-seeking agents rather than in the public interest, and enact policies that reward the special interests that act as their

effective principals.[20] Rather than serve the public good, where there is regulatory the powerful machinery of government can be used to reward those who can purchase access. From the perspective of competition policy, such behavior carries with it a particularly acute concern that regulation can be manipulated by entrenched economic firms as a way to use public restraints on trade to exclude competitors and, in so doing, distort the competitive process and undermine the free market economy.

For this reason, competition law analyses, when properly done, can provide one non-exclusive framework for disciplined thinking about the problems associated with regulation from the perspective of special interest capture. By evaluating the ability of a public restraint of trade to raise the cost of rivals and grant established firms in the industry increased market power, rather than benefit consumers, the antitrust analysis of exclusion can be a helpful tool for determining whether a regulation is actually in the public interest.

IV. Possibilities for Antitrust Division Involvement in the Regulatory Process

The ABA Section of Antitrust Law has commented frequently on regulatory issues, including advocacy for reduced barriers to entry and licensing requirements. Among the most important recent statements in this area is the Section's January 2017 Presidential Transition Report, which provided a comprehensive review of the recent activities of the antitrust agencies and suggestions for antitrust enforcement policy going forward.[21] In that report, the Section commented:

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[20] See generally George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. 3 (1971) (describing theory of regulatory capture).

[21] ABA Section of Antitrust Law, *Presidential Transition Report: The State of the Antitrust Agencies* (Jan. 2017), *available at* https://www.americanbar.org/content/dam/aba/publications/antitrust_law/state_of_antitrust_enforcement.authcheckdam.pdf.

> The Agencies have long advocated against efforts by regulators to limit the application of the antitrust laws. The Section encourages the Agencies to continue to review and comment on federal legislation and regulations that affect competition policy, agency jurisdiction, and procedures, or the ability of agencies to effectuate their missions (including agency budgets). The Agencies should also continue to be vigilant in monitoring state actions and regulations that may be anticompetitive or designed to protect incumbent firms from competition. The Agencies should continue to provide their expert input with respect to state laws that: (1) involve occupational licensing; (2) add unnecessary new barriers to entry to platform and sharing companies, like Uber or AirBnB; (3) place anachronistic distribution requirements on innovative, vertically integrated companies (e.g., laws to exclude car manufacturers from operating in states without physical dealer locations); and (4) circumvent the antitrust laws in the healthcare area, including, but not limited to, Certificate of Public Advantage (COPA) laws and Certificate of Need (CON) laws.[22]

These priorities represent areas in which there is a broad consensus that recent regulatory interventions reflect an excessive concern for protecting the interests of incumbent actors. While many aspects of licensing regimes, regulation of traffic and housing policy, and other market regulations lie outside of the expertise of the antitrust agencies, the agencies are uniquely credible in articulating the harm to competition and to consumers caused by protection of market incumbents from competition.

The antitrust agencies should focus their efforts in these areas. Both the Division and the FTC have an admirable tradition of bringing antitrust principles to bear on the regulatory process. Whether enforcing against anticompetitive activities by regulatory boards composed of unsupervised agency actors or advising legislators of the likely competitive consequences of legislation under consideration, the agencies have played an important role in ensuring that regulatory processes are not used to undermine the competitive process. These activities further the important goals of protecting consumers and preserving competition.

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[22] *Id*. at 10-11.

As with enforcement matters, the antitrust agencies should set priorities, given the limited resources available to support intervention in regulatory matters. With this in mind, the Division and the FTC should pay particular attention to decisions by regulatory boards composed of industry participants to ensure the decisions do not exceed their proper limitations. This means strict enforcement of the requirements that any intent by state governments to displace competition be clearly expressed, and that the work of regulatory boards be appropriately supervised by the state government. Encouraging close supervision of regulatory bodies by states helps ensure that regulatory decisions are accountable to political processes, and competition law enforcement in this area protects consumers from self-interested industry regulations that limit competition.

The Division and the FTC also can productively advise Congress, state legislatures, and state and federal agencies on the competition implications of legislative or regulatory actions. Such advice can highlight issues that decision-makers may not have considered, including the extent to which intervention may raise barriers to entry or encourage rent-seeking behavior.

Care must be taken to respect the limitations of antitrust and competition analysis discussed above. For example, the Division and the FTC likely lack the expertise to assess non-competition issues in regulatory decision-making, and excessive emphasis on competition analysis can fail to address the fuller range of purposes that policymakers may have for adopting a particular regulatory approach. While it can be helpful for decision-makers to be attuned to competition concerns, the process of policymaking is ultimately a matter of values and priorities that the political process is better suited to vetting.

Additionally, specific areas of expertise in regulatory bodies concerning, for example, energy or telecommunications issues may not be replicable in the antitrust agencies. While many staff at the antitrust agencies have backgrounds in different areas of regulation, specialized

regulatory bodies will often have scientific, technical, or other expertise built up over the course of long periods focused on specific policy issues. Tradeoffs between competition and other values ultimately must be weighed by elected officials and expert agencies acting in accordance with their legislative mandates.

V. Conclusion

The interaction of competition analysis and regulatory policy is an important area where both the Division and the FTC have a long history of productive enforcement efforts and engagement with policymakers. The antitrust agencies should continue acting within this tradition of vigorous competition advocacy in a way that protects consumers, respects federalism and separation of powers concerns, and balances the important values of free and open competition against the understanding that policymaking may serve multifaceted ends.