



Chapter V. Competition Advocacy

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In addition to enforcing the antitrust laws, the Antitrust Division also acts as an advocate for competition throughout the economy. In particular, the Division seeks to promote competition in those 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 important Division goals. The Antitrust Division's advocacy efforts focus on strengthening markets and preserving economic freedom and fairness. Indeed, promoting competition principles through broad advocacy efforts and regulatory outreach is one of the Antitrust Division's highest priorities. These efforts include extensive cooperation and engagement with Federal agencies, as well as with Congress, state agencies and legislatures, courts, and foreign antitrust authorities. Through its competition advocacy efforts the Division works to promote economic freedom and fairness, and seeks to secure efficient and well-functioning markets for American consumers. The items in its toolkit for these efforts are numerous, including regulatory comments or views letters on antitrust exemptions, workshops, hearings, *amicus* briefs, speeches, articles, testimony, personnel details, video conferences, and consultations with regulatory agencies, among others.

The Division's competition advocacy efforts primarily focus on Federal and state regulations and regulatory frameworks in which competition and competitive principles can produce better outcomes for consumers consistent with important regulatory goals. The Division's competition advocacy efforts span virtually the entire economy, including, but not limited to, the agricultural, banking, communications, energy, healthcare, insurance, intellectual property, finance, media, professional and occupational licensing, transportation, and real estate sectors.

While the competition issues raised by regulation can be numerous and factually diverse, the Division's role is relatively simple: to promote reliance on competition rather than on regulation where appropriate and to ensure that where regulation is appropriate, it is aligned as much as possible with competition principles. These goals should be reflected in all of the Division's competition advocacy efforts.

1. The Division's Analytical Model

Through its competition advocacy program, the Division seeks to prevent unnecessary regulations that impede competition and, where possible, to align necessary and beneficial regulations, adopted to achieve important noncompetition goals, with competition principles. In analyzing potential competition advocacy opportunities, the Division

examines a diverse set of factors, but the following are major considerations:

- If the regulatory scheme or antitrust exemption is an existing one, do the economic and social conditions that originally justified the regulations or exemption still exist and are they as valid now as they were when the departure from full competitive principles first went into effect? In some industries, such as airlines and motor carriers, economic regulation was eliminated after the justifications for such regulation were reexamined and found invalid.
- If a regulatory scheme or antitrust exemption is valid, is it aligned with competition policy in a way that would both advance the noncompetition policy goals of the regulation or exemption and promote competition? In some industries, such as agriculture and banking, there are Congressionally-approved, legitimate, noncompetition policy goals at stake. The Antitrust Division has an important role to play in working with other Federal agencies to promote those goals in ways that are consistent, to the extent possible, with competition principles. Indeed, by embracing these other policy goals while bringing competition tools to bear, the Antitrust Division can improve both governmental oversight and consumer welfare.

2. The Methodology of Competition Advocacy

The Antitrust Division conducts its program of competition advocacy through 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, workshops, 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 agricultural, energy, financial services, healthcare, intellectual property, and telecommunications. 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 typically promotes competition principles in the crafting of new legislation or in amendments to existing laws. It may also oppose efforts to extend unnecessary regulation or 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 nonlawyers. *See, e.g., [Letter from Scott D. Hammond, Acting Assistant Attorney General, and Jon Leibowitz, Chairman, Federal Trade Commission, to Hawaii Judiciary Public Affairs Office \(April 20, 2009\)](#); [Letter from Scott D. Hammond, Acting Assistant Attorney General, to the Montana Supreme Court \(April 17, 2009\)](#)*. The Division also has filed comments on proposed “minimum service laws”, which would restrict the provision of limited service real estate brokerages. *See, e.g., [Letter from J. Robert Kramer II, Director of Operations, to Hon. Mark Boitano, New Mexico State Senator \(Feb. 13, 2009\)](#)*.

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, communications, healthcare, insurance, ocean shipping, and numerous energy industries. *See, e.g., [Voice, Video and Broadband: The Changing Competitive Landscape and Its Impact on Consumer](#) (2008); [Competition in the Real Estate Brokerage Industry](#) (2007); [Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition](#) (2007); [Improving Health Care: A Dose of Competition](#) (2004)*. The purpose of such reports is to create greater public awareness of the proper role of competition in these sectors of the economy and thereby to advance regulatory reform efforts.

d. Intervention in Regulatory Agency Proceedings

One of the Division's major competition advocacy efforts 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 may participate 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. For example, each section should review the Federal Register and the trade press to identify important regulatory matters. At times, the Division may be invited by an 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 the Assigned DAAG 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.