Statement of William Askew

On behalf of

The Financial Services Roundtable

On

The Role of Antitrust Law in Government-Funded Consolidation in the Banking Industry

Before

The Subcommittee on Courts and Competition Policy
Committee on the Judiciary
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Chairman Johnson, Ranking Member Coble, and members of the Subcommittee, my name is William Askew. I am an Executive Vice President with Regions Financial Corporation, and also serve as the Anthony T. Cluff Senior Policy Advisor to the Financial Services Roundtable (the "Roundtable"). I am appearing today on behalf of the Roundtable whose members are 100 of the nation's largest integrated financial services firms. Roundtable members provide banking, insurance and investment products and services to American consumers and businesses.

Thank you for the opportunity to participate in this hearing on the role of antitrust policy in financial regulation.

While many factors contributed to the current crisis in our financial markets, that crisis is not a product of our antitrust laws. The crisis is a liquidity crisis, caused by a combination of inappropriate practices by some financial services firms and our fragmented financial regulatory system. The appropriate policy response to this crisis should not be to revise our antitrust laws, but instead, to reform the nation's financial regulatory system.

Banks and other financial services firms are subject to the full range of our nation's anti-trust laws.[1] Depending upon the precise nature of the institution and the transaction in question, mergers, acquisitions and other consolidations may be subject to review by not only federal antitrust enforcers, but also the Federal Reserve Board, the Federal Deposit Insurance Corporation ("FDIC"), the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Securities and Exchange Commission ("SEC"), the Commodity Futures Trading

[1] Congress also has prohibited any bank from holding more than 10 percent of all deposits. While this deposit cap is intended to limit overall deposit growth and concentration, it is arbitrary from both a policy and economic perspective.

Commission ("CFTC"), and the various state bank regulatory agencies and insurance commissions.

As a result of the application of anti-trust laws, the financial services industry remains extremely competitive. Each year, the Roundtable and the Insurance Information Institute publish a “Fact Book” on the financial services industry. The most recent edition of that publication reports that as of 2007, the financial services industry included 5,000 registered broker/dealers, 1,250 thrift institutions, 8,000 credit unions, 7,250 commercial banks, 1,200 life insurance companies, 2,700 property and casualty companies, and 800 health insurance companies. In addition, the financial services industry includes literally thousands of other commercial and consumer finance companies, hedge funds, and mortgage lenders.

The financial services industry does include some very large organizations. However, the current crisis was not caused by the size of individual institutions. It was the result of excessively risky practices on the part of some institutions and the inability of our existing financial regulatory system to detect and address these practices as they spread risks throughout the system.

Moreover, this crisis has demonstrated that no institution is “too big to fail”. Over the past twelve months, large thrifts (e.g., Washington Mutual), large banks (e.g.,Wachovia), regional banks (e.g., National City), and large brokers/dealers (e.g., Lehman Brothers and Bear Sterns) have either been sold, reorganized or have been allowed to fail. Nor will AIG emerge from its current state in the same form. Its equity holders have been effectively wiped-out, its management replaced, and its subsidiaries are for sale.

In the case of each of these large institutions, as well as the dozens of smaller banks that have failed during this crisis, regulators have intervened to protect depositors, policyholders, and

the economy as a whole – not to save equity holders or management. Resolution techniques have varied from institution to institution based upon the condition of the institution, and its connections with other market participants. In those cases in which the regulators have continued to operate the institution, such as AIG, they have done so because they believe that a gradual resolution will be the less costly to taxpayers than an immediate dissolution.

As I will explain further below, the real policy answer to the problems confronting our nation's financial markets is to reform the regulation of financial services firms so that risks, especially systemic risks, can be identified and addressed before they cause serious harm to consumers and the economy.

The root causes of this liquidity crisis are two-fold: a breakdown in practices by many, but not all, financial services firms and the failure of our financial regulatory system to identify and prevent such practices.

The industry practices that contributed to the crisis are well documented: Poor loan underwriting standards and credit practices, excessive leverage, misaligned incentives, less than robust risk management and corporate governance. Yet, throughout the run-up to this crisis, no single agency was monitoring the connections between different market participants across the nation's financial markets.

Since the crisis emerged in 2007, the financial services industry has taken actions to correct these practices. Underwriting standards have been upgraded, credit practices have been reviewed and recalibrated, leverage has been reduced as firms have rebuilt capital, incentives have being realigned, and some management teams have been replaced.

The second cause of the crisis, our fragmented financial regulatory system, has yet to be addressed. Crises have a way of revealing structural flaws that long existed, but were little

noticed until the crisis. This crisis is no different in that several structural flaws in our financial regulatory system, including the absence of any comprehensive oversight across financial firms and financial markets, have been identified.

Our current regulatory structure was created in piecemeal fashion over the past 150 years. As it evolved, the various parts of the regulatory system did not logically build upon one another. While the system worked well for many years, its flaws have become evident since the onset of the current crisis in late 2007. Indeed, to say our financial regulatory system is fragmented or uncoordinated would be an understatement.

Our fragmented system of financial regulation is based upon a concept of "functional" regulation. Under this system, firms are regulated according to their charter type, and there is limited coordination and cooperation between different regulators, even though firms with different charters often engage in the same or similar activities. Moreover, no federal agency is responsible for examining and understanding the risks created by the interconnections between firms and markets.

This functional system has resulted in gaps in regulation that permit some financial services firms to operate with minimal oversight and supervision, and it has encouraged firms to engage in regulatory arbitrage.

The regulation of mortgage finance illustrates these structural flaws. No single regulator was accountable for identifying and recommending corrective actions across the mortgage origination and securitization process. Most mortgage brokers were not subject to any licensing and qualification requirements. Over half of all mortgage loans were originated by state-licensed lenders and were not subject to supervision or regulation. Other lenders that were regulated were

able to engage in practices that did not meet basic safety and soundness or consumer protection standards.

The federal banking regulators recognized many of these problems and took actions to address the institutions within their jurisdiction.. Eventually, the Federal Reserve Board's Home Ownership and Equity Protection Act ("HOEPA") regulations did extend some consumer protections to a broader range of lenders, but the Federal Reserve Board does not have the authority to ensure that those lenders are engaged in safe and sound underwriting practices or risk management.

The process of securitization suffered from a similar lack of systemic oversight and prudential regulation. No agency had the authority to prohibit the sale of mortgages that were poorly underwritten. Likewise, no agency was responsible for addressing the over-reliance investors placed upon the credit rating agencies to rate mortgage-backed securities. Moreover, under our state-based system of insurance regulation, no federal agency was paying attention to the role of the mortgage insurance industry and other insurance companies that contribute to the mortgage origination and securitization process.

During the past year, the Roundtable has developed a regulatory reform proposal that is designed to address the structural flaws in our financial regulatory system. We believe that regulatory reforms, not changes in anti-trust policy, hold the answer to the problems that are plaguing our financial markets.

A key feature of our proposal is the creation of a market stability regulator that could identify, and to the extent possible, control systemic risks. Systemic risk is a significant, industry-wide threat or vulnerability based on market interconnections and regulatory gaps across the financial services industry as a whole (including products, markets, and firms), which,

if left unaddressed, could have material and adverse effects on either our financial markets or the U.S. economy.

In other words, systemic risk is not an isolated risk posed by a single institution or a solitary practice. It is a risk that crosses market segments as well as whole markets, domestic and globally, in addition to firms. Although large firms can create large risks, systemic risks can arise from the collective actions of many firms, both small and large.

The practices and activities that contributed to the current crisis were not a function of the size of an institution. They were practices and activities that cut across different sectors of the financial services industry, and involved firms of varying sizes and shapes. These practices and activities include underwriting standards based on short-term adjustable rates, not rates over the term of a loan; securitizations based only upon a credit rating, with little due diligence by investors; and pro-cyclical capital standards that promoted the development of off-balance sheet vehicles. Individually these actions did not give rise to systemic risk, but collectively they did.

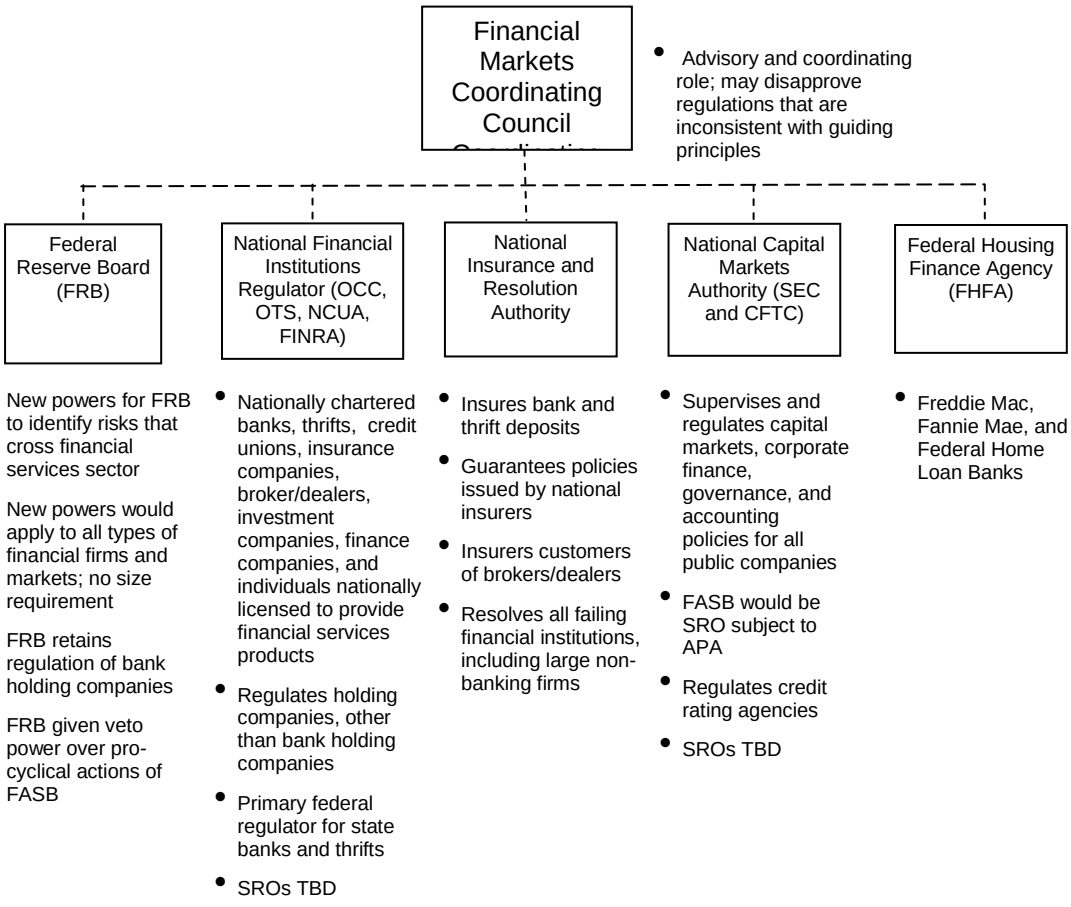
The Roundtable supports the creation of a market stability regulator to monitor broad trends across markets and firms and identify practices and activities that could pose significant risks to the financial system and our economy. This regulator should have the authority to collect information on all types of financial services firms, including depository institutions, broker/dealers, insurance companies, hedge funds, private equity firms, industrial loan companies, credit unions, and any other financial services firms that facilitate financial flows (e.g., transactions, savings, investments, credit, and financial protection) in our economy.

A market stability regulator should not duplicate the work of other regulators, but should work with other regulators to recommend actions that would prevent and address systemic risks.

This ensures a solid working relationship between the market stability regulator and prudential regulators and ensures that individual prudential regulators are sensitive to larger systemic risks.

Other features of our regulatory reform proposal are illustrated in the following chart.

FINANCIAL REGULATORY ARCHITECTURE PROPOSAL



The key components of this proposed regulatory architecture are as follows. First, to enhance coordination and cooperation among the many and various financial regulatory agencies, we propose to expand membership of the President's Working Group on Financial Markets ("PWG") and rename it as the Financial Markets Coordinating Council ("FMCC" or

"Council"). This Council should be established by law, in contrast to the existing PWG which has operated under a Presidential Order. This would permit Congress to oversee its Council's activities. The Council should include representatives from all major federal financial agencies, as well as individuals who can represent state banking, insurance and securities regulation. The Council should serve as a forum for national and state financial regulators to meet and discuss regulatory and supervisory policies, share information, and develop early warning detections.

The Council should not have independent regulatory or supervisory powers. However, it might be appropriate for the Council to have some ability to review the goals and objectives of the regulations and policies of federal and state financial agencies, and thereby ensure that they are consistent.

Second, to address systemic risk, we propose that the Federal Reserve Board should be authorized to act as a market stability regulator. As a market stability regulator, the Federal Reserve Board should be responsible for looking across the entire financial services sector to identify interconnections that could pose a risk to the financial system. To perform this function, the Federal Reserve Board should be empowered to collect information on financial markets and financial services firms, to participate in joint examinations with other regulators, and to recommend actions to other regulators that address practices that pose a significant risk to the stability and integrity of the U.S. financial services system. The Federal Reserve Board's authority to collect information should apply not only to depository institutions, but also to all types of financial services firms. This authority should not be based upon the size of an institution. It is possible that a number of smaller institutions could be engaged in activities that collectively pose a systemic risk.

Third, to reduce gaps in regulation, we propose the consolidation of several existing federal agencies into a single, National Financial Institutions Regulator ("NFIR"). This new agency would be a consolidated prudential and consumer protection agency for banking, securities and insurance. The NFIR would reduce regulatory gaps by establishing comparable prudential standards for all of these of nationally chartered or licensed entities. For example, national banks, federal thrifts and federally licensed brokers/dealers that are engaged in comparable activities should be subject to comparable capital and liquidity standards. Similarly, all federally chartered insurers would be subject to the same prudential and market conduct standards.

Fourth, to focus greater attention on the stability and integrity of financial markets, we propose the creation of a National Capital Markets Agency through the merger of the SEC and the CFTC, preserving the best features of each agency. The NCMA would regulate and supervise capital markets and exchanges. As noted above, the existing regulatory and supervisory authority of the SEC and CFTC over firms and individuals that serve as intermediaries between markets and customers, such as broker/dealers, investment companies, investment advisors, and futures commission merchants, and other intermediaries would be transferred to the NFIR. The NCMA also should be responsible for establishing standards for accounting, corporate finance, and corporate governance for all public companies.

Fifth, to protect depositors, policyholders, and investors, we propose the creation of the National Insurance and Resolution Authority as an insurer of bank deposits, the guarantor of retail insurance policies written by nationally chartered insurance companies, and a financial backstop for investors who have claims against broker/dealers. These three insurance systems would be legally and functionally separated. Additionally, this agency should be authorized to

act as the receiver for large non-bank financial services firms. The failure of Lehman Brothers illustrated the need for such a better system to address the failure of large non-banking firms.

Finally, to supervise the Federal Home Loan Banks and to oversee the emergence and future restructuring of Fannie Mae and Freddie Mac from conservatorship we propose that the Federal Housing Finance Agency remain in place, pending a thorough review of the role and structure of the housing GSEs in our economy.

Achieving better and more effective regulation will require more than just rearranging regulatory assignments. Consolidation of overlapping regulatory functions and greater coordination between the remaining agencies will be beneficial, but better and more effective regulation also requires (1) greater reliance on principles-based regulations that are responsive to changes in market conditions and are focused on desired regulatory results; (2) greater reliance on a system of prudential supervision that is based upon an on-going exchange of information between regulated firms and regulators that seeks to solve common problems before they pose a risk to consumers or the financial system; and (3) a reduction in the pro-cyclical effects of regulatory and accounting requirements.

Antitrust regulation should not be viewed as a substitute for regulatory reform. Our antitrust laws protect consumers against private agreements among firms that create or facilitate the exercise of market power – often thought of as the power of companies to raise prices or limit output. The Sherman Act (1890), enacted to address Congress's concerns about the impact of large trusts that emerged in the wake of the industrial revolution, protects consumers from private agreements between firms that seek to unreasonably restrain trade, and restricts the ability of individual firms from using improper means to acquire, maintain or exercise such market power. The Clayton Act, first enacted 1914, protects consumers from mergers and

acquisitions that are likely to substantially lessen competition or tend to create monopolies. Antitrust laws exist because we have an economic system generally grounded in competitive free markets, and it is designed to ensure that private agreements do not interfere with the benefits brought by such competition.

Our existing antitrust laws are flexible and have served the country well – in good times and in bad – for many years. While there are numerous federal statutes that address specific aspects of antitrust law, and the Clayton Act has been periodically amended, the fundamental statutes remain flexible to preserve competition.

I urge the Subcommittee to resist any changes to these basic laws in response to the current crisis. These, and other anti-trust laws, are aimed at preserving competition and guarding against market power, not addressing a liquidity crisis.

A simple hypothetical might be the easiest way to demonstrate the risk of seeking to address the current problems facing our financial markets through changes in anti-trust law. Suppose a merger involves two financial services firms with largely complementary businesses. These firms desire to merge because the combination of their complementary expertise and footprints would enable them to develop new higher quality products and distribute those products at a lower cost than either firm could do individually. Neither firm would endeavor this new product development on its own. The merger also would permit some reductions in overhead expenditures due to duplication in general and administrative office services. In today's highly competitive and unconcentrated financial services industry, this hypothetical transaction is unlikely to raise any antitrust concern. However, if antitrust standards were changed to limit such mergers simply because of the size of the firms involved, consumers would

lose the benefits of new products and services. In other words, any such regime would be an unwarranted intrusion into free markets without any clear benefit.

In conclusion, Mr. Chairman, thank you for inviting me to testify before the Subcommittee today. I look forward to answering any questions you and other members of the Subcommittee may have regarding my testimony.