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Is There Life After *Trinko* and *Credit Suisse*?
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Antitrust law promotes competition in the service of economic efficiency. Government regulation may or may not promote either competition or efficiency, depending on both the goals of the agency and the effects of industry "capture." Antitrust courts have long included regulated industries within their purview, working to ensure that regulated industries could not use the limits that regulation imposes on the normal competitive process to achieve anticompetitive ends. Doing so makes sense; an antitrust law that ignored anticompetitive behavior in any regulated industry would be a law full of holes.

The role of antitrust in policing regulated industries appears to be changing, however. A cluster of Supreme Court decisions in the past decade have fundamentally altered the relationship between antitrust and regulation, placing antitrust law in a subordinate relationship that, some have argued, requires it to defer not just to regulatory decisions but perhaps even to the silence of regulatory agencies in their areas of expertise. The most notable cases in this group are *Trinko* and *Credit Suisse*.

Absolute antitrust deference to regulatory agencies makes little sense as a matter either of economics or experience. Economic theory teaches that antitrust courts are better equipped than regulators to assure efficient outcomes in many circumstances. Public choice theory - and long experience - suggests that agencies that start out trying to limit problematic behavior by industries often end up condoning that behavior and even insulating those industries from market forces. And as history has shown, relying on regulatory oversight alone without the backdrop of antitrust law would leave both temporal and substantive gaps in enforcement, which unscrupulous competitors could exploit to the clear detriment of consumers. The mere existence of a competition-conscious regulatory structure cannot guarantee against abuses of that structure, or against exclusionary behavior that falls just beyond its jurisdiction. Indeed - and perhaps ironically - the very regulatory structure that exists to promote competition can create gaming opportunities for competitors bent on achieving anti-competitive goals. Such "regulatory gaming" undermines both the regulatory system itself and the longstanding complementary relationship between regulatory and antitrust law.

The risk of regulatory gaming provides an important example of the need for ongoing antitrust oversight of regulated industries. Regulatory

gaming is private behavior that harnesses pro-competitive or neutral regulations and uses them for exclusionary purposes. In the attached paper, Stacey Dogan and I identify three instances of regulatory gaming: (1) product-hopping, in which the branded company makes repeated changes in drug formulation to prevent generic substitution, rather than to improve the efficacy of the drug product; (2) manipulation of government standard-setting organizations to push a technical standard that excludes competitor products; and (3) price squeezes by partially regulated industries that exclude competition in the unregulated product sector.

My goal here is not to argue that these particular examples of regulatory gaming do or do not violate the antitrust laws. Rather, my point is that whether or not particular acts of regulatory gaming harm competition is and should be an antitrust question, not merely one that involves interpreting statutes or agency regulations. Some level of antitrust enforcement - with appropriate deference to firm decisions about product design and affirmative regulatory decisions that affect market conditions - provides a necessary check on behavior, such as product hopping, that has no purpose but to exclude competition.

Until the past decade, it was a well-established maxim of antitrust law that courts would not assume the passage of a particular regulation impliedly

repealed or limited the reach of antitrust law. The Supreme Court abandoned that maxim in *Trinko* and *Credit Suisse*. While the Supreme Court could reverse ground and permit antitrust scrutiny of regulatory gaming, the recent trend in its cases makes that unlikely. I believe Congress should act to preserve the traditional role of antitrust law in the face of regulation. The most straightforward way to do so would be to enact that time-honored maxim as law.

As a result, I offer the following possible amendment to the Sherman Act for the Subcommittee's consideration:

"No regulation or Act of Congress shall be interpreted to restrict or repeal the antitrust laws unless it expressly so provides."