Is There Life After *Trinko* and *Credit Suisse*?
The Role of Antitrust in Regulated Industries

Prepared Statement of
The Federal Trade Commission

Before the
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Committee on the Judiciary
Subcommittee on Courts and Competition Policy

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Chairman Johnson, Ranking Member Coble, and members of the Subcommittee, I am Howard Shelanski, Deputy Director for Antitrust in the Bureau of Economics at the Federal Trade Commission ("FTC" or "Commission").[1] Thank you for inviting the Commission to present its views on how the Supreme Court's decisions in *Verizon v. Trinko*[2] and *Credit Suisse v. Billing*[3] could affect public enforcement of the antitrust laws in regulated industries.

We would like to make two points in this statement. First, the combined effect of *Credit Suisse* and *Trinko* is to make it more difficult than before for either private plaintiffs or public agencies to bring important antitrust cases in regulated sectors of the American economy. Second, the heightened concerns about the high costs and questionable benefits of antitrust enforcement in regulated industries that motivate the Court's decisions in *Credit Suisse* and *Trinko* do not apply to public enforcement actions. While we do not take the position in this testimony that *Trinko* or *Credit Suisse* necessarily prevents the Commission from bringing any particular case or set of cases, we do argue that the federal courts should not be able to use those decisions to impose an unwarranted bar on public antitrust enforcement in regulated industries.

[1] This written statement represents the views of the Federal Trade Commission. My oral presentation and responses to questions will be my own and do not necessarily reflect the views of the Commission or of any Commissioner.
[2] *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004).
[3] *Credit Suisse Securities v. Billing*, 551 U.S. 264 (2007).

I. <u>Antitrust Enforcement in Regulated Industries Prior to *Credit Suisse* and *Trinko*</u>

Before the Supreme Court decided *Trinko* (2004) and *Credit Suisse* (2007), the Court had held in a line of cases stretching back 60 years that public agencies and private plaintiffs could enforce the antitrust laws in regulated industries. In those cases, the Court did not view it as surprising or troublesome for antitrust agencies or private parties to challenge conduct as anticompetitive even if that conduct was already subject to agency rules.

In 1963, for example, the Supreme Court in *Silver v. New York Stock Exchange* rejected the Exchange's attempt to block a group of securities dealers from pursuing an antitrust suit against the Exchange for having directed its members not to provide wire transfer services to the non-member plaintiffs.[4] The Court held that while the Securities Exchange Act of 1934 allowed the exchanges to engage in some self-regulatory conduct that might ordinarily run afoul of the antitrust laws, the group boycott at issue was outside the scope of such self-regulation and therefore not exempt from antitrust suits.[5] The Court's decision presumed against exemptions from the Sherman Act, the nation's principal antitrust statute, in order to advance Section 1's core objective of preventing anticompetitive collusion.

[4] 373 U.S. 341 (1963).
[5] *Id.* at 357.

Similarly, in 1973 the Court in *Otter Tail Power v. United States* affirmed the government's application of Section 2 of the Sherman Antitrust Act[6] to interconnection—or network sharing—among rival electric utilities.[7] The Federal Power Commission arguably had independent authority under the Federal Power Act to order and regulate such interconnection.[8] The Court nonetheless upheld the lower courts' decision to block a dominant utility from using its control over electrical generation to exclude a rival power distributor and monopolize the power market.[9] Likewise, the Department of Justice ("DOJ") has sued AT&T three times (in 1912, 1949, and 1974) for a variety of exclusionary practices against rivals in various telephone equipment and service markets.[10] These markets have long been subject to substantial regulation under federal statutes.

The clear trend in the cases that came before *Trinko* and *Credit Suisse* was that the federal courts generally allowed the simultaneous application of the general antitrust statutes and an industry-specific regulatory statute. The Supreme Court did wrestle in several cases with the question of whether a regulatory regime displaced the antitrust laws, characterizing the issue, among other things, as whether the regulatory regime impliedly repealed the antitrust laws or impliedly immunized the conduct from the antitrust laws. But the Court consistently disfavored antitrust immunity and required a fairly direct level of conflict—"plain repugnancy" in the Court's words—between antitrust law and the regulatory statute before courts could immunize the regulated

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[6] 15 U.S.C. § 2.
[7] 410 U.S. 366 (1973).
[8] *Id.* at 373.
[9] *Id.* at 374-5.
[10] *See* STUART BENJAMIN, ET AL., TELECOMMUNICATIONS LAW AND POLICY 713 (2d ed. 2006) (discussing the antitrust actions).

conduct from antitrust law.[11] The rule that emerged from early cases was that the courts should imply immunity from antitrust enforcement only where, and to the minimum extent, necessary for the relevant regulatory statute to achieve its purpose.[12]

II. The Potential Impact of *Credit Suisse* and *Trinko* on Antitrust Enforcement

Credit Suisse and *Trinko* went beyond the earlier decisions in allowing regulation to limit antitrust enforcement. *Credit Suisse* extended the idea of "repugnancy" between regulation and antitrust law by finding antitrust claims "repugnant" even if the only way they could conflict with regulation was through judicial error.[13] *Trinko* can be read to make it harder to bring antitrust claims that are not already established in precedent against firms whose competitive conduct is subject to regulatory oversight, even when Congress has included a savings clause that expressly preserves the simultaneous operation of antitrust and regulation.[14] The combined result is that through *Credit Suisse* and *Trinko*, the Supreme Court has shifted the earlier cases' balance between antitrust and regulation in favor of regulation.

A. *Credit Suisse*

Prior to *Credit Suisse*, the Supreme Court invariably drew a line between antitrust claims that could conflict with an agency's statutory authority to regulate a particular

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[11] *Otter Tail,* 410 U.S. at 372.
[12] *See, e.g., Silver,* 373 U.S at 357; *Georgia v. Pennsylvania R. Co.,* 324 U.S. 439, 456-457 (1945)*; California v. Fed. Power Comm'n,* 369 U.S. 482, 485 (1962).
[13] 551 U.S. at 284.
[14] 540 U.S. at 410-11.

kind of conduct, and were thus “repugnant” to that statutory authority, and those claims that could not conflict, principally because they addressed activities the agency had no power either to approve or prohibit.[15] In those cases, the Court did not imply immunity where the conduct underlying the antitrust claim was distinct from anything the securities laws would or could allow. In *Credit Suisse*, the Court extended its precedent in a way that could block some antitrust claims involving conduct the agency either has no specific statutory power to regulate or is certain to regulate in a manner that is consistent with the antitrust laws.

Credit Suisse involved an attempted antitrust suit for collusion in the underwriting of initial public offerings of securities. The applicable regulatory statute gave the SEC authority to review joint underwriting activities and contained no specific antitrust savings clause.[16] It did contain a general savings clause that “the rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity.”[17]

The plaintiffs in *Credit Suisse* complained that the defendants, a group of underwriters, had violated Section 1 of the Sherman Act (the anti-collusion provision) by going beyond the kinds of joint setting of securities prices that the securities laws allow.[18] They alleged that the defendants had impermissibly engaged in tying and similar activities that are prohibited by both the antitrust laws and the securities statutes.[19] Importantly, the Court took as given that the defendants’ conduct was unlawful under the

[15] *See, e.g., Silver*, 373 U.S. at 357-8; *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 685 (1975); *U.S. v. Nat’l Ass’n of Securities Dealers,* 422 U.S. 694, 719-20 (1975).
[16] 551 U.S. at 271, 276.
[17] *Id.* at 275; 15 U.S.C. §§ 77p(a), 78bb(a).
[18] *Credit Suisse*, 551 U.S. at 269-70.
[19] *Id.*

securities laws and would remain so.[20] The Court nonetheless extended the potential-conflict rationale for immunity even to antitrust claims that, correctly construed, would not actually conflict with regulation.[21] *Credit Suisse* goes beyond prior implied immunity cases by blocking some antitrust claims that are based on legitimate antitrust principles, are consistent with securities laws, and are not potentially repugnant to the regulatory scheme, but where the underlying conduct is similar enough to regulated conduct that a judge might confuse the two and create a conflict with regulatory authority.

The Court's main concern was the potential for a flood of "lawsuits through the nation in dozens of different courts with different nonexpert judges and nonexpert juries."[22] If plaintiffs could "dress what is essentially a securities complaint in antitrust clothing," they could bypass the expert securities regulators in favor of generalist courts more prone to errors and more likely to impose unwarranted costs on defendants.[23] While the prevention of unnecessary litigation costs and meritless suits is a sound objective, the flood of private suits that motivated the Court in *Credit Suisse* is not an issue in public antitrust enforcement. The fact that the case does not distinguish the private litigation context that was before the Court from public enforcement could lead to unnecessary limitations on beneficial actions by the federal antitrust agencies; it could block the FTC from bringing cases clearly within the scope of antitrust law yet that would be just beyond the reach of regulation.

[20] *Id.* at 279.
[21] *Id.* at 283-4.
[22] *Id.* at 281.
[23] *Id.* at 284.

B. *Trinko*

The Court considered *Trinko* against the backdrop of the Telecommunications Act of 1996 ("the 1996 Act"). A central goal of that statute was to foster competition in the provision of local telephone services by requiring incumbent monopolies to provide access to their networks to new entrants into the telecommunications market.[24] When such a new entrant wishes to provide service to customers in a given area, it typically asks the incumbent to connect the customer's line to the new entrant's routing and billing equipment.[25] In this way the new entrant can provide service without building all the "last mile" lines to each customer. AT&T, which had been out of the local telephone business since the company's divestiture in 1984, re-entered that market as a competitor after the 1996 Act. One of the retail customers AT&T signed up was the law office of Curtis V. Trinko. AT&T faced delays in providing service to the plaintiff because of a dispute with Verizon, the incumbent provider of local services in New York, over AT&T's access to Verizon's network facilities.[26]

The 1996 Act amended the Communications Act of 1934 to add an antitrust savings clause, which states that "nothing in this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws" in telecommunications markets.[27] The plaintiff, ostensibly because he could not obtain his choice of telephone service provider, sued Verizon under Section 2 of the Sherman Act as well as under the

[24] 47 U.S.C. § 151; *Trinko*, 540 U.S. at 402.
[25] *Trinko*, 540 U.S. at 402.
[26] *Id.* at 404.
[27] 47 U.S.C § 152.

1996 Act.[28] He claimed that Verizon violated Section 2 and the 1996 Act by discriminating against rivals like AT&T by refusing to supply them with the network connections they needed to provide service to customers like Trinko's law office.[29] The case reached the Supreme Court after the Second Circuit reversed the district court's dismissal of Trinko's suit.

The Supreme Court phrased the question presented in *Trinko* as "whether a complaint alleging a breach of the incumbent's duty under the 1996 Act to share its network with competitors states a claim under § 2 of the Sherman Act."[30] The Court answered that question in the negative, and reversed the Second Circuit. Our concern with *Trinko* is not with the Court's ruling against the plaintiff in that particular case, but that the decision may be susceptible to broad interpretations by lower courts that would preclude antitrust claims—both private and public—even absent some of the factors that might have justified the result in *Trinko* itself.

Present in *Trinko* were three critical factors. First, the duties to deal that the 1996 Act imposed on incumbent telephone carriers were stronger than any such duties under Section 2 of the Sherman Act, the anti-monopoly provision on which the plaintiff had based his claim. Second, the Federal Communications Commission (FCC) had issued a set of rules that directly regulated the conduct about which the plaintiff was complaining. And third, the FCC actively administered its duty-to-deal regulations under the 1996 Act. The Court's holding can be read to say that where such factors are present, a violation of the agency's rule does not constitute a separate violation of the antitrust laws. That ruling directly answers the question presented and establishes the principle that when regulatory

[28] *Trinko*, 540 U.S. at 405.
[29] *Id.* at 404-5.
[30] *Id.* at 401.

statutes establish pervasive competition enforcement regimes they do not implicitly enlarge the scope of substantive liability under the antitrust laws.[31] As the Court put it, "just as the 1996 Act preserves claims that satisfy existing antitrust standards, it does not create new claims that go beyond existing antitrust standards."[32]

Embedded in the Supreme Court's ruling so interpreted are underlying issues related to the comparative competency of sector-specific regulatory agencies and generalist courts or public antitrust authorities that are beyond the scope of this testimony. The Court speaks explicitly in both *Credit Suisse* and *Trinko* about the hazards of diverting claims from expert agencies to non-expert courts. The risk is that the ability of plaintiffs to seek through antitrust what they could not obtain through the regulatory process could lead to a flood of costly litigation that, when multiplied by the likelihood that generalist courts will make errors at both the pleading and merits stages of litigation, could distort firms' competitive and innovative incentives in a way that will be costly to society.

We do not here address the Court's institutional presumption favoring the administrative processes of expert regulatory agencies over antitrust litigation where the three factors discussed earlier are present. Where a competent agency actively administers a rule whose standard for the competitive conduct at issue in litigation is more demanding on the defendant than antitrust law, the Court was right to find it relevant whether the marginal gains outweigh the potential costs of antitrust enforcement against the same conduct.

[31] The specifics of the regulation will matter in deciding how a regulatory statute affects antitrust law; not every statute should be read to limit expansion of antitrust law. In the Court's words, "[j]ust as regulatory context may in other cases serve as a basis for implied immunity, it may also be a consideration in deciding whether to recognize an expansion of the contours of *§ 2*." *Id.* at 412 (internal citations omitted).
[32] *Id.* at 407.

Our concern is that *Trinko* could be read more broadly by lower courts to block antitrust claims even where regulation does not as directly or effectively address the alleged competitive harm as the Supreme Court found the FCC rules at issue in *Trinko* to do. *Trinko* states that one key factor in deciding whether to recognize an antitrust claim against a regulated firm "is the existence of a regulatory structure designed to deter and remedy anticompetitive harm" because "[w]here such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small."[33] Had the Court made clear that to preclude antitrust claims a regulatory structure must, like the one at issue in *Trinko*, be directly relevant to the conduct at issue, be more demanding than antitrust law, and be actively administered, one might worry less about any collateral consequences on public antitrust enforcement. The Court, however, goes on to pose as the contrasting scenario in which antitrust might be worthwhile the case where "[t]here is nothing built into the regulatory scheme which performs the antitrust function."[34] Between "nothing" and the actively enforced duties to deal under the 1996 Act there is a lot of room. The risk for public enforcement agencies is that, given the *Trinko* Court's emphasis on the "sometimes considerable disadvantages" of antitrust, lower courts will preclude antitrust suits where the regulatory scheme is something greater than "nothing" but something well short of the FCC's implementation of the 1996 Act's competitive access provisions.

The Supreme Court's line between the novel claims its rule would preclude and established antitrust claims that could proceed in light of the 1996 Act's savings clause does not alleviate our concern. As a practical and legal matter, that line may be difficult

[33] *Id.* at 412.
[34] *Id.* (quoting *Silver*).

to draw, especially in activities analyzed under the fact-intensive rule of reason. The more factual dimensions there are to a liability determination, the more likely it is that every example of some kind of conduct will be distinguishable from every other example and, therefore, to some extent a novel expansion of doctrine that came before.

After *Trinko*, therefore, the presence of regulatory authority over a competition-related matter may make it more difficult for a plaintiff to pursue an antitrust challenge to the same conduct if the antitrust claim in any way exceeded the clear boundaries of antitrust precedent. Perhaps the most illustrative way to explain *Trinko*'s effect is this: had the decision been in place 40 years ago, the government's ability to pursue the antitrust suit that led to the break-up of AT&T, and other cases in which the government publicly enforced the antitrust laws in regulated industries, would have been in question. To the extent regulatory authorities have become more successful or active in enforcing competition-enhancing rules than they were in the past,[35] one might be inclined to worry less about the loss of such antitrust enforcement. But to the extent the net benefits of antitrust enforcement in regulated industries have declined in light of better competition-oriented regulation, we think they must necessarily have done so less for public enforcement whose net costs, as we will discuss below, are likely to be much lower than the costs of the kind of private suit at issue in *Trinko*. We see no reason, therefore, for the presumption of regulatory effectiveness implicit in *Trinko* to preclude the FTC from pursuing an antitrust case where it finds that a regulatory structure does not adequately "perform the antitrust function."

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[35] The FCC had acknowledged its own ineffectiveness as a regulator in the antitrust case leading up to the 1982 AT&T divestiture. *United States v. AT&T*, 552 F. Supp. 131, 168 (D.D.C. 1982).

In sum, *Credit Suisse* and *Trinko* could together make it more difficult for antitrust plaintiffs to bring claims against regulated firms where the conduct subject to complaint could be confused with conduct subject to regulation or where the claim could in some way be characterized as beyond the boundaries of established antitrust precedent. Of the two cases, *Credit Suisse* may be the more far-reaching because it could immunize some anticompetitive yet unregulated conduct from scrutiny. *Trinko* could, as in the case itself, strike a beneficial balance between antitrust and regulation if interpreted narrowly. But the questions *Trinko* leaves open about the standard regulation must meet before it displaces antitrust creates the risk that courts will apply the decision in ways that block public antitrust enforcement that would be beneficial to American consumers.

III. Why *Trinko* and *Credit Suisse* Should Not Apply to Public Enforcement

Both *Trinko* and *Credit Suisse* involved private antitrust suits rather than public enforcement actions by the Federal Trade Commission or the Department of Justice. The Supreme Court's decisions appear, however, to apply to both public and private actions. This is unfortunate because the Court's core concern in both cases about the costs and potential deterrent effects of antitrust are more relevant to private suits, while the benefits of antitrust law as a complement and substitute for regulation are likely to be greatest through public enforcement. The lower costs and higher benefits of cases brought by public agencies arise because of differences in the incentives and capabilities of public and private antitrust plaintiffs.

Phrased broadly, the Court's concern is that antitrust litigation is always costly and in the presence of regulation is likely to have little additional benefit for competition. Treble damages and class action litigation could make erroneous antitrust liability particularly costly in private cases. The government, however, has no reason to use antitrust law against regulated firms unless doing so could yield net benefits on top of those the market already achieves through regulation. The FTC does not collect revenue or otherwise materially benefit from successful competition enforcement. Federal antitrust authorities also have greater resources than private plaintiffs to assess the costs and benefits of a particular antitrust enforcement action and to avoid interfering with regulatory objectives. The FTC and DOJ can both investigate private conduct through a variety of tools that can be focused on specific conduct and information.[36] These procedures are not costless, but they can be narrowly tailored and they occur in advance of litigation, unlike private discovery which occurs after litigation has been initiated and where plaintiffs have incentives to be much less discriminating in the information they demand from defendants.

Importantly, public antitrust agencies can better coordinate with relevant government regulatory agencies to avoid conflicts and unnecessary administrative costs. This ability to coordinate with regulatory authorities relates directly to the Supreme Court's concerns in both *Credit Suisse* and *Trinko*. Coordination could reduce the risk of the kind of judicial error the Court identified in *Credit Suisse* and of the costly duplication and deterrent effects that motivated the Court's decision in *Trinko*.

The federal antitrust agencies therefore have more incentive and ability than private plaintiffs do—not to mention an obligation to the American public—to assess the

[36] ABA SECTION OF ANTITRUST LAW, FTC PRACTICE AND PROCEDURE MANUAL 86 (2007).

potential costs of an antitrust case, to identify the potential benefits that would not be achieved through regulation, and to balance the two in the public interest before deciding to issue a complaint. As a result, public antitrust enforcement is much more likely than private litigation to avoid claims that will be prone to judicial errors, that will interfere with regulation, or that will fail to yield net benefits over regulation.

We are concerned that although the rationales of *Credit Suisse* and *Trinko* apply more to private suits than public enforcement actions, the decisions themselves may sweep more broadly. *Credit Suisse* and *Trinko* could have negative spillover effects on public enforcement and could impede the FTC from bringing cases that would benefit American consumers and promote economic growth. The Commission believes that its authority to prevent "unfair methods of competition" through Section 5 of the Federal Trade Commission Act[37] ("the FTCA") enables the agency to pursue conduct that it cannot reach under the Sherman Act, and thus avoid the potential strictures of *Trinko*.[38] There is good reason for the courts applying *Trinko* to treat FTCA actions differently from private suits under the Sherman Act given, among other things, the absence of treble damages under the FTCA. We nonetheless believe that the better course is for Congress to clarify that neither *Credit Suisse* nor *Trinko* prevents public antitrust agencies from acting under any of the antitrust laws when they conclude that anticompetitive conduct would otherwise escape effective regulatory scrutiny.

[37] 15 U.S.C. § 45.
[38] *See* How the Federal Trade Commission Works to Promote Competition and Benefit Consumers in a Dynamic Economy, Prepared Statement of the Federal Trade Commission Before the United States Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights 10-12 (June 9, 2010), *available at* http://www.ftc.gov/os/testimony/100609dynamiceconomy.pdf.