



Federal Trade Commission

The FTC's Role in Shaping Antitrust Doctrine: Recent Successes and Future Targets

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Good evening. Thank you for the kind introduction and warm welcome. I am delighted to be here today. I'd like to thank Georgetown University Law Center, and especially Larry Center and Steve Salop, for the generous invitation to share my views and to help kickoff what is always a terrific symposium on global antitrust enforcement.

Today I would like to discuss what I think is one of the most important ways in which the Federal Trade Commission can fulfill its competition mission: by influencing

* The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisor, Jan Rybnicek, for his invaluable assistance in preparing this speech, and to Kelsey Goodman and Tim Geverd for research assistance.

the appropriate development of antitrust doctrine. My remarks will highlight a couple of examples where the Commission recently has helped improve antitrust doctrine, and will propose future targets where the Commission can usefully bring its experience and influence to bear in order to benefit of consumers.

Before I begin, I want to emphasize that my remarks represent my own views and not those of the Commission or any of its Commissioners.

The Commission, of course, achieves important victories for consumers in individual enforcement actions whenever it identifies and successfully challenges anticompetitive mergers, restraints of trade, or exclusionary conduct. These individual victories have immediate and tangible benefits. Because of the Commission's efforts in these matters, consumers purchasing groceries,¹ hospital services,² prescription drugs,³ energy services,⁴ and many other products, reap the benefits of competition in the form of lower prices, greater output, increased quality, or more innovation. As former FTC Chairman Bill Kovacic observed in the FTC at 100 Report, "[d]eterrence of unlawful conduct . . . is the lodestar of the agency's enforcement efforts."⁵ While deterrence of

¹ See, e.g., Decision & Order, Koninklijke Ahold N.V., FTC File No. 121-0055 (Aug. 17, 2012), *available at* <http://www.ftc.gov/os/caselist/1210055/120817konkinlijkedo.pdf>.

² See, e.g., FTC v. OSF Healthcare Sys., 852 F. Supp. 2d 1069 (N.D. Ill. 2012) (granting FTC's motion for preliminary injunction).

³ See, e.g., Decision & Order, Watson Pharmaceuticals Inc., FTC File No. 121-0132 (Oct. 15, 2013), *available at* <http://www.ftc.gov/os/caselist/1210132/121015watsonactavisdo.pdf>.

⁴ See, e.g., Decision & Order, Tesoro Corp., FTC File No. 131-0052 (June 17, 2013), *available at* <http://www.ftc.gov/os/caselist/1310052/130617tesorodo.pdf>.

⁵ William E. Kovacic, Chairman, Fed. Trade Comm'n, THE FEDERAL TRADE COMMISSION AT 100: INTO OUR 2ND CENTURY 113 (2009), *available at* <http://www.ftc.gov/os/2009/01/ftc100rpt.pdf>.

unlawful anticompetitive conduct brings substantial and direct gains to consumers, there are other important ways the Commission's enforcement efforts can provide value to consumers.

In my view, the Commission makes equally significant, and potentially longer lasting, progress toward achieving its goal of promoting competition and consumer welfare when its actions inform judicial thinking and positively shape antitrust law and competition policy. Indeed, where the Commission succeeds in influencing how the antitrust laws are applied, the benefits of using the best analytical framework to identify anticompetitive conduct are felt not only by consumers in the particular case, but potentially can reverberate across multiple industries and consumer groups.⁶ This approach can be a particularly effective method of leveraging the Agency's scarce resources to maximize the rate of return we generate for consumers.

The Commission can influence competition policy in several ways. For instance, the Commission organizes hearings and workshops to examine difficult legal and policy issues. It also collects empirical data and other evidence from industry

⁶ I have noted elsewhere that the Commission's authority to prosecute "unfair methods of competition" under Section 5 of the Federal Trade Commission Act was intended by Congress to allow the Commission to use its research and reporting function and expertise to generate sound competition rules and influence antitrust doctrine. To better harness this capability, I have called upon the Commission to issue guidelines for the use of its Section 5 unfair methods authority and have distributed a proposed policy statement to serve as a starting point for a fruitful discussion of the issue. *See generally* Joshua D. Wright, Comm'r, Fed. Trade Comm'n, Section 5 Recast: Defining the Federal Trade Commission's Unfair Method of Competition Authority, Remarks at the Executive Committee Meeting of the New York State Bar Association's Antitrust Section (June 19, 2013), *available at* <http://ftc.gov/speeches/wright/130619section5recast.pdf>.

participants to better understand whether and how the antitrust laws may apply within an industry or to specific conduct. Further, the Commission's Office of Policy & Planning studies business practices and prepares reports and advocacy papers about their potential competitive effects. The Commission also enters into consent decrees and can issue closing statements that outline how the Agency thinks about a particular issue. In my view, however, the most significant mechanism by which the Commission influences antitrust doctrine is by challenging anticompetitive conduct and mergers in federal court. In doing so, the Commission can use its economic expertise, research capabilities, and accumulated learning to advocate its view of how the antitrust laws should be applied, and ultimately have those views enshrined in doctrine extending beyond the specific case.⁷

There are several examples of the Commission employing its resources to successfully influence antitrust doctrine. Usually, these efforts aim to more closely align antitrust law with modern developments in economic science and empirical learning. I would like to begin by highlighting quickly two recent examples before discussing some areas that are ripe for similar efforts.

⁷ See, e.g., *PolyGram Holding, Inc. v. FTC*, 416 F.3d 29, 33-36 (D.C. Cir. 2005) (adopting Commission's application of an "inherently suspect" standard to restraints that "appear[ed] likely, absent an efficiency justification, to restrict competition and decrease output")

I. RECENT FTC SUCCESSES IN SHAPING ANTITRUST DOCTRINE

The Commission won two major victories earlier this year that, in my view, significantly improve antitrust doctrine and considerably strengthen the Commission's ability to challenge anticompetitive conduct and protect consumers.

a. State Action Doctrine: *FTC v. Phoebe Putney Health Sys., Inc.*

In February of this year, the Supreme Court reversed a decision by the Eleventh Circuit Court of Appeals that held the state action doctrine precluded the Commission from challenging a merger between the only two hospitals serving consumers in and around Albany, Georgia.⁸ The Supreme Court's decision in *FTC v. Phoebe Putney Health System* resolved an important doctrinal dispute that began nearly two years earlier when the Commission challenged the merger between Phoebe Putney Memorial Hospital ("Phoebe") and Palmyra Medical Center ("Palmyra"), on the grounds that the transaction would result in a substantial lessening of competition and allow the hospital authority to raise prices for general acute-care services in violation of Section 7 of the Clayton Act. The Supreme Court's decision reaffirmed that state action immunity is disfavored and significantly narrowed the doctrine's scope.

As any antitrust student knows, the state action doctrine permits government entities to work outside the federal antitrust laws when they act pursuant to a "clearly

⁸ *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003 (2013).

articulated and affirmatively expressed” state policy to displace competition.⁹ What had been less clear in the run up to *Phoebe Putney* is what exactly a state must do to trigger the state action doctrine. The Eleventh Circuit found that the state action doctrine immunized the merger between Phoebe and Palmyra from antitrust scrutiny because the Georgia legislature delegated to the local hospital authority the power to acquire other hospitals and, in the courts view, this delegation constituted a clear articulation of a policy to displace competition because mergers such as the one between Phoebe Putney and Palmyra were a foreseeable result.¹⁰

In reversing, the Supreme Court observed that “given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, ‘state-action immunity is disfavored.’”¹¹ At the urging of the Commission, the Court clarified that potentially anticompetitive conduct by state entities is protected only when the state has “foreseen and implicitly endorsed the anticompetitive” behavior being challenged as consistent with the state’s policy goals.¹² Although the Court did not go so far as to require that legislatures expressly authorize the specific anticompetitive conduct in question in order to trigger state action immunity, it significantly narrowed the scope of what constitutes “clear articulation” by declaring that the anticompetitive effects of the challenged conduct must be “the

⁹ *Cnty. Commc’ns. Co. v. Boulder*, 455 U.S. 40, 52 (1982).

¹⁰ *FTC v. Phoebe Putney Health Sys., Inc.*, 663 F.3d 1369, 1376-78 (11th Cir. 2011).

¹¹ *Phoebe Putney*, 133 S. Ct. at 1010 (quoting *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992)).

¹² *Id.* at 1013.

inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature” in order for the state action doctrine to apply.¹³ Given the enduring nature of public restraints on competition, and their pernicious effects, narrowing the scope of state action immunity allows the Commission to reach plainly anticompetitive conduct blessed by state regulators and regulatory boards on behalf of consumers.¹⁴

The Supreme Court’s decision in *Phoebe Putney* was a tremendous victory for the Commission and represents the culmination of much work that began long before the merger was ever contemplated. Indeed, it is easy to forget that the Commission’s efforts to recalibrate the state action doctrine actually began nearly a decade before *Phoebe Putney* under then Chairman Tim Muris with the issuance of an in-depth report by the Office of Policy & Planning’s State Action Task Force.¹⁵ The report described the basis of the state action doctrine, identified several recurrent problems in the case law, and recommended several methods, including shaping judicial thinking, for bringing the doctrine in line with effective competition policy. Through this effort, and subsequent litigation, the Commission was able to play a key role in influencing

¹³ *Id.* The Court did not address the issue whether the second prong of the state action doctrine—active supervision by the state—was satisfied. The Commission previously has highlighted the need for clarification of this standard. Fed. Trade Comm’n, REPORT OF THE STATE ACTION TASK FORCE 53 (Sept. 2003), [hereinafter STATE ACTION REPORT] available at <http://www.ftc.gov/os/2003/09/stateactionreport.pdf>. For a view on the proper application of the active supervision prong in the context of *Phoebe Putney*, see Angela M. Diveley, *Clarifying State Action Immunity Under the Antitrust Laws: FTC v. Phoebe Putney Health System, Inc.*, 25 ST. THOMAS L. REV. 73, 96 (2012).

¹⁴ See Joshua D. Wright, Comm’r, Fed. Trade Comm’n, What’s Your Agenda?, Remarks at ABA Spring Meeting (Apr. 11, 2013), available at <http://ftc.gov/speeches/wright/130411abaspringmtg.pdf>.

¹⁵ See generally STATE ACTION REPORT, *supra* note 13.

antitrust doctrine by making it more difficult for parties to avoid antitrust liability by cloaking clearly anticompetitive conduct with the apparent blessing of a state or local regulatory authority.

b. Reverse-Payment Settlement Agreements: *FTC v. Actavis*

The second victory came in June of this year, when the Supreme Court ruled in *FTC v. Actavis* that “reverse payment” settlement agreements between brand and generic pharmaceutical companies are subject to antitrust scrutiny and should be analyzed under the traditional rule of reason.¹⁶ The victory follows upon nearly a decade of research and reporting by the Commission, and numerous amicus filings and lawsuits urging the federal courts to stop such deals when anticompetitive.¹⁷

As you know, “reverse payment” settlement agreements, sometimes referred to as pay-for-delay agreements, involve a brand-name drug manufacturer compensating a potential generic entrant to abandon its patent challenge and agree not to sell its generic drug product for a number of years. Anticompetitive pay-for-delay agreements violate the antitrust laws and undermine the goals of the Hatch-Waxman Act, legislation that aims to prevent weak patents from obstructing the development of competition between branded and lower-cost generic pharmaceuticals. These agreements may lead to higher prices for pharmaceuticals by deterring generic entry, and contribute to

¹⁶ *FTC v. Actavis*, 133 S. Ct. 2223 (2013).

¹⁷ See, e.g., Fed. Trade Comm’n, AUTHORIZED GENERIC DRUGS: SHORT-TERM EFFECTS AND LONG-TERM IMPACT (2011), available at <http://www.ftc.gov/os/2011/08/>.

increased health care costs that consumers, employers, and federal and state governments are struggling to contain. Identifying and challenging anticompetitive pay-for-delay agreements therefore has been one of the Commission's top priorities for many years.

Prior to the Supreme Court's decision in *Actavis*, there existed a circuit split among the Courts of Appeals on the question of whether and how to analyze pay-for-delay agreements under the antitrust laws. The Second, Eleventh, and Federal Circuits all utilized the "scope of the patent" test, which states that any agreement to resolve patent infringement under the Hatch-Waxman Act is shielded from the antitrust laws, absent fraud in obtaining the patent or sham litigation, so long as the agreement does not exceed the scope of the patent.¹⁸ In contrast, the Third Circuit held that pay-for-delay agreements can be scrutinized under the traditional antitrust laws and that lower courts should apply a "quick look" analysis when determining liability.¹⁹

In *Actavis*, the Supreme Court endorsed the Commission's view that pay-for-delay agreements can violate the antitrust laws because they have the potential for "genuine adverse effects on competition."²⁰ The Court flatly rejected the scope of the patent test, and accepted the Commission's argument that companies cannot defend such agreements by merely arguing that the brand-name drug company would likely

¹⁸ *In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187, 213 (2d Cir. 2006); *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 544 F.3d 1323, 1336 (Fed. Cir. 2008); *FTC v. Watson Pharms., Inc.*, 677 F.3d 1298 (11th Cir. 2012).

¹⁹ *In re K-Dur Antitrust Litig.*, 686 F.3d 197, 209 (3d Cir. 2012) .

²⁰ *Actavis*, 133 S. Ct. at 2234 (quoting *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986)).

have prevailed had the patent case been fully litigated or that the settlement provided for entry prior to patent expiration.²¹ Although the Court rejected the Commission's position that these arrangements should receive "quick look" treatment, the decision improved greatly upon prevailing antitrust doctrine by bringing pay-for-delay agreements within the traditional rule of reason framework.²²

Although the Court in *Actavis* provided useful guidance to lower courts and competition agencies analyzing pay-for-delay agreements, the Court also left considerable room for the lower courts to structure the contours of that analysis. For example, it remains an open issue when and to what extent the validity of the patent will need to be tested as part of the rule of reason analysis, what types of direct economic evidence lower courts might consider assessing the competitive effects of the settlement, what indirect evidence will serve as the most useful evidence of anticompetitive effects, and how courts will analyze potential efficiencies that arise from such agreements. I am confident that the Commission will play as important of a role in influencing how lower courts analyze specific pay-for-delay agreements, and what factors they consider most relevant, as it did in having the Supreme Court adopt an appropriate analytical framework for understanding when pay-for-delay agreements violate the Sherman Act.

²¹ *Id.* at 2231.

²² *Id.* at 2236, 2339.

II. FUTURE FTC TARGETS FOR IMPROVING ANTITRUST DOCTRINE

With those two examples of Commission enforcement actions influencing antitrust doctrine in mind, I will focus the remainder of my remarks upon a couple of areas that, in my view, are particularly ripe for similar targeting of Commission resources to inform judicial thinking and to impact the law.

a. Appropriate Antitrust Analysis of Loyalty Discounts

The first area where the Commission can help improve upon the current state of antitrust doctrine is in the legal framework used to analyze loyalty discounts. Loyalty discounts are “a particular form of non-linear pricing in which the unit price of a good declines when the buyer’s purchases meet a buyer-specific minimum threshold requirement.”²³ Loyalty discounts are common and observed across a variety of industries and competitive conditions. The primary competitive concern with loyalty discounts is—as with exclusive dealing contracts generally—that they may be used by a monopolist to raise a rival’s costs of distribution by depriving them the opportunity to compete for distribution sufficient to achieve efficient scale, and ultimately harm consumers.²⁴ However, the economic literature also is replete with procompetitive

²³ Bruce H. Kobayashi, *The Economics of Loyalty Discounts and Antitrust Law in the United States*, COMPETITION POL’Y INT’L, Autumn 2005, at 115-16.

²⁴ See, e.g., Alden F. Abbott & Joshua D. Wright, *Antitrust Analysis of Tying Arrangements and Exclusive Dealing*, in ANTITRUST LAW AND ECONOMICS 183, 194-96 (Keith N. Hylton ed., 2d ed. 2010).

justifications for loyalty discounts and, in fact, generally supports the view that, more often than not, such arrangements benefit consumers.²⁵

Although there is some consensus among economists regarding how loyalty discounts may harm or enhance competition, there are fundamentally disparate views as to how antitrust law should analyze such arrangements.²⁶ Some believe antitrust law should treat loyalty discounts as it does other discount-based claims—that is, by subjecting such claims to a legal standard requiring proof of below-cost pricing. Others, myself among them, believe that to the extent loyalty discounts raise antitrust concerns, the concerns are about anticompetitive exclusion rather than predatory pricing and, as a result, the legal framework developed to evaluate exclusive dealing claims ought to be used to evaluate claims relating to loyalty discounts.²⁷

²⁵ Kobayashi, *supra* note 23, at 115; *see also* Dissenting Statement of Commissioner Joshua D. Wright, Graco, Inc., FTC File No. 101-0215 (Apr. 17, 2013), *available at* <http://www.ftc.gov/speeches/wright/130417gracostatement.pdf>.

²⁶ Some courts have analyzed loyalty discounting using both exclusive dealing precedent and a price-cost test. *See* NicSand, Inc. v. 3M Co., 507 F.3d 442, 447-48, 455 (6th Cir. 2007); Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1062-63 (8th Cir. 2000) (using the rule of reason to evaluate claim under § 1 and the *Brooke Group* test to evaluate claim under § 2); Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227 (1st Cir. 1983). Other courts have analyzed loyalty discounting programs under the rule of reason only. *See, e.g.*, Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768 (6th Cir. 2002); R.J. Reynolds Tobacco Co. v. Philip Morris Inc., 199 F. Supp. 2d 362 (M.D.N.C. 2002), *aff'd per curiam sub nom.* RJ Reynolds Tobacco Co. v. Phillip Morris USA, Inc., 67 F. App'x 810 (4th Cir. 2003). Still, other courts have analyzed loyalty discounts using a price-cost test. *See, e.g.*, Virgin Atl. Airways Ltd. v. British Airways Plc, 257 F.3d 256 (2d Cir. 2001) (using the *Brooke Group* test where plaintiff had alleged below-cost pricing). Finally, courts have also applied a version of a price-cost test in the context of a challenge to a *bundled* discounting program. *See, e.g.*, Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 909 (9th Cir. 2008).

²⁷ Joshua D. Wright, Comm'r, Fed. Trade Comm'n, Simple But Wrong or Complex But More Accurate? The Case for an Exclusive Dealing-Based Approach to Evaluating Loyalty Discounts, Remarks at the Bates White 10th Annual Antitrust Conference (June 3, 2013), *available at* <http://ftc.gov/speeches/wright/130603bateswhite.pdf>; *see also* Steve Salop, *Wright is Right, and Price-Cost*

In my view, the Commission should take an active role in encouraging courts to apply the legal framework for loyalty discounts that is best able to answer the question of whether the monopolist's conduct is anticompetitive, benign, or procompetitive. The current debate is a legal one, not a dispute concerning the underlying economic theory and evidence. Thus, the Commission can play a valuable role, and one it has served well over time, by investing in efforts that would bring the legal treatment of loyalty discounts more closely in line with economic thinking. The best legal framework is the one that is most likely to minimize the costs to consumer welfare in its application. Those costs include the erroneous condemnation of procompetitive loyalty discounts, the failure to condemn anticompetitive conduct, and the cost of administering the antitrust system. Because loyalty discounts raise the same concerns about raising rivals' costs that exclusive dealing does, the Commission should seek to have courts apply the same legal rubric as in exclusive dealing cases. This rubric would require courts to ask whether a loyalty discount program has, or is likely to, increase or maintain the firms' market power and harm competition through increased prices, reduced output, or diminished quality.²⁸

How can the Commission steer courts towards applying the correct legal framework in loyalty discounts cases? If history is any guide, and I think it is, the

Safe Harbors are Wrong: The Raising Rival's Cost Paradigm, Loyalty Discounts and Exclusive Dealing, TRUTH ON THE MARKET BLOG (June 7, 2013), <http://truthonthemarket.com/2013/06/07/wright-is-right-and-price-cost-safe-harbors-are-wrong-the-raising-rivals-cost-paradigm-loyalty-discounts-and-exclusive-dealing/>.

²⁸ For application of the exclusive dealing framework to loyalty discounts, see Abbott & Wright, *supra* note 24.

Commission's best chance of influencing the law is by first identifying, and then bringing anticompetitive loyalty discount cases in federal court, and using those opportunities to educate courts on the important economic distinction between exclusion and predation and calling for application of the legal framework applied to exclusive dealing. Although the existing economic theory and evidence suggests that instances of anticompetitive loyalty discounts will be relatively rare, ensuring that courts apply the appropriate analysis when called upon is valuable. Along these lines, the Commission also should – informed by its own research and reporting efforts to study the costs and benefits of applying different legal frameworks to loyalty discounts – seek to file amicus briefs with federal courts reviewing private loyalty discount disputes that urge the adoption of an exclusive dealing framework.

In addition, the Commission should articulate in its own complaints, consent agreements, closing statements, and decisions why the exclusive dealing analytical framework is superior to the price-cost test when analyzing loyalty discounts. Indeed, the Commission has investigated a number of loyalty discount programs over the years, but those cases have not articulated a concrete or consistent position about whether the price-cost test or exclusive dealing framework applies or is preferred.²⁹ Going forward, I believe the Commission should systematically advocate for an exclusive dealing framework to be applied to loyalty discount cases.

²⁹ See *e.g.*, *Transitions Optical, Inc.*, 149 F.T.C. 1281 (2010); *Intel Corp.*, No. 9341, 2010 WL 4542454 (F.T.C. Nov. 2, 2010); *McCormick & Co.*, No. C-3939, 2000 WL 521741 (F.T.C. Apr. 27, 2000).

b. The Role of Efficiencies in Merger Analysis

Another area where the Commission can influence judicial thinking to help improve upon current antitrust doctrine is in the application of the antitrust laws to mergers. The Commission already has done a great deal to influence how courts analyze mergers. Indeed, the Horizontal Merger Guidelines (“Guidelines”) have proven to be one of antitrust law’s great successes in grounding antitrust doctrine to economic learning precisely because of the Guidelines’ widespread adoption by the federal courts.³⁰ As our understanding of the economics of mergers improves, and as our methodological toolkit for modeling and measuring the effects of mergers is further refined, the Commission would be wise to urge courts to incorporate those developments into their analysis so that there is a greater likelihood they reach the result that best promotes consumer welfare. In my view, there are two especially well-qualified candidates for the Commission’s immediate focus in terms of bringing modern merger review more closely in line with economic thinking: (1) urging courts to abandon the decades-old and economically misguided *Philadelphia National Bank*³¹ presumption, and (2) updating efficiencies analysis to capture modern economic thinking about the potential value of “out-of-market” efficiencies.

³⁰ In addition to their primary function of describing “the principal analytical techniques and the main types of evidence on which the Agencies usually rely to predict whether a horizontal merger may substantially lessen competition,” the Guidelines also are intended to “assist the courts in developing an appropriate framework for interpreting and applying the antitrust laws.” U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 1 (2010) [hereinafter 2010 MERGER GUIDELINES], available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.html>.

³¹ *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321 (1963).

i. Flawed Reliance on the Philadelphia National Bank Presumption

The hallmark of the antitrust agencies' 2010 Merger Guidelines is the continued shift away from a rudimentary focus upon market structure and towards an evidence-based competitive effects analysis.³² Consistent with these improvements, it is my view that the Commission should encourage courts to abandon the use of the structural presumption—first announced by the Supreme Court in *Philadelphia National Bank*. Such a change would considerably improve courts' analysis of mergers, and better reflect modern economic thinking and empirical evidence.

In *Philadelphia National Bank*, the Supreme Court held that “a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.”³³ The legacy of the structural presumption is clear: it represents the introduction of a mechanical approach mapping static information about merging firms' market shares into predictions of post-merger competitive effects. Although the influence of the structural presumption has eroded somewhat, it continues to play a significant role in merger analysis in the federal courts.

³² See generally Carl Shapiro, *The 2010 Horizontal Merger Guidelines: from Hedgehog to Fox in Forty Years*, 77 ANTITRUST L. J. 49 (2010).

³³ 374 U.S. at 363 (1963).

There are two principal reasons the Commission should encourage courts to reject the structural presumption. First, the structural presumption endorsed by *Philadelphia National Bank* does not make economic sense. Modern economic learning and empirical evidence does not support the notion that mergers that generate a post-merger firm with greater than 30 percent share are systematically more likely to be anticompetitive. Of course, the presumption is a convenient litigation tool—and one that confers some valuable advantages to the antitrust agencies and private plaintiffs in their litigation efforts—to shift the burden to defendants when courts are not otherwise persuaded by a competitive effects story. But the lodestar of the antitrust laws is not litigation victories—it is consumer welfare. If the economic foundation of the structural presumption is no longer supported by sound economics, and it is not and has not been for quite some time, the Commission would do well to encourage courts to abandon its use.

The second reason to abandon the presumption is that it is far too sensitive to the market definition exercise. It is important to note the tension between, on the one hand, the movement towards effects analysis by the antitrust agencies and away from market definition and, on the other hand, the use of the structural presumption, which depends heavily on the identification of the relevant market. Indeed, it is difficult to justify the structural approach when the critical lesson of the modern economic approach to

mergers is that post-merger changes in pricing incentives and competitive effects analysis are what matter.

If the Commission desires courts to take the modern economics of mergers seriously, and to reduce the primacy of market definition in antitrust analysis in favor of greater focus upon competitive effects—as I believe we should and do, we also should urge courts to do away with the structural presumption. Because I do not believe the courts are likely to get to that place on their own, and because Commission efforts have been tremendously influential in the federal courts’ treatment of merger analysis, I think the Commission should take an active approach—most significantly in the way it drafts its own complaints and briefs—to encouraging courts to move away from the structural presumption.

ii. Incorporating “Out-of-Market” Efficiencies Analysis

The Commission also should advocate that courts adopt an approach to efficiencies analysis that considers the competitive benefits from a merger that are outside the relevant product market. In my view, doing so would take the important step of updating current merger doctrine with respect to efficiencies analysis so that it is consistent with the modern trend in favor of analyzing actual competitive effects rather than adopting simplified and potentially misleading proxies for harm.³⁴ Indeed, the

³⁴ See Judd E. Stone & Joshua D. Wright, *The Sound of One Hand Clapping: The 2010 Merger Guidelines and the Challenge of Judicial Adoption*, 39 REV. INDUS. ORG. 145 (2011); Joshua D. Wright, *Comment on the*

absence of serious consideration of out-of-market efficiencies by the courts can have significant implications that could result in procompetitive mergers being blocked.

Consider a case in which Firm A and Firm B plan to merge and there is convincing evidence that harms will occur to a narrow group of customers in a relevant product market but that prices will fall to other groups. Further, assume that the benefits of the merger are significantly greater than the harms. Under current antitrust doctrine, the merger of Firm A and Firm B will violate Section 7 of the Clayton Act despite the fact that it increases consumer welfare because the current law precludes counting efficiencies outside the relevant market. In other words, the merging parties cannot rely upon consumer gains outside of the narrowly defined product market to defend the merger, even if the increase in consumer welfare is huge and dominates any potential anticompetitive effects. As a result, despite the overall consumer benefits, the merger could be challenged successfully because of its harms in a relevant market.

Taking into account out-of-market efficiencies is even more important following the issuance of the 2010 Guidelines, which endorse a methodological approach that generally will result in narrower relevant markets.³⁵ Narrow markets inevitably lead to the atomization of classes of consumers whereby a market may be defined by picking a

Proposed Update on the Horizontal Merger Guidelines: Accounting for Out-of-Market Efficiencies (May 31, 2010), available at <http://ftc.gov/os/comments/hmgrevisedguides/548050-00008.pdf>.

³⁵ 2010 MERGER GUIDELINES, *supra* note 30, § 4, at 8 (“Defining a market broadly to include relatively distant product or geographic substitutes can lead to misleading market shares. This is because the competitive significance of distant substitutes is unlikely to be commensurate with the shares in a broad market.”)

harmed consumer and defining a relevant market around that individual. As the antitrust agencies and courts move towards allowing anticompetitive effects to be found in narrower markets, there exists a concern that the competitive benefits that are “outside” the market will become even more irrelevant. If the Commission and the courts are concerned principally about net consumer welfare, it follows that we should be doing our best to update efficiencies analysis to account for such out-of-market efficiencies.

It is worth noting that the antitrust agencies recognized the potential importance of out-of-market efficiencies in the 2010 Guidelines by providing that efficiencies not strictly in the relevant market, but so inextricably linked with it, can make a difference in whether a merger is challenged when those out-of-market efficiencies “are great and the likely anticompetitive effect in the relevant market(s) is small so the merger is likely to benefit customers overall.”³⁶ Although the Guidelines do not go far enough in my mind because they do not commit the agencies to not challenging mergers when the out-of-market efficiencies outweigh the competitive harms, the Guidelines nevertheless provide merging parties an important avenue to showing that out-of-market efficiencies render the merger beneficial to consumers. The Commission, through commentary, further Guideline revision, closing statements and other mechanism, should make clear that its merger analysis takes into full consideration the value of out-of-market

³⁶ *Id.* § 10, at 30 n.14.

efficiencies. Doing so will undoubtedly have the benefit of also improving the application of merger law by the federal courts.

CONCLUSION

In closing, I believe that one of the most important ways the Commission can fulfill its competition mission is by influencing the appropriate development of antitrust doctrine. Working to improve antitrust doctrine effectively leverages the Agency's scarce resources to maximize the rate of return we generate for consumers. By, for instance, better aligning antitrust doctrine to consider the most appropriate legal framework or reflect modern economics, the Commission helps fulfill its mission of promoting consumer welfare by minimizing social costs.

Thank you for your time.