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Analytical Approaches and Institutional Processes for Implementing Competition Policy Reforms by the Federal Trade Commission

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Introduction

We are pleased to participate in the Federal Trade Commission's examination of the Changing Nature of Competition in a Global and Innovation-Driven Age. Public institutions rarely entertain a probing assessment of their policies and purpose. The Commission's hearings of the past two months offer the potential for valuable adjustments in the antitrust system and, more broadly, serve as an important example of critical institutional self-evaluation.

Our presentation seeks to do two things. The first is to propose a general analytical framework for the Federal Trade Commission's consideration of the many recommendations made in these hearings. The second is to explore institutional processes that might be used to implement specific recommendations. In pursuing both tasks, we have sought to draw upon the testimony of witnesses who have appeared previously in these hearings, as well as offer our own suggestions for further agency initiatives.

Despite the substantial integration of economic analysis into antitrust doctrine and policy during the past two decades, today's antitrust too often is governed more by history than analysis. An important theme of earlier testimony in these hearings is that "rational" antitrust policy will not impede, and may enhance, the competitive posture of American firms in the world economy.(1) Yet a number of features of the antitrust system remain distinctly irrational.

Important doctrinal and institutional anomalies continue to encumber planning by business managers. Broad interpretations of the Robinson-Patman Act treat a wide range of price differences as unlawful price discrimination. The absolutist *per se* prohibition against vertical price fixing coexists along-side permissive rule of reason tests for equally restrictive nonprice restraints, and resale price maintenance is subject to harsher legal scrutiny than agreements among competitors affecting prices.(2) Analytically incoherent "soft core" *per se* rules govern the treatment of tie-ins and concerted refusals to deal. Antitrust decision-makers, including both the Commission and the courts, have been far too reluctant to abandon doctrines whose rationales are no longer persuasive. Indeed, only one antitrust rule -- the *per se* command of *United States v. Arnold, Schwinn & Co.*(3) -- has ever been expressly overruled.(4)

We strongly support the Commission's message of the need to adjust the interpretation and institutions of antitrust law to meet changing times. Many witnesses in these hearings have suggested how ill-conceived antitrust precedents

or poorly specified analytical processes impose costly burdens on the economy.(5) In making adjustments that curtail or expand antitrust enforcement, however, we urge caution to ensure an analytical approach that evaluates likely competitive effects after determining that the parties have sufficient market power to warrant such an inquiry.(6) In addition, we identify several areas where we believe the cost of *stare decisis* exceeds its benefits. Our substantive policy recommendations rely on well-established economic understandings about which there is little serious dispute, except perhaps wonderment that they have not been incorporated into antitrust's modern framework. Our proposals for institutional change reflect the view that desirable reforms will not be sustainable without effective means to implement them.

Historical Context

While the forms and the nature of competition may be ever-changing, the principles that make antitrust an important component of economic policy are not. At its best, antitrust encourages and ensures competition among separate firms by removing impediments to direct and indirect rivalry whenever the net result would be an intensification of that competition. It presumes that rivalry will create pressures to lower costs, improve quality, and develop innovative products and services because sellers will be driven to attract purchasers in order to maximize revenue. It likewise recognizes that sellers face conflicting incentives: to obtain supracompetitive profits from output restrictions either through cartel arrangements or monopoly power, on the one hand, or added profits by undercutting such arrangements, on the other. It also understands that supracompetitive prices are difficult to sustain either under cartels or by monopoly power, especially if entry is open and can be made on a timely basis. Finally, most arrangements have the potential for competitive and anticompetitive effects.

Sound antitrust policy requires rules which challenge dangerous permanent aggregations of market power and which also support efficiency gains and provide predictable results. The lines are inevitably blurred and the distinctions difficult to make. History is replete with claims of misuse of market power where the monopolist's advantage dissipated, often very quickly. On the other hand, counter examples exist, though seldom without some form of government support. Effective antitrust enforcement therefore requires rules and processes which can make generally accurate judgments despite the inevitable uncertainty of available evidence. The process must be manageable within the context of timely enforcement by agencies and private parties in transparent administrative and judicial proceedings.

This is, of course, an exceptionally complex task. It is far from clear that past efforts at antitrust enforcement often have met this standard. We are not willing, however, to concede that no effort be made, for the existence of sound antitrust rules and the threat of sensitive enforcement themselves have salutary market place effects. Nonetheless, experience counsels caution in the development of expansive rules of antitrust liability because the threat of enforcement may discourage cost-cutting and innovative efforts rather than output restrictions. History also discourages the use of categorical tests unrelated to actual market effects except where the likelihood of substantial competitive harm is clearly apparent.

Precedent and *stare decisis* have played a special role in antitrust. Concerns that monopoly power or extensive restraints on significant market participants would injure competitors, harm competition, and undermine public welfare are traceable to decisions in the 17th and 18th centuries.**(7)** Early in the history of the American antitrust experience courts outlined the general rule of reason approach, looking to market place effects as the basic framework for antitrust analysis and its balancing of a restraint's costs and benefits.**(8)** And the doctrine of ancillary restraints dominant in much of today's antitrust analysis clearly traces its origins to a 19th century-opinion by then-Circuit Judge William Howard Taft.**(9)** Some of the early, formative antitrust precedents were as disciplined as any modern economic analysis.

On the other hand, the fabled "mothball fleet"**(10)** of antitrust case law continues to affect commerce on the antitrust seas beyond any reasonable measure. The inconsistent rules applicable to vertical restraints, depending on whether they can be characterized as price or nonprice, depend solely on history for their justification. The same can be said for many exemptions such as those given some insurance arrangements under the McCarran-Ferguson Act and

baseball's anachronistic status as a sport, not commerce.**(11)** The extraordinary market and nonmarket tests in the merger decisions of the 1960s and 1970s, as well as their ever more expansive presumptions of illegality, have not been overruled and are still cited despite the more permissive approach of the federal government's merger guidelines.**(12)** And the four horsemen of antitrust's horizontal market apocalypse -- *Timken*,**(13)** *Sealy*,**(14)** *Topco*,(15) and *GMC***(16)** -- continue to wreak havoc among competition-enhancing, efficiency-inducing joint venture arrangements with their insatiable demands for integration and highly restrictive structural tests.**(17)** Even the ancient rule of reason remains nearly as murky today as it was in 1711 and 1918.**(18)**

A Modern Framework

Although antitrust's foundations contain serious flaws, modern developments -- especially in three cases from the mid-1970s -- provide a workable framework for antitrust policy. The first development, implicit in the 1974 decision in *United States v. General Dynamics Corp.*,**(19)** was made explicit in the 1982 federal Merger Guidelines and their subsequent updates. The Guidelines expressly abandoned much of the old structure-conduct-performance numerology while adopting economic standards for defining markets and measuring concentration, for assessing likely market effects, and for approving efficiency defenses. But all too often the old theories or insupportable assumptions have not been abandoned, and questionable new practices have been followed.**(20)**

The consideration of market effects also led the Supreme Court, three years later in *Continental T.V., Inc. v. GTE Sylvania Inc.*(21) and *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,**(22)** to adopt price theory as well as public choice tests in a truly remarkable shift of approach in antitrust law. In overruling *Schwinn*, the *Sylvania* Court gave decisive effect to transaction cost theories (especially free rider effects) and emphasized the likely efficiency gains from vertical contractual restrictions. *Sylvania* applied a rule of reason test which relied on interbrand competition to balance any harms from intrabrand restrictions in evaluating nonprice vertical restraints. As a result, a supplier without significant market power (as inferred from low market shares) whose marketing strategy required dealers to sell from a specific location was allowed to protect its dealers from intrabrand price and other competition. Similarly, in *Brunswick*, Justice Thurgood Marshall not only embraced an efficiency orientation ("The antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*'"**(23)**) but also denied the use of antitrust courts to foreclose competition by imposing the novel requirement that private plaintiffs show "antitrust injury." As a consequence, a competitor could not challenge a merger that might have violated then-prevailing merger law standards because the competitor's sole interest was in restraining the defendant from entering the market, not because of any injury to competition.

Specific Lessons from Antitrust History

There are, we believe, insights in the history of antitrust, the changing nature of both doctrine and enforcement policy, and recent case developments which go beyond the willingness of both courts and agencies to accept change when the criticism becomes overwhelming. The first is that the history of antitrust is often about failed ideas, costly experiments, and the danger of basing policy on theory without empirical support, or on faulty empiricism. Perhaps the foremost example of antitrust notions gone awry is the structure-conduct-performance paradigm that led to over-enforcement of merger law prohibiting numerous combinations that posed little danger and probably would have made the economy more efficient and competitive. One of the clearest consequences of such erroneous policy was documented in a Commission study on the beer industry which demonstrated a substantial antitrust lag-time in production and distributional efficiencies in the United States compared with Canada and the United Kingdom.**(24)**

A second is the fallacy based on populist notions embedded in the concept that antitrust should be used to protect smaller enterprises against the rigors of competition. Examples include still-applied interpretations of the Robinson-Patman Act's rigid prohibitions against many forms of price competition and conglomerate merger case law.**(25)** Although open standards often are important for ensuring competitive opportunities, some of the current calls for "open architecture" for operating systems and software programs in computer applications and systems seem far removed from competition theory and appear to be based primarily on largely abandoned notions that "bigness is bad."**(26)**

Third, we read the record of antitrust enforcement as demonstrating both the durability of competition -- even when anticompetitive actions are strongly supported by government -- and inefficient legal rules. On the one hand, this seemingly permits antitrust enforcers wide latitude for error insofar as competition is likely to correct false positives or even false negatives. But the broader lesson of antitrust experience is the decidedly mixed record of antitrust achievement over the past 105 years. The ability of regulatory bodies to improve the performance of the economy and best the market place in disciplining restraints is exceptionally modest. Whether a restraint will improve or harm competition is probably unknown to those imposing them: business succeeds by trial-and-error more than theoretical insights or predictive power.**(27)** Antitrust enforcement necessarily operates at a snail's pace compared with the market, at least if such enforcement is based on informed decisions. Antitrust's primary reliance on competitors for information about nonmerger restraints ensures an erroneous bias in selecting areas to investigate. As a consequence, doing nothing often may be the best policy even though contrary to the usual bureaucratic imperative.

As an additional caution, we note that the pursuit of antitrust enforcement "innovations" often ends in failed searches for new tools to attacked perceived problems. They include such concepts as shared monopoly, criminal prosecutions of vertical price-fixing, challenges to conglomerate mergers, and more. We therefore urge particular skepticism toward the application of new, more restrictive concepts in evaluating global competition or networks before they are understood or it is too late to correct their effects. Just as the rising tide of merger-induced concentration perceived by the FTC in 1948**(28)** and assumed by *Brown Shoe Co. v. United States***(29)** was an illusion,**(30)** we question prescriptions for either special exemptions or intensified oversight. Global competition, if anything, means a dissipation of power insofar as markets are broader and entry barriers more difficult to construct.

The application of restrictive antitrust rules to network economics of highly innovative computer software companies, such as Microsoft, raises the specter of the errors of the government's monopolization suit against IBM. Certainly the recent evidence of Microsoft's difficulty -- at least in the first three months -- in entering the on-line communications market and its failure to anticipate the importance of the Internet suggest that basic principles of competition continue to be difficult to overcome. One area not sufficiently considered in most discussions of Microsoft's recent dominance, however, is whether a critical component might be the application of copyright rather than patent law to its basic technology.**(31)** Copyright law, for example, is expansive in the protection it affords literary works. In contrast to patents which require a showing of novelty and nonobviousness, mandate disclosure, and extend only for 20 years from the date of filing,**(32)** copyrights have no such preconditions, impose no disclosure requirements, and extend for the life of the author plus 50 years.**(33)** Further, contrary to the narrow reading of most patent claims, copyrights extend to compositions that "look and feel" like the original or derivative works; in general, copyrighted computer programs cannot be reverse engineered -- outside of the fair use privilege -- because reconstruction constitutes an infringement.**(34)** While expanded copyright protection is perhaps unobjectionable when applied to novels, plays, and films, computer programs are, as Judge Boudin's concurring opinion perceptively noted in *Lotus Development Corp. v. Borland International, Inc.*,**(35)** "a *means* for causing something to happen [and thus play] . . . an instrumental role in accomplishing the world's work."**(36)** One consequence is that unbridled protection of computer systems and programs through the copyright laws may present a concern of "fencing off access to the commons in an acute form."**(37)**

Controlling Other Government Intervention

A related policy development, though not the result of FTC decisionmaking, raises significant issues involving the adjustment of antitrust doctrine to promote innovation and account for the increasingly global nature of competition. This development deals with the extent to which other forms of government intervention in the economy undermine competition. Antitrust law coexists with countless regulatory programs at the federal, state, and local levels that curb rivalry by, among other means, restricting entry and limiting output. For decades antitrust commentators and enforcement officials have demonstrated how regulatory schemes often straitjacket competitive forces that, if unleashed, would improve economic performance and consumer welfare.**(38)** No assessment of innovation and the global economic environment today can ignore the degree to which various economic regulatory systems continue to harmfully subvert competition, reduce the nation's economic welfare, and discredit U.S. efforts to have foreign governments open their domestic markets to American firms.**(39)**

The tools that the Commission can take to directly challenge regulatory obstacles to competition are comparatively weak. At the federal level, Congress has established numerous exemptions, subsidies, and regulatory schemes with dubious economic justifications and demonstratively adverse competitive effects. Emboldened by *Parker v. Brown*(40) and its progeny,(41) state and local government entities have enacted many restrictions on competition. In the courtroom, existing antitrust law limits the Commission to pursuing a strategy of containment against statutory and regulatory dispensations from competition.(42) Here the Commission can seek to ensure that competition-suppressing measures are narrowly construed.(43) This battle is surely worth the continuing struggle, even though legal doctrines governing the effect of federal and state involvement minimize the Commission's ability to block the creation of damaging exceptions to the nation's competition laws.(44) Consideration also might be given to granting U.S. antitrust authorities some of the more potent tools (such as Article 90 of the Treaty of Rome) that European Community competition officials have at their disposal to attack anticompetitive government intervention in the economy. In this vital respect, our competition system would do well to emulate the European model.

Beyond a litigation strategy of containment, the Commission can and should continue to draw on its competition and consumer protection expertise to urge legislatures and regulatory bodies to dismantle existing government barriers to competition and to protest the adoption of new initiatives that impede rivalry.(45) We concede that the effects of competition and consumer protection advocacy are difficult to measure. We also acknowledge that advocacy efforts do not generate the same type of readily observable events -- such as issuing cases or consent agreements -- that yield quantifiable outputs for appropriations committees to review. The commitment of significant Commission resources to advocacy is nonetheless warranted by the past contributions of competition authorities to the reevaluation of regulatory barriers to rivalry, and by the magnitude and durability of anticompetitive effects caused by public restraints on competition. Indeed, many market phenomena that become the subjects of litigation by antitrust enforcement agencies have their roots in other forms of government intervention that directly encourage or indirectly facilitate the suppression of competition.(46)

Evaluative Principles

This review of antitrust experience leads us to suggest the following principles for testing policy initiatives:

First, antitrust doctrine and policy should be structured so that intervention is undertaken cautiously. Error rates are high compared with success. Once embedded in the antitrust system, overly expansive enforcement policies and doctrines tend to be highly resistant to change. The capacity for overinclusive antitrust prohibitions to suppress competition should not be underestimated. In general, the economy rebounds more quickly from antitrust enforcement false negatives (underenforcement) than from false positives (overenforcement).

Second, many of the most durable and serious barriers to competition can be traced to government intervention, particularly regulatory programs. Continuing efforts by antitrust enforcement agencies to challenge government barriers to competition, either by scrutinizing the scope of asserted immunities or advocating the withdrawal of such barriers, promise to enhance the competitiveness of U.S. firms abroad and facilitate innovation.

Third, the lessons of price theory and transaction cost economics should be applied to *every* antitrust action in order to reduce error rates. These include close evaluation of output effects, the significance and likelihood of entry, and the transaction cost savings and other efficiencies made possible by the restraint being reviewed. To be sure, these must be balanced against anticompetitive possibilities and the probabilities of each must be weighed. But even then, a significant discount which reflects the likely cost of intervention and the "success" ratio should be applied in determining whether antitrust intervention is appropriate or necessary.

Fourth, prohibitory rules and guidelines should be documented by careful economic theory, empirical studies, and experience. Few doctrines or guidelines currently pass such tests. For example, although the federal merger guidelines have greatly improved the quality of merger analysis, their quantitative thresholds remain wanting for a convincing empirical basis.(47) Infirmities in the process by which such thresholds were established would be less

important were it not for the significance that antitrust analysis continues to attach to concentration effects in merger control.

Fifth, global economics, network effects, installed base opportunism, first-mover advantages, game theory, raising rivals' costs, and similar ideas, while interesting, should not be exempt from any of these principles. Whether they can contribute to long-lasting policy is unclear; but the presumption should be that they are only possible explanations for certain market place effects until demonstrated otherwise.

Sixth, the attainment of important efficiency gains and productivity breakthroughs often may require a willingness by enforcement agencies to dramatically loosen, at least on an experimental basis, existing antitrust restrictions. The Commission's decision in 1984 to permit the production joint venture between General Motors and Toyota supplies an instructive example.**(48)** Over a decade later, it is easy to forget how many observers asserted at the time that the Commission had made a foolish -- indeed, catastrophic -- policy choice.**(49)** We know today that the NUMMI joint venture, among other positive effects, provided General Motors with valuable experience in implementing lean production and labor management systems that helped inspire the company's design of its Saturn division.**(50)**

Institutional Processes

Despite the primary importance of conceptual improvements in antitrust policy, ultimately they count for little without effective mechanisms to ensure their implementation. We therefore examine some of the more significant institutional issues that are likely to confront the Commission and suggest approaches that the FTC might consider in adjusting current policies.

New Guidelines and Policy Statements

The FTC can improve antitrust policy directly and swiftly by issuing guidelines. In the past fifteen years, the Commission has improved the quality of analysis in both the consumer protection and antitrust fields with its unfairness and deception guidelines and its joint guidelines, with the Department of Justice, on health care, intellectual property, and mergers. Building on this work, we propose the development of guidelines or policy statements in three areas.**(51)**

(1) Unfair Methods of Competition. The first deals with the Commission's conception of its competition policy role and the meaning of Section 5 of the Federal Trade Commission Act. If Section 5 is in fact to prohibit conduct beyond the reach of the other antitrust laws, it is incumbent upon the FTC to issue guidelines that delineate its view of its jurisdiction. A policy statement on unfair methods of competition would articulate the Commission's vision of the role of Section 5 as a policy making tool and where it will be implemented. In the past, there often has been an institutional fear that efforts to specify how the Commission intends to exercise its discretion under Section 5 would surrender possible enforcement approaches and foreclose certain options.

This historical concern is misplaced. Ill-defined authority tends to be difficult to apply with great effectiveness in practice. The hostility of the federal courts to FTC efforts to reach beyond the bounds of existing Clayton Act and Sherman Act doctrine attests to this need.**(52)** In point of fact, prior statements delimiting enforcement possibilities have increased the enforcement presence of the antitrust agencies while also providing helpful guidance to business operators. Donald Turner's 1968 Justice Department Merger Guidelines did not claim the full terrain staked out by Supreme Court merger jurisprudence of the 1960s. In taking a more cautious approach, Turner injected a greater degree of rationality into merger policy and increased the stature of the Antitrust Division. Section 5 of the FTC Act would likely be a more useful tool for policy development if the FTC presented a carefully-stated vision of how and when Section 5 should be applied in the competition field, even if such a vision purposefully abandoned certain enforcement possibilities in the future. Self-restraint, in other words, can increase the institution's influence.

The central operative element of an unfairness competition policy statement should be the specification of principles that the Commission intends to use in determining when to use Section 5 to address conduct beyond the reach of

conventional Clayton Act or Sherman Act principles. The application of Section 5 to treat behavior that escapes Clayton Act or Sherman Act scrutiny would be appropriate where two basic conditions are met: (1) empirical analysis or theoretical work demonstrate the fact of, or a great likelihood, of net adverse effects on consumer welfare; and (2) the conduct evades correction through the application of other legal controls, or can be corrected only at a cost significantly exceeding the cost of Commission intervention. Such an analytical framework would make formal and explicit the rationale underlying recent Commission efforts to proscribe conduct that might not satisfy the agreement requirement of Section 1 of the Sherman Act or the attempt to monopolize or conspiracy to monopolize requirements of Section 2.

(2) Standards for Applying the Rule of Reason. A second type of guidelines would address analytical problems that beset several areas of antitrust. One such problem involves the formulation and application of the rule of reason. One of antitrust's greatest needs today is the development of administrable operational principles which would permit courts and enforcement authorities to characterize conduct accurately and evaluate its competitive significance effectively while minimizing the informational demands imposed on business operations. Although some witnesses in these hearings have raised serious concerns about its analytical approach,**(53)** the Commission's opinion in *Massachusetts Board of Registration in Optometry* represented a significant, albeit preliminary, effort to design such a framework. We urge the preparation of a rule of reason policy statement which contained the following analytical ingredients borrowed from the caselaw: (1) a characterization process by which the Commission would determine whether the conduct chiefly seeks to limit output or, alternatively, to accomplish benign or procompetitive ends;**(54)** (2) the application of a market power screen to assess whether the conduct -- even inherently suspect conduct -- is likely to pose competitive dangers;**(55)** and (3) the use of a competitive effects analysis that considers plausible justifications for the behavior.**(56)**

(3) Other Substantive Guidelines. A third type of guidance would address specific types of conduct under the Commission's jurisdiction. The following three possibilities stand out.

Joint ventures and standard setting. The testimony in these hearings has identified the increasingly prominent role played by joint ventures, strategic alliances, and other forms of business collaboration in the design, production, and delivery of goods and services in the global economy.**(57)** Yet antitrust doctrines governing joint ventures today provide largely unsatisfying answers to a number of questions that are crucial to planning and managing such business relationships.**(58)** A number of participants in these proceedings have suggested that enforcement guidelines could cure some of these deficiencies.**(59)**

There is a need for improvements in the analytical methods for drawing the boundary between procompetitive collaboration and improper trade restraints. As one of us already has proposed in these hearings, current measures for joint ventures that require integration and risk-sharing do not necessarily have any direct relation to the competitive contribution or limits of a particular venture.**(60)**

A second appropriate focal point for joint venture guidelines involves the assessment of the reasonableness of ancillary restrictions. Antitrust doctrine fails to take proper account of literature involving transaction costs and free-riding that demonstrates how mutually-binding restrictions on the behavior of joint venture participants may be essential to the accomplishment of the venture's legitimate aims.**(61)** Joint ventures frequently pose difficult organizational challenges.**(62)** Limits on the ability of venture participants to pursue projects that compete with the venture may improve the venture's performance by preventing an individual member from free-riding on the contributions of its partners. Without such restrictions, a venture participant might seek to reduce promised contributions of data, know-how, or first rate personnel to the venture and instead channel its best resources to projects whose benefits it can appropriate exclusively.**(63)**

A third area warranting attention is standard-setting, which remains one of the more important unchecked areas for behavior that facilitates cartelization and inhibits market entry by innovative products and services.(64)

Price Discrimination. As the sole source of federal enforcement of the Robinson-Patman Act since the 1950s, the FTC should identify what it believes to be the high policy ground for continued enforcement of the statute. If a probing assessment of the price discrimination law reveals (as we expect it would) that there is little high ground and an abundance of swamps, the Commission should be willing to say so and to advocate the statute's demise.**(65)** Politics should not be allowed to trump sound policy, and this Commission may be particularly well-placed to lead us out of the current morass.

Vertical restraints. For most of the post-World War II era, the FTC has been the preeminent source of federal enforcement activity involving vertical restraints. In light of the withdrawal of the Justice Department's Vertical Restraint Guidelines, there is considerable room for the FTC to develop a comprehensive statement of the methodology it will use to pursue cases in this area. We make this recommendation while urging great caution in the Commission's consideration of any extension of current law. In fact, we believe, as with the Robinson-Patman Act, that past efforts to impose antitrust liability for vertical restraints have contributed more mischief than good to competition. A careful statement of guidance by the Commission could play a significant leadership role. For example, in addressing vertical price restraints, the Commission should identify which episodes of resale price maintenance it intends to prosecute. In particular, it makes a great difference -- for business planning and economic efficiency -- whether the Commission means to challenge all instances of RPM, whenever found, or will permit exceptions where the manufacturer is a new entrant or an older incumbent experimenting with a new distribution technique to arrest a decline in its market position.**(66)**

A clarification of enforcement intentions and analytical methodologies should address the role, documented in these hearings, that organizational innovations play in stimulating improvements in the distribution of goods and services by American firms. The mention of innovation often conjures images of research and development laboratories, but innovation in the ways in which firms structure their internal operations and their relationships with suppliers and customers -- for example, the establishment of "lean production" and "lean retailing" systems -- is an equally significant source of efficiency gains.**(67)** Excessively stringent controls on contractual techniques by which firms seek to achieve cost reductions and quality improvements run a serious risk of discouraging experimentation that generates valuable organizational innovations. In our view, this is an important reason for a policy of lighthanded antitrust intervention where vertical contractual relations are concerned.

Reassessment of Existing Guidelines and Policy Statements

No less important than the articulation of new guidelines is the periodic reassessment of existing statements of the FTC's enforcement intentions. The systematic reevaluation of guidelines should be a routine aspect of the Commission's execution of its competition policy responsibilities.

The federal government's merger guidelines are a useful place to begin. Although last revised in 1992, many witnesses at these hearings has underscored the value of additional review. A reassessment of the Merger Guidelines would have several focal points. The first would be to reexamine the Guidelines' existing quantitative thresholds. As noted above,**(68)** the choice of HHI thresholds in the 1982 Guidelines and their successors want for a convincing empirical basis.**(69)** A number of observers in these proceedings -- including former Assistant Attorney General James F. Rill, whose office collaborated with the Commission in the preparation of the 1992 Guidelines -- have suggested that existing thresholds are set too low, especially by comparison with quantitative benchmarks applied by foreign antitrust regimes.**(70)**

A second focal point for consideration is the interplay between the Guidelines' quantitative benchmarks and its qualitative factors. In form, the Guidelines suggest that inferences drawn from concentration increases alone can be overcome by consideration of qualitative factors. In practice, there are questions about whether the Commission and its various offices in the Bureau of Competition and in the regional offices in fact give proper emphasis to qualitative considerations. The testimony in these hearings suggest two possible approaches. One is to change the Guidelines to state explicitly that no special presumption or weight should be attached to market share data; increases in concentration would be treated as simply one factor to be evaluated with the Guidelines' existing qualitative

factors.(71) A second approach is to study how the Guidelines are applied internally in the enforcement agencies -- to determine how individual enforcement bureaus exercise their discretion in practice. Such an assessment could be carried out as part of the *ex post* evaluation process suggested below.

A third area for analysis would involve the treatment of efficiencies, both formally under the Guidelines and in the routine review of mergers by the federal enforcement agencies.(72) These hearings have featured extensive discussion of the analysis of efficiency claims in merger analysis. Although the hearings suggest no clear consensus about precisely how the Guidelines or existing enforcement policy should be adjusted to treat efficiencies, most witnesses appear to agree that greater recognition of efficiency considerations is appropriate.(73) The hearings provide a substantial basis for revisiting this aspect of the Guidelines.(74)

Ex Post Evaluation of Enforcement Initiatives

In principle, one would think that systematic efforts to evaluate the impact of past enforcement policies would be a central ingredient of policy formation in government agencies. Yet government institutions, including antitrust enforcement agencies, spend comparatively few resources assessing the effect of past initiatives.(75) One some occasions, the FTC has performed retrospective assessments and, by doing so, has improved our knowledge of how antitrust rules influence business behavior.(76) Expanded efforts to assess the affect of past enforcement decisions would, we believe, provide important insights for policymaking.(77)

There are two basic ways in which the Commission might use *ex post* evaluations to improve future policymaking. The first is for the FTC to perform internal audits. The Commission would establish a routine mechanism for its own personnel to select completed enforcement initiatives (both litigated cases and consent agreements) and analyze their effects. Internal self-evaluation could be performed as a collaborative effort involving the operational bureaus, the Bureau of Economics, and, perhaps, the Office of Policy Planning. The results of such assessments could be examined by the Commission in internal review sessions. The Commission also should make the results of these sessions available to the public while protecting sensitive business data.

The second approach is to rely on external audits, either through outsiders under contract to the Commission (the model used for the Commission's vertical restraints impact evaluations in the late 1970s and early 1980s) or by government institutions such as the General Accounting Office, which occasionally has examined antitrust enforcement. External audits would study specific enforcement episodes in detail, examining the Commission's own deliberative processes, interviewing the respondents, and consulting other parties which participated in the matter. Again, the results of the external audits should be made public.

Experiments with Reducing Information Demands

The federal enforcement agencies collect a substantial amount of information in reviewing mergers and other forms of business practices. Responding to government information requests is not costless,(78) and a number of commentators have suggested that federal antitrust enforcement officials pay too little attention to the resources that firms consume in responding to information demands.(79) A fruitful area for institutional reform is to pursue new techniques for reducing information demands without materially diminishing the quality of Commission analysis -- and probably improving it. The reduction of informational burdens would have several elements. The first is to identify, internally, how much of the information the Commission routinely collects is examined carefully and what types of information are most useful. A second approach is to experiment with more austere information requests. A third approach is to gather data on the costs that affected firms incur in responding to information demands. Seemingly routine or insignificant, we believe that this could be an important contribution to less burdensome yet more effective antitrust oversight by both the FTC and the Antitrust Division.

Increasing Decision-making Transparency

Federal antitrust policymaking in the past 15 years has featured progressively greater reliance on consent agreements, a number of which impose ongoing regulatory oversight. Three principal developments seem to have accounted for this trend. The first is the transformation of the merger review process occasioned by the interplay between the Hart-Scott-Rodino premerger notification mechanism and the "fix-it-first" approach that the federal antitrust agencies adopted in the 1980s. The second is the increasing frequency with which antitrust officials confront access issues at the boundary between traditional public utility regulation and antitrust doctrine in industries such as telecommunications. The third is the relative "antitrust conservatism" of the federal judiciary, which is more likely to view government (or private) antitrust claims skeptically than the federal bench did in the 1960s and early 1970s.**(80)**

The increased use of consent agreements as policy formation tools poses a number of problems. Most result from the limited transparency concerning the rationale for accepting a consent agreement. Limited transparency makes it extremely difficult for those other than the parties to the negotiations to determine the basis or significance that should be attributed to the consent agreement.**(81)** Press releases and competitive impact statements that accompany the announcement of consent agreements usually contain highly stylized statements of the facts that portray the enforcement agency's decision to prosecute in the most favorable light. To establish the wisdom of its acts, and to convince nonparticipants (including legislators and consumers) that it executed its responsibilities appropriately, the enforcement agency's disclosures of information are limited to perceived competition concerns and to assurances that the relief obtained has corrected serious competition problems. One must turn to the private parties responses for any rebuttals, and these are usually tame and meaningless. There is, in other words, no candid discussion of the facts or policy arguments that weighed against a decision to intervene, or presentation of objective information that would allow an external observer to construct the relevant arguments.

The fuller context surrounding a consent agreement becomes somewhat clearer as enforcement officials give speeches, as news organizations conduct inquiries, and enforcement officials, respondents, or external advisors reveal what took place during deliberations between the enforcement agency and the firm. A more complete picture of the underlying decision often emerges over time, but the picture and the means that generate it are unsatisfying. Many elements of the picture are articulated informally, by agency officials and respondents, and lack the certainty that permits confident judgments about future enforcement. Moreover, this process puts a premium on the ability of insiders with access to enforcement officials to garner insight into how discretion was in fact exercised.

To a considerable extent the phenomenon described here is an inevitable result of creating any regulatory system. All regulation involves the exercise of discretion, and information about the preferences and tendencies of the public officials who exercise the discretion will always be valuable. However, because the information that formally accompanies the release of consent agreements is so austere and incomplete, the emphasis on consent agreements as policy instruments magnifies the role of enforcement agency discretion and correspondingly increases the importance of Washington insiders as means for identifying and articulating the basis for the exercise of such discretion.

The incomplete and often one-sided nature of the information surrounding a consent agreement has another important consequence. It makes it very difficult for outsiders not only to identify what the enforcement agency has done and why it has intervened, but it also complicates efforts for outsiders to evaluate the wisdom of the decision to prosecute. Unlike a trial, which usually generates a relatively rich, publicly available record, the consent agreement supplies little basis for outsiders to evaluate the enforcement agency's strategy and tactics.**(82)** One is left to sift though the enforcement agency's announcement that it has gained valuable relief and the respondent's response that, while it accepted the remedy, the fundamental elements of the transaction proceeded unscathed.

How, then, can the transparency of the consent process be increased and the quality of enforcement agency choices be evaluated more effectively? One approach is for enforcement agencies to issue competitive impact statements that include a fuller discussion of the arguments that the respondent raised on is own behalf and of the agency's reasons for discounting or rejecting those arguments.**(83)** We should also note that some witnesses for these hearings have suggested that the Commission also reveal more information -- for example, in speeches -- about why it decided not to intervene to challenge or modify specific transactions.**(84)**

A second approach is to rely on periodic, *ex post* audits to examine the decisionmaking process, to evaluate its soundness, and to consider the effects of the consent agreement. The *ex post* audit would be performed by an individual or entity outside the agency and having no relationship to the respondent or industry members affected by the consent agreement. The results of the audits would be made public.

Policy Formation and Coordination within the Commission

If the Commission were to accept these recommendations and issue new guidelines and policy statements, as well as conduct more *ex post* analysis of enforcement initiatives, it will be especially important for the FTC to monitor policy coherence and to guarantee that the results of efforts to assess its work are incorporated into future decisionmaking.**(85)** This could be accomplished by enhancing the role of the FTC's formal policy apparatus -- the Office of Policy Planning -- as a mechanism for ensuring consistency in the agency's guidance activities and for sustaining a commitment to examine completed initiatives. These hearings must not be the sole occasion in the next one or two decades on which the Commission examines important competition policy concerns. It would be a refreshing step in public administration if the Commission were to establish a mechanism by which it regularly invited outsiders to comment upon its activities in face-to-face formal proceedings of this kind.

Policy Formation and Coordination in the Antitrust System

Efforts to achieve adjustments in antitrust policy also must take account of the degree to which the U.S. antitrust system decentralizes the decision to prosecute. Existing statutes and judicial interpretations confer standing on two federal agencies and a variety of other "persons," including state attorneys general, consumers, and business enterprises. No other antitrust system in the world distributes prosecutorial power so widely. The multiplicity of prosecutorial agents complicates efforts by any single agent to accomplish adjustments in enforcement policy, including any changes that the Commission itself might pursue after these hearings. Unless Congress or the courts establish binding rules that apply to all prosecutorial agents, policy adjustments undertaken by any one agent can be undermined by other agents.

The impediments that prosecutorial decentralization poses for establishing consistent national competition policies is perhaps most evident in the field of mergers and joint ventures. The state attorneys general have adopted merger guidelines that deviate in significant respects from the federal merger guidelines.**(86)** In their testimony in these hearings, representatives of state governments have expressed suspicion toward policy shifts -- such as the expansion of possibilities for merging parties to justify transactions with efficiency arguments -- that would increase the likelihood that the Commission might approve various business consolidations. As a matter of law, the decision of a federal agency concerning a merger does not preclude the states from attacking the same transaction.**(87)** As a matter of enforcement preferences, the states often have demonstrated a willingness to challenge mergers at thresholds more stringent than those applied by federal authorities,**(88)** to give virtually decisive effect to concentration data,**(89)** and to use their enforcement power chiefly to forestall business restructurings that would reduce employment levels within the state's boundaries.**(90)** State intervention might be acceptable for transactions whose impact falls entirely within a state's borders, but the states have not so delimited their merger enforcement efforts to date. As a result, firms must spend nontrivial resources anticipating and accommodating the desires of state antitrust officials, even if it means providing concessions that federal officials do not demand.

The autonomy of state antitrust officials to shape merger policy places federal authorities in an awkward position. Though they may disagree with state enforcement policies, there is little they can do to shape the choices of the states. In effect, federal officials are left in the position of trying to coopt state authorities through a mix of speeches that effusively praise the states' antitrust presence and collaborative activities that involve some information sharing and joint enforcement efforts.**(91)** The federal agencies' apparent hope is that extended contact and cooperation will pull state policy increasingly within the orbit of federal analytical methodologies and enforcement tastes.

Despite federal and state efforts at harmonization, we seriously doubt that state officials will acquiesce in policy adjustments that narrow the zone of liability for mergers and joint ventures. The Commission and the rest of the

competition policy community must confront the genuine possibility that state resistance to a loosening of restrictions on mergers will retard efforts to implement new, consistent competition policies in these areas.**(92)** No amount of federal-state dialogue or cooperation promises to alter this condition. If, as we believe it should, the Commission concludes that a more permissive policy toward consolidation is appropriate, and it desires such a policy to be truly national in scope, it must either persuade the states to accept the policy or convince Congress to limit the states' role in merger oversight for transactions with significant regional or national effects. It is irrational to allow individual state antitrust officials to obstruct the attainment of important national and international competition policy goals through their enforcement of federal antimerger laws.

Conclusion

In reviewing the statements and presentations made to the Commission over the past two months, we were reminded of the powerful incentives for rent seeking and other competitive advantage, and that the FTC is a constant target for such pleas. Many complained of their competitors' conduct; none acknowledged any fencing-out ambitions of their own; no one complained about having too many advantages or of the need for more competition in her industry. Nor do we claim immunity from such incentives ourselves. We mention this as a note for caution and skepticism in considering the recommendations made in these hearings, including the particulars of the agenda we propose. Nonetheless, we urge that there be no hesitation by the Commission in focusing its energies and intellectual powers on revamping antitrust doctrine to shed an array of outmoded rules and to reflect modern economic understanding, including the lessons of price theory and transaction cost analysis.

In particular, we would press the Commission to fulfill its original task of developing antitrust law and doctrine, especially by guidelines for such diverse areas as joint ventures and standard-setting, vertical restraints, and price discrimination.**(93)** Clarification of the analytical requirements of the rule of reason -- a task largely uncompleted since 1914 -- would do much to rationalize antitrust enforcement. On the other hand, the regulatory process, particularly for mergers, must be made more transparent so that the meaning of the Merger Guidelines is not reserved to a narrow few; and the scope of information routinely collected in mergers and other antitrust investigations should be narrowed to what is used and useful. Finally, a continuing review and cost-benefit analysis of prior enforcement efforts, if undertaken on a systematic basis, could both inform and improve antitrust enforcement. None of these recommendations separately focuses on either innovation or global competition. While changes in competition, especially from new technologies and distant markets, should not be ignored, we are struck by the acute level of disagreement in these hearings about whether such changes warrant fundamental modifications of antitrust doctrine or enforcement policy.**(94)** We believe, however, that our proposed framework of evaluative principles and suggestions for institutional processes serve to increase the likelihood that suggested adjustments are soundly analyzed *ex ante*, that conceptually desirable changes are wisely implemented, and that the effects of specific initiatives are monitored and evaluated carefully *ex post*.

The lesson of these hearings to us is that the FTC's most important assignment today is to modernize antitrust rules, to concentrate enforcement where serious systemic blocks to competition may exist, and to lessen the burden as well as improve the transparency of its enforcement efforts. If the Commission follows up on these and other suggestions, it will have a full, constructive agenda and justify its responsibilities and its budget. And these hearings will have been worth the effort. Once having undertaken these hearings, however, the Commission has entered a zero sum game, and a failure to follow up will render the Commission a worthy target for down-sizing.**(95)**

ENDNOTES:

(1) *See* Janet L. McDavid, "Efficiencies, Failing Firms, and the *General Dynamics* Defense" 1 (Prepared Statement for Federal Trade Commission Hearings on Global and Innovation-Based Competition, Dec. 5, 1995: mimeo); James F. Rill, Prepared Statement for the Federal Trade Commission Hearings on Global and Innovation-Based Competition 2 (Oct. 12, 1995: mimeo).

(2) In Broadcasting Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1979), the Supreme Court said it would entertain at least a cursory examination of the defendant's claims that conduct facially resembling horizontal "price-fixing" was justified by efficiency rationales and was worthy of analysis more elaborate than per se condemnation. In Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911) and subsequent cases, the Supreme Court has never explicitly endorsed so discriminating an approach for resale price maintenance.

(3) 388 U.S. 365 (1967).

(4) *Cf.* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) (discussing and distinguishing the Court's earlier intra-enterprise conspiracy cases without specifically repudiating them).

(5) *See* Abbott B. Lipsky, Jr., "Geography, Competition and Market Definition: The Proper Use of Economic Theory in Antitrust Decisions" 2 (Prepared statement for FTC Hearings on Global and Innovation-Driven Competition, Oct. 18, 1995: mimeo) ("the economic reasoning underlying every antitrust enforcement decision must be made explicit if antitrust law is to weed out invalid theories and adopt sound reasoning"); Statement of James F. Rill, *supra* note 1, at 2 ("enforcement of the antitrust laws that does not focus on consumer welfare or conduct bearing a direct and substantial effect on foreign commerce would be costly"); David J. Teece, "Assessing Competition, Firm Performance, and Market Power in the Context of Innovation: Implications for Antitrust Enforcement" 33-34 (Prepared Statement for FTC Hearings on the Changing Nature of Competition, Oct. 24, 1995: mimeo) ("Antitrust Enforcement, private and public, cannot improve the chances for innovation based competition very much, but it can surely get in the way.").

(6) *Compare* Massachusetts Board of Registration in Optometry, 110 F.T.C. 549 (1988) *with* Joseph Kattan, "The Role of Efficiency Considerations in the Federal Trade Commission's Antitrust Analysis" 9-14 (Prepared Statement for FTC Hearings on Global and Innovation-Driven Competition, Nov. 14, 1995: mimeo) (recommending abandonment of *Massachusetts Board* methodology).

(7) *See* Darcey v. Allein, 77 Eng. Rep. 1250 (1602); Mitchel v. Reynolds, 24 Eng. Rep. 347 (1711).

(8) *See* Chicago Board of Trade v. United States, 246 U.S. 231 (1918); Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911).

(9) United States v. Addyston Pipe & Steel Co., 85 Fed. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

(10) Richard M. Steuer, *Monsanto and the Mothball Fleet of Antitrust*, 30 **Antitrust Bull.** 1 (1985).

(11) Flood v. Kuhn, 407 U.S. 258 (1972); Federal Base Ball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922).

(12) *See* Hospital Corp. of Am. v. Federal Trade Commission, 807 F.2d 1381, 1385 (7th Cir. 1986) (discussing the Supreme Court's horizontal merger cases of the 1960s and observing that "[n]one of these decisions has been overruled"), *cert. denied*, 481 U.S. 1038 (1987).

(13) United States v. Timken Roller Bearing Co., 341 U.S. 593 (1951).

(14) United States v. Sealy, Inc., 388 U.S. 350 (1967).

(15) United States v. Topco Assocs., Inc., 405 U.S. 596 (1972).

(16) United States v. General Motors Corp., 384 U.S. 127 (1966).

(17) *See also* Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332 (1982); *but see* Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1979); Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987).

(18) *Compare Mitchel v. Reynolds*, 24 Eng. Rep. 347 (1711) *with* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977); Nat'l Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1985).

(19) 415 U.S. 486 (1974).

(20) For example, whether the numerical thresholds for applying concentration tests set forth in the Merger Guidelines are theoretically sound and consistent with empirical evidence -- or otherwise justified -- is questioned in one of our recommendations below. *See also* Statement of David J. Teece, *supra* note 5, at 2 ("The structure-conduct-performance edifice erected in the 1930s is still substantially intact. Antitrust agencies and courts are still guided by an intellectual apparatus that tends to be backward, not forward looking. Without conceptual lenses capable of focusing on the dynamics of the global marketplace, mistakes will be made.").

(21) 433 U.S. 36 (1977).

(22) 429 U.S. 477 (1977).

(23) *Brunswick*, 429 U.S. at 488 (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (emphasis in original).

(24) *See* Staff Report of the Federal Trade Commission, Bureau of Economics, **The Brewing Industry** (Federal Trade Commission, Dec. 1978).

(25) *See* Federal Trade Commission v. Procter & Gamble Co., 386 U.S. 568 (1967); Federal Trade Commission v. Morton Salt Co., 334 U.S. 37 (1948).

(26) *Compare* United States v. U.S. Steel Corp., 251 U.S. 417, 451 (1920) ("the law does not make mere size an offense").

(27) *See* Ernest Gellhorn, *The Practical Uses of Economic Analysis: Hope vs. Reality*, 56 **Antitrust L.J.** 933, 934 (1988); *see also* James C. Cubbin, Prepared Statement for FTC Hearings on Global and Innovation-Driven Competition 2, 4-6 (Nov. 7, 1995: mimeo)
(explaining importance of experimentation by business managers in identifying methods for increasing efficiency in the health care sector).

(28) Federal Trade Commission, The Merger Movement: A Summary Report (1948).

(29) 370 U.S. 294 (1962).

(30) *See* Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 **Harv. L. Rev.** 226, 231-33 (1961) (describing how commentators in the late 1940s and early 1950s discredited the key findings of the FTC's 1948 Report).

(31) Patent protection was the initial approach taken to protect computer programs, but this path was foreclosed by a narrow view of the patent laws. *See* Gottschalk v. Benson, 409 U.S. 631 (1972) (mathematical formula for controlling computer operation not patentable).

(32) 35 U.S.C. §§ 101 *et seq.*

(33) 17 U.S.C. §§ 101 *et seq. See also* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 54 (1976) (specifically noting that copyright coverage of literary works includes computer data bases and computer programs).

(34) *See, e.g.*, Computer Assoc. Int'l, Inc. v. Altai, Inc., 61 F.3d 6 (2d Cir. 1995); Computer Assoc. Int'l, Inc. v. Altai, Inc., 982 F.2d 693 (2d Cir. 1992).

(35) 49 F.3d 807 (1st Cir.), *cert. granted*, 116 S. Ct. 39 (1995).

(36) *Lotus Development*, 49 F.3d at 819 (Boudin, J., concurring).

(37) *Id*.

(38) *See, e.g.*, Robert H. Bork, **The Antitrust Paradox** 347-66 (1978) (urging greater attention to the role of government intervention in reducing competition); Walter Adams & Horace M. Gray, **Monopoly in America -- The Government as Promoter** 59-69 (1955) (criticizing government controls on entry and pricing in the transportation sector).

(39) See Kenneth W. Dam, "Testimony Before the Federal Trade Commission Hearings on Global and Innovation-Based Competition" 10 (Oct. 12, 1995: mimeo) ("[W]e should not forget that many U.S. markets are not fully open to foreign competition, again because of regulatory restraints . . . . The United States . . . is nearly as often a sinner as sinned against.")

(40) 317 U.S. 347 (1943).

(41) *See* Einer R. Elhauge, *The Scope of Antitrust Process*, 104 **Harv. L. Rev.** 668 (1991).

(42) *See, e.g.*, Donald Hudler, Transcript of Testimony Before FTC Hearings on the Changing Nature of Competition in a Global and Innovation Driven Age, Nov. 2, 1995, at 1365 (describing how state franchise laws limit flexibility of General Motors' Saturn Division to improve efficiency of its distribution network); Daniel Roos, "Outline of Remarks for FTC Hearings on the Changing Nature of Competition in a Global and Innovation Driven Age" (Oct. 18, 1995: mimeo) (suggesting how federal and state laws might inhibit development of more efficient automobile distribution networks).

(43) *See, e.g.*, Federal Trade Commission v. Ticor Insurance Co., 112 S. Ct. 2169 (1992) (supporting Commission's view that state oversight of collective rate-setting by title insurance companies failed to constitute "adequate supervision" necessary to establish state action immunity).

(44) One specific area where we believe the Commission should take a leadership role challenging indirectly governmental immunity that has major competitive implications is in defining more clearly minimum limitations of the antitrust injury doctrine where government (primarily states and their political subdivisions) adopt private standards as construction or other codes. Here the Ninth Circuit has, we believe erroneously, concluded that private conduct otherwise subject to antitrust scrutiny is immune from damage claims because they flow "directly from government action." *See* Sessions Tank Liners, Inc. v. Joor Manufacturing, Inc., 17 F.3d 295, 299 (9th Cir.), *cert. denied*, 115 S. Ct. 66 (1994).

(45) For example, in his prepared remarks for these hearings, Joseph Stiglitz noted the need to revise the U.S. trade laws "to make them consistent with the competition-protection principles of antitrust." Joseph E. Stiglitz, "The Role of Antitrust in a Changing Global Economy" 5 (Oct. 12, 1995: mimeo). The Commission has played a leading role in documenting the social welfare losses resulting from import restrictions, including controls on dumping. *See, e.g.*, Morris Morkre & David Tarr, **The Effects of Restrictions on United States Imports: Five Case Studies and Theory** (Federal Trade Commission: June 1980). However, not all participants in these hearings believe the Commission's advocacy in anti-dumping proceedings has been beneficial. *See* Thomas R. Howell, Statement on

Behalf of the Coalition for Open Trade Before the Federal Trade Commission Hearings on Global and Innovation-Driven Competition 14 (Oct. 19, 1995: mimeo).

(46) A relatively fresh example can be found in the emphasis that the district court placed on the procurement policies of the Commonwealth of Puerto Rico as determinants of the respondent's behavior in Federal Trade Commission v. Abbott Labs., 853 F. Supp. 526 (D.D.C. 1994). The court's decision to reject the Commission's complaint in *Abbott Laboratories* suggested that the respondent was responding rationally to incentives provided by Puerto Rico's approach to managing the procurement of infant formula.

(47) *See* Barry C. Harris & David D. Smith, *Survey of Economic Studies*, Appendix B to Testimony of Richard L. Scott, Hearings Before the Federal Trade Commission on Global and Innovation-Based Competition 5 (Nov. 7, 1995: mimeo) ("A review of the economics literature, both theoretical and empirical, indicates that there are no numerical concentration standards that apply across product and service markets."); Prepared Statement of James F. Rill, *supra* note 1, at 10-11 (observing that "there is no economically compelling basis for viewing the current HHI thresholds of the Merger Guidelines as rigid or to speak in terms of transactions which exceed these thresholds as 'Guidelines violations'" and calling for an increase in the Guidelines quantitative thresholds)

(48) *See* General Motors Corp., 103 F.T.C. 374 (1984).

(49) *See, e.g.*, *General Motors*, 104 F.T.C. at 391, 397 (dissenting statement of Commissioner Bailey):

[I]f this joint venture between the world's first and third largest automobile companies does not violate the antitrust laws, what does the Commission think will? This is surely the question that potential joint venture partners will be asking themselves. In this decision, the Commission has swept another set of generally recognized antitrust law principles into the dustbin, using again the incorporeal economic rhetoric that now dominates Commission decision-making. In this case, the decision results in the blessing of a business proposal that is both breathtaking in is audacity and mind-numbing in its implications for future joint ventures between leading U.S. firms and major foreign competitors that seek to lend a friendly helping hand.

(50) *See* David Roos, "Automobile Competitiveness: A Report of The MIT International Motor Vehicle Program" (Statement prepared for the Capitol Hill Forum on Industrial Competitiveness in September 1995 and submitted as part of Professor Roos's presentation for the FTC Hearings on Global and Innovation-Driven Competition, Oct. 18, 1995: mimeo) (hereinafter "Sloan Foundation Study") (describing significance of NUMMI joint venture for adoption of production and management innovations by General Motors).

(51) We note that our list is not necessarily exhaustive. Other participants in these hearings have suggested additional candidates for consideration. *See, e.g.*, Michael N. Sohn, "Competitive Effects and Entry Analysis in R&D and Future Generation Markets" 12 (Testimony Outline for Federal Trade Commission Hearings on Global and Innovation Based Competition, Oct. 25, 1995: mimeo) (proposing that Commission develop guidelines involving future generation and innovation markets).

(52) *See, e.g.*, Official Airline Guides, Inc. v. Federal Trade Commission, 630 F.2d 920 (2d Cir. 1980) (rejecting recognition of a monopolist's duty not to deal arbitrarily with nonrivals), *cert. denied*, 450 U.S. 917 (1982); E.I. du Pont de Nemours & Co. v. Federal Trade Commission, 729 F.2d 128 (2d Cir. 1984) (rejecting Section 5 challenge to noncollusive adoption of facilitating practices).

(53) *See* Prepared Statement of Joseph Kattan, *supra* note 6, at 9-11.

(54) *See BMI*, 441 U.S. 1 (1979); *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988).

(55) *See* Frank H. Easterbrook, *The Limits of Antitrust*, 63 **Tex. L. Rev.** 1 (1984); *see also* Thomas M. Jorde, "Antitrust, Innovation and Competitor Cooperation" 3-5 (Prepared statement for FTC Hearings on Global and

Innovation-Based Competition, Oct. 26, 1995: mimeo) (proposing use of market-power-based-safe harbor as part of rule of reason assessment of cooperative agreements among competitors).

(56) *See NCAA*, 468 U.S. 85 (1984).

(57) *See, e.g.*, Chickery J. Kasouf & David C. Zenger, Prepared Statement for FTC Hearings on Global and Innovation-Driven Competition 3-4 (Nov. 8, 1995: mimeo) (describing development of new relationships between automobile assemblers and their suppliers); Richard Rogers, Prepared Statement on Behalf of the National Association of Manufacturers Before the Federal Trade Commission Hearings on Global and Innovation-Driven Competition 4 (Oct. 18, 1995: mimeo) ("Reflecting the increasingly global nature of competition in many industries, global alliances are increasingly commonplace.").

(58) *See, e.g.*, Bennett R. Katz, Prepared Statement for FTC Hearings on Global and Innovation-Based Competition 6 (Oct. 26, 1995: mimeo) ("[T]he antitrust laws have not adequately developed standards for evaluating joint venture practices under the rule of reason, including the importance of encouraging entrepreneurial risk-taking and investments in innovation. . . . Reforming the rule of reason is a topic that is broader than the subject of joint venture innovation. However, it is a matter of some urgency.").

(59) *See, e.g.*, Boyd Berends, Prepared Statement for FTC Hearings on Global and Innovation-Driven Competition 8 (Nov. 8, 1995: mimeo) ("The FTC should take the lead in promulgating simplified guidelines that could be utilized by American businesses when forming strategic alliances and joint ventures."); Prepared Statement of Kenneth W. Dam, *supra* note 39, at 5-6 ("guidelines setting out 'safe harbors' in the international sphere for complex inter-firm, intra-industry arrangements might help promote the strength of American industry abroad"); *cf.* Samuel R. Miller, "Antitrust and Competitor Collaboration in the Computer Industry" 7-9 (Prepared statement for FTC Hearings on Global and Innovation-Driven Competition, Oct. 26, 1995: mimeo) (proposing the Commission revise a 1971 advisory opinion concerning standard certification programs and seek legislative and executive branch efforts to promote interoperability).

(60) *See* Ernest Gellhorn & Todd Miller, "Joint Ventures and Standard Setting: Problems in the Current Framework" (Testimony Before the Federal Trade Commission Hearings on Global and Innovation-Based Competition, Oct. 12, 1994: mimeo).

(61) *See* Ernest Gellhorn & William E. Kovacic, **Antitrust Law and Economics in a Nutshell** 254-59 (4th ed. 1994).

(62) *Cf.* Testimony of Benjamin W. Heineman, Transcript of the October 17, 1995 Session of the Federal Trade Commission Hearings on the Changing Nature of Competition in a Global and Innovation-Driven Age, 193-95 (explaining why mergers might be preferred to joint ventures because mergers, which rely on hierarchical decisionmaking processes, solve transaction cost problems that beset joint ventures); Testimony of David C. Mowery, Transcript of the October 24, 1995 Session of the Federal Trade Commission Hearings on the Changing Nature of Competition in a Global and Innovation-Driven Age 763-65 (explaining how the diverging interests of SEMATECH's members complicated efforts by the joint venture to devise a research agenda).

(63) *See* William B. Burnett & William E. Kovacic, *Reform of United States Weapons Acquisition Policy: Competition, Teaming Arrangements, and Dual-Sourcing*, 6 **Yale J. Reg.** 249, 276-77 (1989).

(64) Prepared Statement of Ernest Gellhorn & Todd Miller, *supra* note 60; *see also supra* note 44 and accompanying text.

(65) *Cf.* U.S. Department of Justice, **Report on the Robinson-Patman Act** (1977) (recommending repeal of Robinson-Patman Act).

(66) In an attachment to his presentation in these hearings, Daniel Roos describes how "[t]he Saturn Corporation has successfully pioneered a new marketing approach for auto dealerships based on no haggle selling and customer satisfaction." Daniel Roos, Sloan Foundation Study, *supra* note 50. Let us suppose for purposes of discussion, that Saturn's "no haggle" policy consists of a requirement by the General Motors Saturn Division that its dealers, including independently-owned outlets, advertise and adhere to a specified retail price. Would the Commission condemn such an arrangement out of hand as a violation of the rule of *Dr. Miles*, or would it permit the Saturn Division to use the technique as part of an effort to develop a new system of distribution?

(67) *See, e.g.*, Daniel Roos, Sloan Foundation Study, *supra* note 50 (describing adoption of lean production techniques by automobile assemblers); David Weil, "Information Integration and Emerging Competitive Dynamics in the U.S. Apparel Channel" (FTC Hearings on Global and Innovation-Driven Competition, Oct. 18, 1995: mimeo) (describing the adoption of lean retailing techniques by U.S. apparel manufacturers).

(68) *See supra* note 47 and accompanying text.

(69) *See* David T. Scheffman, *Ten Years of Merger Guidelines: A Retrospective, Critique, and Prediction*, 8 **Rev. Indus. Org.** 173 (1993); *cf.* Statement of Richard Rogers, *supra* note 57, at 8 ("[W]hat real empirical evidence exists to support the proposition that the mathematical 'decision points' in the current Merger Guidelines ... accurately predict an impermissible anticompetitive result?").

(70) *See* Benjamin W. Heineman, Jr., "Statement Before the Federal Trade Commission's Hearings on the Changing Nature of Competition in a Global and Innovation-Driven Age" 9-13 (Oct. 17, 1995: mimeo); Statement of James F. Rill, *supra* note 1, at 10-11.

(71) *See, e.g.*, Prepared Statement of Benjamim W. Heineman, Jr., *supra* note 70, at 12 ("Remove all presumptions based upon market share data -- use the HHI's as a screen to determine when the potential competitive effects of a transaction merit scrutiny."); Prepared Statement of Richard Rogers, *supra* note 57, at 8-9; Richard L. Scott, Prepared Statement for FTC Hearings on Global and Innovation-Driven Competition 6 (Nov. 7, 1995: mimeo) ("Use of the [Merger] Guidelines' concentration-based presumption in evaluating hospital mergers fundamentally misconceives the forces that drive hospital competition and hospital concentration."); *cf.* Prepared Statement of David J. Teece, *supra* note 5, at 28-29 ("market concentration thresholds that are insensitive to industrial dynamics are likely to be somewhat meaningless").

(72) *See* Steven C. Salop, "Efficiencies in Dynamic Merger Analysis" 4 (Prepared Statement for FTC Hearings on Global and Innovation-Driven Competition, Nov. 2, 1995: mimeo) ("the [Merger] Guidelines' analysis of efficiencies is nothing more than a brief placeholder"); Robert A. Skitol, Prepared Statement for FTC Hearings on Global and Innovation-Driven Competition 9-10 (Oct. 26, 1995: mimeo) (observing that the Merger Guidelines' "section on efficiencies is patently uninformative").

(73) *Compare* Terry Calvani, Prepared Statement for FTC Hearings on Global and Innovation-Driven Competition 3 (Nov. 8, 1995: mimeo) (favoring fuller consideration of efficiency claims and proposing that the FTC reconsider the Merger Guidelines' treatment of efficiencies); James C. Egan, Jr., Prepared Statement for FTC Hearings on Global and Innovation-Driven Competition 6 (Nov. 2, 1995: mimeo) (proposing that Merger Guidelines be modified to "make it clear that efficiencies are art of the competitive analysis, not a defense to an otherwise illegal merger" and to "articulate more specifically the types of efficiencies the agencies will consider"); Prepared Statement of Benjamin W. Heineman, Jr., *supra* note 70, at 12 (proposing that federal enforcement agencies, in reviewing mergers, "[g]ive greater scope and weight to potential efficiency benefits of the transaction); William C. MacLeod, Prepared Statement for FTC Hearings on Global and Innovation-Driven Competition 5-6 (Nov. 7, 1995: mimeo) (enforcement agencies' analysis of mergers involving grocery manufacturers should be adjusted to take greater account of dynamic efficiency considerations); Timothy J. Muris, Prepared Statement for FTC Hearings on Global and Innovation-Driven Competition 3 (Nov. 7, 1995: mimeo) ("It is time for the government to evaluate efficiency arguments fully and without undue skepticism. The agencies should reconsider the present standards applied to evidence of efficiencies."); Phillip

A. Proger, Prepared Statement for FTC Hearings on Global and Innovation-Driven Competition 6 (Nov. 7, 1995: mimeo) ("[O]ne issue that might merit further review by the FTC is the extent and nature of proof that it will require before recognizing efficiencies in connection with a particular transaction."); Prepared Statement of James F. Rill, *supra* note 1, at 9 ("the agencies should become more hospitable to the types of efficiencies that may be considered"); Prepared Statement of Steven C. Salop, *supra* note 72, at 24 (recommending addition of case-by-case evaluation of efficiency benefits in merger review); Prepared Statement of Richard L. Scott, *supra* note 71, at 10 ("[I]t is simply unconscionable to continue to evaluate efficiencies justifications for hospital mergers with the degree of skepticism you currently accord them."); Joe Sims, "Antitrust Treatment of Mergers in Distressed Industries: Hospitals as a Case Study" 15-16 (Prepared statement for FTC Hearings on Global and Innovation-Driven Competition, Nov. 14, 1995: mimeo) (proposing that FTC give greater emphasis to efficiency concerns in evaluating hospital mergers) *with* Kevin J. Arquit, "Efficiencies and Merger Analysis" 2, 10 (Prepared statement for FTC Hearings on Global and Innovation-Driven Competition, Dec. 5, 1995: mimeo) (opposing broadening of efficiencies defense but suggesting that FTC consider issuing "a formal policy statement expanding the role of efficiencies analysis" as part of the assessment of competitive effects); Kevin J. O'Connor, "Efficiencies: Should Current Antitrust Policy Be Changed" (Prepared statement for FTC Hearings on Global and Innovation-Driven Competition, Nov. 7, 1995: mimeo) (describing rationale for approach of Merger Guidelines of the National Association of Attorneys General which, compared to the Federal Merger Guidelines, regard efficiency claims more skeptically; suggesting lack of need for more favorable treatment of efficiency arguments); Alan A. Fisher & Robert H. Lande, "Efficiency Considerations in Merger Enforcement" 1-3, 5 (Prepared statement for FTC Hearings on Global and Innovation-Driven Competition, Nov. 7, 1995: mimeo) (criticizing case-by-case evaluation of efficiencies; proposing accommodation of efficiency concerns by raising the numerical thresholds of the Merger Guidelines).

(74) As former Assistant Attorney General Rill put the point in his testimony, "our failure to adequately address efficiencies could be a costly error and it is, therefore, an excellent time to re-evaluate their role in merger analysis." Statement of James F. Rill, *supra* note 1, at 8

(75) *See* Prepared Statement of Abbott B. Lipsky, Jr., *supra* note 5, at 7 ("Retrospective research on the accuracy of the economic predictions underlying previous antitrust decisions is also extremely rare. When the Commission or a court strikes down a merger, for example, it seldom attempts to quantify either the efficiencies or the price increases that might result from a decision for or against the transaction.").

(76) *See, e.g.*, Federal Trade Commission, **Impact Evaluations of Federal Trade Commission Vertical Restraints Cases** (Ronald N. Lafferty, Robert H. Lande & John B. Kirkwood, eds. 1984); *see also* Timothy Bresnahan, *Post-Entry Competition in the Plain Paper Copier Market*, 75 **Am. Econ. Rev.** 15 (May 1985) (presenting results of impact evaluation funded by FTC); *compare* Peter Huber, **The Geodesic Network -- 1987 Report on Competition in the Telephone Industry** (U.S. Department of Justice, Jan. 1987) (evaluation of effects of AT&T divestiture; evaluation was mandated by terms of Modified Final Judgment).

(77) *See* U.S. General Accounting Office, **Closer Controls and Better Data Could Improve Antitrust Enforcement** 12-18 (Feb. 29, 1980); Robert A. Katzmann, **Regulatory Bureaucracy: The Federal Trade Commission and Antitrust Enforcement** 204-05 (1980); William E. Kovacic, *Federal Antitrust Enforcement in the Reagan Administration: Two Cheers for the Disappearance of the Large Firm Defendant in Nonmerger Cases*, 12 **Res. in L. & Econ.** 173, 187 (1989); William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 **Iowa L. Rev.** 1105, 1147 (1989); *see also* Norman R. Augustine, Prepared Statement for FTC Hearings on Global and Innovation-Driven Competition 6-7 (Nov. 2, 1995: mimeo) ("[A] study should be conducted to review, say, two years after the fact, whether the intended outcomes of previous antitrust reviews [of defense industry mergers] were actually achieved, and if not, what lessons are to be learned."); Richard Gilbert, "Responding to Structural Change: A Call for a Review of the Competitive Consequences of Hospital Mergers" 2-3 (Prepared statement for FTC Hearings on Global and Innovation-Driven Competition, Nov. 14, 1995: mimeo) (urging FTC "to use its investigatory powers to learn more about the competitive effects of hospital mergers. . . . The Commission could do a great service by undertaking a critical review of the effects of antitrust enforcement in this industry."); Prepared Statement of Abbott B. Lipsky, Jr., *supra* note 5, at 10 ("The Commission should consider

whether retrospective study of the assumptions and results of previous antitrust enforcement efforts would help to discover whether fundamental but unstated misconceptions about supply response may underlie some enforcement judgments."); David Pitts, Prepared Statement for FTC Hearings on Global and Innovation-Driven Competition 3 (Nov. 2, 1995: mimeo) (suggesting that the government evaluate whether anticipated efficiencies in hospital mergers were realized in practice); Prepared Statement of Joe Sims, *supra* note 73, at 17 (proposing that FTC study actual effects of hospital mergers); Robert A. Skitol, Prepared Statement for FTC Hearings on Global and Innovation-Driven Competition 6-7 (Oct. 26, 1995: mimeo) (proposing the Commission's Bureau of Economics review experience of selected consortia that filed notifications under the National Cooperative Research Act or the National Cooperative Research and Production Act); *cf.* Joseph F. Brodley, "Proof of Efficiencies in Mergers and Joint Ventures: Testing Ex Ante Claims Against Ex Post Evidence" (Preliminary Draft of Prepared Statement for FTC Hearings on Global and Innovation-Driven Competition, Nov. 1, 1995: mimeo) (advocating *ex post* verification that efficiencies claimed for mergers and joint ventures have materialized); Philip B. Nelson, Prepared Statement for Federal Trade Commission Hearings on the Changing Nature of Competition in a Global and Innovation-Driven Age 7 (Oct. 19, 1995: mimeo) ("[I]t appears that the FTC could perform a valuable service by researching and documenting more fully the economic circumstances under which shipments pattern data can be misleading").

(78) *See* **Business Disclosure: Government's Need to Know** (Harvey J. Goldschmid, ed. 1979); George Bentson, *An Appraisal of the Costs and Benefits of Government Required Disclosure*, 41 **L & Contemp. Probs** 30 (1977).

(79) *See, e.g.*, William Blumenthal, *Market Imperfections and Over-Enforcement in Hart-Scott-Rodino Second Request Negotiations*, 36 **Antitrust Bull.** 745 (1991); *see also* Thomas B. Leary, Transcript of Testimony Before FTC Hearings on Global and Innovation-Driven Competition, Oct. 17, 1995, at 242-43 (criticizing scope of second requests in merger investigations); Prepared Statement of Richard Rogers, *supra* note 57, at 10-11; Prepared Statement of Richard L. Scott, *supra* note 71, at 11 (In my view, hospital merger review imposes enormous, and largely unnecessary, discovery burdens on merging hospitals. . . . We continue [to] receive the same standard Second Request as if the issues have not been joined, and as if little has been learned, from previous hospital merger investigations.").

(80) *See* William E. Kovacic, *Reagan's Judicial Appointees and Antitrust in the 1990s*, 50 **Ford. L. Rev.** 49 (1991); William E. Kovacic, *Judicial Appointments and the Future of Antitrust Policy*, **Antitrust** 8 (Spring 1993).

(81) *See* Thomas B. Leary, Transcript of FTC Hearings on Global and Innovation-Based Competition, Oct. 17, 1995, at 231-33, 236-40, 246-49 (recommending that the FTC provide the business community with more information about its merger enforcement decisions and the rationale for consent agreements); *cf.* Allen Bloom & Stephen A. Stack, Jr., Prepared Statement Before the Federal Trade Commission Hearings on the Changing Nature of Competition in a Global and Innovation-Driven Age 2 (Oct. 23, 1995: mimeo) (finding a "need for greater transparency in the Commission's enforcement decisions relating to transactions involving pharmaceutical products that are under development"); Robert A. Skitol, Prepared Statement for FTC Hearings on Global and Innovation-Driven Competition 2 (Oct. 26, 1995: mimeo) ("[T]here is a certain 'black-magic' quality and lack of transparency about [Commission] decisionmaking, particularly about the conclusions reached on high-visibility, controversial transactions.").

(82) *Compare* Statement of Michael N. Sohn, *supra* note 51, at 12-13 (noting that previous federal enforcement concerning innovation markets has occurred "where the R&D overlap is a small part of a much larger transaction"; in such a context, "the parties have strong incentives to 'fix' the problem quickly and go forward, irrespective of their assessment of the merits of the Commission's case. We may well continue to have enforcement by consent order without the important safeguard provided by the litigation alternative or even a vigorous defense at the enforcement agency level. In this context, it is particularly important that the Commission clearly set forth and consistently apply its enforcement principles.").

(83) *See* Prepared Statement of Robert A. Skitol, *supra* note 81, at 3 (proposing that Commission, when publishing a proposed complaint and consent order, issue a fuller "analysis to aid public comment" that reveals the bases for the Commission's decision to intervene).

(84) *See* Prepared Statement of Robert A. Skitol, *supra* note 81, at 3-5.

(85) *Compare* Statement of Robert A. Skitol, *supra* note 81, at 10-12 (identifying need for methodological consistency in guidance issued by antitrust enforcement agencies).

(86) We speak here of mergers and joint ventures, but the same observations apply to distribution restraints. The Vertical Restraints Guidelines of the National Association of Attorneys General stake out enforcement terrain -- such as a stated willingness to use criminal sanctions to challenge nonprice vertical restraints -- that we doubt the federal enforcement agencies would choose to occupy.

(87) *See* California v. American Stores Co., 495 U.S. 271 (1990).

(88) *See, e.g.*, New York v. Kraft General Foods, Inc., 1995-1 Trade Cas. (CCH) ¶ 70,911 (S.D.N.Y. 1995).

(89) For a discussion of this phenomenon in the context of the State of New York's challenge to the purchase by Kraft General Foods of the ready-to-eat cereal operations of RJR Nabisco, see Ronald A. Stern, "New Directions for a New Administration" 5-7 (Remarks prepared for The Conference Board's Program on Antitrust Issues in Today's Economy, Mar. 3. 1993: mimeo), provided as Appendix 3 to the Statement of Benjamin W. Heineman, Jr., *supra* note 70).

(90) *See* Pennsylvania v. Russell Stover Candies, Inc., 1993-1 Trade Cas. (CCH) ¶ 70,224 (E.D. Pa. 1993); Connecticut v. Newell Co., 1992-2 Trade Cas. (CCH) ¶ 70,008 (D. Conn. 1992).

(91) *See, e.g.*, *FTC Announces New Policy Expanding Cooperation with States on Merger Investigations*, FTC Press Release (June 21, 1995).

(92) *See* Prepared Statement of William C. MacLeod, *supra* note 73, at 20 ("Even if the Commission recognizes . . . dynamic efficiencies, the failure of state regulators to recognize the welfare effects of nonprice competition threatens to block beneficial transactions."); *compare* Prepared Statement of Kevin J. O'Connor, *supra* note 73, at 3 (when drafting NAAG Merger Guidelines, "it seemed to many states that the Federal Guidelines gave too much weight and credence to efficiency arguments in mergers").

(93) *See also* Caswell O. Hobbs, *Antitrust in the Next Decade -- A Role for the Federal Trade Commission*, 31 **Antitrust Bull.** 451, 474 (1986) ("[A]n agency such as the FTC has an important affirmative responsibility to keep legal doctrine updated and focused.").

(94) For example, on the issue of whether antitrust officials should examine competitive effects in the context of innovation markets, the hearings featured a high level of discord among the experts who addressed the question. Witnesses fell into four basic groups: those who supported the recognition and analysis of innovation markets, albeit with some qualifications (e.g., Richard Gilbert and Dennis Yao); those who found some merit in the approach but were fundamentally skeptical (e.g., Janet McDavid, James Rill, and Judy Whalley); those who expressed concern that consideration of innovation markets might yield excessive scrutiny of desirable collaboration involving high technology companies (e.g., Norman Augustine), and those who flatly opposed the use of the innovation market concept (e.g., Sumanth Addanki, Dennis Carlton, Richard Rapp, Michael Sohn, David Teece, Lawrence White). It seems fair to say that most observers who commented upon the innovation market concept doubted its usefulness.

(95) *Compare* William E. Kovacic, *Downsizing Antitrust: Is It Time to End Dual Federal Enforcement?*, **Antitrust Bull** (Forthcoming Winter 1995).