Federal Trade Commission

"REINVENTING ANTITRUST ENFORCEMENT? ANTITRUST AT THE FTC IN 1995 AND BEYOND"

Remarks of

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"A New Age of Antitrust Enforcement: Antitrust in 1995"

Marina Del Rey, CA

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Good afternoon. I want to extend my thanks to former Commissioner Terry Calvani for extending this invitation. Before we continue, I must let you know that the opinions I express here are my own and do not necessarily reflect those of the Commission or of any other Commissioner.

I come before you at a very interesting time in the life of a federal agency. As you know, every federal regulatory agency, and every department and agency in the Executive Branch, is undergoing some pretty intense scrutiny. This scrutiny addresses not only how we do business and whether we can do it more effectively; it extends to whether the very functions of each agency are appropriate functions of federal government. The Clinton Administration, through the National Performance Review's "reinventing government" proposals, is asking each agency to reflect on the nature of its mission, whether federal involvement is necessary to that mission, and, if so, whether that mission can be defined with more clarity and can be achieved more effectively and efficiently by the agency. I don't need to tell you that the new Republican Congress is turning up both the heat and the light on this essential reexamination. The objectives of the new Congressional majority are to reduce the unnecessary burdens of the federal bureaucracy; their efforts will likely engender some extensive and permanent changes that will ensure that "reinventing government" is more than just a flirtation with reform. The likely result of this review will be that many

current functions of the federal government will be eliminated or transformed considerably and those functions that survive in essentially their current form will likely operate more effectively in the public interest for having reconsidered their missions.

I welcome this scrutiny and the efforts to guide bureaucratic self-examination. It is likely to reveal that my agency is doing its job quite well. As the FTC nears its 80th birthday, I think it is relatively lean and mean. The Commission operates today at approximately 50% of its peak workyears of the 1970s.[1] But we are operating more efficiently. In FY 1994, we had a record year in terms of case productivity, and in FY 1995 we are running well ahead of even that pace.[2] Moreover, as I will describe, we have engaged in significant internal regulatory, management, and administrative reform. In addition, since the early 1980s, the federal antitrust agencies have given considerable thought to the public interest objectives of their work and have developed as focused and coherent an analytical

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[1] In FY 1979, the agency operated with approximately 1720 workyears; in 1994, we operated with approximately 950 workyears, less than half of which were allocated to the antitrust mission.

[2] In the antitrust mission in FY 1994, the Commission obtained twenty-six consent orders, authorized four preliminary injunctions, modified six orders, and issued five litigated orders in the antitrust mission. In the consumer protection mission, the Commission issued thirty-four administrative complaints, obtained fifty-eight consent orders, authorized ninety-two preliminary injunctions, modified one order, and issued three litigated orders.

framework for achieving that objective as any agency in the federal government. Thus, the quality of our cases has improved along with the quantity. Nevertheless, the Commission, like any unit of government, does not have a market mechanism to evaluate its performance and must remain vigilant in its efforts to improve its operations and its decisions. I intend to propose additional improvements in these remarks.

The reconsideration of federal functions has a particular resonance for federal antitrust enforcement. Consider the three inquiries of the National Performance Review, which is now in Phase II: (1) What is the Agency's mission? (2) Can this mission be privatized or terminated; in other words, is governmental involvement in the mission in the public interest? (3) If the agency's role is terminated, could the mission be handled by another federal agency, or could it devolve to state or local agencies? Now, you need only a passing familiarity with the institutional structure of federal antitrust enforcement to know that this last question is especially interesting to both the FTC and the Antitrust Division of the Department of Justice. Before I reach this last question, however, I want to respond briefly to the first two.

What is the mission? The Commission's antitrust mission is to protect competition and to promote consumer welfare by preserving the efficient functioning of the free market economy.

I, for one, take this mission very seriously and cannot overestimate its importance. More specifically, the Commission engages in two civil antitrust programs. Merger enforcement under Sections 7 and 7A of the Clayton Act (including a primary role in interpreting the HSR Act) is the most significant assignment. The remainder of the antitrust mission is civil antitrust enforcement under Section 5 of the FTC Act. For reasons I need not explain here, I do not believe that devolution of these functions to state or local officials is in the public interest. We should certainly seek to cooperate with these officials and to consult on avoiding redundancy or conflict in the allocation of resources in the enforcement of the antitrust laws. But antitrust regulation of interstate commerce is a federal responsibility, calling for uniform national policies. These points, of course, are neither controversial nor original. Federal antitrust enforcement has enjoyed and retains strong bipartisan support.

That brings us back to the third question. As you know, the Commission shares federal antitrust enforcement responsibility

with the Antitrust Division.[3] Under this dual enforcement system, the agencies must seek to coordinate their activities to maximize efficiency and minimize duplication in enforcement.[4] There is some statutory division of labor. For example, the Antitrust Division has exclusive jurisdiction over criminal antitrust enforcement, which, in any event, has little in common with complex civil antitrust enforcement -- either analytically or procedurally.[5] On the other hand, the breadth of Section 5 of the FTC Act permits the Commission to challenge anticompetitive activity that the DOJ cannot -- such as invitations to collude, which are undoubtedly pernicious but evade the reach of Section 1 of the Sherman Act, which requires proof of actual agreement.

For matters of concurrent jurisdiction, such as enforcement

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[3] In fact, the FTC and DOJ share competition law enforcement jurisdiction with a number of other federal agencies, including the Federal Reserve Board, the Office of Comptroller of the Currency (OCC), and the Federal Energy Regulatory Commission, among others. For example, DOJ shares authority to examine competitive implications of bank mergers with the OCC and the Federal Reserve Board. This has been a matter of considerable controversy in previous administrations. This review is not divided among the agencies: all three look at every merger, which average more than 1800 annually. *See* Testimony before the House Committee on Banking, Finance, and Urban Affairs (Sep. 24, 1991).

[4] Uncoordinated enforcement can result in imposing undue burdens on particular defendants while forgoing opportunities to obtain relief against other defendants.

[5] Criminal antitrust enforcement -- primarily involving bid-rigging -- generally involves only proof of conspiracy and does not require use of complex economic analysis. In general, the investigative tools and procedures of criminal antitrust enforcement are not significantly different from those used by DOJ's Criminal Division to prosecute wire fraud cases.

of Section 7 and other civil antitrust cases, the FTC and the Department of Justice have a liaison agreement that has been in effect since the Truman Administration. The liaison agreement avoids overlapping investigations through a "clearance" procedure that assigns matters on the basis of interest and expertise.[6] The liaison agreement has generally been an effective means of dividing responsibilities and avoiding duplication. During the Bush Administration, the agencies took steps to increase the effectiveness of the clearance process and to reduce frictions, which arise almost exclusively with respect to HSR merger enforcement. Some measure of inefficiency or friction may have crept back in with the change in administrations, but this may be an inevitable and salutory result of significant shifts in enforcement philosophy in the Executive Branch. I do not believe that significant friction inheres in the process, or that any existing friction has significantly affected enforcement efforts. Nevertheless, we are currently engaged in evaluating further modifications to the clearance process in order to minimize the already insubstantial costs.[7]

Substantively, the two agencies have accommodated dual

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[6] The liaison agreement followed a Supreme Court decision holding that the FTC could condemn under Section 5 of the FTC Act conduct that violates the Sherman Act, and that the filing of an action by DOJ did not preclude the FTC from proceeding with existing administrative litigation regarding the same conduct. *FTC v. Cement Institute*, 333 U.S. 683 (1948).

[7] The federal agencies have also made strides in recent years to coordinate enforcement with the state attorneys general.

jurisdiction by issuing joint enforcement policy guidelines. In addition to the Horizontal Merger Guidelines, the Commission and the Antitrust Division have issued joint statements regarding antitrust enforcement in the health care field and have published for public comment joint guidelines relating to international operations. I also expect that the agencies will issue joint intellectual property guidelines in the next few months.[8] Whatever minor analytical differences may have existed prior to the issuance of these joint statements -- and I'm not sure there were any -- have been effectively eliminated. Thus, it cannot be said that dual enforcement is responsible for uncertainty in private antitrust compliance.

Nevertheless, the Commission's competition mission, like that of the Antitrust Division, must stand on its own contribution to the public interest. In 1989, the ABA Special Committee on the FTC concluded that the FTC has a "special role" in civil antitrust enforcement.[9] First, we can seek injunctions

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[8] In October 1994, the Commission and the Department of Justice published for public comment proposed *Antitrust Enforcement Guidelines for International Operations*, 59 Fed. Reg. 52810 (October 19, 1994). In August 1994, the Department of Justice published for public comment proposed *Antitrust Guidelines for the Licensing and Acquisition of Intellectual Property*, 59 Fed. Reg. 41339 (August 8, 1994). The Commission and the Department of Justice are now considering public comments and whether to issue jointly a final set of both guidelines.

[9] Report of the American Bar Association Section of Antitrust Law, Special Committee to Study the Role of the Federal Trade Commission (1989), *reprinted in* 58 ANTITRUST L.J. 43 (1989).

without establishing antitrust liability for purposes of private damages actions. This allows the Commission to develop and apply new legal theories without the concern that it may create widespread private Sherman Act liability. Second, the Commission has the ability to devote sufficient time and attention to complex economic questions. Third, the Commission has the ability to consider a variety of remedies for competitive harms. These and other special attributes of the Commission antitrust mission have been discussed elsewhere, and they will be discussed at length in the coming months. Whether the Commission has taken full advantage of these attributes over time is a matter of considerable debate. In the remainder of my remarks, I will focus on what steps the Commission has recently taken, and can take in the future, to ensure that the Congressional intent in conferring these attributes is achieved.

During the Bush Administration, the Commission started a process of reforming its internal operations. These reforms were designed to focus the agency's mission, to increase internal efficiency, and to enhance our institutional integrity. First, we established a rigorous and systematic process of regulatory review, examining all of the Commission's trade regulation rules and guides over a ten-year period. As a result, we have eliminated or scaled back a number of regulations, including repeal of such useless (but potentially confusing) items as the Trade Regulation Rule Concerning Discriminatory Practices in

Men's and Boys' Tailored Clothing Industry[10] and the Guides for the Greeting Card Industry Relating to Discriminatory Practices.[11]

Second, and more important to antitrust lawyers, the Commission adopted major reforms for both the adjudicative and investigative (or prosecutorial) functions of the agency. The nonadjudicative reforms were made both at the staff level and in the Commission's voting procedures. In particular, the Bureau of Competition substantially eliminated its investigational backlog and institutionalized management practices to expedite investigations. The Commission has also improved the internal reporting procedures that allow the Commissioners to ensure that all nonadjudicative matters -- including investigations, advisory opinions, advocacy comments, and reports to Congress -- proceed expeditiously. Perhaps more importantly, the Commission resolved to heal itself, adopting deadlines for making motions and registering votes on all these matters. These have worked very well, and the Commission's caseload is probably more current than it has been in decades.

Third, perhaps the most important institutional reforms involved the adjudicative process, and in particular the issuance

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[10] 16 C.F.R. Part 412, *repealed at* 59 Fed. Reg. 8527 (Feb. 23, 1994).

[11] 16 C.F.R. Part 244, *repealed at* 59 Fed. Reg. 8527 (Feb. 23, 1994).

of Commission opinions. At the request of Chairman Janet Steiger, I formulated the broad outlines of the reforms that the Commission eventually adopted (some of which were based on proposals advanced by Terry Calvani during his tenure at the Commission). We have adopted some fairly demanding deadlines for issuing adjudicative opinions, and the results have been very encouraging. When the reforms were adopted in April of last year, the Commission had six pending adjudicative matters for which oral argument had been presented on appeal. During the past ten months, the Commission has issued six adjudicative opinions, effectively clearing the docket. Today, only one matter is currently pending on appeal. These results are all the more impressive when one considers the level of enforcement activity at the Commission over the past year, including the issuance of a number of administrative complaints.

Thus, the Commission has effectively addressed one of the principal criticisms leveled at it in recent decades: that the length of the administrative process is excessive. Of course, complex antitrust litigation before the decisional stage will continue to be longer than the average personal injury or wire fraud case. Complex antitrust litigation entails an inherent tradeoff: unduly expediting the trial increases the possibility of error.[12] The complicated economic and legal issues in a full

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[12] *See Chicago Professional Sports Ltd. Partnership v. Nat'l Basketball Assn.*, 961 F.2d 667 (7th Cir.), *cert. denied*, 113 S. Ct. 409 (1992).

rule of reason examination of a contested merger or horizontal restraint often require lengthy proceedings. This is true at the Commission and in the federal district courts. Just recently, on the appeal in *Chicago Professional Sports*, which involved the Chicago Bulls' challenge to the NBA's restrictions on the number of superstation broadcasts, Judge Easterbrook criticized the district court for handling the case "like greased lightning":

> Seven weeks from complaint to trial is unheard of in antitrust litigation. Explanations of problematic conduct take time to develop and more time to test. . . Understanding novel practices may require years of study and debate. If litigation ought not to resemble a marathon, neither is the 100-yard dash a good model.

As Judge Easterbrook's comment suggests, antitrust litigation often will and should be time-consuming. One of the unique benefits of administrative litigation before the Commission is that, unlike a federal district court, the FTC's administrative forum provides a concentration of time and expertise on each antitrust matter. This permits the development of a more complete evidentiary record to which the Commission can bring considerable legal and economic resources. With the benefit of a fully developed administrative record, the Commission can and should attempt to expedite the issuance of its opinions at the termination of the litigation. We have undertaken to do so, and

have had considerable success.

Judge Easterbrook's critical comments about the risks of "greased lightning" antitrust litigation answer, in part, two other questions for FTC merger enforcement, to wit: (1) Should the Commission litigate the merits of Section 7 actions solely in federal district court rather than in administrative proceedings? And more particularly, (2) should the Commission discontinue prosecution of a Section 7 case when it has been denied a preliminary injunction? My answer to the first question is: no. My answer to the second question is: it depends.

A few words about how cases are currently litigated and about the complementary roles of the federal courts and administrative litigation. If a majority of the Commission finds reason to believe that a merger is likely to be anticompetitive, it authorizes staff to petition a federal district court, under Section 13(b) of the FTC Act, for a preliminary injunction pending administrative trial. These "P.I." hearings tend to be perfunctory[13] and are explicitly "preliminary."[14] After

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[13] "Section 13(b) does not contemplate a full-blown trial-type hearing in District Court." *FTC v. Imo Indus., Inc.*, 1992-2 ¶ 69,943 (D.D.C. 1992). Indeed, in the federal district for D.C. and other circuits, there is a local rule presuming that preliminary injunctions are decided on the papers, without a hearing.

[14] *See, e.g., id.* Section 13(b) requires the court to determine only whether the Commission has raised "serious and substantial" questions about the legality of the proposed transaction.

authorizing the preliminary injunction motion, the Commission generally issues an administrative complaint. But this is an independent step that is left to the Commission's discretion.

I think it is clear that Congress fully intended FTC administrative litigation to be the primary forum for adjudication of Section 7 cases and development of Section 7 law. Under Section 11(b) of the Clayton Act, Congress has expressly authorized the Commission, in its sole discretion, to determine the legality of corporate acquisitions by means of an administrative proceeding, subject to review in the court of appeals. Moreover, under Section 13(b) of the FTC Act -- which permits the Commission to seek preliminary injunctions in federal court in aid of its adjudicative proceedings -- the Commission is the primary (and exclusive) factfinder in all cases in which it issues an administrative complaint. Section 13(b) was intended purely "to assist" the Commission's law enforcement efforts. In creating the Federal Trade Commission and establishing a procedure for administrative determination of the legality of corporate acquisitions and other conduct, Congress recognized the value of specialized expertise in a complex area of the law and economic regulatory policy.[15]

Let me give you an example of the importance of the

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[15] *See, e.g., Atlantic Refining Co. v. FTC*, 381 U.S. 357, 367 (1965); *Stanley Works v. FTC*, 469 F.2d 498, 505 (2d Cir. 1972), *cert. denied*, 412 U.S. 928 (1973).

administrative process in developing expertise in a complex area of the law. Hospital merger enforcement is a major enforcement initiative at both of the antitrust agencies. Yet in the early 1980s the jurisprudence and economic thinking in this area were in their infancy. The foundations of that analysis were set forth a decade ago in the Commission's opinion in *Hospital Corporation of America*.[16] In its 1985 decision the Commission set forth a detailed road map on how hospital mergers should be analyzed, resolving along the way important questions of market definition, the risk of coordinated interaction, entry barriers, and the role of regulation.

The *HCA* opinion serves as the lodestar for merger analysis in this complex area of the law. Its not surprising that almost every subsequent hospital merger case, litigated before the federal courts or the Commission, relies on *HCA*. But don't rely on my opinion about the importance of the decision. In upholding the Commission's decision on appeal, Judge Posner went out of his way to call it a "model of lucidity" and praised the Commission for accepting the difficult task of focusing on "harm to consumers" rather than relying on discredited legal precedents of the 1960s.[17]

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[16] 106 F.T.C. 455 (1985) (Calvani, C.).

[17] *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1385 (7th Cir. 1986).

It is safe to say that *HCA* would not have been written by a federal district court. Moreover, it is only one example of where the Commission, through the use of its administrative process, has advanced the understanding of a complex area of law and economics and, in turn, has advanced Congress's objectives in enacting the Clayton Act. As Judge Posner stated in *HCA*:

> One of the main reasons for creating the Federal Trade Commission and giving it concurrent jurisdiction to enforce the Clayton Act was that Congress distrusted judicial determination of antitrust questions. It thought the assistance of an administrative body would be helpful in resolving such questions and indeed *expected the FTC to take the leading role in enforcing the Clayton Act.*[18]

This brings me to my second question, about whether the Commission should discontinue administrative proceedings when it has failed to secure a preliminary injunction. Since our sister agency, the Antitrust Division, will often drop its challenge when denied a preliminary injunction, some practitioners have questioned whether there are inconsistent standards applied by the two agencies. Accordingly, some have suggested that the

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[18] *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1387 (7th Cir. 1986) (*citing* Henderson, THE FEDERAL TRADE COMMISSION, ch. 1 (1924))(emphasis added), *cert. denied*, 481 U.S. 1038 (1987).

district courts -- and in essence the preliminary injunction hearing -- be the sole forum for adjudicating Section 7 matters. I do not think this proposal is consistent with the public interest.

A preliminary injunction hearing is *preliminary* and is not intended to be a judgment on the merits.[19] The risks inherent in a lack of specialized expertise in adjudicating complex antitrust issues are magnified in a preliminary injunction proceeding. Again Judge Posner has enlightened us: "The problem for the judge asked to grant a preliminary injunction is that he is being asked to rule in a hurry, on the basis of incomplete information. The risk of error is high."[20]

So I question whether the determination of a federal judge in denying a preliminary injunction, in an expedited proceeding conducted under intense time pressure and procedural strictures, will often be an adequate substitute for a more complete analysis

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[19] The Supreme Court has described the essential rationale for distinguishing a preliminary injunction hearing (regarding "likelihood of success") from a decision on the merits: "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given the limited purpose, and given the haste that is often necessary if these positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *University of Texas v. Camenish*, 451 U.S. 390, 394-95 (1981) (citations omitted).

[20] *See* Richard Posner, ECONOMIC ANALYSIS OF LAW 554 (4th ed. 1992).

of the issues in a Section 7 case. That is not to say, however, that the Commission should ignore such a determination in making its own decision whether to continue prosecuting the case. In exercising our prosecutorial discretion, we should carefully examine the court's decision in light of the breadth and depth of the evidentiary proceedings and the extent to which the decision incorporates sound antitrust analysis (consistent with our *Horizontal Merger Guidelines*[21] and modern Section 7 precedent).[22]

There is at least one other important reason why it may not make sense to continue administrative litigation after the denial of a preliminary injunction, which relates to the underlying purposes of the HSR Act. It can be difficult to obtain meaningful relief -- to "unscramble the eggs" -- after an anticompetitive merger has been consummated, particularly where the parties have had time to fully integrate their assets and activities and to rearrange commercial relationships.[23] As a practical matter, denial of preliminary relief -- at least after all appeals have been exhausted, where appropriate -- may mean that any victory by the Commission in subsequent litigation is

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[21] U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (1992), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104.

[22] The decision to issue an administrative complaint is committed to the Commission's discretion.

[23] *FTC v. Weyerhauser Co.*, 665 F.2d 1072, 1081 (D.C. Cir. 1981); *see* Kenneth Elzinga, *The Antimerger Laws: Pyrrhic Victories*, 12 J.L. & ECON. 43 (1969).

nothing more than pyrrhic. As I have noted in other contexts, prosecutorial discretion must be exercised to maximize the public interest given resource constraints.[24] In some cases, this calculation may suggest that we react to the denial of a preliminary injunction by reallocating our resources to cases in which obtaining effective relief at the end of the day is more likely.

Thus, it will be a rare case when the Commission should terminate a prosecution *simply* because it has been denied a preliminary injunction. A proviso to Section 13(b) permits the Commission to request, and the court to grant, a permanent injunction in a "proper case," in lieu of administrative resolution of the matter.[25] Perhaps the Commission should attempt to define (at least internally) what might constitute a proper case either for consolidation (where a preliminary injunction is granted) or for discontinuing action (where a preliminary injunction is denied). The legislative history to the 13(b) proviso indicates that it is to be invoked only when the agency concludes that a case presents no issues warranting

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[24] Roscoe B. Starek, III, *How Regulators Decide Whom to Prosecute: One View from the Federal Trade Commission*, Remarks Before The Commonwealth Club of California, July 28, 1993. *See* William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 Tex. L. Rev. 661 (1982).

[25] *See, e.g., United States v. JS&A Group, Inc.*, 716 F.2d 451 (7th Cir. 1983).

detailed administrative consideration.[26]

In any event, as I have said, the statutes we enforce make it clear that the Congress believes that the administrative forum is the superior forum for judging antitrust matters on the merits. Of course, in order to justify this view, the Commission should continue to seek ways to strike the proper balance between expedited action and fully-informed judgment in the administrative process. The Commission's new deadlines and other procedural reforms were designed with this objective in mind. The next step is to find ways to increase the speed and efficiency of FTC administrative trials. I intend to propose that the Commission begin a systematic review of our adjudicative rules of practice and the current operations of our administrative process. We should try to import into our trials the best practices of other administrative courts and the Article III courts, and to avoid some of the worst.

There is one situation, however, in which the Commission generally can avoid administrative litigation following a preliminary injunction hearing. Specifically, it is probably time for the Commission to reconsider its longstanding policy of insisting on obtaining an order requiring prior approval of future acquisitions in cases in which the acquiring firm has abandoned a transaction. Although there was once an important

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[26] *Id.* at 456-57.

place for such prior approval orders, the policy today has very little justification. First, I think it is unlikely that there exists a class of "Section 7 recidivists" who need to be placed on probation to preclude future violations. A punitive model of antitrust sanctions has no place in dealing with morally neutral business transactions that are subject to Commission review. We may determine, after a full rule of reason inquiry, that a particular acquisition is likely substantially to lessen competition in violation of Section 7. But that does not change the moral character of the transaction: mergers are neither "right" nor "wrong"; instead, they are either likely to be anticompetitive or not likely to be anticompetitive. Thus, a transaction that the Commission has determined was likely to lessen competition and is then abandoned should not, by itself, qualify the proposed acquirer for probation. The Commission's prior approval policy has been described in the FTC Operating Manual, which explicitly eschews the punitive model:

> Whether such relief is appropriate depends not on whether the respondent has a history of law violations or otherwise deserves to be punished, but on whether, in view of the violation proven in [the case], the relief is necessary to detect and investigate further acquisitions that may significantly endanger

competition.[27]

Second, in the age of HSR pre-merger notification and waiting requirements and Section 13(b) preliminary injunctions, the prior approval order is unlikely to be "necessary to detect and investigate further acquisitions that may significantly endanger competition."[28] We cannot justify prior approval as a necessary prophylactic remedy simply because we have identified a market in which conditions are conducive to Section 7 violations. Any transaction that meets the reporting thresholds of HSR will be subject to meaningful pre-consummation antitrust review, *with or without* an applicable prior approval requirement. Thus, the appropriate policy may be that the Commission seek prior approval provisions (i) where the transaction at issue violates Section 7 and (ii) where market conditions suggest that future acquisitions pose a threat to competition, but (iii) only with respect to acquisitions that are not otherwise subject to HSR.[29] In fact, under these circumstances, I would favor imposing a notice and

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[27] *But see The Coca Cola Company*, 117 F.T.C. ___ (1994), slip op. at 67 (prior approval is appropriate, and appropriately shifts the burden of justifying a covered acquisition, "given that respondent attempted to make an unlawful anticompetitive acquisition," (*citing FTC v. National Lead Co.*, 352 U.S. 419, 431 (1957) for the proposition that "those caught violating the Act must expect some fencing in.")).

[28] *See American Medical International*, 104 F.T.C. 177, 224-26 (1984); *HCA*, 106 F.T.C. at 513-17.

[29] Since most prior approval provisions contain *de minimis* exceptions, the proper role for any notice and wait provision may be limited to transactions above the *de minimis* maximum but below the HSR minimums.

wait obligation similar to the HSR requirements rather than shifting the burden of proof through a prior approval provision.[30]

The Commission's general policy might not be objectionable if it did not place unnecessary burdens on parties subject to prior approval orders. The Commission has recognized that such orders can be burdensome and has fashioned exceptions to the standard.[31] If prior approval is substantively coextensive with Section 7 and procedurally coextensive with the HSR Act, then there is no principled basis for covering HSR-reportable transactions. On the other hand, shifting the burden of proof to the proponent of a future transaction is unnecessary to the sound administration of Section 7.

In addition to focusing on the procedural and operational issues, we must keep our eyes on the bigger prize of substantive, doctrinal coherence in the federal antitrust enforcement mission. All the procedural reform and efficiency in the world cannot justify antitrust enforcement if it does not advance the public interest. When the antitrust agencies are placed under the microscope, we must be certain that our enforcement is based on

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[30] Such a policy, of course, would apply to provisions, in any Section 7 order, that require prior approval for acquisitions.

[31] *See American Medical International, Inc.*, 104 F.T.C. 1, 224-26 (1984).

clear standards and viable theories of harm to competition. I believe that the benefits of analytically coherent and theoretically well-founded antitrust enforcement far outweigh the costs. You have probably noticed that I placed a huge qualifier in that sentence: "analytically coherent and theoretically well-founded." In 1978, Robert Bork, who was then a professor at Yale Law School, spoke of the "Crisis in Antitrust" and warned, among other things, that the ubiquitous, bipartisan support for the antitrust laws could not survive a sustained period of analytically incoherent and sometimes contradictory doctrines and policies.

Over the last twenty years, antitrust policy has undergone substantial, positive, and (I hope) immutable change. Starting with *General Dynamics*, *GTE Sylvania*, and *Broadcast Music* in the 1970s, antitrust law has moved away from simple categorizations of conduct based on an array of sometimes conflicting objectives and toward a more explicitly economic analysis of actual or likely effects based on a single objective: prohibiting the creation of market power, or facilitating its exercise. I think the near consensus of antitrust practitioners, enforcers, and scholars is that these changes have produced a body of antitrust law and a federal antitrust enforcement policy that are more predictable and generally more consistent with the public interest.

Let's look at one area in which the consensus is currently being contested in a way that could trigger the reaction Robert Bork warned us about: vertical mergers. Many of the theories for attacking vertical transactions have a relatively weak analytical foundation and do not provide a sufficient basis for distinguishing anticompetitive transactions from other transactions based on any observable criteria. This is in marked contrast to current federal horizontal merger policy. The analytical framework of the *DOJ and FTC Horizontal Merger Guidelines*[32] is based on an extensive, well-developed body of theoretical analysis. The basic assumption underlying horizontal merger enforcement -- that increased concentration in a relevant market increases the probability of coordinated behavior, other things equal -- is shared by a broad consensus of academics and policy makers.

By contrast, no similar consensus exists regarding theories of anticompetitive effects of vertical mergers. This is not surprising. Vertical mergers differ fundamentally from horizontal mergers. They do not create market power -- concentration in the relevant upstream and downstream markets is unchanged by these mergers. Rather, at worst, vertical mergers

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[32] U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (1992), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104.

may alter the manner in which existing market power is exercised.[33] Moreover, the theoretical analysis suggesting harm from vertical mergers is fragmentary and unsupported by any systematic empirical scholarship. In fact, most empirical studies of vertical mergers have found evidence consistent with efficiency explanations for vertical integration.[34] Consequently, no widely shared premises about the competitive effects of vertical integration have emerged from this analysis that could effectively guide the design and execution of antitrust enforcement policies.[35]

Federal enforcement action against vertical mergers is a relatively rare phenomenon. The paucity of vertical merger enforcement activity is the continuation of a trend that dates back to early 1970s (and perhaps even the mid-1960s).[36] I cannot

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[33] *See* Timothy Brennan, *Understanding Raising Rivals' Costs*, 33 ANTITRUST BULL. 95 (1988).

[34] *See* Dennis Carlton and Jeffrey Perloff, MODERN INDUSTRIAL ORGANIZATION 540-43 (1994), and the sources cited therein.

[35] Indeed, one of the prominent contributors to the theory of anticompetitive vertical integration warns explicitly of the difficulties and dangers of attempting to use these theories to guide policy. *See* Michael A. Salinger, *Vertical Mergers and Market Foreclosure*, 103 Q.J. ECON. 345, 355 (1988).

[36] Available statistics on mergers and acquisitions show that in the 1970s, the FTC and the DOJ challenged only two purely vertical transactions. By contrast, in the 1960s twenty-seven purely vertical transactions were challenged. *See* Alan Fisher and Richard Sciacca, *An Economic Analysis of Vertical Merger Enforcement Policy*, 6 RES. L. & ECON. 1 (1984) (Table 8). The agencies appear not to have challenged a purely vertical transaction during the period from 1981-93. I note that this

pretend to know all of the reasons underlying the decline of vertical merger enforcement at the Federal agencies during this period. I would surmise that it reflects in part the considerable scholarly criticism that has been directed at the theories of "market foreclosure" under which most of these cases had been brought.[37] The fundamental problem with vertical merger enforcement during this period was an inability to articulate a coherent theory of harm to competition -- as opposed to mere harm to competitors.[38]

This fundamental problem remains. Although theories have been devised showing that vertical mergers might, under certain conditions, cause final goods prices to increase,[39] these models

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latter period provides a vast data set for an empirical analysis of the competitive effects of vertical mergers.

[37] For a representative sampling of this criticism, *see* Robert Bork, THE ANTITRUST PARADOX 225-45 (1978); Roger Blair and David Kaserman, LAW AND ECONOMICS OF VERTICAL INTEGRATION AND CONTROL 147-51 (1983). I think it is fair to say that the agencies were also deterred by the not unrelated trend of adjudicative failure in vertical merger enforcement actions. *See, e.g., United States v. Siemens Corp.*, 621 F.2d 499 (2nd Cir. 1980); *Tenneco, Inc. v. FTC*, 689 F.2d. 346 (2d Cir. 1982).

[38] This is why so-called "customer complaints" must be assessed far differently in vertical transactions from how they are evaluated in horizontal transactions. In the former, customers are also competitors of the integrated entity. Efficient vertical mergers that benefit consumers also "harm" rivals.

[39] Examples include John Vernon and Daniel Graham, *Profitability of Monopolization by Vertical Integration*, 79 J. POL. ECON. 924 (1971); Richard Schmalensee, *A Note on the Theory of Vertical Integration*, 81 J. POL. ECON. 442 (1973); Frederick R. Warren-Boulton, *Vertical Control With Variable Proportions*, 82 J. POL. ECON. 783 (1974); Michael Waterson, *Vertical Integration,*

have yet to reach the stage where they can provide a basis for a more aggressive enforcement posture towards vertical mergers. These models are notorious for their lack of generality -- their inability to predict *likely*, as distinguished from *possible*, effects even under the most strictly devised theoretical conditions[40] -- and for ignoring procompetitive rationales for vertical mergers that have greater empirical support.[41] But even assuming that these models describe an empirically relevant class of vertical transactions, their practical applicability remains severely limited.

The difficulties we may encounter in crafting defensible vertical enforcement policies can perhaps best be illustrated by contrasting existing horizontal merger enforcement standards with some suggested standards for vertical merger enforcement. With

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Variable Proportions, and Oligopoly, 92 ECON. J. 129 (1982); Parthasaradhi Mallela and Babu Nahata, *Theory of Vertical Control With Variable Proportions*, 88 J. POL. ECON. 1009 (1980); Fred M. Westfield, *Vertical Integration: Does Product Price Rise or Fall?* 71 AM. ECON. REV. 334 (1981); Masahiro Abiru, *Vertical Integration, Variable Proportions, and Successive Oligopolies*, 36 J. IND. ECON. 315 (1988); and Salinger, supra note 34.

[40] Under section 7, of course, we may challenge a transaction only if it is *likely* to lessen competition substantially.

[41] These rationales include reducing transactions costs and preventing "post-contractual opportunism" on the part of buyers and sellers. *See, e.g.*, Kirk Monteverde and David J. Teece, *Supplier Switching Costs and Vertical Integration in the Automobile Industry*, 13 BELL J. ECON. 206 (1982a); Kirk Monteverde and David J. Teece, *Appropriable Rents and Quasi-Vertical Integration*, 25 J. L. & ECON. 321 (1982); Benjamin Klein, *Vertical Integration as Organizational Ownership: The Fisher Body-General Motors Relationship Revisited*, 4 J. L. ECON. & ORG. 199 (1988).

horizontal mergers, we assume that if pre-merger conditions are conducive to the exercise of market power by some or all incumbents (*e.g.*, high concentration coupled with a low fringe supply elasticity and difficult entry), the merger likely will reduce welfare unless there are demonstrable merger-related efficiencies. Further, the greater the degree of pre-merger competitive imperfection, the greater the presumed welfare loss from the transaction (and thus the greater the merger-specific efficiencies necessary to rescue the transaction from legal challenge).

It is tempting to think that we can create vertical enforcement standards simply by extrapolating from these horizontal guidelines. And in a limited sense, we can: as with horizontal mergers, vertical mergers should not be considered competitively troubling absent high concentration in a relevant market. Past this point, however, the analogy breaks down. In all of the theories of vertical integration that raise the possibility of post-merger price increases, the incentive to merge arises *precisely because* the upstream firm has market power pre-merger. Because there was pre-merger market power, the merger leads to a lower input price for the integrated downstream entity, which causes it to increase its output. The input price to nonintegrated rivals may rise or fall. Sometimes the net effect on downstream price is positive; other times not. But most importantly for our purposes, there is no general,

predictable relationship between observable variables (such as pre-merger concentration) and the net price effect of a vertical merger. High pre-merger price-cost margins increase the size of the efficiency gain to the integrated firm as well as the potential for anticompetitive input price increases. Consequently, if we adopt decision rules for vertical mergers that mimic those applied to horizontal mergers, the only thing we can safely predict is that efficient vertical acquisitions will be frequently challenged -- and thus frequently deterred.

As long as we are in the vertical enforcement business, we should provide clear guidance regarding our analytical framework and enforcement intentions. In this regard, a few speeches describing some voguish foreclosure theories cannot substitute for the hard analysis that drafting guidelines would necessitate. In this and other areas of antitrust enforcement, we must remain focused on our mission: protecting competition and consumers, not merely competitors.

I trust I have conveyed a resolve to define our mission and to reinvent our operations in the public interest. I think the entire Commission is interested in any other views from outside the agency on how we may improve the work we do and the way we do it.