11-21-05

BEFORE THE ANTITRUST MODERNIZATION COMMISSION
Statement of Thomas B. Leary*

Hearing on Federal Civil Remedies for Antitrust Offenses
December 1, 2005

## I. Introduction and Summary

I welcome the opportunity to present my individual views on federal civil remedies in antitrust cases, with particular emphasis on the role of the Federal Trade Commission ("FTC").

It is useful to begin with some historical perspective. The FTC was originally created in 1914 primarily to provide future guidance, rather than to remedy offenses that had occurred in the past. The FTC would be a special kind of prosecutor. Over time, for a variety of reasons, this special role of the FTC became blurred. Some commentators have noted that in many respects the remedial actions of the FTC today parallel or even duplicate those that are also sought by other plaintiffs, public and private.

This statement will not focus on the advantages or disadvantages of particular remedial approaches, but rather focus on the larger issues raised by the convergence of civil remedies available to the FTC and its sister federal enforcement agency, the Antitrust Division of the Department of Justice ("DOJ"). Despite this general convergence, there appear to be some anomalous differences that may no longer make sense. I believe that recommendations by this Commission could help to reduce these anomalies. At the same time, I believe that the present allocation of responsibilities has an underlying logic, which is not generally recognized but that should be preserved. Accordingly, I do not believe that legislative changes are either feasible or necessary.

## II. The Historical Background

### A. The FTC's Early Years

The legislative history of the Federal Trade Commission Act is complex, but there is a direct link between the 1911 *Standard Oil* [1] decision, which first explicitly articulated the "rule

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* Commissioner, Federal Trade Commission. These views are based on my experience at the Commission, as well as experience in the private sector, but they do not necessarily represent the views of any other Commissioner.

[1] *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). For a comprehensive study of the FTC's origins, *see* Marc Winerman, The Origins of the FTC: Concentration, Cooperation,

of reason," and the passage of the Act just three years later. Immediately after the decision was announced, one of the major architects of the Act stated on the floor of the Senate:[2]

> "The question therefore presents itself to us as whether we are to . . . subject the question as to the reasonableness or unreasonableness of any restraint upon trade . . . to the varying judgements of different courts . . . or whether we will organize, as the servant of Congress, an administrative tribunal similar to the Interstate Commerce Commission . . . ."

Three years later, he commented in this Statement opening the debate on the bill:[3]

> "Many men are doing business under apprehension of the law when, with safe guidance, they need have no apprehension of it. A commission of this kind will be instructive rather than punitive, helpful rather than prejudicial, and will be of immense advantage to the business world."

The distinction between the role of the proposed commission and the role of a typical prosecutor was underscored by the inclusion of additional powers to gather information and to issue reports. President Wilson emphasized that the new commission would have "[p]owers of guidance and accommodation," in sharp distinction to antagonistic prosecutors.[4]

The idea that the FTC is primarily designed to provide future guidance, rather than impose remedies for past misconduct, was a guiding principle for more than sixty years. The FTC issued a substantial number of industry guides and trade practice rules (and later, trade regulation rules),[5] for the conduct of various businesses and, apart from prosecutions for violations of its rules and orders, its enforcement efforts focused on administrative actions for injunctive relief.[6] The prospective nature of FTC remedies was underscored by the fact that a

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Control, and Competition, 71 Antitrust L.J. 1 (2003).

[2] 47 Cong. Rec. 1225 (May 16, 1911). Sen. Newlands was Chairman of the Senate Commerce Committee at the time. *See* Winerman, *supra* n.1 at 76.

[3] 51 Cong. Rec. 11086 (June 25, 1914).

[4] *See* Winerman, *supra* n. 1 at 93.

[5] *See generally*, ABA Section of Antitrust Law, Antitrust Law Developments at 698-700 (5th ed. 2002).

[6] As recently as 1975, the FTC had nine Administrative Law Judges (once called Hearing Examiners), to try these cases. Today, the FTC has two.

decision finding a violation of the FTC Act was not given collateral estoppel or *prima facie* effect in a subsequent antitrust treble-damage action against the same respondent, based on the same conduct.[7]

B. Intervening Events

A number of events have, in combination, turned the FTC away from primary reliance on prospective guidance. For example:

> (l) A rich jurisprudence on the "rule of reason" has emerged since *Standard Oil* was decided. This jurisprudence has been flexible and responsive to changes in economic learning.[8] A broad policy consensus exists in many areas, with fewer gaps to be filled by agency guidance or by application of FTC Act § 5.
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> (2) In 1973, Congress passed Section 13(b) of the FTC Act,[9] which enabled the FTC to seek preliminary injunctions against problematic mergers. The utility of this authority was enhanced by the subsequent passage in 1976 of the Hart-Scott-Rodino Antitrust Improvement Act,[10] which required advance notification of mergers above certain size thresholds. Somewhat later, the FTC was upheld when it used Section 13(b) to get prompt ancillary equitable relief - - including asset freezes and consumer redress - - against those charged with false and deceptive practices.[11] Even more recently, the FTC successfully obtained similar ancillary relief against those charged with non-merger antitrust offenses, in a high-visibility case.[12]

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[7] *See* 15 U.S.C. § 16(a)(1994); *In re Antibiotic Antitrust Actions*, 333 F. Supp. 317, 322 (S.D.N.Y. 1971).

[8] *See, e.g.*, William Kovacic, The Modern Evolution of U.S. Competition Policy Enforcement Norms, 71 Antitrust L.J. 377 (2003).

[9] 15 U.S.C. § 53(b).

[10] Clayton Act § 7A, 15 U.S.C. § 18a.

[11] *E.g., FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 247 (9th Cir. 1989). *Compare FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952) (a case decided before Section 13(b) was passed, where the court said: "Orders of the Federal Trade Commission are not intended to . . . exact compensatory damages for past acts . . .").

[12] *F.T.C. v. Mylan Labs., Inc.*, 62 F. Supp. 28, 25 (D.D.C. 1999) (District Court opinion denying motion to dismiss FTC action for permanent injunction and other equitable

(3) While all this was going on, the FTC's trade regulation rulemaking activities[13] generally fell into disfavor. Indeed, absent statutory directives or Congressional expressions of interest, the FTC has not exercised its power to prescribe rules since the 1980s.[14] There are a number of reasons for this development, including the increased availability of and reliance on judicial remedies; the considerable burdens of formal rulemaking; and Congressional hostility to certain proposed FTC rules that seemed to be overly regulatory.

C. Where We Are Now

It should be noted that very recently there has been an increase in administrative cases, largely as the result of expanded non-merger enforcement and attacks on already consummated mergers.[15] In the majority of cases, however, the FTC still relies on federal court litigation to obtain its remedies. In other words, there has been a substantial convergence between the prosecutorial roles of the two federal enforcement agencies. At the same time, there are - - at least facially - - some lingering differences in the remedies available to them.

The balance of this Statement will discuss, first, the concerns expressed by the Antitrust Section of the American Bar Association about differences in merger enforcement between the DOJ and the FTC.[16] Second, the Statement will discuss some differences in relief available for non-merger cases. This Statement will conclude with more general comments on the continued logic and utility of multiple enforcement agencies.

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relief, including disgorgement); *Fed. Trade Comm'n v. Mylan Pharm., Inc*., File No. X990015 (Nov. 29, 2000) (settlement of District Court action, including disgorgement remedy), http://www.ftc.gov/opa/2000/11/mylanfin.htm.

[13] Although trade regulation rules technically are issued under the auspices of consumer protection, they obviously have competitive effects.

[14] *See, e.g.*, Credit Practices, 16 C.F.R. pt. 444 (effective Mar. 1, 1985) and Used Motor Vehicle Trade Regulation Rule, 16 C.F.R. pt. 455 (effective May 1985). The FTC, however, has amended some of the trade regulation rules since that time.

[15] *See* Thomas Leary, The Muris Legacy, Antitrust Source, at p. 6 (Nov. 2004), http://www.abanet.org/antitrust/source/11-04/Nov04-Leary1129.pdf.

[16] ABA Section of Antitrust Law, Comments Regarding Differential Merger Enforcement Standards (Oct. 28, 2005).

## III. Issues Presented by Multiple Enforcement Agencies

### A. Merger Review by Both the FTC and the DOJ

There is no need to burden this Commission with a detailed and substantially concurring analysis of the issues presented in the thoughtful submission of the Antitrust Law Section late last month. It is enough to say that I generally agree with the ABA's conclusions about the nature of the problems, but suggest that the agencies themselves have already mitigated these problems, and can do more, without any statutory revisions. Some examples:

#### (1) Preliminary Injunction Standards

The ABA submission points out, first, that some decisions seem to apply a more lenient standard when the FTC applies for a preliminary injunction than they do when the DOJ applies. It is not possible to know whether the facially different standards have been outcome-determinative; I personally doubt that they have been in recent years, and suspect our litigators would agree. This does not conclude the argument, however, because the perception that there is a difference is also a matter of some concern.

The rationale for a different standard depends on the assumption that FTC administrative proceedings will follow. As discussed below in subsection (2), this assumption is no longer entirely accurate. I believe that counsel have an obligation to be candid about this reality, and that should alleviate the problem. There is, however, a closely related issue that the FTC cannot address by itself. This Commission may want to consider whether preliminary injunction hurdles for both the FTC and the DOJ have been set too high. Have motions for preliminary injunctions been treated essentially as motions for permanent injunctions - - *i.e.*, as outcome determinative - - and, if so, is this a good idea? The issue is particularly important if steps are taken to compress the time allotted for agency review.

On the merits, there appear to be arguments in support of both sides. If a merger is driven by efficiencies, for example, it seems odd that they would disappear so quickly. On the other hand, it may be that the value of the acquiree erodes dramatically if the ultimate decision takes a long time. This is an area where opinions seem to be firm, but actual knowledge seems to be soft, and it is thus an appropriate area for further study by this Commission.

#### (2) The FTC's Administrative Litigation Option

I continue to believe that administrative litigation is a desirable option in some cases, both merger and non-merger. I also believe, however, that the FTC should not pursue administrative litigation promptly after it has lost a preliminary injunction motion in federal court. In other words, I think the FTC should elect up front whether to take the administrative or the judicial route. A commitment to elect, rather than preserve both options, is not really a big

stretch. Since 1995, the FTC has had in place a policy that narrowly restricts its ability to pursue administrative litigation following a loss in federal court,[17] and the FTC has never done so since the policy statement was issued.

My own votes in the recent *Arch Coal* matter are consistent with this view.[18] I thought the *Arch Coal* matter was well suited for administrative litigation. The FTC did not have the usual concern about dissipation of the acquired company's assets; the coal in the ground would not be "scrambled" away. Moreover, the subtleties of the FTC's coordinated effects story could be better developed, by both sides, outside the intense pressures of a preliminary injunction hearing. Hence, my disagreement with the decision to seek an injunction in court, and my support for an administrative complaint. Once the preliminary injunction had been denied, however, I agreed with the majority of my colleagues that further administrative litigation would not be appropriate[19] - - notwithstanding the fact that I was troubled by some statements in the District Court's adverse opinion.

Therefore, I agree with the ABA's recommendation (p. 9) that the FTC not pursue administrative litigation immediately after the loss of a preliminary injunction motion. If the FTC were to adopt this suggestion, it also would be easier for the agency's commissioners to exercise some active control over the litigation strategy in federal court. As it is now, the agency routinely votes out an administrative complaint concurrent with, or shortly after, the federal court complaint, in order to preserve a remedy that it does not use in practice. Once this is done, the commissioners tend to distance themselves from the prosecution of the federal court action, as well as the administrative action.

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[17] *See* Statement of the Federal Trade Commission Policy Regarding Administrative Merger Litigation Following Denial of a Preliminary Injunction, 60 Fed. Reg. 39, 741 (1995).

[18] *In the Matter of Arch Coal, Inc., et al.*, Docket No. 9316 (federal complaint filed April 1, 2004, 4-1 Commission vote; administrative complaint filed April 7, 2004, 5-0 Commission vote), http://www.ftc.gov/opa/2004/04/archcoalcomp.htm; Statement of Commissioner Thomas B. Leary, *Arch Coal, Inc.*, File No. 931-0191 (statement explaining vote opposing preliminary injunction and in favor of administrative complaint), http://www.ftc.gov/os/caselist/0310191/040407/learystatement0310191.pdf; *Fed. Trade Comm'n v. Arch Coal, Inc., et al.*, 329 F.Supp. 2d 109 (2004 D.D.C.) (District Court opinion denying FTC request for preliminary injunction).

[19] Additional Statement of Commissioner Thomas B. Leary, *Arch Coal, Inc.*, Docket No. 9316 (statement joining 4-1 vote to close investigation), http://www.ftc.gov/os/adjpro/d9316/050613learystatement.pdf.

I also agree with the ABA, however, that it is important for the FTC to retain the option to proceed administratively if new evidence is uncovered. The most obvious case would be one where a merger has been cleared based on certain clearly stated assumptions about intentions or incentives, which later turn out to be wrong.[20] Another likely case would be one where there were significant price increases shortly after the merger, which could not be explained by competitive market conditions. In addition, of course, both antitrust agencies should continue to have authority to move against consummated mergers that were not notified in the first place, and the administrative process may be particularly appropriate for some of these cases.

(3) The Clearance Process.

There is one further suggestion relating to dual merger enforcement which the ABA does not address in its most recent statement, but which this Commission might appropriately consider. Occasional protracted interagency clearance battles may be of greater practical concern than the theoretical exposure to both a judicial and an administrative process in the FTC. In an act of enlightened statesmanship, Tim Muris and Charles James - - then heads of the FTC and the DOJ respectively - - arrived at a global agreement that effectively eliminated clearance delays. As we all know, the agreement collapsed as a result of political pressure that was based on serious misunderstandings in Congress.[21] This Commission could perform a valuable service (and help to ease Congressional misgivings) if it were to encourage renewed efforts by the agencies to revive the idea of a global agreement on clearance matters.

B. Ancillary Equitable Relief

As mentioned above, it now seems settled that the FTC can get the full spectrum of equitable relief under Section 13(b) of the FTC Act, including permanent injunctions, asset freezes, disgorgement and restitution. It is reasonable to assume that the DOJ could get similar relief, under Section 4 of the Sherman Act, 15 U.S.C. § 4, and Section 15 of the Clayton Act, 15 U.S.C. § 25, which both have been available for a much longer time. To my knowledge,

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[20] *Cf.* Statement of Commissioner Thomas B. Leary, *Synopsis Inc./Avant! Corporation*, File No. 021-0049, http://www.ftc.gov/os/2002/07/avantlearystmnt.htm.

[21] *See*, Statement of Commissioners Orson Swindle and Thomas B. Leary, Jan. 18, 2002, Memorandum of Agreement between the Federal Trade Commission and The Antitrust Division of the United States Department of Justice Concerning Clearance Procedures for Investigations, http://www.ftc.gov/opa/2002/01/ftcdojostl.htm. The misunderstanding arose because some Senators apparently believed the agencies were fundamentally re-allocating jurisdiction among themselves, without Congressional authorization, when they were merely attempting to codify - - tentatively, and for a limited time - - allocation decisions that had previously been made, without objection, on an *ad hoc* basis.

however, the DOJ has never sought to use this authority to obtain either disgorgement or restitution, as a civil remedy. This restraint may be explained today by the DOJ's current emphasis on criminal prosecution - - which enables the DOJ to seek fines measured by "twice the gross gain or twice the gross loss," with a generous presumption on the amount of the illegal "overcharge."[22] However, the DOJ apparently did not seek civil equitable recoveries when the available criminal fines were much lower.

This historic restraint of the DOJ is mirrored by the FTC's recent Policy Statement on the use of Section 13(b) in antitrust cases.[23] This Statement indicates that the FTC intends to use its new-found authority sparingly, in cases where (i) the underlying violation is clear, (ii) the appropriate remedial payment can be calculated and (iii) other remedies are "unlikely to result in complete relief."

In light of the current caution displayed by both agencies in the area of equitable relief,[24] I do not believe that this Commission needs to recommend any legislative changes. It might be helpful, however, if this Commission were to affirmatively provide its views about the current policies of both agencies, for the guidance of future administrations.

C. Antitrust Enforcement by Multiple Agencies

The foregoing discussion - - which highlights some parallels between the ability of the DOJ and the FTC to obtain civil remedies in antitrust cases, and recommends some further convergence - - inevitably raises the issue of whether their present dual enforcement responsibilities continue to make sense. Issues raised by dual federal enforcement, as well as issues raised by concurrent state enforcement, have been addressed by others at previous

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[22] *See* 18 U.S.C. § 3571(d) and Sentencing Guidelines § 2 R.I. 1(d).

[23] FTC Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45,820 (Aug. 4, 2003), *available at* http://www.ftc.gov/os/2003/07/disgorgementfrn.htm.

[24] The FTC's Policy Statement has alleviated my original concerns about the use of equitable relief in antitrust cases.

hearings. This statement will not discuss state enforcement,[25] but will provide an additional perspective on dual federal enforcement.[26]

We need to take account of the full spectrum of laws that deal with market distortions. When people talk about the overlaps between the FTC and the DOJ, they tend to focus on antitrust alone - - which is understandable at these hearings, given the name of this Commission - - but antitrust and consumer protection law have a lot more in common than is generally appreciated. Both deal with market distortions; the difference is that antitrust law deals with supply-side effects and consumer protection law deals with demand-side effects.[27] Both are informed by fundamental economic concepts. These laws can be divided very roughly into four different categories, which require rather different prosecutorial skills. They include different varieties of antitrust cases and consumer protection cases.

(1) *Per Se* Antitrust. Most, but not all, *per se* cases are prosecuted criminally. Enforcement is typically aimed at clandestine behavior, often with the aid of informants and high-tech surveillance tools. The focus of the inquiry tends to be on what people did or did not do, and a prosecutor deals as much with issues of truthfulness as the esoterics of antitrust law. Criminal enforcement is the exclusive province of the DOJ.

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[25] There are a number of interesting theoretical issues associated with the concurrent responsibilities of the two federal agencies and the fifty states, particularly in light of the efforts to achieve greater convergence worldwide. However, the topic is much too large and complicated for this short statement.

[26] The relative advantages and disadvantages of an executive agency with a single head and an independent agency with many heads is a separate issue. (The current trend in the recently-created antitrust regimes abroad seems to favor a multi-headed agency in the executive branch - - which is interesting but not particularly instructive.)

[27] For a more extended discussion of these similarities, *see* Thomas Leary, Competition Law and Consumer Protection Law: Two Wings of the Same House, 72 Antitrust L.J. 1147 (2005). Both offenses can result in higher prices. (The price effects of antitrust offenses are well known; an offense like deception can have the same effect because consumers are deluded about the value of what they buy.) Both also can result in a misallocation of resources. (Output of a price-fixed product is artificially reduced; output of a deceptively advertised product is artificially increased.)

(2) Antitrust with Balancing Tests.[28] Prosecution here typically addresses overt behavior. Cases come in different varieties of the rule-of-reason, but the common thread is that it is not enough simply to determine what was done; it is also necessary to focus on the likely past or future effects of what was done. Effective prosecution may require special expertise in antitrust law and economics. Truthfulness is not typically the issue (though the credibility of an expert's analysis may be). There is shared responsibility between the DOJ and the FTC.

(3) *Per Se* Consumer Protection: The most important examples are fraud and knowing deception. These consumer protection offenses have much in common with per se antitrust offenses. The focus of the inquiry similarly is on what people did or did not do. The conduct, by definition, is not clandestine but concealment of ill-gotten gains is common. The FTC often acts in tandem with the DOJ in these matters - - although the DOJ people are not from the Antitrust Division. The FTC works with a variety of other DOJ offices, including the Office of Consumer Litigation (which files civil penalty actions[29] and prosecutes some contempt actions); various sections of the Criminal Division; the Office of Foreign Litigation; U.S. Attorney offices throughout the country; and the FBI.

(4) Consumer Protection with Balancing Tests. The most significant cases included in this category are the relatively rare prosecutions for "unfair" practices. By statute, a practice can be prosecuted as "unfair" only if there is "substantial" consumer injury that is not reasonably avoidable or offset by countervailing benefits.[30] The resolution of an unfairness case therefore depends on the balance of various offsetting factors, which looks a lot like a rule-of-reason antitrust case. These prosecutions are the exclusive province of the FTC.

Attached to this statement is a chart that schematically illustrates the relationships among these four categories of cases. Notice that there are certain symmetries in the overall enforcement scheme. There are two categories of antitrust cases, which involve supply-side distortions, and two categories of consumer protection cases, which involve demand-side distortions. There are two categories of cases, which involve offenses that are illegal *per se* and two categories which depend on a balance of various factors. The DOJ and the FTC each have one category of sole responsibility, and they share responsibility for the other two.

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[28] This traditional distinction between two kinds of antitrust cases has been modified by the "sliding scale" terminology of a case like *Polygram Holding Inc.*, 416 F.3d 29, but - - as will become apparent - - any blurring of categories merely reinforces the argument presented here.

[29] 15 U.S.C. § 45(n).

[30] *See* 28 U.S.C. § 516; 15 U.S.C. § 56(a).

The present regime of shared authority may look inefficient if the focus is only on category (2) in the "Southwest" quadrant of the chart, but it looks rather different if the focus is on the full spectrum of federal responsibility for offenses that distort markets. For example, it makes sense to have DOJ prosecutors - - familiar with criminal or hard-core offenders - - involved in the *per se* categories (1) and (3). Moreover, even though criminal antitrust prosecutors do not need to be experts in antitrust law and economics, they surely will be more effective if they understand why *per se* offenses are uniquely harmful. Therefore, something would be lost if category (1) responsibility were severed from category (2).

It is also important for the FTC's consumer protection prosecutors to have a full appreciation of the economics of a market system and, particularly, the merits of consumer sovereignty. Without this appreciation, there may be a strong temptation for the FTC to favor its own judgements about what is good for consumers over the judgements of consumers themselves. Congress perceived that this is what happened in the late 1970s, and that is why the FTC's unfairness authority was ultimately limited by a statute which looks like a codification of an antitrust rule of reason. That is also the reason why something will be lost if category (4) responsibility is separated from category (2).[31] After all, antitrust enforcers have had much longer and more extensive experience with this kind of market-oriented analysis.

The benefits of experience can also flow in the opposite direction. Consider, for example, the complaints in two recent antitrust cases, *Dell* and *Unocal*,[32] where the predicate offense was deception - - a concept with which consumer protection enforcers have had considerable experience.[33] Consider also the fact that "consumer protection" issues like internet

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[31] Proposals to strip the FTC of its antitrust authority were actively supported by some respected commentators about twenty-five years ago. *See* Report, National Commission for the Review of Antitrust Laws and Procedures, 349, 370-377 (1979). I thought this was a bad idea then, and I do now. If the effort had been successful, the surviving parts of the FTC would ultimately have replicated the proposed "Consumer Protection Agency," which many of the same commentators bitterly (and successfully) opposed at that time.

[32] *In the Matter of Dell Computer*, 121 F.T.C. 616 (1996); *In the Matter of Union Oil Company of California*, Docket No. 9305 (consent agreement June 10, 2005), http://www.ftc.gov/opa/2005/06/chevronunocal.htm.

[33] For an elaboration of this view, *see* the recent Comment of Deborah Platt Majoras, Chairman, United States Federal Trade Commission on Proposed Consumer Trading and Standards Authority to the United Kingdom Office of Fair Trading, http://www.ftc.gov/bc/international/docs/majorasresponsedt/pdf. Chairman Majoras pointed out (p. 2) that "The FTC integrates its competition and consumer protection missions by focusing policy and enforcement in both areas on market-oriented outcomes."

fraud or the compromise of security may have as profound market effects as traditional antitrust offenses. Finally, consider that discrete consumer preferences become increasingly important as the economy evolves away from the production and marketing of commodities.[34] Consumer protection enforcers have had far more experience with consumers as individuals rather than as an undifferentiated mass that can be reduced to a statistic.

In other words, I personally believe that the present system is not nearly as inefficient as some have claimed, and inefficiencies may be further reduced if the agencies - - with encouragement from this Commission - - undertake some suggested actions on their own. Whatever spillover inefficiencies remain are surely trivial when compared with those involved in reallocating the various interwoven federal responsibilities among two separate agencies, or somehow combining them all into one. Moreover, there are also additional affirmative benefits from the continued involvement of the FTC in antitrust matters. Apart from its role as a prosecutor, the FTC devotes substantial resources to so-called "competition advocacy" and "competition policy research and development."

Competition advocacy involves the effort to persuade "other government policymakers to apply competition principles as they make decisions affecting consumer welfare."[35] In recent years, the FTC has commented to state and federal lawmakers on a wide range of issues - - including, for example, proposals to restrict participation of lay people in various activities or proposals for price-control legislation.[36] An independent agency has obvious advantages when commenting on politically sensitive issues like these.[37]

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[34] *See* Thomas Leary, The Significance of Variety in Antitrust Analysis, 68 Antitrust L.J. 1007 (2001).

[35] *See* Federal Trade Commission, Fiscal Year 2007 Budget Request at 10 (Sept. 12, 2005).

[36] *See, e.g.*, Comment to the Honorable Thomas Bliley Concerning United States House of Representatives H.R. 2944 to Encourage Competition and Reliability in Electricity Markets (Jan. 2000), http://www.ftc.gov/be/v000002.htm; FTC Staff Comment to the Honorable Dennis Stapleton Concerning Ohio H.B. 325 to Permit Competing Health Care Providers to Engage in Collective Bargaining With Health Plans (Oct. 2002), http://www.ftc.gov/os/2002/10/ohb325.htm; FTC and Department of Justice Comment to the Honorable Matt Blunt Concerning Missouri H.B. 174 to Impose Minimum Service Requirements on Real Estate Brokers (May 2005), http://www.ftc.gov/opa/2005/05/mrealestate.htm.

[37] In addition to enhanced credibility, an independent agency may be more willing to take an unpopular stand. *See, for example,* Chairman Majoras' courageous and lonely testimony for the FTC on November 9, 2005, in opposition to federal "price gouging" legislation. Market

In addition to advocacy, the FTC holds hearings, conducts studies and issues reports, either alone or in conjunction with the DOJ, on competition issues of current concern.[38] This activity - - which seeks comments from a wide spectrum of opinion, and is oriented to the future rather than the past - - has accurately been called "competition policy research and development."[39] I suggest, with all appropriate deference, that this part of the FTC acts like a vest pocket Modernization Commission, in continuous session.

Competition advocacy and competition R&D are probably the roles that must closely approach what the FTC was originally designed to do ninety years ago. But, these activities do not exist in isolation. The FTC is more than an academic think tank. The real-world experience in prosecution of cases informs the FTC's research, just as the research informs decisions about the prosecution of cases.[40] There is value in this link.

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Forces, Competitive Dynamics, and Gasoline Prices: FTC Initiatives to Protect Competitive Markets, Before the Committee on Commerce, Science and Transportation and the Committee on Energy and Natural Resources, U.S. Senate, Nov. 9, 2005, http://www.ftc.gov/os/testimony/051109gaspricetest3.pdf.

[38] *See, for example,* Competition R&D: Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace (1996), http://www.ftc.gov/opp/global/report/gc_v2.pdf; To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy (2003), http://www.ftc.gov/opa/2003/10/cpreport.htm; Improving Health Care: A Dose of Competition (2004), http://www.ftc.gov/opa/2004/07/healthcarerpt.htm; Gasoline Price Changes: The Dynamic of Supply, Demand and Competition (2005), http://www.ftc.gov/opa/2005/07/gaspricefactor.htm.

[39] For a summary description, *see* William Kovacic, Measuring What Matters: The Federal Trade Commission and Investments in Competition Policy Research and Development, 72 Antitrust L.J. 861 (2005). An example of a specific FTC decision informed by competition policy research is *Polygram Holding, Inc.*, 5 Trade Reg. Rep. (CCH) ¶ 15,453 (FTC 2003), *aff'd*, 416 F.3d 29 (D.C. Cir. 2005).

[40] *In the Matter of Abbott Laboratories*, Docket No. C-3945 (May 22, 2000) (consent order), complaint, http://www.ftc.gov/os/2000/05/c3945complaint.htm; *Geneva Pharmaceuticals, Inc.*, Docket No. C-3946 (May 22, 2000) (consent order), complaint, http://www.ftc.gov/os/2000/05/c3946complaint.htm; *see* Federal Trade Commission, Generic Drug Entry Prior to Patent Expiration: An FTC Study (July 2002), http://www.ftc.gov/os/2002/07/genericdrugstudy.pdf; *see Bristol-Myers Squibb Company*, Docket No. C-4076, http://www.ftc.gov/os/caselist.c4076.htm.

Conclusion

This Statement does not recommend any legislative changes in civil remedies, given the current enforcement policies of both federal antitrust agencies. It does, however, make some specific suggestions for further Commission activity, and addresses other issues of current concern.

# Prosecution of Market Distortions