TESTIMONY OF MICHAEL PERTSCHUK
COMMISSIONER, FEDERAL TRADE COMMISSION
BEFORE THE FOSSIL AND SYNTHETICS
FUELS AND COMMERCE AND TRANSPORTATION SUBCOMMITTEES OF THE
HOUSE COMMITTEE ON ENERGY AND COMMERCE

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I strongly support H.R. 5452. It represents a thoughtful and creative effort to build in safeguards for the current risky remedy of partial divestitures in major oil company mergers. The recent history of the FTC's approach toward oil mergers -- a consistent pattern of arching over backwards to arrange partial divestitures in order to preserve the merger -- makes the strongest case for implementing these safeguards.

In addition, the bill provides a much needed extension in the time allowed for antitrust agency review of the largest mergers. Our experience with massive mergers -- and the frantic efforts to analyze thousands of documents, interview long lists of witnesses, and negotiate settlements, all in a matter of days -- demonstrates the need for this provision.

The Divestiture Safeguards

The bill makes three basic changes in the current law concerning oil company divestitures. First, it requires that the acquired company be held separate -- that is, maintained as an independently operated company -- until divestitures of oil assets required by a court or Commission order are approved. Second, it delays final approval of a merger settlement until the divestitures are approved; and in the event the divestitures are not approved, it makes clear that the antitrust agencies may initiate an antitrust action seeking rescission of the merger itself. Third, it insures that the merging companies will be maintained as separate entities for some time after the divestitures are approved in order to allow third parties, particularly state attorneys general, to take action if these safeguards are necessary.

The oil industry exhibits a clear structural pattern. The major companies are highly integrated -- from owning crude oil and other energy reserves "upstream" through marketing gasoline and home heating oil "downstream." It is no coincidence that major integrated companies are able to weather cyclical periods of increased and reduced demand, shifts in the availability and price of crude, and fluctuating retail prices while non-integrated refiners and marketers flirt with extinction. A regular supply of product -- crude oil for refiners and refined products for marketers -- is key to survival and viability.

Both in devising remedies and in identifying antitrust problems, the FTC has frequently failed to address the "vertical" problem of cutoffs of crude oil and refined products to independent non-integrated companies. Instead, the FTC has focused on the horizontal overlaps in "downstream" markets -- refining, pipelines, and marketing. Consequently, mergers have been allowed to go through with required divestitures of some downstream assets. Since the driving force behind most large oil mergers is the thirst for crude oil, there has been a comfortable coincidence of oil company wishes and FTC concerns. The majority of the FTC is content with a settlement; the acquiring firm is content with its expanded crude reserves; the stockholders of the acquired firm are content with a windfall. But the independent refiners and marketers are justified in their fears and the public is justified in worrying about higher fuel prices.

Given that the FTC apears committed to a consistent policy of relying on divestitures, a corollary problem has emerged. The future prospects for these divested assets -- once severed from their umbilical cord to secure supply -- is uncertain at best. If these assets cannot survive over the long run because their regular supplies of crude and refined product have disappeared, then even the modest claim of the FTC to have maintained competition in "downstream" markets cannot be made. The energy and skill devoted by our excellent career lawyers to negotiate partial divestitures may nonetheless prove to be a futile exercise in wishful thinking.

Let me review the history of the FTC's major actions in the oil industry during this administration.

Mobil-Marathon

In December 1981, the Commission considered whether to challenge Mobil's attempt to acquire Marathon Oil Company. By a 2-2 vote (with Commissioner Bailey and myself dissenting), the Commission decided to challenge the acquisition "until such time as there is presented a transaction, subject to the approval of the court, which would result in an immediate divestiture of the transportation, storage, and marketing assets of Marathon, in such manner as to maintain the divested entity in viable competition in the relevant markets." 1/ If this position had prevailed in court, Mobil would have acquired all of Marathon's crude oil and refining assets, while some or all of its pipeline, storage and marketing assets would have been put on the market for sale to a third party. One problem with this approach, of course, was that the procompetitive role of Marathon in supplying independent marketers would have disappeared after Mobil obtained control of Marathon's "upstream" assets. But, in addition, the court would have been in the position of having issued a divestiture order without an assurance that the viability of the divested assets could have been maintained. 2/

Fortunately, the private suit by Marathon resulted in the district court enjoining the acquisition and the Commission's

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1/ See motion of Chairman Miller, Mobil Corp./Marathon Oil Co., File No. 821-0020, December 8, 1981.

2/ The principal debate within the Commission at the time of the Mobil-Marathon case was whether the procompetitive role of Marathon in using its crude oil and refining assets to supply independent marketers made the remedy of divestiture of downstream assets alone inadequate. Even the FTC's own report on oil mergers concluded that "Mobil's policy of refusing to supply independents conflicted with Marathon's policy of fully supplying those independents. Thus, the acquisition could have threatened the independents' supply and reduced their competitiveness in part on the market." (Mergers in The Petroleum Industry: Report of the FTC, Sept. 1982, p. 7.) In a spirited example of historical revisionism, Bureau Director Muris testified that the Commission did support a theory that Mobil's cutting off of independents raised antitrust problems. (See Testimony of Timothy Muris before the Senate Subcommittee on Energy and Mineral Reserves of the Committee on Energy and Natural Resources, April 10, 1984, p. 5) In fact, however, the Commission was deeply split on this issue and Commissioner Bailey and I issued dissenting statements. Mr. Muris and perhaps even Chairman Miller may now wish the entire Commission had supported this approach. I wish they would have also.

attempt to achieve partial divestiture was mooted. The court of appeals also rejected Mobil's attempt to persuade it to accept a "hold separate" agreement, along the lines of the Commission's position, whereby Mobil would have gained control of Marathon's crude and refining assets, in part because there was no assurance that the "downstream" assets would survive with a competitively viable form. As the court stated:

> Nothing that Mobil has proposed in these belated filings would serve to protect the marketplace from the elimination, in times of shortage, of price competition provided by independent dealers previously supplied by Marathon. We are not convinced that Mobil's "hold separate" proposal which would cut Marathon's refining and marketing operations from its oil field production and reserves would cure the probable antitrust violations. It would leave Marathon's refining and marketing operations at the mercy of basic suppliers (like Mobil) and make it more vulnerable to possible monopoly pressures. 3/

Gulf-Cities Service

In July 1982, the Commission voted to challenge Gulf's proposed acquisition of Cities Service. Again, the staff initiated negotiations with Gulf concerning divestiture of certain assets. The Commission staff proposed that Gulf divest certain marketing assets and terminate operations, an interest in the Colonial pipeline and, most significantly, a refinery. Probably because of the insistence by the Commission on a refinery divestiture, Gulf walked away from the deal. However, if a settlement had been reached, refining and marketing assets

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3/ Marathon Oil Co. v. Mobil Corp., 669 F.2d 384, 385 (6th Cir. 1982).

would have been put on the market with a substantial risk that the divestitures would not have been accomplished in a way that achieved the principal objective -- restoring the competitive role of Cities Service otherwise lost through the acquisition.

Texaco-Getty

As you are painfully aware, the Commission on February 13 of this year tentatively approved a consent agreement with Texaco which allows Texaco to acquire Getty, subject to certain divestiture requirements and a temporary requirement to supply some independent refineries in California. Once again, the Commission's approach means major, previously productive assets will be put on the market for sale to unknown parties. Once again, there are limited assurances that the divestitures can be accomplished in a way that maintains their viability and restores competition lost as a result of the acquisition. Those risks are particularly great in the case of refining divestitures.

The Texaco-Getty order requires two refineries be divested -- one in Eagle Point, New Jersey, the other in Eldorado, Kansas. It is not at all clear that the refineries will end up in the hands of a company which will maintain their viability and competitive significance. In particular, neither refinery, once sold off from its current owner, may have a reliable source of crude oil. Consequently, these remedies present a major risk that the Commission's remedy of restoring the competition cost through Getty's disappearance will be illusory.

The advantages of the proposed legislation are clearly illustrated by the Texaco-Getty agreement. First, unlike the procedure contemplated in H.R. 5452, the Commission will very likely finalize the Texaco agreement before any divestitures are presented for approval. Consequently, if no satisfactory purchaser can be found, the Commission will be unable to rescind the agreement and reconsider the question of seeking divestiture of Getty as an independent company. 4/ Second, unlike H.R. 5452, the hold separate agreement in Texaco-Getty expires when the agreement is finalized. Consequently, even if the Commission could ultimately reconsider the question of whether the ordered divestitures are practical, Getty would by that time be absorbed as an independent company of Texaco. And, of course, there is no period after the divestitures are approved for any third party to challenge the Commission's resolution of the merger.

Socal-Gulf

The Socal-Gulf consent agreement provides much better protection than any of the previous Commission orders by building in safeguards in the event the divestitures cannot be effectively achieved. In fact, the Socal-Gulf agreement parallels the proposed legislation in major ways by including a hold separate agreement until the divestitures are approved and a right of the

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4/ It should be noted that Assistant Attorney General Baxter announced a Justice Department policy of insisting on elimination of anticompetitive overlaps before consummation of a merger, rather than "promises to eliminate such overlaps." See Justice Department press release of Feb. 8, 1982.

Commission, though under circumstances which are somewhat unclear, to seek rescission of the merger if the divestitures cannot be accomplished. In addition, the agreement recognizes the importance of regular access to crude oil by allowing the Commission to order additional assets be divested to insure viability.

I voted against the consent agreement because I believe the potential anticompetitive risks are so significant and the divestiture plan is so uncertain that the Commission should seek to enjoin the acquisition despite these additional safeguards. Nevertheless, I believe the consent agreement in this case is far better than the Commission's approach in prior cases and the staff, particularly the career staff in our Petroleum Division, deserve a great deal of credit. In addition, the concerns raised by persons outside the Commission, including Congress, have focused attention on the problems of large-scale divestitures. The similarity of the approach in H.R. 5452, which was introduced just two weeks before the Socal-Gulf agreement, reflects a growing consensus that our prior approaches must be improved.

Unfortunately, these safeguards were not included in the Texaco-Getty agreement, nor are they likely to be in all future agreements. The Bureau Director argued, at the time the Socal-Gulf agreement was before us, that there was a particularly good record in this case that justified these safeguards, but that these special facts would not necessarily be present in every case. According to Mr. Muris:

> [T]he critical difference between this case and Texaco-Getty is the record the staff has developed here on the feasibility of selling the particular refinery assets in question should the Commission

> find that relief necessary to resolve antitrust problems in some refined product market. Unlike Texaco-Getty, the staff uncovered troubling documentary evidence indicating that any divestiture of the refineries at issue may be problematic given the current depressed state of the refining markets, and the industry's substantial excess refining capacity. (Muris memo, April 25, 1984, p. 8)

But the implications of this "troubling documentary evidence" are by no means limited to the Gulf Coast refinery which must be divested by Socal. The problem of spun-off assets, particularly refineries, surviving as viable independent entities is common to the entire domestic oil industry as, indicated by the staff's own analysis in Socal-Gulf:

> [D]espite the current surplus crude situation, there seems to be a widespread and continuing belief in the industry that security of crude supply is highly consequential to the success of a refining marketing organization, and that the large firms involved in both upstream and downstream operations possess certain advantages in obtaining such supply security. (Staff memo, April 25, 1984, p. 46)

The testimony relied on by staff to support the additional safeguards is also relevant to the entire industry, not simply to the Gulf assets.

It is true that our staff may believe we have a better chance of winning these additional safeguards in court because they were fortunate enough to obtain testimony and documents which supports the argument that a secure supply of crude is the key to viability of a refinery. But relying on the testimony our litigators extract from witnesses or locate in company files is an unsatisfactory way of deciding which cases will result in effective remedies and which will not, if the same considerations apply across the industry.

The great advantage of the bill is that it insures that effective oil merger remedies will not depend on the exigencies of negotiations between the enforcement agencies and the merging companies or on the untested waters of the federal courts. There is no doubt that industrywide conditions in the oil industry means divestitures of substantial assets are risky remedies and antitrust enforcement agencies can greatly benefit from statutory safeguards in all large oil merger cases.

Extending the Waiting Period

Another very desirable feature of the bill is the provision allowing the Justice Department or the FTC to extend the waiting period under the Hart-Scott-Rodino Act if the value of the merger exceeds $2 billion. It has become increasingly clear that the short periods provided in the Hart-Scott-Rodino Act when it was passed in 1976 do not provide adequate time for antitrust review. In the case of the Texaco-Getty and Socal-Gulf mergers, the time for review was governed by the provisions in the H-S-R Act for cash tender offers, which allow only a 10 day waiting period after the companies have fully complied with H-S-R "second requests." As is sometimes the case, mergers may be delayed by agreement with the merging companies or because, although some information has been supplied, all of it has not. But the fact remains that the companies are entitled to force the antitrust agencies to act within an extremely short time if they believe it is in their strategic interest.

I believe it is fair to say that when the H-S-R provisions were initially passed, Congress did not contemplate that the antitrust agencies would, not only be reviewing such massive mergers, but also be engaging in far-reaching negotiations to restructure multi-billion dollar corporations through partial divestitures. The legislative history reflects the Congressional view that post-merger divestitures and partial divestitures were often unworkable remedies and that the advance notice and waiting period requirements were primarily intended to facilitate enjoining the merger altogether before consummation. 5/

One of the ironies of the Reagan-era FTC's antitrust policies is that a professed deregulatory administration has followed extremely regulatory approaches to resolving mergers. The Texaco-Getty agreement includes a five year requirement for Getty to supply independent refiners in California. It incorporates by reference lengthy contracts and involves the Commission in overseeing price, output and other terms. The Socal-Gulf agreement will involve the Commission even more intimately in overseeing the sale of divested assets and, perhaps, even in attempting to construct individual oil companies by putting together packages of assets that are competitively viable. Whether or not this course is a desirable one -- and I believe it is not -- this greater complexity in reviewing and restructuring acquisitions is a new development since the H-S-R provisions were enacted.

5/ See H.R. Rep. No. 94-1373, 94th Cong., 2d Sess. 8-9 (1976).

Not only has the staff been forced to operate under extremely tight time constraints, the Commission itself has become involved too late in the decision-making process because the staff analyses have regularly been furnished only at the last minute. In GM-Toyota, the settlement was given to the Commission the day before the meeting to approve it, although we had been verbally informed of its principal features a few days earlier. The Texaco-Getty agreement and analysis was submitted to the Commission on Friday afternoon in advance of a Monday morning meeting to accept or reject it. The Socal-Gulf agreement and analysis was furnished at 2:00 P.M. (and the Bureau Director's memo at 6:30 P.M.) on the afternoon before the early morning meeting the next day to approve it.

It might be argued that an additional waiting period creates added uncertainty for acquiring firms about whether the acquisition will be approved and for stockholders, nervously awaiting final word on whether or not their stock will be bought at a windfall gain. This argument should be rejected for a number of reasons. First, the antitrust agencies would not exercise the option to extend the waiting period in every case and, in fact, would no doubt continue to grant an early termination of the existing waiting period when no antitrust concerns were evidenced. Second, the bill provides for the opportunity to extend the waiting period only in a relatively small number of cases,those valued in excess of $2 billion. Of course, antitrust agencies can be spectacularly effective at increasing the number of large mergers by sitting on their hands.

Nine of the largest oil mergers in history have occurred during the Reagan administration. But, even under current free-for-all conditions -- what Business Week called "enabling legislation for the current merger wave," the number of mergers in excess of $2 billion still represents only a very small fraction of total mergers.

Third, the limited additional uncertainty that may be created by an extended waiting period must be weighed against the enormous public stake in responsibly dealing with massive acquisitions. Multi-million dollar mergers threaten loss of competition, destruction of smaller companies which are supplied by the merging companies, dislocation of communities and millions of dollars in price increases to consumers. We should take our time, and if the stockholders are kept in suspense, the price is a small one. If, in fact, there are truly productive efficiencies to be gained from an acquisition, these will not be lost after 60 days or 90 days or even much longer. Far too often, however, the professed "efficiencies" are simply speculation or creative justifications discovered after the fact. In too many ways, the profits to be made are through the tax code, depressed stock values, or short-term balance sheets, not through more efficient production on the factory floor.

Access to Information by Attorneys General

A final issue is the Commission's recent 3-2 decision to interpret the Federal Trade Commission and Hart-Scott-Rodino Acts as precluding the Commission from sharing information obtained under H-S-R with State Attorneys General. This interpretation is a complete reversal of the past policy which has interpreted our statutes as allowing this information sharing.

As you may know, Congress in the 1980 Improvement Act included two provisions which specifically authorized the FTC to share information with attorneys general for use in law enforcement, including confidential commercial information. It takes a particularly strained analysis of the FTC Act to arrive at the conclusion that H-S-R information can't be shared with the attorneys general. The pre-1980 version of Section 6 of the FTC Act, states that the FTC can make public certain information obtained by it "hereunder." 6/ In 1980, Congress added a new section allowing the FTC to disclose non-public information to state law enforcement authorities, provided they certify it will remain confidential and be used for law enforcement purposes. The new language did not refer to the "hereunder" clause, nor did the new statutory language or legislative history reflect any intention to exclude H-S-R materials from the confidential information that could be shared with state attorneys general. And, in fact, giving state attorneys general access to H-S-R materials is a perfectly sound law enforcement tool, just as giving access to other investigational material. Until now, the Commission had never detected a Congressional desire to distinguish between H-S-R materials and other non-public information. But under the strained theory that the reference to

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6/ 15 U.S.C. § 46(f).

"hereunder" means that our authorization to release information in the 1980 amendment is limited to information obtained under the FTC Act only (not the Hart-Scott-Rodino Act), the Commission decided it has no discretion to release H-S-R materials under the terms of the 1980 amendments.

I seriously doubt this interpretation and believe that a more reasonable interpretation of the statute would have been to allow release. (For your information, I have attached a copy of my dissent.) Nevertheless, the fact remains that the majority has taken a firm position and the easiest solution, short of litigation, is to modify the statute. Consequently, I would recommend a simple amendment to Section 6 by dropping the term "hereunder" with appropriate legislative history. It is regrettable that Congress has to remedy this problem, but the majority has made it necessary to do so.

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