Federal Trade Commission

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on

"WHAT DOES EFFICIENT ANTITRUST ENFORCEMENT MEAN FOR ASSOCIATIONS?"

before the

AMERICAN SOCIETY OF ASSOCIATION EXECUTIVES

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I am delighted to be here today. I certainly enjoyed speaking to the Society in May of this year and it is particularly gratifying to be asked to return to address the Legal Section of the Society. To persons in controversial jobs, return speaking engagements are always welcome. They hold out the hope that someone out there is listening to our message.

When I spoke to the Society in May, I suggested three ways that associations might help our country and consumers. Two of those suggestions are particularly relevant to my topic today, which is "What Does Efficient Antitrust Enforcement Mean for Associations?"

My first suggestion was and is: Resist the urge to request government to insulate your industry from competition. Although competition may produce uncomfortable results in the short run, in the long run you may find your association members become a healthier, stronger set of competitors.

My second suggestion was and is: Where the market is not operating correctly, consider reasonable, pro-competitive, self-regulatory measures rather than requests for mandatory government regulation.

The first suggestion is really a corollary of the proposition that competition leads to the optimal allocation of society's resources and to maximum consumer welfare. That's the central premise of the antitrust laws, and my job is to make our enforcement policy as consistent with that premise as possible. Of course, controversy comes with the job of Chairman of the Federal Trade Commission -- it always has and I am sure that it always will.

The critics are always numerous and vociferous concerning the proper level of antitrust enforcement. The critics of yesterday said that the antitrust agencies were pursuing enforcement policies that exceeded the bounds of the laws Congress had enacted, and they said the policies resulted in economic inefficiency. And they were right. Today, I am happy to say, those of us who used to be critics are now in a position to correct the problems we identified. Perhaps inevitably, however, a new group of critics has arisen. And today's critics accuse us of going too far in the opposite direction, of refusing to enforce the antitrust laws vigorously enough.

The truth is, however, that our record offers a solid refutation of that complaint. We've recently completed our fiscal year-end review at the Commission, and I will tell you that I'm proud of our enforcement record. Our enforcement procedures combine good law and good economics to produce good policy results.

Our critics are certainly right on one point, however: we <u>are</u> using fewer resources in antitrust enforcement. But our critics tend to measure effectiveness by measuring input, rather than output. But the fact is we've been able to do more with less; we've become more efficient, and these are some of the reasons why. We've computerized much of our enforcement operation. We've gotten our economists more involved with the enforcement effort at earlier stages, so that we can be more certain of targeting the most economically important legal violations. We've sought to identify recurring patterns of misconduct, so that one case can generate another. And, let me repeat, in the process we've taken great care to maintain an appropriate level of enforcement.

Now, it's important to understand exactly what the word "appropriate" means at the FTC. Our goal is not to challenge every business practice that conceivably could violate someone's interpretation of the antitrust laws. We might be able, at least theoretically, to challenge more mergers pursuant to Section 7 of the Clayton Act, or a greater variety of business practices pursuant to the "unfair methods of competition" clause of the Federal Trade Commission Act. But that wouldn't be fair to consumers; neither would such challenges represent an intelligent application of our nation's antitrust laws. For the Commission, it's crucially important to oppose only those mergers and business practices that have the potential to undermine or inhibit competition.

Let me give you an example. As the Supreme Court has recognized, non-price vertical arrangements frequently enhance consumer welfare by offering important efficiency benefits and intensifying inter-brand price competition.[1] It would therefore make no economic sense to challenge such arrangements without carefully evaluating their positive competitive benefits -- and the law, in any event, now requires precisely that sort of analysis. Our job is to find the practices that threaten competition, but to do it without destroying the incentives that businesses need to establish the kinds of vertical arrangements that promote competition.

Our present merger enforcement program offers a good example of what I mean by an appropriate level of enforcement. Free markets for capital and corporate assets are vital to the efficient functioning of our economy. Mergers and acquisitions allow those assets to be reorganized efficiently, and they improve consumer welfare by reducing costs and prices.

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[1] <u>Continental T.V., Inc. v. GTE Sylvania Inc</u>., 433 U.S. 36, 54-55 (1977).

The truth is, mergers may injure consumers in only two situations. First, it's possible that an acquiring company will make a mistake and be unable to improve the productivity of the company it acquires. Even so, government intervention would compound rather than solve the problem. The fact is that the federal government is in no position to second guess the judgment of people willing to place large sums of money at risk in these matters. Second, some mergers may substantially lessen competition, with the effect of permitting or generating price increases. And make no mistake about it: at the FTC, we've made it a priority to identify and prevent those few transactions that are likely to increase prices and injure consumers by substantially lessening competition.

Separating the wheat from the chaff has not gotten any easier over the last few years. The Commission received over 2500 Hart-Scott-Rodino merger filings in fiscal 1987, compared with approximately 1900 in fiscal 1986. The Bureau of Competition staff, with the assistance of our economists, reviewed all 2500 of those mergers to determine whether there was any reason to believe that they might violate Section 7 of the Clayton Act. In 21 investigations, the Commission issued second requests for additional information. During the fiscal year that just ended, seven of those investigations led the Commission to authorize suits for injunctive relief to prevent the transactions at issue. While these numbers may not strike you as impressive, it is important to note that this is the largest number of injunctive actions the Commission has authorized in a single year since the premerger notification provisions of the Hart-Scott-Rodino Act became effective in 1978. In one additional case in fiscal 1987, the parties were required to restructure the transaction at issue to eliminate our antitrust concerns before they could pursue it.

These efforts illustrate our commitment to challenge potentially anticompetitive mergers without preventing acquisitions capable of encouraging competition. If businesses believe that a merger will be efficient, and the merger does not pose a competitive threat, we will not impose our judgment on that marketplace. For the FTC, an appropriate level of merger enforcement is one that allows a healthy market system to do its best work.

In addition to sharing substantive merger enforcement with the Department of Justice, the Commission is responsible for administering and enforcing the Hart-Scott-Rodino Act premerger notification program. This program requires all parties to mergers and acquisitions satisfying certain size criteria to notify the Commission and the Department. The parties must then refrain from consummating the transactions for a statutorily defined waiting period while the Commission or the Antitrust Division analyzes them for potential antitrust problems.

In addition, the Bureau of Competition is actively investigating allegations that the parties to a number of acquisitions either negligently failed to provide the required notification, or affirmatively structured their transactions to avoid the filing requirements. These investigations were made possible because the Bureau's Premerger Notification staff -- while processing and initially investigating a record number of merger filings -- were also able to detect the failures to file in the cases I mentioned by monitoring the business press.

I'm pleased to report that a number of changes in the Hart-Scott-Rodino rules should allow us to be even more efficient in administering this program in fiscal 1988. Until recently, most partnerships were exempt from the premerger notification requirements, and a number of parties took advantage of this loophole to avoid the kind of premerger antitrust screening that might otherwise have been required. No more. The Commission has now amended its rules to require partnerships satisfying certain criteria to comply with the premerger notification requirements. The Bureau of Competition is also considering a number of other proposals designed to reduce the costs of complying with the program without compromising its effectiveness.

Now I know that your association members don't spend all of their time thinking about mergers and acquisitions. I would guess that you're also interested in what the Commission is doing in other areas. Commission activities with respect to distributional arrangements include evaluations of vertical arrangements relating to prices and other terms of trade, and also address practices that may violate the Robinson-Patman Act.

As I mentioned earlier, non-price vertical arrangements frequently enhance consumer welfare. Commission enforcement efforts therefore focus on those non-price vertical arrangements that may injure competition. Explicit agreements to fix resale prices are still against the law of the land -- if not against the laws of economics.[2]

My view of appropriate enforcement of the Robinson-Patman Act begins with the Supreme Court's admonition that "the...Act should be construed so as to ensure its coherence with 'the broader antitrust policies that have been laid down by Congress.'"[3] I have in the past suggested that Congress review the Act, because -- as the Commission itself recognized recently

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[2] See Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 760-64 (1984).

[3] United States v. United States Gypsum Co., 438 U.S. 422, 458 (1978), quoting Automatic Canteen Co. v. FTC, 346 U.S. 61, 74 (1953).

-- it is a "protectionist, non-efficiency oriented" statute.[4] Therefore, the Act should be used to address only conduct that actually injures competition and reduces consumer welfare.

Now, in respect of exclusionary practices, the Commission's enforcement efforts are guided by the monopolization and attempted monopolization theories of liability enunciated in section 2 of the Sherman Act. Certain predatory practices, predatory pricing in particular, may satisfy the exclusionary conduct components of these theories. However, no less an authority than the Supreme Court has concluded that predatory pricing is "rarely tried, and even more rarely successful."[5]

However, investigations of non-price predation may represent a more fruitful line of inquiry. This form of predation consists of strategic behavior that is intended to raise, and has the effect of raising, the costs that rival firms have to bear. It may be a much less costly exclusionary strategy than predatory pricing. Instead of dramatically reducing its own prices, the predator forces rival firms to raise their prices. The best examples of non-price predation probably arise through the abuse of regulatory or judicial processes. For example, the Commission recently alleged in one case -- which was ultimately settled -- that the respondent had engaged in "a deliberate course of action to abuse the judicial process in order to injure a competitor," in connection with bankruptcy proceedings for its chief rival.[6] The Commission is currently conducting a number of non-public investigations in this area.

Our final major enforcement area -- one in which your members have, I think, a particular interest -- involves horizontal restraints. During my tenure, the Commission will vigorously enforce the prohibitions of section 1 of the Sherman Act -- through section 5 of the FTC Act -- against price fixing and other forms of demonstrably anticompetitive horizontal restraints. A number of cases involving allegations of this sort

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[4] General Motors Corp., 103 F.T.C. 641, 695-96 (1984).

[5] Cargill, Inc., v. Monfort, ___ U.S. ___, 107 S.Ct. 484, 495 n. 17 (1986), quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., ___ U.S. ___, 106 S.Ct. 1348, 1357-58 (1986). Consistent with that view, the Commission has determined that sales at prices equal to or above average variable cost should be strongly if not conclusively presumed to be legal, regardless of the market power or intentions of the respondent involved or the duration of the pricing in question. International Tel. & Tel., 104 F.T.C. 280, 403 (1984).

[6] AMERCO, Docket No. 9193 (final consent order accepted May 19, 1987).

are now in progress. The Commission recently heard arguments in two cases involving allegations of horizontal restraints in transportation industries, and in another case involving allegations of restraints established by a state regulatory board. Two more horizontal restraints cases were tried this year before Administrative Law Judges. The first involves allegations of price fixing in the title insurance industry, while the second concerns allegations that a group of automobile dealers implemented horizontal restrictions on their hours of operation.

Now, in the event that the Commission does impose an order in a particular case, and that order is sustained on appeal, a number of situations may develop in connection with enforcement of the order. In 1987 the Commission reviewed and resolved eight petitions to reopen old orders and eleven requests for prior approval of acquisitions or divestitures filed pursuant to old orders. In addition, the Commission filed two lawsuits in federal district court alleging noncompliance with orders, and in one suit secured a substantial civil judgment from the defendant.

The important thing to understand is that while law enforcement efforts may be the most <u>visible</u> undertakings of the Federal Trade Commission, they are not the <u>only</u> way in which we work toward a more competitive economy. Whenever possible, we pursue voluntary compliance and competition advocacy programs, which, though less conspicuous, are equally important.

Now, this leads me back to the second suggestion I made to your organization last May: unless regulation is needed to correct some sort of market failure, refrain from requesting mandatory government regulation. What many people refuse to understand is that many impediments to competition -- both domestic and foreign -- are actually created by governmental action. For example, unwarranted state licensing regulations clearly represent an impediment to domestic competition. As I mentioned before, consumers suffer when licensing boards or regulations become a vehicle for limiting supply or suppressing innovative products or services.

In fiscal 1987, the Commission secured voluntary agreements from a number of state regulatory boards to change their regulations and codes to make them consistent with the federal antitrust laws. For instance, after negotiations with the Bureau of Competition, the boards that regulate pharmacies in two different states agreed to eliminate restrictions on the computer transfer of prescription information. In three states, the boards that regulate funeral homes agreed to eliminate restrictions on advertising and on pre-need sales by funeral homes. Boards in five states agreed to reduce or eliminate competitive restrictions on veterinarians, including restrictions on advertising, solicitation, and the use of referral fees.

Ostensibly, each and every one of these restrictions is designed to protect consumers. But, in fact, they serve to protect competitors and to injure consumers. Such restrictions make it impossible for new and innovative kinds of competition to occur. They also make it unlikely that consumers will be fully informed of the competitive options available to them. Consumers, again, are the ultimate losers. Our program is designed to make them winners by making state regulatory bodies face up to the anticompetitive effects generated by their rules and codes of conduct.

Governmental restraints on competition from foreign firms can, of course, be equally pernicious. Supporters contend that protectionist legislation is specifically designed to protect firms from "unfair" foreign competition. Often they say such protectionist measures will be temporary. But we have protected steel, and shoes, and textiles, for as much as 25 years. Protectionism extorts a high price from consumers, who eventually discover that they are no longer free to buy goods they would like to buy at the prices they would like to pay. We don't aim legislation at automobiles or microchips. The automobile doesn't know who wants to buy it. Protectionism is aimed at consumers.

Protectionism is as intellectually responsible as rain-dancing -- but far more damaging. We know that saving each \$28,000 job[7] in the steel industry costs consumers \$125,000.[8] In all, protectionism cost consumers \$65 billion last year. That's how much consumers had to pay to support the special interests who profit from protectionist regulation.

Finally, I'd like to say a few words about our competition advocacy program. This is a program in which the Commission files comments with various state, local, and federal regulatory agencies and boards, advocating the pro-consumer position as opposed to those of the special interest groups. Last year, we filed 102 such comments. One result -- and it's a result that I predicted -- is that Congress is now attempting to curtail our ability to do this kind of work: the special interest lobbies on Capitol Hill seem to think we're doing our job too well and too often.

Part of the opposition, I admit, probably derives from a misunderstanding of the Federal Trade Commission's mission, as envisioned by its creators. In 1913, just one year before the creation of the FTC, President Woodrow Wilson spoke of special interests in these words: "It is of serious interest to the

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[7] Washington Post (March 22, 1987), at H-8.

[8] FTC estimate of \$114,000 in 1983 dollars, adjusted for inflation to 1986 dollars.

country that the people at large should have no lobby and be voiceless ... while great bodies of astute men seek to create an artificial opinion and to overcome the interests of the public for their private profit."[9] In a later message to Congress, President Wilson stated that the public

> demands such a commission only as an indispensable instrument of information and publicity, as a clearing house for the facts by which both the public mind and the managers of great business undertakings shall be guided. . . .[10]

The early economic reports of the Commission played important and "sometimes decisive" roles in the passage of a number of important federal regulatory statutes, including the Federal Communication Act of 1934, the Securities Act of 1933, and the Natural Gas Act of 1938.[11]

Thus, the Commission has always been an advocacy agency, even before its enforcement powers were fully formed. When we advocate competitive solutions to regulatory problems, we are following in a long Commission tradition, and we are executing -- notwithstanding protestations to the contrary -- the will of Congress.

The advocacy program is important today because in typical regulatory situations no one represents the interests of a competitive economy or its beneficiaries -- the consumers. And that's a fact that too few people understand. Interested parties are always represented, including, sometimes, certain consumer groups. But not all consumers are represented. No one speaks for efficiency in production and distribution and all of the other benefits that accrue from a competitive economy. The Commission is one of the few institutions that has both the interest and the expertise necessary to champion competition against special interest regulation.

Let me give you some examples from our 1987 filings.

In three states, the Commission staff filed comments supporting the dispensing of prescription drugs by physicians in

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9 See A. Link, Wilson: The New Freedom 187 (Princeton University Press: 1973).

10 Message of President Woodrow Wilson to Congress, January 20, 1914, cited in Henderson, The Federal Trade Commission: A Study in Administrative Law and Procedure 24 (1924).

11 Wagner, The Federal Trade Commission 78 (1971).

competition with druggists, as a way of giving consumers as many purchase options as possible.

The Commission staff filed comments with eight states and with the American Bar Association urging that restrictions on lawyer advertising be removed, because ethical codes should focus principally on fraudulent or deceptive advertising, while permitting advertising that promotes competition.

The Commission staff filed several comments opposing state laws that would require oil producers and refiners to divest their retail outlets. These laws would substitute a state-mandated business structure for the vertical integration that has proven to be a highly efficient method of distributing gasoline and other oil products.

The staff also filed a number of comments with the International Trade Commission urging it to consider the interests of consumers as well as producers when making determinations of injury from foreign competition.

In additional filings too numerous to describe, the Commission staff has consistently advocated free access to markets, unrestricted pricing flexibility, and the free flow of nondeceptive and nonfraudulent information to consumers.

These are the major antitrust activities that were undertaken by the Commission in fiscal 1987. Now, if I get a third invitation from this Association, I can talk about our efforts in the consumer protection area. We're proud of those too, and we want you to understand why. Thank you.