interpretation, as well as scrutiny by practioners and scholars, are highly effective in protecting and preserving the nation's free market system.

This does not mean that no changes are needed. Over time, the reach of the antitrust laws has been narrowed by a large number of formal statutory exemptions and immunities. Most of these "exceptions" to the antitrust laws may have had sound policy justifications when they were enacted, but advancements in technology and the increased mobility of capital likely have

Significantly, neither of these substantial changes in substantive merger law, nor shifts of comparable magnitude in the treatment of vertical restraints, resulted from or generated statutory amendments to the antitrust laws. Rather, they arose out of advances in the knowledge and experience of the courts, practitioners, and scholars. The clear lesson is that the antitrust laws are sufficiently flexible to support and sustain significant changes in their interpretation and application, driven by litigation, changed enforcement policies, and new scholarship. The Supreme Court made precisely this point in *State Oil Co. v. Khan*, where it held that vertical maximum price fixing was not *per se* unlawful, overruling prior cases:

> [T]he general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition . . . [T]his Court has reconsidered its decisions construing the Sherman Act when the theoretical underpinnings of those decisions are called into serious question . . . Although we do not lightly assume that the economic realities underlying earlier decisions have changed, or that earlier judicial perceptions of those realities were in error, we have noted that different sorts of agreements may amount to restraints of trade in varying times and circumstances, and it would make no sense to create out of the single term restraint of trade a chronologically schizoid statute, in which a rule of reason evolves with new circumstances and new wisdom, but a line of *per se* illegality remains forever fixed where it was.[4]

My inclination against substantive statutory changes extends to proposals to modify the antitrust laws to address specific circumstances in particular sectors of the economy. A virtue of the U.S. antitrust laws and legal system is that the courts and enforcement agencies generally have applied the same criteria flexibly to an enormous array of industries. The result has been a consistent competition policy that gives firms a reasonable degree of certainty and transparency. Thus, I disagree with those who maintain that the antitrust laws are not well-suited for today's

[4]522 U.S. 3, 20-21 (1997) (citations and quotations omitted).

rapidly-changing high-technology industries, such as software and pharmaceuticals. Over the past two decades, the antitrust community has developed and emphasized doctrines that enable the sound application of our antitrust laws to even the fastest-moving sectors of our economy. For example, advancement in theories relating to entry and the contestability of markets has greatly informed agency and judicial decisions about the competitive effects of mergers and other conduct in high-technology industries.

There is one significant caveat to my reluctance to make substantive changes to the antitrust laws. The Commission should seriously consider recommending the repeal of the Robinson-Patman Act, the overall purpose of which stands in contrast to the recognized goals of modern antitrust law – the protection and enhancement of consu

question that, as we work with new competition agencies around the globe and they look to the United States as an example of an antitrust regime with consumer welfare as its centerpiece, the Act stands out as representing contrasting policy goals and the protection of special interests – something against which we repeatedly caution our counterparts.

2. Statutory Exemptions

Even as the antitrust laws have evolved to make greater use of economics and to focus primarily on consumer welfare, the number of statutory exemptions that shield competitors from the antitrust laws remains high. Exemptions covering a substantial volume of commerce that are decades old remain on the books. I recommend that the AMC evaluate some of these exemptions and urge Congress and the President to consider their elimination.

Fundamentally, antitrust exemptions typically are inconsistent with a central premise of U.S. economic policy – that vigorous competition in a free market, protected by the sound application of the antitrust laws, is the best approach to promote consumer welfare and efficiency. Thus, the potential for antitrust exemptions to harm consumers and the economy is substantial. Indeed, standard economic theory predicts that unless certain conditions of market failure are present, government limits on competition can produce higher prices, reduced output, and less innovation. Moreover, this is not simply a matter of theory. The successful experience of deregulation in various sectors of the American economy over the past three decades teaches valuable lessons. Numerous studies show that the removal of government limits on competition has resulted in greater economic efficiency and produced significant benefits for consumers.[6]

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[6]For surveys, *see, e.g.*, Clifford Winston, *Economic Deregulation: Days of Reckoning for Microeconomists*, 31 J. Econ. Lit. 1263 (1993); Clifford Winston, *U.S. Industry Adjustment to Economic Deregulation*, 12:3 J. Econ. Perspectives 89, 98-102 (1998). *See also* Elizabeth E.

To be sure, circumstances that make restrictions on competition necessary to generate substantial efficiencies may arise, and thus warrant a departure from a free market economic model. It is important, however, that the Congress make certain that those conditions truly exist, and that consumers rather than competitors will benefit from statutory exemptions from the antitrust laws. If there is one thing that modern antitrust thinking recognizes, it is that markets are not static. Yet, many exemptions are several decades old and likely were based on market or regulatory justifications that probably no longer are valid. Innovations in communications and transportation and other technologies have improved capital markets and increased the ability of consumers and business customers to evaluate competitive alternatives without the assistance of government regulation. Consequently, some exemptions that were needed to correct market failures when enacted likely no longer serve consumers and the economy.

There also probably are less restrictive ways than antitrust immunity to allow efficiency-enhancing collaborations among competitors in some of the industries to which the exemptions apply. Over the past three decades, antitrust analysis has been refined to incorporate economic principles that allow for procompetitive joint ventures and other forms of cooperation. These principles are reflected in antitrust case law and the guidelines promulgated by the antitrust enforcement agencies. For example, the FTC/DOJ *Statements of Antitrust Enforcement Policy in Health Care*[7] provide that the agencies usually will not challenge forms of collaboration among health care providers if the collaborative efforts are reasonably necessary to achieve efficiencies

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Bailey, *Price and Productivity Change Following Deregulation: The US Experience,* 96 Econ. J. 1 (1986).

[7]*Available at* http://www.ftc.gov/reports/hlth3s.htm.

that benefit consumers. The FTC/DOJ *Antitrust Guidelines for Collaborations Among Competitors*[8] similarly allow efficient forms of collaboration among competitors. Assuming that there still are economically efficient forms of collaboration in some of the industries that currently enjoy antitrust exemptions, it is likely that the antitrust laws are sufficiently flexible to permit the collaboration without the need for formal antitrust immunity.

Finally, statutory exemptions from the U.S. antitrust laws can significantly hinder the ability of the United States to promote sound competition policies abroad. The health of the United States economy has become increasingly affected by the competition policies of other countries. The United States has been and remains at the forefront in advocating for the adoption of competition laws that reflect free market economic principles. Our ability to do so effectively is reduced, however, when we do not practice what we preach. The United States' competition policies and practices will be imitated only to the extent that they are worth emulating. A critical review by the AMC of the U.S. antitrust exemptions will assist all of our efforts to advocate for competition policies that promote vibrant consumer-oriented competition both in the United States and abroad.

3. Patent Reform

A comprehensive review of our antitrust laws requires cognizance of other statutory regimes that regularly interact with the antitrust laws in ways that significantly affect competition and consumers. Today, the patent system is the area of law that perhaps looms the largest in its impact on the antitrust laws and competition policy. Patents are, of course, critical to promoting investment and innovation. By preventing competing rival firms from free riding

[8] *Available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.

on discoveries, patents allow firms to recoup their often substantial capital investments in developing new products. Indeed, the patent and antitrust laws share the same goal of promoting investment and competition, so it should come as no surprise that the two systems typically work well together. Moreover, most patents do not yield market power that can impair competition, and even when they do, if a patent is properly granted under appropriate standards, the incentives and other advantages it provides typically outweigh possible market power concerns.

If improperly administered or misused, however, the patent system can harm innovation and competition. Dubious patents can slow innovation by discouraging firms from conducting research and development out of fear of patent infringement and can result in the payment of unnecessary royalties, which are passed on to consumers.

The FTC's recent attention to patent issues dates from a series of hearings in 2002 that led to issuance of a major report in October 2003, "To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy."[9] One of the chief recommendations in the FTC Report is that Congress enact legislation establishing procedures for post-grant review by the Patent and Trademark Office. This recommendation seconded a proposal in the PTO's own 21st Century Strategic Plan. The Report reasons that some questionable patents inevitably will slip through the examination system. Litigation weeds out invalid patents only slowly and at great cost; challengers cannot seek declaratory judgments until imminently threatened with suit. Collectively, these considerations suggest that some unwarranted patents will be issued and will remain factors in the market for a considerable time, which may create unnecessary market power and transaction costs and infect markets with risk, uncertainty, and distorted business

[9] *Available at* http://www.ftc.gov/os/2003/10/innovationrpt.pdf.

planning. An improved post-grant opposition system could offer a quicker, less costly means for resolving validity issues. The Report recommended a system that provides an early and effective review beneficial to comp

a top-to-bottom review of the FTC's merger review process. The central purpose of the reforms is to lower the costs of merger investigations for the FTC and the parties by reducing the volume of materials that parties must preserve and produce to respond to a second request, while preserving the FTC's ability to conduct thorough merger investigations. Particularly significant is that the reforms place substantial restrictions on the number of custodians that a party will be required to search – one of the most important factors (if not the most important factor) in the size and cost of second request productions. The limits on the number of custodians in second request search groups constitutes the first time that a U.S. antitrust enforcement agency ever has imposed such a limitation on itself.

The reforms contain four core presumptions:

1. a party will not be required to search the files of more than 35 of its employees when responding to a second request, if the party complies with specified timing conditions;

2. a party will not be required to produce responsive documents that were created more than two years prior to the issuance of the second request (a reduction from the current three-year period);

3. a party will be required to preserve backup tapes for only two calender days identified by FTC staff; and

4. a party will be entitled to produce a limited partial privilege log, rather than a "full" log, for most of the custodians in the second request search group.[11]

[11]The reforms also contain modifications to the instructions and the specifications of the second request that are designed to reduce the burdens on the parties.

One thing made clear by the FTC's internal review process was that meaningful reform requires the participation of all components of the agency, not only the staff. Consequently, in addition to implementing presumptive limitations on the size of second requests, the reforms increase the responsibility of the senior management of the Bureaus of Competition and Economics for ensuring that second requests do not impose undue burdens on the parties. For example, the agency may require a party to search the files of more than 35 employees only if the Bureau of Competition Director approves the larger search group. Parties are entitled to meet or confer with the BC Director before the Director decides whether to authorize a larger search group, and I highly encourage them to do so. Similarly, because requests for empirical data also have contributed to higher costs, the reforms provide that a party will be entitled to meet or confer with a Director or a Deputy Director from both the Bureau of Competition and the Bureau of Economics if the party believes that the data requests are unnecessarily broad. We also are requiring that an FTC lawyer with substantial experience participate in all second request negotiations with the parties.

Moreover, as I stated when I released the reforms, they represent the start rather than the end of the FTC's efforts to improve the merger review process. For example, we will continue to work to reduce the burden of requests for empirical data. The merger process reforms contain provisions that should reduce the costs of data requests, but further work and experience are needed to ensure that the FTC obtains the data it needs to analyze the competitive effects of 86 Tm(W)TjEl17d2

I also intend to devote significant resources to improving the technologies that the FTC uses in merger investigations, particularly the hardware and software for processing and reviewing electronic documents and data. Such improvements will benefit everyone – the agencies, the parties, the bar, and, most important, U.S. consumers. Currently, FTC staff, outside counsel, and the parties devote far too much time during many merger investigations to resolving technical issues related to the format and methods used to produce electronic documents. I hope to develop a set of more standardized options for parties to use when they produce electronic documents in response to a second request, which will free up valuable resources to further the agency's core mission in merger analysis – determining whether the transaction is likely substantially to harm consumers.

As I stated, despite the need for significant improvements to the merger review process, I do not believe that formal statutory or regulatory changes are warranted. The reforms that I issued last month address the primary sources of the growing costs of the merger review process – the size of the search groups, the time period for which parties are required to produce documents, the preservation of backup tapes, and the production of privilege logs. Further, I urge the AMC to exercise significant caution about recommending modifications to the merger review process that assign direct responsibility to other components of the government, such as the courts. Experience shows that adding more procedural requirements to merger investigations generally decreases the ability of the agencies and the parties to resolve matters expeditiously, and increases the cost and overall burdens imposed on all involved.

5. Two Antitrust Agencies

The question whether a “modern” U.S. antitrust regime should include two agencies with largely overlapping jurisdiction has threaded through your mandate since the AMC’s formation. And given that I have held senior positions in both agencies within the last five years, I often am asked for my opinion on whether we really need two agencies and about the strengths and weaknesses of each. My answer is unlikely to surprise you. There is no point in the AMC’s considering how to create an antitrust regime from scratch and whether that means creating two agencies, because you are not starting from scratch. You have before you two strong agencies, with overlapping and also differing strengths. To change the current system would come at a cost that would not be offset by countervailing benefits.

For example, the Federal Trade Commission was formed, in part, to study markets and competition issues in depth, and that responsibility -0.0009 Tw 12 0 0 12 72 568.92 Tmctt0007 Tc -0.00f3n m

between the two agencies drives them toward greater effectiveness and responsiveness to the needs of our public.

Conversely, I do not see public harm from having two agencies. We avoid duplication in investigations, so that is not an issue. To the extent that some parties claim that their treatment may vary as between agencies, I see no more variance between agencies than I see among different staff even within the same agency – something that we are taking concrete steps to minimize both within the FTC and between agencies. The clearance process works effectively in more than 90% of matters, and we are actively working together to make the process faster and smoother. Still, not only do I recognize the warts in the clearance process, but I disdain the conflicts that develop in a handful of matters.

The FTC, together with the Antitrust Division, devotes substantial resources to participating in international com