

# Federal Trade Commission

ANTITRUST ENFORCEMENT UNDER THE CLINTON ADMINISTRATION

A PERSPECTIVE FROM THE FTC

Remarks by

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before the

American Bar Association  
Section of Litigation Law,  
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Program on

"Antitrust Enforcement Under the Clinton

Good afternoon. I am very pleased to be here and to speak about antitrust enforcement under the Clinton Administration, from my perspective at the Federal Trade Commission. My customary disclaimer at the beginning of every speech is that I speak only for myself, not for the Federal Trade Commission or for any other commissioner. Given the subject matter of the panel, I should perhaps add a second disclaimer. Although I have been a close and interested observer of antitrust enforcement trends for more years than I might care to admit, my remarks about what is to come, although informed to some extent by my vantage point and my experience, are more in the nature-of--a wish list about the direction of antitrust in the new administration rather than a program on which you can rely.

One of the first questions, of course, is who the players will be. One notable feature of the Clinton Administration is the amount of antitrust expertise at the very top. The President has taught antitrust law, and the Vice President chaired the Senate subcommittee with oversight responsibility for the Federal Trade Commission. Having so much antitrust expertise at the very highest levels is surely a promising sign for antitrust enforcement.

At the Department of Justice, Anne Bingaman, of course, is the new Assistant Attorney General and that is an excellent appointment. At the Federal Trade Commission, President Clinton has not yet had the opportunity to make any appointments. The Commission has a full complement of five commissioners who have staggered seven year terms. The President will have his first opportunity to appoint a commissioner when the first term expires in September 1994 or when one of the five commissioners leaves by his or her own volition, whichever comes first. At the moment, I know of no commissioner planning to leave before September 1994. The President has authority to appoint a different chair from among the sitting commissioners, but he has not done so.

Resources, of course, are directly relevant to the strength of any enforcement program. From 1980 to 1989, the size of the Commission, expressed in terms of the number of employee workyears, was cut approximately in half. Beginning in 1990, we expanded almost ten percent, but we are again cutting personnel. A troubling trend from the enforcement standpoint is that Congress is increasingly assigning new duties to the Commission

without providing additional resources to complete them.\*  
Certainly, it is appropriate for the Congress to set priorities  
and assign the Commission new duties, but this may entail a  
tradeoff in enforcement activity.

One theme that has emerged in the reporting on the economic  
policy of the new administration is the need to make the United  
States more internationally competitive. Although a few have  
argued for relaxation of the antitrust laws in an effort to  
support selected domestic industries against foreign rivals, the  
stronger view seems to be that vigorous domestic competition lays  
the groundwork for international competitive strength. Michael  
Porter, an influential and informed authority on matters of  
international competitiveness, has taken the position that strong  
antitrust enforcement with respect to horizontal mergers and  
collusive behavior is essential.<sup>2</sup> Porter views the cartelization  
of an industry as the 'beginning of the end of international  
**success**' and regards leniency toward mergers as  
"counterproductive."<sup>3</sup> I am hopeful that **strong antitrust  
enforcement will be recognized as an important foundation of our  
competitiveness policy.**

**Merger enforcement remains at the top of the Commission's**

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investigated. This is in part, I believe, because most firms are well counseled and do not attempt mergers or acquisitions that clearly would violate the law. Even if the government were to double the number of mergers it challenges, the number of Section 7 cases would remain relatively small in absolute terms.

If we become more aggressive in challenging mergers, we may - sustain some losses in court, but this is a risk we should be prepared to take. Through careful case selection and continued good staff work, the Commission should be able to continue its relatively good track record in winning preliminary injunctions. Our staff has been effective in putting on minitrials even at this early stage of a case. If we believe we have an anticompetitive story to tell, we should not be deterred from proceeding by undue fear of--litigation risk.

A related item from my wish list relating to merger enforcement is that we continue to challenge mergers when otherwise appropriate that fall within the moderate range of concentration as defined by the Merger Guidelines. Concentration is merely the starting point in merger analysis that enables the agencies to winnow out transactions that merit particular attention. The agencies then conduct a detailed, usually complex analysis of the competitive implications of those transactions.

The temptation, at this point, to find answers based on quantifiable, objective factors is great, but there are dangers in relying too heavily on concentration data in merger analysis. One risk is that reliance on levels of concentration may become a crutch. Its attractions may lead us to displace the time-consuming process of sifting through other, more probative facts or to make decisions based on relatively small differences in HHI numbers.

Merger decisions of the 1960's and 1970's have been much maligned for blocking transactions, on the basis of the numbers alone, that posed no threat to competition. Given the widespread recognition today that most mergers are competitively neutral or procompetitive, repetition of that enforcement approach is unlikely. In today's world, the result of greater reliance on numbers may be under-enforcement, particularly in moderately concentrated markets, rather than over-enforcement. That is my concern. Under-enforcement is inconsistent with our mandate under Section 7 of the Clayton Act and is likely to harm consumers.

Although we have made impressive progress in our analysis of the competitive implications of mergers, this is an area in which important questions remain. Antitrust analysis historically has benefited from new ways of looking at familiar patterns, from fresh insights and new economic learning. No doubt this growth and refinement will continue during the Clinton Administration.

Also in the area of merger law, I hope that the enforcement agencies will continue to challenge anticompetitive vertical mergers and mergers that have anticompetitive effects as a result of the loss of potential competition. Fewer vertical mergers pose a likelihood of anticompetitive effects than horizontal mergers, but the Commission has challenged vertical mergers during my tenure on the Commission and I hope it will continue to do so. The Merger Guidelines recognize that the loss of potential competition is a source of concern under Section 7. I agree and hope that the Commission will not be deterred by dicta in B.A.T. Industries, Ltd., 104 F.T.C. 853 (1984), from continuing to bring potential competition cases.

The remainder of our antitrust enforcement resources not devoted to mergers is allocated over a wide range of industries and antitrust theories. Given the limits on our resources, we have tried to concentrate on a few industries that pose special antitrust concerns, and at the same time, we have tried to maintain a credible enforcement presence in the full range of civil antitrust law. Within the Bureau of Competition, we have a division that specializes in health care issues, and we recently have devoted resources to high technology companies. Unlike private plaintiffs who are concerned primarily about their interests in a particular case, our Continued commitment of resources to markets such as health care also allows us to gain institutional knowledge and a long-term perspective of competition in those markets.

The Commission's efforts in the health care area have helped set the competitive ground rules under which efficient, low cost providers of health care services, such as HMOs, have started to evolve. Recall that it was not much more than a decade ago that the Commission successfully challenged the American Medical Association's restrictions on advertising.<sup>4</sup> Now advertising by professionals is taken for granted, and its importance to competition is easy to overlook. Unless a provider with a better or lower cost service can get his or her message out to the public, the provider's innovation may not succeed. Although many restrictions on medical advertising have been abandoned, we continue to bring cases in this area. For example, the Commission recently issued a complaint against the California Dental Association for its restrictions on advertisings

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<sup>4</sup> American Medical Association v. FTC, 638 F.2d 443 (2d Cir. 1980), aff'd by an equally divided Court, 452 U.S. 960 (1982) .

<sup>5</sup> California Dental Association, Docket No. 9259 (Complaint Issued July 9, 1993).

The Commission has brought many cases against medical professionals who have unlawfully resisted competition from low cost providers. One obstacle to the expansion of innovative health care delivery systems has been the occasional obstruction by those who prospered under the traditional system. A typical example of such behavior involved an expansion by the Cleveland Clinic into a new market in Fort Lauderdale, Florida. The Clinic

Our consent order paved the way for Cleveland Clinic to enter the Fort Lauderdale market.

The Commission recently has devoted resources to investigations of various high technology companies. High technology industries present a special challenge to antitrust enforcers. As in other contexts, scholars hold strongly divergent views about how antitrust rules should apply to high tech industries. On one hand, scholars such as Michael Porter argue for a strong antitrust regime to promote domestic rivalry as a way to foster innovation. To this end, he would circumscribe cooperative research, prohibit joint production and marketing between leading rivals, block mergers of leading firms, and generally promote reconcentration of economic power. .

Others, such as Jorde and Teece, argue that innovation requires an array of linkages and feedback mechanisms among firms. They believe that efficiencies afforded by the horizontal or vertical linkages of joint ventures promote innovation, and

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Alliances or specific joint ventures may help high tech firms lead or keep up with succeeding steps in innovation. Agreements among firms may be made for a wide variety of procompetitive reasons, and antitrust authorities should be careful not to chill joint efforts necessary to encourage or facilitate innovation. The rapid pace of change in high tech markets poses a special challenge for antitrust analysis, which frequently relies on static observation of a market at a given moment in time.

Because of the inherent difficulties in obtaining a clear understanding of the competitive implications of conduct in dynamic, innovation-driven industries, I think that the Commission should be careful to ensure that our activities do not discourage the innovation that we seek to promote. This does not translate into any exemptions or special preferences under the antitrust laws. High tech firms should be held to the principles of fair competition; but it is appropriate, in reviewing their conduct, for the government to maintain a healthy respect for their visionaries and their competitive successes.

Merger enforcement and our continuing examination of specific-industries together consume a substantial portion of the Commission's antitrust enforcement resources, but we continue to be active in a wide variety of other important areas that also merit serious attention. The Commission has continued its commitment to all areas of antitrust and has brought cases involving collusion, Robinson-Patman, resale price maintenance, and tying, as well as less traditional cases in which the Commission has used the penumbra of Section 5 of the Federal Trade Commission Act to charge firms with violations of law that do not meet the established elements of a violation under the Sherman or Clayton Acts. I expect that will continue.

For example, the Commission continues to bring cases that involve hard core conduct that is per se unlawful but that is not being prosecuted as a criminal matter. Recently, the Commission imposed an order on three school bus companies that engaged in a horizontal market allocation scheme under the guise of a joint venture.<sup>9</sup> Although I would have preferred a stronger order, and so stated in a separate statement, the serious nature of the conduct made this an appropriate case to bring, and I hope we will see more cases like this one in the future.

Vertical antitrust theories have not taken up a large proportion of our resources. Nonetheless, vertical price fixing is per se unlawful, and the Commission does not hesitate to pursue such unlawful conduct. Other vertical conduct can be

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<sup>9</sup> Kansas City School Transportation, FTC Docket No. C-3425 (April 22, 1993).

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anticompetitive under the rule of reason. The Commission has  
a 72obtained some consent orders involving vertical conduct, and  
several other investigations are underway. It is important for

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The Commission also has issued complaints and accepted consent orders involving unilateral solicitations to collude purely on the basis of Section 5 of the Federal Trade Commission Act.<sup>13</sup> Section 1 of the Sherman Act prohibits conspiracies, not unsuccessful attempts to solicit a conspiracy, and Section 2, which prohibits monopolization and attempts to monopolize, prohibits a monopolist's attempt to solicit a conspiracy.<sup>14</sup> Section 5 can fill the gap between Sections 1 and 2 for a unilateral solicitation to fix prices by a firm that has not achieved a monopoly. Solicitations of price fixing pose not only the obvious danger that they may be accepted, but also the more subtle danger that the communication can lead to tacit accommodations between competitors.

As the Commission continues to test the limits of Section 5, it is important that it seek cases that are factually strong and pose demonstrable competitive risks. In order for advances in theory to have lasting meaning, the Commission also should identify some test cases and litigate them to a successful conclusion. The Commission's acceptance of consent orders signals its adoption of the theory, but the courts historically have not been quick to endorse such novel theories. The Commission has a responsibility to the business community either to obtain some assurance that its creative enforcement initiatives will be sustained in the courts or to abandon them.

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