AMERICAN BAR ASSOCIATION
SECTION OF ANTITRUST LAW

THE STATE OF FEDERAL ANTITRUST ENFORCEMENT – 2001

Report of the Task Force on the Federal Antitrust Agencies---2001

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The Task Force on the Federal Antitrust Agencies was appointed by the Chair of the Section of Antitrust Law in the Fall of 2000, with the mission of evaluating and reporting on the state of federal enforcement of the antitrust laws of the United States, with the view that the resulting report would be of use to the new Administration, whichever political party might be in power.[1] The Task Force presents its views in four parts. We begin with an Executive Summary that reviews the Task Force's recommendations. Section I of the Report summarizes past efforts by the Section of Antitrust Law to provide advice on antitrust issues to new administrations. Section II describes overriding principles that guided the Task Force's evaluation of the current state of antitrust enforcement. Section III presents a more detailed statement of the Task Force's recommendations. A short Conclusion completes the Report.

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[1] The Task Force consisted of senior members of the Section with diverse backgrounds, including prior agency experience, and political party affiliation (with Republicans, Democrats, and Independents all represented): Joe Sims and Mary Cranston, Co-Chairs, and Members Michael Denger, William Kovacic, Richard Steuer, and Patricia Vaughan. Participating *ex officio* were Section Chair Ky P. Ewing, Jr., Section Chair-Elect Roxane Busey, and Section Vice Chair Robert Joseph. Wayne D. Collins was originally a member, and contributed to the work of the Task Force, but resigned because of other work commitments before this Report was made final.

While the members of the Task Force remain solely responsible for the content and the recommendations of this Report, the Task Force sought input from a wide variety of sources, in government and in the private sector, and wishes specially to acknowledge the input of many individuals, including the following (without in any way attributing its recommendations to any of them): William J. Baer, Jonathan Baker, David Balto, William Blumenthal, Molly S. Boast, Timothy Brennan, Malcolm B. Coate, Jerry Cohen, Anthony C. Epstein, Kenneth P. Ewing, Kathryn M. Fenton, Robert W. Fleishman, Lawrence R. Fullerton, Andrew Gavil, Reid Horwitz, Charles A. James, Andrew S. Joskow, Joseph Kattan, Robert Lande, Robert Langer, Abbott B. Lipsky, Jr., James R. Loftis III, William C. MacLeod, Janet L. McDavid, Philip B. Nelson, Richard Parker, Phillip A. Proger, Thomas R. Overstreet, Malcolm R. Pfunder, R. Clifford Potter, Robert A. Potter, Steven C. Salop, Lynn H. Shecter, Marc G. Schildkraut, William L. Sippel, Michael N. Sohn, Bruce R. Snapp, Richard J. Wallis, and Charles D. Weller. The Task Force would also like to recognize the substantial contributions of Michael McFalls to the work of the Task Force.

EXECUTIVE SUMMARY

Substantive federal antitrust policy, as administered by the Antitrust Division of the Department of Justice ("Antitrust Division") and the Federal Trade Commission "(FTC"), is today within the broad mainstream of American antitrust thinking, albeit at the more activist end of that spectrum.

This is not to say that there are no issues that deserve attention. People from both ends of the antitrust spectrum have expressed concern about what appears to some to be the *ad hoc* nature of enforcement decision-making, especially since the rationale for particular decisions is not clearly articulated or obvious, and the agencies' inability or unwillingness to provide a useful explanation of those decisions continues. Reasonable people can and do disagree about particular enforcement actions and policies, particularly in the areas of remedies and of vertical mergers and restraints. There is continuing debate about the degree of intervention by the Antitrust Division and the FTC, particularly in the merger and technology areas. These issues are important, even if they do not go to the very core of federal antitrust policy.

In addition, there are general concerns about antitrust process and procedure, and about the overall structure of antitrust enforcement, both in the United States and internationally. The Task Force heard from many sources that the federal agencies have become more insistent on "their" way of doing things, notwithstanding practical problems, and that some members of the staff are less forthcoming about their concerns and analysis than was true in the past. There is a strong sense in the antitrust bar and the private entities it serves that more candid interaction at earlier stages of investigations would likely lead to quicker, less burdensome and less adversarial investigations, and decisions that would still be fully consistent with the agencies' mission. There is also concern that the agencies occasionally insist on remedies and remedy processes that are not directly related to the antitrust harms that could be established in a courtroom. A renewed effort by the agencies at creating a tone of more openness and candid interaction in the pre-litigation phases of their work should be a focus of the new Administration.

In addition, there is a growing concern among the private antitrust bar and the business community about the rapid internationalization of antitrust, and the role (or lack of it) of the federal antitrust agencies in that development. Antitrust policy is no longer an American phenomenon; over 100 countries now have antitrust laws of one kind or another. Both federal antitrust agencies interact with many of these foreign competition policy regimes on a regular basis, and have to some extent been responsible for encouraging their development. Unfortunately, many antitrust regimes outside the United States have neither the professional resources or experience, or the commitment to open markets, that are the great strength of American antitrust policy. The federal agencies, perhaps because they have been limited in the resources available for this purpose, have not been as active as many think they should be in advocating competition policy approaches that are consistent with the American experience. In the merger review process in particular, but generally throughout both criminal and civil antitrust enforcement, the relationship between American and international antitrust

enforcement in this increasingly global economy should be one of the very highest priorities of the new Administration.

Finally, American antitrust enforcement itself remains an uncoordinated hodge-podge of federal, state and multiple private enforcers, with their own statutes to enforce and unique perspectives. Viewed from abroad, the United States presents a country controlled by various federal statutes, and 54 different "state" statutes (the 50 States, the District of Columbia, Puerto Rico, the Virgin Islands and Guam), enforceable by federal and state officials and by private parties, as well as a huge segment of the economy operating under exemptions and state action immunities from the antitrust rules. At the federal level, there are a number of regulatory agencies (e.g., the Federal Communications Commission and the Federal Energy Regulatory Commission) that assert their own individual ability, under their statutes, to enforce antitrust principles as they see them – which is often quite different from the way that the antitrust agencies or most antitrust observers would see them.

Unfortunately, the coordination between the federal antitrust agencies and these other federal enforcers is sporadic and informal, and the results frequently illustrate that fact. In addition, each state has some form of antitrust statute, and one or more of the states make periodic incursions as federal law enforcers, generally as private plaintiffs under the federal antitrust statutes. It is not intuitively obvious that it is desirable for the states to be able to enforce the federal antitrust laws, in addition to their state statutes, and even less so when the states are in conflict with federal agency action on the same matter. In addition, there are the unlimited number of truly private attorneys general, frequently encouraged by the promise of treble damages, and most often represented by lawyers asserting claims on behalf of large classes of consumers or other allegedly injured parties. There is too little coordination between the states and the federal enforcement agencies, and almost none between federal agencies and private attorneys general. The practical consequences of this multi-variate antitrust enforcement regime are considerable and at a minimum not always desirable. The Task Force believes that the new Administration should look carefully at this less than optimal situation to see whether there is a politically acceptable alternative that accomplishes the policy objectives without unnecessary societal costs.

These are serious issues that deserve careful attention by the new Administration. The Task Force offers the following specific recommendations that, if followed, it believes could significantly advance the cause of competition policy in the United States and around the world. These are (in rough order of priority):

1. The Administration Should Appoint Leaders of the Antitrust Division and FTC Who Have Significant Antitrust Experience And a Commitment to Positive Change.

The leadership positions at the federal antitrust agencies are critically important economic policy positions. The recent *Microsoft* litigation and the historic *AT&T* divestiture are merely the most obvious illustrations of the fact that what the antitrust agencies do can have important economic effects. These effects may be direct, as in

the case of the break-up of AT&T, or indirect, by influencing attitudes and thus actions of American business; both are important. There are many highly qualified persons in America who could fill these leadership positions; they should be selected with the care appropriate to the significant economic policy functions they carry out.

2. The Agencies Should Be Provided the Resources Necessary to Carry Out Their Mission Effectively and Efficiently.

By almost any measure, the resources allocated the federal antitrust agencies in recent years have not kept up with the increasing scope and complexity of their mission responsibilities. There is little point in enacting legal commands without providing the means to enforce them effectively. Even conceding an imperfect use of the resources provided, it is clear that high levels of merger activity and the increasing complexity of applying the antitrust laws to ever more technologically intensive markets have left the agencies with inadequate resources to address important parts of the workload – competitive advocacy, international education and assistance, ex post reviews of enforcement policies, and the like – that deserve prominent places on the agendas of the federal enforcement agencies. In addition, underfunded agencies may paradoxically increase burdens on business, as they are unable to efficiently carry out their enforcement responsibilities. Finally, agency resources should be de-coupled from merger filing fees or any other revenues generated by enforcement activity; these important economic policy and law enforcement functions should be funded on their merits, not the mere volume of their output.

3. The Relationship Between Antitrust Law and Policy, and Intellectual Property Law and Policy, Requires Careful and Immediate Review.

In today's technology-driven economy, the protection of intellectual property rights has taken on even greater importance to many persons and companies. While the encouragement of innovation that is at the heart of intellectual property protections is fully consistent with the goals of antitrust policy, the intersection of these two regimes can raise complicated issues. This issue has heightened visibility because of recent enforcement actions by the agencies, and because of the determination by the United States Court of Appeals for the Federal Circuit that the Federal Circuit has jurisdiction over all patent-related appeals in the federal courts, including antitrust litigation involving patent claims or defenses. We urge the leadership of the antitrust agencies to encourage examination of and debate about this issue, both through public forums such as seminars and workshops, and if and as appropriate through *amicus* participation in the Federal Circuit, in other Circuits and in the Supreme Court.

4. The American System For Penalties and Victim Compensation is Inadequate and Should Be Given Serious Attention.

There are many enforcers of the American antitrust laws – federal antitrust agencies, state attorneys general, and multiple private attorneys general. Each can extract penalties of various kinds, ranging from criminal fines to civil damage judgments to the most recent innovation (at least in antitrust) – disgorgement. Each of these

actors has its own set of incentives and motivations, and there is very little attempt – and little opportunity – for coordination. As a result, our systems generates large administrative costs, large legal fees, and haphazard results in terms of victim compensation. The transaction costs are very high, and the results are at best uneven. Obviously, it is difficult to generate any enthusiasm for reform in this area, since it is so easily characterized as an attempt to weaken the antitrust laws, or benefit wrongdoers. No one condones cartel behavior, but in fact, the prime beneficiary of the current system is the private antitrust bar, both plaintiff and defendant, and thus it is appropriate that we be the source of the call for reform. This problem deserves serious attention. We urge the new Administration to appoint a Blue Ribbon Commission to carefully study this issue, chaired by the Chairman of the FTC and the Assistant Attorney General for Antitrust, and including representatives from the National Association of Attorneys General, the plaintiffs' and defendants' private bar, and the business community.

5. The Global Competition Initiative Now Underway Should Be a High Priority for Both Agencies.

In today's global economy, American companies are affected not only by domestic antitrust enforcement but also by the actions of a growing number of foreign competition agencies and regimes. This proliferation of competition policy throughout the world is highly desirable in concept, but it matters greatly how those policies are defined and enforced. None of the international antitrust regimes function in political environments that have as great a historical commitment to free markets as does the United States; thus, it is not surprising that competition policy outside our borders tends to be more interventionist and more regulatory, and to contain fewer procedural safeguards or opportunities for judicial review than is the case in the U.S. There are two critical missions in this area for the federal antitrust agencies: (1) procedural coordination and (2) substantive education and advocacy. The burdens of complying with a growing number of antitrust regimes, particularly in the case of cross-border transactions, are significant and growing; a high priority effort of the U.S. antitrust agencies should be an attempt to find procedural common ground with (at least) the most significant international antitrust regimes. Both the ABA Section of Antitrust Law and the International Bar Association are actively supporting the Global Competition Initiative, and are co-sponsoring a study of the costs (both private and governmental) of the growing multiplicity of merger regimes in our increasingly global economy. In addition, the federal antitrust agencies should accept as an important part of their mission education about and advocacy for true market-based competition regimes around the world. As economic thinking about competitive markets advances, the federal antitrust agencies should not only incorporate it in their own enforcement, but should help to ensure that make sure that this knowledge is easily available to enforcement agencies in other nations.

6. The Assistant Attorney General for Antitrust Should Be a Full Participant in the Administration's Economic Policy Functions, And Both Agencies Should Be Vigorous Advocates for Competition Values.

As befits the importance of the economic policy function of the Antitrust Division, the Assistant Attorney General for Antitrust should be a key participant in the economic decision-making process of the Executive Branch. There are always many voices for private advantage or government intervention; there needs also to be a strong voice emphasizing the importance of competition. In addition, we believe that competition advocacy should be an important part of the mission of both agencies; the Assistant Attorney General for Antitrust, as a member of the Administration, can have the greatest impact if it is clear that the Antitrust Division's voice will be heard as economic policy decisions are made. More broadly, both agencies should devote more resources, and be willing to spend more political capital, speaking out for competition before other federal agencies, before Congress, and before state legislatures and agencies.

7. The Merger Review Process Needs Continued Attention.

Merger review is one of the core activities of both the Antitrust Division and FTC. It is the point of most frequent contact between the agencies and the business community, and it has clearly been the source of the greatest friction between those two constituencies in recent years. Both agencies have recently been responsive to criticism, and legislation just passed amending the Hart-Scott-Rodino Act (with agency support) contains some additional guidance for the process; the problem is not as severe as it once was. But this is still an area where the press of time, limited resources, and the possibility of litigation all combine to generate frequent opportunities for tension between the various actors. The new leadership of both agencies should make continued oversight and lubrication of the merger review process a high priority – both because it is warranted by its intrinsic importance and because it will generate the good will necessary for other interactions to be most effective. Both agencies should continue to look vigorously for ways to reduce the HSR reporting and compliance burden wherever possible.

8. A Priority Objective of the New Administration Should Be Sustaining and Improving the Professional Capability of the Agencies.

The best leadership and sufficient resources would be wasted without competent staff to carry out the agency's work. Entry level salary (with bonuses) at the federal antitrust agencies today is approximately $50,000; the comparable salary at the law firms with which the agency staff most often interact can be three times that figure. The salary gap can be even more startling for attorneys with more experience. While no government agency will ever match private salaries for professional employees, the current gap threatens the human capital of both agencies: it must be addressed. In addition, resource constraints limit the training opportunities for agency staffers; more resources targeted on training would probably produce more efficient and effective agency performance.

9. The Operation and Organization of Both Agencies Should Be the Subject of Regular Review and Evaluation.

For agencies with multiple mission responsibilities, such as the federal antitrust agencies, regular re-evaluation of operations and organization is necessary to ensure that those responsibilities are each effectively managed. In recent years, the agencies (and especially the FTC) have been very successful in outreach efforts, through workshops and guidelines; this should be continued and expanded. But both have been less successful in other interactions with the private bar and the business community. Especially in recent years, both agencies have seemed to adopt a generally more adversarial posture in their general enforcement functions that the Task Force believes is counter-productive. Organizational structure can have an important impact on this, and in recent years (at least in the Antitrust Division) there seems to have been a proliferation of top-level positions without clear lines of authority. The communication of clear enforcement policies, the application of those policies in an open and transparent way, and a commitment to seeking to maximize the chances of getting it right, even if that may tend to reduce litigation leverage, are all important ingredients in the effective operation of a public enforcement body. We urge the new leaders of the federal antitrust agencies to review their operations and organization, and to recalibrate their approach to staff-private party interaction where appropriate.

10. Two Substantive Policy Issues Worthy of Attention.

The Task Force has identified two areas in which existing antitrust statutes and doctrines appear to depart meaningfully from mainstream antitrust policy. The Robinson-Patman Act is Depression-era legislation that neither agency actively enforces. It remains on the books, however, and generates considerable private litigation. It also consumes significant counseling resources in many business organizations. At a minimum, a candid public discussion of the continued utility, if any, of this statute is desirable.

Another perhaps even more complex and controversial area worth careful attention by the new Administration is the issue of state action immunity, which now immunizes a large segment of the American economy from normal antitrust rules. This is a complex body of mainly judicial law that permits states to exempt significant commercial activity from federal antitrust scrutiny, without regard to any economic effects outside the state. While any legislative action in this area would no doubt be complex and controversial, it is worth carefully considering the proper balance of federalism and national economic policy, taking into account the varying forms of statutory authority governing state and local governments, and their legitimate interests in this area.

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These recommendations are discussed in more detail in Section III below. While there are any number of other issues that may well deserve careful attention by the new

Administration, the Task Force believes that concentrating initially on this limited but important list has the potential to generate significant public benefits.[2]

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[2] This Report is focused on the enforcement of the antitrust laws as such, and does not cover the consumer protection laws and functions of the Federal Trade Commission. The new Administration inherits a consumer protection effort at the FTC that is also in generally good condition. The FTC has continued its prior efforts in the enforcement of laws that protect consumers from fraud and deception, and it has enhanced its previous efforts to provide timely guidance to both consumers and industry. It also eliminated a substantial portion of its old, out-dated Consumer Protection Guides and Trade Regulation Rules, such as the Sleeping Bag Rule, which no longer served any useful purpose, but did impose considerable burdens on business.

Traditional consumer protection problems, such as false or unsubstantiated advertising, fraudulent business opportunity schemes, and credit abuses continue, even in the new economy. For example, the FTC recently filed a federal court action to close down a business that sold software for Use in forging illegal drivers licenses and bogus birth certificates Used by identify thieves to pose as others or to erase past bad credit histories. The FTC has also focused specific efforts on the challenges posed by the growth in telemarketing fraud, which costs consumers up to $40 billion each year.

The FTC's Bureau of Consumer Protection has properly identified the potential for fraud and deception on the Internet as its major current challenge. Since 1995, the infancy of the Internet as a commercial medium, the FTC has attempted to deal with the challenge of a new, continuously-evolving electronic marketplace through self-educational workshops and hearings, new techniques for monitoring action, and maximizing enforcement resources to achieve its goals largely through existing consumer protection principles and laws. Protecting both business and consumer needs for safe, predictable, and healthy e-commerce without impeding the growth and development of this new medium through unnecessary regulation will continue to challenge the agency and tax its resources. Privacy, children's on-line access issues, and media violence are items on the FTC's agenda that require continued attention.

The Task Force believes that this focus on the Internet is appropriate, given its increasing significance in national and global commerce. The FTC has established procedures to leverage limited resources through coordination with states, other federal agencies, international enforcement agencies, and private industry groups, as well as by careful targeting its enforcement and consumer education programs. Continued nimble efforts to combine such resources in ways that stay abreast of the latest consumer concerns will remain an important objective.

Protecting both business and consumer needs for safe, predictable, and healthy e-commerce without impeding the growth and development of this new medium through unnecessary regulation will continue to challenge the agency and tax its resources. Privacy, children's on-line access issues, and media violence are items on the FTC’s agenda that require continuing attention.

Despite the generally positive activities of the FTC in this area, there is room for improvement. The FTC has properly recognized and acted to achieve multi-national efforts in the global marketplace, such as in spearheading action with the OECD and publication of the OECD guidelines on consumer protection in e-commerce in December 1999. But the FTC also recognizes that new jurisdictional issues remain complex and unresolved. Prompt and concentrated effort to resolve these jurisdictional issues should remain a priority so that abuses affecting US consumers do not fall in the cracks between national regulation, so that businesses can operate with predictability, and so that nations do not work at cross-purposes through conflicting policies and programs. These goals are recognized in the September 2000 report of the Bureau of Consumer Protection, "Looking Ahead: Consumer Protection in the Global Electronic Marketplace."

I. PRIOR TRANSITION REPORTS FROM THE SECTION OF ANTITRUST LAW

This Report continues the practice, established by the Section of Antitrust Law in four previous special committees and task forces of the Section, of providing observations and recommendations on competition and consumer protection issues that the new Administration may wish to consider in setting its agenda and priorities in this area.[3]

Each previous Report provided views, evaluations, and recommendations on significant aspects of competition policy and staffing issues. The 1989 FTC Report and the 1989 DOJ Report offered a somewhat different perspective than the 1991 and 1993 Reports, in that a major focus of the 1989 FTC Report (and derivatively the 1989 DOJ Report) was a re-examination of the value of dual federal enforcement of competition laws.[4] Other overarching topics of the 1989 Reports were the appropriate level of funding and staffing of the enforcement agencies, the appropriateness of a negative (versus a positive) agenda for law enforcement, and the workload mix that was pursued by the agencies with limited resources. The 1989 Reports appear to have been well received by the agencies, and during the period that followed both agencies obtained additional funding and staffing and significantly expanded enforcement activity.

By the time of the 1993 Report, it was widely acknowledged that many of the issues addressed in the 1989 Reports were no longer of concern. The outlook reflected in the 1993 Report was one of taking inventory of accomplishments and assessing the challenges that remained for the new Administration and beyond. As the 1991 International Report had done earlier, the 1993 Report recognized the increasing globalization of commerce and the particular importance of fostering international cooperation and coordination in competition policy.

Footnote Cont'd.

In this area as in its antitrust enforcement activities, the Task Force believes that more attention must be paid to the burdens imposed on parties subject to investigation. Requests for documents and information to parties subject to investigation are frequently unduly burdensome, and not realistically related to the issues under investigation, to the staff's practical ability to review requested material, or to the costs imposed on responding persons. Nothing more threatens business respect for and cooperation with the FTC in this area than to receive, at the close of an investigation or proceeding, materials prepared at considerable cost returned untouched by staff and without any apparent comprehension of the substantial and practical burdens required to produce the material. More training and a heightened level of appreciation of the practical burdens imposed on business could alleviate this problem.

[3] The predecessors of this Report are the following: the 1989 Report of the ABA Antitrust Section Special Committee to Study the Role of the Federal Trade Commission (1989 FTC Report), the 1989 Report of the ABA Antitrust Section Task Force on the Antitrust Division of the US Department of Justice (1989 DOJ Report), the 1991 Report of the ABA Antitrust Section Special Committee on International Antitrust (1991 International Report), and the 1993 Report of the ABA Antitrust Section Special Task Force on Competition Policy.

[4] This is a topic that continues to be debated, but the Task Force does not perceive any political or policy consensus to revisit this issue, so we do not discuss it in this Report.

Continuing in the spirit of the 1993 Report, this Report recognizes the agencies' advances in enforcement administration and policy and their efforts to keep competition in the forefront of economic policy, both in the U.S. and in the international arena. Many of the recommendations of the 1993 Report were followed by the agencies, and thus we assume that its suggestions were generally found to be constructive. This Report invites a similar dialogue with the new Administration over certain areas of competition policy and antitrust enforcement where the Task Force believes improvement over the status quo is possible and desirable.

II. CRITICAL INGREDIENTS FOR EFFECTIVE ANTITRUST ENFORCEMENT

We start from the broadly accepted premise that effective and appropriate antitrust enforcement is critical to the performance of a market economy. If we are willing to accept the results of the interactions of millions of private economic actors as determinants of economic environment, we must stand ready to remove artificial impediments to those interactions. We are mindful of the argument that markets are self-correcting, and so they may be over time. But the weight of the evidence supports the conclusion that significant consumer harm, and significant welfare losses, can occur between the imposition of a market restraint and its removal by market forces. We are also mindful that inappropriate and overly intrusive antitrust enforcement can do more harm than good; indeed, we have evidence of that in our history. But we believe there is broad consensus today on the major outlines of appropriate antitrust policies, with most substantive disagreements, even important ones, at the margins.

In a market economy, effective and appropriate antitrust enforcement calls for the minimum degree of intervention necessary to prevent anticompetitive behavior, without sending the message to the business community or the bar that the antitrust laws can be safely ignored. Both over-enforcement and under-enforcement are undesirable, because they each can lead to distortions in the economy. For example, many feel that the overly aggressive enforcement of the merger laws in the 1960's, and the relatively indiscriminate application of *per se* rules, may well have discouraged American companies from entering into or perhaps even seriously exploring the prospects for potentially efficient business relationships of the kind that have been routinely approved in recent years. On the other hand, some feel that overly tentative antitrust enforcement in the 1980's, particularly in the merger area, may have permitted some transactions that, on balance, reduced competition in ways not outweighed by any potential efficiency benefits. Moreover, the perceived federal enforcement vacuum in the 1980's was rapidly filled by more activity by state attorneys general, with at best mixed results. The proper balance avoids or minimizes these undesirable effects.

In the antitrust context, both the FTC and the Antitrust Division are primarily law enforcement agencies. Their mission is to find that difficult balance between, on the one hand, the "cop on the beat" or umpire role that is provided by statute, and on the other the natural tendency of those intensely focused on a specific mission to want to act to make things better where they see an opportunity to do so. Both agencies obviously must make decisions and take actions cognizant of the broader market context in which they are operating, but they are and must be limited in their law

enforcement roles[5] to reacting to conduct that violates the prohibitions of the statutes they enforce. And today the entire antitrust community is struggling to come to grips with the more complex analyses that will be required to carefully decide how to employ antitrust concepts in industries with much different economic characteristics than have commonly been faced in the past (*e.g.*, technology industries and international markets), while avoiding the imposition of the heavy hand of regulation, directly or indirectly through insufficiently precise antitrust enforcement.

So what is the recipe for optimal antitrust enforcement? The Task Force believes it must start with strong leadership. The agencies have enormous discretion; there are relatively few limitations on agency action, at least in the short term, and serious consequences can flow from ill-advised action even if it is subsequently reversed or withdrawn. These are extremely important governmental functions; they should be treated as such and placed in the hands of only the most highly qualified leaders.

Second, the agencies must be funded at a level that enables them to do efficiently what they should be doing -- intervening where appropriate to prevent anticompetitive behavior. Of course, the "where appropriate" conceals a fairly broad spectrum of potential activity, but there is general agreement on mainstream antitrust enforcement. The disagreements that do exist cannot be effectively controlled by resource allocation. If the agencies have fewer resources than they need to efficiently operate, they will not ignore their mission. Instead, they will adjust -- and become less efficient, less sensitive to private party burdens, less concerned about training their personnel, and less able to devote the appropriate level of resources to the careful thought and analysis that this discipline properly practiced requires.

Third, there must be sufficient dialogue between the agencies, the private bar and the business community so that enforcement priorities are informed by real world facts, and are effectively communicated to those to whom they are directed. The agencies need the leavening influence of real-life practical experience. In addition, private compliance efforts are a critical prophylactic against anticompetitive behavior, and the effectiveness of private compliance efforts is directly affected by the nature and clarity of the communication of enforcement priorities.

Fourth, the agencies must be seen as faithful to principles of fairness, consistency, confidentiality where appropriate[6], and transparency. There will inevitably be episodes of adversarial behavior; law enforcement sometimes requires coercion.

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[5] As advocates for competition, the antitrust agencies should of course seek to advance their policy mission wherever appropriate. But this policy advocacy is a different and broader role than their role as law enforcers, where they are properly constrained only to penalize misconduct and (in the merger context) to seek to prevent cognizable future competitive harms.

[6] In this regard, the agencies (and particularly the FTC) must reinforce their efforts to prevent “leaks” to the press about high visibility matters pending before the agencies. The inability to maintain confidentiality undermines confidence in the agencies on the part of the business community and the bar, and if it continues will significantly impair the ability of the agencies to carry out their mission.

But the general approach should not be overly adversarial; a good faith effort by the agencies to communicate clearly, and to act with proper notice and due regard to fairness, will inevitably generate much more cooperation from the business community and the private bar than will a perception of arbitrary or otherwise inappropriate behavior. This does not mean that agencies cannot be aggressive in carrying out their mission; it simply requires doing so openly, clearly, consistently and with due regard for the consequences.

Fifth, an optimal antitrust regime requires coordination between the various federal and state bodies that share enforcement responsibility, and between the U.S. and enforcers in foreign countries. This is a complicated problem, given the lack of a single central authority in our federal system, and the jurisdictional and geo-political complications of multi-national competition enforcement. Nevertheless, the overlaps and duplications, and occasional inconsistencies, produced by the American hodge-podge of antitrust enforcement are not optimal, and the risks of serious problems generated by the growing internationalization of quite varied forms of competition policy are very real.

Finally, a willingness to review and revisit, and adjust where appropriate, is a critical feature of any long-term program. There should be regular reevaluations of substance and process at the federal enforcement agencies, in order to minimize the inevitable risk of bureaucratic inertia. In our political system, a change of Administrations provides an ideal opportunity for such reexamination. This Report is intended to aid in that process.

III. SPECIFIC RECOMMENDATIONS

As would be true with any major governmental program, those familiar with federal antitrust enforcement and the federal antitrust agencies could produce a long list of important and less important ideas for change or consideration. The Task Force has consulted widely among antitrust practitioners, economists and others with interest in this subject, and combined that input with the considerable aggregate experience of Task Force members from both within and outside the agencies. We have sought reactions and suggestions from representatives of both federal agencies, and from others who have recently held senior positions at the agencies.[7] What follows are recommendations for the new Administration of the most significant issues it should consider in its stewardship of this critical function:

[7] See footnote 1 for a listing of some of those who have given input.

1. The Administration Should Appoint Leaders of the Antitrust Division and FTC Who Have Significant Antitrust Experience and a Commitment to Positive Change.

In many respects, a nation reveals the credibility of its commitment to enforce its laws by its selection of individuals to lead the institutions dedicated to that task. The more respected and capable the appointees to high office, the more serious and believable is the country's intent to execute its laws effectively. Most recently, the quality of leadership at both federal agencies has been extraordinarily high; the individuals serving as Chairman of the FTC and Assistant Attorney General for Antitrust have been among the most highly competent ever to hold those positions. But this has not always been the case.

In the field of competition policy, the selection of esteemed agency leadership is vital to the effectiveness of domestic enforcement. The agencies have great discretion in enforcement priorities and decisions, and enormous influence in setting the tone for discussion of antitrust and competition policy issues. At both agencies, the senior officials can have a very significant impact, as a comparison of the antitrust programs of recent Administrations makes obvious. Business officials and their advisors closely observe the quality of appointments and often evaluate the legitimacy of the antitrust system by their assessment of the abilities of the individuals entrusted with key management duties. In formal enforcement decisions and in messages revealed in speeches or other discourse with the business community and the antitrust bar, the leaders of the agencies shape perceptions about the quality and integrity of the antitrust system itself.

Choosing first-rate leadership for the antitrust agencies is not merely a parochial concern of domestic policy. The quality of agency leadership today assumes increased importance for U.S. efforts to influence the direction of competition policy internationally. Foreign governments closely monitor developments in the US antitrust system. Their receptivity to U.S. perspectives depends substantially on their perception of the capabilities of the Antitrust Division and FTC leaders they encounter in international fora. Foreign officials, even in the newest of the emerging market competition policy systems, routinely make judgments about the soundness of U.S. policy preferences based on their perceptions of the knowledge and capabilities of top-level U.S. antitrust officials.

Because antitrust agencies execute serious economic policy functions at home and abroad, every appointee to key leadership positions should meet demanding professional standards. Fortunately, the United States is blessed with a competition policy community of unequaled breadth and diversity. There is no good excuse for failing to ensure that each appointment to top leadership positions – the Assistant Attorney General for Antitrust, the deputies to the Assistant Attorney General, the Federal Trade Commissioners, the bureau directors of the Federal Trade Commission – reflect the extraordinary capabilities of this community. Given the wealth and diversity of relevant expertise, the new Administration should make every appointment count toward increasing respect for U.S. antitrust institutions.

In addition, a new Administration has an opportunity to use appointments to take special advantage of largely untapped opportunities presented by the unusual design of the federal antitrust system. When the FTC was created in 1914, Congress anticipated that appointments to it would include not just legal experts, but others with broader expertise, especially in the fields of economics and business. This has not been the case; of the 73 individuals who have served as FTC commissioners, only five have been economists or individuals with graduate degrees in business administration. No economist has been appointed a Commissioner since 1990. Only six of the 73 commissioners have had backgrounds as business managers at the time of their appointment, and no person with substantial experience as a business manager has been appointed to the FTC since 1929.

The Task Force believes that, as a rule, Federal Trade Commissioners should be people experienced in antitrust law and policy. However, this certainly includes economists as well as lawyers; antitrust law and policy is uniquely informed by economics. In addition, however, the new President, with the consent of the Senate, could enrich the quality of decision-making by at least considering a wider focus in the mix of FTC appointments to more closely follow the model of the 1914 legislation when considering persons to fill the four vacancies that will occur as a matter of normal course in the next four years. In particular, we believe that the FTC and federal antitrust policy in the near-term future would benefit from the presence of a Commissioner with special familiarity with some of the "new economy" issues that constitute an ever larger component of the FTC's workload.

Finally, the persons appointed to head these important agencies should be able and willing to deal effectively with the issues facing the antitrust community, including those identified in this Report. Some of these issues will be controversial; in some areas, accomplishing these goals will require the creation of a broad political and substantive consensus, while in others it will require effective advocacy. The persons chosen will have to represent the principles of competition within the Administration, before the Congress, in negotiations with international enforcers, and before the American public and business community. Strong leadership skills are essential ingredients of successful appointments to these critical positions.

2. The Agencies Should Be Provided the Resources Necessary to Carry Out Their Mission Effectively and Efficiently.

Measured by full-time equivalent work years, from 1981 to 1989 outlays for the Antitrust Division and the FTC's competition mission fell by approximately 50 percent. In the 1990s, Congress restored the budget for the Antitrust Division to nearly 80 percent of its level in 1980. The FTC's competition-related activities, however, continued to receive funding at roughly 50 percent of the budget they received in 1980. Appropriations measures for Fiscal Year 2001 increase funds for the two federal competition agencies above the Fiscal Year 2000 levels by about 15%. In constant dollars, this means that the antitrust agencies of 2001 are funded at slightly below the level of the competition agencies of 1980. The Task Force believes that more

resources should be devoted to the full range of tasks that are inherent in the broad mission responsibilities of the federal antitrust agencies.

There is little point in enacting legal commands without providing the means to enforce them effectively. Decisions about what constitutes an adequate level of resources may depend in part on assumptions about what types of enforcement programs the federal agencies should pursue, but our view is that today, regardless of policy preferences, the federal antitrust agencies are underfunded. We assume that the agencies are not perfect administrators of their current level of funds, and that some funds are not spent efficiently. But even accepting this premise, and even though one may disagree about the wisdom of specific actions taken by the Antitrust Division or the FTC, the Task Force believes that the performance of the U.S. competition policy system today suffers from the failure of budgets to keep pace with legitimate enforcement and policymaking functions assigned to the two federal enforcement agencies.

Two principal considerations support this conclusion. The first is an extraordinary increase in the 1990s in mergers falling within the jurisdiction of the Antitrust Division and the FTC. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 created a system of pre-merger notification that has evolved into a merger review scheme of significant dimensions. Almost 5000 HSR pre-merger notification filings were made in the most recent fiscal year, and about 400 preliminary investigations were initiated; 98 second requests (a good proxy for serious and time-consuming investigations) were issued. As suggested in this Report, the Task Force believes that the agencies could reduce some of the resulting strain on agency resources by limiting the types of mergers to be reviewed and by streamlining the process under the pre-merger notification regime. The recent legislation raising HSR thresholds (effective February 1, 2001) is a step in this direction, but we also believe that the agencies should continue to seek ways to be more discerning in the type of transactions they review. Even with such improvements, however, there will remain a large body of transactions that demand at least some attention by the agencies. With current levels of funding, there is even a danger that, although high-profile transactions will receive satisfactory scrutiny, an unacceptable degree of randomness could creep into the analysis of less prominent mergers. And there has obviously been a reduction in the attention given to non-merger issues at both agencies as a result of the demands of the merger review process.

A second factor involves the exercise of competition policy functions that go beyond the development and prosecution of antitrust cases. There are a number of things in addition to law enforcement – issuing guidelines, holding workshops, providing advice on contemplated business ventures, conducting *ex post* reviews of completed enforcement matters, publishing studies, advocating that other government bodies embrace procompetitive policies, enhancing internal training for professional staff, participating in international initiatives to promote the harmonization of antitrust procedures – that deserve prominent places on the agendas of the federal antitrust agencies. We regard these tasks as essential elements of a sensible competition policy

system and necessary complements to the prosecution of cases. Performing these activities requires a significant commitment of resources.

Some elaboration on this latter point may be useful. First, we strongly believe that neither agency is today able to engage in adequate retrospective contemplation of its activities and output -- not because of unwillingness or disinterest, but because its resources are mostly dedicated to enforcement activities. These are not commercial enterprises; we cannot measure their success by how many widgets they sell. More enforcement, measured simply by the number of cases won, or investigations started, is not inevitably good enforcement. There are no shareholders, no good measure of return on invested capital, no stock market returns -- none of the indicia that businesses normally use to gauge whether the organization has performed well and its output is accepted by the market.

This is an inevitable feature of a government agency, and implies an even more important role for critical self-examination than in a commercial enterprise. Here, absent such departures from rationality that political intervention becomes appropriate, agency output -- type, volume, emphasis -- is entirely in the hands of agency leadership. Those managers should be devoting considerable time and resources to considering whether their programs and decisions are actually serving the public interest. When Michael C. McCarey retired in 1995 after many years at the FTC's Bureau of Consumer Protection, he offered his "Top 10 signs you know it's time to retire." One was the following: "When rules or cases you worked on have been in place long enough that people can actually tell whether or not they have served the public interest." In the ideal world, there should be an ongoing effort by both agencies to constantly evaluate whether the policies they are applying are having the desired or predicted effect on the public interest.

For example, in the merger area, which currently occupies a very significant portion of each agency's resources, there is considerable debate whether the structural concentration thesis that has been the basis for most merger enforcement over the last three decades has continuing validity. The agencies have obviously focused much more heavily on unilateral effects concerns in recent years, but they continue to assert the importance of coordinated effects arising from greater concentration. While the Supreme Court has recently emphasized (in *California Dental Association*) that presumptions (e.g., increased concentration will have anticompetitive effects at certain levels) must rest on more than assumptions, the agencies continue to prosecute, and courts continue to condemn, mergers based on the concentration assumptions that historically have been accepted as touchstones of merger analysis. In addition, there are extremely interesting issues dealing with market definition that have begun to get attention; clearly, concentration analysis is only as good as the market definitions on which the calculations are based.

Similarly, the unilateral effects thesis now being pursued by the agencies is not well articulated in the Merger Guidelines. As they now read, if one can identify a single customer against which the merged entity can price discriminate, one has not only

identified a "market" but also triggered the presumption of challenge. This ignores questions of entry and materiality of harm to consumers and the competitive process.

The Section of Antitrust Law has commissioned a Task Force on Fundamental Theory and another Task Force on the Concepts of Time, Change and Materiality in Antitrust Enforcement to review such issues; their reports are due in the Spring of 2001. This is an area where serious agency attention to the issues, with the participation of other interested parties, could advance the public interest.

Another important issue that deserves more study than it gets is whether past enforcement decisions have actually produced the predicted results. The FTC has recently undertaken such an effort focused on relief (FTC Bureau of Competition's 1999 Retrospective "Study of The Commission's Divestiture Process"), and there are other examples as well, but this is another area where much more work could profitably be done. One interesting point of comparison would be those areas where agency practice differs.

Of course, in the real world deadlines always trump contemplation, and thus it may be that the only way to ensure that the appropriate level of contemplation takes place at the agencies is to create a true planning and evaluation function in both agencies, with dedicated resources and a mission that does not include speechwriting or other diversions. Both agencies have such a function on their organization charts, but they are not solely devoted to this effort and they have very limited resources. A sufficient collection of people, perhaps with the ability to fund the use of outside resources (academics and others) who can, under proper confidentiality rules, gain access to all the relevant information could allow the kind of objective ongoing evaluation of agency practices and policies that is critical to effective enforcement over the long run. More resources devoted to this goal, and more public explanations of the results, would significantly enhance the outside perception that enforcement resources are being effectively managed.

There are other important policy and practical reasons why additional resources are required. It is widely believed in the antitrust community that some unknown number of matters do not get proper attention from the agencies because of limited resources. This is true in areas where there are statutory deadlines, like merger review, but it is most obvious in areas where there are no such deadlines, like non-merger civil investigations, and in business review letters. These matters can and too frequently do drag on interminably, and sometimes seem to die of resource starvation rather than conscious determinations after a full factual investigation and policy review. Some of this problem may simply be the result of agency management and policy choices poorly communicated, but it is our judgment that, even correcting for that, the agencies do not have all the resources they need to do their job as well as they could with more.

There is another manifestation of too-few resources that has practical significance: it creates pressures for staff to make up this deficiency through other means. Human nature has almost certainly not been eliminated at either agency, and people who have more to do than the time to do it will try to find more time, or cut

analytical or procedural corners. The effects of not providing the right level of enforcement resources can result in increased and substantively unnecessary burdens on private parties as easily as can excessive resources.

Of course, the great danger of more resources is a failure by the agencies to use those resources appropriately. Given governmental powers and few practical constraints, more resources could easily result in more burdens, more waste, and poorer agency performance. This can partially be dealt with by earmarking certain resource allocations -- such as for the planning and evaluation, technical assistance and training functions -- but in general it depends on the good faith and devotion to the principles of effective enforcement of agency leaders. As discussed below, this is yet another reason why selection of those leaders needs to be a serious exercise of the Presidential appointment authority. The Task Force does not believe that the justifiable fear of over-enforcement is best managed by limiting resources for the agencies. Instead, this should be dealt with through the various other recommendations contained in this report, and through the normal oversight functions of the Congress, the Administration and the private sector.

Finally, the Task Force strongly believes that agency resources should not be tied to specific revenue-generating activities. Today, the great bulk of both agencies' funding is directly tied to revenues generated by HSR pre-merger notification filing fees. This has several sub-optimal implications: (1) there is no incentive for the agencies to limit filings by regulation, and indeed the incentives are to broaden the filing net; (2) a significant reduction in HSR filings would have a very severe adverse effect on agency funding, quite likely disproportional to continued needs -- a reduction in filings (most of which raise no antitrust issue) will not likely result in a totally proportional reduction in mergers requiring investigation; and (3) it reduces the need for the agencies to justify specific funding requests on the merits, and for the Administration and the Congress to use those funding requests as a basis for evaluating performance and policy. Antitrust enforcement is an important part of our nation's economic policy machinery; it should no more be subject to funding by “user fees” than should the Council of Economic Advisors or the Treasury Department.

The recent legislation adjusting both filing thresholds and filing fees illustrates the undesirability of the current system. Twenty-four years after its original passage with no filing fees required, the size of transaction filing threshold for HSR reporting was raised from $15 million to $50 million, essentially after-the-fact indexing of the original threshold to reflect inflation. But in order to win the necessary support to do so, the HSR filing fee was raised from $45,000 to a maximum of $280,000 for the largest transactions. To put this in perspective, there was no filing fee under HSR from its origins until the November 21, 1989 amendment which set a fee of $20,000. That original fee has now been increased 13 fold in just 11 years. The practical fact is that this off-budget funding is attractive to appropriations committees (if not to the substantive Judiciary and Commerce Committees of the Congress), and thus, absent some serious effort by a new Administration, is likely to stay with us, along with all the undesirable side effects. We urge the new Administration and the Congress to release

federal antitrust agency funding from this inappropriate "user fee" mentality, and return to direct funding of these important economic policy functions.

3. The Relationship between Antitrust Law and Policy, and Intellectual Property Law and Policy, Requires Careful and Immediate Review.

Perhaps one of the most complex issues facing competition policy today is the application of antitrust law to technology industries, and in particular the interaction of the intellectual property regime with antitrust enforcement, public and private.

Most agree that both regimes are important institutional frameworks for the preservation and expansion of a competitive free market economy. Patents and copyrights encourage large and small firms alike to invest in innovations that can create new industries or revolutionize existing markets, and innovation and dynamic competition, not law, is the source of long-run economic progress. Still, antitrust law can play an important role by ensuring that consumers benefit from a process of dynamic competition that enhances the pace and quality of innovation. The reward of patents and copyrights provides an incentive for individual firms to act competitively; the regime of antitrust law can ensure that markets in which these firms participate remain competitive.

Although many agree that antitrust and intellectual property should be complementary, there is surprisingly little agreement on exactly how they should be integrated. For over 90 years, the courts have struggled to reconcile antitrust enforcement with the statutory rights to exclude under patent and copyright laws, careening from one extreme to the other. The situation improved in the early 1980s, when the appellate courts, soon followed by the newly-created Federal Circuit, recognized that intellectual property rights, particularly patents, were not inconsistent with the underlying principles of the Sherman Act. The enforcement agencies gradually recognized the complementary nature of antitrust and intellectual property in their 1995 Antitrust Guidelines for the Licensing of Intellectual Property, which not only provided the private sector with greater guidance on always nettlesome issues, but also signaled a definitive departure from the knee-jerk hostility to intellectual property expressed by both courts and the agencies in the past.

But improvement does not mean that the problem is solved. As the so-called "New Economy," based in significant part on the creation and exploitation of intangible intellectual property rather than the mere production of goods, becomes a more important component of the global economy, this tension was bound to increase, and so it has. The antitrust tools that were so useful in the past are being stretched today to accommodate industries and markets with very different characteristics. The number and potential value of patents, copyrights and trademarks have increased significantly over the past ten years. As importantly, large and small firms alike have begun to realize the strategic value that intellectual property rights can confer. These trends have not only affected traditional industries in which intellectual property is important, such as pharmaceuticals, but also newer industries in which hundreds and perhaps even thousands of patents can be involved in the production of a single product.

All of these factors have been reflected in recent enforcement actions by both agencies. With respect to unilateral conduct, both agencies have pursued enforcement actions against firms allegedly using intellectual property in attempts to obtain or extend monopoly power. But these actions also involved high-technology contexts in which intellectual property rights might be especially critical to the incentive to innovate. What is the right balance? With respect to concerted action, the FTC has pursued a series of enforcement actions against patent litigation settlements that allegedly reduced competition. But some of these actions arose in newer industries involving products covered by numerous patents, which might involve significantly different competitive considerations than more traditional contexts in which settlements would be challenged. What is the right balance? The FTC has also challenged settlement agreements in the pharmaceutical industry, but the underlying patent litigation arose out of a relatively new statutory scheme that gave rise to different and more frequent litigation between patent holders and generic pharmaceutical producers. Again, what is the right balance? The Antitrust Division has addressed a number of complex antitrust issues in issuing a series of Business Review Letters to prospective patent pool members in the consumer electronics industry; did it strike the right balance? And finally, in the merger context, the agencies have increasingly encountered acquisitions involving firms with blocking or conflicting intellectual property rights, where either firm might be eliminated from relevant markets in the absence of the acquisition; how should these complex interests be weighed?

Many of these cases, in addition to the complex substantive issues identified above, also involve complicated procedural antitrust issues. For better or worse, none of them has resulted in litigation that is helpful in clarifying the proper balance between antitrust law and intellectual property rights. In most cases, the agencies have reached pretrial settlements that avoided any meaningful resolution or clarification of the underlying merits. In other cases, the agencies have terminated their investigations. Only in *Microsoft* were intellectual property rights litigated, but even there, intellectual property rights were asserted only as part of a much broader defense ultimately rejected by the district court. Perhaps appellate review of this decision will provide some useful guidance in this area.

To be sure, perfect clarity in this area will be elusive. There is certainly not yet any consensus in the antitrust community about the proper balance to be struck between intellectual property rights and the principles of the Sherman Act. But the enforcement agencies could perform an extremely useful service by initiating a thorough public discussion of the optimal relationship between antitrust and intellectual property law and policies. The Federal Circuit's recent opinion in *Festo* is the most significant evidence that such an examination has not only begun in other legal communities, but could have dramatic implications outside the confines of antitrust law. This debate would surely benefit from broader participation.

This is not exactly the same subject already addressed by the Intellectual Property Guidelines. The issue here is not just what enforcement policies the agencies will apply in this context, but how these two bodies of law, both of which are aimed at promoting innovation and fomenting competition, should best be reconciled. A proper

balance is critically important for both to coexist. The issues are so pervasive that it is impossible for a set of enforcement guidelines or a handful of investigations to assure the right balance. What is needed is greater dialogue between the enforcement agencies, decision-makers in Congress and the Executive Branch, including those with responsibilities for intellectual property policy, such as the Under Secretary of Commerce for Intellectual Property, and those in the business community who depend, more than ever before, on intangible intellectual property and innovation as a competitive tool. The dialogue should also involve, where appropriate, an active program of *amicus* participation, both in the Circuit Courts and in the Supreme Court if and when these issues reach that body. This is an important dialogue; it needs to be richer and more frequent; and the antitrust agencies — particularly the FTC — are ideally positioned to expand it.

The Task Force understands that there is already in existence an internal task force in the Antitrust Division struggling with these issues, and the FTC has clearly thought about these issues as well. We believe this discussion should be broadened to include all the relevant constituencies, and we urge the new Administration to give this area the high priority attention it deserves.

4. The American System For Penalties and Victim Compensation is Inadequate and Should Be Given Careful Attention.

Any competent system of antitrust laws should provide deterrence, ensure appropriate redress to those actually injured by antitrust violations, avoid windfalls and unnecessary costs and burdens on the parties and judicial system, and hold out the promise for improving or preserving competition. It should also be a system that generates respect abroad, both from foreign firms subject to the system and foreign sovereigns. Against these criteria, our system for antitrust penalties and victims' compensation has evolved into one with serious failings.

Obviously, it is difficult to feel much sympathy for organizations found to have violated the antitrust laws.[8] But the fact is that our uncoordinated system of penalty and

[8] In particular, there is no excuse for the kind of egregious behavior that is typically prosecuted criminally. This conduct -- primarily price fixing and bid rigging -- is or should be known to be illegal, and in the overwhelming majority of cases produces no even arguable consumer benefits. It deserves vigorous prosecution, and the imposition of significant penalties is appropriate both as punishment and for their deterrent effect. The recent performance of the Antitrust Division in the criminal area has been nothing short of outstanding, and deserves our commendation. This does not mean, however, that there are no ways in which this part of antitrust enforcement could not be improved. It continues to take far too long to complete many criminal investigations. Some of this is no doubt the result of the lack of incentive on the part of those under investigation to have that investigation come to a rapid conclusion; some of it, however, may well be due to resource constraints. For the same reason that the use of HSR filing fees to fund the agencies is undesirable, criminal fines should certainly not be diverted to the agencies; the potential perverse incentives there are obvious. But cartel enforcement, particularly the international cartel cases that have become common in recent years, almost certainly produce significant consumer welfare benefits, and should not be constrained in any way by resource limitations.

damage actions generates significant transaction costs, uneven compensation for those damaged, and uncertain deterrence effects.[9] Our goal should be to minimize the administrative costs of producing restitution or damages awards. Unfortunately, the system that prevails today in the U.S. does not operate in the best interests of victims, and it certainly does not minimize either the administrative costs or the time required to produce results.

Today, an antitrust prosecution or complaint can be brought by both federal agencies (if criminal, only by the Antitrust Division), by any state attorney general (either under state antitrust laws or more commonly as a private plaintiff under the federal statutes), and by an infinite number of private attorneys general (either seeking injunctive relief or damages, and the latter commonly in class action form). While the Antitrust Division does not typically seek financial penalties in civil cases, it can and does seek significant fines in criminal cases; the largest criminal fine to date is $500 million. The FTC has recently obtained a $110 million settlement in an action seeking disgorgement of allegedly illicit profits; while it says that such actions will be "rare," there does not appear to be any limit other than the agency's discretion on when such actions could be brought. In almost every case where a criminal indictment is brought, and sometimes even where there is no criminal complaint, scores of duplicative class action complaints and individual direct purchaser actions are filed in numerous federal district courts across the country. These are usually consolidated in an multi-district litigation ("MDL") court for pretrial proceedings. These cases are rarely tried, take years to resolve, and burden the courts and the parties with substantial litigation costs (including plaintiff's attorneys' fees running from 20% - 30% of settlements and substantial defense fees and expenses). In addition, they can give rise to windfalls to direct purchaser plaintiffs if they passed on overcharges (sometimes with additional markups) to their customers.

Overlaid on top of the MDL direct purchaser litigation is an even more complex multitude of lawsuits that can be brought by state attorneys general (for direct and indirect government purchases and as *parens patriae* on behalf of the state's citizens) as well as class and individual actions on behalf of indirect purchasers in those states where by statute or judicial decision state law permits indirect purchasers to sue for antitrust damages. Other indirect purchaser cases are also filed based on common law theories and state consumer protection laws. Unlike federal direct purchaser actions which can be coordinated and consolidated for pretrial purposes through the MDL procedure, there is often no basis to remove such cases and no comparable MDL mechanism to coordinate state court litigation pending in multiple jurisdictions. As a

[9] The Task Force notes that the Antitrust Division this past year sought legislation to raise the statutory fines for criminal violation of the Sherman Act to $100 million, and that the Section of Antitrust Law issued a report supporting the Antitrust Division's efforts to have Congress increase the level of statutory fines under the Sherman Act without taking a position on how large the increase should be. It should also be noted that all fines obtained by the Antitrust Division by statute go into the federal victims compensation fund; they are not targeted to the actual victims of the antitrust violation.

result, the potentially duplicative, resource consuming and chaotic state-by-state adjudication of similar and related actions can only be coordinated by voluntary cooperation among the parties and state court judges involved. Since indirect purchaser claims for the same purchases potentially may be made in more than one state, class settlements are also impeded. The inability to coordinate and consolidate these cases can consume enormous resources of the parties and the judiciary.

In 1993, the Report of the Indirect Purchaser Task Force of the Antitrust Section pointed out that the result of the Supreme Court's *Illinois Brick* (denying indirect purchasers the right to sue under federal antitrust law in the interest of judicial economy) and *ARC America* (permitting states to authorize indirect purchaser lawsuits under state law) decisions was to permit inconsistent and potentially duplicative recoveries, and to encourage the inefficient use of judicial resources. We endorse this assessment, and note that the situation has not measurably improved in the last eight years. Indeed, the "innovation" of the use of the FTC's disgorgement authority in the antitrust context has potentially further complicated the situation.

Today, this uncoordinated system generates significant costs (fines, litigation costs and expenses, civil settlements and damages, and burdens on judicial resources) but in many cases those costs are not principally directed to compensation of the actual victims of cartel behavior. Certainly real consumers rarely receive meaningful compensation. The private antitrust bar -- both plaintiffs and defendants -- is well-served by this system, but it does not well serve either the victims of cartel behavior or our desire for an efficient, effective damage recovery and deterrence mechanism. Nor does it take into account the innocent actors – workers and suppliers – who also suffer when multiple layers of penalties go beyond deterring wrongdoing and compensating victims.

This is a complex problem with no easy solutions. It is difficult to reconcile completely the sometimes competing desires for deterrence, full and fair compensation for victims, and efficient judicial administration. In the abstract, however, a more rational system for dealing with these issues, and improving the efficiency of the process both in general and in actually compensating those injured, could be imagined.

Such a solution might operate along the following lines:

First, all damage and penalty matters should be consolidated in the district court in which an original criminal or civil penalty action (if there is one) was brought, or if there was no preceding enforcement action, in some other court that would have exclusive jurisdiction over any related direct and indirect purchaser monetary claims related to the charged conspiracy, whether federal, state or private.

Second, all defendants would remain subject to the jurisdiction of the court, and be required to provide relevant discovery, for both any substantive enforcement action and all related damage claims.

Third, any criminal proceeding or other substantive enforcement action would take precedence over any related civil claims, which would be stayed until the end of the criminal proceeding.

Fourth**,** a single civil proceeding would determine liability for damages, the aggregate amount of any unlawful overcharge or other damage, and the allocation of damages among all claimants. This proceeding would have several distinct phases. The first phase, which would follow any criminal trial(s), would determine whether the defendants violated the antitrust laws, applying all rules of evidence, including the prima facie effect of guilty verdicts or pleas, that exist today. The court would appoint a limited number of counsel from among those representing damage claimants to litigate liability on behalf of all claimants. Defendants could elect to bypass this phase by stipulating to liability. The second phase would be devoted to determining the aggregate amount of any overcharges or other damages, which would be calculated on an overall basis at the direct purchaser level for the period of the conspiracy. A similar limited group of counsel would be designated by the court to conduct this phase. After this phase or a judicially approved settlement, the defendants would deposit the overcharge (appropriately trebled or multiplied pursuant to the legislation) into the registry of the court. (Consideration should be given to crediting part of any “loss-based" fine to the overcharge fund to compensate the claimants.) Finally, with the assistance of whatever special masters, magistrates or other resources the court elects to engage, an allocation of the overcharge between and among the direct and indirect purchasers and any other claimants would be made for their respective claims. As part of its allocation, presumptions could be made as to whether an overcharge was passed on. Indeed, as in interpleader actions it may not even be necessary for defendants to participate in this final phase (or to participate in only a limited fashion).

Obviously, a solution along these lines would require some complex form of state and federal governmental interaction, and potentially some form of legislation and/or a federal/state compact; it is clearly an extremely ambitious suggestion. It may, after study, prove to be politically impractical or suffer from other flaws. Nevertheless, the concept of consolidating all civil penalty or damages litigation in one court, and thereby reducing the burden on judicial resources, limiting unnecessary attorneys' fees and litigation costs, expediting resolution of damage claims, avoiding windfalls and duplicative and inconsistent recoveries, and making the process more rational and efficient, is a notion worth considering, since the problem is a serious one.

We urge the new Administration to appoint a Blue Ribbon task force, co-chaired by the Chairman of the FTC and the Assistant Attorney General for Antitrust, and with representatives from the National Association of Attorneys General, the plaintiffs’ and defendants’ private bar and the business community, to study these issues and report its recommendations to the President no later than the end of FY 2002. The Section of Antitrust Law has had a Task Force on Civil Litigation working during the past year on antitrust litigation issues, and its Report is due in the Spring of 2001. We hope that the antitrust agencies and the task force recommended by this Report (if appointed) will give serious consideration to that Report in dealing with these important issues.

5. The Global Competition Initiative Now Underway Should Be a High Priority for Both Agencies.

The end of the Cold War intensified not only the globalization of commerce but also the adoption of free market principles by countries around the world, accompanied by a vast proliferation of competition policy regimes. Today, over 100 countries have competition/antitrust laws. In many cases, these laws claim jurisdiction based on an "effects" test, which means that multiple countries have jurisdiction over the same commerce, often with conflicting substantive and procedural rules.

In our increasingly international economy, mergers in particular affect multiple jurisdictions and merging parties are confronted by a variety of different, expensive, time consuming, and potentially inconsistent merger regulations. In 1990, fewer than 20 nations had a merger review system in place; today over 70 do, with more considering such systems every day. At the same time, the globalization of commerce has made an increasing number of transactions subject to review in multiple jurisdictions. These jurisdictions have different substantive policy standards and objectives (i.e., preventing market dominance, avoiding substantial lessening of competition, protecting other public interests (employment, important national industries, etc.)), differing triggering events for notification, divergent notification forms, different time periods for review, and confidentiality strictures limiting the ability to share information with other enforcement agencies. These divergent and ever proliferating merger regulation requirements substantially increase the cost, complexity and time required to consummate mergers, including merger transactions posing no serious competitive issues.

In 1991, the Report of the Section of Antitrust Law's Special Committee on International Antitrust recommended, *inter alia*, that the United States and other sovereigns "should strive for greater harmonization regarding the timing and content of their premerger reporting requirements," cooperate among each other in coordinating merger investigations, enforcement action, and relief (being duly cognizant of the comparative interests of the respective nations), and remove statutory barriers to the sharing of "confidential information, subject to appropriate safeguards." Positive steps have been taken by the enforcement agencies and their counterparts abroad bilaterally and *ad hoc* in particular transactions to coordinate merger enforcement. The job is not finished.

We recommend that as a priority matter the United States work with other nations toward reducing the compliance burden, cost and time delays of multi-jurisdiction pre-merger review, particularly for the vast majority of transnational mergers which are not anticompetitive. To the extent that an international antitrust enforcement protocol can be created in which a single filing form can be used for participating nations, uniform time limits for merger review established, confidentiality restrictions waived so that all participating nations can have access to confidential information under appropriate safeguards and their enforcement agencies can communicate freely, and protocols worked out to balance the comparative interests of participating nations, this could substantially reduce the complexity, cost and delay that burdens consummation of international mergers today.

More broadly, in the fall of 2000 both the U.S. Department of Justice and the European Commission finally agreed that a multilateral approach, outside of the World Trade Organization, should be undertaken to seek harmonization of competition regimes under the rubric of a Global Competition Initiative. This reflected the recommendation of the International Competition Policy Advisory Committee appointed by the Attorney General (co-chaired by James Rill, the Assistant Attorney General for Antitrust in President George Bush's Administration and a former Chair of the Section of Antitrust Law) that additional efforts be undertaken to achieve further harmonization. The U.S. antitrust community has a large stake in the development of internationally accepted competition standards and procedures that promote the appropriate level and form of antitrust enforcement at the lowest possible cost, and thus the Task Force endorses this initiative. The Global Competition Initiative offers the possibility of establishing a more effective means for identifying a commonly accepted competition policy agenda, and concrete means for implementing appropriate harmonization efforts.

The Section of Antitrust Law is supporting the Global Competition Initiative that the United States, the European Commission and Canada have begun. Under the auspices of the International Bar Association, the first meeting of governments under the Global Competition Initiative is scheduled for February 2-4, 2001 at Ditchley House in England, with agreed participation by the U.S., the EC and Canada, and invitations to over 30 other governments.

There is no easy or quick path to harmonizing the world's competition regimes. Potentially conflicting sovereign interests must be balanced. It is critically important, however, that these issues should continue to have a high priority. The Task Force urges the new Administration to actively foster the Global Competition Initiative and maintain its momentum over the years ahead.

6. The Assistant Attorney General for Antitrust Should Be a Full Participant in the Administration's Economic Policy Functions, and Both Agencies Should Be Vigorous Advocates for Competition Values.

When one views the entirety of the economy of the United States, one quickly realizes that a great part of our economy has been exempted, or is immune under the state action doctrine, from the rigors of competition enforced by the antitrust laws. In other countries, even larger segments of their economies enjoy subsidies or exemptions and immunities.

There is a global consensus among students of competition policy that one of the most important contributions of a competition agency is to encourage the adoption of policies that encourage rather than retard competition wherever possible. This advocacy can take many forms: testimony before Congress, participation before federal and state regulatory agencies, *amicus* briefs, preparation of reports, and speeches and interviews are all important. But equally important is a voice promoting competitive alternatives in the private economic policy debates within the Executive Branch. This can be most effective when the Administration's principal advocate for competition, the

Assistant Attorney General for Antitrust, is an active and regular participant in the economic policymaking apparatus of the new Administration, whatever form that takes.

As reflected in the work of individual commentators and multinational bodies such as the Organization for Economic Cooperation and Development, competition advocacy is regarded as a vital complement to law enforcement in the work of antitrust authorities. This universal support for antitrust bodies to undertake a strong competition advocacy role stems from two basic sources. The first is the recognition that government measures that suppress business rivalry have a singular capacity to stifle competition. Compared to private restraints on rivalry, government mandates tend to be more durable and effective, if only because the power of the state, exercised with civil or criminal sanctions, stands behind the public restriction on entry, pricing, innovation, or other dimension of competition. Even a casual examination of economic policy at the national, state, or local levels reveals that publicly-imposed distortions in the competitive process are commonplace and significant. The ability of the marketplace to self-correct for governmentally-imposed restraints is limited. Competition authorities may be the only instruments of government with the charter and incentive to effectively illuminate the costs of public restrictions on business rivalry.

The second source of support for competition advocacy is the realization, based on decades of experience, that there is a continuing need for efforts to sustain a political consensus favoring reliance on business rivalry as the chief means for organizing the economy. Despite a general national commitment to rely on a competitive free market process, business groups and other constituencies often seek dispensations by arguing that competition poorly serves national interests. Unless rebutted, such views have the capacity to undermine support for market-based economic policies. Among government institutions, competition agencies have a unique ability to reinforce the culture of competition that helps sustain political support for the free enterprise system.

Over the past decade, competition advocacy has assumed relatively less importance at both the Antitrust Division and the FTC. To some extent, this trend is a function of resource constraints. The renewed emphasis on litigation and the revival by the FTC of seminars and workshops (for example, the B2B workshop) as policymaking tools have required a reallocation of resources and a reduction of funding for other activities, such as advocacy. The reduced emphasis on competition advocacy may also reflect an unwillingness to spend political capital on what can sometimes be unpopular efforts to eliminate or prevent government programs that favor one group of economic actors over another.

The Task Force believes that an expansion of the agencies' appropriations and a reallocation of internal resources to increase the prominence of advocacy as a policymaking tool should be a priority of the new Administration. The voices of the antitrust agencies are too important to not be heard on issues with real competitive significance. In addition to the traditional activities, one possible focal point for specific study would be to examine the extent to which existing government policies facilitate collusion. For example, recent academic research has suggested ways in which recourse to the U.S. anti-dumping mechanism gives cartel participants a tool for

punishing firms that refuse to participate in setting output limits or abiding by market division agreements. Other researchers have raised important questions about how domestic content programs and other limits on entry facilitate collusion against government purchasing authorities. These and other important issues could benefit from increased, targeted resources for the federal antitrust agencies.

The economic landscape also features a number of sectors that would seem to be ripe candidates for deregulation techniques already applied in sectors such as energy and telecommunications. The postal services sector may be the low technology end of the information services industry, but the U.S. Postal Service is a $60 billion per year company and the holder of one of the country's most important monopoly franchises. The United States lags far behind foreign jurisdictions in moving from state-owned monopolies to privatization and competition as governance strategies for postal services. The federal antitrust agencies occasionally have commented on proposed legislation to reform the postal services, but the Task Force believes that a substantially more robust program of research and analysis would spur reconsideration of the existing regulatory regime.

7. The Merger Review Process Needs Continued Attention.

Merger review is one of the central activities of the Antitrust Division and FTC. During recent years, merger review has occupied the bulk of resources at both agencies. The merger process is the most common point of contact between the business community and the enforcement agencies, and thus it has a disproportionate effect on perceptions of agency behavior and performance by the general business community. As a result, it has received considerable attention, both in the bar, in Congress and in the agencies. This attention has produced obvious improvements, and that dialogue is ongoing.

The Section of Antitrust Law's Task Force on HSR Investigations has just published, with the cooperation of both enforcement agencies, *Guidance For Federal Merger Investigations and Complying With "Second Requests"* (January 2001). It presents guidance to both the private bar and the government staffs of practices that enhance efficient enforcement. The Task Force believes that this area requires continued attention, and notes that it could be affected by progress on the Global Competition Initiative discussed earlier in this Report, as well as by the results of the Task Forces on Fundamental Theory and on the Concepts of Time, Change, and Materiality in Antitrust Enforcement which are due later this year.

A. <u>The Agency Clearance Process Needs to be Regularly Monitored By the Agencies.</u>

The "clearance process," by which the enforcement agencies allocate responsibility for investigating a merger among themselves, in the past has consumed a significant part of the 30-day waiting period in a number of transactions, leading to second requests occasioned solely by a lack of time to preliminarily review a proposed transaction and unnecessary re-filings to avoid such second requests. The 1993 Task

Force Report recommended that regulations be promulgated under the HSR Act to require clearance no later than the 10th day of the waiting period and that unexceptional transactions be cleared in a week.

While the HSR regulations have not been so amended, the enforcement agencies initiated new procedures in April 1995 that had the effect of shortening the clearance time from an average of more than seventeen days to about ten days, allowing the agencies more time for investigation during the initial waiting period. The agencies report that currently only about 50 transactions annually are not cleared within a week, and only a few of these result in second requests. This is obviously very significant progress, for which the agencies deserve our congratulations. Nevertheless, this is an area that requires constant attention; in a very real sense, this is analogous to a customer service issue for a retail business. A lack of continued efficiency in this area would generate unhappiness and frustration in the served community far beyond the cost of the resources necessary to maintain recent good performance.

Finally, it is in everyone's interest that decisions as to whether to issue second requests are as fully informed as possible and that the maximum amount of time exists for resolution of potential anticompetitive concerns without resorting to the second request process. We encourage the agencies to carefully monitor this aspect of the merger review process, to pay careful attention to any signs of slippage, and to ensure that the vast majority of transactions that admittedly have no antitrust significance at all are not unnecessarily delayed. The Task Force believes that it is much more important that the clearance decision be made quickly than which agency eventually handles the matter, and suggests serious consideration be given to setting an absolute limit of ten days for all clearance decisions, if necessary made by a coin flip or some similar random method.

B. The Scope and Burden of the Standard Second Request Continues to Be a Matter of Concern.

One of the most complex issues in merger review today is the proper balance between the need to adequately investigate and effectively prosecute those mergers that threaten serious anticompetitive effects, and the burdens imposed on the parties to transactions prior to a conclusion that they should be challenged as a violation of Section 7 of the Clayton Act. No one argues with the relevant principles: the agencies should have the flexibility to undertake an adequate investigation, and the parties should not be forced to carry any unnecessary burdens. The disagreement comes in applying these axioms, and in striking the proper balance between them.

There are good reasons why this balance is hard to strike. The agencies generally are not expert in the industries they are forced to evaluate in the context of merger investigations. They face relatively short time limits -- 30 days to decide whether to investigate, and then only another 30 days (increased from 20 days by

recent legislation) after they receive responsive materials before they must make an enforcement decision.[10] In addition, the statutory scheme only allows the agencies one bite at the apple; any information they do not ask for in the Second Request can only be obtained by the agreement of the parties or through the use of non-self-enforcing compulsory process, which may not be practical in many cases given the time pressures involved. In those situations where there are legitimate competitive concerns, the parties may have little incentive to help the agencies understand those problems, and the third parties (including frequently competitors) to whom the agencies must turn for information may have private agendas that require the agencies to evaluate any information gathered carefully to ensure that it is objective and not an attempt to game the merger review system. Finally, the agencies have the burden of proof; a tie goes in this case not to the runner but to the transaction, and thus the agencies have a legitimate concern that their investigation be sufficiently thorough that it not only enable the right enforcement decision but also put them in a position to successfully litigate if necessary.

Unfortunately, the result of these legitimate needs and concerns can be a second request that requires the production of hundreds -- and sometimes thousands -- of boxes of documents, the preparation of indices thereto, and responses to detailed interrogatories. Obtaining “substantial compliance” with such a second request can take months and require the expenditure of hundreds of thousands -- or millions -- of dollars. While these burdens are visited on only a relatively small number of transactions each year (the agencies combined issued a total of 98 Second Requests in FY2000), the burdens imposed on the unfortunate parties are quite significant.

This issue has been with us for some time. The 1993 Task Force Report emphasized that, "[i]n enacting the Hart-Scott-Rodino Act, Congress did not intend that regulatory abuse or the expense and demands involved in responding to a second request thwart lawful transactions" and recommended "that the antitrust enforcement agencies harmonize their data requests, re-examine the sweeping scope of the standard HSR second request, and streamline requests to reduce burden." The enforcement agencies, working with the Section, have since developed a uniform model second request intended to decrease the compliance burden and achieve greater consistency among the agencies. In April of this year, the FTC announced further improvements to the second request process, including greater high level review prior to issuance to reduce burden, a commitment to faster responses to requests for modification or narrowing of the requests, additional staff training in formulating

[10] Of course, these limits are avoidable in a variety of ways. The original 30 day period can be extended by the parties if they choose to do so by simply withdrawing the original HSR filing and refiling; if refiled within two business days of withdrawal, no new filing fee is required. And the agencies can frequently negotiate or coerce additional time following compliance by agreeing to a schedule for a final decision (and perhaps certain milestones along the way) or by hinting that an adverse decision could potentially be avoided if more time was available for analysis. Notwithstanding these practical variations, the statutory time periods are what drives process at the agencies, and therefore are the relevant point of analysis.

requests, and development of "best practices" and new appeal procedures for second request issues. The Antitrust Division also took steps to address the issues. The newly issued *Guidance For Federal Merger Investigations and Complying With "Second Requests"* (January, 2001), compiled by the Section of Antitrust Law in cooperation with the enforcement agencies, should be helpful.

These efforts are obviously steps in the right direction but it is too early to assess their efficacy.[11] New legislation effective February 1, 2001 requires the Antitrust Division and FTC to designate a senior official who does not have direct responsibility for any enforcement recommendation concerning the merger transaction to hear petitions that the second request "is unreasonably cumulative, unduly burdensome or duplicative" or that "substantial compliance" with the second request has been achieved. We endorse this legislation and urge the agencies to quickly implement it. In addition, we urge the agencies to promulgate standards (1) by which the proper scope of second requests can be assessed and (2) for determining whether substantial compliance has been achieved. These matters are now handled on a case by case basis. For an appeals process to be meaningful, standards against which the burden and substantial compliance issues are assessed need to be set forth.

Finally, the recent legislation calls for the heads of each agency to "conduct an internal review and implement reforms of the merger review process in order to eliminate unnecessary burden, remove costly duplication, and eliminate undue delay, in order to achieve a more effective and more efficient merger review process." It also requires reports to Congress within 180 days by each agency detailing the reforms adopted and the effects of such reforms. The Task Force strongly suggests that this legislative direction be taken seriously, that the new leadership of both agencies focus intensely on this evaluation[12], and that Congress carefully review their report.

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[11] Complaints that second requests routinely ask for far more material than the staff will ever review or need are still widespread. In particular, requirements that the parties produce information beyond that kept in the normal course of business (e.g., econometric analysis of scanner data and preparation of detailed maps) have added to the expense and time for compliance. In many cases, complaints also are made that model second request interrogatories and boilerplate requests are used in particular industries when they are either irrelevant or unanswerable. The agencies need to be more vigilant in encouraging their staffs to tailor (not augment) the model request to address the transaction involved and the competitive concerns likely to be at issue.

[12] In this respect, while application of the criteria contained in the instruction to Item 4(c) can be straightforward for certain kinds of documents, a variety of issues arise for practitioners attempting to ensure that their clients fully comply with Item 4(c). Because the consequences of non-compliance can be draconian (e.g., the waiting period may be re-started, even if it had initially expired, and a second request may be issued, or revised and re-issued, during the new waiting period), additional guidance from the HSR staffs of the enforcement agencies would be useful with respect to issues such as (1) the kinds of documents that are, or are not, "studies, surveys, analyses or reports" within the meaning of the instructions; (2) the circumstances in which the mention of an item 4(c) topic (i.e., competition, competitors, markets, market shares, opportunities for sales growth or expansion into product and geographic markets) constitutes an "analysis" or "evaluation" within the meaning of the instruction; (3) when documents prepared by the target are 4(c) documents for the acquiring person; (4) when, if

C. The Enforcement Agencies Need To More Fully Disclose The Bases For Current Merger Enforcement Decisions.

In the last two decades, merger law has shifted from largely judicially-created precepts arising from a body of case law to enforcement agency guidance and economic theories. Merger analysis also has become more complex, relying far more on econometric analysis and detailed review of the particular dynamics of the product and geographic markets at issue than on presumptions based on market structure. The shift from judicial decisions to enforcement agency policies as the critical focus of merger "law" makes it critical that agency policies be transparent, current and readily ascertainable. The agencies' policies have been reflected in the current version of the *Merger Guidelines*, speeches of agency officials, competitive impact statements and statements to aid public comment, and made more accessible through the agencies' web sites – all of which we applaud.

The Task Force believes that additional efforts would be desirable. Many, across the full spectrum of antitrust opinion, perceive an *ad hoc* character to much of antitrust enforcement, and have great difficulty understanding the rationale for particular actions, at least as explained (or not) by the enforcement agencies. It is hard for many in the business community to understand the enforcement objectives of the agencies sufficiently to formulate acceptable business conduct.

First, there is a general belief that the standards set forth in some areas of the 1992 *Merger Guidelines* (e.g., the HHI thresholds actually used to challenge mergers) may not reflect current enforcement policy. Other recent areas of current enforcement emphasis – such as unilateral effects analysis – are not as fully set forth in the *Guidelines* as their increasing role in agency merger review would seemingly dictate. Another example is the use in the *Guidelines* of "innovation markets," which many sophisticated antitrust analysts view as completely superfluous, impossible to understand, and unnecessary when better techniques are available to deal with the real issues of innovation. While there is some debate over whether the effort involved in producing revised guidelines is worth the benefit – many believe that the institutional compromises required to produce consensus often produce a least common denominator articulation of agency practice, which is not very helpful to the outside bar and other constituencies – there is no reason why, through speeches or other means the agencies could not identify and explain those area of agency practice that may now deviate from the *Merger Guidelines*.

Second, the enforcement agencies generally issue statements explaining their enforcement actions only with respect to cases where they bring complaints. Many of

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ever, a document is prepared "for" a person even if he or she is not an addressee of the document; and (5) the enforcement agencies' policies with respect to drafts and redaction. In providing this guidance, the agencies should be mindful of both the purpose of this provision and the burdens that it imposes on every transaction, including the vast majority that raise no significant antitrust issues

these releases merely highlight the remedies achieved and provide conclusory reviews of the competitive concerns. In general, they do not meaningfully explain the market context, specific competitive concerns and the mode of analyzing competitive effects. We recognize the confidentiality issues posed. Nonetheless, we urge the agencies to make greater efforts to more meaningfully explain the factors that give rise to competitive concerns, the type of evidence viewed as relevant, the econometric analysis used (if any), and other key considerations that led to the decision to bring a complaint or enter into a consent order.

Third, the agencies generally do not explain why they elect not to bring complaints. Their decisions not to challenge investigated transactions are, one hopes and assumes, based upon careful review and analysis of competitive effects, but much of this assumption rests on faith, not facts. When judicial decisions were the principal bases of merger assessment, court cases finding no violations of Section 7 explicated the reasons for such determinations. We believe the agencies, consistent with strictures of confidentiality, should make more effort to publicly explain why they do not take enforcement action in all cases in which second requests are issued (and, for that matter, in any highly visible investigation). The recent press release by the FTC explaining its decision to not take enforcement action with respect to the *Covisint B2B* venture is a good example of what could be done more often and in more detail. The Task Force is aware that this has been a stated goal of the agencies for some time now, and recognizes the complexities of the task. But we encourage even more effort to educate the general public community about the reasons why enforcement decisions are made.

D. The FTC's Requirement Of Up-Front Buyer Divestiture Needs Further Consideration.

There is currently some considerable uncertainty in the legal and business community as to under what circumstances FTC policy requires an up-front buyer where a divestiture remedy is sought. The policy needs to be clarified. In addition, the circumstances when up-front buyers should be required should be carefully examined to balance the need to preserve effective competition with the imposition of unnecessary costs on the merging parties. The 1999 FTC Divestiture Study found that approximately 75% of the 37 1990-94 divestitures studied were successful in creating a viable competitor in the relevant market, and that 19 of the 22 divestitures requiring the spin-off of an ongoing business were successful immediately. The vast majority of these were post-closing divestitures. In cases of an ongoing, self-contained business where the merging parties demonstrate that there are multiple qualified and interested buyers, the risk of not requiring up-front divestiture seems low.[13]

[13] The Task Force notes that the Divestiture Study has taken on a significance, in terms of justification of Commission policies, that was not foreseen at the time it was issued, especially since it was never formally adopted by the Commission. In addition, it is not clear from the description of the Study whether the authors, in evaluating the apparent failure of a remedy, considered whether this was

Since the "up-front buyer" approach imposes potentially very significant costs on the parties, it should be clear that such a requirement is reasonably necessary to solve the competitive problem before it becomes a necessary condition precedent for a negotiated settlement. Accordingly, in developing an appropriate up-front buyer policy, the enforcement agencies should balance the competition-based need for this approach against the risk of causing significant value destruction in a fire sale environment, the divestiture of a broader package of assets than necessary to protection competition-related interests, or the delay of the consummation of transactions where an up-front buyer is not needed to address competition concerns.

E. The FTC's Use of Compliance Personnel In Negotiating Consent Decrees Should Be Reviewed.

In addition, it is the perception of many that the current consent order negotiation process at the FTC is both inefficient and unnecessarily rigid. It appears that much of the substantive decision-making about the adequacy of particular divestiture packages is left to the discretion of the Compliance Division, with the staff that has spent considerable time studying the industry and understanding the competitive situation taking a back seat. While it is probably useful to involve those in the FTC that have the broadest experience on compliance issues in the drafting of a consent order, a strong case can be made that the staff that analyzed the problem should have primacy in crafting the appropriate remedy. In essence, the Task Force believes that it would be more appropriate for compliance specialists to simply act as advisors to the substantive staffs, rather than as primary decisionmakers.

8. A Priority Objective of the New Administration Should Be Sustaining and Improving the Professional Capability of the Agencies.

Because of recent developments in the private market for young lawyers, the federal enforcement agencies today face a potential crisis in human capital. To understand the source of the problem, consider the situation of a graduating law student who holds an offer from a major law firm and from either the Antitrust Division or the FTC. The entry level compensation at the federal antitrust agencies (a GS-11) is approximately $50,000. By comparison, the law firms with whom that graduate will most commonly interact at the agencies now pay first-year associates a base salary of between two and three times that amount, and often provide additional signing bonuses and stipends for the bar examination. The salary gap can be even more startling for attorneys with more experience.

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consistent with the lack of a need for a remedy in the first place. What is the competitive significance of the exit of a divestee, where prices remain competitive? Studies such as this would be more useful contributions to the dialogue between the agencies and the private bar if their methodology was fully discussed and disclosed prior to the study, and the study included the participation (with appropriate confidentiality constraints) of outside academics and practitioners.

In addition to difficulties in recruiting from law schools, a major consequence of these compensation disparities is rapid turnover within the ranks of junior attorneys at the enforcement agencies. For the private sector, the Antitrust Division and the FTC are attractive recruiting grounds, for the federal agencies provide junior attorneys substantial levels of hands-on experience in areas such as merger enforcement. For most recent law school graduates, the private sector salaries eventually become an overpowering inducement – especially for those carrying tens of thousands of dollars in education loans. As the enforcement agencies place greater demands on their attorneys to handle merger and non-merger matters, junior attorneys also are likely to conclude that the federal government offers no substantial quality of life advantage in the form of fewer hours in the office.

Over time, difficulty in recruiting and rapid turnover will create a serious deficit in capability and institutional memory at these important agencies. Despite the tradition of public service in this country, and the willingness of some to trade economic returns for other values, the Antitrust Division and the FTC are likely to find themselves with too few of what law firms would describe as mid-level to senior associates – attorneys with a level of experience to handle complex tasks skillfully with only a limited amount of supervision. The agencies also are likely to find that they lack enough mid-level and senior managers with extensive experience. Such limits upon capability in the junior and senior ranks would impede the efficient administration of both routine investigational tasks (such as the review and analysis of merger filings) and the implementation of enforcement strategies that involve greater recourse to litigation as a policymaking tool.

There are a number of possible strategies for coping with this potential capability deficit. An obvious measure would be to increase the compensation for government attorneys. It is an anomaly of U.S. public policy that Americans seen to assume, contrary to their other life experiences, that there is no relationship between the quality of public administration and the level of compensation paid to enforcement agency professionals. Enhancements in the compensation scheme could take a number of forms, including direct increases in salary, the payment of bonuses to valued employees, or the abatement of debt incurred to finance higher education. Obviously, any significant change might require basic adjustments in national policies concerning the civil service, although we understand that there are situations elsewhere in the government where special pay arrangements are made for particularly valuable personnel. Nevertheless, the Task Force urges the new Administration to carefully consider the feasibility of appropriate adjustments in professional compensation at the federal antitrust agencies.

Another, far less desirable option for dealing with this problem is to contract out key functions, including major litigation tasks. This is the model that the Antitrust Division followed to obtain lead trial counsel for the *Microsoft* case and appears to have used in one or more other matter(s) for an analysis of a merger in which litigation was contemplated. If compensation for government attorneys is not increased substantially, the antitrust agencies may find themselves turning more frequently to variants of this strategy – either contracting out specific functions or hiring, as full-time employees,

experienced professionals with the express understanding that they will serve a relatively short period and be given lead roles in matters that enter litigation. Experienced private sector attorneys may be willing to accept the latter type of assignment because it is substantively interesting and because it enhances their market value upon leaving government.

Without improvements in the general federal compensation scheme, the antitrust agencies may find it necessary to draw more extensively on both strategies – contracting out to experienced private practitioners or engaging experienced professionals in relatively short-term (one to two years) appointments with a promise that they will lead the prosecution of litigated cases. Each strategy has important institutional implications that should receive more extensive discussion within the antitrust community.

Another action that could improve institutional capability is the expansion of the agencies' internal programs for training professionals.[14] Both agencies have training programs of varying kinds, ranging from internal orientation to economic seminars, and both detail a small number of lawyers to the U.S. Attorney's office for trial experience. Some lawyers are able to attend the NITA trial advocacy program. But resource limitations constrain the training capacity of both agencies, and earmarked funds for this purpose would be very useful. The agencies could also consider using former practitioners (either retired or no long active for other reasons) as resources, either in an established training program or perhaps as mentors for individual young lawyers.

Whatever mix of specific measures is chosen, the Task Force believes the enhancement of training for professionals in the federal antitrust agencies is an increasingly important tool to prevent the erosion of the capability of these institutions.

9. The Actual Operation and Organization of Both Agencies Should be The Subject of Regular Review and Evaluation.

In recent years, the federal antitrust agencies have exhibited something of a split personality. There has been a very considerable, and largely successful, effort (especially by the FTC) to reach out to and engage with the private bar, consumer groups, academics and the business community over issues as diverse as slotting allowances, joint ventures and antitrust policy in high-tech industries. The workshops and guidelines that have been generated by this effort have been generally quite useful, both in exposing the attitudes and concerns of those at the agencies and in providing them with the perspective of those whose actions they seek to influence. On the other hand, and quite consciously, both agencies seem to have adopted a more arms length, sometimes adversarial posture in their general enforcement functions. This is not

[14] While having fewer staff to train, the United Kingdom's Office of Fair Trading now requires a lengthy training course and passage of an examination for *all* of its staff members before allowing staff to participate in investigations. The training is conducted under the supervision of the Director of Policy.

merely a reflection of a greater willingness to litigate when appropriate, which the Task Force generally applauds; the development of the law is generally advanced best by regular judicial review of enforcement approaches and priorities. Instead, it is better illustrated by the unwillingness of some agency staff to engage candidly on the merits at early stages of the investigatory phase of the agencies' work, an approach that the Task Force believes is not productive.

We focus first on outreach. While it is probably true that the positive effect on antitrust compliance of good antitrust counseling exceeds any effects of government enforcement actions or private damage litigation, it is also true that the federal enforcement agencies set the tone and have the greatest single influence on the perceptions of antitrust policy and enforcement, both among antitrust counselors and in the business community. There is no doubt that the stated attitudes and emphasis of the leaders of the federal antitrust agencies can and do have an enormous impact throughout our economy. For antitrust counseling to be most effective requires that counselors understand the enforcement landscape, and those being counseled must appreciate that what they are being told is not simply lawyerly caution but a realistic recitation of real antitrust risks. Thus, it is critical that enforcement objectives be clear and transparent, so that all interested constituencies -- the business community, the bar, Congress and other (state and foreign) enforcers -- have an accurate and complete understanding of the views and objectives of the federal enforcement agencies.

One way to accomplish this objective is by public statements of various kinds explaining enforcement and policy positions and actions. Both agencies have a long history of speeches and other public presentations on these subjects; these are important parts of any effective enforcement program and should clearly be continued in a new Administration. Internet access to government websites has made the distribution of this information even easier. Particularly important pronouncements, in our judgment, should be made in those forums that reach the broadest possible audience, and this has generally been the case in the past In addition, some agency officials have also been willing to participate in private meetings of law firms or other groups; we see no reason to discourage this practice, but do believe that the substance of any remarks or presentations at such gatherings should be made publicly available simultaneously with the presentation.

Another important way to inform the outside world of agency positions and approaches is through the issuance of guidelines, and the agencies have issued a number of such guidelines in recent years. In those areas where guidelines can be produced that accurately reflect agency practice, these can be immensely useful to the bar and the business community in helping avoid unnecessary confrontations with the agencies. Of course, the converse is also true: guidelines that do not accurately reflect actual agency practice, whether because of the passage of time or the inability of the agencies to accurately articulate agency practice, are counter-productive. For these reasons, and because guideline preparation requires considerable resources, the Task Force believes they should be reserved for core issues, such as merger review, and that other forms of communication may be superior for other issues.

The Task Force does, however, strongly encourage the agencies to regularly evaluate outstanding guidelines as to whether they accurately reflect agency practice, and, if not, to either withdraw, replace or modify them as necessary. This is particularly important in the case of merger guidelines, which have a real practical effect on regular and ongoing business activity; since the most recent merger guidelines were issued in 1994, the new leadership of the antitrust agencies should carefully consider whether updated or new guidelines would be appropriate, or whether some other form of guidance about current agency practice is appropriate. That review should take into account the latest thinking on substantive antitrust rules. For example, the agencies in their next review should carefully consider the work of the various Task Forces of the Antitrust Section discussed above.

When the agencies do undertake to issue or revise guidelines, the Task Force recommends that this should be done with the full participation of the relevant constituencies, particularly the business community and the antitrust and intellectual property bars. While guidelines should articulate current enforcement policies, those policies, especially in emerging areas such as the proper intersection of intellectual property protection, technology and antitrust, should be formulated with input from those most affected by those policies. In this context, workshops and hearings of the kind held by the FTC with respect to Antitrust in the New Millennium and the recent B2B workshop (and staff report) are extremely useful ways for the enforcers and the communities that are affected by their actions to exchange views and to inform each other.

The antitrust agencies, in the aggregate, have one great advantage over all others interested in antitrust enforcement -- they see a broader range of antitrust issues and policies more completely than any outside entities. They see, in the nature of the enforcement process, all the variations on a theme, while those outside the agencies are likely to see only the relative few that directly involve their business or practice. As a result, the antitrust agencies are a very important repository of antitrust knowledge and thinking, both legal and economic.

On the other hand, the agencies suffer from one serious weakness -- their staffs do not deal with practical business problems on a daily basis, and many have no practical business experience at all. The practical impact of a broad HSR second request looks much different from the perspective of the entity that receives it than from that of the person who drafts it. It is in the nature of things that people with a specific focused mission can become insulated from the practical implications of what they do, or may not always be aware of developments or events that should inform their thinking and actions. There are many ways to minimize the adverse effects of this insulation, including participation in outside bar events and programs, giving speeches and listening to the feedback, and inviting comments and suggestions from those outside the agencies about agency actions and positions. The FTC in recent years has used the workshop technique very effectively, and this trend should continue. The Task Force encourages the new Administration to consider new and regular ways in which agency personnel and those outside the agencies can interact and exchange thoughts and ideas about agency practice and policy issues.

Now we turn to the other face of the agencies – the actual day-to-day enforcement activities. Among the important recommendations of the 1993 Report was the plea that the agencies should reduce the burden, delay and misallocation of resources reflected in their then-extant procedures and policies. To a significant extent the agencies were responsive to this plea: the FTC essentially abandoned pursuit of Part III proceedings after losing merger cases in federal court; the FTC introduced automatic sunset provisions in its consent orders and also changed its general boilerplate in many instances from requiring prior approval of various actions to prior notice; and the Antitrust Division has cooperated with a number of parties in eliminating or altering unnecessary consent decrees.

Improvements in the merger investigation process have been somewhat harder to come by, despite agency efforts and even the most recent legislation, and it is still the case that many matters take much too long to complete, especially non-merger matters. There are many reasons for these continuing problems, some of which are discussed earlier in this Report, but among the most important are the resource constraints caused by the combination of a lack of sufficient resources and a misallocation of those resources that are available. In addition, while there are obvious benefits to concentrating merger enforcement in specialized units, as has been done to some extent at both agencies, there are also possible costs, in terms of loss of industry expertise and knowledge. This is an organizational issue that deserves more attention.

Indeed, the Task Force recommends that the new Administration carefully review both the structure and the actual operational priorities of both federal antitrust agencies to ensure that they are organized and operated in a way that promotes efficient and effective efforts. While there have been periodic reorganizations of both agencies, continuing changes in the economy and in global enforcement make it appropriate to review those structures periodically. We suggest that this be approached for analytical purposes as a "clean-sheet" study, an analog to zero-sum budgeting. This is not to suggest that all or even most of the structure or operations of either agency are inadequate or misdirected, but simply to suggest a useful technique for making the most effective evaluation.

Input from the private bar should be solicited for that review, since members of the private bar -- the people that interact with agency personnel daily -- are probably in the best position to offer constructive criticism on any inefficiencies that may result from the current structure. These issues are necessarily different in the two agencies, given the inherent differences between an Executive Branch agency and an Independent Agency. Indeed, they are probably more important at the FTC, where the separation between the Commission (the decision-makers) and the staff is much more formal than is the case at the Antitrust Division. As part of this exercise, the Task Force urges the agencies to regularly publish organization charts or other information clearly explaining internal lines of authority and decision-making.

Finally, each agency should carefully review its internal operational and decision-making processes to ensure that they are designed to produce the right kind of information, presented in the right way, to enable decision-makers to make informed

decisions. There have been periods in the recent past when one of the agencies reduced or eliminated the requirement for a careful written evaluation of the facts (the so-called "Fact Memorandum"), and in particular an explanation of how those facts would be placed in evidence if necessary, as a prerequisite to any enforcement decision. The Task Force believes that the value of committing such thoughts to paper far outweighs the cost in time and personnel to create such writings; writing it down makes you think through your analysis, and having to clearly state how those facts would be evidenced tends to highlight any weaknesses that might be present in the analysis or proof. In the end, the first priority of the antitrust enforcement agencies should be to make informed decisions based on clearly articulated policies; all other objectives, including actually being successful when forced to litigate, should be secondary to the goal of making the right decision in the first place.

One area that deserves particularly careful review is the general approach to interaction with private parties at the investigatory stage of enforcement activities. Particularly in recent years, many in the agencies have seemed to adopt the attitude that they were entitled (and perhaps required) to behave at all stages of a matter as if it was necessarily adversarial, and thus to minimize disclosure and maximize tactical advantages wherever possible.[15] This is not a trend that should continue.

The Task Force believes that everyone's interests are served by the exchange, as early as possible in the process, of candid views by both sides. The initial obligation must be on the agency staff, since they are the moving party if the government is to intervene, and they do carry the burden of proof. It is in the interest of efficient investigation to disclose early and as fully as is consistent with confidentiality constraints any concerns that the staff may have. The agencies want to get it right; they want to preserve any efficiencies that may be present in a transaction; they have limited resources and should be looking to conserve them, not waste them; and they have a broader responsibility for stewardship of a responsible enforcement policy. The parties also have an interest in as quick and efficient resolution of the investigation as possible;

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[15] This seems to be a broadly held view, with multiple impacts, but two examples will illustrate the point. It is the general practice of most staffs at the FTC to refuse to allow the deponent to obtain a transcript of an investigatory deposition at the same time that the staff gets a transcript. The stated rationale for this practice – when any explanation is given -- is that deponent's counsel may use the transcript to improperly shape the testimony of future witnesses represented by that same counsel. Apart from the fact that this presumes improper conduct with no basis at all, counsel can of course take notes and have in fact been forced to resort to all sorts of second-best substitutes, ranging from bringing in stenographers to having additional associates or paralegals attend the deposition to do nothing other than make as close to a verbatim record on their laptop as possible. In fact, this practice does nothing to prevent improper conduct, but it does inconvenience counsel and witnesses, and it does raise costs by forcing counsel to find a second-best solution. The new Administration should ensure that its appointed leaders end this particular practice immediately.

It is also generally not possible to persuade the agencies to share econometric analyses, even though it would be more productive to have economists on both sides of a matter working off the same basic analytical structure, and debating why they come to different results, than to have one side uncertain of the methodological approach used by the other.

all transactions weaken with the passage of time between announcement and closing. Thus, all interests are served by candid interaction, and the disclosure and explanation of any concerns that the staff may have as early as possible in the process.

The best way for the agencies to strive for the proper goal of objectively correct enforcement decisions is to show their hand, and see if the parties can deal with it; to explain clearly their theories, and see if the parties can show why they don't fit these facts; to explain what competitive problems they are worried about, so the parties can understand what all the options for dealing with those concerns might be, assuming they cannot convince the agency that they are not real. In addition to enhancing the prospects that the agency has gotten it right, such disclosures are also likely to be effective, when they are persuasive, in convincing the parties to be more realistic in how they should respond to the concerns expressed by the agencies.

Litigation will, and should, continue to occur. There will be times when the parties feel strongly enough, or just where reasonable people could differ, that litigation is an appropriate device for resolving those disagreements. And litigation offers other values as well, not the least of which is judicial guidance based on an evidentiary record. But litigation should be reserved for those relatively rare circumstances when reasonable people with a clear understanding of each other's objectives and perspectives simply could not find a mutually agreeable resolution. The best way to reach this objective is to operate as openly as possible, with no hidden balls and no refusals to talk.

The Task Force urges the new Administration to set a tone of openness and candid interaction whenever possible throughout the investigatory process. In other words, we suggest that the approach of the very successful outreach activities of the agencies should be imported more fully into their day-to-day enforcement activity. In this regard, the Section's recent publication *Guidance For Federal Merger Investigations and Complying With "Second Requests"* (January, 2001) contains quite useful suggestions for minimizing friction in the merger investigatory process.

10. Two Substantive Policy Areas Worthy of Attention.

The Task Force has identified the following areas in which existing antitrust statutes and doctrines are believed by many to depart dramatically from mainstream views about the proper content of competition policy. The new Administration might usefully devote attention to revisiting these areas of antitrust policy and considering how they could be better aligned with the sense of the antitrust community about the elements of sound policy.

A. The Robinson-Patman Act

This 1936 price discrimination law deserves a careful reassessment. This is not a new idea; calls for reform or repeal of Robinson-Patman have been heard almost from the day of its passage. But with the essential elimination of federal enforcement activity over the last quarter-century, the statute is now almost exclusively a tool of private

enforcement. In the early 1960s, the Antitrust Division abandoned enforcement of the statute and allowed the FTC to exercise the exclusive federal government role in the field. In the 1970s, the FTC dramatically retreated from the active program of enforcement that had characterized Commission policy in the previous three decades. The most recent two decades have featured nearly complete bipartisan neglect of the statute. The Reagan FTC initiated a single new Robinson-Patman case, the Bush FTC began none, and the Clinton Administration filed one action.

The inability of the federal enforcement agencies since 1980 to find more than one case per decade lends support to the claim of many commentators that the Robinson-Patman Act no longer serves any useful public function. A policy of non-enforcement or minimalist enforcement is a decidedly inferior alternative to repeal or drastic formal revision, especially since the statute continues to generate private antitrust litigation on a regular basis, and therefore requires the business community to devote significant counseling resources to this area.

Using an implicit policy of prosecutorial nonintervention to blunt the harsh edges of an ill-conceived statute merely breeds disrespect for the law and raises doubts about the legitimacy of the competition policy system. It would be better for the federal antitrust agencies at least to encourage a candid public discussion of the subject – perhaps through a workshop or seminar hosted by the FTC – rather than side-step the issue by bringing the exceedingly rare case. And notwithstanding the obvious political difficulties, the new Administration should at least consider whether it is time for legislative action. *See* the Section of Antitrust Law's two volume monograph *The Robinson-Patman Act: Policy and Law* (Volume I, 1980), (Volume II, 1983).

B. State Action Immunity

State action immunity drives a large hole in the framework of the nation's competition laws. The ability of state and local governments under U.S. law to exempt activity from federal antitrust scrutiny has attracted harsh criticism from domestic commentators and multinational institutions alike. Given our federal system, one might accept state measures to restrict competition if the effects of such restrictions fell exclusively or predominantly on the citizens of the jurisdiction that adopted the restrictive scheme. Unfortunately, the state action doctrine is not so delimited. The doctrine immunizes competitive restraints without considering whether one state's intervention imposes substantial spillovers on another jurisdiction's citizens.

Foreign jurisdictions are far ahead of the United States in curbing the power of political subdivisions to subvert the interests of economic integration. The Treaty of Rome creates direct limits on the power of member states of the European Union to restrict competition. Numerous transition economy antitrust laws preclude or make difficult various forms of government intervention to restrict competition.

Greater attention to the hazards of that form of state intervention that generates substantial adverse spillovers should induce American antitrust institutions to devote more energy to resisting state and local policies that suppress competition. A first step

would be for the federal antitrust agencies to encourage consideration of whether the existing dimensions of state action immunity are compatible with principles of federalism, properly applied, and national competition policy objectives.

If the existing boundaries of state action immunity prove to be politically or constitutionally immovable, federal and state antitrust officials, in their role as competition advocates, might at least engage in a cooperative effort to bolster efforts at the state level to oppose legislation and regulations that inappropriately restrict rivalry. Collaboration between the national and state competition authorities to highlight the costs of competition-suppressing measures would be one ingredient of such cooperation. Federal and state antitrust officials have periodically extolled the benefits of cooperation in law enforcement. Collaboration to dismantle state and local impediments to competition – especially obstacles that distort interstate and foreign commerce – deserves no less emphasis.

CONCLUSION

Antitrust enforcement is one of the most visible parts of any Administration's economic policy; it attracts attention and creates impressions. The right attention to the right impressions can have a positive impact on the entirety of any Administration's economic programs; the wrong impressions can make achieving economic goals more difficult. This is an important area in which to get it right.

Appointing highly qualified people, giving them the resources to do their job, and allowing those efforts to go forward without inappropriate political influence are the minimum prerequisites for a successful antitrust enforcement program. Following through on the substantive recommendations contained in this Report would, the Task Force believes, significantly improve the opportunity to make a positive contribution to antitrust and competition policy.

We want to emphasize the importance of intangibles in the effectiveness of any antitrust enforcement program – the tone and candor of day-to-day interaction between agency staffs and the outside bar and business community; the objectivity with which the agency is perceived to make enforcement decisions; the willingness of senior decisionmakers to actively engage in discussions of the merits of a particular enforcement action or other decision. The quality of the enforcement decisions and other substantive actions that the agencies take is, of course, the most important measurement of its accomplishments. But how it goes about doing making those decisions and deciding on those actions, and especially how it interacts with the business community and the outside bar during that process, will have a major impact on the perceived success of the Administration's antitrust enforcement program, just as it has on its predecessors.

We trust that this contribution to the ongoing dialogue on antitrust enforcement and policy will be helpful.

Respectfully submitted,

Joe Sims, Co-Chair
Mary Cranston, Co-Chair
Michael Denger
William Kovacic
Richard Steuer
Patricia Vaughan

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