August 18, 2004

ABA Sherman Act Section One Committee
Questionnaire for Commissioner Pamela Jones Harbour
Federal Trade Commission

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Q: Before joining the Federal Trade Commission, you were a partner with Kaye Scholer LLP. I understand that your work focused on both competition and consumer protection matters. Which area do you enjoy more? Why? Now that you are at the Commission, what percentage of your time presently is devoted to each area?

As a former state antitrust enforcer, having served under four New York State Attorneys General, the bulk of my practice focused upon antitrust and consumer protection matters. Later, as a law firm partner, I counseled clients on a variety of competition and consumer related matters. Notwithstanding consumer fraud and deception matters, I have always believed that sensible antitrust enforcement is itself a critically important consumer protection activity - so I am quite accustomed to taking a consumer-based approach to *any* matter that crosses my desk, no matter how it might be classified. As a Commissioner, I have welcomed the opportunity to immerse myself in traditional consumer protection matters while also continuing to study (and hopefully shape) the development of competition law. I work on both competition and consumer protection matters on a daily basis, and in my view, both missions are equally important to the Commission. Competition matters - especially recommended enforcement actions and Part 3 adjudications - frequently are complex and time-consuming. Due to the sheer volume of consumer protection cases, rulemakings, reports, comments to other agencies, Congressional testimony, workshops, and other activities, the Commission's consumer protection function comprises a large percentage of my work. Congress was wise to empower a single agency to enforce both consumer protection and antitrust laws because of the interdependent relationship of these two legal regimes.

Q: What drew you to the Commission?

While I experienced considerable professional growth as a partner at a distinguished American law firm, I have found that my greatest professional fulfillment has come through government service, to which I have devoted most of my legal career. I was thrilled to join the Commission, and thus return to the public sector, upon being officially sworn into office on August 4, 2003. I was attracted to the Commission's goal of advancing a strong and competitive U.S. economy by creating a business environment that provides high-quality and competitively-priced goods and services to a well-informed consuming public. As I understand it, the Commission's unique structure was conceived by President Wilson and Louis Brandeis as a new kind of government body.

The Commission's mandate was not primarily to intervene in private sector matters, but to work with the private sector to improve the performance of business for the mutual benefit of consumers and businesses - and, derivatively, to improve the manner in which government and businesses interact.

Q: Has anything about your experience at the Commission surprised you so far?

The number of matters currently before the Commission - both public and non-public - is staggering. Therefore, I must carefully prioritize additional projects of interest, such as conferences, speeches and publications. Among other things, it is essential to be fully versed in the facts and legal theories of each matter that comes before the Commission, so that I can exercise my decisionmaking authority as responsibly as possible. As a result, I am constantly reading additional studies, reports, case law and secondary authority - which, surprisingly, I view as a necessary luxury given the prior exigencies of private and state law practice.

Q: What has been the most satisfying matter you have worked on at the FTC and why? What accomplishment(s) are you most proud of?

To date, the most satisfying matter I have worked on is the *Genzyme* case,[1] which involved innovation markets in the biotechnology industry and their application to merger analysis. This case generated three separate Commissioner statements, including my own.[2] I believe strongly that the preservation of innovation competition is extremely valuable to consumers and society and thus should be a critical goal of antitrust enforcement.

I am also particularly proud of my separate statement in the *Kentucky Fried Chicken* matter,[3] which settled deceptive advertising claims. I believe that companies should not be allowed to cynically exploit a massive health problem (such as obesity) through deceptive advertising. In the past, the Commission has negotiated disgorgement or *cy pres* relief in similar national advertising cases, although it has not done so in several years. In my statement, I encouraged the Commission to find ways to seek monetary relief in future cases in this area.[4]

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1 Genzyme Corp., FTC File No. 021-0026 (closing of investigation announced Jan. 13, 2004), *available at* http://www.ftc.gov/opa/2004/01/genzyme.htm.

2 Genzyme Corp., Statement of Commissioner Pamela Jones Harbour, *available at* http://www.ftc.gov/os/2004/01/harbourgenzymestmt.pdf.

3 KFC Corp., FTC File No. 042-3033 (proposed consent order June 3, 2004), *available at* http://www.ftc.gov/os/caselist/0423033/0423033.htm.

4 KFC Corp., Statement of Commissioner Pamela Jones Harbour, *available at*

Q: What role do you believe the Commission has with respect to enforcing violations of §1 (or §5 of the FTC Act)?

The Commission's enforcement role includes the entire panoply of non-criminal cases that might be brought under §1. Throughout the agency's history, the Commission has brought a wide range of enforcement actions in the §1 area - and not surprisingly, many of these actions have evolved into leading cases and often-cited opinions. The Commission has brought cases targeting various forms of anticompetitive conduct, including resale price maintenance,[5] adherence to a trade association pricing system,[6] use of a common sales agent to set prices,[7] fixing product inputs,[8] prohibition of truthful advertising and business solicitation,[9] group boycotts,[10] agreements limiting hours of operation,[11] horizontal price fixing and state action,[12] horizontal market allocation,[13] and agreements not to compete.[14]

During my term as Commissioner, I intend to exhort two goals for the Commission's §1 agenda. First, I would like the Commission to pursue a variety of cases that will help to refine the burden of proof requirements under the rule of reason, along the continuum of

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http://www.ftc.gov/os/caselist/0423033/040603statementharbour0423033.pdf.

5 Beech-Nut Packing Co., 1 F.T.C. 516 (1919), *rev'd*, 264 F. 885 (2nd Cir. 1920), *rev'd*, 257 U.S. 441 (1922).

6 Pacific States Paper Trade Ass'n, 7 F.T.C. 155 (1923), *enforcement denied in part and granted in part*, 4 F.2d 457 (9th Cir. 1925), *rev'd in part and FTC order enforced*, 273 U.S. 52 (1927); Cement Institute, 37 F.T.C. 87 (1943), *rev'd*, 157 F.2d 533 (7th Cir. 1946), *rev'd*, 333 U.S. 683 (1948).

7 Virginia Excelsior Mills, Inc., 54 F.T.C. 455 (1957), *aff'd*, 256 F.2d 538 (4th Cir. 1958).

8 National Macaroni Manufacturers Ass'n, 65 F.T.C. 583 (1964), *aff'd*, 345 F.2d 421 (7th Cir. 1965).

9 American Medical Ass'n, 94 F.T.C. 701 (1979), *enforced as modified*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982).

10 Superior Court Trial Lawyers Ass'n, 107 F.T.C. 510 (1986), *rev'd*, 856 F.2d 226 (DC Cir. 1988), *rev'd*, 493 U.S. 411 (1990).

11 Detroit Auto Dealers Ass'n, Inc., 111 F.T.C. 417 (1989), *aff'd in part and rev'd in part*, 955 F.2d 457 (6th Cir.), *cert. denied*, 506 U.S. 973 (1992).

12 Ticor Title Ins. Co., 112 F.T.C. 344 (1989), *rev'd*, 922 F.2d 1122 (3rd Cir. 1991), *rev'd*, 504 U.S. 621 (1992).

13 Schering-Plough Corp., FTC Dkt. No. 9297 (Commission opinion issued Dec. 8, 2003), *available at* http://www.ftc.gov/os/adjpro/d9297/031218commissionopinion.pdf, *appeal pending*, No. 04-10688 AA (11th Cir. Feb. 13, 2004).

14 Polygram Holding, Inc., FTC Dkt. No. 9298 (Commission opinion issued July 24, 2003), *available at* http://www.ftc.gov/os/adjpro/d9298/030724commoppinionandfinalorder.pdf, *appeal pending*, No. 03-1293 (D.C. Cir. Sept. 22, 2003).

liability standards ranging from the most cursory analysis to the "full Monty."[15] Second, the Commission should bring cases that will confirm the continuing vitality of the *per se* rule in appropriate circumstances.[16]

The Commission also has an important role to play in the development of the law, beyond the traditional process of case selection and the formulation of guidelines that inform the exercise of prosecutorial discretion.[17] The Commission is uniquely situated to conduct studies and issue reports relating to discrete areas of §1 analysis.[18] An excellent example is the Commission's Generic Drug Report,[19] in which the Commission reviewed a number of problems that arise from the special competitive relationship between name-brand and generic drugs, and set forth detailed recommendations for possible legislative remedies. That report also has informed the Commission's own §1 enforcement agenda in cases involving related patent litigation settlements.[20]

Q: What are the FTC's current enforcement priorities in the §1 area (or §5 of the FTC Act)? Do you anticipate any changes or new emphases in the future?

The Commission's recent §1 cases have focused on a few different areas. Health care probably has been the Commission's top enforcement priority. Most recently, the Commission authorized staff to file stipulated permanent injunctions settling allegations of an unlawful market allocation agreement between Perrigo Company and Alpharma Inc., the only two approved manufacturers of store-brand, over-the-counter liquid ibuprofen (the generic version of Children's Motrin). Under the proposed final orders, the parties will pay a total of $6.5 million, representing disgorgement of illegally-obtained profits; the Commission will use these funds to compensate customers harmed

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[15] Stephen Calkins, *California Dental Association*: *Not a Quick Look But Not the Full Monty*, 67 ANTITRUST L. J. 495 (2000) (stringency of rule of reason analysis varies on a case-specific basis from minimal to total along a sliding scale).

[16] *See, e.g.*, Federal Trade Commission v. Perrigo Co. & Alpharma Inc., **Civ. No. 1:04CV01397 (RMC) (D.D.C. complaint filed Aug. 17, 2004), *available at* http://www.ftc.gov/os/caselist/0210197/040812comp0210197.pdf; *see especially id.* at ¶43 (per se count). This case is discussed in greater detail *infra*, text accompanying note 21.**

[17] *See* Federal Trade Commission & U.S. Dept. of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (April 2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.

[18] 15 U.S.C. § 46(f).

[19] Federal Trade Commission, *Generic Drug Entry Prior to Patent Expiration: An FTC Study* (July 2002), *available at* http://www.ftc.gov/os/2002/07/genericdrugstudy.pdf.

[20] *Schering-Plough*, *supra* note 13, at n. 2.

by the agreement. To settle similar claims by several states and territories, the parties will pay an additional $1.5 million in lieu of civil fines or forfeitures.[21]

In the last few years, the Commission has pursued numerous enforcement actions against unintegrated physician groups that have collectively negotiated prices. Many of these cases have settled,[22] while a few others have progressed to administrative litigation.[23]

In the pharmaceutical arena, the Commission has challenged agreements between name-brand drug manufacturers and generic drug manufacturers that have exploited the Hatch-Waxman regulatory scheme to keep lower-priced generic drugs off the market. Of particular note is the Commission's December 2003 administrative opinion in *Schering-Plough*,[24] in which the Commission held that Schering and two of its potential generic competitors entered into illegal agreements to delay the entry of lower-cost generic competition for one of Schering's popular name-brand prescription drugs. Two other cases involving agreements between name-brand and generic competitors have resulted in settlements.[25] The Commission also has challenged a market allocation agreement between two generic drug manufacturers.[26]

The Commission's §1 enforcement activities have not been limited solely to health care, however. For example, the Commission's final decision in the *Three Tenors* case upheld

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[21] FTC News Release, *Generic Drug Marketers Settle FTC Charges* (Aug. 12, 2004), *available at* http://www.ftc.gov/opa/2004/08/perrigoalpharma.htm; *see also* Federal Trade Commission v. Perrigo Co. & Alpharma Inc., FTC File No. 021-0197 (D.D.C.), *available at* http://www.ftc.gov/os/caselist/0210197.htm (includes links to complaint and proposed final orders).

[22] For a comprehensive listing of the Commission's enforcement actions against unintegrated physician groups, see Federal Trade Commission, Bureau of Competition, Health Care Services and Products Division, *FTC Antitrust Actions in Health Care Services and Products* (April 2004), *available at* http://www.ftc.gov/bc/hcupdate0404.pdf *(see especially* page 7 *et seq.*, Section II.C, "Agreements on Price or Price-Related Terms").

[23] One case remains in Part 3 litigation. North Texas Specialty Physicians, FTC Dkt. No. 9312 (administrative complaint issued Sept. 16, 2003), *available at* http://www.ftc.gov/os/adjpro/d9312/index.htm. A second case went into administrative litigation but later settled. California Pacific Medical Group, Inc., d/b/a Brown and Toland Medical Group, FTC Dkt. No. 9306 (administrative complaint issued July 8, 2003; final consent order entered May 10, 2004), *available at* http://www.ftc.gov/os/adjpro/d9306/index.htm. A third case recently was removed from Part 3 for consideration of a settlement. Piedmont Health Alliance, Inc., et at., FTC Dkt. No. 9314 (administrative complaint issued Dec. 22, 2003; order withdrawing matter from adjudication entered July 2, 2004), *available at* http://www.ftc.gov/os/adjpro/d9314/index.htm.

[24] Schering-Plough, *supra* note 13.

[25] Hoechst Marion Roussel, Inc./Andrx Corp., FTC Dkt. No. 9293 (consent order issued May 8, 2001), *available at* http://www.ftc.gov/os/caselist/d9293.htm; Abbott Laboratories/Geneva Pharmaceuticals, Inc., FTC Dkt. Nos. C-3945 & C-3946 (consent order issued May 22, 2000), *available at* http://www.ftc.gov/os/caselist/c3945.htm.

[26] Biovail Corp./Elan Corp., plc, FTC Dkt. No. C-4057 (consent order issued Aug. 15, 2002), *available at* http://www.ftc.gov/opa/2002/08/fyi0245.htm.

an administrative law judge's finding that music distribution companies had entered into an illegal agreement not to discount or advertise older Three Tenors recordings in an effort to promote the most recent concert recording.[27] The Commission also has issued complaints against associations of intrastate household movers in several states, alleging that competing movers conspired to fix prices by collectively filing rates for intrastate moving services. Six of these cases have settled;[28] one remains in administrative litigation.[29]

Q: Of late, the Commission has focused considerably upon alleged conspiracies in the healthcare arena. Why is healthcare an area ripe for FTC investigation?

Many of the complaints fielded by the Commission in recent years have involved allegations of anticompetitive activity in the health care industry, which has led to a large number of investigations. Still, promoting competition in the health care sector has always been a high priority for the Commission. Health care is a vital service that touches the lives of millions of Americans on a daily basis. Moreover, the cost, quality and accessibility of American health care have become major legislative and policy issues. Substantial increases in the cost of health care have placed considerable stress on federal, state and household budgets. Current health care expenditure are rising dramatically: approximately $1.6 trillion (or 14% of the Gross Domestic Product) was spent on health care services in the United States in 2002. In the past few decades, competition has profoundly altered the institutional and structural arrangements through which health care is financed and delivered. Competition law and policy have played an important and beneficial role in this transformation, and have much more to offer in addressing these challenges.

Rather than simply conduct investigations, the Commission actually has taken a broader approach. Together with the DOJ Antitrust Division, we recently issued an extensive report addressing the role of competition in the health care industry.[30] The report, which

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[27] *Polygram*, *supra* note 14.

[28] Indiana Household Movers and Warehousemen, Inc., FTC Dkt. No. C-4077 (consent order entered April 25, 2003), *available at* http://www.ftc.gov/os/caselist/c4077.htm; Iowa Movers and Warehousemen's Association, FTC Dkt. No. C-4096 (consent order entered Sept. 10, 2003), *available at* http://www.ftc.gov/os/caselist/c4096.htm; Minnesota Transport Services Association, FTC Dkt. No. C-4097 (consent order entered Sept. 15, 2003), *available at* http://www.ftc.gov/os/caselist/c4097.htm; Alabama Trucking Association, Inc., FTC Dkt. No. 9307 (consent order accepted Dec. 4, 2003), *available at* http://www.ftc.gov/os/adjpro/d9307/index.htm; Movers Conference of Mississippi, Inc., FTC Dkt. No. 9308 (consent order entered Dec. 4, 2003), *available at* http://www.ftc.gov/os/caselist/d9308.htm; New Hampshire Motor Transport Association, FTC Dkt. No. C-4102 (consent order entered Dec. 9, 2003), *available at* http://www.ftc.gov/os/caselist/0210115.htm.

[29] Kentucky Household Goods Carriers Association, Inc., FTC Dkt. No. 9309 (administrative complaint filed July 8, 2003), *available at* http://www.ftc.gov/os/caselist/d9309.htm.

[30] Federal Trade Commission & U.S. Dept. of Justice, *Improving Health Care: A Dose of Competition*

synthesizes 27 days of joint hearings and a significant amount of independent research, examines the current state of the health care marketplace as well as the interrelated roles of competition and consumer protection policy in satisfying the preferences of Americans for high-quality, cost-effective health care.

Q: Are there any other sectors of the economy that are likely to face the same type of stringent FTC review?

The Commission has jurisdiction over many sectors of the economy, so technically we can target a wide range of unlawful conduct. However, I believe that the Commission should be particularly vigilant in industries that directly affect consumers and their everyday purchases. The oil industry is a prime example. As the Commission recently has testified,[31] past Commission investigations have identified numerous factors that have led to occasional gas price spikes, but Commission staff has not found evidence of collusion among private oil companies.[32] If new information leads us to suspect conspiratorial activity among private oil firms within the jurisdictional reach of the Commission, I certainly would expect Commission staff to closely scrutinize their conduct and to develop any evidence that might demonstrate a §1 violation.

Q: With respect to violations of §1, what do you believe to be the most important way businesses can minimize their risk?

In my experience, both as a prosecutor and as a counselor, most businesses encounter §1 problems when they fail to draw the appropriate lines between the legitimate needs of their businesses and their aspirations for business success. Not surprisingly, a lack of clear business planning is often accompanied by - if not the product of - an ineffective or nonexistent antitrust compliance program.

(July 2004), *available at* http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf; *see also* FTC News Release, *FTC and DOJ Issue Report on Competition and Health Care* (July 23, 2004), *available at* http://www.ftc.gov/opa/2004/07/healthcarerpt.htm.

[31] Federal Trade Commission, Prepared Statement, *Market Forces, Anticompetitive Activity, and Gasoline Prices: FTC Initiatives to Protect Competitive Markets*, before the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, Committee on Government Reform, U.S. House of Representatives (July 7, 2004), *available at* http://www.ftc.gov/os/2004/07/040707gaspricetestimony.pdf; Federal Trade Commission, Prepared Statement, *Market Forces, Anticompetitive Activity, and Gasoline Prices: FTC Initiatives to Protect Competitive Markets*, before the Subcommittee on Energy and Air Quality, Committee on Energy and Commerce, U.S. House of Representatives (July 15, 2004), *available at* http://www.ftc.gov/os/2004/07/040715gaspricetestimony.pdf.

[32] The activities of the sovereign nations that comprise the OPEC cartel are, of course, a separate consideration.

A competitive market is relatively indifferent to the business success or failure of any particular firm. The protection of competition, not competitors, is more than just a mantra repeated by antitrust lawyers; it is a core principle of American antitrust law.[33] But each individual company, of course, has its own survival at stake. Commercial success depends, in large part, on the ability to create and maintain a complex network of relationships with competitors, customers, suppliers, standards-setting organizations, governments and others. These relationships, while they may be necessary, pose a host of §1 risks.

Our competition regime imposes upon the business community the burden of managing some amount of uncertainty. But businesses can avoid a great deal of hardship if they make an effort to understand the limits imposed by the antitrust laws on critical business relationships. A firm must resist the impulse to micromanage the business decisions of another firm, particularly in circumstances not required by *legitimate* business needs. An effective compliance program is equally critical. Most businesses ask outside antitrust counsel to conduct periodic audits of their compliance efforts and to suggest corrective measures when required. Consistent compliance efforts, along with a philosophy of careful decisionmaking, will go a very long way toward avoiding §1 problems.

Q: Considering the eleven years you spent in the New York Attorney General's Office, your time in private practice, and now your tenure at the FTC, what do you believe is the appropriate role for state Attorneys General in enforcement of federal antitrust laws?

I believe that the states have an extremely important role to play in antitrust enforcement.

Ideally, the relationship between all public antitrust enforcers would always be one of cooperative dual enforcement. Political realities make this a constantly sought-after goal rather than a *fait accompli*. But I believe strongly in the "checks and balances" system of dual federal and state enforcement, so I am not all that troubled by the fact that state attorneys general and the federal agencies do not always agree.[34]

One purpose for the adoption of the Sherman Act was to supplement - not supplant - the states' enforcement of their own antitrust laws.[35] A state has an independent right to sue whenever a violation causes (or threatens to cause) injury to the state or its citizens.[36]

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[33] Standard Oil Co. v. Federal Trade Commission., 340 U.S. 231, 249 (1951) ("Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.").

[34] *See* Lloyd Constantine, *Antitrust Federalism*, 29 WASHBURN L.J. 163, 183 (1990) (state and federal enforcement of the antitrust laws serve as mutual checks and balances).

[35] California v. ARC America Corp., 490 U.S. 93, 102 (1989).

[36] Georgia v. Pennsylvania RR Co., 324 U.S. 439 (1945) (State may seek injunctive relief without showing damage to its business or property.).

Congress has provided state attorneys general with additional incentives to sue, including the availability of *parens patriae* treble damages on behalf of individual consumers,[37] costs and attorneys fees,[38] and evidentiary advantages following a successful federal prosecution.[39] In many cases, state attorneys general have comparative advantages over the federal agencies, and these advantages should be exploited wherever possible.[40] For example, in a case where it is particularly important to understand local institutions and markets (such as a retail merger), state attorneys general have the advantage of proximity. Where one hopes to obtain recovery for injuries suffered by individual citizens, the states' ability to sue for *parens patriae* damages may offer a superior remedy.

Antitrust enforcement by state attorneys general undoubtedly helps consumers. There have been instances where businesses unsuccessfully have sought enforcement help from the federal agencies, but ultimately have had their problems resolved by timely state enforcement action.[41] Moreover, ever since Congress granted *parens patriae* authority to state attorneys general, millions of dollars have been recovered for antitrust injuries to individual consumers who otherwise might have obtained no relief at all.[42] The federal antitrust enforcement agencies also benefit from assistance from their state counterparts - both in cases where the states join the federal agencies in litigation,[43] as well as in cases where the federal agencies may refer a matter to a state attorney general for enforcement.[44]

Our system of dual enforcement has its critics. Antitrust violators, merging parties, and other targets of antitrust enforcement activity occasionally may be frustrated when they have resolved their problems with one set of enforcers, only to learn that they still face

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37 15 U.S.C. § 15c.

38 15 U.S.C. § 15(a)

39 15 U.S.C. § 16(a).

40 *See* Stephen Calkins, *Perspective on State and Federal Antitrust Enforcement*, 53 DUKE L.J. 673 (2003).

41 Alan R. Malasky, *Commentary: Antitrust Federalism*, 29 WASHBURN L.J. 185, 185-86 (1990).

42 *See generally* http://www.abanet.org/antitrust/committees/state-antitrust/settlements.html (listing, *inter alia*, state *parens patriae* settlements).

43 The Commission's recent federal district court litigation in the *Arch/Triton* matter is one example of close coordination between federal and state antitrust enforcement officials. Federal Trade Commission v. Arch Coal, Inc., et al., Civ. No. 1:04CV00534 (JDB) (D.D.C. complaint filed April 1, 2004); *see also* FTC News Release, *FTC Files Federal Complaint Challenging Arch Coal's Proposed Acquisition of Triton Coal Company* (April 1, 2004), *available at* http://www.ftc.gov/opa/2004/04/archcoal.htm. Six states have joined the Commission's action (with Missouri leading Illinois, Arkansas, Iowa, Kansas and Texas).

44 *See* Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General, *available at* http://www.ftc.gov/os/1998/03/mergerco.op.htm.

another set of enforcers who are not like-minded.[45] But Congress, in creating a dual enforcement system, determined that the greater public good would outweigh the potential costs and risks of duplicative enforcement. I agree with the vision that originally motivated Congress, and I believe that this vision has been borne out in practice.

Q: Do you think that the FTC's administrative litigation procedures provide benefits or have any disadvantages as compared to the DOJ's reliance on federal district court litigation? If so, how? Do you see any areas for improvement in the FTC's administrative litigation processes?

The Commission has pursued a very active Part 3 agenda in the last few years, resulting in a large number of competition cases currently in administrative litigation (as well as several consumer protection cases). The Commission's administrative litigation process has several benefits, particularly with respect to the Commission's competition mission. Competition cases are notoriously intricate, both factually and legally. Part 3 litigation allows for intense fact-finding and the development of a complete record in a relatively short time frame. More importantly, once a case reaches the Commission on appeal, the Commission can bring its unique expertise to bear in an adjudicative capacity. The Commission's thorough grounding in competition principles probably gives it a head start as compared to a federal tribunal, with its varied civil and criminal docket, which may have limited antitrust experience. When the Commission drafts a Part 3 opinion, it strives to offer thoughtful guidance to the bar, businesses, and the public at large.

Administrative litigation may be particularly well-suited for evaluation of conduct cases and consummated mergers. The Commission has pursued more of these types of cases in the last few years, which accounts, in part, for the increased number of pending Part 3 proceedings.

A major disadvantage of administrative litigation is that it does not allow the Commission to pursue monetary remedies. We certainly consider this when faced with a case where monetary relief may be appropriate, and we may choose to go to federal district court, rather than Part 3, to allow for this possibility.

I am aggressively pursuing one particular area where I believe there is significant room for procedural improvement: the increased use of technology in administrative litigation. I envision a future where all documents, briefs, and other materials (including all non-public documents) are produced electronically and uploaded to a secure location on our Intranet site, such that the ALJ and the Commissioners can access the entire record, review documents, and perform electronic searches right from our desktops. I know that the Secretary's office already has made great strides in utilizing available technology. For example, public Part 3 filings and orders are now routinely made available on the

[45] *See* Jay L. Himes, *Exploring the Antitrust Operating System: State Enforcement of Federal Antitrust Law in the Remedies Phase of the Microsoft Case*, 11 GEORGE MASON L. REV. 37 (2002).

Commission's external website. I would like to see the Commission take this to the next level, to streamline the internal mechanics of our adjudicative process, which hopefully will enable us to more quickly resolve adjudicated matters.

Q: Now that Congress has funded a panel to study the reform the antitrust laws, what do you believe the panel's priorities will be? Any thoughts as to the potential impact of the panel?

The Antitrust Modernization Commission (AMC) has both the opportunity and the resources to conduct an exhaustive, non-partisan review of the current structure and performance of our economy - on a scale that has not been undertaken since the review conducted in 1941 by the Temporary National Economic Committee. Unlike some of its predecessors, the AMC does not have a discrete focus for its inquiry.[46] Rather, it is free to define its own agenda, so long as it takes care to "solicit views of all parties concerned with the operation of the antitrust laws."[47]

Ideally, the panel will undertake a principled review of changes in the economy over the last few decades. If nothing else, a detailed report would provide an informed predicate for the AMC's ultimate reform recommendations and any subsequent debate, regardless of the content of the AMC's suggestions. In particular, I would like to see the panel focus on one consistent theme: how best to ensure the existence of competitive markets. Promoting consumer welfare in this manner would be an outcome worthy of the resources that have been committed to the AMC.

Q: What is your view of the Supreme Court's holding in *Empagran*?

Where price fixing injures purchasers in the United States and in foreign countries *and* those injuries are unrelated, the Court held that a foreign purchaser in a foreign market who suffered no injury from effects in United States markets may not sue for treble damages under §4 of the Clayton Act for such unrelated foreign injuries.[48] Agreeing with the interpretation advocated by the United States as *amicus curiae*, the Court found that Congress did not intend the Foreign Trade Antitrust Improvements Act of 1982[49] to

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[46] The National Commission for Review of the Antitrust Laws and Procedures established by Executive Order in 1977 was tasked, for instance, to study the unnecessary protraction of complex antitrust cases and to review existing immunities and exemptions. *See* Albert A. Foer, *Putting the Antitrust Modernization Commission into Perspective*, 51 BUFFALO L. R. 1029, 1041-42 (2003).

[47] 21st Century Department of Justice Appropriations Act, § 11053.

[48] F. Hoffman-La Roche Ltd. v. Empagran S.A., 124 S. Ct. 2359 (2004).

[49] 15 U.S.C. § 6a.

extend to wholly foreign injuries, even when remedies for the domestic injuries springing from the same conspiracy may be available to other injured parties.[50]

The brief of the United States, signed by representatives of the Commission and the Department of Justice, advised the Court that such an extension of Sherman Act jurisdiction (i.e., allowing foreign purchasers to sue for treble damages) would have significant adverse effects on criminal enforcement generally (by making cooperating witnesses less likely to come forward) and also might be offensive to other nations.[51] The Court, finding it lacked an adequate factual basis for resolving the competing claims regarding a potential effect on enforcement, refused to allow such a policy argument to outweigh the otherwise clear meaning of the statute.[52] The Court also recognized that international comity - recognition of the rights of other countries to regulate their own domestic commerce - counseled restraint in interpreting the extraterritorial reach of our antitrust laws.[53]

The Court's opinion limits the extraterritorial reach of American antitrust damage remedies to injuries that are causally related to an effect on American markets. In my view, that result does no fundamental damage to our law. Indeed, it is too early to tell whether the respondents in this case ultimately will be left without an American damage remedy. The Court of Appeals on remand may well find, as urged by respondents,[54] that their foreign injury was not wholly independent of the domestic harm in the United States, in which case their damage claims may yet be cognizable under our antitrust laws.

Q: With a new Chairwoman about to assume leadership of the FTC, do you foresee any changes to the FTC's competition or consumer protection agendas?

Each Chair has the ability to steer or even radically modify the Commission's agenda, based upon the Chair's own enforcement and policy priorities, along with the Chair's particular management style and the predilections of the Bureau Directors whom the Chair selects. I would assume, therefore, that a change in Commission leadership will lead to, at least, a few noticeable shifts in the Commission's agenda. One important and unique aspect of the Federal Trade Commission, however, is its five-member, bipartisan composition. Not to diminish the extremely important role of the Chair - but the Chair is

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[50] *Id*. at 2367 (refusing to extend the reach of the Sherman Act to injuries arising from "*foreign harm alone*") (emphasis in original). The Court of Appeals for the D.C. Circuit had found that the additional deterrence which would result by extending the reach of the Sherman Act to wholly foreign injuries justified its broader interpretation. Empagran S.A. v. F. Hoffman-LaRoche Ltd., 315 F.3d 338, 355-58 (D.C. Cir. 2003).

[51] *Empagran*, 124 S. Ct. at 2369, 2372.

[52] *Id*. at 2372.

[53] *Id*. at 2369.

[54] *Id*. at 2372.

entitled to only one vote on any decision requiring Commission approval. Moreover, each Commissioner has an equal opportunity to voice her or his opinions, both within the Commission and to the public. Finally, the Commission has a large number of exceedingly talented staff members who have been with the agency for many years, and who continue to do their best work no matter who is in charge. Collectively, I think that these factors tend to foster continuity during times of transition at the Commission, at least in the short term. Changes inevitably will occur when a new Chair arrives, but change will be an evolutionary process. Eventually, the overall "chemistry" of the Commission will adjust as the new arrival learns to work with the remaining four Commissioners, new managers, and Commission staff.

Q: What advice would you give to a new attorney just out of law school who wants a career in antitrust law?

Pursue your intellectual and professional passions. Competition law is substantively rigorous, fact-driven, and policy-oriented. If you are passionate about antitrust, then learn all you can, join professional associations to increase your knowledge, and fully immerse yourself in the field. Much of what you need to know, you will not have been taught in law school. But you definitely can learn on the job, no matter where you choose to practice. I happen to think that the practice of antitrust has gotten more rigorous in recent years, due to increased globalization and a greater focus on economics. Competition law has never been a bright-line practice, but in light of today's large global transactions and sophisticated analytical approaches, it is more challenging than ever. Remember, however, that it is entirely possible to be an excellent antitrust lawyer without being an economist - as long as one is able to communicate effectively with economists and work closely with them as part of a team.