OBSERVATIONS ON FEDERAL ANTITRUST ENFORCEMENT INSTITUTIONS

Comments of William Blumenthal, General Counsel,
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to the Antitrust Modernization Commission
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Thank you for inviting me to join the discussion this afternoon. My remarks address some of the issues raised in the AMC's Federal Register notice concerning federal enforcement institutions, in particular questions relating to dual federal merger enforcement and the standards for preliminary injunctions in merger cases.

A. Dual Federal Merger Enforcement

The first set of questions you raised in this area echo the intermittent debate over the past thirty years or so on whether there should be two agencies overseeing federal merger policy. So far as I am aware, despite many provocative suggestions, no persuasive case has ever been made for a radical change in the current system. The American Bar Association, in particular, which has studied this question on several occasions, has concluded that dual enforcement should be retained.[2] Even Judge Posner, a self-described "notorious FTC skeptic," who had advocated the slow death by strangulation of the agency in his separate statement to the ABA's 1969 FTC

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[1] These comments are my own and not necessarily those of the Commission or any particular Commissioner, however the Commission has authorized me to appear today and deliver these remarks.

[2] *See, e.g.*, Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission, 58 Antitrust L.J. 43 (1989).

Study Commission, announced recently that he was "duly chastened."[3]

I suggest that there is still no persuasive case to be made for any alteration in the status quo (at least as to DOJ and the FTC). Both the Division and the FTC have been quite busy in recent years and have been able to make a number of noteworthy contributions to antitrust jurisprudence both in merger and non-merger matters. For the FTC, some examples include the *Chicago Bridge & Iron* decision, the Commission's significant Noerr and State Action decisions, the commentary and court decisions surrounding preliminary injunction actions including *Arch Coal*, *Heinz*, *Swedish Match*, and *Staples/Office Depot*, and our hearings and reports in the areas of health care, intellectual property and energy. The latter activities fulfill part of the original mission of the FTC, to study and disseminate information on market conditions and behavior, for which we have available the unique investigative tools in Section 6 of the FTC Act. Further, the agencies continue to work together and with the private bar to avoid inconsistencies and seek improvements in the merger review process. To the extent there are perceived differences in the approach of the agencies, in my view they are either exaggerated (as is the case, I believe, with respect to "fix it first" remedies) or reflect nothing more than you would expect from dealing with multiple individuals even within the same organization. I have been on both sides of these discussions and, in my view, it is preferable to continue addressing on an administrative level any concerns that arise, rather than trying to move the discussion into the legislative arena.

I am reminded of the testimony of Chairman-designate Robert Pitofsky during his

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[3] Richard A. Posner, *The Federal Trade Commission: A Retrospective*, 72 Antitrust L. J. 761, 765 (2005) ("The question seems to me to continue to be worth asking, even though I freely acknowledge that the Commission has managed to amass in recent years a number of genuine accomplishments . . . .).

confirmation hearing in 1995. Commenting on dual merger enforcement, he said that "while you might not have set it up that way in the first place, the fact of the matter is it works rather well. . . . There is no duplication, there is no overlap."[4] Having these two agencies assigned to this task, he observed, was consistent with and an outgrowth of the American political system of checks and balances, and reflected the importance of these issues to our economy. I agree.

B. The Standards for Preliminary Injunctions in Merger Cases

The Commission asks whether the standard DOJ must meet to obtain a preliminary injunction to block a merger differs, as a practical matter, from that the FTC must meet. The answer is no. I will review how the courts have articulated that standard in a moment. But the true concern in this area, I would submit, is that neither DOJ nor the FTC is getting the benefit of a true preliminary injunction in merger cases. Both have as a practical matter been forced into rushed full trials in a way not seen in any other area of American jurisprudence. Again, I am not sure there is a legislative solution for this problem, and I believe we will have to continue to work on the issue in the courts.

The Commission has also raised several questions suggesting there is a "difference in the procedural aspects" of merger enforcement because the FTC, as an expert agency, can proceed to consider the merits of merger cases (in this case, through administrative litigation) after the preliminary injunction motion has been decided. Putting this question in proper perspective, it is hard to see any legitimate cause for concern. There seems to be general agreement that the

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[4] *Nomination of Robert Pitofsky to be Chairman of the Federal Trade Commission: Hearing Before the Senate Committee on Commerce, Science and Transportation*, S. Hrg. 104-290, 104th Cong. 13 (1995)

outcome of the preliminary injunction motion will decide the fate of the majority of transactions, and very few matters will be litigated further (although there is a range of explanations why this is so). For those few remaining matters, I would submit that it serves a valid public purpose for either DOJ or the FTC occasionally to have a merger case litigated to full conclusion, and cutting edge Section 7 issues explored thoughtfully by the agencies and the courts, rather than have merger law determined by a handful of preliminary injunction orders. The proposals to limit the FTC's ability to proceed with a case after the p.i., therefore, are unwarranted. The FTC has already imposed on itself a significant restraint – a detailed set of factors to consider concerning further litigation if a preliminary injunction is denied.[5] That practice has been conscientiously followed since its adoption, most recently in *Arch Coal*.[6]

Despite occasional minor differences in wording, courts entertaining injunction cases involving either DOJ or the FTC have applied a "public interest" test, rather than the "traditional equity test" for preliminary injunctions. For the FTC, Congress adopted this "public interest" standard through its enactment of § 13(b) in 1973, finding "that the traditional standard was not 'appropriate for the implementation of a Federal statute by an independent regulatory agency where the standards of the public interest measure the propriety and the need for injunctive relief.'" *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001), *quoting* H.R. Rep. No. 93-624 at 31 (1971); *FTC v. University Health, Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991). This

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[5] *See Statement of the Federal Trade Commission Policy Regarding Administrative Merger Litigation Following the Denial of a Preliminary Injunction* ("*Policy Statement*"), 60 Fed. Reg. 39,741 (1995).

[6] *See* FTC Docket No. 9316 (Statement of Commission accompanying closing of administrative proceedings June 13, 2005), available at http://www.ftc.gov/os/adjpro/d9316/050613commstatement.pdf.

public interest standard was not new to § 13(b), however. Rather, this legislation represented a codification of the approach that courts had come to use in cases where a government agency was seeking interim relief while acting to enforce a federal statute. *Heinz*, 246 F.3d at 714; *FTC v. Weyerhauser Co.*, 665 F.2d 1072, 1081-82 (D.C. Cir. 1981); *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C. Cir. 1980).

So far as we can ascertain, this standard is not meaningfully different from that applied by the courts to DOJ since the 1950 amendment to Section 7. In *United States v. UPM-Kymmene Oyj*, 2003-2 Trade Cas. (CCH) ¶ 74,101 (N.D. Ill 2003), for example, the court applied a test virtually identical to the Commission's public interest test, finding that "the public interest in having competitive markets is served by preventing the merger" (*id*. at 96,938), and even quoted a Section 13(b) case, *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 903 (7th Cir. 1989), in its analysis. *Id.* at 96,937.[7]

Some observers have asserted that the standard for likelihood of success applied in FTC actions is more lenient than the standard in DOJ cases. As that standard is often articulated, the FTC must raise "questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals." *Heinz*, 246 F.3d at 714-15, *quoting FTC v. Beatrice Foods Co.*, 587 F.2d 1225, 1229 (D.C. Cir. 1978); *FTC v. Tenet Health*

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[7] The court superimposed 13(b)'s sliding scale and public interest standards on the threshold standard for private injunction actions: "To obtain a preliminary injunction, the Government must first "'meet the threshold burden of establishing (1) some likelihood of prevailing on the merits; and (2) that in the absence of the injunction, [it] will suffer irreparable harm for which there is no adequate remedy at law.' *Allied Signal, Inc. v. BF. Goodrich Co.*, 183 F.3d 568, 573 (7th Cir. 1999)." *UPM-Kymmene Oyj*, 2003-2 Trade Cas. (CCH) ¶ 74,101 at 96,937.

Care Corp., 186 F.3d 1045, 1051 (8th Cir. 1999); *University Health*, 938 F.2d at 1218.

This same test, however, has also been applied in DOJ injunction actions. *See, e.g. United States v. Country Lake Foods*, 754 F. Supp. 669, 675 (D. Minn. 1990) (asking whether DOJ had raised questions "so serious and difficult as to call for a more deliberative investigation"). [8]

This convergence in standards applied to the FTC and the DOJ is not surprising. As noted in *Heinz*, the public interest standard represents an evolving standard developed by courts where the government seeks interim injunctive relief in assistance of its attempt to enforce a federal statute. *Heinz*, 246 F.3d at 714. Because the preliminary injunction standards applied to actions brought by the FTC and DOJ appear to be substantially identical, any differences in their application would seem more likely to be based upon the specific facts of a given matter than substantive legal standards. So far as I am aware there is no evidence that any cases or group of cases were or would have been decided differently based on which of the antitrust agencies was the plaintiff.

What may be more critical than any possible differences in the preliminary injunction standards faced by the FTC and the DOJ is how the district courts approach the concept of interim relief. No matter which agency brings the action, the question before the court is whether to maintain the status quo pending a full resolution of the case on the merits. Focusing on the FTC's experience, in an increasing number of matters where we have sought interim

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[8] *See also United States v. Brown Shoe Company*, 1956 Trade Cas. (CCH) ¶ 68,244 (ED Mo. 1956) ("do the affidavits, pleadings and statutes present a record that raises questions so serious, substantial, difficult and doubtful as to make them a fair ground for litigation and to call for more deliberate investigation as to the merits of the [Section 7] charge").

injunctive relief, district courts have conducted proceedings that, in essence, amounted to full trials on the merits, preceded by costly and time-consuming discovery and consuming multiple weeks of trial time:

1. In *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004), three months after the Commission filed its complaint and subsequent discovery, the district court conducted a two week trial involving "more than twenty witnesses and received hundreds of exhibits, many of them lengthy, including depositions and affidavit testimony of several additional witnesses." *Id*. at 114. The parties submitted over 700 pages of post-trial proposed findings of fact and briefs. *Id.* In an 89-page opinion, the district court denied the injunction.

2. In *Swedish Match*, the district court held a five-day evidentiary hearing, with live testimony from eleven witnesses, including four expert witnesses, and considered several hundred exhibits. 131 F. Supp. 2d at 155.

3. In *FTC v. Cardinal Health, Inc.*, the district court "held a seven-week evidentiary trial," 12 F. Supp. 2d at 44, that was, in the court's words, "a fascinating experience. It has been more than the trial of a protracted case. An important phase of the pharmaceutical industry has been laid bare." *Id.* at 66. The trial included testimony from 33 witnesses, including 6 experts, depositions from numerous additional witnesses, and proffers for at least 24 additional witnesses. The court also considered over 2,000 exhibits, *id*.

at 44, and appointed a special master. *Id*. at 67.

4. In *Staples,* the district court conducted a five day evidentiary hearing with live testimony from more than 13 witnesses (including four experts) and considered over 6.000 exhibits, "including declarations from consumers, industry analysts, economic experts, suppliers, and other sellers of office supplies. 970 F. Supp. at 1070.

In contrast, the ordinary rule in this District and elsewhere is for preliminary injunctions to be decided promptly, on the papers, with minimal live testimony or argument.[9]

It is of course true that the post-p.i. procedure is different in cases brought by the Division and the FTC. For the FTC, an administrative adjudication process is available. As Congress and the courts have observed, however, there is a useful role for an expert agency to play in exploring and applying Section 7. Judge Posner went so far as to find that "[o]ne of the main reasons for creating the Federal Trade Commission and giving it concurrent jurisdiction to enforce the Clayton Act was that Congress distrusted judicial determination of antitrust questions. It thought the assistance of an administrative body would be helpful in resolving such questions and indeed expected the FTC to take the leading role in enforcing the Clayton Act, which passed at the same time as the statute creating the Commission." *Hospital Corporation of America v. FTC,* 807 F.2d 1381, 1386 (7th Cir. 1986)(Posner J.).

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[9] *Cf. Allied Signal, Inc. v. BF. Goodrich Co.,* 183 F.3d 568, 577 (7th Cir. 1999) ("there is no general requirement that a district judge hear live testimony or conduct a hearing at all. The burden is on the party seeking such a hearing to establish that it 'has and intends to introduce evidence that if believed will so weaken the moving party's case as to affect the judge's decision on whether to issue the injunction'" (citation omitted)).

Like any other litigant, particularly a government agency acting pursuant to a statutory mandate to protect the public interest, the FTC should have a meaningful opportunity to maintain the status quo while the merits of the dispute are considered more fully, in order to avoid unwarranted harm to the public and to preserve the possibility of meaningful effective final relief. If a court denies a request for temporary injunctive relief, then again, like any other litigant, the FTC should be able to consider whether further action is in the public interest. The FTC has exercised those prerogatives responsibly, and no further legislative modifications of its authority are warranted.

Thank you.