STATEMENT OF COMMISSIONERS HARBOUR, LEIBOWITZ AND ROSCH ON THE ISSUANCE OF THE SECTION 2 REPORT BY THE DEPARTMENT OF JUSTICE[1]

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Today the Department of Justice ("the Department") issued a Report that, if adopted by the courts, would be a blueprint for radically weakened enforcement of Section 2 of the Sherman Act.[2]
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UNDER SECTION 2 OF THE SHERMAN ACT (2008), *available at* http://www.usdoj.gov/atr/public/reports/236681.pdf [hereinafter REPORT]. Section 2 prohibits, among other things, monopolization and attempts to monopolize.

[3] Reiter v. Sonotone Corp., 442 U.S. 330, 342 (1979).

[4] We express our appreciation to Commission and Department staff members who labored long and hard to put together the Section 2 hearings. We are equally appreciative of the time and effort invested by all of the witnesses who testified at the hearings (identified in an Appendix to the Department's Report), and we join the Department in saluting them for their contributions.

Leegin Creative Leather Prods. v. PSKS, Inc., 127 S. Ct. 2705, 2729 (2007) (Breyer,

adequately consider the harm consumers will suffer while waiting for the correction to occur. Markets can and do take years, even decades, to correct themselves. For one reason or another, it may take a long time for rivals to surmount entry barriers or other impediments to effective competition. Indeed, the monopolist's own deliberate conduct may further delay a market correction and prolong the duration of consumer harm.

Third, the Department repeatedly cites the "costs of administration" as a factor weighing against enforcement of Section 2.[12] Of course those costs must be considered, by the federal antitrust enforcement agencies as well as by the courts. For example, if it would be impossible to fashion a meaningful remedy for an alleged violation, arguably it is not worth challenging the suspect conduct in the first place. But no one – including the Department – has yet provided a methodology for weighing the costs and benefits of Section 2 enforcement (including potential remedies), or for comparing the relative costs and benefits to businesses versus consumers. Therefore, we do not agree that any category of conduct can be excluded from the scope of Section 2 based on the difficulty of devising an appropriate remedy.

Fourth, the Report emphasizes a need for clear and administrable rules, asserting that this need has motivated courts to fashion "bright line" tests.[13] While clear rules are desirable in the abstract, the benefits of clarity must be balanced against the benefits of effective and reasonable law enforcement, lest the interests of consumers be compromised.[14] Drawing an analogy to Section 1 enforcement, rules of *per se* illegality largely have been tempered by rule of reason analysis, despite the clear guidance afforded by earlier *per se* rules. Similarly, the Report overstates the extent to which the Supreme Court has embraced bright-line rules of *per se* legality. The only "safe harbors" blessed by the Supreme Court relate to alleged predatory pricing and bidding;[15] they were adopted because of the unique threat to consumer welfare that otherwise might result from challenges to low

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[12] *See, e.g.,* REPORT, Chapter 1 at 9, 16; Chapter 2 at 4; Chapter 3 at 45; Chapter 6, section 1 at 102 (bundled discounts); Chapter 7 at 123, 126-27 (refusals to deal with rivals).

[13] *See, e.g.*, REPORT, Introduction at 2; Chapter 1 at 13-15, 17-18; Chapter 3 at 34-35; Chapter 4 at 49-50, 61, 73 (predatory pricing); Chapter 6, section 1 at 97-98, 105 (bundled discounts); Chapter 6, section 2 at 116 (loyalty discounts); Chapter 8 at 141 (exclusive dealing).

[14] We recognize that businesses are key stakeholders interested in Section 2 enforcement. Firms that enjoy monopoly or near-monopoly power are among these stakeholders, as are their rivals and customers. To the extent the federal antitrust enforcement agencies can provide detailed and transparent guidance to the business community regarding our interpretation of Section 2 and our enforcement priorities – without compromising the interests of consumers – of course we should do so.

[15] Brooke Group v. Brown & Williamson Tobacco Corp, 509 U.S. 209 (1993); Weyerhauser Co. v. Ross-Simmons Hardwood Lumber Co., 127 S.Ct. 1069 (2007). The Court has not, however, adopted the "average avoidable cost" safe harbor set forth in the Report. REPORT, Chapter 4 at 65-67.

prices.[16] The Report incorrectly suggests that the Court in *Trinko* adopted a rule of *per se* legality for refusals to deal with rivals, ignoring both the context of the case and the Court's e

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16 *Brooke Group*, 509 U.S. at 226-27.

17 Verizon Comms. Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

18 REPORT, Chapter 3 at 45.

19 *See, e.g.*, United States v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001).

1. Predatory Pricing

With respect to predatory pricing, the Department states that as long as prices are above a firm's "average avoidable costs" (which would not include any costs incurred before the alleged predatory pricing occurs), the firm's pricing is legal.[20] The Department adopts this broad rule of legality despite acknowledging that the rule could enable a firm with monopoly or near-monopoly power to exclude a rival who otherwise could constrain the firm's exercise of monopoly

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20 REPORT, Chapter 4 at 65-67.

21 *Id.* at 63-64.

22 *Id.* at 71-72.

23 In *Brooke Group*, the Court stated only that "an appropriate measure of cost" should be used. *Brooke Group*, 509 U.S. at 222-24. The Court did not say it would be "appropriate" to use a price-cost test that could facilitate foreclosure of rivals in a market where monopoly power exists, and the Court has never blessed an additional "efficiencies" defense in those circumstances.

24 REPORT, Chapter 4 at 71.

25 REPORT, Chapter 6, section 2 at 116.

26 "First dollar" or "non-linear" discounts are discounts offered not only on the "contestable" portion of sales made to customers (sales for which the firm and its rival can both compete) but also on "uncontestable" sales (sales for which a rival cannot compete because, for example, the rival lacks the economies of scale or scope to do so). *See* REPORT, Chapter 6, section 2 at 111-12.

[27] *Id.* at 107, 111-12.

[28] The Supreme Court has never blessed the use of any price-cost rules of *per se* legality for any practice except predatory pricing. It is not clear that any of the lower court decisions cited in the Report involved "first dollar" or "non-linear" discounts granted by a firm with monopoly or near-monopoly power. In any event, even if such discounts were involved, the lower courts did not address their exclusionary potential.

[29] REPORT, Chapter 6, section 2 at 114-15.

[30] REPORT, Chapter 6 at 105-06.

[31] *Id.* at 105.

[32] *Id.*

use of the “disproportionality” safety net.[34] Moreover, the Report does not mention the possibility of analyzing bundled discounts as a form of exclusive dealing instead of affording them the protection of price-cost “safe harbors” and requiring proof of “disproportionality,” despite the Department’s recognition of the kinship between bundled discounts and “first dollar” loyalty discounts (the latter having been identified by the Department as a form of exclusive dealing).

4. Tying

The Department declares that tying is ubiquitous. Contrary to e

[34] REPORT, Chapter 3 at 45-46.

[35] REPORT, Chapter 5 at 77.

[36] Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984).

[37] REPORT, Chapter 5 at 90.

[38] *Id.*

[39] *Id.*

[40] *See* REPORT, Chapter 3 at 45-46.

[41] REPORT, Chapter 7 at 127, 129.

[42] *Id.* at 124 and n. 71.

[43] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (Apr. 2007), *available at*
http://www.ftc.g

rival.[50] According to the Report, that rule applies despite the Department's acknowledgment that a rival may need greater access to the market in order to achieve sufficient scope and scale to constrain the exercise of monopoly power.[51] The Department further declares that exclusive dealing will be considered legal, even if outside the "safe harbor," unless the public or private plaintiff can establish that the conduct has no procompetitive effects or that its anticompetitive effects are "disproportionate" to its benefits under the Department's newly-created "disproportionality" requirement.[52]

III. Conclusion

The Department's Report does not consider all of the exclusionary practices that may be used to obtain or maint

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[50] REPORT, Chapter 8 at 141.

[51] *Id.* at 137.

[52] *Id.* at 140.

[53] As one notable example, except for a passing reference, the Report ignores forms of "cheap exclusion;" that is, virtually costless forms of exclusionary conduct, which may be employed by a firm with monopoly or near-monopoly power. *See* Susan A. Creighton, D. Bruce Hoffman, Thomas G. Krattenmaker & Ernest A. Nagata, *Cheap Exclusion*, 72 ANTITRUST L.J. 975 (2005) (citing, as examples, the Commission's *Unocal* case and the Commission's Orange Book exclusion payment cases).

This Commission stands ready to fill any Sherman Act enforcement void that might be created if the Department actually De