***Statement of Federal Trade Commission Chairman William E. Kovacic*[1]**

Modern U.S. Competition Law and the Treatment of Dominant Firms: Comments on the Department of Justice and Federal Trade Commission Proceedings Relating to Section 2 of the Sherman Act

I. Introduction

To advance the analysis of dominant firm conduct, the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) in 2006 undertook an ambitious program of public consultations.[2] When these proceedings began, I hoped that if the agencies were to publish something based on the deliberations, they would prepare one document that reflected their common views. That did not come to pass. Today the DOJ has issued its policy prescriptions based on the proceedings and related research.[3]

Robust public debate – even between the two federal antitrust agencies – can serve the valuable end of pressing the U.S. antitrust system toward the acceptance of better practices. If one fears one's ideas cannot survive an open intellectual contest, it is time to get new ideas. I do not expect today's events to diminish the efforts of the DOJ and the FTC to cooperate in addressing key issues and in performing the valuable function of giving guidance about their views of doctrine and about their enforcement intentions.

I am most grateful to the DOJ and FTC staff attorneys, economists, and administrative professionals who organized the proceedings and worked heroically to prepare a draft report that both federal antitrust agencies might endorse. The DOJ Report acknowledges these contributions and graciously thanks the FTC team for their efforts. To

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recognize the extraordinary, thoughtful participation of the FTC staff in this process, I thank Bill Cohen, Karen Grimm, Bill Adkinson, Chris Bryan, Karen Goldman, Andrew Heimert, Doug Hilleboe, Tom Klotz, Pat Schultheiss, and Jim Taronji. In a number of

antitrust doctrine and enforcement policy since the 1970s have narrowed significantly the range of dominant firm conduct that is subject to condemnation. Before the change of direction in the past three decades, U.S. doctrine and enforcement policy toward dominant firms generally had been more intervention-minded than the competition policy systems of other jurisdictions before or since.[4] Judicial decisions adopted an expansive view of abuse. For a time in the 1940s, the Supreme Court seemed poised to dispense with the requirement of abusive conduct and endorse a no-fault theory of monopolization.[5]

appreciation for these trends ought to inspire caution before one embraces the proposition that U.S. antitrust doctrine and policy today expose dominant firms to significant, systematic risks attributable to over-inclusive liability rules.

B. Formative Intellectual Influences

To see the trend sketched above is to ask why it happened. A fuller historical perspective would explain why U.S. antitrust system has grown more tolerant of dominant firm behavior since the mid-1970s. A key reason for the course of U.S. doctrinal and policy evolution lies in the ideas that have narrowed the zone of intervention. The intellectual DNA of U.S. antitrust doctrine governing single-firm conduct today is mainly a double helix[11] that intertwines two chains of ideas, one drawn from the Chicago School of Robert Bork, Richard Posner, and Frank Easterbrook, and the other drawn from the modern Harvard School of Phillip Areeda, Donald Turner, and Steven Breyer.[12] The combination of Chicago School and Harvard School perspectives features shared prescriptions about the appropriate substantive theories for antitrust enforcement (Chicago's main contribution to the double helix) and cautions about the administrability of legal rules and the capacity of the institutions entrusted with implementing them (Harvard's main contribution to the double helix). The double helix of ideas does not preclude enforcement, but it has supported the acceptance of presumptions that elevate the hurdles that antitrust plaintiffs must clear to prevail in the courts.

Three presumptions embedded in the Chicago-Harvard double helix stand out in the treatment of dominant firms. First, both schools generally embrace an economic efficiency orientation that emphasizes reliance on economic theory in forming antitrust rules.[13]

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[11] The image borrows from Francis Crick's and James Watson's discovery of the double helix structure of DNA. *See* James D. Watson, The Double Helix (Penguin Books 1999).

[12] By speaking of the modern Harvard School, I mean to distinguish the work of Areeda, Turner, and Breyer from the 1970s onward from the more intervention-minded scholarship that characterized the Harvard School from the 1940s through the 1960s.

[13] *See* I Phillip Areeda & Donald F. Turner, Antitrust Law, paras. 103-13 (1978); Robert H. Bork, The Antitrust Paradox 69-89 (1978).

Chicago School and Harvard School scholars do not define efficiency identically, but the two schools discourage consideration of non-efficiency objectives such as the dispersion of political power and the preservation of opportunities for smaller enterprises to compete.[14]

The second presumption endorses the elements of economic theory that favor giving individual firms broad freedom to select product development, pricing, and distribution strategies. Among other policy implications, this presumption generally disfavors intervention to control dominant firms.[15] Here Chicago School and Harvard School commentators tend to share the view that the social costs of enforcing antitrust rules against dominant firms too aggressively exceed the costs of enforcing them too weakly.[16]

The third presumption demands that courts and enforcement agencies pay close attention to considerations of institutional design and capacity in formulating and applying antitrust rules. The insistence that competition policy take account of the limitations of the institutional arrangements of the U.S. antitrust system is perhaps the Harvard School's main contribution to the double helix. Areeda and Turner urged courts and agencies to account for institutional factors and taught the precept that antitrust rules should not outrun the capabilities of implementing institutions.[17] These scholars argued that antitrust rules and decision-making tasks must be administrable for the central participants in the antitrust system (courts, enforcement agencies, the private bar, and business managers).[18] They also recommended that special substantive and procedural screens be used to ensure that private

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[14] For example, Areeda and Turner said "As a goal of antitrust policy, 'fairness' is a vagrant claim applied to any value that one happens to favor." 4 Phillip Areeda & Donald F. Turner, Antitrust Law 21 (1980).

[15] Bork, Antitrust Paradox, 163-97; Phillip Areeda & Donald F. Turner, *Predatory Pricing and Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 704-12 (1975).

[16] *See* Walter Adams & James W. Brock, *Areeda/Turner on Antitrust: A Hobson's Choice*, 41 Antitrust Bull. 735, 741-42 (1996) (noting similarity of views of Easterbrook, Areeda, and Turner of relative dangers of over-inclusive and under-inclusive enforcement of restrictions on dominant firm behavior).

[17] *See* I Areeda & Turner, Antitrust Law, at 31-33 (discussing institutional limitations of courts and enforcement agencies).

[18] *See* 3 Phillip Areeda & Donald F. Turner, Antitrust Law 150-53 (1978) (discussing flaws in previous judicial efforts to define illegal predatory pricing).

antitrust suits were consistent with larger social aims. An acute wariness of U.S. private rights of action (including mandatory trebling of damages, asymmetric fee-shifting, and jury trials) is a major theme of Areeda's and Turner's writing. Their concern for overly expansive private enforcement guided their proposals concerning substantive antitrust standards and procedural screens relating to standing and injury.[19]

III. The Chicago-Harvard Double Helix and Future U.S. Polic-41(5)1.8(e9J16.37 10 -2.04 9 TD.06 Tc2023 9 Tw