Statement of the Federal Trade Commission

Presented by
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Before the

Committee on the Judiciary
United States Senate

Concerning

Mergers and Corporate Consolidation in the New Economy

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Washington, D.C.

Mr. Chairman and Members of the Committee, I am pleased to present the Statement of the Federal Trade Commission on Mergers and Corporate Consolidation in the New Economy. The subject is one immediately familiar to us because the Commission, along with the Antitrust Division of the Department of Justice, has a statutory responsibility to review the competitive implications of almost every large merger that is proposed.

Recently, merger review has been an extremely daunting and challenging task. The number of mergers reported to the antitrust agencies under the Hart-Scott-Rodino (" HSR") Act has increased dramatically from 1,529 filings in fiscal year 1991 to an

say that the current merger wave is significantly different from the " junk bond" -fueled mergers of the 1980's. Some of those mergers involved the acquisition of unrelated businesses that were targeted for their break-up value or designed to generate cash for corporate raiders. Today

a fast-moving, technology-driven economy, a merger may enable a firm to acquire quickly the technology or other capabilities to enter a new market or to be a stronger competitor. The communications industry is a good example. Other mergers may be driven by a desire to consolidate research and development resources to produce a greater research capability. Some pharmaceutical mergers fit that mold.

Strategic mergers. Many mergers, perhaps more than in some years past, involve direct competitors and appear to be motivated by " strategic" considerations. Firms are increasingly concerned about being number one or a strong number two in their markets, or perhaps even dominant. That drive can lead to mergers intended to boost market share, eliminate competitors, or acquire an important supplier of inputs needed by competitors. In these types of mergers we may be concerned that a firm has acquired a dominant

as the potential efficiencies and procompetitive benefits of the transaction. This analysis produces better decisions, but it also is more resource-intensive. Consequently, more resources are needed for both the FTC and the Antitrust Division to do our job of ensuring a competitive American economy.

Although we have found that the majority of mergers do not appear to harm competition, we are able to make that determination only after reviewing the facts of each transaction. We must be able to do that quickly and accurately. We believe we have been quite successful under the circumstances. For example, of the 3,702 transactions filed under HSR in fiscal year 1997, roughly 70% were reviewed very quickly and allowed to proceed before the end of the statutory 30-day waiting period; that is, they were granted " early termination." Approximately 14% of the transactions raised enough issues to proceed beyond the initial review stage and were assigned to either the Commission or the Antitrust Division for further substantive review. In the past year, 4.5% raised questions serious enough to warrant a request for additional information (" second request") from either the Commission or the Antitrust Division. These are the most intensive investigations and require major resources. Almost half of those transactions resulted in enforcement action or abandonment due to antitrust concerns. In fiscal 1997, the Commission and the Antitrust Division challenged a total of 52 mergers through court or administrative actions and settlement proceedings, and an additional seven transactions were abandoned before formal enforcement action was announced. Over the past three fiscal years (1995-1997), Commission action has resulted in an average of 32 transactions per year either challenged or abandoned. Although the number of problematic mergers is small in relation to the total, the consequences of anticompetitive mergers can be enormous. For example, enforcement action in one case alone -- the proposed merger of Staples and Office Depot -- saved consumers an estimated $1.1 billion over five years.

III. The Antitrust Agencies' Response

Given the tremendous numbers of recent mergers, it is appropriate to ask whether the antitrust agencies are doing enough to prevent anticompetitive mergers. We believe the level of enforcement has been appropriate. To the extent the mergers not challenged are procompetitive, consumers benefit and companies can be more competitive in both domestic and international marketplaces. We should be concerned about the relatively small but important number of mergers that pose a serious threat to competition and to consumers. We believe we have been successful in distinguishing between the mergers that should be allowed to proceed, and those that raise significant concerns. We review transactions efficiently, we promptly give the green light to those that clearly are not anticompetitive, and we challenge those that present a serious threat to competition and consumers. Furthermore, we place great emphasis on implementing an effective remedy when we find reason to believe that a merger will be anticompetitive.

Forward-looking analysis. The dynamics of the new economy make it especially important that merger analysis be rigorous and forward-looking. In fact, the Commission held a series of public hearings in 1995-96 to address precisely whether antitrust analysis

marketplace. Some of the issues considered were whether antitrust analysis recognized the international nature of competition, merger review in industries that were downsizing, the standards for strategic alliances and joint ventures, and evaluation of cost-savings or efficiency claims.

The hearings produced a comprehensive report and a general consensus that antitrust policy is on the right course. This consensus reflects the basic fact that the antitrust laws have been and continue to be sufficiently flexible to accommodate new economic learning and a changing business environment. Court decisions and the agencies' guidelines demonstrate that our interpretation and application of those laws have changed with the times. Merger analysis has moved from strict reliance on structure-based presumptions that focused largely on market share data to a sophisticated analysis that takes account of the dynamic nature of competition in the real world. The analysis recognizes that competition in many markets is global. Thus, antitrust analysis takes account of competition from imports, and it recognizes the need for U.S. firms to be competitive in world markets.

As we undertake this analysis, we find there is little inconsistency or conflict between the goal of the antitrust laws to protect U.S. consumers and competition in domestic markets, on the one hand, and the imperatives of global competition on the other. Competition in world markets and competition at home go hand in hand -- one benefits the other. Likewise, efforts to increase efficiency and competitiveness transcend national boundaries. A merger that produces a stronger competitor in a global market could very well have procompetitive benefits in the United States, and those efficiencies will be taken into account. Further, if a merger does create a competitive problem in a domestic market, antitrust remedies are targeted to the specific competitive problem; we make every effort not to interfere with the remainder of the transaction. A Commission order may require a partial divestiture, or licensing of technology, and the remainder of the merger is allowed to proceed. In most cases it is not necessary to block a merger entirely.

Thus, the Commission's enforcement decisions recognize that the principles of merger analysis must be applied with sharp attentio9cus0.k2mloi8 Tm [(onr m)-2(e)4(r)-6(ie)(mu)s(ic) rie mder 4(

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necessary. An example is the merger of Boeing and McDonnell Douglas. Although the merger would give Boeing control over 60 percent of the market for commercial airliners and leave only one major competitor, the evidence from the Commission's extensive investigation showed that McDonnell Douglas was no longer a significant competitive force in the market, and there was little likelihood that it would regain that status. Thus, although market concentration data suggested that a merger of Boeing and McDonnell Douglas would raise competitive concerns, a careful review of the evidence indicated that the merger would not significantly lessen competition.

- *Minimizing burdens.* The Commission also recognizes that it is important to minimize burdens on business as we conduct this essential review. Since the majority of mergers do not raise anticompetitive concerns, they should be reviewed quickly and allowed to proceed. We have taken several recent steps to reduce burdens. Last year, we adopted five new rules to exempt certain mergers from the Hart-Scott-Rodino reporting and waiting period requirements. Our experience showed that those kinds of transactions were very unlikely to raise competitive concerns. The new HSR exemptions reduced the reporting requirement by about seven to ten percent and resulted in a significant saving of filing fees and other reporting costs for companies engaging in those transactions, as well as a saving of resources for the antitrust agencies in processing and reviewing those filings. While adoption of additional exemptions may be possible, we must proceed cautiously. The fact-specific nature of merger analysis makes it very difficult to determine beforehand which transactions are not likely to raise competitive concerns.

The agencies also have worked on process improvements -- ways to make merger review faster and more efficient. We have expedited the process, called " clearance," through which we decide which agency will review a particular merger. The agencies have also adopted a more streamlined joint model request for additional information, and we implemented a " quick look" investigative process that permits an investigation to be terminated if certain threshold information indicates that the merger is not likely to be anticompetitive.

- *Continued evaluation of antitrust standards.* Plainly, the antitrust agencies must continue to be forward-looking in their antitrust analysis, and must do so with efficiency and sophistication. In that regard, another observation from our review of marketplace behavior is that companies increasingly are entering into strategic alliances and joint ventures that are something less than a complete merger. That phenomenon is occurring in a number in industries, including high-tech markets, and a number of joint ventures are international. These ventures may involve, for example, joint research and development, joint manufacturing, marketing agreements, or joint distribution arrangements. While we would expect many of those ventures to be procompetitive, certain concerns inevitably arise whenever competitors collaborate. The need for further study of this issue is another outgrowth of the Commission's global competition hearings. As a result of those hearings, the Commission formed a task force to study the competitive

implications of joint ventures and other forms of competitor collaboration, with the goal of providing additional antitrust guidance to firms and practitioners. That