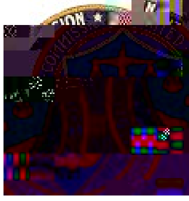

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, DC 20580

Prepared Keynote Address by Chairman Joseph J. Simons[1]

At American University Washington College of Law Conference on

Themes of Professor Jonathan Baker's New Book,

The Antitrust Paradigm: Restoring a Competitive Economy

March 8, 2019

Good afternoon. First, I want to thank Jon for asking me to participate in this event. Jon's new book, *The Antitrust Paradigm*, is a significant one.[2] Jon has called for us—courts, agencies, and legislators—to rethink and update some of the core policy choices and legal principles that we have accepted for the past quarter-century or longer.[3] Jon has had an impressive career as an academic, teacher, policy maker, enforcer, and practitioner. A limited number of people have the breadth and quality of experience that Jon possesses. So I take seriously his concerns about the failure of courts and agencies to identify and remedy anticompetitive conduct and problematic mergers.

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[1] These remarks reflect my own views. They do not necessarily reflect the views of the Commission or any other individual Commissioner.
[2] JONATHAN B. BAKER, THE ANTITRUST PARADIGM0 9.TA

> economic evidence are the key to persuading a Court committed to understanding the antitrust laws as advancing economic goals.[5]

I agree with Jon and want to expand on his conclusion. We ought to pursue those policy and

its enforcement efforts to Judge Bork’s narrow concerns. The Commission, under Republican and Democratic leadership, has consistently rejected the suggestion that mergers are benign unless they lead to monopoly or duopoly. The Commission regularly seeks relief in markets where a merger will eliminate one of four or five pre-merger competitors, and occasionally, we have gotten relief in even less concentrated markets. The Commission also periodically challenges “small

be careful about accepting or creating presumptions without a strong economic (preferably empirical) basis. Both the courts and the agencies, however, have been guilty of moving the law beyond what the economic literature would justify, but there are also areas where this agency has undertaken substantial empirical work that eventually supported presumptions or approaches on a strong bipartisan basis. I will describe a couple of examples from both buckets:

- Bucket 1: Where presumptions or approaches were not supported by economic evidence; and
- Bucket 2: Where they were supported by economic evidence.

(i) *Horizontal Merger Guidelines* & General Standards fT7ouppor0 12 90 5 ())]dar 1.155cJ 0 Tc 0 Tw (

I should note that Jon Baker played a significant role in merger enforcement during part of this time period as Director of the Bureau of Economics from 1995 to 1998, and I am confident Jon thought he was applying good economics and using reliable economic evidence.

More recently, however, empirical merger retrospectives (primarily using a difference-in-difference approach) have raised the possibility of testing the results of our institutional/case studies approach more directly and systematically.[15] And indeed, there is a growing literature on merger retrospectives, which Jon cites as evidence that our enforcement has been too lax.[16]

(ii) Exchange of Past Compensation Information

My second example regarding presumptions is a more cautionary one, and comes from the 1996 *Statements of Antitrust Enforcement Policy in Health Care*.[17] Statement Six is particularly relevant because both agencies are now devoting more attention to competition in labor markets and how certain conduct, including mergers, may impact competition in those markets.

Statement Six indicates that the antitrust agencies will not challenge health care provider participation in wage surveys if: (i) the information to be shared is based on data more than three

3. CONSISTENT AND CRITICAL EVALUATION

Now to the last of the three key principles for bipartisan evolutionary change. I believe a necessary factor in achieving and maintaining a new antitrust consensus is a willingness to evaluate critically and consistently the results of agency or court decisions. Academics and practitioners undertake some of this evaluation through their commentary on agency actions and court decisions, and on legislative proposals. But, the enforcement community must remain willing to evaluate its own past enforcement and policy decisions, and to criticize past efforts if the evidence warrants it. The FTC has a long history of such internal evaluation, and that effort must continue. As you know, we are holding a series of hearings designed precisely to do that.[25]

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