American Antitrust Institute
Private Antitrust Enforcement Conference
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Remarks of Commissioner Terrell McSweeny

Good evening. Thank you, Rick, for that kind introduction. Thank you to Bert and to the American Antitrust Institute for the invitation to join you this evening. Congratulations, Diana, on being selected as AAI's next President. As you know all too well, you have big shoes to fill. Bert, thank you also for your vision in founding AAI and your leadership of it for the last 16 years. Having worked with a few of the finalists on matters while I was at the Antitrust Division, I can personally attest to their excellent work.

As Rick mentioned, I joined the FTC as a Commissioner earlier this year. And from day one I learned this important disclaimer: The views I express tonight are my own and do not reflect the views of the FTC or any other Commissioner.

My arrival at the FTC coincided with a very special time for the Commission – its 100th birthday. We've spent a good bit of time this year both celebrating and, importantly, reflecting on the FTC's history and accomplishments. It is also the centennial of another landmark piece of antitrust legislation: the Clayton Act.

It is not a historical accident that Congress passed the Federal Trade Commission Act and the Clayton Act in the same year. As most of you know, Congress initially passed the Sherman Act in 1890, in order to safeguard competition and prevent the consolidation of economic power.

But, by the second decade of the 20th century, there was growing recognition that legislation supplementing the Sherman Act was necessary to – as Woodrow Wilson put in his New Freedom campaign speeches – "open again the fields of competition, so that new men with brains, new men with capital, new men with energy in their veins, may build up enterprises in America."[1]

It was Wilson – partly goaded by Theodore Roosevelt – who threw down the gauntlet against trusts in the 1912 election, proposing to "prevent private monopoly by law, to see to it that the methods by which monopolies have been built up are legally made impossible."[2] Shortly after assuming office in 1913, President Wilson delivered a special address on trusts and monopolies to a joint session of Congress, in which he called for two things: (1) a "more explicit legislative definition of the policy and meaning of the existing antitrust law;" and (2) an

[1] Woodrow Wilson, Campaign Speech in Indianapolis, Indiana (Oct. 3, 1912).
[2] Woodrow Wilson, Campaign Speech, *The New Freedom* (1913).

"interstate trade commission."[3] Congress answered Wilson's first call by passing the Clayton Act and his second by passing the FTC Act.

Importantly, with Sections 4 and 16 of the Clayton Act, Congress explicitly introduced a private right of action for damages and injunctive relief, respectively.[4] This expanded the private right of action within the Sherman Act to include all of the antitrust laws.[5] The legislative history of the Clayton Act suggests that Congress intended to of Jysn.33 0 Td (.)Tj EMC /Sp6n <</MCID 3

patent" test, while others held that they were presumptively anticompetitive, prompting a "quick look" review.

This backdrop set the stage for the Supreme Court's review of *FTC v. Actavis* last year. The Supreme Court's *Actavis* decision was significant in confirming the harm to competition from reverse payment agreements.[17] But it left it to the lower courts to structure the rule

important and legitimate safety function, but they also have the potential to foreclose less expensive alternatives for customers by blocking access to samples needed by generic manufacturers to meet FDA requirements for approval. Congress included language in the 2007 FDA Amendments Act that stated that brand name drug manufacturers should not utilize the REMS program to impede generic competition,[22] but it appears this conduct nevertheless continues.

Although the Commission has yet to file an enforcement action challenging this type of conduct, the agency recently submitted an amicus brief in a private action, *Mylan v. Celgene*, which is pending in the District of New Jersey.[23] While the Commission did not take a position on the merits