Washington Center for Equitable Growth
Making Antitrust Work for the 21st Century
Washington, DC
October 6, 2016
Keynote Remarks of Commissioner Terrell McSweeny[1]

Good morning. It is a pleasure to be here today. I would like to thank the Center for Equitable Growth for the invitation to speak to you.

In the two sessions this morning, you've heard from a number of distinguished academics and practitioners about the development of antitrust law over the past 40 years and about the relationship between antitrust

While there is, undoubtedly, still much work to be done in order to better understand these trends and the linkages between them, I believe there is a growing consensus that suggests a troubling decrease in competition. It is well established that competition benefits consumers via lower prices, greater quality, and greater innovation.[7] Innovation, in turn, leads to productivity growth and better living standards.[8] In labor markets, competition to attract and retain workers also leads to higher wages. So it is worrisome when we see indicators of declining competition.

Against this backdrop, the role antitrust plays in maintaining competitive markets has become, quite appropriately, an important topic of public debate.

Ironically, antitrust enforcers do not have a monopoly on competition policy. That's why the President's executive order encouraging agencies across the federal government to consider actions they can take within their authority to promote competition is important. I hope the next Administration continues this wise policy.

Today I am going to focus my remarks on the vital role antitrust enforcers must continue to play. There is a great deal that antitrust does extremely well today. Over the last seven years, U.S. enforcers have challenged a larger proportion of merger transactions than in the previous two decades. It has been a great privilege for me to work with so many talented and dedicated lawyers and economists, both as a Commissioner at the Federal Trade Commission and in my time at the Department of Justice.

But there are also some areas of the antitrust enterprise that – to be quite candid – could use some work.

First, we must enforce effectively. Second, we must continue to protect opportunity and advocate for competition. Third, we must eliminate barriers to effective antitrust enforcement, including antiquated federal immunities and protectionist state laws. Finally, we must continually seek to improve our understanding of markets, economics, and the theories underlying antitrust enforcement. That includes subjecting to critical scrutiny even "conventional wisdom" in antitrust.

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https://www.whitehouse.gov/sites/default/files/page/files/20151016_firm_level_perspective_on_role_of_rents_in_inequality.pdf.

[7] William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, J. ECON. PERSPECTIVES, Vol. 14, No. 1 (Winter 2000), http://faculty.haas.berkeley.edu/shapiro/century.pdf.

[8] Carl Shapiro, *Competition and Innovation: Did Arrow Hit the Bull's Eye?, in* THE RATE & DIRECTION OF INVENTIVE ACTIVITY REVISITED, 361-410 (Josh Lerner & Scott Stern eds., 2010) http://faculty.haas.berkeley.edu/shapiro/arrow.pdf.

presumption is yielding bad results. The available data suggest that U.S. enforcers rarely block procompetitive mergers.[13] Indeed, the evidence suggests that the "conventional wisdom" that mergers generally tend to lead to efficiency gains may itself be suspect. Recent research suggests that mergers frequently fail to deliver their promised efficiency gains.[14] In a recent interview, Judge Richard Posner – himself a leading figure in the ascension of the Chicago School[15] – observed that "[i]t's very unclear that mergers are primarily about increasing efficiency."[16]

Other critics of modern antitrust enforcement argue that antitrust law and competition enforcers simply cannot keep pace with change in dynamic, high-tech markets and therefore should not intervene in them.[17] In these markets, they argue, even well intentioned enforcement may do more harm than good.[18] I believe that there is broad international consensus that antitrust enforcers can and should play a vital role in protecting competition in the high-tech, digital economy by preserving the process of innovation and keeping markets open for innovators. Competition enforcers should not turn a blind eye toward an0.00066t.00 8Tc ahTw -18 -1.38 Tdloul

These cases demonstrate that enforcers should not shy away from "litigating the fix" where we believe it is appropriate to safeguard post-merger competition.

The courts in both of these cases reaffirmed the long-standing and widely accepted role that market concentration presumption plays in merger analysis. The *Guidelines* establish a presumption of market power for mergers that cause a significant increase in concentration and result in highly concentrated markets.[21] But the presumption is only the beginning of a more extensive analysis. The Commission considers competitive effects, the feasibility of entry, expansion, repositioning, and claims of efficiencies and failing firm to identify instances in which application of the presumption might be misplaced. While the FTC certainly did not rest on the presumption in *Sysco* and *Staples*, both courts reaffirmed the continuing significance of the presumption and its role in suggesting the likelihood of anticompetitive harm.

Moreover, the agencies and the courts continue to be appropriately skeptical of the merging parties' claimed efficiencies where the evidence demonstrates that the efficiencies are speculative, not merger-specific, and unlikely to be passed on to consumers.

Of course, antitrust enforcers do not prevail in all of their merger challenges. For example, the Commission challenged the merger between the second and third largest sterilization companies in the world, alleging that the merger would have prevented important innovations in the market.[22] Unfortunately, we lost that one.[23] While I disagree with the court's ruling, this case shows that the FTC takes innovation seriously.

Bringing and Winning Conduct Cases

It is equally important that we enforce effectively when we identify anticompetitive conduct. The FTC's track record in this area is relatively strong.

For example, for nearly two decades, the FTC has worked to stop anticompetitive reverse payment settlements where a drug company pays a potential generic rival to drop its patent challenge and delay entering the market. The FTC's efforts met with considerable and sustained resistance from many in the industry, but in 2013, the FTC won a major victory at the Supreme Court in the *Actavis* case.[24] Following the *Actavis* decision, the number of reverse payment

[21] *See id.* § 5.3.

[22] Compl., *FTC v. Steris Corp.*, No. 1:15-cv-0108 (N.D. Ohio filed June 4, 2015), https://www.ftc.gov/system/files/documents/cases/150529sterissynergytro.pdf.

[23] Order Returning Matter to Adjudication and Dismissing Compl. (Oct. 30, 2015), https://www.ftc.gov/system/files/documents/cases/151030sterissynergyorder.pdf.

[24] *FTC v. Actavis*, 133 S. Ct. 2223 (2013).

settlements has decreased.[25] Last year, the FTC secured a $1.2 billion settlement in *FTC v. Cephalon* related to anticompetitive reverse payments.[26] Earlier this year, the FTC filed suit against Endo and generic firms for entering into illegal reverse payment agreements to delay entry of generic versions of two drugs.[27] It would be helpful to clarify that all pay-for-delay deals are presumptively illegal – bipartisan legislation proposed by Senators Klobuchar and Grassley would do so. Moreover, while the FTC must continue to aggressively use its antitrust authority to prevent anticompetitive conduct and mergers that keep drug prices high, there are limits to antitrust enforcers' ability to counter high drug prices absent evidence of anticompetitive conduct.

Conduct cases can prove especially challenging for enforcement agencies. Oftentimes, there is no case law directly on point, and the cases themselves can require substantial time and energy to prosecute. Though these types of cases take a great deal of resources and are not easy to win, they are worth bringing.

Protecting Opportunity

Competition enforcers also have a role to play in advocating for competition at the state and local levels. Sometimes this takes the form of advocating on behalf of the competition introduced by new entrants.[28] But it can also mean safeguarding economic opportunity by advocating against prescriptive occupational licensing regimes.

Take, for example, state occupational licensing laws. A White House report found that the share of workers subject to state licensing laws has grown five-fold since the 1950s.[29] There can be valid quality, health, and safety reasons for imposing licensing requirements. But licensing laws can also reduce competition, harm consumers, and heighten income inequality by

[25]FTC Bureau of Competition Report, *Overview of MMA Agreements Filed in FY2014* at 1, https://www.ftc.gov/system/files/documents/reports/agreements-filled-federal-trade-commission-under-medicare-prescription-drug-improvement/160113mmafy14rpt.pdf.

[26]FTC Press Release, *FTC Settlement of Pay for Delay Case Ensures $1.2 Billion in Ill-Gotten Gains Relinquished, Refunds Will Go to Purchasers Affected by Anticompetitive Tactics*, May 28, 2015, https://www.ftc.gov/news-events/press-releases/2015/05/ftc-settlement-cephalon-pay-delay-case-ensures-12-billion-ill.

[27] *Endo* is the first FTC case to challenge a so-called "no-AG commitment" as a reverse payment. A no-AG commitment is a pledge by the branded drug company not to compete with the generic firm by marketing its own generic version of its drug following the agreed-upon entry date. Compl., . *27*

"shift[ing] resources from workers with lower-income and fewer skills to those with higher income and skills."[30]

The FTC has focused its advocacy on commenting on regulations that may unduly restrict competition in certain fields – especially when licensing boards are controlled by active market participants. And, the FTC has taken enforcement action when these practices eliminate competition.

In general, I believe it will continue to be important for federal antitrust enforcers to express concern about state laws that thwart competition. The FTC has won two important Supreme Court victories clarifying the scope of the state action antitrust immunity, *North Carolina State Board of Dental Examiners*[31] and *Phoebe Putney*.[32] However, we continue to see efforts aimed at shielding potentially anticompetitive conduct from federal antitrust enforcement. This is particularly so in health care. For example, we continue to advocate against Certificates of Public Advantage ("COPAs"), cooperative agreements, and other state legislation granting broad antitrust immunity to health care providers. These laws – no matter how well intentioned – are unlikely to replicate the significant benefits of competition.[33] Indeed, I have significant concern that cooperative agreements likely protect deals that impose competitive harms far exceeding their proffered benefits.

Targeting Barriers to Effective Antitrust Enforcement

Eliminate Antiquated Federal Immunities

Antiquated federal immunities present another barrier to effective antitrust enforcement. The McCarran-Ferguson Act, for example, exempts "the business of insurance" from the reach of the antitrust laws. Congress passed McCarran-Ferguson more than 70 years ago. At the time, the concern was that antitrust might preempt state regulation. This concerns makes little sense today.

McCarran-Ferguson is just one of many industry-specific exemptions and carve-outs from antitrust laws. These exemptions and immunities may have made sense when they were created – Congress generally established them for that an co- e regedlawBut d(.)TjEMC /StyleSpan <</MCID 7

many exemptions have held over despite deregulation in the underlying industries, including freight rail, common carrier activity, and agriculture.

This leads to gaps in antitrust enforcement.

Thankfully, the challenge of making antitrust even better is not borne by the FTC and DOJ alone. We are joined in this endeavor by researchers and academics who share our goal of protecting competition and making the economy work for all Americans. Professor Kwoka's recent study of merger retrospectives, for example, has shifted the conversation about modern merger enforcement. Whereas before, much of the academic literature focused on the theoretical dangers of blocking procompetitive mergers, Pr