

The Center for Corporate Policy
<http://www.corporatepolicy.org>

October 12, 2004

Ms. Deborah A. Garza
Chair, Antitrust Modernization Commission
1001 Pennsylvania Ave., NW
Suite 800
Washington, DC 20004

Re: **Comments Regarding Commission Issues for Study**

Dear Commissioner Garza:

I write on behalf of the Center for Corporate Policy to comment in response to the commission's request for input on the scope and focus of issues to be undertaken for study. Please accept these comments despite the late date.

First, while we recognize the bipartisan nature of the AMC, we are struck by the lack of representation from stakeholders apart from the corporate sector and the corporate antitrust bar. For that reason we would urge the commission to seek out additional expertise when considering the effect of diminished competition in terms of higher prices; less choice and poorer service for consumers, especially lower-income consumers; the loss of good-paying jobs; slower rates of innovation and product development; as well as the influence of the corporate sector on the political and regulatory system.

As the Commission sets its agenda, we believe it should devote attention to the following proposals:

Reviving the "incipiency" doctrine. Mergers tend to run in waves, with new megamergers often triggering the expectation that others in the same sector will follow. These merger waves are sometimes triggered by deregulation, as we have seen with the telecommunications, banking and financial services, oil and gas and other sectors deregulated in the past decade.

Section 7 of the Clayton Act has been re-written and re-legislated in a manner that has altered the original intent of Congress in amending the law in 1950 to serve specifically as an obstacle to merger-induced industry and market concentration in the U.S. economy. The failure of the original Section 7 as enacted in 1914 to arrest merger-induced trends in economic concentration was precisely the reason the statute was altered in 1950 through the Celler-Kefauver amendment. The legislative purpose in 1950 was to make merger policy preventative -- to head off trends toward greater concentration early on, "in their incipiency," before concentration became a problem. The emphasis was deliberately put on blocking mergers that "might" substantially lessen competition. Instead, over the past two decades the act has been re-interpreted as applying only to mergers that will with

virtually absolute probability eliminate competition -- an interpretation that Congress rejected in rewriting Section 7 in 1950. The AMC should review the subsequent history to see if it has been consistent with the Act and the 1950 amendment. We believe this is important because of the common assertion by those proposing to merge that they must do so in order to be able to compete with other companies that have already merged.

Reviewing performance claims. Virtually every merger over the past two decades has been accompanied by assertions about the resulting efficiencies, synergies and economies of scale sure to result. In many cases mergers are touted as a way to “better serve customers” or increased shareholder value. These claims have also played an important role in the approval of certain mergers. We believe the commission should undertake a retrospective review of claimed efficiencies involved in larger merger cases to assess their accuracy.

Preventing mergers that create inherent conflicts of interest that stifle competition. If we’ve learned anything from the corporate scandals of recent years, it is that inherent conflicts of interest can result from large, horizontal mergers following deregulation, doing damage to consumers (including small investors) and others. In the banking sector, for instance, there were numerous cases where one firm provided two services at once to the same client (e.g. commercial lending and stock brokerage advising), resulting in “spinning” and the inflated estimates that distorted the market. The inability of regulators to completely eliminate such conflicts through costly and time-consuming regulation (e.g. Sarbanes-Oxley tax consulting loophole) suggests that structural solutions and antitrust policies that prevent problematic cross-sector ownership should be given some consideration as an alternative. The AMC should examine the potential for structural approaches (including industry-specific rules) that would delimit the sphere of permissible corporate activity in order to prevent inherent conflicts of interest.

Evaluating political impacts of mergers that result in concentrated political power. The concentration of ownership in particular industrial sectors – e.g. the news media and the defense weapons manufacturers -- has the potential to create a dangerous concentration of influence over policymaking. These are not questions of partisanship. The AMC should examine how the concentration of power in these particular industries (versus more diffuse ownership) can lessen competition, impact policymaking and thereby adversely impact upon our democracy.

As large bureaucracies whose success or failure is contingent upon government policy, the large defense firms have an inherent interest in lobbying for an increased use of their products and services. But without competition, the concentration of firms in this industry can result in tremendous costs to taxpayers. A recent examination of over 2.2 million Pentagon contracts between 1998 and 2002, for example, found that sixty percent of the contracts examined were given out without competition.¹ In addition, the giant defense firms have a shareholder-driven interest in influencing procurement decisions, which has

¹ Larry Makison, “Outsourcing the Pentagon,” Center for Public Integrity, October 2004. See www.publicintegrity.org

the potential to significantly distort national security and defense priorities, driving procurement toward unnecessary or unwanted weapons systems.

The concentration of ownership of the media in the hands of a relatively few large conglomerates also poses a potential threat to democracy, reducing the diversity of views on the nation's airwaves and stifling dissent. Although there has been a proliferation of new media outlets in recent years, the incorporation of these new technologies under the same corporate ownership (often in the name of synergies) has reduced the diversity of reporting and stifled noncommercial editorial content. The media's ability to serve the public should not be judged purely by commercial criteria (shareholder value or even lower consumer rates), but also by other measures, including universal public access and its impact on vigorous citizen engagement with the activities of government. At a time of broad concern about media ownership and concentrated ownership in other sectors (retail, agriculture, etc.), the lack of public awareness about the AMC and the public's ability to provide input into its proceedings is itself illustrative.

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