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OF THE
UNITED STATES OF AMERICA

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November 8, 2005

Antitrust Modernization Commission
Attn: Public Comments
1001 Pennsylvania Ave., N.W.
Suite 800 – South
Washington, D.C. 20004-2505

Re: *Comments on Commission Issues Accepted for Study*

The U.S. Chamber of Commerce, the world's largest business federation representing more than three million businesses of every size, sector, and region, appreciates the opportunity to submit its views to the Antitrust Modernization Commission ("AMC") on issues of importance to the business community and the continued prosperity of the American economy. The Chamber works continuously to promote the fundamental principles of our free enterprise economy and recognizes that the free market system is essential to ensuring a vibrant and productive economy as well as the American way of life. An effective and balanced system of antitrust law is critical to ensuring the efficient operation of our free market system. The Chamber also believes that this policy will perform best if it rests on a sound understanding of business realities in a global economy and a strong commitment to eliminate or reduce unproductive, anticompetitive objectives that reduce competitive vigor.

I: ENFORCEMENT INSTITUTIONS

The Proper Role of the States in Federal Antitrust Enforcement

The proper role of the federal and state government is an important issue for American business in the 21st century. Firms find themselves in commercial enterprises spanning a national or global market that is subject to regulation by one or more states. This problem, of course, is not limited to the antitrust area; state taxation of national or global enterprises (to use just one example) also is a significant problem. But the antitrust laws pose a unique risk: they threaten a firm with treble damages and can inflict massive litigation costs that are a deadweight loss to the firm and society.

The problem stems from the ability of states to bring *parens patriae* suits on behalf of their citizens under federal law. Originally, states could not sue in such a capacity to recover treble damages for injuries to their economies. That restriction was necessary, the Supreme Court held, to prevent duplicative recoveries from multiple treble damages actions brought by citizens on their own behalf and by states on behalf of their citizens.[1] Congress, however, later voided that limitation in the Hart-Scott-Rodino Act, 15 U.S.C. § 15c. Believing that consumer class actions were an inadequate vehicle to obtain redress for a large number of small, individual claims, Congress authorized state attorneys general to bring *parens patriae* treble damages lawsuits on behalf of their citizens.[2]

Limiting States' Enforcement of Federal Antitrust Laws

Recently, however, numerous economists and antitrust scholars have revisited this issue and have concluded that it is a mistake to allow states to regulate interstate business through the federal antitrust laws.[3] These commentators have determined that Congress should altogether deny states the right to bring federal antitrust actions, or severely restrict the states' ability to enforce federal law, for a number of reasons:

1. States lack the resources necessary to make a material contribution to the enforcement of federal law. Theoretically, states could contribute to enforcement by serving as additional watchdogs for anticompetitive conduct. The reality, however, is quite different. The Justice Department and the Federal Trade Commission consider thousands of potential cases each year, but most states review only a few. States' efforts are systematically handicapped by a tremendous disparity in resources, as indicated by the table appended at the end of this section. Different estimates indicate that the states have brought perhaps as few as 77 actions in the 27-year period from 1976 to 2003, or roughly 1.5 per state, or perhaps 100 cases over the last decade, or 2 per state.[4]

2. Most states also lack antitrust expertise necessary to bring effective claims against sophisticated wrongdoers. Most states do not have dedicated antitrust divisions, let alone a staff of experts specializing in technical subjects (*e.g.*, computers, communications, etc.) or industrial organization economics, which may be necessary to a proper understanding of the factual,

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[1] *Hawaii v. Standard Oil Co*., 405 U.S. 251 (1972).

[2] *Illinois v. Abbott & Associates, Inc*., 460 U.S. 557, 573 n.29 (1983).

[3] *See*, *e.g.*, Richard A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, in RICHARD EPSTEIN & MICHAEL GREVE, EDS., *COMPETITION LAWS IN CONFLICT* 252 (2004); RICHARD A. POSNER, *ANTITRUST LAW* 280-82 (2d ed. 2001); Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 940-41 (2001); Robert B. Bell, *Should the States Enforce National Mergers?*, 3 ANTITRUST 37 (Spring 1989); Michael DeBow, *State Antitrust Enforcement: Empirical Evidence and a Modest Reform Proposal*, in RICHARD EPSTEIN & MICHAEL GREVE, EDS., *COMPETITION LAWS IN CONFLICT* 267 (2004); Michael DeBow, *Restraining State Attorneys General, Curbing Government Lawsuit Abuse,* POLICY ANALYSIS*,* 437, 443 (May 10, 2002); Robert W. Hahn & Anne Layne-Farrar, *Federalism in Antitrust*, 26 HARV. J. L. & PUB. POL'Y 877 (2003); Robert H. Lande, *When Should States Challenge Mergers: A Proposed Federal/State Balance*, 35 N.Y. LAW SCHOOL L. REV. 1047 (1990); Edward T. Swaine, *The Local Law of Global Antitrust*, 43 WM. & MARY L. REV. 627 (2001); David A. Zimmerman, Note, *Why State Attorneys General Should Have a Limited Role in Enforcing the Federal Antitrust Law of Mergers*, 48 EMORY L.J. 337 (1999); *cf.* Roger L. Faith, Donald L. Leavens & Robert D. Tollison, *Antitrust Pork Barrel*, 25 J. OF L. & ECON. 329 (1982); *see generally* Michael Greve, *"What They Have Done, and What They Have Failed To Do,"* 1 n.2 (JOHN M. OLIN PROGRAM IN LAW AND ECONOMICS, UNIVERSITY OF CHICAGO LAW SCHOOL, June 18 & 19, 2004) (collecting authorities identifying competing positions).

[4] Richard A. Posner, *COMPETITION LAWS IN CONFLICT* Table 3, at 264. Judge Posner found only 77 cases from 1976 through 2003. By contrast, Michael DeBow found that the states brought 120 cases in the 1993-2000 period with 24 being "follow-on" suits filed after a federal investigation and lawsuit. Michael DeBow, *COMPETITION LAWS IN CONFLICT* Table 1, at 272.

economic, and legal issues raised by contemporary antitrust problems.[5] State attorneys may be stretched thin pursuing non-antitrust cases. Fewer personnel and less funding translate directly into states' relatively minor contribution to antitrust cases that the federal government already has chosen to pursue.

3. It is dubious that supplemental state enforcement of the federal antitrust laws is necessary in any field, like telecommunications, in which a federal or state regulatory agency oversees regulated companies. Regulation traditionally has been deemed an alternative to antitrust enforcement as a means of ensuring that the market remains competitive.[6] Overlaying *state antitrust enforcement* atop *federal antitrust enforcement* and *federal and state regulatory enforcement* and *private enforcement* is an unnecessary fifth enforcement mechanism that is unlikely to be worth its costs.

4. State lawsuits can affirmatively frustrate uniform enforcement of federal law. For example, antitrust guidelines issued by the Justice Department and the National Association of Attorneys General differ in various respects.[7] Different enforcers can have divergent philosophies and priorities based on their political affiliation, education, training, and unique personal experience.[8] For example, the National Association of Attorneys General Merger Guidelines expressly provide that general policy can be supplemented or varied in light of differing precedents and "in the exercise of individual prosecutorial discretion."[9] Accordingly, even if state regulators or enforcers act in good faith, complaints filed in state-initiated lawsuits could seek to impose multiple punishments or to generate inconsistent obligations on national or international firms that could cripple the ability of a domestic company to compete with overseas firms. At a minimum, such outcomes bleed a firm's ability to operate efficiently.

5. There is a considerable risk that state actions could be motivated by parochial considerations. Federal antitrust officials are appointed, and most are career lawyers and economists. Because they are responsive to the entire nation, they are unlikely to be influenced by individual, local interests (*e.g.*, particular rivals, customers, or labor unions). By contrast, most state attorneys general are elected officials with only a statewide constituency. Every political incentive, therefore, is stacked against a non-resident corporation: prosecution of a foreign corporation brings local political rewards with no local costs, not even the litigation costs otherwise borne by in-state businesses.[10]

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[5] *See*, *e.g.*, A Douglas Melamed, *Network Industries and Antitrust*, 23 HARV. J. L. & PUB. POL'Y 147 (1999); Richard A. Posner, *Antitrust in the New Economy,* 68 ANTITRUST L.J. 925, 936-39 (2001).
[6] *See Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, C.J.).
[7] David A. Zimmerman, 48 EMORY L.J. at 349-59.
[8] *See* Walter Adams & James W. Brock, *Antitrust, Ideology, and the Arabesque of Economic Theory*, 66 U. COLO. L. REV. 257, 258-59, 292-93 (1995); Jonathan Ross, *State Antitrust Enforcement, Mergers, and Politics*, 41 WAYNE L. REV. 71, 81-87 (1994) (contrasting differences between U.S. and NAAG Merger Guidelines).
[9] Robert W. Hahn & Anne Layne-Farrar, 26 HARV. J. L. & PUB. POL'Y at 890 n.68 (citing *Horizontal Merger Guidelines of the National Association of Attorneys General,* 52 ANTITRUST & TRADE REG. REP. (BNA) No. 1306, at S-3 (Mar. 12, 1987)).
[10] In Judge Posner's words: "A situation in which the benefits of government action are concentrated in one state and the costs in other states is a recipe for irresponsible state action. This is a genuine downside of federalism." *ANTITRUST LAW* 281.

6. Even the states' practice to free-ride on federal enforcement efforts is not necessarily benign. By joining with federal agencies in an antitrust prosecution in order to share in the proceeds of any future settlement or judgment, each state becomes a party to settlement negotiations or trial. The communication, coordination, and decision-making obstacles so created can make settlement discussions unduly costly or impossible.[11]

In sum, there are several powerful reasons for limiting states' ability to enforce federal laws and only one countervailing factor: the interest in correcting mistaken decisions by federal enforcers not to bring meritorious antitrust cases. That factor might justify the current regime if allowing states to bring such cases *increased* the likelihood that more (and only) meritorious cases would be brought. But the federal government is far better equipped to make enforcement decisions than are the states, so the likelihood is remote that states will spot worthwhile cases missed by DOJ or the FTC. As such, state enforcement of federal antitrust law adds substantial costs with little or no countervailing benefits.

Reducing Problems with State Enforcement

There are several remedies that would eliminate or reduce the problems caused by state enforcement of federal antitrust law. Each option is worthy of the AMC's consideration. Each one would improve the current state of the law. The dearth of evidence to date that state antitrust enforcement has materially advanced consumers' interests combined with the small number of state-initiated cases suggests that little would be lost if the states were removed from the antitrust enforcement business. In most areas of law, except for those very small, very local cases that are pursued by some states today, little would change. These local cases can be addressed by states under their own antitrust laws.[12]

One option would be to repeal that portion of the Hart-Scott-Rodino Act that authorizes states to bring *parens patriae* actions. States would remain free to sue when they are injured in the same manner as any private party, such as when a horizontal conspiracy forces a state to pay a supranormal price for supplies.

Another option is to condition a state's right to bring a federal antitrust claim on receiving prior authorization by the federal government. A related option would be to grant the federal government a right of first refusal in bringing a case. Federal law could require a formal notice to DOJ of any state antitrust suit that seeks to raise a federal antitrust claim. The state could not bring a claim unless and until the federal government approves the filing, or the state could not bring such a claim for a certain fixed period, such as 180 days, to allow the federal government to bring the action instead. The former option has a considerable advantage over the latter: the federal government could decline to prosecute a matter because it saw no antitrust problem, and

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[11] *See* Deborah Platt Majoras, then-Deputy Assistant Attorney General Antitrust Division, U.S. Department of Justice, *Antitrust and Federalism*: NEW YORK STATE BAR ASS'N ANTITRUST LAW SECTION ANNUAL MEETING 13-14 (Jan. 23, 2003). Participants and observers already have noted these problems in their well-known criticisms of the states' involvement in the *Microsoft* case. *See generally* Richard A. Posner, in *Competition Laws in Conflict* 265; Michael DeBow, in *Competition Laws in Conflict* 267; Robert W. Hahn & Anne Layne-Farrar, 26 HARV. J. L. & PUB. POL'Y at 878, 892-907.

[12] Several of the arguments summarized above also could be used to support the position that Congress also should preempt state antitrust laws. We do not, however, believe that such a result is necessary. Limiting enforcement of federal law to the federal government should balance the competing interests.

its decision would prevent the states from second-guessing the federal government's decision. Otherwise, the states would be free to bring unjustified antitrust lawsuits.

Another proposal would grant states the continued ability to prosecute local conspiracies involving horizontal price-fixing, market-sharing, or the like, which may often be more obvious to local enforcement personnel than to federal officials. Prosecution of these cases does not involve elaborate doctrinal tests and would not allow the states to upset national antitrust policy as set by federal enforcement agencies in other areas that involve more in the way of economic expertise, especially in the field of mergers. Furthermore, continued state vigilance against bid-rigging and price-fixing at the local level would raise the ante for those companies contemplating such behavior.

A related alternative would be to allow the states to enforce all purely intrastate matters, because such cases do not pose the risk of concentrating the benefits and costs of antitrust enforcement in different states.

Antitrust Enforcement Budgets[13]

States

State	Annual Budget	Year	Antitrust Budget	FTE
Alaska	3,576,000,000	2005	0	0
Arizona	7,703,840,200	2005	183,000	
California	117,362,000,000	2005	6,057,000	23
Colorado	14,000,000,000	2005	1,300,000	16
Connecticut	13,881,100,000	2005	925,000	10
Delaware	2,600,000,000	2005	147,635	2
Florida	65,400,000,000	2005	2,900,000	22
Georgia	29,617,547,150	2005	0	0
Idaho	50,972,000,000	2005	0	0.2
Indiana	20,378,651,374	2005	as req	0
Kansas	20,858,009,400	2005	228,000	3
Maryland	24,041,495,677	2005	845,952	9
Montana	2,300,000,000	2004-2005	60,000	1
Missouri	19,293,984,133	2005	589,544	7
New Jersey	28,027,261,000	2005	500,000	7
New Hampshire	1,278,893,000	2004	110,400	
New York	106,503,000,000	2005-2006		
North Carolina	15,918,359,528	2005	170,000	4
North Dakota	5,059,439,396	2005-2007	as req	0
Ohio	53,142,500,000	2006	446,449	
South Dakota	2,907,686,333	2005	0	0.5
Vermont	4,133,135,105	2005	242,200	3
Federal Government				
Dept of Justice Antitrust Division		2006	144,451,000	621
Federal Trade Commission		2006	92,000,000	507

II: <u>EXCLUSIONARY CONDUCT</u>

[13] The data in this table was compiled and calculated from publicly available state budgets, from the U.S. DOJ Budget, 2006, at http://www.usdoj.gov/jmd/2006summary/pdf/BPSComplete.pdf, from the FTC Budget and public relations office, and from emails received from state attorneys general budget analysts. State data not included in table were unavailable or not obtainable. Similar disparities between federal and state antitrust resources for FY2002 are set forth in Robert W. Hahn & Anne Layne-Farrar, 26 HARV. J. L. & PUB. POL'Y at 889.

Clarifying Principles for Deterrence of Wrongful Unilateral Conduct

Section 2 of the Sherman Act, 15 U.S.C. § 2, prohibits monopolization and attempts to monopolize, theoretically making an antitrust violation out of purely unilateral conduct. There is general agreement that Section 2 usefully deters firms from engaging in conduct that has no redeeming features. But there is widespread disagreement about the proper scope of Section 2 liability and the standard that should be used to distinguish legal conduct from illegal conduct. According to Judge Richard Posner, this is "is the biggest substantive issue facing antitrust." Richard Posner, *Vertical Restraints and Antitrust Policy*, 72 U. Chi. L. Rev. 229 (2005) (symposium article).

The Chamber believes that Section 2 should be interpreted carefully and predictably. The lack of a clear legal standard against which to judge unilateral conduct imposes significant costs on the economy. Nevertheless, the Chamber recognizes that it will be difficult, if not impossible, to implement a substantial overhaul of Section 2 conduct standards given the substantial and persistent disagreement on the subject. As a practical matter it may be more productive for the AMC to focus on correcting specific problems relating to the interpretation of Section 2.

The recommendation that the AMC demur on the issue of a universal and predictable standard for Section 2 notwithstanding, the Chamber laments the law's current state. Courts and antitrust enforcement agencies have had (perhaps understandable) difficulty distinguishing robust competition from conduct that may in the long-run have anticompetitive effects. As commentators have long observed and even the Supreme Court seems to recognize, robust competition and too robust, anticompetitive behavior both look the same in the short-run, when courts and enforcement agencies are typically asked to render their judgments. *See, e.g.,* Frank H. Easterbrook, *When Is It Worthwhile to Use Courts to Search for Exclusionary Conduct?*, 2003 Colum. Bus. L. Rev. 345, 346. *See also Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1984) (noting the difficulty of "distinguishing robust competition from conduct with long-run anticompetitive effects"). The persistent attempt to do so imposes significant costs on the economy as a whole.

Firms defending antitrust claims stand directly in the line of fire. No firm relishes the prospect of ruinous liability. Uncertain liability rules and huge potential damages give firms an incentive to shy away from conduct that, although entirely legitimate, can reasonably be expected to attract antitrust scrutiny. As the Supreme Court observed in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, when antitrust law leads firms to pull their competitive punches, it undermines its only legitimate objective—increasing consumer welfare by lower prices, increasing output and improving the quality of goods and services. *Id.*, 475 U.S. 574, 594 (1986)

Although these arguments are compelling, they do not have universal support. Given the absence of a general consensus, the Chamber believes that the AMC should attend to particular areas that are more clearly broken. In that vein, the U.S. Chamber suggests that the AMC bring tying claims into the general unilateral conduct fold and put an end to the so-called "essential facilities" doctrine.

Tying Arrangements

Tying arrangements occupy a strange place in the antitrust pantheon. Tying arrangements are often considered to be a prime example of unilateral power. But courts review them under an idiosyncratic standard with roots in Section 1. More than fifty years ago, Justice Frankfurter put tying arrangements in the same class as bid rigging and price fixing, asserting that "tying agreements serve hardly any purpose beyond the suppression of competition." *Standard Oil v. U.S.*, 337 U.S. 293, 305 (1949). Scores of commentators have observed that tying arrangements serve many procompetitive purposes and do not deserve the contempt reserved for actions that have no redeeming competitive purposes. *E.g.,* Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 372-375 (Free Press 1993); Richard A. Posner, *Antitrust Law* 197-207 (U. Chi. Press 2001); Victor H. Kramer, *The Supreme Court and Tying Arrangements: Antitrust as History*, 69 Minn L Rev 1013 (1985).

Reacting to the consistent and stinging criticisms, the Supreme Court has over the past two decades engaged in a bit of judicial legerdemain. The Supreme Court has simultaneously affirmed its commitment to *per se* condemnation of tying arrangements while constructing a peculiar set of criteria that must be satisfied before the sanction applies. "It is," the Court asserts, "far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable *per se*." *Jefferson Parish Hospital Dist. No. 2 v. Hyde,* 466 U.S. 2, 9 (1984). However, according to the Court, plaintiffs seeking to prove a tying claim must establish that (i) the seller conditioned the sale of one product on the purchase of another; (ii) the seller has "appreciable economic power" in the tying product market; and (iii) the arrangement "affect[ed] a substantial volume of interstate commerce." *Eastman Kodak Co. v. Image Tech Servs., Inc.*, 504 U.S. 451, 462 (1991). *See also Jefferson Parish*, 466 U.S. at 13-4 ("[W]e have condemned tying arrangements when the seller has some special ability—usually called "market power"—to force a purchaser to do something that he would not do in a competitive market.")

This test is doubly odd. As the four concurring Justices in *Jefferson Parish* observed,

> tying doctrine incurs the costs of a rule of reason approach without achieving its benefits: the doctrine calls for the extensive and time-consuming economic analysis characteristic of the rule of reason, but then may be interpreted to prohibit arrangements that economic analysis would show to be beneficial.

Id. at 34.

Cf. Illinois Tool Works, Inc. v. Independent Ink, Inc., 396 F.3d 1342 (Fed. Cir. 2005), *cert. granted*, 73 U.S.L.W. 3733 (U.S. Jun. 20, 2005) (No. 04-1329) (granting review to consider whether the Court should overrule the well-established doctrine that market power can be presumed solely because defendant holds patent over tying product).

The existing approach to tying arrangements does nothing to advance the cause of competition policy. The focus of attention in an antitrust case should be on whether the challenged practice threatens to raise prices or restrict output in a coherently defined market. With the exception of market power in the tying product market, however, none of these criteria sheds any light on whether competition is threatened in either market or, just as importantly, whether the obvious supply side benefits offset these anticompetitive effects. The current approach simply "does not correspond to any theory that could be used to distinguish procompetitive from anticompetitive tying." Evans and Padilla, 72 U. Chi. L. Rev. at 90.

After more than half a century, the time has come to break with Justice Frankfurter's oft-quoted, but more often ignored, assertion. Tying arrangements do not warrant *per se* scrutiny, however ingeniously crafted. They should be subject to the same general standards that apply to exclusive dealing arrangements and other potentially exclusionary vertical restraints.

Essential Facilities Doctrine

The essential facilities doctrine is another antitrust anomaly. In theory, the essential facilities doctrine provides a firm with an opportunity to challenge a rival's decision to deny access to its property. But the Supreme Court has never expressly endorsed this theory of antitrust liability, and it has attracted considerable criticism from an impressive array of commentators.

The leading modern case applying the essential facilities doctrine is *MCI Communications Corp. v. AT&T* , 708 F.2d 1081, 1132 (7th Cir. 1983). MCI argued that AT&T had improperly refused to let it connect its telephone lines with AT&T's nationwide telephone network and that interconnection was essential if MCI was to compete against AT&T in the long-distance business. The Seventh Circuit held that MCI had proven "that it was technically and economically feasible for AT&T to have provided the requested interconnections, and that AT&T's refusal to do so constituted an act of monopolization." *Id.* at 1133. The court stated:

> A monopolist's refusal to deal under these circumstances is governed by the so-called essential facilities doctrine. Such a refusal may be unlawful because a monopolist's control of an essential facility (sometimes called a "bottleneck") can extend monopoly power from one stage of production to another, and from one market into another. Thus, the antitrust laws have imposed on firms controlling an essential facility the obligation to make the facility available on nondiscriminatory terms.

Id. at 1132.

The Supreme Court has never acknowledged the existence of the essential facilities doctrine as a source of liability under Section 2. The two cases most widely cited as the source of the doctrine, *US v. Terminal Railroad Assoc.*, 224 U.S. 383 (1912) and *Associated Press v. US*, 326 U.S. 1 (1945), did not involve unilateral conduct. In both cases, the Department of Justice challenged decisions by a group of competitors to deny a rival access to a jointly created resource. Although the Court in both cases upheld a remedy granting the excluded rivals' access to the shared facility, neither case stands for the proposition that a stand-alone firm has an obligation to share its property with it rivals. Just last year, the Court expressly recognized that it had never endorsed the existence of the doctrine, though it declined the opportunity to repudiate it. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004).

Even as a figment, however, the doctrine has proved quite controversial. A wide cross-section of antitrust scholars, including Posner, Areeda and Hovenkamp, have called for its abolition. Posner, *Antitrust,* 242-44; Herbert Hovenkamp, *Federal Antitrust Policy* 305 (2d ed. 1999); Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 841 (1990). *See also* John Thorne, *A Categorical Rule Limiting Section 2 of the Sherman Act:* Verizon v. Trinko, 72 U. Chi. L. Rev. 289, 300 (2005). They and others have assembled a laundry list of objections to the doctrine: compelling firms to share their property with rivals poses a significant threat to innovation; mandatory sharing puts courts in the position of having to serve as public utility regulators, a function for which they are ill-equipped; and it runs counter to the view that firms do not have to share their property with others.

The "essential" facilities doctrine serves no justifiable purpose and the AMC should recommend its complete abolition.

III: IMMUNITIES AND EXEMPTIONS

The Chamber understands that the AMC is now undertaking to provide Congress some criteria or a framework that might apply as lawmakers review immunities and exemptions (existing and proposed). In this context, the Chamber offers the following views:

No generalized hostility to safe harbors

The basic U.S. antitrust laws are written in extraordinarily broad, almost Constitution-like terms. Experience over 100 years has shown that they have the potential to chill legitimate and desirable business activity, and that statutory safe harbors play an appropriate "fine-tuning" role as part of the public policy response to that concern. Congress should not enact safe harbors indiscriminately, and indeed it has not done so. As well, some existing safe harbors may be less necessary, or may entail greater or different costs, now than when they were first created. Keeping them under review is, from that perspective, quite appropriate. However, safe harbors are not presumptively unhealthy, and should not be treated as such in any review process.

No presumption that existing law should be changed

The burden of justifying a change in any existing law properly rests with the proponent of that change. Therefore, before Congress undertakes to modify—or the AMC recommends modification of—any specific immunity or exemption, there should be a concrete U.S. consumer welfare benefit that would flow from altering the existing provision. If there is not, then any review undertaken by Congress (pursuant to an AMC recommendation or otherwise) will be a resource-wasting exercise.

Appropriate cost/benefit analysis

A cost/benefit analysis is, as already suggested by the AMC, an appropriate framework for evaluating particular immunities and exemptions. "Costs," in this context, should involve some burden on U.S. consumers or U.S. commerce, and should be based on the actual operation and measurable consequences of an exemption—not on speculation, theory or anecdotes. As suggested above, where no costs can be demonstrated for an existing immunity/exemption, the analysis should stop there and no change should even be considered. "Benefits"—if the analysis proceeds that far—should be assessed in terms of U.S. consumer welfare, allocative efficiency (e.g., economies of scale, risk-sharing, reduced shipping or administrative costs), and other public policy objectives such as an increase in exports or U.S. jobs. The alternatives to a given immunity/exemption should face a similarly rigorous cost-benefit analysis—taking into account the regulated status of a firm or industry, since the presence of regulation may lessen the likelihood of anticompetitive behavior.[14]

Transparency and oversight

Annual reports and reviews on immunities and exemptions prepared by administering agencies, as well as periodic legislation authorizing or appropriating funds for these agencies, are useful and adequate tools in maintaining legal certainty and ensuring that immunities and exemptions are being applied consistently with Congressional intent. The issue of parallel or overlapping agency jurisdiction should also be considered on an ongoing basis.

Legal certainty

Predictability and legal certainty are important objectives of any economic regulatory scheme, and antitrust is no exception. Sunset clauses create an unproductive and unnecessary level of uncertainty in the law. When there is sufficient reason to change a law, such as a fundamental change in the public policies (or in the business climate) which initially led to enactment of the law, Congress can respond appropriately and has done so in the past. Regular oversight of the operation of an immunity or exemption provides the necessary information to assess the need for a change in law, making sunset provisions unnecessary.

IV: INTERNATIONAL

Subject matter Jurisdictional Limits of U.S. Antitrust Law

The Foreign Trade Antitrust Improvements Act ("FTAIA") properly states U.S. public policy by setting limits beyond which U.S. antitrust law should not be empowered to act. These limits are based on the core interest which the U.S. antitrust laws are supposed to foster and protect: the consumer welfare interest of ensuring vigorous competition in a domestic U.S. marketplace and the interest in assuring that U.S. exporters do not encounter restraints in their export trade

[14] *Verizon Communications v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 411-13 (2004); *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, J.); *1A Phillip Areeda & Herbert Hovenkamp, Antitrust Analysis 12* (2d ed. 2000).

activities. Where these protected interests are not "affected" by the restrictive trade practices, the U.S. antitrust laws are not empowered to act.[15]

Clarification of the Scope of the FTAIA's Jurisdictional Reach

The Chamber believes that the legislation's standard of "direct, substantial and reasonably foreseeable effect" on these protected U.S. interests remains the appropriate jurisdictional test to measure whether these interests have been sufficiently threatened so as to justify the application of U.S. antirust law remedies. However, the Chamber recommends that the "gives rise to" causation element in the statute be amended to clarify the circumstances in which the U.S. antitrust laws, assuming such an "effect" on protected domestic interests, apply as well to foreign transactions affected by such restrictive practices. The D.C. Circuit's recent interpretation of the FTAIA on remand in Empagran states that the "gives rise to" language in the FTAIA requires a direct causal relationship, that is, proximate causation, and not merely a "but-for nexus" in order for an anticompetitive effect to trigger U.S. antitrust jurisdiction.[16] The Chamber suggests that the AMC recommend that Congress codify the D.C. Circuit's interpretation if other circuits diverge from the decision in the future.

International Antitrust Convergence

While the Chamber supports the continued expansion of antitrust enforcement regimes around the world, the Chamber urges the AMC to recommend that Congress and the Administration work to achieve greater cooperation with national competition authorities, to avoid duplicative, costly and sometimes inconsistent outcomes and to work toward greater convergence among these enforcement authorities on substantive competition policy and standards as well as procedural enforcement mechanisms and safeguards. As important as these competition policy and procedural convergence goals may be standing alone, they should be viewed as a part of a broader framework of convergence issues focused on leveling the playing field on foreign investment opportunities, domestic content requirements, regulatory delays and national treatment obligations.

International Antitrust Enforcement Cooperation

The Chamber recommends that the International Antitrust Enforcement Assistance Act ("IAEAA") be amended to make clear that information received by one national antitrust enforcement authority from another can only be used by the receiving governmental authority for antitrust law enforcement purposes.

V: MERGER ENFORCEMENT

The Chamber believes that merger enforcement policy should be governed by reasonable and predictable rules designed to facilitate the operation of a free market for capital assets. Premerger notification requirements should apply only to those parties and transactions that are

[15] *F. HoffmanN-La Roche Ltd. v. Empagran S.A.*, 124 S.Ct. 2359 (2004).
[16] *Empagran S.A. v Hoffmann La Roche Ltd*., 2005 U.S. App. LEXIS 12743 (D.C. Cir. June 28, 2005).

of a size sufficient to have a potential impact on competition. To promote greater transparency, the antitrust agencies should continue to build on recent (and commendable) efforts to better explain their reasons for not challenging transactions after a full investigation.

Although the agencies have made some progress in attempting to streamline the merger review process and reduce compliance burdens, much more remains to be done. In addition, the agencies need to adopt policies that will eliminate protracted turf wars over which agency will review a particular transaction. Transactions should not be subjected to full investigations (commonly referred to as "Second Requests") simply because the agencies are unwilling to decide expeditiously which one will take charge of the preliminary investigation during the initial 30-day review process.

The Chamber also has long been opposed to the use of premerger fees to fund agency budgets. These fees bear no relationship to the costs incurred in reviewing the average filing (since the vast majority of filings are cleared without any substantive review) and cannot be justified as a reasonable user charge.

Reducing the Number of Unnecessary Premerger Filings

In 2000, Congress finally raised the basic filing threshold from $15 million to $50 million,[17] the first increase in the threshold since the premerger statute was enacted in 1976. In the three-year period prior to the revision, the number of transactions notified averaged more than 4,500 per year. By FY 2004 the number had dropped nearly 70 percent below the level in FY 2000,[18] due in large part to the increase in the threshold.

As these numbers demonstrate, the upward revision in the filing threshold has dramatically reduced the number of filings and the costs associated with making these filings, including the payment of filing fees ranging from $45,000 to $280,000. Still, even with this change in the law, the vast majority of filings raise no competitive concerns. For example, 76 percent of early termination requests were granted in FY 2004. Only 17 percent of the filings resulted in the opening of a preliminary investigation, and a much smaller percentage—2.6 percent—led to the issuance of a Second Request. In practical terms, this means that three out of four filings were reviewed and cleared by the antitrust agencies in a very short period of time, often within a week or two. Only a handful of transactions (35 in all) were subjected to a full investigation, involving issuance of a Second Request. Thus, the number of filings can be reduced much further, either by Congressional or agency action, while preserving an effective merger enforcement program.

Improving Transparency and Predictability

An efficient market for the transfer of capital assets requires that prospective merger partners can make reasonable predictions about the likely regulatory response to a proposed transaction. The agencies historically have provided guidance in a number of ways: through the issuance and updating of the Merger Guidelines, through enforcement actions, through explanations of

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17 The inflation-adjusted threshold is now $53.1 million.

18 The data is taken from the FTC/DOJ Annual Report to Congress for Fiscal Year 2004.

consent decrees, through public speeches and, occasionally, through statements explaining why enforcement actions were not taken following a full investigation.

More recently, in response to suggestions from the business and legal community, the antitrust agencies have provided more detailed analyses of past decisions and more frequent statements explaining their reasons for not challenging particular transactions.[19] Understanding why a transaction is not challenged is often as important as describing why an enforcement action was brought. Moreover, when an investigation is being closed and litigation is not at stake, the agencies are in a better position to explain all of the factors that were considered in the decision, including the weight given to procompetitive justifications put forward by the parties. Consistent with the need to protect confidential information, the AMC should encourage the agencies to expand and institutionalize these efforts.

Greater predictability in agency decision-making, of course, does not mean that enforcement policies, such as the Merger Guidelines, should be applied mechanically without regard to changing market conditions and new economic learning. To their credit, the agencies have placed increased reliance on economic analysis and concentrated their enforcement efforts on transactions at the higher end of the market share (or HHI) tests set forth in the Guidelines. In fact, because of these developments, some have argued that the agencies should revise the Merger Guidelines to bring them more into conformity with current enforcement policies. Whether the Guidelines are revised or the agencies provide added clarity through other means,[20] the Chamber believes that merger enforcement policy should be reviewed and updated on a regular basis to make sure that only those transactions where there is a real likelihood of competitive harm are challenged.

Reducing the Burden of Second Requests

The incredible burden of responding to Second Requests is well-known to any firm that has survived the ordeal. It is not unusual for companies caught up in the process to produce millions of documents and spend similar amounts in order to comply with agency demands. Compliance with these daunting "Requests" typically takes many months and occasionally more than a year. Apart from the direct costs of compliance, these investigations can be very distracting for management, who must simultaneously continue to run the business and work out the details of the transaction.

Both Congress and the agencies have acknowledged the burdens created by this process and have taken some steps to try to correct the problem. When Congress revised the filing thresholds and fees in 2000, it also directed the agencies to adopt procedures that would reduce compliance costs, including a requirement that each agency designate a "senior official" who would review disputes involving Second Requests. The agencies responded by establishing internal review

[19] A summary of these efforts is set forth in a recent speech by the FTC's General Counsel. *See* W. Blumenthal, "*Recent Developments in the Merger Review Process in the United States and the International Competition Network,"* Remarks before the International Bar Association and Japanese Federation of Bar Associations, at pages 5-6 (April 20, 2005); *see also* M. Coate and S. Ulrick, *"Economic Issues, Transparency at the Federal Trade Commission: The Horizontal Merger Review Process 1996-2003,"* Bureau of Economics, Federal Trade Commission (Feb. 2005).

[20] *Id.*

and appeal mechanisms.[21] In addition, agency task forces have been established to study the issues and some reforms have been implemented, such as issuance of revised model forms. The aggregate burden has also been reduced by the decline in the number of Second Requests, from a high of 125 in FY 1998 to 35 in each of FYs 2003 and 2004.[22]

Nevertheless, even with these reforms and the reduction in number of Second Requests, the enormous burden of compliance is still overwhelming for the parties involved. The AMC should make very specific recommendations to the agencies for improving the process, such as (1) reducing the cumulative burden of duplicative file searches, (2) reducing the number and scope of interrogatory requests calling for the submission of financial/economic data not kept in the ordinary course of business, and (3) establishing objective standards for determining compliance with a Second Request. The internal appeal process as implemented also has many flaws, and the AMC should recommend to Congress alterations, such as replacing it with an independent third-party review structure.

Eliminating Lengthy Agency Clearance Disputes

The dual nature of antitrust enforcement at the federal level is nowhere more evident than in the review of mergers and acquisitions. Every transaction meeting the filing thresholds must be notified to both the FTC and DOJ, and the agencies must decide (1) whether they are interested in reviewing the transaction, (2) which agency will take responsibility for the investigation, and (3) whether the transaction should be cleared or subjected to a full investigation—all within a statutorily mandated 30-day time frame.

Given this unique shared enforcement responsibility, it is not surprising that rivalry exists between the agencies to get the best cases at times where there is no clearly defined jurisdiction barrier. Competition exists everywhere, including between the two federal antitrust agencies. It is unacceptable, however, for this rivalry to unreasonably delay review of a transaction, in some cases delaying the review so long that a Second Request is issued simply to give the agencies more time to make a decision or, to avoid this result, the parties are compelled to withdraw and refile in order to start the 30-day clock running again.

The agencies are aware of this problem and, in 2002, tried to rectify it by agreeing on a plan that would have allocated review of specific industries to one agency or the other. The Chamber and other business organizations supported the plan[23] but Congressional opposition scuttled it. Unfortunately, the problem has not disappeared and corrective action is needed. The Chamber urges the AMC to recommend that the agencies work together to develop another agreement dividing responsibility between them for the review of notified transactions. In addition, the agencies should adopt a reasonably short deadline (*e.g.,* 10 days from the date of filing) for resolving disputes.

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[21] For example, at the FTC, the General Counsel is responsible for hearing Second Request appeals. 16 C.F.R. § 2.20 (2005).

[22] This decline, however, may reflect more a decline in the number of reportable transactions than a change in agency policy. The number of Second Requests as a percentage of total notified transactions has remained relatively constant over the past 10 years, ranging from a high of 3.8 percent in FY 1995 to a low of 2.1 percent in FY 2000.

[23] *See* Letter from The Business Roundtable, National Association of Manufacturers, and U.S. Chamber of Commerce to Timothy J. Muris, Chairman of the Federal Trade Commission (Feb. 25, 2002).

Reforming the Hart-Scott-Rodino Fee Structure

The Chamber has consistently opposed the use of filing fees to help fund agency budgets.[24] As presently structured and applied, the fees represent nothing less than a tax imposed on parties that are forced to comply with the Hart-Scott-Rodino premerger scheme as a necessary condition to consummating a merger or acquisition. This approach creates perverse incentives that discourage the agencies from exploring ways to eliminate unnecessary filings. As discussed above, the change in the filing thresholds has helped to reduce filing fees and other related costs by reducing the total number of filings, but the problem remains and far too many competitively benign transactions must be notified, at unnecessary cost to the parties.

The AMC should recommend to Congress that antitrust agency budgets be funded out of general appropriations. To the extent filing fees are retained, they should be modified to reflect the actual costs incurred by the agencies in reviewing transactions—in other words, a true user fee approach. One possible option is to consider a substantial reduction or elimination of the fee (through a rebate or otherwise) when there is clearly no competitive issue (*e.g.,* early termination is granted).

Conclusion

The Chamber supports an economically sound, sensibly administered merger enforcement program. The current program needs to be improved by, among other things, eliminating unnecessary filings and reducing compliance burdens.

VI: REMEDIES

Limiting Treble Damages To Instances Of Willful Misconduct

The treble damages remedy in the Clayton Act is a valuable enforcement tool. The federal government has limited funds, personnel, and time to devote to enforcement and focuses on cases involving large-scale, recurring, or flagrant violations. The treble damages provision enlists private parties in enforcement, increasing the likelihood that violators will be caught and punished. 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST ANALYSIS* 40 (2d ed. 2000). But its overuse is costly for business, consumers, and the economy. In fact, at times "treble damages can be an embarrassment to antitrust policy." *Id*. at 274.

In what surely was an understatement, Professors Areeda and Hovenkamp have noted that "[s]ome antitrust violators have found the cost of violation to be very high." 2 AREEDA & HOVENKAMP 40. "Understatement," because the lead example they gave was the $1.8 *billion* judgment in *MCI Communications Corp. v. AT&T*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983), although that judgment was vacated. But judgments and settlements upwards of $100 million have occurred, too. 2 AREEDA & HOVENKAMP 40 & n.53. An antitrust verdict

[24] *See, e.g.,* Statement Regarding Hart-Scott-Rodino Filing Fees and S.1854, Before the Subcommittee on Consumer Affairs, Foreign Commerce and Tourism of the Senate Committee on Commerce, Science, and Transportation (Feb. 9, 2000).

also can have a "cluster-bomb effect" of generating additional suits.[25] Plaintiffs can recover attorneys' fees for successful lawsuits (without the converse), and defendants cannot seek contribution from other offenders. All those factors enhance the potential risk of a treble damages lawsuit. The result is that businesses oftentimes are coerced by the risk of such a judgment to settle a case, rather than take a chance with the jury at trial even when the defendant has a complete defense.

These problems are exacerbated by two factors: One is the difficulty that courts and juries have in understanding and applying technical and economic concepts necessary to evaluate business practices.[26] The other is that oftentimes the difference between (a) aggressive and unlawful conduct and (b) aggressive but lawful conduct is like the difference between dusk and twilight. As Judge Frank Easterbrook has summarized: "Competitive and exclusionary conduct look alike."[27] The upshot is this: treble damages can deter lawful procompetitive conduct, injuring American business, consumers, and the economy.

But there is more. The opportunity to recover treble damages spurs marginal cases to be filed for their extortion value, if nothing else. Plaintiffs also are encouraged to trivialize antitrust law by labeling ordinary contract and tort claims as antitrust violations. (Defendants do so, too, when they assert spurious antitrust defenses or counterclaims.) And the prospect of imposing treble damages on firms who did not knowingly violate the law could entice courts to bend the antitrust doctrine in unfavorable ways to avoid mulcting a blameless party. 2 AREEDA & HOVENKAMP 274.

For those reasons, the Clayton Act should be revised to eliminate treble damages liability for reasonable, albeit mistaken, business judgments. The leading antitrust treatise endorses that position. As Professors Areeda and Hovenkamp have explained: "[T]reble damages should properly be awarded only for unambiguously anticompetitive conduct, when the defendant knew or should have known that its conduct was socially harmful, or when detection of the intended antitrust violation is uncertain." 3 AREEDA & HOVENKAMP 41; *accord id*. at 110-11.

The problems identified above can be remedied in different ways. One is to apply to Clayton Act § 4 a version of the qualified immunity doctrine that has grown up in constitutional tort actions under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). That will prevent the mulcting of morally blameless parties and the overdeterrence of socially

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[25] Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 940-41 (2001); *see, e.g.,* "Microsoft to pay IBM $775M in antitrust settlement: Claims were based on findings in the U.S. case against Microsoft," http://www.computerworld.com/governmenttopics/government/legalissues/story/0,10801,102916,00.html.

[26] *See*, *e.g.*, RICHARD A. POSNER, *NATURAL MONOPOLY AND ITS REGULATION* 98 (CATO INST. REPRINT 1999); Richard A. Posner, 68 ANTITRUST L.J. at 936-39; Paul L. Joskow, *Transaction Costs Economics, Antitrust Rules, and Remedies*, 18 J. LAW, ECON. & ORG. 95, 100 (2002); William Kovacic, *The Influence of Economics on Antitrust Law*, 30 ECONOMIC INQUIRY 294, 299 (1992).

[27] Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972, 972 (1986); *accord* WILLIAM J. BAUMOL & ALAN S. BLINDER, *ECONOMICS: PRINCIPLES AND POLICY* 425-26 (8th ed. 2000) ("One problem that haunts most antitrust litigation…is that vigorous competition may look very similar to acts that undermine competition and support monopoly power. The resulting danger is that the courts will prohibit, or the antitrust authorities will prosecute, acts that appear to be anticompetitive but that really are the opposite. The difficulty is that effective competition by a firm is always tough on its rivals.").

beneficial competition. An alternative approach would be to distinguish among the types of antitrust offenses that would be subject to trebling: for example, *per se* offenses and other similar conduct (*e.g*., agreements struck down after a "quick look") would remain subject to treble damages, while "rule of reason" violations would be subject only to compensatory damages. Finally, certain types of conduct—such as mergers reviewed by one or more government agencies—should not be subject to treble damages liability, because the conduct at issue is sufficiently public that treble damages are not needed to encourage private parties to detect unlawful conduct.

Qualified Immunities Doctrine

Parties alleging a violation of their constitutional rights can seek damages relief against state or federal officials. That liability, however, is carefully limited. Since *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), it has been firmly settled that government officials exercising discretionary authority are shielded from personal damages liability and suit insofar as their conduct does not violate the plaintiff's clearly established constitutional rights. The reason for such immunity is to protect innocent parties from the risk of liability, from the distraction of litigation, and from the deterrent effect of both in order to avoid chilling the responsible exercise of governmental power and dissuading parties from holding public office. 457 U.S. at 814.

The qualified immunity doctrine does not sanction knowing illegality, but it also does not demand that government officials choose among several reasonable alternatives or foresee future legal developments. As the Court explained, on the one hand, if the law at the time an action occurred was not "clearly established," then "an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow*, 457 U.S. at 818. On the other hand, if the law was "clearly established," then the defense ordinarily should fail, "since a reasonably competent public official should know the law governing his conduct. *Id*. at 818-19. "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the objective reasonableness of the action assessed in light of the legal rules that were clearly established at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (citation and punctuation omitted). The upshot is that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Several features of the qualified immunity doctrine bear on the parallel analysis that should be followed here.

1. The issue whether the law was "clearly established" at a specific time is a question of law, not fact. Accordingly, the district court, not the jury, must decide the issue in the first instance, and an appellate court must review the district court's decision de novo. *Elder v. Holloway*, 510 U.S. 510, 516 (1994). The same rule would apply in the antitrust context.

2. A claim of qualified immunity in all types of legal cases can and should, if at all possible, be resolved early in the process, almost always before trial, as part of a motion to dismiss or for summary judgment. *Harlow*, 457 U.S. at 818 ("Until this threshold immunity question is

resolved, discovery should not be allowed."); *see Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). A similar approach should be followed in antitrust cases: The adequacy of a plaintiff's claim for treble damages could be resolved on a motion to dismiss, filed under Rule 12, Fed. R. Civ. P., or, if some discovery on this issue is necessary, on a motion for summary judgment, filed under Rule 56, Fed. R. Civ. P. If the district court grants the motion to dismiss the demand for treble damages, the case can continue forward with the plaintiff still free to seek compensatory damages on his claim(s) and still able potentially to argue on appeal that he should have been entitled to obtain treble damages. The district court also could certify the treble damages issue for immediate appellate resolution under 28 U.S.C. § 1292(b), and the circuit court could decide whether to address the issue before a final judgment is entered. Of course, not all cases will go forward once the plaintiff is unable to obtain treble damages, but that is not necessarily an undesirable outcome. Cases brought just for their treble damages potential likely will settle, which will speed the resolution of those disputes, as well as ease docket congestion in district courts. However these issues are resolved, the judicial system and the parties will be well served by an early resolution of this matter.

3. The qualified immunity standard is an objective one that does not look to or even consider relevant the subjective state of mind of the responsible party. Moreover, the objective reasonableness of a government official's conduct is analyzed in light of the specific facts confronting him—not at the wholesale level by abstractly considering the relevant legal issue (*e.g.*, "Are warrantless searches generally lawful?"), but at the retail level by considering the specific facts facing the particular decisionmaker (*e.g.*, "Is *this* warrantless search lawful?). *Anderson*, 483 U.S. at 640; *Harlow*, 457 U.S. at 819. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 282. In the antitrust context, the question would be whether a reasonable person in the defendant's position could have believed that his actions were not anticompetitive, not (for example) whether a company intended to "punish" its rivals or whether one of its officers acted out of ill will toward a competitor. Also, the inquiry under *Harlow* is whether *this* defendant acted reasonably in the particular course that he chose, not whether *another* reasonable person could have acted differently or whether there is *another* reasonable action that this defendant could have pursued. *Hunter v. Bryant*, 502 U.S. 224, 228 (1991). Under the standard that we propose, the same approach would be used to determine whether treble damages are appropriate: Could the defendant reasonably have believed that his conduct was lawful, not whether there was a less restrictive way to accomplish the same goal or whether another company would have chosen a different path. *Cf.* Howard W. Chang, David S. Evans & Richard Schmalensee, *Some Economic Principles for Guiding Antitrust Policy Towards Joint Ventures*, 1998 COLUM. BUS. L. REV. 223, 286-87.

Application of qualified immunity to antitrust cases does *not* mean that treble damages never will be available where the rule of reason applies. The question whether conduct should be analyzed under the rule of *per se* illegality, (*e.g.*, *Northern Pacific Ry. v. United States*, 356 U.S. 1, 4-5 (1958)), under the "quick look" doctrine, (*e.g.*, *FTC v. Indiana Federation of Dentists,* 476 U.S. 447, 460-61 (1986)), or under the rule of reason, (*e.g.*, *Chicago Board of Trade v. United States*, 264 U.S. 231, 238 (1918)), is analytically distinct from the issue whether a reasonable person could have believed that the specific actions he took were lawful. The classification decision has the effect of deciding which factors a court may consider in deciding whether a practice is anticompetitive—namely, the practice alone (*e.g.*, an agreement between rivals on price) or its circumstances, too (*e.g.*, an agreement between partners on price). A practice can be in essence "clearly unlawful" when analyzed as a "rule of reason" case, because it may be judged that no reasonable person would have thought that the practice was lawful. Accordingly, this proposal cannot be said to eliminate treble damages through a slight of hand, any more than the qualified immunity doctrine has eliminated constitutional tort liability. *See*, *e.g*., *Groh v. Ramirez*, 540 U.S. 551, 563-66 (2004); *Hope v. Pelzer*, 536 U.S. 730, 742-46 (2002).

Per Se Offenses versus Rule of Reason Violations

An alternative would approach this problem from another direction: it would limit treble damages to "per se" violations of the antitrust law, while limiting "rule of reason" cases to only compensatory damages.

Historically, antitrust law has used two different categories to review allegedly anticompetitive conduct: (i) conduct that is illegal *per se* versus (ii) conduct that is illegal only if, after considering all of the circumstances, its anticompetitive features outweigh its procompetitive elements. The Supreme Court defined the category of *per se* offenses, as well as the rationale for having such a category, in *Northern Pacific Ry. v. United States*, 356 U.S. 1, 5 (1958):

> "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable – an inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 210; division of markets, *United States v. Addyston Pipe & Steel Co*., 85 F. 271, aff'd, 175 U.S. 211; group boycotts, *Fashion Originators' Guild v. Federal Trade Comm'n*, 312 U.S. 457; and tying arrangements, *International Salt Co. v. United States*, 332 U.S. 392."[[28]]

Not every business practice is analyzed under that approach. The reason is that "[a]lthough the Sherman Act, by its terms, prohibits every agreement 'in restraint of trade,' th[e Supreme] Court has long recognized that Congress intended to outlaw only unreasonable restraints." *State Oil v. Kahn*, 522 U.S. 3, 10 (1997). The Supreme Court therefore generally has applied a "rule of reason" analysis in determining whether a challenged business practice, on balance, is anticompetitive. *See*, *e.g.*, *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918); *United States v. Penn-Olin Chemical Co*., 337 U.S. 293, 307-14 (1949); *Times-Picayune*

[28] As explained above, we do not believe that tying arrangement should be subject to a rule of *per se* condemnation.

Publishing Co. v. United States, 345 U.S. 594, 614-26 (1953); *United States v. Columbia Steel Co.*, 334 U.S. 495, 527-28 (1948). The rule of reason is the "prevailing standard of analysis," and any departure from that standard "must be based upon demonstrable economic effect rather than…upon formalistic line drawing." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49, 58-59 (1977); *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 726 (1988) ("there is a presumption in favor of a rule-of-reason standard").

The classic statement of the "rule of reason" is found in *Chicago Board of Trade v. United States*, 246 U.S. at 238:

> "[T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

What is striking about the difference between these two categories is the ability to determine at the time that a business proposal is made or undertaken whether that practice will be held unlawful. Two rivals would know with certainty that they cannot agree to set a uniform price or to divide the market into two different geographic areas, because that type of conduct long has been held to be a *per se* violation of Section 1 of the Sherman Act. But one firm by itself may find it near impossible to know with certainty in advance of litigation whether and, if so, how it can separately deal with suppliers, distributors, or customers in areas that involve wholly unilateral conduct, because Section 2 of the Sherman Act is not subject to a *per se* analysis.

As we noted above, the case law on this topic does not supply a clear answer, or even a clear methodology. There is no single coherent legal framework explaining why or when monopolization should be deemed illegal, no one verbal formulation that captures all of the unilateral conduct that has been deemed anticompetitive, and no single generalized theory of exclusionary conduct that enjoys universal acceptance in the case law—or in the academic and economic literature for that matter. As Professor Hovencamp recently explained: "Notwithstanding a century of litigation, the scope and meaning of exclusionary conduct under the Sherman Act remain poorly defined. No generalized formulation of unilateral or multilateral exclusionary conduct enjoys anything approaching universal acceptance. About the best antitrust has been able to produce are rules designed for specific classes of cases, such as the cost rules governing predatory pricing, or the simple *per se* rules applied to naked boycotts." Herbert Hovenkamp, *Exclusion and the Sherman Act,* 72 U. Chi. L. Rev. 147, 148 (2005) (footnotes omitted). Moreover, contemporary microeconomic analysis, which the Supreme Court has found useful in various contexts in antitrust law, *e.g.*, *State Oil v. Khan*, 522 U.S. 3 (1997); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Continental T.V. v. GTE Sylvania*, 433 U.S. 36 (1977); *see also Town of Concord v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990) (Breyer, C.J.), does not provide a clear answer here, because there is no consensus on what conduct should be outlawed by Sherman Act § 2. Professor Richard Epstein has made that point:

> "The difficulties associated with the conception are compounded by how antitrust law seeks to deal with the endless interplay between the adverse consequences of monopoly behavior and the social efficiencies generated by certain practices. In dealing with § 1 cartelization cases, it is possible to identify the prima-facie harm from cartelization or territorial division, and then to require the defendant to offer some specific explanation as to why the presumption does not hold in the given case. But with § 2 monopolization cases, there is no clear illustration of the paradigmatic wrong, so that the form of argumentation runs quite differently. Any practices prompted by slippery intentions are presumed to have adverse consequences, so that it is now the defendant's burden to advance some legitimate business justification to defeat the charges lodged against it. But since the vices of monopolization are so poorly understood, the accounts of any business justification are hard to come by, if they are needed at all. The tangles of economic effects are in my view quite misguided: complex industrial practices do not have just a single consequence, either negative or positive."

Richard A. Epstein, *Monopoly Dominance or Level Playing Field? The New Antitrust Paradox*, 72 U. CHI. L. REV. 49, 58 (2005).

Indeed, an inherent problem with any "rule of reason" analysis, in antitrust law or elsewhere, is that it is particularly difficult to know with certainty in advance of litigation how any case will turn out. A reasonableness test based on the totality of the circumstances does not identify any necessary and sufficient conditions for liability, nor does it establish an ordinal relationship among the relevant factors. The result in many instances is that the test becomes an arbitrary line-drawing exercise that can be influenced by a variety of subjective factors, such as the perceived "fairness" of the outcome.

No firm should be subjected to treble damages for making the wrong judgment in those circumstances—that is, the judgment later held by a court to have been impermissible only after an "incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken." *Northern Pacific Ry. v. United States*, 356 U.S. at 5. Penalizing a firm for a mistaken judgment not only offends the principles of fairness that Professor Hovenkamp discussed in his treatise, but also is likely to chill procompetitive, but aggressive, conduct by firms unwilling to take the chance that a court later will find its conduct lawful. Treble damages when combined with ambiguous legal standards produces overdeterrence, overdeterrence causes firms to be overly cautious, and cautious behavior can hurt consumers. If, for example, the standard for what constitutes a predatory price, or a predatory bundle is unclear, and the cost of treble damages is factored into the legal analysis, good lawyers will advise their clients to price above a safe harbor, in order to give the less efficient competitor room to compete. That higher price harms consumers.

Any rule of law that leads to such adverse results should be re-examined and revised. Here, the appropriate revision would be to limit to compensatory damages any recovery for an antitrust violation subject only to rule of reason analysis.

Publicly Open Violations

The other treble damages justification noted by Professors Areeda and Hovenkamp is the need to deter secret violations that otherwise would not be discovered. 2 AREEDA & HOVENKAMP 274; 3 AREEDA & HOVENKAMP 111. To achieve that goal without needlessly punishing companies, they would disallow treble damages "for publicly open violations—such as mergers, distribution contracts, many joint ventures, and some monopolizing practices—that are clearly known to competitors, terminated dealers, and other likely plaintiffs." 2 AREEDA & HOVENKAMP 274. We agree. To that list, we would add any transaction that is the subject of advance review by the Justice Department, the Federal Trade Commission, or one of the federal administrative agencies, such as the Department of Transportation or the Federal Communications Commission. All such transactions not only are public, but also receive review and approval (with or without modification) from a governmental body chosen by Congress to supervise national competition law and the public interest. There is no justification for potentially subjecting the parties to such transactions to the risk of treble damages awards, especially at the hands of lay juries, when the Congressionally-designated governmental officials already have endorsed the transaction in question.

Conclusion

The Chamber believes that treble damages should only be applied in the most egregious cases in which defendants should have reasonably known their actions were illegal under the law. The AMC should make recommendations that sufficiently shield reasonable business judgments from treble damage liability, while not unduly protecting unreasonable business decisions. These criteria will create a more procompetitive business environment, reduce detrimental overdeterrence effects, and enhance consumer welfare.

VII: ROBINSON-PATMAN ACT

The Chamber believes that businesses must be given freedom to respond to competition in setting prices and should not be unduly hindered by prohibitions on price and promotional concession discrimination. As a result, the Chamber endorses case law under the Robinson-Patman Act ("RP Act") that has given greater scope to the meeting competition and other defenses and has required plaintiffs to prove actual business injury as a condition to recovery. The AMC should carefully examine these developments and recommend ways to reduce the burden of compliance and to enhance the usefulness of these defenses. The AMC should also consider other improvements to the interpretation and enforcement of the Act, including refinement of the competitive injury test and elimination of the criminal penalties in Section 3. In particular, the AMC should carefully consider:

- How to alleviate the costs (including recordkeeping burdens) imposed on businesses by the meeting competition defense.

- Whether the criteria for establishing a cost justification defense should be revised to make the defense less rigid from a cost accounting perspective and more attuned to varied business models and cost structures.

- Whether the current "safe harbors" for promotional allowances afforded by the FTC's *Fred Meyer Guides*[29] are too restrictive, particularly when businesses are selling goods through multiple layers of distribution.

- Whether the competitive injury test under Section 2(a) should be modified to incorporate a more market-oriented test and whether that standard should be made available to businesses defending promotional concession claims under Sections 2(d) and 2(e).

- Recommending repeal of the criminal penalties under Section 3 of the RP Act.

Alleviating the Records Burden Posed by the Meeting Competition Defense

The Supreme Court's ruling in the *Falls City* case[30] expanded the scope of the meeting competition defense to encompass area-wide price reductions and, accordingly, reduced compliance burdens. Nevertheless, in many instances prudent adherence to the requirements of the defense imposes significant documentation and compliance costs. In fact, the Chamber has received reports that entire departments have been established simply to track and process the information necessary to document compliance with the defense, at a cost both in direct outlays and reduced flexibility in responding to rapidly changing competitive conditions. To address these burdens, the Chamber believes that the AMC should consider alternatives that would expand the good faith meeting competition defense to include a broader range of market-based factors.

Simplifying the Proof Needed for the Cost Justification Defense

The combined effect of court decisions and historical guidance provided by the FTC has created a fairly complicated cost accounting methodology to support a cost justification defense. In fact, the Chamber understands that the practical effect of these requirements is sufficiently burdensome that many firms have virtually abandoned the defense, except in those limited circumstances where a specific buyer order can be matched up with a specific manufacturing run of the goods in question. That situation is not often found in a world where the supply chain for a given product includes multiple parts and service providers and other cost centers. The

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[29] 16 C.F.R. § 240 (2005).
[30] *Falls City Industries v. Vanco Beverage, Inc.,* 460 U.S. 428 (1983).

Chamber believes that the defense would be more viable if the cost accounting needed to sustain the defense could be greatly simplified.

Reexamining the Effect of the Fred Meyer Guides on Multiple Levels of Distribution

Although the FTC's *Fred Meyer Guides* have afforded businesses a fairly detailed roadmap for conducting promotional allowance programs, the guidelines (which were last amended by the FTC in 1990) and case law interpreting sections 2(d) and 2(e) have not adequately addressed the practical difficulties of complying with these requirements. That is particularly true in the context of multi-tiered distribution systems where the task of passing promotional benefits down the distribution chain strains the relationship between a supplier and its downstream distributors and resellers. The Chamber understands that this situation has had negative effects on supplier-distributor relationships, even resulting in some instances in the complete abandonment of promotional programs. The Chamber urges the AMC to consider recommendations that would ease this tension by clarifying the obligations on suppliers to police the pass-through of promotional benefits.

Competitive Effects Test

There has been considerable debate and conflicting court decisions regarding the standard that should be applied to proving competitive injury in secondary line cases under section 2(a) of the RP Act. Much of this stems from the Supreme Court's decision in *Morton Salt*[31] and subsequent judicial and FTC decisions interpreting that decision. The Chamber believes that consideration should be given to adoption of a test that would expand the factors to be considered in the competitive injury analysis. This is not to suggest that the same competitive effects test applied in Sherman Act cases would have to be applied in 2(a) cases, but this revised approach would contemplate a more market-oriented analysis.

The Chamber also believes that a similar competitive injury test should be applied to Section 2(c), 2(d) and 2(e) claims, which at present are subject to a virtual *per se* rule of illegality once the jurisdictional prerequisites have been established. There is no compelling reason in today's economy to analyze the competitive effects of conduct subject to these Sections differently from conduct subject to Section 2(a).

Criminal Sanctions

The criminal penalties in Section 3 of the RP Act have not been enforced in decades. Because the complex character of the RP Act does not lend itself to criminal sanctions, this provision should be repealed.

Conclusion

As discussed above, the Chamber urges the AMC to consider ways to reduce compliance burdens under the RP Act and to inject more market-oriented tests for determining whether a violation of the statute has been established. In addition, because of the FTC's historical role in

[31] *FTC v. Morton Salt,* 334 U.S. 37 (1948).

interpreting and enforcing the Act, including issuance of the *Fred Meyer Guides*, it would seem appropriate for that agency to take a proactive role in efforts to clarify and improve the operation of the statute.

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The Chamber appreciates the opportunity to submit these comments for the AMC's thoughtful consideration and review.

Sincerely,

R. Bruce Josten