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BY ELECTRONIC AND REGULAR MAIL

Antitrust Modernization Commission
Attn: Public Comments
1001 Pennsylvania Avenue, N.W.
Suite 8000-South
Washington, D.C. 20004-2505

Re: *Issues To Be Studied By The Antitrust Modernization Commission*

Dear Commissioners,

We are partners at Constantine & Partners, a law firm specializing in antitrust litigation and counseling. We write in response to the Commission's request for public comment on suggested items of study.

Our Experience

We thought that a brief primer on our antitrust background would be helpful to you in evaluating our comments. In this regard, we enclose our biographies.[1] More information about each of us and our firm can be gleaned from a review of our firm website: www.cpny.com.

As you can see, we both specialize in antitrust. Throughout our careers, we have each tackled numerous "cutting edge" antitrust issues in the litigation context. For example, we – as part of the plaintiffs Lead Counsel Team in *In re Visa Check/MasterMoney Antitrust Litigation* -- recently secured the largest antitrust class action settlement in history, worth over $3.4 billion (net present value) in compensatory relief and between $25 and $87 billion in injunctive relief (presently valued over the next ten years), in a case concerning class claims for illegal tying and attempted monopolization.

Further, each of us have dealt with substantial antitrust issues while appearing before the Antitrust Division, Federal Trade Commission and state Attorneys General on numerous multi-billion dollar matters. And we have each lectured and written extensively on various antitrust

[1] Mr. Shinder has been recently appointed as Special Counsel to Commissioner Pamela Jones Harbour of the Federal Trade Commission. The views in this submission are his own and do not represent the views of Commissioner Harbour or the Commission.

issues, particularly those concerning markets for electronic payments, communications, software and health care.[2]

A Word On The Importance Of Bipartisan Support For Antitrust Law

Before commenting on specific issues for study, we also felt it necessary to briefly underscore the importance of antitrust law and to request that the Commission reject the politicization of its duties.

Well over a century ago, antitrust law was adopted on the premise that a comprehensive economic charter of freedom was needed to assure that vibrant competition would continue to deliver lower prices, expanded output and better products to consumers. In that capacity, enforcers -- both Republican and Democrat -- historically utilized the antitrust laws to correct market failures and reign in unlawful exercises of market power.

By preventing the squelching of free markets through anticompetitive collective or individual dominance, antitrust enforcement assisted in ensuring that the benefits of competition inured to consumers. Moreover, antitrust enforcement assisted in providing American entrepreneurs and workers with overwhelming economic opportunities, which, in turn, propelled America to become the leading economy in the world. As our economy moves into the information age and network and intellectual property driven industries proliferate, antitrust enforcement remains as vital and important as it ever was.

Unfortunately, commentators and enforcers from both ends of the political and ideological spectrum have attempted to divert antitrust from its historic mission. We believe these efforts threaten antitrust as it faces new challenges in the twenty-first century. Further, such efforts can result in inconsistent antitrust enforcement that creates uncertainty in the marketplace.

We hope that the Commission will, in its quest to improve the antitrust laws, reject the politicization of these issues and seek common ground in modifying these critical laws.

Specific Issues To Be Tackled By The Commission

1. *Defining Standards for Anticompetitive Effects.*

Determining the appropriate standard of proof for anticompetitive effects has confused courts in both Sherman Act Section 1 and 2 actions. As courts have correctly demanded proof of

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[2] Our various speeches and publications can be downloaded from our firm website.

anticompetitive effects in more and more antitrust cases, this issue has taken on even greater importance.

In many cases where proof of anticompetitive effects is demanded, defendants generally take an overly narrow position on the types of proof that will satisfy antitrust standards. When such a narrow definition is accepted by courts, failure to qualify for strict *per se* treatment will usually defeat the plaintiff's case, even though evidence of consumer harm may exist. For example, in *In re Visa Check*, the defendants argued that, despite the higher prices for debit and credit card transactions caused by the alleged tying arrangements and the massive share shift away from a superior and lower priced product in the tied product market, only a showing of *absolute foreclosure* in the tied product market would be sufficient to demonstrate anticompetitive effects. While this argument was rejected by the court when it denied defendants' motion for summary judgment, we cannot be assured that other courts would have properly disregarded this argument.

Accordingly, we believe that the Commission should identify a non-exhaustive list of the types of evidence that will qualify as proof of anticompetitive effects and that such a list should be incorporated into the Sherman Act. The Commission can recommend that the Sherman Act identify *types of proof* that can satisfy a finding of anticompetitive effects, including evidence demonstrating that the conduct in question caused (1) prices to increase, (2) output to decline, (3) a substantial (but by no means absolute) foreclosure of competition on the merits, (4) a loss or reduction in innovation, or (5) poorer quality of services or products. By incorporating such a non-exhaustive list into antitrust statutes, private parties, enforcers and judges will be provided with more certainty over whether particular conduct is illegal.

2. *Definition of Anticompetitive Conduct*

While it may be impossible to enumerate an exhaustive list of conduct that is exclusionary or anti-competitive,[3] the Commission can draft a definition of anticompetitive conduct that courts can utilize when they grapple with this core question. While this issue is important to the effective adjudication of most antitrust cases, it is particularly important in Section 2 cases, where there is some controversy regarding the range of permissible conduct for firms that have lawfully acquired market power.[4] For example, whether certain conduct was

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[3] *See LePage's*, 324 F. 3d 141, 152, *cert. denied*, 124 S.Ct. 2932 (2004) (quoting *Carribean Broad. Sys., Ltd v. Cable & Wireless PLC*, 148 F.3d 1080, 1087 (D.C. Cir. 1998), (anticompetitive conduct "can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties.")

[4] *See e.g., In re Visa Check/MasterMoney Antitrust Litig.*, 2003 WL 1712568, *7 (E.D.N.Y. April 1, 2003) (noting that "the courts of appeals have struggled to articulate the difference between permissible and impermissible conduct under Section 2.")

anticompetitive was important in several recent high-profile cases. *See LePage's v 3M,* 324 F.3d at 152-159 (3d Cir. 2003); *United States v. Visa U.S.A., Inc.,* 34 F.3d 229, 240-244 (2d Cir. 2003); *United States v. Microsoft Corporation,* 253 F.3d 34, 58-59 (D.C. Cir. 2001)

Some commentators and litigants propose that exclusionary conduct be defined as conduct that makes no business sense but for its ability to lead to the acquisition of market power. This formulation has some advantages. It is relatively easy to understand and therefore easy to administer. And it properly identifies blatantly exclusionary conduct.

It has two fundamental problems, however. First, it is unduly restrictive as this definition threatens to sanitize acts that may have a veneer of legitimacy, but whose principal purpose is the subversion of competition. Second, this definition could inappropriately condemn legitimate conduct in situations where competition is "for the market" and not "within the market" and the act in question is designed to acquire market power.

For this reason, we propose that the definition of anticompetitive conduct be explicitly tied to the fundamental goals of the antitrust laws. In such a formulation, conduct is exclusionary if it harms rivals in a manner that does not further competition's basic goals of lower prices, expanded output, better products or greater efficiency.[5] To ensure the consistent application of this standard, we propose that the Sherman Act be amended to include the following definition: "for purposes of this statute anticompetitive conduct shall mean conduct that is not competition on the merits as its principal purpose is the exclusion of rivals by means other than by offering lower prices, better products or superior efficiency."[6]

3. *Repeal The Robinson-Patman Act*

The Robinson-Patman Act should be repealed. It is antithetical to the purposes of antitrust. While its purpose -- to create a "level playing field" so that smaller businesses can compete -- appears laudatory, the statute is actually detrimental. It sacrifices the rational interests of consumers – for lower prices, increased output, etc. – by spurring economic inefficiency.

Moreover, the statute is incredibly vague and has created massive business and legal uncertainty over what type of discounting is permissible.

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[5] *See* generally, 3 Philip Areeda J. Herbert Hovenkamp Antitrust Law ¶ 651a (2002).

[6] To the extent this definition could be construed to legitimize predatory pricing or the pricing strategy condemned by the Third Circuit in *LePage's*, we propose the following addition to this definition: "The definition of anticompetitive conduct shall include below cost pricing that creates dangerous probability of market power or pricing that makes no business sense but for its ability to lead the acquisition of market power."

Lastly, the statute is unnecessary to prevent predation. Other statutes, particularly Section 2 of the Sherman Act and Section 3 of the Clayton Act, provide efficient actors with rights against entities with monopoly power that engage in exclusionary behavior (such as by engaging in product bundling that leads to substantial foreclosure or by pricing below-cost).

Conclusion

We hope that the Commission will address the issues that we have raised. Of course, should you need assistance from either of us with respect to your extremely important mission, we would be happy to be of service.

Respectfully,

Matthew L. Cantor

Jeffrey I. Shinder

Enclosures