Antitrust Basics for First Years

NOVEMBER 14, 2013

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George Hay

George Hay is one of the foremost antitrust authorities in the United States. After he received his Ph.D. in economics from Northwestern University, Hay taught economics at Yale University for five years, until he joined the U.S. Department of Justice's Antitrust Division in 1972. Hay served as Director of Economics, and won several awards for service to the Justice Department. Hay became a Professor of Law and a Professor of Economics at Cornell University in 1979, and was named to the Edward Cornell chair in the Law School in 1992. Professor Hay teaches a variety of law and law-related courses in both the Law School and the College of Arts and Sciences and lectures on antitrust throughout the United States and the rest of the world. He has appeared as an expert witness in many antitrust cases in the United States, Canada, Australia, and New Zealand. His most recent articles include: A Tale of Two Cities: From Davids Holdings to Metcash by George Hay and E. Jane Murdoch and Anti-competitive Agreements: the meaning of "agreement" by George Hay. Hay received a B.S. degree in Mathematics from Le Moyne College, and a M.A. degree in Economics from Northwestern University.

Wendy Waszmer, King & Spalding

Wendy Waszmer is an antitrust and litigation partner in King & Spalding’s New York office. Her practice focuses on cartel and other antitrust matters, government investigations, and complex civil litigation.

Prior to joining King & Spalding, Ms. Waszmer served as the Assistant Chief of the New York Field Office of the U.S. Department of Justice Antitrust Division where she supervised and led criminal and civil antitrust investigations with a focus on financial markets matters. In this role, she was the liaison with federal and state enforcement agencies in joint and parallel investigations. Ms. Waszmer also served as Counsel to the Assistant Attorney General of the Antitrust Division.

During her time with the Antitrust Division, Ms. Waszmer tried a high-profile 2012 case involving charges against three Wall Street executives (United States of America v. Carollo, Goldberg and Grimm) that Rolling Stone magazine called the “the first trial of the modern American mafia.” She also was recognized with Assistant Attorney General Awards and the Attorney General’s Award for Distinguished Service to the Antitrust Division.

Ms. Waszmer also served as an assistant United States Attorney, Civil Division, in the United States Attorney’s Office for the Southern District of New York. As an assistant United States attorney, Ms. Waszmer handled a broad range of affirmative and defensive litigation on behalf of the United States in district court and the Second Circuit. She appeared as the lead counsel in trials and hearings, as well in as False Claims Act and other investigations. Ms. Waszmer served as a law clerk to the Honorable Richard J. Leon, United States District Judge for the District of Columbia. She received a J.D. degree from Georgetown University Law Center and a B.A. degree from the College of William & Mary.

Jay Himes, Labaton Sucharow

Jay L. Himes is Co-Chair of the Firm's Antitrust & Competition Litigation Practice. Jay's expertise includes all facets of the antitrust landscape, including investigations and case filings, merger transactions, trial and appellate litigation, and settlement. With more than 30 years of experience in complex litigation, Jay focuses on representing plaintiffs in price-fixing class action cases, and on protecting businesses from anticompetitive activities. Jay is actively engaged in the prosecution of major antitrust class actions throughout the United States.

Prior to joining Labaton Sucharow in late 2008, Jay served as the Antitrust Bureau Chief in the New York Attorney General's office. During his nearly eight-year tenure as New York's chief antitrust official, Jay led significant, high-profile antitrust investigations and enforcement actions. These cases included: In re Buspirone Antitrust Litigation ($100 million settlement); In re Cardizem CD Antitrust Litigation ($80 million settlement); and In re Compact Disc Antitrust Litigation ($67 million settlement). Under Jay's leadership, the New York Bureau secured the two largest antitrust civil penalties recoveries ever achieved under the State's antitrust statute.

While heading the New York Antitrust Bureau, Jay was also the State's principal representative in the marathon 2001 negotiations that led to a settlement of the government's landmark monopolization case against Microsoft. Thereafter, he was a leader in the Microsoft judgment enforcement activity that continued throughout his time at the Attorney General's office.

Prior to serving in the Attorney General's office, Jay practiced complex litigation for 25 years at Paul, Weiss, Rifkind, Wharton & Garrison LLP. There, he represented the 12 Federal Reserve Banks as plaintiffs in a price-fixing case against the nation's leading armored car companies, and defended a Revlon healthcare company in a series of price-fixing cases that spanned nearly a decade. More generally, Jay handled a wide range of litigation, including securities class actions as well as contract, construction, constitutional, entertainment, environmental, real property and tax litigation. Active in pro bono matters, Jay worked with the New York Civil Liberties Union, the NAACP and the National Coalition for the Homeless, while also representing inmate and immigration asylum clients.

Jay is a regular speaker at conferences focusing on antitrust and class actions, has authored many articles on related issues, and recently co-authored a book entitled Concurrent Antitrust Criminal and Civil Proceedings: Identifying Problems and Planning for Success. He is also a member of the U.S. Advisory Board of the Loyola University Chicago School of Law's Institute of Consumer Antitrust Studies, the advisory board of the BNA Antitrust & Trade Regulation Reporter and the editorial advisory group of the Antitrust Chronicle.

Jay is the past-chair of the Antitrust Law Section of the New York State Bar Association, and co-chairs the antitrust committee of the State Bar's Commercial and Federal Litigation Section. He is also a member of antitrust, litigation, information technology and intellectual property groups in the New York City Bar Association and the American Bar Association.

Jay graduated from the University of Wisconsin Law School, where he served as the Articles Editor of the Wisconsin Law Review. After graduating from law school, he also pursued independent study at Oxford University in England.

Scott Martin, Greenberg Traurig LLP

Scott Martin is a shareholder in the Litigation Practice of Greenberg Traurig's New York office. He focuses his practice in the areas of antitrust and complex commercial litigation. He has been instrumental in the defense of numerous high-profile antitrust class actions and civil and criminal international cartel cases for more than a decade. Scott's experience extends to bench and jury trials in federal and state courts, complex federal multidistrict actions, class actions involving direct and indirect purchasers, parens patriae cases, Federal Trade Commission (FTC) and Department of Justice (DOJ) investigations as well as other regulatory actions, foreign discovery proceedings and qui tam litigation.

Scott also regularly counsels across a wide range of industries on pricing, distribution, competitive intelligence, joint ventures, and non-compete agreements, among other competition issues, and has designed antitrust compliance programs for some of the world's largest corporations. Clients interviewed by leading legal publications have commented that Scott is a "terrifically talented and surefooted" litigator, "an astute operator who always adds value to proceedings," and a business-oriented lawyer who "looks to see what the overall issues are and determines how best to approach the representation of those interests, including common sense approaches to exit strategies where feasible."

Scott received a J.D. degree from Stanford Law School and an A.B. degree with honors from Stanford University.

Michael Jahnke, Thompson Hine LLP

Michael, a partner in the firm's Business Litigation and Corporate Transactions & Securities practices, counsels clients concerning antitrust and consumer protection issues in connection with litigation and proposed mergers and acquisitions, joint ventures and other business transactions. He represents clients before the FTC and Department of Justice, helping resolve or limit antitrust issues throughout the government merger review process, and counsels clients on compliance with governmental requests.

Michael's antitrust experience encompasses a broad range of matters. He advises companies on proposed transactions, analyzing potential issues, providing input on draft agreements and diligence, handling HSR filings and addressing regulators' requests. He also provides guidance related to joint ventures, IP licensing, compliance queries and training, exclusive dealing, antitrust litigation and criminal/cartel investigations.

Michael has considerable experience counseling clients on antitrust issues in connection with U.S. and international M&A transactions and joint ventures involving companies in many industries, including financial services, derivatives, energy, foods, tobacco, information services, telecommunications, paper/packaging and automotive.

In addition, Michael advises companies on supervision, regulation and enforcement by the Consumer Financial Protection Bureau (CFPB), created by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

Michael received a J.D. degree from Creighton University School of Law, magna cum laude, and a B.A. degree from Huron College, summa cum laude.

Lisl Dunlop, Shearman & Sterling LLP

Lisl Dunlop is counsel in the Antitrust Group of Shearman & Sterling, based in New York. She advises leading U.S. and multinational companies in an array of industries, in particular in the media, technology and health care sectors, on a broad range of antitrust counseling, litigation and transactional matters. Ms. Dunlop advises on antitrust-related aspects of mergers & acquisitions, joint ventures and other combinations, and sales and distribution matters, represents clients in merger and non-merger agency investigations, and has represented major corporations in complex antitrust litigations, including multi-district treble damages class actions. Ms. Dunlop has been recognized as a leading antitrust lawyer in Chambers USA, Legal 500 and Global Competition Review.

In addition to over 15 years of experience practicing U.S. antitrust law, Ms. Dunlop has significant international experience. She began her legal career in Australia, where she practiced competition law at the Sydney firm Allen Allen & Hemsley. From 2001-2002, she was based in Shearman & Sterling's London office, where she practiced UK and EU competition law and helped to establish the firm's UK antitrust practice. In the course of her career, Ms. Dunlop has appeared before the U.S. federal enforcement agencies, the European Commission, the UK Office of Fair Trading, and the Australian Competition and Consumer Commission, and has coordinated the multijurisdictional defense of transactions throughout the world. Ms. Dunlop's experience in competition matters in a broad range of jurisdictions brings added value to clients who conduct business internationally and interact with different legal systems and regulators.

Ms. Dunlop received a BSc and a LL.B. degree from University of Sydney, and a LL.M. from Cornell University Law School.

Martha Gifford, Law Office of Martha E. Gifford

For over 30 years Martha ("Meg") Gifford has counseled businesses how to structure pricing, distribution, marketing and competitor collaborations to achieve best commercial results while complying with Federal and state antitrust laws. Her clients' businesses have spanned the economy from publishing, music and fashion to health care and basic industry. She regularly represents clients before the Justice Department, Federal Trade Commission and state Attorneys General, and serves as co-counsel to firms without antitrust expertise. An alumna of the University of Chicago Law School, she has served in the Antitrust Division, co-chaired a national firm's antitrust practice, and chaired the NYSBA Antitrust Law Section. Meg received her B.A. degree, magna cum laude, from Connecticut College.

TITLE 15 - COMMERCE AND TRADE

CHAPTER 1 - MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

(July 2, 1890, ch. 647, § 1, 26 Stat. 209; Aug. 17, 1937, ch. 690, title VIII, 50 Stat. 693; July 7, 1955, ch. 281, 69 Stat. 282; Pub. L. 93–528, § 3, Dec. 21, 1974, 88 Stat. 1708; Pub. L. 94–145, § 2, Dec. 12, 1975, 89 Stat. 801; Pub. L. 101–588, § 4(a), Nov. 16, 1990, 104 Stat. 2880; Pub. L. 108–237, title II, § 215(a), June 22, 2004, 118 Stat. 668.)

Amendments

2004—Pub. L. 108–237 substituted “$100,000,000” for “$10,000,000”, “$1,000,000” for “$350,000”, and “10” for “three”.

1990—Pub. L. 101–588 substituted “$10,000,000” for “one million dollars” and “$350,000” for “one hundred thousand dollars”.

1975—Pub. L. 94–145 struck out from first sentence two provisos granting anti-trust exemption to State fair trade laws.

1974—Pub. L. 93–528 substituted “a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years” for “a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year”.

1955—Act July 7, 1955, substituted “fifty thousand dollars” for “five thousand dollars”.

1937—Act Aug. 17, 1937, inserted two provisos.

Effective Date of 2001 Amendment

Pub. L. 107–72, § 4, Nov. 20, 2001, 115 Stat. 650, provided that: “This Act [enacting and amending provisions set out as notes under this section] and the amendments made by this Act shall take effect on September 30, 2001.”

Effective Date of 1975 Amendment

Pub. L. 94–145, § 4, Dec. 12, 1974, 89 Stat. 801, provided that: “The amendments made by sections 2 and 3 of this Act [amending this section and section 45 of this title] shall take effect upon the expiration of the ninety-day period which begins on the date of enactment of this Act [Dec. 12, 1975].”

Short Title of 2009 Amendment

Pub. L. 111–30, § 1, June 19, 2009, 123 Stat. 1775, provided that: “This Act [enacting and amending provisions set out as notes under this section] may be cited as the ‘Antitrust Criminal Penalty Enhancement and Reform Act of 2004 Extension Act’.”

Short Title of 2008 Amendment

Pub. L. 110–327, § 1, Sept. 30, 2008, 122 Stat. 3566, provided that: “This Act [amending provisions set out as a note under this section] may be cited as the ‘Need-Based Educational Aid Act of 2008’.”

Short Title of 2007 Amendment

Pub. L. 110–6, § 1, Feb. 26, 2007, 121 Stat. 61, provided that: “This Act [amending provisions set out as a note under this section] may be cited as the ‘Antitrust Modernization Commission Extension Act of 2007’.”

Short Title of 2004 Amendment

Pub. L. 108–237, title II, § 201, June 22, 2004, 118 Stat. 665, provided that: “This title [amending this section and sections 2, 3, and 16 of this title and enacting provisions set out as notes under this section and section 16 of this title] may be cited as the ‘Antitrust Criminal Penalty Enhancement and Reform Act of 2004’.”

Short Title of 2002 Amendment

Pub. L. 107–273, div. C, title IV, § 14101, Nov. 2, 2002, 116 Stat. 1921, provided that: “This title [amending sections 3, 12, 27, and 44 of this title, section 225 of Title 7, Agriculture, section 1413 of Title 30, Mineral Lands and Mining, and section 2135 of Title 42, The Public Health and Welfare, repealing sections 30 and 31 of this title, enacting provisions set out as a note under section 3 of this title, amending provisions set out as notes under this section and section 8 of this title, and repealing provisions set out as notes under section 15 of this title and section 41309 of Title 49, Transportation] may be cited as the ‘Antitrust Technical Corrections Act of 2002’.”

Short Title of 2001 Amendment

Pub. L. 107–72, § 1, Nov. 20, 2001, 115 Stat. 648, provided that: “This Act [enacting and amending provisions set out as notes under this section] may be cited as the ‘Need-Based Educational Aid Act of 2001’.”

Short Title of 1998 Amendment

Pub. L. 105–297, § 1, Oct. 27, 1998, 112 Stat. 2824, provided that: “This Act [enacting section 26b of this title and provisions set out as a note under section 26b of this title] may be cited as the ‘Curt Flood Act of 1998’.”

Short Title of 1997 Amendments

Pub. L. 105–43, § 1, Sept. 17, 1997, 111 Stat. 1140, provided that: “This Act [enacting and amending provisions set out as notes below] may be cited as the ‘Need-Based Educational Aid Antitrust Protection Act of 1997’.”

Pub. L. 105–26, § 1, July 3, 1997, 111 Stat. 241, provided that: “This Act [amending sections 37 and 37a of this title and enacting provisions set out as notes under section 37 of this title] may be cited as the ‘Charitable Donation Antitrust Immunity Act of 1997’.”

Short Title of 1995 Amendment

Pub. L. 104–63, § 1, Dec. 8, 1995, 109 Stat. 687, provided that: “This Act [enacting sections 37 and 37a of this title and provisions set out as a note under section 37 of this title] may be cited as the ‘Charitable Gift Annuity Antitrust Relief Act of 1995’.”

Short Title of 1990 Amendment

Pub. L. 101–588, § 1, Nov. 16, 1990, 104 Stat. 2879, provided: “That this Act [amending this section and sections 2, 3, 15a, and 19 of this title and repealing section 20 of this title] may be cited as the ‘Antitrust Amendments Act of 1990’.”

Short Title of 1984 Amendment

Pub. L. 98–544, § 1, Oct. 24, 1984, 98 Stat. 2750, provided: “That this Act [enacting sections 34 to 36 of this title and provisions set out as a note under section 34 of this title] may be cited as the ‘Local Government Antitrust Act of 1984’.”

Short Title of 1982 Amendment

Pub. L. 97–290, title IV, § 401, Oct. 8, 1982, 96 Stat. 1246, provided that: “This title [enacting section 6a of this title and amending section 45 of this title] may be cited as the ‘Foreign Trade Antitrust Improvements Act of 1982’.”

Short Title of 1980 Amendment

Pub. L. 96–493, § 1, Dec. 2, 1980, 94 Stat. 2568, provided: “That this Act [enacting section 26a of this title] may be cited as the ‘Gasohol Competition Act of 1980’.”

Short Title of 1976 Amendment

Pub. L. 94–435, § 1, Sept. 30, 1976, 90 Stat. 1383, provided: “That this Act [enacting sections 15c to 15h, 18a, and 66 of this title, amending sections 12, 15b, 16, 26, and 1311 to 1314 of this title, section 1505 of Title 18, Crimes and Criminal Procedure, and section 1407 of Title 28, Judiciary and Judicial Procedure, and enacting provisions set out as notes under sections 8, 15c, 18a, and 1311 of this title] may be cited as the ‘Hart-Scott-Rodino Antitrust Improvements Act of 1976’.”

Short Title of 1975 Amendment

Pub. L. 94–145, § 1, Dec. 12, 1975, 89 Stat. 801, provided: “That this Act [amending this section and section 45 of this title and enacting provisions set out as a note under this section] may be cited as the ‘Consumer Goods Pricing Act of 1975’.”

Short Title of 1974 Amendment

Pub. L. 93–528, § 1, Dec. 21, 1974, 88 Stat. 1706, provided: “That this Act [amending this section and section 2, 3, 16, 28, and 29 of this title, section 401 of Title 47, Telegraphs, Telephones, and Radiotelegraphs, and sections 43, 44, and 45 of former Title 49, Transportation, and enacting provisions set out as notes under this section and section 29 of this title] may be cited as the ‘Antitrust Procedures and Penalties Act’.”

Short Title

Pub. L. 94–435, title III, § 305(a), Sept. 30, 1976, 90 Stat. 1397, added immediately following the enacting clause of act July 2, 1890, the following: “That this Act [this section and sections 2 to 7 of this title] may be cited as the ‘Sherman Act’.”

Antitrust Enforcement Enhancements and Cooperation Incentives

Pub. L. 108–237, title II, §§ 211–214, June 22, 2004, 118 Stat. 666, 667, as amended by Pub. L. 111–30, § 2, June 19, 2009, 123 Stat. 1775; Pub. L. 111–190, §§ 1–4, June 9, 2010, 124 Stat. 1275, 1276, provided that:

“SEC. 211. SUNSET.

“(a) In General.—Except as provided in subsection (b), the provisions of sections 211 through 214 of this subtitle [this note] shall cease to have effect 16 years after the date of enactment of this Act [June 22, 2004].

“(b) Exceptions.—With respect to—

“(1) a person who receives a marker on or before the date on which the provisions of section 211 through 214 of this subtitle shall cease to have effect that later results in the execution of an antitrust leniency agreement; or

“(2) an applicant who has entered into an antitrust leniency agreement on or before the date on which the provisions of sections 211 through 214 of this subtitle shall cease to have effect,

the provisions of sections 211 through 214 of this subtitle shall continue in effect.

“SEC. 212. DEFINITIONS.

“In this subtitle [subtitle A (§§ 211–215) of title II of Pub. L. 108–237, amending this section and sections 2 and 3 of this title and enacting this note]:

“(1) Antitrust division.—The term ‘Antitrust Division’ means the United States Department of Justice Antitrust Division.

“(2) Antitrust leniency agreement.—The term ‘antitrust leniency agreement,’ or ‘agreement,’ means a leniency letter agreement, whether conditional or final, between a person and the Antitrust Division pursuant to the Corporate Leniency Policy of the Antitrust Division in effect on the date of execution of the agreement.

“(3) Antitrust leniency applicant.—The term ‘antitrust leniency applicant,’ or ‘applicant,’ means, with respect to an antitrust leniency agreement, the person that has entered into the agreement.

“(4) Claimant.—The term ‘claimant’ means a person or class, that has brought, or on whose behalf has been brought, a civil action alleging a violation of section 1 or 3 of the Sherman Act [15 U.S.C. 1, 3] or any similar State law, except that the term does not include a State or a subdivision of a State with respect to a civil action brought to recover damages sustained by the State or subdivision.

“(5) Cooperating individual.—The term ‘cooperating individual’ means, with respect to an antitrust leniency agreement, a current or former director, officer, or employee of the antitrust leniency applicant who is covered by the agreement.

“(6) Marker.—The term ‘marker’ means an assurance given by the Antitrust Division to a candidate for corporate leniency that no other company will be considered for leniency, for some finite period of time, while the candidate is given an opportunity to perfect its leniency application.

“(7) Person.—The term ‘person’ has the meaning given it in subsection (a) of the first section of the Clayton Act [15 U.S.C. 12 (a)].

“SEC. 213. LIMITATION ON RECOVERY.

"(a) In General.—Subject to subsection (d), in any civil action alleging a violation of section 1 or 3 of the Sherman Act [15 U.S.C. 1, 3], or alleging a violation of any similar State law, based on conduct covered by a currently effective antitrust leniency agreement, the amount of damages recovered by or on behalf of a claimant from an antitrust leniency applicant who satisfies the requirements of subsection (b), together with the amounts so recovered from cooperating individuals who satisfy such requirements, shall not exceed that portion of the actual damages sustained by such claimant which is attributable to the commerce done by the applicant in the goods or services affected by the violation.

"(b) Requirements.—Subject to subsection (c), an antitrust leniency applicant or cooperating individual satisfies the requirements of this subsection with respect to a civil action described in subsection (a) if the court in which the civil action is brought determines, after considering any appropriate pleadings from the claimant, that the applicant or cooperating individual, as the case may be, has provided satisfactory cooperation to the claimant with respect to the civil action, which cooperation shall include—

"(1) providing a full account to the claimant of all facts known to the applicant or cooperating individual, as the case may be, that are potentially relevant to the civil action;

"(2) furnishing all documents or other items potentially relevant to the civil action that are in the possession, custody, or control of the applicant or cooperating individual, as the case may be, wherever they are located; and

"(3)(A) in the case of a cooperating individual—

"(i) making himself or herself available for such interviews, depositions, or testimony in connection with the civil action as the claimant may reasonably require; and

"(ii) responding completely and truthfully, without making any attempt either falsely to protect or falsely to implicate any person or entity, and without intentionally withholding any potentially relevant information, to all questions asked by the claimant in interviews, depositions, trials, or any other court proceedings in connection with the civil action; or

"(B) in the case of an antitrust leniency applicant, using its best efforts to secure and facilitate from cooperating individuals covered by the agreement the cooperation described in clauses (i) and (ii) and subparagraph (A).

"(c) Timeliness.—The court shall consider, in making the determination concerning satisfactory cooperation described in subsection (b), the timeliness of the applicant's or cooperating individual's cooperation with the claimant.

"(d) Cooperation After Expiration of Stay or Protective Order.—If the Antitrust Division does obtain a stay or protective order in a civil action based on conduct covered by an antitrust leniency agreement, once the stay or protective order, or a portion thereof, expires or is terminated, the antitrust leniency applicant and cooperating individuals shall provide without unreasonable delay any cooperation described in paragraphs (1) and (2) of subsection (b) that was prohibited by the expired or terminated stay or protective order, or the expired or terminated portion thereof, in order for the cooperation to be deemed satisfactory under such paragraphs.

"(e) Continuation.—Nothing in this section shall be construed to modify, impair, or supersede the provisions of sections 4, 4A, and 4C of the Clayton Act [15 U.S.C. 15, 15a, 15c] relating to the recovery of costs of suit, including a reasonable attorney's fee, and interest on damages, to the extent that such recovery is authorized by such sections.

"SEC. 214. RIGHTS, AUTHORITIES, AND LIABILITIES NOT AFFECTED.

"Nothing in this subtitle [subtitle A (§§ 211–215) of title II of Pub. L. 108–237, amending this section and sections 2 and 3 of this title and enacting this note] shall be construed to—

"(1) affect the rights of the Antitrust Division to seek a stay or protective order in a civil action based on conduct covered by an antitrust leniency agreement to prevent the cooperation described in section 213(b) of this subtitle from impairing or impeding the investigation or prosecution by the Antitrust Division of conduct covered by the agreement;

"(2) create any right to challenge any decision by the Antitrust Division with respect to an antitrust leniency agreement; or

"(3) affect, in any way, the joint and several liability of any party to a civil action described in section 213(a) of this subtitle, other than that of the antitrust leniency applicant and cooperating individuals as provided in section 213(a) of this subtitle."

[Pub. L. 111–190, § 6, June 9, 2010, 124 Stat. 1276, provided that: "The amendments made by section 1 [amending section 211 of Pub. L. 108–237, set out above] shall take effect immediately before June 22, 2010."]

[Pub. L. 111–30, § 3, June 19, 2009, 123 Stat. 1775, provided that: "The amendment made by section 2 [amending section 211(a) of Pub. L. 108–237, set out above] shall take effect immediately before June 22, 2009."]

Antitrust Modernization Commission

Pub. L. 107–273, div. C, title I, subtitle D, Nov. 2, 2002, 116 Stat. 1856, as amended by Pub. L. 110–6, § 2, Feb. 26, 2007, 121 Stat. 61, provided that:

"SEC. 11051. SHORT TITLE.

"This subtitle may be cited as the 'Antitrust Modernization Commission Act of 2002'.

"SEC. 11052. ESTABLISHMENT.

"There is established the Antitrust Modernization Commission (in this subtitle referred to as the 'Commission').

"SEC. 11053. DUTIES OF THE COMMISSION.

"The duties of the Commission are—

"(1) to examine whether the need exists to modernize the antitrust laws and to identify and study related issues;

"(2) to solicit views of all parties concerned with the operation of the antitrust laws;

"(3) to evaluate the advisability of proposals and current arrangements with respect to any issues so identified; and

"(4) to prepare and to submit to Congress and the President a report in accordance with section 11058.

"SEC. 11054. MEMBERSHIP.

"(a) Number and Appointment.—The Commission shall be composed of 12 members appointed as follows:

"(1) Four members, no more than 2 of whom shall be of the same political party, shall be appointed by the President. The President shall appoint members of the opposing party only on the recommendation of the leaders of Congress from that party.

"(2) Two members shall be appointed by the majority leader of the Senate.

"(3) Two members shall be appointed by the minority leader of the Senate.

"(4) Two members shall be appointed by the Speaker of the House of Representatives.

"(5) Two members shall be appointed by the minority leader of the House of Representatives.

"(b) Ineligibility for Appointment.—Members of Congress shall be ineligible for appointment to the Commission.

"(c) Term of Appointment.—

"(1) In general.—Subject to paragraph (2), members of the Commission shall be appointed for the life of the Commission.

"(2) Early termination of appointment.—If a member of the Commission who is appointed to the Commission as—

"(A) an officer or employee of a government ceases to be an officer or employee of such government; or

"(B) an individual who is not an officer or employee of a government becomes an officer or employee of a government;

then such member shall cease to be a member of the Commission on the expiration of the 90-day period beginning on the date such member ceases to be such officer or employee of such government, or becomes an officer or employee of a government, as the case may be.

"(d) Quorum.—Seven members of the Commission shall constitute a quorum, but a lesser number may conduct meetings.

"(e) Appointment Deadline.—Initial appointments under subsection (a) shall be made not later than 60 days after the date of enactment of this Act [Nov. 2, 2002].

"(f) Meetings.—The Commission shall meet at the call of the chairperson. The first meeting of the Commission shall be held not later than 30 days after the date on which all members of the Commission are first appointed under subsection (a) or funds are appropriated to carry out this subtitle, whichever occurs later.

"(g) Vacancy.—A vacancy on the Commission shall be filled in the same manner as the initial appointment is made.

"(h) Consultation Before Appointment.—Before appointing members of the Commission, the President, the majority and minority leaders of the Senate, the Speaker of the House of Representatives, and the minority leader of the House of Representatives shall consult with each other to ensure fair and equitable representation of various points of view in the Commission.

"(i) Chairperson; Vice Chairperson.—The President shall select the chairperson of the Commission from among its appointed members. The leaders of Congress from the opposing party of the President shall select the vice chairperson of the Commission from among its remaining members.

"SEC. 11055. COMPENSATION OF THE COMMISSION.

"(a) Pay.—

“(1) Nongovernment employees.—Each member of the Commission who is not otherwise employed by a government shall be entitled to receive the daily equivalent of the annual rate of basic pay payable for level IV of the Executive Schedule under section 5315 of title 5 United States Code, as in effect from time to time, for each day (including travel time) during which such member is engaged in the actual performance of duties of the Commission.

“(2) Government employees.—A member of the Commission who is an officer or employee of a government shall serve without additional pay (or benefits in the nature of compensation) for service as a member of the Commission.

“(b) Travel Expenses.—Members of the Commission shall receive travel expenses, including per diem in lieu of subsistence, in accordance with subchapter I of chapter 57 of title 5, United States Code.

“SEC. 11056. STAFF OF COMMISSION; EXPERTS AND CONSULTANTS.

“(a) Staff.—

“(1) Appointment.—The chairperson of the Commission may, without regard to the provisions of chapter 51 of title 5 of the United States Code (relating to appointments in the competitive service), appoint and terminate an executive director and such other staff as are necessary to enable the Commission to perform its duties. The appointment of an executive director shall be subject to approval by the Commission.

“(2) Compensation.—The chairperson of the Commission may fix the compensation of the executive director and other staff without regard to the provisions of chapter 51 and subchapter III of chapter 53 of title 5 of the United States Code (relating to classification of positions and General Schedule pay rates), except that the rate of pay for the executive director and other staff may not exceed the rate of basic pay payable for level V of the Executive Schedule under section 5315 of title 5 United States Code, as in effect from time to time.

“(b) Experts and Consultants.—The Commission may procure temporary and intermittent services of experts and consultants in accordance with section 3109 (b) of title 5, United States Code.

“SEC. 11057. POWERS OF THE COMMISSION.

“(a) Hearings and Meetings.—The Commission, or a member of the Commission if authorized by the Commission, may hold such hearings, sit and act at such time and places, take such testimony, and receive such evidence, as the Commission considers to be appropriate. The Commission or a member of the Commission may administer oaths or affirmations to witnesses appearing before the Commission or such member.

“(b) Official Data.—The Commission may obtain directly from any executive agency (as defined in section 105 of title 5 of the United States Code) or court information necessary to enable it to carry out its duties under this subtitle. On the request of the chairperson of the Commission, and consistent with any other law, the head of an executive agency or of a Federal court shall provide such information to the Commission.

“(c) Facilities and Support Services.—The Administrator of General Services shall provide to the Commission on a reimbursable basis such facilities and support services as the Commission may request. On request of the Commission, the head of an executive agency may make any of the facilities or services of such agency available to the Commission, on a reimbursable or nonreimbursable basis, to assist the Commission in carrying out its duties under this subtitle.

“(d) Expenditures and Contracts.—The Commission or, on authorization of the Commission, a member of the Commission may make expenditures and enter into contracts for the procurement of such supplies, services, and property as the Commission or such member considers to be appropriate for the purpose of carrying out the duties of the Commission. Such expenditures and contracts may be made only to such extent or in such amounts as are provided in advance in appropriation Acts.

“(e) Mails.—The Commission may use the United States mails in the same manner and under the same conditions as other departments and agencies of the United States.

“(f) Gifts, Bequests, and Devises.—The Commission may accept, use, and dispose of gifts, bequests, or devises of services or property, both real and personal, for the purpose of aiding or facilitating the work of the Commission. Gifts, bequests, or devises of money and proceeds from sales of other property received as gifts, bequests, or devises shall be deposited in the Treasury and shall be available for disbursement upon order of the Commission.

“SEC. 11058. REPORT.

“Not later than 3 years after the first meeting of the Commission, the Commission shall submit to Congress and the President a report containing a detailed statement of the findings and conclusions of the Commission, together with recommendations for legislative or administrative action the Commission considers to be appropriate.

“SEC. 11059. TERMINATION OF COMMISSION.

“The Commission shall cease to exist 60 days after the date on which the report required by section 11058 is submitted.

“SEC. 11060. AUTHORIZATION OF APPROPRIATIONS.

“There is authorized to be appropriated $4,000,000 to carry out this subtitle.”

Year 2000 Information and Readiness Disclosure

Pub. L. 105–271, Oct. 19, 1998, 112 Stat. 2386, as amended by Pub. L. 107–273, div. C, title IV, § 14102(e), Nov. 2, 2002, 116 Stat. 1922, known as the Year 2000 Information and Readiness Disclosure Act, provided for the free disclosure and exchange of information about computer processing problems, solutions, test practices and test results, and related matters in connection with the transition to the year 2000.

Application of Antitrust Laws to Award of Need-Based Educational Aid

Pub. L. 107–72, § 3, Nov. 20, 2001, 115 Stat. 648, provided that:

“(a) Study.—

“(1) In general.—The Comptroller General shall conduct a study of the effect of the antitrust exemption on institutional student aid under section 568 of the Improving America’s Schools Act of 1994 (15 U.S.C. 1 note) [Pub. L. 103–382, see below].

“(2) Consultation.—The Comptroller General shall have final authority to determine the content of the study under paragraph (1), but in determining the content of the study, the Comptroller General shall consult with—

“(A) the institutions of higher education participating under the antitrust exemption under section 568 of the Improving America’s Schools Act of 1994 (15 U.S.C. 1 note) (referred to in this Act [see Short Title of 2001 Amendment note above] as the ‘participating institutions’);

“(B) the Antitrust Division of the Department of Justice; and

“(C) other persons that the Comptroller General determines are appropriate.

“(3) Matters studied.—

“(A) In general.—The study under paragraph (1) shall—

“(i) examine the needs analysis methodologies used by participating institutions;

“(ii) identify trends in undergraduate costs of attendance and institutional undergraduate grant aid among participating institutions, including—

“(I) the percentage of first-year students receiving institutional grant aid;

“(II) the mean and median grant eligibility and institutional grant aid to first-year students; and

“(III) the mean and median parental and student contributions to undergraduate costs of attendance for first year students receiving institutional grant aid;

“(iii) to the extent useful in determining the effect of the antitrust exemption under section 568 of the Improving America’s Schools Act of 1994 (15 U.S.C. 1 note), examine—

“(I) comparison data, identified in clauses (i) and (ii), from institutions of higher education that do not participate under the antitrust exemption under section 568 of the Improving America’s Schools Act of 1994 (15 U.S.C. 1 note); and

“(II) other baseline trend data from national benchmarks; and

“(iv) examine any other issues that the Comptroller General determines are appropriate, including other types of aid affected by section 568 of the Improving America’s Schools Act of 1994 (15 U.S.C. 1 note).

“(B) Assessment.—

“(i) In general.—The study under paragraph (1) shall assess what effect the antitrust exemption on institutional student aid has had on institutional undergraduate grant aid and parental contribution to undergraduate costs of attendance.

“(ii) Changes over time.—The assessment under clause (i) shall consider any changes in institutional undergraduate grant aid and parental contribution to undergraduate costs of attendance over time for institutions of higher education, including consideration of—

“(I) the time period prior to adoption of the consensus methodologies at participating institutions; and

“(II) the data examined pursuant to subparagraph (A)(iii).

“(b) Report.—

“(1) In general.—Not later than September 30, 2006, the Comptroller General shall submit a report to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives that contains the findings and conclusions of the Comptroller General regarding the matters studied under subsection (a).

“(2) Identifying individual institutions.—The Comptroller General shall not identify an individual institution of higher education in information submitted in the report under paragraph (1) unless the information on the institution is available to the public.

“(c) Recordkeeping Requirement.—

“(1) In general.—For the purpose of completing the study under subsection (a)(1), a participating institution shall—

“(A) collect and maintain for each academic year until the study under subsection (a)(1) is completed—

“(i) student-level data that is sufficient, in the judgment of the Comptroller General, to permit the analysis of expected family contributions, identified need, and undergraduate grant aid awards; and

“(ii) information on formulas used by the institution to determine need; and

“(B) submit the data and information under paragraph (1) to the Comptroller General at such time as the Comptroller General may reasonably require.

“(2) Non-participating institutions.—Nothing in this subsection shall be construed to require an institution of higher education that does not participate under the antitrust exemption under section 568 of the Improving America’s Schools Act of 1994 (15 U.S.C. 1 note) to collect and maintain data under this subsection.”

Pub. L. 103–382, title V, § 568(a)–(d), Oct. 20, 1994, 108 Stat. 4060, 4061, as amended by Pub. L. 105–43, § 2(a), Sept. 17, 1997, 111 Stat. 1140; Pub. L. 105–244, title I, § 102(a)(3), Oct. 7, 1998, 112 Stat. 1618; Pub. L. 107–72, § 2, Nov. 20, 2001, 115 Stat. 648; Pub. L. 110–327, § 2, Sept. 30, 2008, 122 Stat. 3566, provided that:

“(a) Exemption.—It shall not be unlawful under the antitrust laws for 2 or more institutions of higher education at which all students admitted are admitted on a need-blind basis, to agree or attempt to agree—

“(1) to award such students financial aid only on the basis of demonstrated financial need for such aid;

“(2) to use common principles of analysis for determining the need of such students for financial aid if the agreement to use such principles does not restrict financial aid officers at such institutions in their exercising independent professional judgment with respect to individual applicants for such financial aid;

“(3) to use a common aid application form for need-based financial aid for such students if the agreement to use such form does not restrict such institutions in their requesting from such students, or in their using, data in addition to the data requested on such form; or

“(4) to exchange through an independent third party, before awarding need-based financial aid to any of such students who is commonly admitted to the institutions of higher education involved, data submitted by the student so admitted, the student’s family, or a financial institution on behalf of the student or the student’s family relating to assets, liabilities, income, expenses, the number of family members, and the number of the student’s siblings in college, if each of such institutions of higher education is permitted to retrieve such data only once with respect to the student.

“(b) Limitations.—Subsection (a) shall not apply with respect to—

“(1) any financial aid or assistance authorized by the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.) [and 42 U.S.C. 2751 et seq.]; or

“(2) any contract, combination, or conspiracy with respect to the amount or terms of any prospective financial aid award to a specific individual.

“(c) Definitions.—For purposes of this section—

“(1) the term ‘alien’ has the meaning given such term in section 101 (3) [101(a)(3)] of the Immigration and Nationality Act (8 U.S.C. 1101 (3) [1101(a)(3)]);

“(2) the term ‘antitrust laws’ has the meaning given such term in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12 (a)), except that such term includes section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent such section applies to unfair methods of competition;

“(3) the term ‘institution of higher education’ has the meaning given such term in section 101 of the Higher Education Act of 1965 [20 U.S.C. 1001];

“(4) the term ‘lawfully admitted for permanent residence’ has the meaning given such term in section 101 (20) [101(a)(20)] of the Immigration and Nationality Act (8 U.S.C. 1101 (20) [1101(a)(20)]);

“(5) the term ‘national of the United States’ has the meaning given such term in section 101 (22) [101(a)(22)] of the Immigration and Nationality Act (8 U.S.C. 1101 (22) [1101(a)(22)]);

“(6) the term ‘on a need-blind basis’ means without regard to the financial circumstances of the student involved or the student’s family; and

“(7) the term ‘student’ means, with respect to an institution of higher education, a national of the United States or an alien admitted for permanent residence who is admitted to attend an undergraduate program at such institution on a full-time basis.

“(d) Expiration.—Subsection (a) shall expire on September 30, 2015.”

[Pub. L. 105–43, § 2(b), Sept. 17, 1997, 111 Stat. 1140, provided that: “The amendments made by subsection (a) [amending section 568 (a)–(d) of Pub. L. 103–382, set out above] shall take effect immediately before September 30, 1997.”]

TITLE 15 - COMMERCE AND TRADE

CHAPTER 1 - MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

(July 2, 1890, ch. 647, § 2, 26 Stat. 209; July 7, 1955, ch. 281, 69 Stat. 282; Pub. L. 93–528, § 3, Dec. 21, 1974, 88 Stat. 1708; Pub. L. 101–588, § 4(b), Nov. 16, 1990, 104 Stat. 2880; Pub. L. 108–237, title II, § 215(b), June 22, 2004, 118 Stat. 668.)

Amendments

2004—Pub. L. 108–237 substituted “$100,000,000” for “$10,000,000”, “$1,000,000” for “$350,000”, and “10” for “three”.

1990—Pub. L. 101–588 substituted “$10,000,000” for “one million dollars” and “$350,000” for “one hundred thousand dollars”.

1974—Pub. L. 93–528 substituted “a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years” for “a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year”.

1955—Act July 7, 1955, substituted “fifty thousand dollars” for “five thousand dollars”.

TITLE 15 - COMMERCE AND TRADE

CHAPTER 1 - MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

§ 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b) Amount of damages payable to foreign states and instrumentalities of foreign states

(1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) of this section an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to a foreign state if—

(A) such foreign state would be denied, under section 1605 (a)(2) of title 28, immunity in a case in which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;

(C) such foreign state engages primarily in commercial activities; and

(D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

(c) Definitions

For purposes of this section—

(1) the term "commercial activity" shall have the meaning given it in section 1603 (d) of title 28, and

(2) the term "foreign state" shall have the meaning given it in section 1603 (a) of title 28.

(Oct. 15, 1914, ch. 323, § 4, 38 Stat. 731; Pub. L. 96–349, § 4(a)(1), Sept. 12, 1980, 94 Stat. 1156; Pub. L. 97–393, Dec. 29, 1982, 96 Stat. 1964.)

References in Text

The antitrust laws, referred to in subsec. (a), are defined in section 12 of this title.

Prior Provisions

Section supersedes two former similar sections enacted by act July 2, 1890, ch. 647, § 7, 26 Stat. 210, and act Aug. 27, 1894, ch. 349, § 77, 28 Stat. 570, each of which were restricted in operation to the particular act cited. Section 7 of act July 2, 1890, was repealed by act July 7, 1955, ch. 283, § 3, 69 Stat. 283, effective six months after July 7, 1955. Section 77 of act Aug. 27, 1894, was repealed by Pub. L. 107–273, div. C, title IV, §§ 14102(c)(1)(A), 14103, Nov. 2, 2002, 116 Stat. 1921, 1922, effective Nov. 2, 2002, and applicable only with respect to cases commenced on or after Nov. 2, 2002.

Amendments

1982—Pub. L. 97–393 designated existing provisions as subsec. (a), inserted "Except as provided in subsection (b) of this section,", and added subsecs. (b) and (c).

1980—Pub. L. 96–349 inserted provisions respecting award of prejudgment interest including considerations for the court in determining whether an award is just under the circumstances.

Effective Date of 1980 Amendment

Pub. L. 96–349, § 4(b), Sept. 12, 1980, 94 Stat. 1157, provided that: "The amendments made by this section [amending this section and sections 15a and 15c of this title] shall apply only with respect to actions commenced after the date of the enactment of this Act [Sept 12, 1980]."

TITLE 15 - COMMERCE AND TRADE
CHAPTER 1 - MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

§ 18. Acquisition by one corporation of stock of another

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce or in any activity affecting commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: Provided, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Secretary of Transportation, Federal Power Commission, Surface Transportation Board, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title,[1] the United States Maritime Commission, or the Secretary of

Agriculture under any statutory provision vesting such power in such Commission, Board, or Secretary.

Footnotes

[1] See References in Text note below.

(Oct. 15, 1914, ch. 323, § 7, 38 Stat. 731; Dec. 29, 1950, ch. 1184, 64 Stat. 1125; Pub. L. 96–349, § 6(a), Sept. 12, 1980, 94 Stat. 1157; Pub. L. 98–443, § 9(l), Oct. 4, 1984, 98 Stat. 1708; Pub. L. 104–88, title III, § 318(1), Dec. 29, 1995, 109 Stat. 949; Pub. L. 104–104, title VI, § 601(b)(3), Feb. 8, 1996, 110 Stat. 143.)

References in Text

Section 79j of this title, referred to in text, was repealed by Pub. L. 109–58, title XII, § 1263, Aug. 8, 2005, 119 Stat. 974.

Amendments

1996—Pub. L. 104–104, in sixth par., struck out “Federal Communications Commission,” after “Secretary of Transportation,”.

1995—Pub. L. 104–88, in sixth par., substituted “Surface Transportation Board” for “Interstate Commerce Commission” and inserted “, Board,” after “vesting such power in such Commission”.

1984—Pub. L. 98–443 substituted “Secretary of Transportation” for “Civil Aeronautics Board” and “Commission or Secretary” for “Commission, Secretary, or Board” in sixth par.

1980—Pub. L. 96–349, substituted “person” for “corporation” wherever appearing in first and second pars.; substituted “persons” for “corporations” in second par. and first sentence of third par.; and inserted “or in any activity affecting commerce” after “commerce” wherever appearing in first, second, and third pars.

1950—Act Dec. 29, 1950, amended section generally so as to prohibit the acquisition of the whole or any part of the assets of another corporation when the effect of the acquisition may substantially lessen competition or tend to create a monopoly.

Effective Date of 1995 Amendment

Amendment by Pub. L. 104–88 effective Jan. 1, 1996, see section 2 of Pub. L. 104–88, set out as an Effective Date note under section 701 of Title 49, Transportation.

Effective Date of 1984 Amendment

Amendment by Pub. L. 98–443 effective Jan. 1, 1985, see section 9(v) of Pub. L. 98–443, set out as a note under section 5314 of Title 5, Government Organization and Employees.

Effective Date of 1980 Amendment

Pub. L. 96–349, § 6(b), Sept. 12, 1980, 94 Stat. 1158, provided that: “The amendments made by this section [amending this section] shall apply only with respect to acquisitions made after the date of the enactment of this Act [Sept. 12, 1980].”

Transfer of Functions

Federal Power Commission terminated and functions, personnel, property, funds, etc., transferred to Secretary of Energy (except for certain functions transferred to Federal Energy Regulatory Commission) by sections 7151 (b), 7171 (a), 7172 (a), 7291, and 7293 of Title 42, The Public Health and Welfare.

Executive and administrative functions of Maritime Commission transferred to Chairman of Maritime Commission by Reorg. Plan No. 6 of 1949, eff. Aug. 19, 1949, 14 F.R. 5228, 63 Stat. 1069, which was repealed by Pub. L. 109–304, § 19, Oct. 6, 2006, 120 Stat. 1710, and was formerly set out in the Appendix to Title 5, Government Organization and Employees.

United States Maritime Commission abolished by Reorg. Plan No. 21 of 1950, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1273, which was superseded in part by Reorg. Plan No. 7 of 1961, § 305, eff. Aug. 12, 1961, 26 F.R. 7315, 75 Stat. 840, repealed in part by Pub. L. 109–304, § 19, Oct. 6, 2006, 120 Stat. 1710, and remains only partially set out in the Appendix to Title 5. Reorg. Plan No. 21 of 1950 transferred part of Commission’s functions and part of functions of its Chairman, to Federal Maritime Board and Chairman thereof, such Board having been created by that Plan as an agency within Department of Commerce with an independent status in some respects, and transferred remainder of such Commission's functions and functions of its Chairman to Secretary of Commerce, with power vested in Secretary to authorize their performance by Maritime Administrator (the head of Maritime Administration, which likewise established by the Plan in Department of Commerce) with provision that Chairman of Federal Maritime Board should, ex officio, be such Administrator.

Section 304 of Reorg. Plan No. 7 of 1961, eff. Aug. 12, 1961, 26 F.R. 7315, 75 Stat. 840, set out in the Appendix to Title 5, abolished Federal Maritime Board, including offices of members of Board. Functions of Board transferred either to Federal Maritime Commission, by section 103 of Reorg. Plan No. 7 of 1961, which was repealed by Pub. L. 109–304, § 19, Oct. 6, 2006, 120 Stat. 1710 and formerly set out in the Appendix to Title 5, or to Secretary of Commerce, by section 202 of Reorg. Plan No. 7 of 1961, set out in the Appendix to Title 5.

Maritime Administration of Department of Commerce transferred to Department of Transportation, and all related functions of Secretary and other officers and offices of Department of Commerce transferred to Department of Transportation and vested in Secretary of Transportation, by Maritime Act of 1981, Pub. L. 97–31, Aug. 6, 1981, 95 Stat. 151, which was repealed in part by Pub. L. 109–304, § 19, Oct. 6, 2006, 120 Stat. 1710. See section 109 of Title 49, Transportation.

TITLE 18 - CRIMES AND CRIMINAL PROCEDURE
PART II - CRIMINAL PROCEDURE
CHAPTER 213 - LIMITATIONS

§ 3282. Offenses not capital

(a) In General.— Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

(b) DNA Profile Indictment.—

(1) In general.— In any indictment for an offense under chapter 109A for which the identity of the accused is unknown, it shall be sufficient to describe the accused as an individual whose name is unknown, but who has a particular DNA profile.

(2) Exception.— Any indictment described under paragraph (1), which is found not later than 5 years after the offense under chapter 109A is committed, shall not be subject to—

(A) the limitations period described under subsection (a); and

(B) the provisions of chapter 208 until the individual is arrested or served with a summons in connection with the charges contained in the indictment.

(3) Defined term.— For purposes of this subsection, the term "DNA profile" means a set of DNA identification characteristics.

(June 25, 1948, ch. 645, 62 Stat. 828; Sept. 1, 1954, ch. 1214, § 12(a), formerly § 10(a), 68 Stat. 1145; renumbered Pub. L. 87–299, § 1, Sept. 26, 1961, 75 Stat. 648; Pub. L. 108–21, title VI, § 610(a), Apr. 30, 2003, 117 Stat. 692.)

Historical and Revision Notes

Based on section 746 (g) of title 8, U.S.C., 1940 ed., Aliens and Nationality, and on title 18, U.S.C., 1940 ed., § 582 (R.S. § 1044; Apr. 13, 1876, ch. 56, 19 Stat. 32; Nov. 17, 1921, ch. 124, § 1, 42 Stat. 220; Dec. 27, 1927, ch. 6, 45 Stat. 51; Oct. 14, 1940, ch. 876, title I, subchap. III, § 346(g), 54 Stat. 1167).

Section 582 of title 18, U.S.C., 1940 ed., and section 746 (g) of title 8, U.S.C., 1940 ed., Aliens and Nationality, were consolidated. "Except as otherwise expressly provided by law" was inserted to avoid enumeration of exceptive provisions.

The proviso contained in the act of 1927 "That nothing herein contained shall apply to any offense for which an indictment has been heretofore found or an information instituted, or to any proceedings under any such indictment or information," was omitted as no longer necessary.

In the consolidation of these sections the 5-year period of limitation for violations of the Nationality Code, provided for in said section 746 (g) of title 8, U.S.C., 1940 ed., Aliens and Nationality, is reduced to 3 years. There seemed no sound basis for considering 3 years adequate in the case of heinous felonies and gross frauds against the United States but inadequate for misuse of a passport or false statement to a naturalization examiner.

Amendments

2003—Pub. L. 108–21 designated existing provisions as subsec. (a), inserted heading, and added subsec. (b).

1954—Act Sept. 1, 1954, changed the limitation period from three years to five years.

Effective Date of 1954 Amendment

Section 12(b) of act Sept. 1, 1954, formerly section 10 (b), as renumbered by Pub. L. 87–299, § 1, provided that: "The amendment made by subsection (a) [amending this section] shall be effective with respect to offenses (1) committed on or after September 1, 1954, or (2) committed prior to such date, if on such date prosecution therefor is not barred by provisions of law in effect prior to such date."

Fugitives From Justice

Statutes of limitations as not extending to persons fleeing from justice, see section 3290 of this title.

Offenses Against Internal Security

Limitation period in connection with offenses against internal security, see section 783 of Title 50, War and National Defense.

Sections 792, 793, and 794 of This Title; Limitation Period

Limitation period in connection with sections 792, 793, and 794 of this title, see note set out under section 792.

130 S.Ct. 2201 (2010)

AMERICAN NEEDLE, INC., Petitioner, v. NATIONAL FOOTBALL LEAGUE et al.

No. 08-661.

Supreme Court of United States.

Argued January 13, 2010.
Decided May 24, 2010.

2206 *2206 Glen D. Nager, Washington, DC, for petitioner.

Malcolm L. Stewart, for the United States as amicus curiae, by special leave of the Court, supporting neither party.

Gregg H. Levy, Washington, DC, for respondents.

Meir Feder, Andrew D. Bradt, David M. Cooper, Jones Day, New York, NY, Jeffrey M. Carey, Northfield, IL, Glen D. Nager, Counsel of Record, Joe Sims, Jones Day, Washington, DC, for petitioner.

Lori Alvino McGill, Latham & Watkins LLP, Washington, DC, Timothy B. Hardwicke, Counsel of Record, Latham & Watkins LLP, Chicago, IL, for Respondent Reebok International Ltd.

Eugene E. Gozdecki, Gozdecki, Del Giudice, Americus & Farkas LLP, Chicago, IL, Gregg H. Levy, Counsel of Record, Derek Ludwin, Leah E. Pogoriler, Covington & Burling LLP, Washington, DC, for NFL Respondents.

Justice STEVENS delivered the opinion of the Court.

"Every contract, combination in the form of a trust or otherwise, or, conspiracy, in restraint of trade" is made illegal by § 1 of the Sherman Act, ch. 647, 26 Stat. 209, as amended, 15 U.S.C. § 1. The question whether an arrangement is a contract, combination, or conspiracy is different from and antecedent to the question whether it unreasonably restrains trade. This case raises that antecedent question about the business of the 32 teams in the National Football League (NFL) and a corporate entity that they formed to manage their intellectual property. We conclude that the NFL's licensing
2207 activities *2207 constitute concerted action that is not categorically beyond the coverage of § 1. The legality of that concerted action must be judged under the Rule of Reason.

I

Originally organized in 1920, the NFL is an unincorporated association that now includes 32 separately owned professional football teams.[1] Each team has its own name, colors, and logo, and owns related intellectual property. Like each of the other teams in the league, the New Orleans Saints and the Indianapolis Colts, for example, have their own distinctive names, colors, and marks that are well known to millions of sports fans.

Prior to 1963, the teams made their own arrangements for licensing their intellectual property and marketing trademarked items such as caps and jerseys. In 1963, the teams formed National Football League Properties (NFLP) to develop, license, and market their intellectual property. Most, but not all, of the substantial revenues generated by NFLP have either been given to charity or shared equally among the teams. However, the teams are able to and have at times sought to withdraw from this arrangement.

Between 1963 and 2000, NFLP granted nonexclusive licenses to a number of vendors, permitting them to manufacture and sell apparel bearing team insignias. Petitioner, American Needle, Inc., was one of those licensees. In December

2000, the teams voted to authorize NFLP to grant exclusive licenses, and NFLP granted Reebok International Ltd. an exclusive 10-year license to manufacture and sell trademarked headwear for all 32 teams. It thereafter declined to renew American Needle's nonexclusive license.

American Needle filed this action in the Northern District of Illinois, alleging that the agreements between the NFL, its teams, NFLP, and Reebok violated §§ 1 and 2 of the Sherman Act. In their answer to the complaint, the defendants averred that the teams, NFL, and NFLP were incapable of conspiring within the meaning of § 1 "because they are a single economic enterprise, at least with respect to the conduct challenged." App. 99. After limited discovery, the District Court granted summary judgment on the question "whether, with regard to the facet of their operations respecting exploitation of intellectual property rights, the NFL and its 32 teams are, in the jargon of antitrust law, acting as a single entity." *American Needle, Inc. v. New Orleans La. Saints*, 496 F.Supp.2d 941, 943 (2007). The court concluded "that in that facet of their operations they have so integrated their operations that they should be deemed a single entity rather than joint ventures cooperating for a common purpose." *Ibid.*

The Court of Appeals for the Seventh Circuit affirmed. The panel observed that "in some contexts, a league seems more aptly described as a single entity immune from antitrust scrutiny, while in others a league appears to be a joint venture between independently owned teams that is subject to review under § 1." 538 F.3d, 736, 741 (2008). Relying on Circuit precedent, the court limited its inquiry to the particular conduct at issue, licensing of teams' intellectual property. The panel agreed with petitioner that "when making a single-entity determination, courts must examine whether the conduct
2208 in question *2208 deprives the marketplace of the independent sources of economic control that competition assumes." *Id.,* at 742. The court, however, discounted the significance of potential competition among the teams regarding the use of their intellectual property because the teams "can function only as one source of economic power when collectively producing NFL football." *Id.,* at 743. The court noted that football itself can only be carried out jointly. See *ibid.* ("Asserting that a single football team could produce a football game . . . is a Zen riddle: Who wins when a football team plays itself"). Moreover, "NFL teams share a vital economic interest in collectively promoting NFL football . . . [to] compet[e] with other forms of entertainment." *Ibid.* "It thus follows," the court found, "that only one source of economic power controls the promotion of NFL football," and "it makes little sense to assert that each individual team has the authority, if not the responsibility, to promote the jointly produced NFL football." *Ibid.* Recognizing that NFL teams have "license[d] their intellectual property collectively" since 1963, the court held that § 1 did not apply. *Id.,* at 744.

We granted certiorari. 557 U.S. ___, 129 S.Ct. 2859, 174 L.Ed.2d 575 (2009).

II

As the case comes to us, we have only a narrow issue to decide: whether the NFL respondents are capable of engaging in a "contract, combination . . ., or conspiracy" as defined by § 1 of the Sherman Act, 15 U.S.C. § 1, or, as we have sometimes phrased it, whether the alleged activity by the NFL respondents "must be viewed as that of a single enterprise for purposes of § 1." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984).

Taken literally, the applicability of § 1 to "every contract, combination . . . or conspiracy" could be understood to cover every conceivable agreement, whether it be a group of competing firms fixing prices or a single firm's chief executive telling her subordinate how to price their company's product. But even though, "read literally," § 1 would address "the entire body of private contract," that is not what the statute means. *National Soc. of Professional Engineers v. United States,* 435 U.S. 679, 688, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978); see also *Texaco Inc. v. Dagher,* 547 U.S. 1, 5, 126 S.Ct. 1276, 164 L.Ed.2d 1 (2006) ("This Court has not taken a literal approach to this language"); cf. *Board of Trade of Chicago v. United States,* 246 U.S. 231, 238, 38 S.Ct. 242, 62 L.Ed. 683 (1918) (reasoning that the term "restraint of trade" in § 1 cannot possibly refer to any restraint on competition because "[e]very agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence"). Not every instance of cooperation between two people is a potential "contract, combination. . ., or conspiracy, in restraint of trade." 15 U.S.C. § 1.

The meaning of the term "contract, combination . . . or conspiracy" is informed by the "`basic distinction'" in the Sherman

Act "`between concerted and independent action'" that distinguishes § 1 of the Sherman Act from § 2. Copperweld, 467 U.S., at 767, 104 S.Ct. 2731 (quoting *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984)). Section 1 applies only to concerted action that restrains trade. Section 2, by contrast, covers both concerted and independent action, but only if that action "monopolize[s]," 15 U.S.C. § 2, or "threatens actual
2209 monopolization," *Copperweld*, 467 U.S., at 767, 104 S.Ct. 2731, a category that is narrower than restraint of trade. *2209 Monopoly power may be equally harmful whether it is the product of joint action or individual action.

Congress used this distinction between concerted and independent action to deter anticompetitive conduct and compensate its victims, without chilling vigorous competition through ordinary business operations. The distinction also avoids judicial scrutiny of routine, internal business decisions.

Thus, in § 1 Congress "treated concerted behavior more strictly than unilateral behavior." *Id.,* at 768, 104 S.Ct. 2731. This is so because unlike independent action, "[c]oncerted activity inherently is fraught with anticompetitive risk" insofar as it "deprives the marketplace of independent centers of decisionmaking that competition assumes and demands." *Id.,* at 768-769, 104 S.Ct. 2731. And because concerted action is discrete and distinct, a limit on such activity leaves untouched a vast amount of business conduct. As a result, there is less risk of deterring a firm's necessary conduct; courts need only examine discrete agreements; and such conduct may be remedied simply through prohibition.[2] See Areeda & Hovenkamp ¶ 1464c, at 206. Concerted activity is thus "judged more sternly than unilateral activity under § 2," *Copperweld*, 467 U.S., at 768, 104 S.Ct. 2731. For these reasons, § 1 prohibits any concerted action "in restraint of trade or commerce," even if the action does not "threate[n] monopolization," *Ibid.* And therefore, an arrangement must embody concerted action in order to be a "contract, combination . . . or conspiracy" under § 1.

III

We have long held that concerted action under § 1 does not turn simply on whether the parties involved are legally distinct entities. Instead, we have eschewed such formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate.

As a result, we have repeatedly found instances in which members of a legally single entity violated § 1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity. In *United States v. Sealy, Inc.*, 388 U.S. 350, 87 S.Ct. 1847, 18 L.Ed.2d 1238 (1967), for example, a group of mattress manufacturers operated and controlled Sealy, Inc., a company that licensed the Sealy trademark to the manufacturers, and dictated that each operate within a specific geographic area. *Id.,* at 352-353, 87 S.Ct. 1847. The Government alleged that the licensees and Sealy were conspiring in violation of § 1, and we agreed. *Id.,* at 352-354, 87 S.Ct. 1847. We explained that "[w]e seek the central substance of the situation" and therefore "we are moved by the identity of the
2210 persons who act, rather than the label *2210 of their hats." *Id.,* at 353, 87 S.Ct. 1847. We thus held that Sealy was not a "separate entity, but . . . an instrumentality of the individual manufacturers." *Id.,* at 356, 87 S.Ct. 1847. In similar circumstances, we have found other formally distinct business organizations covered by § 1. See, *e.g., Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 105 S.Ct. 2613, 86 L.Ed.2d 202 (1985); *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984) *(NCAA); United States v. Topco Associates, Inc.*, 405 U.S. 596, 609, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972); *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945); *id.,* at 26, 65 S.Ct. 1416 (Frankfurter, J., concurring); *United States v. Terminal Railroad Assn. of St. Louis*, 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912); see also Rock, Corporate Law Through an Antitrust Lens, 92 Colum. L.Rev. 497, 506-510 (1992) (discussing cases). We have similarly looked past the form of a legally "single entity" when competitors were part of professional organizations[3] or trade groups.[4]

Conversely, there is not necessarily concerted action simply because more than one legally distinct entity is involved. Although, under a now-defunct doctrine known as the "intraenterprise conspiracy doctrine," we once treated cooperation between legally separate entities as necessarily covered by § 1, we now embark on a more functional analysis.

The roots of this functional analysis can be found in the very decision that established the intraenterprise conspiracy doctrine. In *United States v. Yellow Cab Co.,* 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947), we observed that "corporate interrelationships. . . are not determinitive of the applicability of the Sherman Act" because the Act "is aimed at substance rather than form." *Id.,* at 227, 67 S.Ct. 1560. We nonetheless held that cooperation between legally separate entities was necessarily covered by § 1 because an unreasonable restraint of trade "may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent." *Ibid.;* see also *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211, 215, 71 S.Ct. 259, 95 L.Ed. 219 (1951).

The decline of the intraenterprise conspiracy doctrine began in *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.,* 370 U.S. 19, 82 S.Ct. 1130, 8 L.Ed.2d 305 (1962). In that case, several agricultural cooperatives that were owned by the same farmers were sued for violations of § 1 of the Sherman Act. *Id.,* at 24-25, 82 S.Ct. 1130. Applying a specific immunity provision for agricultural cooperatives, we held that the three cooperatives were "in practical effect" one "organization," even though the controlling farmers "have formally organized themselves into three separate legal
2211 entities." *Id.,* at 29, *2211 82 S.Ct. 1130. "To hold otherwise," we explained, "would be to impose grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect" insofar as "use of separate corporations had [no] economic significance." *Ibid.*

Next, in *United States v. Citizens & Southern Nat. Bank,* 422 U.S. 86, 95 S.Ct. 2099, 45 L.Ed.2d 41 (1975), a large bank, Citizens and Southern (C & S), formed a holding company that operated *de facto* suburban branch banks in the Atlanta area through ownership of the maximum amount of stock in each local branch that was allowed by law, "ownership of much of the remaining stock by parties friendly to C & S, use by the suburban banks of the C & S logogram and all of C & S's banking services, and close C & S oversight of the operation and governance of the suburban banks." *Id.,* at 89, 95 S.Ct. 2099 (footnote omitted). The Government challenged the cooperation between the banks. In our analysis, we observed that "`corporate interrelationships. . . are not determinative,'" *id.,* at 116, 95 S.Ct. 2099, "looked to economic substance," and observed that "because the sponsored banks were not set up to be competitors, § 1 did not compel them to compete." Areeda & Hovenkamp ¶ 1463, at 200-201; see also *Citizens & Southern,* 422 U.S., at 119-120, 95 S.Ct. 2099; Areeda, Intraenterprise Conspiracy in Decline, 97 Harv. L.Rev. 451, 461 (1983).

We finally reexamined the intraenterprise conspiracy doctrine in *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984), and concluded that it was inconsistent with the "`basic distinction between concerted and independent action.'" *Id.,* at 767, 104 S.Ct. 2731. Considering it "perfectly plain that an internal agreement to implement a single, unitary firm's policies does not raise the antitrust dangers that § 1 was designed to police," *id.,* at 769, 104 S.Ct. 2731, we held that a parent corporation and its wholly owned subsidiary "are incapable of conspiring with each other for purposes of § 1 of the Sherman Act," *id.,* at 777, 104 S.Ct. 2731. We explained that although a parent corporation and its wholly owned subsidiary are "separate" for the purposes of incorporation or formal title, they are controlled by a single center of decisionmaking and they control a single aggregation of economic power. Joint conduct by two such entities does not "depriv[e] the marketplace of independent centers of decisionmaking," *id.,* at 769, 104 S.Ct. 2731, and as a result, an agreement between them does not constitute a "contract, combination . . . or conspiracy" for the purposes of § 1.[5]

IV

As *Copperweld* exemplifies, "substance, not form, should determine whether a[n] . . . entity is capable of conspiring under § 1." 467 U.S., at 773, n. 21, 104 S.Ct. 2731. This inquiry is sometimes described as asking whether the alleged conspirators are a single entity. That is perhaps a misdescription, however, because the question is not whether the
2212 defendant is a legally single entity or has a single name; nor is the question whether the *2212 parties involved "seem" like one firm or multiple firms in any metaphysical sense. The key is whether the alleged "contract, combination . . ., or conspiracy" is concerted action—that is, whether it joins together separate decisionmakers. The relevant inquiry, therefore, is whether there is a "contract, combination . . . or conspiracy" amongst "separate economic actors pursuing separate economic interests," *id.,* at 769, 104 S.Ct. 2731, such that the agreement "deprives the marketplace of

independent centers of decisionmaking," *ibid.,* and therefore of "diversity of entrepreneurial interests," *Fraser v. Major League Soccer, L.L. C.,* 284 F.3d 47, 57 (C.A.1 2002) (Boudin, C. J.), and thus of actual or potential competition, see *Freeman v. San Diego Assn. of Realtors,* 322 F.3d 1133, 1148-1149 (C.A.9 2003) (Kozinski, J.); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.,* 792 F.2d 210, 214-215 (C.A.D.C.1986) (Bork, J.); see also Areeda & Hovenkamp ¶ 1462b, at 193-194 (noting that the "central evil addressed by Sherman Act § 1" is the "elimin[ation of] competition that would otherwise exist").

Thus, while the president and a vice president of a firm could (and regularly do) act in combination, their joint action generally is not the sort of "combination" that § 1 is intended to cover. Such agreements might be described as "really unilateral behavior flowing from decisions of a single enterprise." *Copperweld,* 467 U.S., at 767, 104 S.Ct. 2731. Nor, for this reason, does § 1 cover "internally coordinated conduct of a corporation and one of its unincorporated divisions," *id.,* at 770, 104 S.Ct. 2731, because "[a] division within a corporate structure pursues the common interests of the whole," *ibid.,* and therefore "coordination between a corporation and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests," *id.,* at 770-771, 104 S.Ct. 2731. Nor, for the same reasons, is "the coordinated activity of a parent and its wholly owned subsidiary" covered. See *id.,* at 771, 104 S.Ct. 2731. They "have a complete unity of interest" and thus "[w]ith or without a formal `agreement,' the subsidiary acts for the benefit of the parent, its sole shareholder." *Ibid.*

Because the inquiry is one of competitive reality, it is not determinative that two parties to an alleged § 1 violation are legally distinct entities. Nor, however, is it determinative that two legally distinct entities have organized themselves under a single umbrella or into a structured joint venture. The question is whether the agreement joins together "independent centers of decisionmaking." *Id.,* at 769, 104 S.Ct. 2731. If it does, the entities are capable of conspiring under § 1, and the court must decide whether the restraint of trade is an unreasonable and therefore illegal one.

V

The NFL teams do not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action. Each of the teams is a substantial, independently owned, and independently managed business. "[T]heir general corporate actions are guided or determined" by "separate corporate consciousnesses," and "[t]heir objectives are" not "common." *Copperweld,* 467 U.S., at 771, 104 S.Ct. 2731; see also *North American Soccer League v. NFL,* 670 F.2d 1249, 1252 (C.A.2 1982) (discussing ways that "the financial performance of each team, while related to that of the others, does not . . . necessarily rise and fall with that of the others"). The teams compete with one another, not only on the playing field, but to attract fans, for gate receipts and for
2213 contracts with managerial *2213 and playing personnel. See *Brown v. Pro Football, Inc.,* 518 U.S. 231, 249, 116 S.Ct. 2116, 135 L.Ed.2d 521 (1996); *Sullivan v. NFL,* 34 F.3d 1091, 1098 (C.A.1 1994); *Mid-South Grizzlies v. NFL,* 720 F.2d 772, 787 (C.A.3 1983); cf. *NCAA,* 468 U.S., at 99, 104 S.Ct. 2948.

Directly relevant to this case, the teams compete in the market for intellectual property. To a firm making hats, the Saints and the Colts are two potentially competing suppliers of valuable trademarks. When each NFL team licenses its intellectual property, it is not pursuing the "common interests of the whole" league but is instead pursuing interests of each "corporation itself," *Copperweld,* 467 U.S., at 770, 104 S.Ct. 2731; teams are acting as "separate economic actors pursuing separate economic interests," and each team therefore is a potential "independent cente[r] of decisionmaking," *id.,* at 769, 104 S.Ct. 2731. Decisions by NFL teams to license their separately owned trademarks collectively and to only one vendor are decisions that "depriv[e] the marketplace of independent centers of decisionmaking," *ibid.,* and therefore of actual or potential competition. See *NCAA,* 468 U.S., at 109, n. 39, 104 S.Ct. 2948 (observing a possible § 1 violation if two separately owned companies sold their separate products through a "single selling agent"); cf. Areeda & Hovenkamp ¶ 1478a, at 318 ("Obviously, the most significant competitive threats arise when joint venture participants are actual or potential competitors").

In defense, respondents argue that by forming NFLP, they have formed a single entity, akin to a merger, and market their NFL brands through a single outlet. But it is not dispositive that the teams have organized and own a legally separate entity that centralizes the management of their intellectual property. An ongoing § 1 violation cannot evade § 1 scrutiny simply by giving the ongoing violation a name and label. "Perhaps every agreement and combination in restraint of trade could be so labeled." *Timken Roller Bearing Co. v. United States,* 341 U.S. 593, 598, 71 S.Ct. 971, 95 L.Ed. 1199 (1951).

The NFL respondents may be similar in some sense to a single enterprise that owns several pieces of intellectual property and licenses them jointly, but they are not similar in the relevant functional sense. Although NFL teams have common interests such as promoting the NFL brand, they are still separate, profit-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned. See generally Hovenkamp, Exclusive Joint Ventures and Antitrust Policy, 1995 Colum. Bus. L.Rev. 1, 52-61 (1995); Shishido, Conflicts of Interest and Fiduciary Duties in the Operation of a Joint Venture, 39 Hastings L.J. 63, 69-81 (1987). Common interests in the NFL brand "*partially* unit[e] the economic interests of the parent firms," Broadley, Joint Ventures and Antitrust Policy, 95 Harv. L.Rev. 1521, 1526 (1982) (emphasis added), but the teams still have distinct, potentially competing interests.

It may be, as respondents argue, that NFLP "has served as the `single driver" of the teams' "promotional vehicle," "`pursu[ing] the common interests of the whole.'" Brief for NFL Respondents 28 (quoting *Copperweld,* 467 U.S., at 770-771, 104 S.Ct. 2731; brackets in original). But illegal restraints often are in the common interests of the parties to the restraint, at the expense of those who are not parties. It is true, as respondents describe, that they have for some time marketed their trademarks jointly. But a history of concerted activity does not immunize conduct from § 1 scrutiny.
2214 "Absence of actual competition may simply be a manifestation *2214 of the anticompetitive agreement itself." *Freeman,* 322 F.3d, at 1149.

Respondents argue that nonetheless, as the Court of Appeals held, they constitute a single entity because without their cooperation, there would be no NFL football. It is true that "the clubs that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival." *Brown,* 518 U.S., at 248, 116 S.Ct. 2116. But the Court of Appeals' reasoning is unpersuasive.

The justification for cooperation is not relevant to whether that cooperation is concerted or independent action.[6] A "contract, combination . . . or conspiracy," § 1, that is necessary or useful to a joint venture is still a "contract, combination . . . or conspiracy" if it "deprives the marketplace of independent centers of decisionmaking," *Copperweld,* 467 U.S., at 769, 104 S.Ct. 2731. See *NCAA,* 468 U.S., at 113, 104 S.Ct. 2948 ("[J]oint ventures have no immunity from antitrust laws"). Any joint venture involves multiple sources of economic power cooperating to produce a product. And for many such ventures, the participation of others is necessary. But that does not mean that necessity of cooperation transforms concerted action into independent action; a nut and a bolt can only operate together, but an agreement between nut and bolt manufacturers is still subject to § 1 analysis. Nor does it mean that once a group of firms agree to produce a joint product, cooperation amongst those firms must be treated as independent conduct. The mere fact that the teams operate jointly in some sense does not mean that they are immune.[7]

The question whether NFLP decisions can constitute concerted activity covered by § 1 is closer than whether decisions made directly by the 32 teams are covered by § 1. This is so both because NFLP is a separate corporation with its own management and because the record indicates that most of the revenues generated by NFLP are shared by the teams on an equal basis. Nevertheless we think it clear that for the same reasons the 32 teams' conduct is covered by § 1, NFLP's actions also are subject to § 1, at least with regards to its marketing of property owned by the separate teams. NFLP's licensing decisions are made by the 32 potential competitors, and each of them actually owns its share of the jointly managed assets. Cf. *Sealy,* 388 U.S., at 352-354, 87 S.Ct. 1847. Apart from their agreement to cooperate in
2215 exploiting *2215 those assets, including their decisions as the NFLP, there would be nothing to prevent each of the teams from making its own market decisions relating to purchases of apparel and headwear, to the sale of such items, and to the granting of licenses to use its trademarks.

We generally treat agreements within a single firm as independent action on the presumption that the components of the firm will act to maximize the firm's profits. But in rare cases, that presumption does not hold. Agreements made within a firm can constitute concerted action covered by § 1 when the parties to the agreement act on interests separate from those of the firm itself,[8] and the intrafirm agreements may simply be a formalistic shell for ongoing concerted action. See, *e.g., Topco Associates, Inc.,* 405 U.S., at 609, 92 S.Ct. 1126; *Sealy,* 388 U.S., at 352-354, 87 S.Ct. 1847.

For that reason, decisions by the NFLP regarding the teams' separately owned intellectual property constitute concerted action. Thirty-two teams operating independently through the vehicle of the NFLP are not like the components of a single firm that act to maximize the firm's profits. The teams remain separately controlled, potential competitors with economic interests that are distinct from NFLP's financial well-being. See generally Hovenkamp, 1995 Colum. Bus. L.Rev., at 52-61. Unlike typical decisions by corporate shareholders, NFLP licensing decisions effectively require the assent of more than a mere majority of shareholders. And each team's decision reflects not only an interest in NFLP's profits but also an interest in the team's individual profits. See generally Shusido, 39 Hastings L. J., at 69-71. The 32 teams capture individual economic benefits separate and apart from NFLP profits as a result of the decisions they make for the NFLP. NFLP's decisions thus affect each team's profits from licensing its own intellectual property. "Although the business interests of" the teams "will *often* coincide with those of the" NFLP "as an entity in itself, that commonality of interest exists in every cartel." *Los Angeles Memorial Coliseum Comm'n v. NFL,* 726 F.2d 1381, 1389 (C.A.9 1984) (emphasis added). In making the relevant licensing decisions, NFLP is therefore "an instrumentality" of the teams. *Sealy,* 388 U.S., at 352-354, 87 S.Ct. 1847; see also *Topco Associates, Inc.,* 405 U.S., at 609, 92 S.Ct. 1126.

If the fact that potential competitors shared in profits or losses from a venture meant that the venture was immune from § 1, then any cartel "could evade the antitrust law simply by creating a `joint venture' to serve as the exclusive seller of their competing products." *Major League Baseball Properties, Inc. v. Salvino, Inc.,* 542 F.3d 290, 335 (C.A.2 2008) (Sotomayor, J., concurring in judgment). "So long as no agreement," other than one made by the cartelists sitting on the board of the joint venture, "explicitly listed the prices to be charged, the companies could act as monopolies through the `joint venture.'" *Ibid.* (Indeed, a joint venture with a single management structure is generally a better way to operate a cartel because it decreases the risks of a party to an illegal agreement defecting from that agreement). However,
2216 competitors "cannot *2216 simply get around" antitrust liability by acting "through a third-party intermediary or `joint venture'." *Id.,* at 336.[9]

VI

Football teams that need to cooperate are not trapped by antitrust law. "[T]he special characteristics of this industry may provide a justification" for many kinds of agreements. *Brown,* 518 U.S., at 252, 116 S.Ct. 2116 (STEVENS, J., dissenting). The fact that NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions. But the conduct at issue in this case is still concerted activity under the Sherman Act that is subject to § 1 analysis.

When "restraints on competition are essential if the product is to be available at all," *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason.[10] *NCAA,* 468 U.S., at 101, 104 S.Ct. 2948; see *id.,* at 117, 104 S.Ct. 2948 ("Our decision not to apply a *per se* rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved"); see also *Dagher,* 547 U.S., at 6, 126 S.Ct. 1276. In such instances, the agreement is likely to survive the Rule of Reason. See *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,* 441 U.S. 1, 23, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979) ("Joint ventures and other cooperative arrangements are also not usually unlawful . . . where the agreement . . . is necessary to market the product at all"). And depending
2217 upon the concerted activity in question, *2217 the Rule of Reason may not require a detailed analysis; it "can sometimes be applied in the twinkling of an eye." *NCAA,* 468 U.S., at 109, n. 39, 104 S.Ct. 2948.

Other features of the NFL may also save agreements amongst the teams. We have recognized, for example, "that the interest in maintaining a competitive balance" among "athletic teams is legitimate and important," *NCAA,* 468 U.S., at 117, 104 S.Ct. 2948. While that same interest applies to the teams in the NFL, it does not justify treating them as a single entity for § 1 purposes when it comes to the marketing of the teams' individually owned intellectual property. It is, however, unquestionably an interest that may well justify a variety of collective decisions made by the teams. What role it properly plays in applying the Rule of Reason to the allegations in this case is a matter to be considered on remand.

* * *

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

[1] The NFL was founded in Canton, Ohio as the "American Professional Football Association." *United States Football League v. National Football League,* 842 F.2d 1335, 1343 (C.A.2 1988). It took its current name in 1922. *Ibid.* Forty-one franchises failed in the first forty-one years of the League's existence. *Ibid.*

[2] If Congress prohibited independent action that merely restrains trade (even if it does not threaten monopolization), that prohibition could deter perfectly competitive conduct by firms that are fearful of litigation costs and judicial error. See *Copperweld,* 467 U.S., at 768, 104 S.Ct. 2731 ("Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive competitor"); cf. *United States v. United States Gypsum Co.,* 438 U.S. 422, 441, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978) ("[S]alutary and procompetitive conduct. . . might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty"). Moreover, if every unilateral action that restrained trade were subject to antitrust scrutiny, then courts would be forced to judge almost every internal business decision. See 7 P. Areeda & H. Hovenkamp, Antitrust Law ¶ 1464c, at 206 (2d ed.2003) (hereinafter Areeda & Hovenkamp) (unilateral behavior is "often difficult to evaluate or remedy").

[3] See, *e.g., FTC v. Indiana Federation of Dentists,* 476 U.S. 447, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986); *Arizona v. Maricopa County Medical Soc.,* 457 U.S. 332, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982); *National Soc. of Professional Engineers v. United States,* 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978); *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975).

[4] See, *e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc.,* 486 U.S. 492, 108 S.Ct. 1931, 100 L.Ed.2d 497 (1988); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.,* 364 U.S. 656, 81 S.Ct. 365, 5 L.Ed.2d 358 (1961) *(per curiam); Fashion Originators' Guild of America, Inc. v. FTC,* 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941).

[5] This focus on "substance, not, form," *Copperweld,* 467 U.S., at 773, n. 21, 104 S.Ct. 2731, can also be seen in our cases about whether a company and its agent are capable of conspiring under § 1. See, *e.g., Simpson v. Union Oil Co. of Cal.,* 377 U.S. 13, 20-21, 84 S.Ct. 1051, 12 L.Ed.2d 98 (1964); see also E. Elhauge & D. Geradin, Global Antitrust Law and Economics 787-788, and n. 7 (2007) (hereinafter Elhauge & Geradin) (explaining the functional difference between *Simpson* and *United States v. General Elec. Co.,* 272 U.S. 476, 47 S.Ct. 192, 71 L.Ed. 362 (1926), in which we treated a similar agreement as beyond the reach of § 1).

[6] As discussed *infra,* necessity of cooperation is a factor relevant to whether the agreement is subject to the Rule of Reason. See *NCAA,* 468 U.S., at 101, 104 S.Ct. 2948 (holding that NCAA restrictions on televising college football games are subject to Rule of Reason analysis for the "critical" reason that "horizontal restraints on competition are essential if the product is to be available at all").

[7] In any event, it simply is not apparent that the alleged conduct was necessary at all. Although two teams are needed to play a football game, not all aspects of elaborate interleague cooperation are necessary to produce a game. Moreover, even if leaguewide agreements are necessary to produce football, it does not follow that concerted activity in marketing intellectual property is necessary to produce football.

The Court of Appeals carved out a zone of antitrust immunity for conduct arguably related to league operations by reasoning that coordinated team trademark sales are necessary to produce "NFL football," a single NFL brand that competes against other forms of entertainment. But defining the product as "NFL football" puts the cart before the horse: Of course the NFL produces NFL football; but that does not mean that cooperation amongst NFL teams is immune from § 1 scrutiny. Members of any cartel could insist that their cooperation is necessary to produce the "cartel product" and compete with other products.

[8] See Areeda & Hovenkamp ¶ 1471; Elhauge & Geradin 786-787, and n. 6; see also *Capital Imaging Assoc. v. Mohawk Valley Medical Assoc., Inc.,* 996 F.2d 537, 544 (C.A.2 1993); *Bolt v. Halifax Hospital Medical Center,* 891 F.2d 810, 819 (C.A.11 1990); *Oksanen v. Page Memorial Hospital,* 945 F.2d 696, 706 (C.A.4 1991); *Motive Parts Warehouse v. Facet Enterprises,* 774 F.2d 380, 387-388 (C.A.10 1985); *Victorian House, Inc. v. Fisher Camuto Corp.,* 769 F.2d 466, 469 (C.A.8 1985); *Weiss v. York Hospital,* 745 F.2d 786, 828 (C.A.3 1984).

[9] For the purposes of resolving this case, there is no need to pass upon the Government's position that entities are incapable of

conspiring under § 1 if they "have effectively merged the relevant aspect of their operations, thereby eliminating actual and potential competition . . . in that operational sphere" and "the challenged restraint [does] not significantly affect actual or potential competition. . . outside their merged operations." Brief for United States as *Amicus Curiae* 17. The Government urges that the choices "to offer only a blanket license" and "to have only a single headwear licensee" might not constitute concerted action under its test. *Id.,* at 32. However, because the teams still own their own trademarks and are free to market those trademarks as they see fit, even those two choices were agreements amongst potential competitors and would constitute concerted action under the Government's own standard. At any point, the teams could decide to license their own trademarks. It is significant, moreover, that the teams here control NFLP. The two choices that the Government might treat as independent action, although nominally made by NFLP, are for all functional purposes choices made by the 32 entities with potentially competing interests.

[10] Justice Brandeis provided the classic formulation of the Rule of Reason in *Board of Trade of Chicago v. United States,* 246 U.S. 231, 238, 38 S.Ct. 242, 62 L.Ed. 683 (1918):

"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 is 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." See also *Leegin Creative Leather Products, Inc. v. PSKS, Inc.,* 551 U.S. 877, 885-887, 127 S.Ct. 2705, 168 L.Ed.2d 623 (2007); *National Soc. of Professional Engineers,* 435 U.S., at 688-691, 98 S.Ct. 1355.

433 U.S. 36 (1977)

CONTINENTAL T. V., INC., ET AL.
v.
GTE SYLVANIA INC.

No. 76-15.

Supreme Court of the United States.

Argued February 28, 1977.
Decided June 23, 1977.
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

37 *37 *Glenn E. Miller* argued the cause for petitioners. With him on the briefs were *Lawrence A. Sullivan* and *Jesse Choper.*

M. Laurence Popofsky argued the cause for respondent. With him on the brief were *Richard L. Goff* and *Stephen V. Bomse.*[*]

MR. JUSTICE POWELL delivered the opinion of the Court.

Franchise agreements between manufacturers and retailers frequently include provisions barring the retailers from selling franchised products from locations other than those specified in the agreements. This case presents important questions concerning the appropriate antitrust analysis of these restrictions under § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1, and the Court's decision in *United States* v. *Arnold, Schwinn & Co.,* 388 U. S. 365 (1967).

38 *38 **I**

Respondent GTE Sylvania Inc. (Sylvania) manufactures and sells television sets through its Home Entertainment Products Division. Prior to 1962, like most other television manufacturers, Sylvania sold its televisions to independent or company-owned distributors who in turn resold to a large and diverse group of retailers. Prompted by a decline in its market share to a relatively insignificant 1% to 2% of national television sales,[1] Sylvania conducted an intensive reassessment of its marketing strategy, and in 1962 adopted the franchise plan challenged here. Sylvania phased out its wholesale distributors and began to sell its televisions directly to a smaller and more select group of franchised retailers. An acknowledged purpose of the change was to decrease the number of competing Sylvania retailers in the hope of attracting the more aggressive and competent retailers thought necessary to the improvement of the company's market position.[2] To this end, Sylvania limited the number of franchises granted for any given area and required each franchisee to sell his Sylvania products only from the location or locations at which he was franchised.[3] A franchise did not constitute an exclusive territory, and Sylvania retained sole discretion to increase the number of retailers in an area in light of the success or failure of existing retailers in developing their market. The revised marketing strategy appears to have been successful during the period at issue here, for by 1965 Sylvania's share of national television sales had
39 increased to approximately 5%, and the *39 company ranked as the Nation's eighth largest manufacturer of color television sets.

This suit is the result of the rupture of a franchiser-franchisee relationship that had previously prospered under the revised Sylvania plan. Dissatisfied with its sales in the city of San Francisco,[4] Sylvania decided in the spring of 1965 to franchise Young Brothers, an established San Francisco retailer of televisions, as an additional San Francisco retailer. The proposed location of the new franchise was approximately a mile from a retail outlet operated by petitioner Continental T. V., Inc. (Continental), one of the most successful Sylvania franchisees.[5] Continental protested that the location of the new franchise violated Sylvania's marketing policy, but Sylvania persisted in its plans. Continental then canceled a large Sylvania order and placed a large order with Phillips, one of Sylvania's competitors.

During this same period, Continental expressed a desire to open a store in Sacramento, Cal., a desire Sylvania attributed at least in part to Continental's displeasure over the Young Brothers decision. Sylvania believed that the Sacramento market was adequately served by the existing Sylvania retailers and denied the request.[6] In the face of this denial, Continental advised Sylvania in early September 1965, that it was in the process of moving Sylvania merchandise from its San Jose, Cal., warehouse to a new retail location that it had leased in Sacramento. Two weeks
40 later, allegedly for unrelated reasons, Sylvania's credit department reduced Continental's *40 credit line from $300,000 to $50,000.[7] In response to the reduction in credit and the generally deteriorating relations with Sylvania, Continental withheld all payments owed to John P. Maguire & Co., Inc. (Maguire), the finance company that handled the credit arrangements between Sylvania and its retailers. Shortly thereafter, Sylvania terminated Continental's franchises, and Maguire filed this diversity action in the United States District Court for the Northern District of California seeking recovery of money owed and of secured merchandise held by Continental.

The antitrust issues before us originated in cross-claims brought by Continental against Sylvania and Maguire. Most important for our purposes was the claim that Sylvania had violated § 1 of the Sherman Act by entering into and enforcing franchise agreements that prohibited the sale of Sylvania products other than from specified locations.[8] At the close of evidence in the jury trial of Continental's claims, Sylvania requested the District Court to instruct the jury that its location restriction was illegal only if it unreasonably restrained or suppressed competition. App. 5-6, 9-15. Relying on this Court's decision in *United States* v. *Arnold, Schwinn & Co., supra,* the District Court rejected the proffered instruction in favor of the following one:

> "Therefore, if you find by a preponderance of the evidence that Sylvania entered into a contract, combination or conspiracy with one or more of its dealers pursuant to which Sylvania exercised
> 41 dominion or control over the *41 products sold to the dealer, after having parted with title and risk to the products, you must find any effort thereafter to restrict outlets or store locations from which its dealers resold the merchandise which they had purchased from Sylvania to be a violation of Section 1 of the Sherman Act, regardless of the reasonableness of the location restrictions." App. 492.

In answers to special interrogatories, the jury found that Sylvania had engaged "in a contract, combination or conspiracy in restraint of trade in violation of the antitrust laws with respect to location restrictions alone," and assessed Continental's damages at $591,505, which was trebled pursuant to 15 U. S. C. § 15 to produce an award of $1,774,515. App. 498, 501.[9]

On appeal, the Court of Appeals for the Ninth Circuit, sitting en banc, reversed by a divided vote. 537 F. 2d 980 (1976). The court acknowledged that there is language in *Schwinn* that could be read to support the District Court's instruction but concluded that *Schwinn* was distinguishable on several grounds. Contrasting the nature of the restrictions, their competitive impact, and the market shares of the franchisers in the two cases, the court concluded that Sylvania's location restriction had less potential for competitive harm than the restrictions invalidated in *Schwinn* and thus should
42 be judged under the "rule of reason" rather than the *per se* rule stated in *Schwinn.* The court found support for its *42 position in the policies of the Sherman Act and in the decisions of other federal courts involving nonprice vertical restrictions.[10]

We granted Continental's petition for certiorari to resolve this important question of antitrust law. 429 U. S. 893 (1976).[11]

II

A

We turn first to Continental's contention that Sylvania's restriction on retail locations is a *per se* violation of § 1 of the Sherman Act as interpreted in *Schwinn.* The restrictions at issue in *Schwinn* were part of a three-tier distribution system comprising, in addition to Arnold, Schwinn & Co. (Schwinn), 22 intermediate distributors and a network of franchised retailers. Each distributor had a defined geographic area in which it had the exclusive right to supply franchised retailers. Sales to the public were made only through franchised retailers, who were authorized to sell Schwinn bicycles only from specified locations. In support of this limitation, Schwinn prohibited both distributors and retailers from selling Schwinn bicycles to nonfranchised retailers. At the retail level, therefore, Schwinn was able to control the number of
43 retailers of *43 its bicycles in any given area according to its view of the needs of that market.

As of 1967 approximately 75% of Schwinn's total sales were made under the "Schwinn Plan." Acting essentially as a manufacturer's representative or sales agent, a distributor participating in this plan forwarded orders from retailers to the factory. Schwinn then shipped the ordered bicycles directly to the retailer, billed the retailer, bore the credit risk, and paid the distributor a commission on the sale. Under the Schwinn Plan, the distributor never had title to or possession of the bicycles. The remainder of the bicycles moved to the retailers through the hands of the distributors. For the most part, the distributors functioned as traditional wholesalers with respect to these sales, stocking an inventory of bicycles owned by them to supply retailers with emergency and "fill-in" requirements. A smaller part of the bicycles that were physically distributed by the distributors were covered by consignment and agency arrangements that had been developed to deal with particular problems of certain distributors. Distributors acquired title only to those bicycles that they purchased as wholesalers; retailers, of course, acquired title to all of the bicycles ordered by them.

In the District Court, the United States charged a continuing conspiracy by Schwinn and other alleged co-conspirators to fix prices, allocate exclusive territories to distributors, and confine Schwinn bicycles to franchised retailers. Relying on *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707 (1944), the Government argued that the nonprice restrictions were *per se* illegal as part of a scheme for fixing the retail prices of Schwinn bicycles. The District Court rejected the price-fixing allegation because of a failure of proof and held that Schwinn's limitation of retail bicycle sales to franchised retailers was permissible under § 1. The court found a § 1 violation, however, in "a conspiracy to divide certain
44 borderline or overlapping counties in the territories served by four Midwestern *44 cycle distributors." 237 F. Supp. 323, 342 (ND Ill. 1965). The court described the violation as a "division of territory by agreement between the distributors . . . horizontal in nature," and held that Schwinn's participation did not change that basic characteristic. *Ibid.* The District Court limited its injunction to apply only to the territorial restrictions on the resale of bicycles purchased by the distributors in their roles as wholesalers. *Ibid.*

Schwinn came to this Court on appeal by the United States from the District Court's decision. Abandoning its *per se* theories, the Government argued that Schwinn's prohibition against distributors' and retailers' selling Schwinn bicycles to nonfranchised retailers was unreasonable under § 1 and that the District Court's injunction against exclusive distributor territories should extend to all such restrictions regardless of the form of the transaction. The Government did not challenge the District Court's decision on price fixing, and Schwinn did not challenge the decision on exclusive distributor territories.

The Court acknowledged the Government's abandonment of its *per se* theories and stated that the resolution of the case would require an examination of "the specifics of the challenged practices and their impact upon the marketplace in order to make a judgment as to whether the restraint is or is not `reasonable' in the special sense in which § 1 of the Sherman Act must be read for purposes of this type of inquiry." 388 U. S., at 374. Despite this description of its task, the Court proceeded to articulate the following "bright line" *per se* rule of illegality for vertical restrictions: "Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it." *Id.,* at 379. But the Court
45 expressly stated that the rule of reason governs when "the manufacturer retains title, dominion, and risk with *45 respect to the product and the position and function of the dealer in question are, in fact, indistinguishable from those of an agent or salesman of the manufacturer." *Id.,* at 380.

Application of these principles to the facts of *Schwinn* produced sharply contrasting results depending upon the role played by the distributor in the distribution system. With respect to that portion of Schwinn's sales for which the distributors acted as ordinary wholesalers, buying and reselling Schwinn bicycles, the Court held that the territorial and customer restrictions challenged by the Government were *per se* illegal. But, with respect to that larger portion of Schwinn's sales in which the distributors functioned under the Schwinn Plan and under the less common consignment and agency arrangements, the Court held that the same restrictions should be judged under the rule of reason. The only retail restriction challenged by the Government prevented franchised retailers from supplying nonfranchised retailers. *Id.,* at 377. The Court apparently perceived no material distinction between the restrictions on distributors and retailers, for it held:

> "The principle is, of course, equally applicable to sales to retailers, and the decree should similarly enjoin the making of any sales to retailers upon any condition, agreement or understanding limiting the retailer's freedom as to where and to whom it will resell the products." *Id.,* at 378.

Applying the rule of reason to the restrictions that were not imposed in conjunction with the sale of bicycles, the Court had little difficulty finding them all reasonable in light of the competitive situation in "the product market as a whole." *Id.,* at 382.

B

In the present case, it is undisputed that title to the television sets passed from Sylvania to Continental. Thus, the
46 *Schwinn per se* rule applies unless Sylvania's restriction on *46 locations falls outside *Schwinn*'s prohibition against a manufacturer's attempting to restrict a "retailer's freedom as to where and to whom it will resell the products." *Id.,* at 378. As the Court of Appeals conceded, the language of *Schwinn* is clearly broad enough to apply to the present case. Unlike the Court of Appeals, however, we are unable to find a principled basis for distinguishing *Schwinn* from the case now before us.

Both Schwinn and Sylvania sought to reduce but not to eliminate competition among their respective retailers through the adoption of a franchise system. Although it was not one of the issues addressed by the District Court or presented on appeal by the Government, the Schwinn franchise plan included a location restriction similar to the one challenged here. These restrictions allowed Schwinn and Sylvania to regulate the amount of competition among their retailers by preventing a franchisee from selling franchised products from outlets other than the one covered by the franchise agreement. To exactly the same end, the Schwinn franchise plan included a companion restriction, apparently not found in the Sylvania plan, that prohibited franchised retailers from selling Schwinn products to nonfranchised retailers. In *Schwinn* the Court expressly held that this restriction was impermissible under the broad principle stated there. In intent and competitive impact, the retail-customer restriction in *Schwinn* is indistinguishable from the location restriction in the present case. In both cases the restrictions limited the freedom of the retailer to dispose of the purchased products as he desired. The fact that one restriction was addressed to territory and the other to customers is irrelevant to functional antitrust analysis and, indeed, to the language and broad thrust of the opinion in *Schwinn.*[12] As Mr. Chief Justice
47 Hughes stated in *47 Appalachian Coals, Inc. v. United States, 288 U. S. 344, 360, 377 (1933): "Realities must dominate the judgment. . . . The Anti-Trust Act aims at substance."

III

Sylvania argues that if *Schwinn* cannot be distinguished, it should be reconsidered. Although *Schwinn* is supported by the principle of *stare decisis,* *Illinois Brick Co.* v. *Illinois,* 431 U. S. 720, 736 (1977), we are convinced that the need for clarification of the law in this area justifies reconsideration. *Schwinn* itself was an abrupt and largely unexplained departure from *White Motor Co.* v. *United States,* 372 U. S. 253 (1963), where only four years earlier the Court had refused to endorse a *per se* rule for vertical restrictions. Since its announcement, *Schwinn* has been the subject of continuing controversy and confusion, both in the scholarly journals and in the federal courts. The great weight of
48 scholarly opinion *48 has been critical of the decision,[13] and a number of the federal courts confronted with analogous
49 vertical restrictions have sought to limit its reach.[14] In our view, the experience of the *49 past 10 years should be

brought to bear on this subject of considerable commercial importance.

The traditional framework of analysis under § 1 of the Sherman Act is familiar and does not require extended discussion. Section 1 prohibits "[e]very contract, combination. . . , or conspiracy, in restraint of trade or commerce." Since the early years of this century a judicial gloss on this statutory language has established the "rule of reason" as the prevailing standard of analysis. *Standard Oil Co.* v. *United States,* 221 U. S. 1 (1911). Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing
50 an unreasonable restraint on competition.[15] *Per se* rules of illegality *50 are appropriate only when they relate to conduct that is manifestly anticompetitive. As the Court explained in *Northern Pac. R. Co.* v. *United States,* 356 U. S. 1, 5 (1958), "there 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."[16]

In essence, the issue before us is whether *Schwinn's per se* rule can be justified under the demanding standards of *Northern Pac. R. Co.* The Court's refusal to endorse a *per se* rule in *White Motor Co.* was based on its uncertainty as to whether vertical restrictions satisfied those standards. Addressing this question for the first time, the Court stated:

> "We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a `pernicious effect on competition and lack . . . any redeeming virtue'
> 51 (*Northern Pac. R. Co.* v. *United States, supra,* p. 5) and therefore should *51 be classified as *per se* violations of the Sherman Act." 372 U. S., at 263.

Only four years later the Court in *Schwinn* announced its sweeping *per se* rule without even a reference to *Northern Pac. R. Co.* and with no explanation of its sudden change in position.[17] We turn now to consider *Schwinn* in light of *Northern Pac. R. Co.*

The market impact of vertical restrictions[18] is complex because of their potential for a simultaneous reduction of
52 intrabrand competition and stimulation of interbrand competition.[19] *52 Significantly, the Court in *Schwinn* did not distinguish among the challenged restrictions on the basis of their individual potential for intrabrand harm or interbrand benefit. Restrictions that completely eliminated intrabrand competition among Schwinn distributors were analyzed no differently from those that merely moderated intrabrand competition among retailers. The pivotal factor was the passage of title: All restrictions were held to be *per se* illegal where title had passed, and all were evaluated and sustained under the rule of reason where it had not. The location restriction at issue here would be subject to the same pattern of analysis under *Schwinn.*

It appears that this distinction between sale and nonsale transactions resulted from the Court's effort to accommodate the perceived intrabrand harm and interbrand benefit of vertical restrictions. The *per se* rule for sale transactions reflected the view that vertical restrictions are "so obviously destructive" of intrabrand competition[20] that their use would
53 "open the door to exclusivity of outlets and limitation of territory *53 further than prudence permits." 388 U. S., at 379-380.[21] Conversely, the continued adherence to the traditional rule of reason for nonsale transactions reflected the view that the restrictions have too great a potential for the promotion of interbrand competition to justify complete prohibition.[22]
54 *54 The Court's opinion provides no analytical support for these contrasting positions. Nor is there even an assertion in the opinion that the competitive impact of vertical restrictions is significantly affected by the form of the transaction. Non-sale transactions appear to be excluded from the *per se* rule, not because of a greater danger of intrabrand harm or a greater promise of interbrand benefit, but rather because of the Court's unexplained belief that a complete *per se* prohibition would be too "inflexibl[e]." *Id.,* at 379.

Vertical restrictions reduce intrabrand competition by limiting the number of sellers of a particular product competing for the business of a given group of buyers. Location restrictions have this effect because of practical constraints on the effective marketing area of retail outlets. Although intrabrand competition may be reduced, the ability of retailers to exploit the resulting market may be limited both by the ability of consumers to travel to other franchised locations and, perhaps more importantly, to purchase the competing products of other manufacturers. None of these key variables, however, is affected by the form of the transaction by which a manufacturer conveys his products to the retailers.

Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products. These "redeeming virtues" are implicit in every decision sustaining vertical restrictions
55 under the rule of reason. Economists have identified a number *55 of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers. See, *e. g.,* Preston, Restrictive Distribution Arrangements: Economic Analysis and Public Policy Standards, 30 Law & Contemp. Prob. 506, 511 (1965).[23] For example, new manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer. Established manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products. Service and repair are vital for many products, such as automobiles and major household appliances. The availability and quality of such services affect a manufacturer's goodwill and the competitiveness of his product. Because of market imperfections such as the so-called "free rider" effect, these services might not be provided by retailers in a purely competitive situation, despite the fact that each retailer's benefit would be greater if all provided the services than if none did. Posner, *supra,* n. 13, at 285; cf. P. Samuelson, Economics 506-507 (10th ed. 1976).

56 *56 Economists also have argued that manufacturers have an economic interest in maintaining as much intrabrand competition as is consistent with the efficient distribution of their products. Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division [II], 75 Yale L. J. 373, 403 (1966); Posner, *supra,* n. 13, at 283, 287-288.[24] Although the view that the manufacturer's interest necessarily corresponds with that of the public is not universally shared, even the leading critic of vertical restrictions concedes that *Schwinn*'s distinction between sale and nonsale transactions is essentially unrelated to any relevant economic impact. Comanor, Vertical Territorial and Customer Restrictions: White Motor and Its Aftermath, 81 Harv. L. Rev. 1419, 1422 (1968).[25] Indeed, to the extent that the form of the transaction is related to interbrand benefits, the Court's distinction is inconsistent with its articulated concern for the ability of smaller firms to compete effectively with larger ones. Capital requirements and administrative expenses may prevent smaller firms from using the exception for nonsale transactions. See, *e. g.,* Baker, *supra,* n. 13, at 538; Phillips,
57 *Schwinn* Rules and the "New Economics" of Vertical *57 Relation, 44 Antitrust L. J. 573, 576 (1975); Pollock, *supra,* n. 13, at 610.[26]

We conclude that the distinction drawn in *Schwinn* between sale and nonsale transactions is not sufficient to justify the application of a *per se* rule in one situation and a rule of reason in the other. The question remains whether the *per se* rule stated in *Schwinn* should be expanded to include nonsale transactions or abandoned in favor of a return to the rule of reason. We have found no persuasive support for expanding the *per se* rule. As noted above, the *Schwinn* Court recognized the undesirability of "prohibit[ing] all vertical restrictions of territory and all franchising . . . ." 388 U. S., at 379-380.[27] And even Continental does not urge us to hold that all such restrictions are *per se* illegal.

We revert to the standard articulated in *Northern Pac. R. Co.,* and reiterated in *White Motor,* for determining whether vertical restrictions must be "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." 356 U. S., at 5. Such restrictions, in varying forms, are widely used in our free market economy. As indicated above, there is substantial scholarly and
58 judicial authority *58 supporting their economic utility. There is relatively little authority to the contrary.[28] Certainly, there has been no showing in this case, either generally or with respect to Sylvania's agreements, that vertical restrictions have or are likely to have a "pernicious effect on competition" or that they "lack . . . any redeeming virtue." *Ibid.*[29] Accordingly, we conclude that the *per se* rule stated in *Schwinn* must be overruled.[30] In so holding we do not foreclose the possibility that particular applications of vertical restrictions might justify *per se* prohibition under *Northern Pac. R.*
59 *Co.* But we do make clear that departure from the rule-of-reason standard *59 must be based upon demonstrable economic effect rather than—as in *Schwinn*—upon formalistic line drawing.

In sum, we conclude that the appropriate decision is to return to the rule of reason that governed vertical restrictions prior to *Schwinn.* When anticompetitive effects are shown to result from particular vertical restrictions they can be adequately policed under the rule of reason, the standard traditionally applied for the majority of anticompetitive practices challenged under § 1 of the Act. Accordingly, the decision of the Court of Appeals is

Affirmed.

MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE WHITE, concurring in the judgment.

Although I agree with the majority that the location clause at issue in this case is not a *per se* violation of the Sherman Act and should be judged under the rule of reason, I cannot agree that this result requires the overruling of *United States* v. *Arnold, Schwinn & Co.,* 388 U. S. 365 (1967). In my view this case is distinguishable from *Schwinn* because there is less potential for restraint of intrabrand competition and more potential for stimulating interbrand competition. As to intrabrand competition, Sylvania, unlike Schwinn, did not restrict the customers to whom or the territories where its purchasers could sell. As to interbrand competition, Sylvania, unlike Schwinn, had an insignificant market share at the time it adopted its challenged distribution practice and enjoyed no consumer preference that would allow its retailers to charge a premium over other brands. In two short paragraphs, the majority disposes of the view, adopted after careful analysis by the Ninth Circuit en banc below, that these differences provide a "principled basis for distinguishing
60 *Schwinn," ante,* at 46, despite holdings by three Courts of Appeals and the District Court on remand in *Schwinn* that *60 the *per se* rule established in that case does not apply to location clauses such as Sylvania's. To reach out to overrule one of this Court's recent interpretations of the Sherman Act, after such a cursory examination of the necessity for doing so, is surely an affront to the principle that considerations of *stare decisis* are to be given particularly strong weight in the area of statutory construction. *Illinois Brick Co.* v. *Illinois,* 431 U. S. 720, 736-737 (1977); *Runyon* v. *McCrary,* 427 U. S. 160, 175 (1976); *Edelman* v. *Jordan,* 415 U. S. 651, 671 (1974).

One element of the system of interrelated vertical restraints invalidated in *Schwinn* was a retail-customer restriction prohibiting franchised retailers from selling Schwinn products to nonfranchised retailers. The Court rests its inability to distinguish *Schwinn* entirely on this retail-customer restriction, finding it "[i]n intent and competitive impact . . . indistinguishable from the location restriction in the present case," because "[i]n both cases the restrictions limited the freedom of the retailer to dispose of the purchased products as he desired." *Ante,* at 46. The customer restriction may well have, however, a very different "intent and competitive impact" than the location restriction: It prevents discount stores from getting the manufacturer's product and thus prevents intrabrand price competition. Suppose, for example, that interbrand competition is sufficiently weak that the franchised retailers are able to charge a price substantially above wholesale. Under a location restriction, these franchisers are free to sell to discount stores seeking to exploit the potential for sales at prices below the prevailing retail level. One of the franchised retailers may be tempted to lower its price and act in effect as a wholesaler for the discount house in order to share in the profits to be had from lowering prices and expanding volume.[1]

61 *61 Under a retail customer restriction, on the other hand, the franchised dealers cannot sell to discounters, who are cut off altogether from the manufacturer's product and the opportunity for intrabrand price competition. This was precisely the theory on which the Government successfully challenged Schwinn's customer restrictions in this Court. The District Court in that case found that "[e]ach one of [Schwinn's franchised retailers] knows also that he is not a wholesaler and that he cannot sell as a wholesaler or act as an agent for some other unfranchised dealer, such as a discount house retailer who has not been franchised as a dealer by Schwinn." 237 F. Supp. 323, 333 (ND Ill. 1965). The Government argued on appeal, with extensive citations to the record, that the effect of this restriction was "to keep Schwinn products out of the hands of discount houses and other price cutters so as to discourage price competition in retailing . . . ." Brief for United States, O. T. 1966, No. 25, p. 26. See *id.,* at 29-37.[2]

It is true that, as the majority states, Sylvania's location restriction inhibited to some degree "the freedom of the retailer to dispose of the purchased products" by requiring the retailer to sell from one particular place of business. But the retailer is still free to sell to any type of customer—including discounters and other unfranchised dealers—from any

area. I think this freedom implies a significant difference for the effect of a location clause on intrabrand competition.
62 The *62 District Court on remand in *Schwinn* evidently thought so as well, for after enjoining Schwinn's customer restrictions as directed by this Court it expressly sanctioned location clauses, permitting Schwinn to "designat[e] in its retailer franchise agreements the location of the place or places of business for which the franchise is issued." 291 F. Supp. 564, 565-566 (ND Ill. 1968).

An additional basis for finding less restraint of intrabrand competition in this case, emphasized by the Ninth Circuit en banc, is that *Schwinn* involved restrictions on competition among distributors at the wholesale level. As Judge Ely wrote for the six-member majority below:

> "[Schwinn] had created exclusive geographical sales territories for each of its 22 wholesaler bicycle distributors and had made each distributor the sole Schwinn outlet for the distributor's designated area. Each distributor was prohibited from selling to any retailers located outside its territory. . . .
>
> ". . . Schwinn's territorial restrictions requiring dealers to confine their sales to exclusive territories prescribed by Schwinn prevented a dealer from competing for customers outside his territory. . . . Schwinn's restrictions guaranteed each wholesale distributor that it would be absolutely isolated from all competition from other Schwinn wholesalers." 537 F. 2d 980, 989-990 (1976).

Moreover, like its franchised retailers, Schwinn's distributors were absolutely barred from selling to nonfranchised retailers, further limiting the possibilities of intrabrand price competition.

The majority apparently gives no weight to the Court of Appeals' reliance on the difference between the competitive effects of Sylvania's location clause and Schwinn's interlocking "system of vertical restraints affecting both wholesale
63 and retail distribution." *Id.,* at 989. It also ignores post-*Schwinn* *63 decisions of the Third and Tenth Circuits upholding the validity of location clauses similar to Sylvania's here. *Salco Corp.* v. *General Motors Corp.,* 517 F. 2d 567 (CA10 1975); *Kaiser* v. *General Motors Corp.,* 530 F. 2d 964 (CA3 1976), aff'g 396 F. Supp. 33 (ED Pa. 1975). Finally, many of the scholarly authorities the majority cites in support of its overruling of *Schwinn* have not had to strain to distinguish location clauses from the restrictions invalidated there. *E. g.,* Robinson, Recent Antitrust Developments: 1974, 75 Colum. L. Rev. 243, 278 (1975) (outcome in *Sylvania* not preordained by *Schwinn* because of marked differences in the vertical restraints in the two cases); McLaren, Territorial and Customer Restrictions, Consignments, Suggested Retail Prices and Refusals to Deal, 37 Antitrust L. J. 137, 144-145 (1968) (by implication *Schwinn* exempts location clauses from its *per se* rule); Pollock, Alternative Distribution Methods After *Schwinn,* 63 Nw. U. L. Rev. 595, 603 (1968) ("Nor does the *Schwinn* doctrine outlaw the use of a so-called `location clause' . . .").

Just as there are significant differences between *Schwinn* and this case with respect to intrabrand competition, there are also significant differences with respect to interbrand competition. Unlike Schwinn, Sylvania clearly had no economic power in the generic product market. At the time they instituted their respective distribution policies, Schwinn was "the leading bicycle producer in the Nation," with a national market share of 22.5%, 388 U. S., at 368, 374, whereas Sylvania was a "faltering, if not failing" producer of television sets, with "a relatively insignificant 1% to 2%" share of the national market in which the dominant manufacturer had a 60% to 70% share. *Ante,* at 38, 58 n. 29. Moreover, the Schwinn brand name enjoyed superior consumer acceptance and commanded a premium price as, in the District Court's words, "the Cadillac of the bicycle industry." 237 F. Supp., at 335. This premium gave Schwinn dealers a margin
64 of *64 protection from interbrand competition and created the possibilities for price cutting by discounters that the Government argued were forestalled by Schwinn's customer restrictions.[3] Thus, judged by the criteria economists use to measure market power—product differentiation and market share[4]—Schwinn enjoyed a substantially stronger position in the bicycle market than did Sylvania in the television market. This Court relied on Schwinn's market position as one reason not to apply the rule of reason to the vertical restraints challenged there. "Schwinn was not a newcomer, seeking to break into or stay in the bicycle business. It was not a `failing company.' On the contrary, at the initiation of these practices, it was the leading bicycle producer in the Nation." 388 U. S., at 374. And the Court of Appeals below found "another significant distinction between our case and *Schwinn"* in Sylvania's "precarious market share," which "was so small when it adopted its locations practice that it was threatened with expulsion from the television market."

537 F. 2d, at 991.[5]

65 *65 In my view there are at least two considerations, both relied upon by the majority to justify overruling *Schwinn,* that would provide a "principled basis" for instead refusing to extend *Schwinn* to a vertical restraint that is imposed by a "faltering" manufacturer with a "precarious" position in a generic product market dominated by another firm. The first is that, as the majority puts it, "when interbrand competition exists, as it does among television manufacturers, it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product." *Ante,* at 52 n. 19. See also *ante,* at 54.[6] Second is the view, argued forcefully in the economic literature cited by the majority, that the potential benefits of vertical restraints in promoting interbrand competition are particularly strong where the manufacturer imposing the restraints is seeking to enter a new market or to expand a small market share. *Ibid.*[7] The majority even recognizes that *Schwinn* "hinted" at an exception for new entrants and failing firms from its *per se* rule. *Ante,* at 53-54, n. 22.

In other areas of antitrust law, this Court has not hesitated to base its rules of *per se* illegality in part on the defendant's market power. Indeed, in the very case from which the majority draws its standard for *per se* rules, *Northern Pac. R. Co.*
66 v. *United States,* 356 U. S. 1, 5 (1958), the *66 Court stated the reach of the *per se* rule against tie-ins under § 1 of the Sherman Act as extending to all defendants with "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product . . . ." 356 U. S., at 6. And the Court subsequently approved an exception to this *per se* rule for "infant industries" marketing a new product. *United States* v. *Jerrold Electronics Corp.,* 187 F. Supp. 545 (ED Pa. 1960), aff'd *per curiam,* 365 U. S. 567 (1961). See also *United States* v. *Philadelphia Nat. Bank,* 374 U. S. 321, 363 (1963), where the Court held presumptively illegal a merger "which produces a firm controlling an undue percentage share of the relevant market. . . ." I see no doctrinal obstacle to excluding firms with such minimal market power as Sylvania's from the reach of the *Schwinn* rule.[8]

I have, moreover, substantial misgivings about the approach the majority takes to overruling *Schwinn.* The reason for the distinction in *Schwinn* between sale and nonsale transactions was not, as the majority would have it, "the Court's effort to accommodate the perceived intrabrand harm and interbrand benefit of vertical restrictions," *ante,* at 52; the reason was rather, as Judge Browning argued in dissent below, the notion in many of our cases involving vertical
67 restraints that independent *67 businessmen should have the freedom to dispose of the goods they own as they see fit. Thus the first case cited by the Court in *Schwinn* for the proposition that "restraints upon alienation . . . are beyond the power of the manufacturer to impose upon its vendees and . . . are violations of § 1 of the Sherman Act," 388 U. S., at 377, was this Court's seminal decision holding a series of resale-price-maintenance agreements *per se* illegal, *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.,* 220 U. S. 373 (1911). In *Dr. Miles* the Court stated that "a general restraint upon alienation is ordinarily invalid," citing Coke on Littleton, and emphasized that the case involved "agreements restricting the freedom of trade on the part of dealers who own what they sell." *Id.,* at 404, 407-408. Mr. Justice Holmes stated in dissent: "If [the manufacturer] should make the retail dealers also agents in law as well as in name and retain the title until the goods left their hands I cannot conceive that even the present enthusiasm for regulating the prices to be charged by other people would deny that the owner was acting within his rights." *Id.,* at 411.

This concern for the freedom of the businessman to dispose of his own goods as he sees fit is most probably the explanation for two subsequent cases in which the Court allowed manufacturers to achieve economic results similar to that in *Dr. Miles* where they did not impose restrictions on dealers who had purchased their products. In *United States* v. *Colgate & Co.,* 250 U. S. 300 (1919), the Court found no antitrust violation in a manufacturer's policy of refusing to sell to dealers who failed to charge the manufacturer's suggested retail price and of terminating dealers who did not adhere to that price. It stated that the Sherman Act did not "restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *Id.,*
68 at 307. In *United States* v. *General Electric Co.,* 272 U. S. 476 (1926), the Court upheld resale-price-maintenance *68 agreements made by a patentee with its dealers who obtained its goods on a consignment basis. The Court distinguished *Dr. Miles* on the ground that the agreements there were "contracts of sale rather than of agency" and involved "an attempt by the Miles Medical Company . . . to hold its purchasers, after the purchase at full price, to an obligation to maintain prices on a resale by them." 272 U. S., at 487. By contrast, a manufacturer was free to contract

with his *agents* to "[fix] the price by which his agents transfer the title from him directly to [the] consumer . . . however comprehensive as a mass or whole in [the] effect [of these contracts]." *Id.,* at 488. Although these two cases have been called into question by subsequent decisions, see *United States* v. *Parke, Davis & Co.,* 362 U. S. 29 (1960), and *Simpson* v. *Union Oil Co.,* 377 U. S. 13 (1964), their rationale runs through our case law in the area of distributional restraints. In *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons,* 340 U. S. 211, 213 (1951), the Court held that an agreement to fix resale prices was *per se* illegal under § 1 because "such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." Accord, *Albrecht* v. *Herald Co.,* 390 U. S. 145, 152 (1968). See generally Judge Browning's dissent below, 537 F. 2d, at 1018-4022; ABA Antitrust Section, Monograph No. 2, Vertical Restrictions Limiting Intrabrand Competition 29-31, 82-83, 87-91, 96-97 (1977); Blake & Jones, Toward a Three-Dimensional Antitrust Policy, 65 Colum. L. Rev. 422, 427-436 (1965).

After summarily rejecting this concern, reflected in our interpretations of the Sherman Act, for "the autonomy of independent businessmen," *ante,* at 53 n. 21, the majority not surprisingly finds "no justification" for *Schwinn's* distinction between sale and nonsale transactions because the distinction is "essentially unrelated to any relevant
69 economic impact." *Ante,* at 56. But while according some weight to the businessman's *69 interest in controlling the terms on which he trades in his own goods may be anathema to those who view the Sherman Act as directed solely to economic efficiency,[9] this principle is without question more deeply embedded in our cases than the notions of "free rider" effects and distributional efficiencies borrowed by the majority from the "new economics of vertical relationships." *Ante,* at 54-57. Perhaps the Court is right in partially abandoning this principle and in judging the instant nonprice vertical restraints solely by their "relevant economic impact"; but the precedents which reflect this principle should not be so lightly rejected by the Court. The rationale of *Schwinn* is no doubt difficult to discern from the opinion, and it may be wrong; it is not, however, the aberration the majority makes it out to be here.

I have a further reservation about the majority's reliance on "relevant economic impact" as the test for retaining *per se* rules regarding vertical restraints. It is common ground among the leading advocates of a purely economic approach to the question of distribution restraints that the economic arguments in favor of allowing vertical nonprice restraints
70 generally apply to vertical price restraints as well.[10] Although *70 the majority asserts that "the *per se* illegality of price restrictions. . . involves significantly different questions of analysis and policy," *ante,* at 51 n. 18, I suspect this purported distinction may be as difficult to justify as that of *Schwinn* under the terms of the majority's analysis. Thus Professor Posner, in an article cited five times by the majority, concludes: "I believe that the law should treat price and nonprice restrictions the same and that it should make no distinction between the imposition of restrictions in a sale contract and their imposition in an agency contract." Posner, *supra,* n. 7, at 298. Indeed, the Court has already recognized that resale price maintenance may increase output by inducing "demand-creating activity" by dealers (such as additional retail outlets, advertising and promotion, and product servicing) that out-weighs the additional sales that would result from lower prices brought about by dealer price competition. *Albrecht* v. *Herald Co., supra,* at 151 n. 7. These same output-enhancing possibilities of nonprice vertical restraints are relied upon by the majority as evidence of their social utility and economic soundness, *ante,* at 55, and as a justification for judging them under the rule of reason. The effect, if not the intention, of the Court's opinion is necessarily to call into question the firmly established *per se* rule against price restraints.

Although the case law in the area of distributional restraints has perhaps been less than satisfactory, the Court would do well to proceed more deliberately in attempting to improve it. In view of the ample reasons for distinguishing *Schwinn* from this case and in the absence of contrary congressional action, I would adhere to the principle that

> "each case arising under the Sherman Act must be determined upon the particular facts disclosed by the record, and . . . the opinions in those cases must be read in the light of their facts and of a clear recognition of the essential differences in the facts of those cases, and in the facts of any new case to
> 71 which the rule of earlier decisions *71 is to be aplied." *Maple Flooring Mfrs. Assn.* v. *United States,* 268 U. S. 563, 579 (1925).

In order to decide this case, the Court need only hold that a location clause imposed by a manufacturer with negligible economic power in the product market has a competitive impact sufficiently less restrictive than the *Schwinn* restraints to justify a rule-of-reason standard, even if the same weight is given here as in *Schwinn* to dealer autonomy. I therefore concur in the judgment.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

I would not overrule the *per se* rule stated in *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365 (1967), and would therefore reverse the decision of the Court of Appeals for the Ninth Circuit.

[*] Briefs of *amici curiae* urging affirmance w ere filed by *Lawrence T. Zimmerman* for the Associated Equipment Distributors; by *Lloyd N. Cutler, James S. Campbell, William T. Lake,* and *Donald F. Turner* for the Motor Vehicle Manufacturers Assn.; and by *Philip F. Zeidman* and *John A. Dienelt* for the International Franchise Assn.

[1] RCA at that time w as the dominant firm w ith as much as 60% to 70% of national television sales in an industry w ith more than 100 manufacturers.

[2] The number of retailers selling Sylvania products declined significantly as a result of the change, but in 1965 there w ere at least tw o franchised Sylvania retailers in each metropolitan center of more than 100,000 population.

[3] Sylvania imposed no restrictions on the right of the franchisee to sell the products of competing manufacturers.

[4] Sylvania's market share in San Francisco w as approximately 2.5%—half its national and northern California average.

[5] There are in fact four corporate petitioners: Continental T. V., Inc., A & G Sales, Sylpac, Inc., and S. A. M. Industries, Inc. All are ow ned in large part by the same individual, and all conducted business under the trade style of "Continental T. V." We adopt the convention used by the court below of referring to petitioners collectively as "Continental."

[6] Sylvania had achieved exceptional results in Sacramento, w here its market share exceeded 15% in 1965.

[7] In its findings of fact made in conjunction w ith Continental's plea for injunctive relief, the District Court rejected Sylvania's claim that its actions w ere prompted by independent concerns over Continental's credit. The jury's verdict is ambiguous on this point. In any event, w e do not consider it relevant to the issue before us.

[8] Although Sylvania contended in the District Court that its policy w as unilaterally enforced, it now concedes that its location restriction involved understandings or agreements w ith the retailers.

[9] The jury also found that Maguire had not conspired w ith Sylvania w ith respect to this violation. Other claims made by Continental w ere either rejected by the jury or w ithdraw n by Continental. Most important w as the jury's rejection of the allegation that the location restriction w as part of a larger scheme to fix prices. A pendent claim that Sylvania and Maguire had w illfully and maliciously caused injury to Continental's business in violation of California law also w as rejected by the jury, and a pendent breach-of-contract claim w as w ithdraw n by Continental during the course of the proceedings. The parties eventually stipulated to a judgment for Maguire on its claim against Continental.

[10] There w ere tw o major dissenting opinions. Judge Kilkenny argued that the present case is indistinguishable from *Schwinn* and that the jury had been correctly instructed. Agreeing w ith Judge Kilkenny's interpretation of *Schwinn,* Judge Brow ning stated that he found the interpretation responsive to and justified by the need to protect "`individual traders from unnecessary restrictions upon their freedom of action.'" 537 F. 2d, at 1021. See n. 21, *infra.*

[11] This Court has never given plenary consideration to the question of the proper antitrust analysis of location restrictions. Before *Schwinn* such restrictions had been sustained in *Boro Hall Corp.* v. *General Motors Corp.*, 124 F. 2d 822 (CA2 1942). Since the decision in *Schwinn,* location restrictions have been sustained by three Courts of Appeals, including the decision below . *Salco Corp.* v. *General Motors Corp.*, 517 F. 2d 567 (CA10 1975); *Kaiser* v. *General Motors Corp.*, 396 F. Supp. 33 (ED Pa. 1975), affirmance order, 530 F. 2d 964 (CA3 1976).

[12] The distinctions draw n by the Court of Appeals and endorsed in MR. JUSTICE WHITE'S separate opinion have no basis in *Schwinn.* The intrabrand competitive impact of the restrictions at issue in *Schwinn* ranged from complete elimination to mere reduction; yet, the Court did not even hint at any distinction on this ground. Similarly, there is no suggestion that the *per se* rule w as applied because of Schw inn's prominent position in its industry. That position w as the same w hether the bicycles w ere sold or consigned, but the Court's analysis w as quite different. In light of MR. JUSTICE WHITE'S emphasis on the "superior consumer acceptance" enjoyed by the Schw inn brand name, *post,* at 63, w e note that the Court rejected precisely that premise in *Schwinn.* Applying the rule of reason to the restrictions imposed in nonsale transactions, the Court stressed that there w as "no show ing that [competitive bicycles w ere] not in all

respects reasonably interchangeable as articles of competitive commerce with the Schwinn product" and that it did "not regard Schwinn's claim of product excellence as establishing the contrary." 388 U. S., at 381, and n. 7. Although *Schwinn* did hint at preferential treatment for new entrants and failing firms, the District Court below did not even submit Sylvania's claim that it was failing to the jury. Accordingly, MR. JUSTICE WHITE'S position appears to reflect an extension of *Schwinn* in this regard. Having crossed the "failing firm" line, MR. JUSTICE WHITE attempts neither to draw a new one nor to explain why one should be drawn at all.

[13] A former Assistant Attorney General in charge of the Antitrust Division has described *Schwinn* as "an exercise in barren formalism" that is "artificial and unresponsive to the competitive needs of the real world." Baker, Vertical Restraints in Times of Change: From *White* to *Schwinn* to Where?, 44 Antitrust L. J. 537 (1975). See, *e. g.,* Handler, The Twentieth Annual Antitrust Review—1967, 53 Va. L. Rev. 1667 (1967); McLaren, Territorial and Customer Restrictions, Consignments, Suggested Retail Prices and Refusals to Deal, 37 Antitrust L. J. 137 (1968); Pollock, Alternative Distribution Methods After *Schwinn,* 63 Nw. U. L. Rev. 595 (1968); Posner, Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions, 75 Colum. L. Rev. 282 (1975); Robinson, Recent Antitrust Developments: 1974, 75 Colum. L. Rev. 243 (1975); Note, Vertical Territorial and Customer Restrictions in the Franchising Industry, 10 Colum. J. L. & Soc. Prob. 497 (1974); Note, Territorial and Customer Restrictions: A Trend Toward a Broader Rule of Reason?, 40 Geo. Wash. L. Rev. 123 (1971); Note, Territorial Restrictions and Per Se Rules—A Re-evaluation of the *Schwinn* and *Sealy* Doctrines, 70 Mich. L. Rev. 616 (1972). But see Louis, Vertical Distributional Restraints Under *Schwinn* and *Sylvania:* An Argument for the Continuing Use of a Partial Per Se Approach, 75 Mich. L. Rev. 275 (1976); Zimmerman, Distribution Restrictions After *Sealy* and *Schwinn,* 12 Antitrust Bull. 1181 (1967). For a more inclusive list of articles and comments, see 537 F. 2d, at 988 n. 13.

[14] Indeed, as one commentator has observed, many courts "have struggled to distinguish or limit *Schwinn* in ways that are a tribute to judicial ingenuity." Robinson, *supra,* n. 13, at 272. Thus, the statement in *Schwinn* that post-sale vertical restrictions as to customers or territories are "unreasonable without more," 388 U. S., at 379, has been interpreted to allow an exception to the *per se* rule where the manufacturer proves "more" by showing that the restraints will protect consumers against injury and the manufacturer against product liability claims. See, *e. g., Tripoli Co.* v. *Wella Corp.,* 425 F. 2d 932, 936-938 (CA3 1970) (en banc). Similarly, the statement that Schwinn's enforcement of its restrictions had been "`firm and resolute,'" 388 U. S., at 372, has been relied upon to distinguish cases lacking that element. See, *e. g., Janel Sales Corp.* v. *Lanvin Parfums, Inc.,* 396 F. 2d 398, 406 (CA2 1968). Other factual distinctions have been drawn to justify upholding territorial restrictions that would seem to fall within the scope of the *Schwinn per se* rule. See, *e. g., Carter-Wallace, Inc.* v. *United States,* 196 Ct. Cl. 35, 44-46, 449 F. 2d 1374, 1379-1380 (1971) (*per se* rule inapplicable when purchaser can avoid restraints by electing to buy product at higher price); *Colorado Pump & Supply Co.* v. *Febco, Inc.,* 472 F. 2d 637 (CA10 1973) (apparent territorial restriction characterized as primary responsibility clause). One Court of Appeals has expressly urged us to consider the need in this area for greater flexibility. *Adolph Coors Co.* v. *FTC,* 497 F. 2d 1178, 1187 (CA10 1974). The decision in *Schwinn* and the developments in the lower courts have been exhaustively surveyed in ABA Antitrust Section, Monograph No. 2, Vertical Restrictions Limiting Intrabrand Competition (1977) (ABA Monograph No. 2).

[15] One of the most frequently cited statements of the rule of reason is that of Mr. Justice Brandeis in *Chicago Bd. of Trade* v. *United States,* 246 U. S. 231, 238 (1918):

"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."

[16] *Per se* rules thus require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its pro-competitive consequences. Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them. Once established, *per se* rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system of the more complex rule-of-reason trials, see *Northern Pac. R. Co.* v. *United States,* 356 U. S., at 5; *United States* v. *Topco Associates, Ine.,* 405 U. S. 596, 609-610 (1972), but those advantages are not sufficient in themselves to justify the creation of *per se* rules. If it were otherwise, all of antitrust law would be reduced to *per se* rules, thus introducing an unintended and undesirable rigidity in the law.

[17] After *White Motor Co.,* the Courts of Appeals continued to evaluate territorial restrictions according to the rule of reason. *Sandura Co.* v. *FTC,* 339 F. 2d 847 (CA6 1964); *Snap-On Tools Corp.* v. *FTC,* 321 F. 2d 825 (CA7 1963). For an exposition of the history of the antitrust analysis of vertical restrictions before *Schwinn,* see ABA Monograph No. 2, pp. 6-8.

[18] As in *Schwinn,* we are concerned here only with nonprice vertical restrictions. The *per se* illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy. As MR. JUSTICE WHITE notes, *post,* at 69-70, some commentators have argued that the manufacturer's motivation for imposing vertical price restrictions may be the same as for nonprice restrictions. There are, however, significant differences that could easily justify different treatment. In his concurring opinion in *White Motor Co.* v. *United States,* MR. JUSTICE BRENNAN noted that, unlike nonprice restrictions, "[r]esale price maintenance is not only designed to, but almost invariably does in fact, reduce price competition not only *among* sellers of the affected product, but quite as much *between* that product and competing brands." 372 U. S., at 268. Professor Posner also recognized that "industry-wide resale price maintenance might facilitate cartelizing." Posner, *supra,* n. 13, at 294 (footnote omitted); see R. Posner, Antitrust: Cases, Economic Notes and Other Materials 134 (1974); E. Gellhorn, Antitrust Law and Economics 252 (1976); Note, 10 Colum. J. L. & Soc. Prob., *supra,* n. 13, at 498 n. 12. Furthermore, Congress recently has expressed its approval of a *per se* analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and McGuire Acts allowing fair-trade pricing at the option of the individual States. Consumer Goods Pricing Act of 1975, 89 Stat. 801, amending 15 U. S. C. §§ 1, 45 (a). No similar expression of congressional intent exists for nonprice restrictions.

[19] Interbrand competition is the competition among the manufacturers of the same generic product—television sets in this case—and is the primary concern of antitrust law. The extreme example of a deficiency of interbrand competition is monopoly, where there is only one manufacturer. In contrast, intrabrand competition is the competition between the distributors—wholesale or retail—of the product of a particular manufacturer.

The degree of intrabrand competition is wholly independent of the level of interbrand competition confronting the manufacturer. Thus, there may be fierce intrabrand competition among the distributors of a product produced by a monopolist and no intrabrand competition among the distributors of a product produced by a firm in a highly competitive industry. But when interbrand competition exists, as it does among television manufacturers, it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product.

[20] The Court did not specifically refer to intrabrand competition, but this meaning is clear from the context.

[21] The Court also stated that to impose vertical restrictions in sale transactions would "violate the ancient rule against restraints on alienation." 388 U. S., at 380. This isolated reference has provoked sharp criticism from virtually all of the commentators on the decision, most of whom have regarded the Court's apparent reliance on the "ancient rule" as both a misreading of legal history and a perversion of antitrust analysis. See, *e. g.,* Handler, *supra,* n. 13, at 1684-1686; Posner, *supra,* n. 13, at 295-296; Robinson, *supra,* n. 13, at 270-271; but see Louis, *supra,* n. 13, at 276 n. 6. We quite agree with MR. JUSTICE STEWART'S dissenting comment in *Schwinn* that "the state of the common law 400 or even 100 years ago is irrelevant to the issue before us: the effect of the antitrust laws upon vertical distributional restraints in the American economy today." 388 U. S., at 392.

We are similarly unable to accept Judge Browning's interpretation of *Schwinn.* In his dissent below he argued that the decision reflects the view that the Sherman Act was intended to prohibit restrictions on the autonomy of independent businessmen even though they have no impact on "price, quality, and quantity of goods and services," 537 F. 2d, at 1019. This view is certainly not explicit in *Schwinn,* which purports to be based on an examination of the "impact [of the restrictions] upon the marketplace." 388 U. S., at 374. Competitive economies have social and political as well as economic advantages, see *c. g., Northern Pac. R. Co.* v. *United States,* 356 U. S., at 4, but an antitrust policy divorced from market considerations would lack any objective bench-marks. As Mr. Justice Brandeis reminded us: "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence." *Chicago Bd. of Trade* v. *United States,* 246 U. S., at 238. Although MR. JUSTICE WHITE'S opinion endorses Judge Browning's interpretation, *post,* at 66-68, it purports to distinguish *Schwinn* on grounds inconsistent with that interpretation, *post,* at 71.

[22] In that regard, the Court specifically stated that a more complete prohibition "might severely hamper smaller enterprises resorting to reasonable methods of meeting the competition of giants and of merchandising through independent dealers." 388 U. S., at 380. The Court also broadly hinted that it would recognize additional exceptions to the *per se* rule for new entrants in an industry and for failing firms, both of which were mentioned in *White Motor* as candidates for such exceptions. 388 U. S., at 374. The Court might have limited the exceptions to the *per se* rule to these situations, which present the strongest arguments for the sacrifice of intrabrand competition for interbrand competition. Significantly, it chose instead to create the more extensive exception for nonsale transactions which is available to all businesses, regardless of their size, financial health, or market share. This broader exception demonstrates even more clearly the Court's awareness of the "redeeming virtues" of vertical restrictions.

[23] Marketing efficiency is not the only legitimate reason for a manufacturer's desire to exert control over the manner in which his products are sold and serviced. As a result of statutory and common-law developments, society increasingly demands that manufacturers assume direct responsibility for the safety and quality of their products. For example, at the federal level, apart from more specialized requirements, manufacturers of consumer products have safety responsibilities under the Consumer Product Safety Act, 15 U. S. C. § 2051 *et seq.* (1970 ed., Supp. V), and obligations for warranties under the Consumer Product Warranties Act, 15 U.

S. C. § 2301 *et seq.* (1970 ed., Supp. V). Similar obligations are imposed by state law. See, *e. g.,* Cal. Civ. Code Ann. § 1790 *et seq.* (West 1973). The legitimacy of these concerns has been recognized in cases involving vertical restrictions. See, *e. g., Tripoli Co.* v. *Wella Corp.,* 425 F. 2d 932 (CA3 1970).

[24] "Generally a manufacturer would prefer the lowest retail price possible, once its price to dealers has been set, because a lower retail price means increased sales and higher manufacturer revenues." Note, 88 Harv. L. Rev. 636, 641 (1975). In this context, a manufacturer is likely to view the difference between the price at which it sells to its retailers and their price to the consumer as its "cost of distribution," which it would prefer to minimize. Posner, *supra,* n. 13, at 283.

[25] Professor Comanor argues that the promotional activities encouraged by vertical restrictions result in product differentiation and, therefore, a decrease in interbrand competition. This argument is flawed by its necessary assumption that a large part of the promotional efforts resulting from vertical restrictions will not convey socially desirable information about product availability, price, quality, and services. Nor is it clear that a *per se* rule would result in anything more than a shift to less efficient methods of obtaining the same promotional effects.

[26] We also note that *per se* rules in this area may work to the ultimate detriment of the small businessmen who operate as franchisees. To the extent that a *per se* rule prevents a firm from using the franchise system to achieve efficiencies that it perceives as important to its successful operation, the rule creates an incentive for vertical integration into the distribution system, thereby eliminating to that extent the role of independent businessmen. See, *e. g.,* Keck, The *Schwinn* Case, 23 Bus. Law. 669 (1968); Pollock, *supra,* n. 13, at 608-610.

[27] Continental's contention that balancing intrabrand and interbrand competitive effects of vertical restrictions is not a "proper part of the judicial function," Brief for Petitioners 52, is refuted by *Schwinn* itself. *United States* v. *Topco Associates, Inc.,* 405 U. S., at 608, is not to the contrary, for it involved a horizontal restriction among ostensible competitors.

[28] There may be occasional problems in differentiating vertical restrictions from horizontal restrictions originating in agreements among the retailers. There is no doubt that restrictions in the latter category would be illegal *per se,* see, *e. g., United States* v. *General Motors Corp.,* 384 U. S. 127 (1966); *United States* v. *Topco Associates, Inc., supra,* but we do not regard the problems of proof as sufficiently great to justify a *per se* rule.

[29] The location restriction used by Sylvania was neither the least nor the most restrictive provision that it could have used. See ABA Monograph No. 2, pp. 20-25. But we agree with the implicit judgment in *Schwinn* that a *per se* rule based on the nature of the restriction is, in general, undesirable. Although distinctions can be drawn among the frequently used restrictions, we are inclined to view them as differences of degree and form. See Robinson, *supra,* n. 13, at 279-280; Averill, Sealy, Schwinn and Sherman One: An Analysis and Prognosis, 15 N. Y. L. F. 39, 65 (1969). We are unable to perceive significant social gain from channeling transactions into one form or another. Finally, we agree with the Court in *Schwinn* that the advantages of vertical restrictions should not be limited to the categories of new entrants and failing firms. Sylvania was faltering, if not failing, and we think it would be unduly artificial to deny it the use of valuable competitive tools.

[30] The importance of *stare decisis* is, of course, unquestioned, but as Mr. Justice Frankfurter stated in *Helvering* v. *Hallock,* 309 U. S. 106, 119 (1940), "*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience."

[1] The franchised retailers would be prevented from engaging in discounting themselves if, under the *Colgate* doctrine, see *infra,* at 67, the manufacturer could lawfully terminate dealers who did not adhere to his suggested retail price.

[2] Given the Government's emphasis on the inhibiting effect of the Schwinn restrictions on discounting activities, the Court may well have been referring to this effect when it condemned the restrictions as "obviously destructive of competition." 388 U. S., at 379. But the Court was also heavily influenced by its concern for the freedom of dealers to control the disposition of products they purchased from Schwinn. See *infra,* at 66-69. In any event, the record in *Schwinn* illustrates the potentially greater threat to intrabrand competition posed by customer as opposed to location restrictions.

[3] Relying on the finding of the District Court, the Government argued:

"[T]he declared purpose of the Schwinn franchising system [was] to establish and exploit a distinctive identity and superior consumer acceptance for the Schwinn brand name as the Cadillac of bicycles, thereby enabling the charging of a premium price. . . . This scheme could not possibly succeed, and doubtless would long ago have been abandoned, if in the consumer's mind other bicycles were just as good as Schwinn's." Brief for United States, O. T. 1966, No. 25, p. 36.

[4] See, *e. g.,* F. Scherer, Industrial Market Structure and Economics Performance 10-11 (1970); P. Samuelson, Economics 485-491

(10th ed. 1976).

[5] Schwinn's national market share declined to 12.8% in the 10 years following the institution of its distribution program, at which time it ranked second behind a firm with a 22.8% share. 388 U. S., at 368-369. In the three years following the adoption of its locations practice, Sylvania's national market share increased to 5%, placing it eighth among manufacturers of color television sets. *Ante,* at 38-39. At this time Sylvania's shares of the San Francisco, Sacramento, and northern California markets were respectively 2.5%, 15%, and 5%. *Ante,* at 39 nn. 4, 6. The District Court made no findings as to Schwinn's share of local bicycle markets.

[6] For an extensive discussion of this effect of interbrand competition, see ABA Antitrust Section, Monograph No. 2, Vertical Restrictions Limiting Intrabrand Competition 60-67 (1977).

[7] Preston, Restrictive Distribution Arrangements: Economic Analysis and Public Policy Standards, 30 Law & Contemp. Prob. 506, 511 (1965); Posner, Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions, 75 Colum. L. Rev. 282, 293 (1975); Scherer, *supra,* n. 4, at 510.

[8] Cf. *Sandura Co.* v. *FTC,* 339 F. 2d 847, 850 (CA6 1964) (territorial restrictions on distributors imposed by small manufacturer "competing with and losing ground to the `giants' of the floor-covering industry" is not *per se* illegal); Baker, Vertical Restraints in Times of Change: From *White* to *Schwinn* to Where?, 44 Antitrust L. J. 537, 545-547 (1975) (presumptive illegality of territorial restrictions imposed by manufacturer with "any degree of market power"). The majority's failure to use the market share of Schwinn and Sylvania as a basis for distinguishing these cases is the more anomalous for its reliance, see *infra,* at 68-70, on the economic analysis of those who distinguish the anticompetitive effects of distribution restraints on the basis of the market shares of the distributors. See Posner, *supra,* at 299; Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division [II], 75 Yale L. J. 373, 391-429 (1966).

[9] *E. g.,* Bork, Legislative Intent and the Policy of the Sherman Act, 9 J. Law & Econ. 7 (1966); Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division [I], 74 Yale L. J. 775 (1965).

[10] Professor Posner writes, for example:

"There is no basis for choosing between [price fixing and market division] on social grounds. If resale price maintenance is like dealer price fixing, and therefore bad, a manufacturer's assignment of exclusive sales territories is like market division, and therefore bad too. . . .

. . . . .

"[If helping new entrants break into a market] is a good justification for exclusive territories, it is an equally good justification for resale price maintenance, which as we have seen is simply another method of dealing with the free-rider problem. . . . In fact, *any* argument that can be made on behalf of exclusive territories can also be made on behalf of resale price maintenance." Posner, *supra,* n. 7, at 292-293. (Footnote omitted.)

See Bork, *supra,* n. 8, at 391-464.

431 U.S. 720 (1977)

ILLINOIS BRICK CO. ET AL.
v.
ILLINOIS ET AL.

No. 76-404.

Supreme Court of United States.

Argued March 23, 1977.
Decided June 9, 1977.
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

722 *722 *Edward H. Hatton* argued the cause for petitioners. With him on the briefs were *Lynne E. McNown, Alan L. Metz, Samuel J. Betar, Earl E. Pollack, James P. Morgan, Thomas W. Johnston,* and *George B. Collins.*

Lee A. Freeman, Jr., Special Assistant Attorney General of Illinois, argued the cause for respondents. With him on the brief was *William J. Scott,* Attorney General.

Assistant Attorney General Baker argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Solicitor General Friedman* and *Carl D. Lawson.*[*]

723 *723 MR. JUSTICE WHITE delivered the opinion of the Court.

Hanover Shoe, Inc. v. *United Shoe Machinery Corp.,* 392 U. S. 481 (1968), involved an antitrust treble-damages action
724 *724 brought under § 4 of the Clayton Act[1] against a manufacturer of shoe machinery by one of its customers, a manufacturer of shoes. In defense, the shoe machinery manufacturer sought to show that the plaintiff had not been injured in its business as required by § 4 because it had passed on the claimed illegal overcharge to those who bought shoes from it. Under the defendant's theory, the illegal overcharge was absorbed by the plaintiff's customers—indirect purchasers of the defendant's shoe machinery—who were the persons actually injured by the antitrust violation.

In *Hanover Shoe* this Court rejected as a matter of law this defense that indirect rather than direct purchasers were the parties injured by the antitrust violation. The Court held that, except in certain limited circumstances,[2] a direct purchaser suing for treble damages under § 4 of the Clayton Act is injured within the meaning of § 4 by the full amount
725 of the overcharge paid by it and that the antitrust defendant is *725 not permitted to introduce evidence that indirect purchasers were in fact injured by the illegal overcharge. 392 U. S., at 494. The first reason for the Court's rejection of this offer of proof was an unwillingness to complicate treble-damages actions with attempts to trace the effects of the overcharge on the purchaser's prices, sales, costs, and profits, and of showing that these variables would have behaved differently without the overcharge. *Id.,* at 492-493.[3] A second reason for barring the pass-on defense was the Court's concern that unless direct purchasers were allowed to sue for the portion of the overcharge arguably passed on
726 to indirect purchasers, antitrust violators "would retain the fruits of their illegality" *726 because indirect purchasers "would have only a tiny stake in the lawsuit" and hence little incentive to sue. *Id.,* at 494.

In this case we once again confront the question whether the overcharged direct purchaser should be deemed for purposes of § 4 to have suffered the full injury from the overcharge; but the issue is presented in the context of a suit in which the plaintiff, an indirect purchaser, seeks to show its injury by establishing pass-on by the direct purchaser and in which the antitrust defendants rely on *Hanover Shoe*'s rejection of the pass-on theory. Having decided that in general a pass-on theory may not be used defensively by an antitrust violator against a direct purchaser plaintiff, we must now decide whether that theory may be used offensively by an indirect purchaser plaintiff against an alleged violator.

I

Petitioners manufacture and distribute concrete block in the Greater Chicago area. They sell the block primarily to masonry contractors, who submit bids to general contractors for the masonry portions of construction projects. The general contractors in turn submit bids for these projects to customers such as the respondents in this case, the State of Illinois and 700 local governmental entities in the Greater Chicago area, including counties, municipalities, housing authorities, and school districts. See 67 F. R. D. 461, 463 (ND Ill. 1975); App. 16-48. Respondents are thus indirect purchasers of concrete block, which passes through two separate levels in the chain of distribution before reaching respondents. The block is purchased directly from petitioners by masonry contractors and used by them to build masonry structures; those structures are incorporated into entire buildings by general contractors and sold to respondents.

727 Respondent State of Illinois, on behalf of itself and respondent local governmental entities, brought this antitrust treble-damages action under § 4 of the Clayton Act, alleging that *727 petitioners had engaged in a combination and conspiracy to fix the prices of concrete block in violation of § 1 of the Sherman Act.[4] The complaint alleged that the amounts paid by respondents for concrete block were more than $3 million higher by reason of this price-fixing conspiracy. The only way in which the antitrust violation alleged could have injured respondents is if all or part of the overcharge was passed on by the masonry and general contractors to respondents, rather than being absorbed at the first two levels of distribution. See *Illinois* v. *Ampress Brick Co.,* 536 F. 2d 1163, 1164 (CA7 1976).[5]

728 Petitioner manufacturers moved for partial summary judgment against all plaintiffs that were indirect purchasers of concrete block from petitioners, contending that as a matter of law only direct purchasers could sue for the alleged overcharge.[6] The District Court granted petitioners' motion, but the Court of Appeals reversed, holding that indirect purchasers such as respondents in this case can recover treble damages for an illegal overcharge if they can prove that the overcharge *728 was passed on to them through intervening links in the distribution chain.[7]

729 We granted certiorari, 429 U. S. 938 (1976), to resolve a conflict among the Courts of Appeals[8] on the question whether the offensive use of pass-on authorized by the decision below is consistent with *Hanover Shoe*'s restrictions on the defensive use of pass-on. We hold that it is not, and we reverse. We reach this result in two steps. First, we conclude that whatever rule is to be adopted regarding pass-on in antitrust damages actions, it must apply equally to plaintiffs and defendants. Because *Hanover Shoe* would bar petitioners from using respondents' pass-on theory as a defense to a treble-damages suit *729 by the direct purchasers (the masonry contractors),[9] we are faced with the choice of overruling (or narrowly limiting) *Hanover Shoe* or of applying it to bar respondents' attempt to use this pass-on theory offensively. Second, we decline to abandon the construction given § 4 in *Hanover Shoe*—that the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party "injured in his business or property" within the meaning of the section—in the absence of a convincing demonstration that the Court was wrong in *Hanover Shoe* to think that the effectiveness of the antitrust treble-damages action would be substantially reduced by adopting a rule that any party in the chain may sue to recover the fraction of the overcharge allegedly absorbed by it.

II

The parties in this case agree that however § 4 is construed with respect to the pass-on issue, the rule should apply equally to plaintiffs and defendants—that an indirect purchaser should not be allowed to use a pass-on theory to recover damages from a defendant unless the defendant would be allowed to use a pass-on defense in a suit by a direct purchaser. Respondents, in arguing that they should be allowed to recover by showing pass-on in this case, have conceded that petitioners should be allowed to assert a pass-on defense against direct purchasers of concrete block, Tr. of Oral Arg. 33, 48; they ask this Court to limit *Hanover Shoe*'s bar on pass-on defenses to its "particular factual context" of overcharges for capital goods used to manufacture new products. *Id.,* at 41; see *id.,* at 36, 47-48.

Before turning to this request to limit *Hanover Shoe,* we consider the substantially contrary position, adopted by our

dissenting Brethren, by the United States as *amicus curiae,* and by lower courts that have allowed offensive use of
730 pass-on, that the unavailability of a pass-on theory to a defendant *730 should not necessarily preclude its use by plaintiffs seeking treble damages against that defendant.[10] Under this view, *Hanover Shoe*'s rejection of pass-on would continue to apply to defendants unless direct and indirect purchasers were both suing the defendant in the same action; but it would not bar indirect purchasers from attempting to show that the overcharge had been passed on to them. We reject this position for two reasons.

First, allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants. Even though an indirect purchaser had already recovered for all or part of an overcharge passed on to it, the direct purchaser would still recover automatically the full amount of the overcharge that the indirect purchaser had shown to be passed on; similarly, following an automatic recovery of the full overcharge by the direct purchaser, the indirect purchaser could sue to recover the same amount. The risk of duplicative recoveries created by unequal application of the *Hanover Shoe* rule is much more substantial than in the more usual situation where the defendant is sued in two different lawsuits by plaintiffs asserting conflicting claims to the same fund. A one-sided application of *Hanover Shoe* substantially increases the possibility of inconsistent adjudications—and therefore of unwarranted multiple liability for the defendant —by *presuming* that one plaintiff (the direct purchaser) is entitled to full recovery while preventing the defendant from using that presumption against the other plaintiff; overlapping recoveries are certain to result from the
731 two lawsuits *731 unless the indirect purchaser is unable to establish any pass-on whatsoever. As in *Hawaii* v. *Standard Oil Co. of Cal.*, 405 U. S. 251, 264 (1972), we are unwilling to "open the door to duplicative recoveries" under § 4.[11]

Second, the reasoning of *Hanover Shoe* cannot justify unequal treatment of plaintiffs and defendants with respect to the permissibility of pass-on arguments. The principal basis for the decision in *Hanover Shoe* was the Court's perception
732 of the uncertainties and difficulties in analyzing price and output *732 put decisions "in the real economic world rather than an economist's hypothetical model," 392 U. S., at 493, and of the costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom.[12] This perception that the attempt to trace the complex economic adjustments to a change in the cost of a particular factor of production would greatly complicate and reduce the effectiveness of already protracted treble-damages proceedings applies with no less force to the assertion of pass-on theories by plaintiffs than it does to the assertion by defendants. However "long and complicated" the proceeding would be when defendants sought to prove pass-on, *ibid.,* they would be equally so when the same evidence was introduced by plaintiffs. Indeed, the evidentiary complexities and uncertainties involved in the defensive use of pass-on against a direct purchaser are multiplied in the offensive use of pass-on by a plaintiff several steps removed from the defendant in the chain of distribution. The demonstration of how much of the overcharge was
733 passed on by the first purchaser must be repeated at each point at which *733 the price-fixed goods changed hands before they reached the plaintiff.[13]

It is argued, however, that *Hanover Shoe* rests on a policy of ensuring that a treble-damages plaintiff is available to deprive antitrust violators of "the fruits of their illegality," *id.,* at 494, a policy that would be furthered by allowing plaintiffs but not defendants to use pass-on theories. See, *e. g., In re Western Liquid Asphalt Cases,* 487 F. 2d 191, 197 (CA9 1973), cert. denied *sub nom. Standard Oil Co. of Cal.* v. *Alaska,* 415 U. S. 919 (1974); Brief for United States as *Amicus*
734 *Curiae* 4-6, 12-13, 17-19.[14] We do not read the Court's *734 concern in *Hanover Shoe* for the effectiveness of the treble-damages remedy as countenancing unequal application of the Court's pass-on rule. Rather, we understand
735 *Hanover Shoe* *735 as resting on the judgment that the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it.

We thus decline to construe § 4 to permit offensive use of a pass-on theory against an alleged violator that could not use the same theory as a defense in an action by direct purchasers. In this case, respondents seek to demonstrate that masonry contractors, who incorporated petitioners' block into walls and other masonry structures, passed on the alleged overcharge on the block to general contractors, who incorporated the masonry structures into entire buildings, and that the general contractors in turn passed on the overcharge to respondents in the bids submitted for those buildings. We think it clear that under a fair reading of *Hanover Shoe* petitioners would be barred from asserting this theory in a suit by the masonry contractors.

In *Hanover Shoe* this Court did not endorse the broad exception that had been recognized in that case by the courts below—permitting the pass-on defense against middlemen who did not alter the goods they purchased before reselling them.[15] The masonry contractors here could not be included under this exception in any event, because they transform the concrete block purchased from defendants into the masonry portions of buildings. But this Court in
736 *Hanover Shoe* *736 indicated the narrow scope it intended for any exception to its rule barring pass-on defenses by citing, as the only example of a situation where the defense might be permitted, a preexisting cost-plus contract. In such a situation, the purchaser is insulated from any decrease in its sales as a result of attempting to pass on the overcharge, because its customer is committed to buying a fixed quantity regardless of price. The effect of the overcharge is essentially determined in advance, without reference to the interaction of supply and demand that complicates the determination in the general case. The competitive bidding process by which the concrete block involved in this case was incorporated into masonry structures and then into entire buildings can hardly be said to circumvent complex market interactions as would a cost-plus contract.[16]

We are left, then, with two alternatives: either we must overrule *Hanover Shoe* (or at least narrowly confine it to its facts), or we must preclude respondents from seeking to recover on their pass-on theory. We choose the latter course.

III

In considering whether to cut back or abandon the *Hanover Shoe* rule, we must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation. See *Edelman* v. *Jordan*, 415 U. S. 651, 671 (1974); *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406-408 (1932) (Brandeis, J., dissenting). This presumption of adherence to our prior decisions
737 construing legislative enactments would support our reaffirmance of the *Hanover Shoe* *737 construction of § 4, joined by eight Justices without dissent only a few years ago,[17] even if the Court were persuaded that the use of pass-on theories by plaintiffs and defendants in treble-damages actions is more consistent with the policies underlying the treble-damages action than is the *Hanover Shoe* rule. But we are not so persuaded.

Permitting the use of pass-on theories under § 4 essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge—from direct purchasers to middlemen to ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness.

As we have indicated, potential plaintiffs at each level in the distribution chain are in a position to assert conflicting claims to a common fund—the amount of the alleged overcharge —by contending that the entire overcharge was absorbed at that particular level in the chain.[18] A treble-damages action brought by one of these potential plaintiffs (or one class of potential plaintiffs) to recover the overcharge implicates all three of the interests that have traditionally been
738 thought to support compulsory joinder of absent and potentially adverse claimants: the interest of the defendant in *738 avoiding multiple liability for the fund; the interest of the absent potential plaintiffs in protecting their right to recover for the portion of the fund allocable to them; and the social interest in the efficient administration of justice and the avoidance of multiple litigation. Reed, Compulsory Joinder of Parties in Civil Actions, 55 Mich. L. Rev. 327, 330 (1957). See *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U. S. 102, 110-111 (1968); 7 C. Wright & A. Miller, Federal Practice and Procedure § 1602 (1972).

Opponents of the *Hanover Shoe* rule have recognized this need for compulsory joinder in suggesting that the defendant could interplead potential claimants under 28 U. S. C. § 1335.[19] But if the defendant, for any of a variety of reasons,[20] does not choose to interplead the absent potential claimants, there would be a strong argument for joining them as "persons needed for just adjudication" under Fed. Rule Civ. Proc. 19 (a).[21] See Comment, Standing to Sue in Antitrust

739 Cases: *739 The Offensive Use of Passing-On, 123 U. Pa. L. Rev. 976, 998 (1975). These absent potential claimants would seem to fit the classic definition of "necessary parties," for purposes of compulsory joinder, given in *Shields* v. *Barrow,* 17 How. 130, 139 (1855):

> "Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it."

See Notes of Advisory Committee on 1966 Amendment to Rule 19, 28 U. S. C. App., p. 7760; 7 C. Wright & A. Miller, *supra,* §§ 1604, 1618; 3A J. Moore, Federal Practice ¶ 19.08 (1974). The plaintiff bringing the treble-damages action would be required, under Fed. Rule Civ. Proc. 19 (c), to "state the names, if known," of these absent potential claimants; they should also be notified by some means that the action was pending.[22] Where, as would often be the case, the potential claimants at a particular level of distribution are so numerous that joinder of all is impracticable, a representative presumably would have to be found to bring them into the action as a class. See Fed. Rule Civ. Proc. 19 (d); 3A J. Moore, *supra,* ¶ 19.21.

It is unlikely, of course, that all potential plaintiffs could or would be joined. Some may not wish to assert claims to the
740 *740 overcharge; others may be unmanageable as a class; and still others may be beyond the personal jurisdiction of the court. We can assume that ordinarily the action would still proceed, the absent parties not being deemed "indispensable" under Fed. Rule Civ. Proc. 19 (b). See *Provident Tradesmens Bank & Trust Co.* v. *Patterson, supra.* But allowing indirect purchasers to recover using pass-on theories, even under the optimistic assumption that joinder of potential plaintiffs will deal satisfactorily with problems of multiple litigation and liability, would transform treble-damages actions into massive multiparty litigations involving many levels of distribution and including large classes of ultimate consumers remote from the defendant. In treble-damages actions by ultimate consumers, the overcharge would have to be apportioned among the relevant wholesalers, retailers, and other middlemen, whose representatives
741 presumably should be joined.[23] And in suits *741 by direct purchasers or middlemen, the interests of ultimate consumers are similarly implicated.[24]

There is thus a strong possibility that indirect purchasers remote from the defendant would be parties to virtually every treble-damages action (apart from those brought against defendants at the retail level). The Court's concern in *Hanover Shoe* to avoid weighing down treble-damages actions with the "massive evidence and complicated theories," 392 U. S., at 493, involved in attempting to establish a pass-on defense against a direct purchaser applies *a fortiori* to the attempt to trace the effect of the overcharge through each step in the distribution chain from the direct purchaser to the ultimate consumer. We are no more inclined than we were in *Hanover Shoe* to ignore the burdens that such an attempt would impose on the effective enforcement of the antitrust laws.

Under an array of simplifying assumptions, economic theory provides a precise formula for calculating how the overcharge is distributed between the overcharged party (passer) and its customers (passees). *If* the market for the passer's product is perfectly competitive; *if* the overcharge is imposed equally on all of the passer's competitors; and *if* the passer maximizes its profits, then the ratio of the shares of the overcharge borne by passee and passer will equal the ratio of the elasticities of supply and demand in the market for the passer's product.[25]

742 *742 Even if these assumptions are accepted, there remains a serious problem of measuring the relevant elasticities —the percentage change in the quantities of the passer's product demanded and supplied in response to a one percent change in price. In view of the difficulties that have been encountered, even in informal adversary proceedings, with the statistical techniques used to estimate these concepts, see Finkelstein, Regression Models in Administrative Proceedings, 86 Harv. L. Rev. 1442, 1444 (1973), it is unrealistic to think that elasticity studies introduced by expert witnesses will resolve the pass-on issue. We need look no further than our own difficulties with sophisticated statistical methodology that were evident last Term in *Gregg* v. *Georgia,* 428 U. S. 153 (1976), and its companion cases. See *id.,* at 184-185 (joint opinion of STEWART, POWELL, and STEVENS, JJ.); 233-236 (MARSHALL, J., dissenting); *Roberts* v. *Louisiana,* 428 U. S. 325, 354-355 (1976) (WHITE, J., dissenting).

More important, as the *Hanover Shoe* Court observed, 392 U. S., at 493, "in the real economic world rather than an economist's hypothetical model," the latter's drastic simplifications generally must be abandoned. Overcharged direct purchasers often sell in imperfectly competitive markets. They often compete with other sellers that have not been subject to the overcharge; and their pricing policies often cannot be explained solely by the convenient assumption of
743 profit maximization.[26] As we concluded in *Hanover Shoe*, 392 U. S., at 492, *743 attention to "sound laws of economics" can only heighten the awareness of the difficulties and uncertainties involved in determining how the relevant market variables would have behaved had there been no overcharge.[27]

It is quite true that these difficulties and uncertainties will be less substantial in some contexts than in others. There have been many proposals to allow pass-on theories in some of these contexts while preserving the *Hanover Shoe* rule in others. Respondents here argue, not without support from some lower courts,[28] that pass-on theories should be permitted for middlemen that resell goods without altering them and for contractors that add a fixed percentage markup to the cost of their materials in submitting bids. Brief for Respondents 9-30; Tr. of Oral Arg. 36-48. Exceptions to the *Hanover Shoe* rule have also been urged for other situations in which most of the overcharge is purportedly passed
744 on—for example, where a price-fixed good is a small but vital input into a *744 much larger product, making the demand for the price-fixed good highly inelastic. Compare *Philadelphia Housing Auth.* v. *American Radiator & Standard Sanitary Corp.*, 50 F. R. D. 13 (ED Pa. 1970), aff'd *sub nom. Mangano* v. *American Radiator & Standard Sanitary Corp.*, 438 F. 2d 1187 (CA3 1971), with *In re Master Key Antitrust Litigation*, 1973-2 Trade Cas. ¶ 74,680 (Conn.). See *Schaefer, supra* n. 25, at 918-925.

We reject these attempts to carve out exceptions to the *Hanover Shoe* rule for particular types of markets.[29] An exception allowing evidence of pass-on by middlemen that resell the goods they purchase of course would be of no avail to respondents, because the contractors that allegedly passed on the overcharge on the block incorporated it into buildings. See *supra,* at 735. An exception for the contractors here on the ground that they purport to charge a fixed percentage above their costs would substantially erode the *Hanover Shoe* rule without justification. Firms in many sectors of the economy rely to an extent on cost-based rules of thumb in setting prices. See F. Scherer, Industrial Market Structure and Economic Performance 173-179 (1970). These rules are not adhered to rigidly, however; the extent of the markup (or the allocation of costs) is varied to reflect demand conditions. *Id.,* at 176-177. The intricacies of tracing the effect of an overcharge on the purchaser's prices, costs, sales, and profits thus are not spared the litigants.

More generally, the process of classifying various market situations according to the amount of pass-on likely to be
745 *745 involved and its susceptibility of proof in a judicial forum would entail the very problems that the *Hanover Shoe* rule was meant to avoid. The litigation over where the line should be drawn in a particular class of cases would inject the same "massive evidence and complicated theories" into treble-damages proceedings, albeit at a somewhat higher level of generality. As we have noted, *supra,* at 735-736, *Hanover Shoe* itself implicitly discouraged the creation of exceptions to its rule barring pass-on defenses, and we adhere to the narrow scope of exemption indicated by our decision there.

The concern in *Hanover Shoe* for the complexity that would be introduced into treble-damages suits if pass-on theories were permitted was closely related to the Court's concern for the reduction in the effectiveness of those suits if brought by indirect purchasers with a smaller stake in the outcome than that of direct purchasers suing for the full amount of the overcharge. The apportionment of the recovery throughout the distribution chain would increase the overall costs of recovery by injecting extremely complex issues into the case; at the same time such an apportionment would reduce the benefits to each plaintiff by dividing the potential recovery among a much larger group. Added to the uncertainty of how much of an overcharge could be established at trial would be the uncertainty of how that overcharge would be apportioned among the various plaintiffs. This additional uncertainty would further reduce the incentive to sue. The combination of increasing the costs and diffusing the benefits of bringing a treble-damages action could seriously impair this important weapon of antitrust enforcement.

We think the longstanding policy of encouraging vigorous private enforcement of the antitrust laws, see, *e. g., Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 139 (1968), supports our adherence to the *Hanover Shoe*

746 rule, under which direct purchasers are not only spared the burden *746 of litigating the intricacies of pass-on but also are permitted to recover the full amount of the overcharge. We recognize that direct purchasers sometimes may refrain from bringing a treble-damages suit for fear of disrupting relations with their suppliers.[30] But on balance, and until there are clear directions from Congress to the contrary, we conclude that the legislative purpose in creating a group of " `private attorneys general' " to enforce the antitrust laws under § 4, *Hawaii* v. *Standard Oil Co. of Cal.*, 405 U. S. at 262, is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it.

It is true that, in elevating direct purchasers to a preferred position as private attorneys general, the *Hanover Shoe* rule denies recovery to those indirect purchasers who may have been actually injured by antitrust violations. Of course, as MR. JUSTICE BRENNAN points out in dissent, "from the deterrence standpoint, it is irrelevant to whom damages are paid, so long as some one redresses the violation." *Post,* at 760. But § 4 has another purpose in addition to deterring violators and depriving them of "the fruits of their illegality," *Hanover Shoe*, 392 U. S. at 494; it is also designed to compensate victims of antitrust violations for their injuries. *E. g., Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 485-486 (1977). *Hanover Shoe* does further the goal of compensation to the extent that the direct purchaser absorbs at least some and often most of the overcharge. In view of the considerations supporting the *Hanover Shoe* rule, we are unwilling to carry the compensation principle to its logical extreme by attempting to allocate damages
747 among all "those within the defendant's chain of distribution," *post,* at 761, especially *747 because we question the extent to which such an attempt would make individual victims whole for actual injuries suffered rather than simply depleting the overall recovery in litigation over pass-on issues. Many of the indirect purchasers barred from asserting pass-on claims under the *Hanover Shoe* rule have such a small stake in the lawsuit that even if they were to recover as part of a class, only a small fraction would be likely to come forward to collect their damages.[31] And given the difficulty of ascertaining the amount absorbed by any particular indirect purchaser, there is little basis for believing that the amount of the recovery would reflect the actual injury suffered.

748 *748 For the reasons stated, the judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL and MR. JUSTICE BLACKMUN join, dissenting.

Respondent State of Illinois brought this treble-damages civil antitrust action under § 4 of the Clayton Act on behalf of itself and various local governmental entities in the Greater Chicago area alleging that an overcharge in the price of concrete block used in the construction of public buildings was made by the petitioners, manufacturers and sellers of concrete block, pursuant to a price-fixing conspiracy in violation of § 1 of the Sherman Act, 15 U. S. C. § 1.[1] Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, broadly provides: "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . . ."

Decisions of the Court defining the reach of § 4 have been consistent with its broad objectives: to compensate victims of antitrust violations and to deter future violations. The Court has stated that § 4 "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers . . . [but] is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Mandeville Island*
749 *Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 236 (1948).[2] *749 Today's decision that § 4 affords a remedy only to persons who purchase directly from an antitrust offender is a regrettable retreat from that line of cases. Section 4 was clearly intended to operate to protect individual consumers who purchase through middlemen. Indeed, Congress acted on the premise that § 4 gave a cause of action to indirect as well as direct purchasers when it recently enacted the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 90 Stat. 1394-1396, 15 U. S. C. § 15c *et seq.* (1976 ed.), and authorized state attorneys general to sue as *parens patriae* to recover damages on behalf of citizens of their various States.

Today's decision flouts Congress' purpose and severely undermines the effectiveness of the private treble-damages action as an instrument of antitrust enforcement. For in many instances, the brunt of antitrust injuries is borne by indirect purchasers, often ultimate consumers of a product, as increased costs are passed along the chain of distribution.[3] In these instances, the Court's decision frustrates both the compensation and deterrence objectives of the treble-damages action. Injured consumers are precluded from recovering damages from manufacturers, and direct purchasers who act as middlemen have little incentive to sue suppliers so long as they may pass on the bulk of the illegal overcharges to the ultimate consumers. This frustration of the congressional scheme is in no way mandated by *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U. S. 481 (1968). To the contrary, the same considerations that
750 *Hanover Shoe* held *750 required rejection of the defendant's argument there, that because plaintiff had passed on cost increases to consumers in the form of higher prices defendant should be relieved of liability—especially the consideration that it is essential to the public interest to preserve the effectiveness of the private treble-damages action —require affirmance of the decision below construing § 4 to authorize respondent's suit.

I

In *Hanover Shoe, supra,* the Court held that a defendant in a treble-damages action could not escape liability, except in very limited circumstances,[4] by proof that the plaintiff had passed on illegal overcharges to others farther along in the chain of distribution.[5] The defendant in *Hanover Shoe,* United Shoe, argued that Hanover was not entitled to recover damages because the increased price it had paid for United's equipment[6] had in turn been reflected in the increased price at which Hanover had sold its shoes to the consuming public. The Court held that several reasons supported its conclusion that this defense was not available to United despite "the argument that sound laws of economics require" its recognition, 392 U. S., at 492. First, the Court followed earlier cases holding that the "victim of an overcharge is
751 [immediately] *751 damaged within the meaning of § 4 to the extent of that overcharge." *Id.,* at 491. The particularly apt precedent supporting this proposition was *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.,* 245 U. S. 531 (1918),[7] where a pass-on defense had been rejected because of "[t]he general tendency of the law, in regard to damages at least, . . . not to go beyond the first step," and the Court's belief that "[t]he carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum. . . ." *Id.,* at 533-534. In other words, the requirement of privity between plaintiff and defendant was a reason to deny defendant the pass-on defense, since otherwise the defendant would be able to profit by his own wrong. *Hanover Shoe* cannot be read, however, as limiting actions to parties in privity with one another. That was made clear in *Perkins* v. *Standard Oil Co.,* 395 U. S. 642, 648 (1969), decided the next Term, a price discrimination case in which the Court traced an illegal overcharge through several levels in the chain of distribution, ultimately holding that a plaintiff seeking to recover damages need show only a "causal connection between the price discrimination in violation of the [antitrust laws] and the injury suffered. . . . If there is sufficient evidence in the record to support an inference of causation, the ultimate conclusion as to what that evidence proves is for the jury." *Darnell-Taenzer* does, however, support *Hanover Shoe's* denial of the pass-on defense for the other reasons relied upon in *Hanover Shoe:* the difficulty of proving and quantifying a pass-on, and the role of the treble-damages action as the most effective means of antitrust enforcement. 392 U. S., at 492-494.

752 The Court correctly discerned that the difficulty of reconstructing *752 hypothetical pricing decisions,[8] would aggravate the already complex nature of antitrust litigation since pass-on defenses would become commonplace whenever the chain of distribution extended beyond the plaintiff. This would lessen the effectiveness of the treble-damages action, since ultimate consumers individually often suffer only minor damages and therefore have little incentive to bring suit. Limiting defendants' liability to the loss of profits suffered by direct purchasers would thus allow the antitrust offender to avoid having to pay the full social cost of his illegal conduct in many cases in which indirect purchasers failed to bring suit. Consequently,

> "those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in

effectiveness." *Id.,* at 494.

Hanover Shoe thus confronted the Court with the choice, as had been true in *Darnell-Taenzer,* of interpreting § 4 in a way that might overcompensate the plaintiff, who had certainly suffered some injury, or of defining it in a way that underdeters the violator by allowing him to retain a portion of his ill-gotten overcharges. The Court chose to interpret § 4 so as to allow the plaintiff to recover for the entire overcharge. This choice was consistent with recognition of the
753 importance *753 of the treble-damages action in deterring antitrust violations.[9] But *Hanover Shoe* certainly did not imply that an indirect purchaser would not also have a cause of action under § 4 when the illegal overcharges were passed on to him.

Despite the superficial appeal of the argument that *Hanover Shoe* should be applied "consistently," thus precluding plaintiffs and defendants alike from proving that increased costs were passed along the chain of distribution, there are sound reasons for treating offensive and defensive passing-on cases differently. The interests at stake in "offensive" passing-on cases, where the indirect purchasers sue for damages for their injuries, are simply not the same as the interests at stake in the *Hanover Shoe,* or "defensive" passing-on situation. There is no danger in this case, for example, as there was in *Hanover Shoe,* that the defendant will escape liability and frustrate the objectives of the treble-damages action. Rather, the same policies of insuring the continued effectiveness of the treble-damages action and preventing wrongdoers from retaining the spoils of their misdeeds favor allowing indirect purchasers to prove that overcharges were passed on to them. *Hanover Shoe* thus can and should be limited to cases of defensive assertion of the passing-on defense to antitrust liability, where direct and indirect purchasers are not parties in the same action.[10] I fully agree with the observation:

754 "The attempt to transform a rejection of a defense *754 because it unduly hampers antitrust enforcement into a reason for a complete refusal to entertain the claims of a certain class of plaintiffs seems an ingenious attempt to turn the decision [in *Hanover Shoe*] and its underlying rationale on its head." *In re Master Key Antitrust Litigation,* 1973-2 Trade Cas. ¶ 74,680, pp. 94,978-94, 979 (Conn.).

II

A

Today's decision goes far to frustrate Congress' objectives in creating the treble-damages action. Treble-damages actions were first authorized under § 7 of the Sherman Act, 26 Stat. 210. The legislative history of this section shows that it was conceived primarily as a remedy for "[t]he people of the United States as individuals," especially for consumers. See, *e. g.,* 21 Cong. Rec. 1767-1768 (1890) (remarks of Sen. George); see also *id.,* at 2612 (Sens. Teller and Reagan),
755 2615 (Sen. Coke), 2640 (Sen. Spooner).[11] In the Clayton Act of *755 1914, Congress extended the § 7 remedy to persons injured by "any violation of the antitrust laws." See *Brunswick Corp* v. *Pueblo Bowl-O-Mat, Inc.,* 429 U. S. 477, 486 n. 10 (1977), citing H. R. Rep. No. 627, 63d Cong., 2d Sess., 14 (1914). These actions were conceived primarily as " `open[ing] the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and giv[ing] the injured party ample damages for the wrong suffered.' "[12] *Brunswick, supra,* at 486 n. 10, quoting 51 Cong. Rec. 9073 (1914) (remarks of Rep. Webb); See, *e. g., id.,* at 9079 (Rep. Volstead), 9270 (Rep. Carlin), 9414-9417, 9466-9467, 9487-9495. See also the House debates following the conference committee report. *Id.,* at 16274-16275 (Rep. Webb), 16317-16319 (Rep. Floyd).

The Court has interpreted § 4 broadly, this in recognition of the plainly stated congressional objective, *Northern Pacific R. Co.* v. *United States,* 356 U. S. 1, 4 (1958), that the private treble-damages action play a paramount role in the enforcement of the fundamental economic policy of the Nation, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U. S. 100, 130-131 (1969); *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.,* 381 U. S. 311, 318 (1965), and has concluded that "the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws." *Perma Life Mufflers,*

Inc. v. *International Parts Corp.,* 392 U. S. 134, 139 (1968). The federal courts have accordingly been cautioned "not [to]
756 *756 add requirements to burden the private litigant beyond what is specifically set forth by Congress in [the antitrust] laws," *Radovich* v. *National Football League,* 352 U. S. 445, 454 (1957), and express approval has been given the "`tendency of the courts . . . to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery' for a proven invasion of the plaintiff's rights." *Bigelow* v. *RKO Radio Pictures,* 327 U. S. 251, 265-266 (1946). See also *Zenith Radio Corp.* v. *Hazeltine Research, Inc., supra,* at 130-131; *Perma Life Mufflers, Inc.* v. *International Parts Corp., supra; Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U. S., at 494. And *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.,* 364 U. S. 656, 660 (1961), emphasized that to plead a cause of action under § 4 "allegations adequate to show a violation and . . . that plaintiff was damaged thereby are all the law requires."

B

The recently enacted Hart-Scott-Rodino Antitrust Improvements Act of 1976 was expressly adopted to create "an effective mechanism to permit consumers to recover damages for conduct which is prohibited by the Sherman Act, by giving State attorneys general a cause of action [to sue as *parens patriae* on behalf of the States' citizens] against antitrust violators." S. Rep. No. 94-803, p. 6 (1976). Title III of the new Act responded to the holding of *Hawaii* v. *Standard Oil Co. of Cal.,* 405 U. S. 251 (1972), that the Clayton Act does not authorize a State to sue for damages for an injury to its general economy allegedly attributable to a violation of the antitrust laws. The Senate Report accompanying the new Act expressly found that "[t]he economic burden of most antitrust violations is borne by the consumer in the form of higher prices for goods and services," S. Rep. No. 94-803, *supra,* at 39, and it is clear that the new Act is intended to
757 provide a remedy *757 for injured consumers whether or not they purchased directly from the violator. The Senate Report states, *id.,* at 42:

> "A direct cause of action is granted the States to avoid the inequities and inconsistencies of restrictive judicial interpretations. . . . Section 4C is intended to assure that consumers are not precluded from the opportunity of proving the amount of their damage and to avoid problems with respect to manageability [of class actions], *standing, privity, target area, remoteness, and the like.*"[13] (Emphasis supplied.)

Representative Rodino, a sponsor, stated during the House debates:

> "[A]ssuming the State attorney general proves a violation, and proves that an overcharge was `passed on' to the consumers, injuring them `in their property'; that is, their pocketbooks—recoveries are authorized by the compromise bill whether or not the consumers purchased directly from the price fixer, or indirectly, from intermediaries, retailers, or middlemen. The technical and procedural argument that consumers have no `standing' whenever they are not `in privity' with the price fixer, and have not purchased directly
> 758 from him, is rejected by the compromise bill. Opinions relying on this procedural *758 technicality . . . are squarely rejected by the compromise bill." 122 Cong. Rec. H10295 (daily ed. Sept. 16, 1976).

It is difficult to see how Congress could have expressed itself more clearly. Even if the question whether indirect purchasers could recover for damages passed on to them was open before passage of the 1976 Act, and I do not believe that it was, Congress' interpretation of § 4 in enacting the *parens patriae* provision should resolve it in favor of their authority to sue. Indeed, the House Report accompanying the bill actually referred to the opinion of the District Court in this case as an example of the correct answer. N. 13, *supra.* The Court's tortuous efforts to impose a "consistency" upon this area of the law that Congress has so clearly rejected is a return to the "legal somersaults and twisting and turnings" of the Court's earlier opinions that ultimately led to the passage of the Clayton Act in 1914 to salvage the ailing Sherman Act., See 51 Cong. Rec. 9086 (1914) (remarks of Rep. Kelly).

III

Hanover Shoe correctly observed that the necessity of tracing a cost increase through several levels of a chain of

distribution "would often require additional long and complicated proceedings involving massive evidence and complicated theories." 392 U. S., at 493. But this may be said of almost all antitrust cases. *Hanover Shoe* itself highlights this unavoidable complication, in that it requires the plaintiff to prove a probable course of events which *would*
759 *have occurred* but for the violation.[14] In essence, estimating the amount of *759 damages passed on to an indirect purchaser is no different from and no more complicated than estimating what the middleman's selling price would have been, absent the violation. See *ante,* at 733 n. 13.

Nor should the fact that the price-fixed product in this case (the concrete block) was combined with another product (the buildings) before resale operate as an absolute bar to recovery. It may well be true, as the State claims, that the cost of the block was included separately in the project bids and therefore can be factored out from the price of the building with relative certainty. In any case, this is a factual matter to be determined based on the strength of the plaintiff's evidence.[15] See, *e. g., In re Western Liquid Asphalt Cases,* 487 F. 2d 191 (CA9 1973), cert. denied *sub nom. Standard Oil Co. of Cal.* v. *Alaska,* 415 U. S. 919 (1974). Admittedly, there will be many cases in which the plaintiff will be unable to prove that the overcharge was passed on. In others, the portion of the overcharge passed on may be only approximately determinable. But again, this problem hardly distinguishes this case from other antitrust cases. Reasoned estimation is required in all antitrust cases, but "while the damages [in such cases] may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate." *Story Parchment Co.* v. *Paterson Co.,* 282 U. S. 555, 563 (1931). See also *Bigelow* v. *RKO Radio Pictures,* 327 U. S., at 266; *Eastman Kodak Co.* v. *Southern Photo Materials Co.,* 273 U. S. 359, 379 (1927). Lack of precision in apportioning damages between direct and indirect purchasers is thus plainly not a
760 convincing reason for denying *760 indirect purchasers an opportunity to prove their injuries and damages. Moreover, from the deterrence standpoint, it is irrelevant to whom damages are paid, so long as someone redresses the violation. Antitrust violators are equally deterred whether the judgments against them are in favor of direct or indirect purchasers. *Hanover Shoe* said as much. The Court's decision recognized that some plaintiffs would recover more than their due, but concluded that the necessity of assuring that *someone* recover and thus deter future violations and prevent the antitrust offender from profiting by his illegal overcharge outweighed any resulting injustice.[16]

I concede that despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable. See, *e. g., Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.,* 429 U. S. 477 (1977); *Hawaii* v. *Standard Oil Co. of Cal.,* 405 U. S. 251 (1972). Courts have therefore developed various tests of antitrust "standing," not unlike the concept of proximate cause in tort law, to define that point. The definition has been variously articulated, usually in terms of two tests. The more restrictive test focuses on the directness of the injury;[17] the more liberal, and more widely accepted, on whether
761 the plaintiff is within the "target area" of the defendant's violation.[18] *761 But if the broad language of § 4 means anything, surely it must render the defendant liable to those within the defendant's chain of distribution. It would indeed be "paradoxical to deny recover to the ultimate consumer while permitting the middlemen a windfall recovery." P. Areeda, Antitrust Analysis: Problems, Text, Cases 75 (2d ed. 1974).

IV

I acknowledge some abstract merit in the argument that to allow indirect purchasers to sue, while, at the same time, precluding defendants from asserting pass-on defenses in suits by direct purchasers, subjects antitrust defendants to the risk of multiple liability. But as a practical matter, existing procedural mechanisms can eliminate this danger in most instances. Even though, as the Court says, no procedure currently exists which can eliminate the possibility entirely, *ante,* at 731 n. 11, the hypothetical possibility that a few defendants might be subjected to the danger of multiple liability does not, in my view, justify erecting a bar against all recoveries by indirect purchasers without regard to whether the particular case presents a significant danger of double recovery. The "double recovery" specter was argued in the Congress that passed the Hart-Scott-Rodino Act, and was rejected. The Senate Report recorded the Act's purpose to codify the holding of the Court of Appeals for the Ninth Circuit in *In re Western Liquid Asphalt Cases, supra:*

> " `We therefore see no problem of double recovery, and we believe that if this difficulty should arise in

> some other connection, the district court will be able to fashion relief accordingly. In addition to the court's control over its decree, numerous devices exist. We note that the consolidation of cases, which has already occurred, is one means of averting duplicitous awards. The short, four-year statute of limitations
> 762 is another; later suits, after *762 final judgment herein, are unlikely. 15 U. S. C. § 15b. In other cases, it may be that statutory interpleader, 28 U. S. C. § 1335, could be used by antitrust defendants to avoid double liability. If necessary, special masters may be appointed to handle complex cases. Finally, there are the doctrines of res judicata and collateral estoppel and procedures for compulsory joinder. The day is long past when courts, particularly federal courts, will deny relief to a deserving plaintiff merely because of procedural difficulties or problems of apportioning damages.'
>
> "We would prefer to place the burden of proving apportionment upon appellees, rather than deny all recovery to appellants. Such a burden would be the consequence of appellees' illegal acts, not appellants' suits. Where the choice is between a windfall to intermediaries or letting guilty defendants go free, liability is imposed. *Hanover Shoe, supra,* 392 U. S. at 494. So, too, between ultimate purchasers and defendants." S. Rep. No. 94-803, p. 44 (1976), quoting 487 F. 2d, at 201 (citation omitted).

Moreover, the possibility of multiple recovery arises in only two situations: (1) where suits by direct and indirect purchasers are pending at the same time but in different courts; and (2) where additional suits are filed after an award of damages based on the same violation in a prior suit.[19] In the first situation, the United States, Brief as *Amicus Curiae* 25, cogently points out that district courts may make use of the alternatives suggested by the Manual for Complex Litigation, 1 (pt. 2) J. Moore, Federal Practice (1976): district courts may use the intradistrict transfer power
763 created by 28 U. S. C. § 1404 (b), coordinate pretrial proceedings of cases pending in *763 different districts, or transfer cases to a single district pursuant to § 1404 (a). In addition, the Judicial Panel on Multidistrict Litigation is empowered by 28 U. S. C. § 1407 to transfer cases involving common questions of fact to any district for coordinated pretrial proceedings upon its determination that the transfer "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." After pretrial transfers under this section, cases can be consolidated and transferred to the same district for trial pursuant to the transfer power under § 1404 (a).[20] A further device mentioned in *Western Liquid Asphalt* is statutory interpleader under 28 U. S. C. § 1335, by which the defendant can bring all potential plaintiffs into the same court and require them to litigate *inter se* to determine their appropriate shares of the total recovery.[21]

True, there is a greater hypothetical danger of multiple recovery where suits are independently instituted after an earlier
764 suit based on the same violation has proceeded to judgment.[22] But even here the likelihood that defendants *764 will be subjected to multiple liability is, as a practical matter, remote. The extended nature of antitrust actions, often involving years of discovery, combines with the short four-year statute of limitations to make it impractical for potential plaintiffs to sit on their rights until after entry of judgment in the earlier suit.

The Court today regrettably weakens the effectiveness of the private treble-damages action as a deterrent to antitrust violations by, in most cases, precluding consumers from recovering for antitrust injuries. For in many instances, consumers, although indirect purchasers, bear the brunt of antitrust violations. To deny them an opportunity for recovery is particularly indefensible when direct purchasers, acting as middlemen, and ordinarily reluctant to sue their suppliers, [23] pass on the bulk of their increased costs to consumers farther along the chain of distribution. Congress has given
765 us a clear signal that § 4 is not to be read to have the restrictive *765 scope ascribed to it by the Court today. I would follow the congressional understanding and therefore would affirm.[24]

MR. JUSTICE BLACKMUN, dissenting.

I regard MR. JUSTICE BRENNAN'S dissenting opinion as persuasive and convincing, and I joint it without hesitation.

I add these few sentences only to say that I think the plaintiffs-respondents in this case, which they now have lost, are the victims of an unhappy chronology. If *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U. S. 481 (1968), had not preceded this case, and were it not "on the books," I am positive that the Court today would be affirming, perhaps unanimously, the judgment of the Court of Appeals. The policy behind the Antitrust Acts and all the signs point in that direction, and a conclusion in favor of indirect purchasers who could demonstrate injury would almost be compelled.

But *Hanover Shoe* is on the books, and the Court feels that it must be "consistent" in its application of pass-on. That,
766 *766 for me, is a wooden approach, and it is entirely inadequate when considered in the light of the objectives of the Sherman and Clayton Acts. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 tells us all that is needed as to Congress' present understanding of the Acts. Nevertheless, we must now await still another statute which, as the Court acknowledges, *ante,* at 734 n. 14, the Congress may adopt. One regrets that it takes so long and so much repetitious effort to achieve, and have this Court recognize, the obvious congressional aim.

[*] *Evelle J. Younger,* Attorney General, *Sanford N. Gruskin,* Chief Assistant Attorney General, *Warren J. Abbott,* Assistant Attorney General, and *Michael I. Spiegel* and *Richard N. Light,* Deputy Attorneys General, filed a brief for the State of California as *amicus curiae* urging affirmance.

A brief of *amici curiae* urging affirmance w as filed by the Attorneys General and other officials for their respective States as follow s: *Bruce E. Babbitt,* Attorney General, *John A. Baade,* Assistant Attorney General, and *Kenneth R. Reed,* of Arizona; *William J. Baxley,* Attorney General, and *William T. Stephens,* Assistant Attorney General, of Alabama; *Avrum M. Gross,* Attorney General, and *Joseph K. Donohue,* Assistant Attorney General, of Alaska; *Bill Clinton,* Attorney General, and *Frank B. Newell,* Deputy Attorney General, of Arkansas; *J. D. MacFarlane,* Attorney General, and *Robert F. Hill,* First Assistant Attorney General, of Colorado; *Carl R. Ajello,* Attorney General, and *Gerard J. Dowling* and *Larry H. Evans,* Assistant Attorneys General, of Connecticut; *Richard R. Wier, Jr.,* Attorney General, and *Regina M. Small,* Deputy Attorney General, of Delaw are; *Robert L. Shevin,* Attorney General, and *Charles R. Ranson,* Assistant Attorney General, of Florida; *Arthur K. Bolton,* Attorney General, and *R. Douglas Lackey,* Assistant Attorney General, of Georgia; *Ronald Y. Amemiya,* Attorney General, and *Nelson S. W. Chang,* Deputy Attorney General, of Haw aii; *Wayne L. Kidwell,* Attorney General, and *Rudolf D. Barchas,* Deputy Attorney General, of Idaho; *Theodore L. Sendak,* Attorney General, and *Donald P. Bogard,* of Indiana; *Richard C. Turner,* Attorney General, and *Gary H. Swanson,* Assistant Attorney General, of Iow a; *Curt T. Schneider,* Attorney General, and *Thomas H. Brill,* Assistant Attorney General, of Kansas; *Robert F. Stephens,* Attorney General, and *W. Patrick Stallard,* Assistant Attorney General, of Kentucky; *William J. Guste, Jr.,* Attorney General, and *John R. Flowers, Jr.,* Assistant Attorney General, of Louisiana; *Joseph E. Brennan,* Attorney General, and *Cheryl Harrington,* Assistant Attorney General, of Maine; *Francis B. Burch,* Attorney General, and *Thomas M. Wilson III,* Assistant Attorney General, of Maryland; *Francis X. Bellotti,* Attorney General, and *Paula W. Gold,* Assistant Attorney General, of Massachusetts; *Frank J. Kelley,* Attorney General, and *Edwin M. Bladen,* Assistant Attorney General, of Michigan; *Warren R. Spannaus,* Attorney General, and *Alan H. Maclin,* Special Assistant Attorney General, of Minnesota; *A. F. Summer,* Attorney General, and *Donald Clark, Jr.,* Special Assistant Attorney General, of Mississippi; *John Ashcroft,* Attorney General of Missouri; *Michael T. Greely,* Attorney General, and *Mike McGrath,* Assistant Attorney General, of Montana; *Paul L. Douglas,* Attorney General, and *Robert F. Bartle,* Assistant Attorney General, of Nebraska; *Robert List,* Attorney General, and *Donald Klasic,* Deputy Attorney General, of Nevada; *David H. Souter,* Attorney General, and *Wilfred John Funk,* Assistant Attorney General, of New Hampshire; *William F. Hyland,* Attorney General, and *Elias Abelson,* of New Jersey; *Toney Anaya,* Attorney General, and *Robert N. Hilgendorf,* Assistant Attorney General, of New Mexico; *Louis J. Lefkowitz,* Attorney General, and *John M. Desiderio,* Assistant Attorney General, of New York; *Rufus L. Edmisten,* Attorney General, and *G. Jona Poe, Jr.,* Special Deputy Attorney General, of North Carolina; *Allen I. Olson,* Attorney General, and *Lynn E. Erickson,* Assistant Attorney General, of North Dakota; *Larry Derryberry,* Attorney General, and *Paul C. Duncan,* Assistant Attorney General, of Oklahoma; *James A. Redden,* Attorney General of Oregon; *Robert P. Kane,* Attorney General, and *Vincent X. Yakowicz,* Solicitor General, of Pennsylvania; *Julius C. Michaelson,* Attorney General of Rhode Island; *Daniel R. McLeod,* Attorney General, and *Victor S. Evans,* Deputy Attorney General, of South Carolina; *William J. Janklow,* Attorney General, and *Thomas J. Welk,* Assistant Attorney General, of South Dakota; *Brooks McLemore,* Attorney General of Tennessee; *John L. Hill,* Attorney General, and *Lee C. Clyburn,* of Texas; *Robert B. Hansen,* Attorney General, and *William T. Evans,* Assistant Attorney General, of Utah; *M. Jerome Diamond,* Attorney General, and *Jay I. Ashman,* Assistant Attorney General, of Vermont; *Anthony F. Troy,* Chief Deputy Attorney General, and *John J. Miles,* Assistant Attorney General, of Virginia; *Slade Gorton,* Attorney General, and *Thomas L. Boeder,* Assistant Attorney General, of Washington; *Chauncey H. Browning, Jr.,* Attorney General, and *Gene Hal Williams,* Deputy Attorney General, of West Virginia; *Bronson C. LaFollette,* Attorney General, and *Michael L. Zaleski,* Assistant Attorney General, of Wisconsin; *V. Frank Mendicino,* Attorney General, *Charles J. Carroll,* Deputy Attorney General, and *Jim Gusea,* Assistant Attorney General, of Wyoming.

[1] Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, provides:

"Any person w ho shall be injured in his business or property by reason of anything forbidden in the antitrust law s may sue therefore in any district court of the United States in the district in w hich the defendant resides or is found or has an agent, w ithout respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

[2] The Court cited, as an example of when a pass-on defense might be permitted, the situation where "an overcharged buyer has a pre-existing `cost-plus' contract, thus making it easy to prove that he has not been damaged . . . ." 392 U. S., at 494. See *infra,* at 735-736.

[3] The Court explained the economic uncertainties and complexities involved in proving pass-on as follows:

"A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypothetical model, is what effect a change in a company's price will have on its total sales. Finally, costs per unit for a different volume of total sales are hard to estimate. Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued. Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable. On the other hand, it is not unlikely that if the existence of the defense is generally confirmed, antitrust defendants will frequently seek to establish its applicability. Treble-damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories." 392 U. S., at 492-493. (Footnote omitted.)

[4] Section 1 of the Sherman Act, c. 647, 26 Stat. 209, as amended, 15 U. S. C. § 1, provides in relevant part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . . ."

[5] Private treble-damages actions brought by masonry contractors, general contractors, and private builders were settled, without prejudice to this suit. 536 F. 2d, at 1164.

[6] The responses to petitioners' interrogatories indicated that only four of the plaintiffs represented by the State purchased concrete block directly from one of the petitioners. 67 F. R. D. 461, 463 (ND Ill. 1975). Only 7% of the 700 public entities named as plaintiffs were apparently able to state the cost of the concrete block used in their building projects. Brief for Petitioners 5 n.[**]. In the only example cited to us by the parties, the cost of the concrete block was reported as less than one-half of one percent of the total cost of the project. *Id.,* at 21 n.[*].

[7] The District Court based its grant of summary judgment against the indirect purchaser plaintiffs not on the ground that this Court's construction of § 4 in *Hanover Shoe* barred their attempt to show that the masonry and general contractors passed on the overcharge to them, but rather on the ground that these indirect purchasers lacked standing to sue for an overcharge on one product—concrete block—that was incorporated by the masonry and general contractors into an entirely new and different product—a building. 67 F. R. D., at 467-468. Although the Court of Appeals held that these indirect purchasers did have standing to sue for damages under § 4, it agreed with the District Court's reading of *Hanover Shoe.* 536 F. 2d, at 1164-1167. Because we find *Hanover Shoe* dispositive here, we do not address the standing issue, except to note, as did the Court of Appeals below, 536 F. 2d, at 1166, that the question of which persons have been injured by an illegal overcharge for purposes of § 4 is analytically distinct from the question of which persons have sustained injuries too remote to give them standing to sue for damages under § 4. See Handler & Blechman, Antitrust and the Consumer Interest: The Fallacy of *Parens Patriae* and A Suggested New Approach, 85 Yale L. J. 626, 644-645 (1976).

[8] Compare *Mangano* v. *American Radiator & Standard Sanitary Corp.,* 438 F. 2d 1187 (CA3 1971), aff'g *Philadelphia Housing Auth.* v. *American Radiator & Standard Sanitary Corp.,* 50 F. R. D. 13 (ED Pa. 1970), with *In re Western Liquid Asphalt Cases,* 487 F. 2d 191 (CA9 1973), cert. denied *sub nom. Standard Oil Co. of Cal.* v. *Alaska,* 415 U. S. 919 (1974); *West Virginia* v. *Chas. Pfizer & Co.,* 440 F. 2d 1079 (CA2), cert. denied *sub nom. Colter Drugs, Inc.* v. *Chas. Pfizer & Co.,* 404 U. S. 871 (1971), and the decision below, *Illinois* v. *Ampress Brick Co.,* 536 F. 2d 1163.

[9] See *infra,* at 734-735.

[10] *Post,* at 753 (BRENNAN, J., dissenting); *post,* at 765-766 (BLACKMUN, J., dissenting); Brief for United States as *Amicus Curiae* 4-6, 15-21; Tr. of Oral Arg. 50-54, 57-60; *West Virginia* v. *Chas. Pfizer & Co.,* 440 F. 2d, at 1086-1088; *Boshes* v. *General Motors Corp.,* 59 F. R. D. 589, 592-598 (ND Ill. 1973); *In re Master Key Antitrust Litigation,* 1973-2 Trade Cas. ¶ 74,680, p. 94,978 (Conn.); *Carnivale Bag Co.* v. *Slide-Rite Mfg. Corp.,* 395 F. Supp. 287, 290-291 (SDNY 1975). See also Brief for State of California as *Amicus Curiae* 6-12.

[11] In recognition of the need to avoid duplicative recoveries, courts adopting the view that pass-on theories should not be equally

available to plaintiffs and defendants have agreed that defendants should be allowed to assert a pass-on defense against a direct purchaser if an indirect purchaser is also attempting to recover on a pass-on theory *in the same lawsuit. E. g.,* *In re Western Liquid Asphalt Cases,* 487 F. 2d, at 200-201; *West Virginia* v. *Chas. Pfizer & Co.,* 440 F. 2d, at 1088. See also Comment, Standing to Sue in Antitrust Cases: The Offensive Use of Passing-On, 123 U. Pa. L. Rev. 976, 995-998 (1975); Comment, *Mangano* and Ultimate-Consumer Standing: The Misuse of the *Hanover* Doctrine, 72 Colum. L. Rev. 394, 410 (1972); Brief for United States as *Amicus Curiae* 25. Various procedural devices, such as the Multidistrict Litigation Act, 28 U. S. C. § 1407, and statutory interpleader, 28 U. S. C. § 1335, are relied upon to bring indirect and direct purchasers together in one action in order to apportion damages among them and thereby reduce the risk of duplicative recovery. These procedural devices cannot protect against multiple liability where the direct purchasers have already recovered by obtaining a judgment or by settling, as is more likely (and as occurred here, see n. 5, *supra*); acknowledging that the risk of multiple recoveries is inevitably increased by allowing offensive but not defensive use of pass-on, *e. g.,* Comment, 123 U. Pa. L. Rev., *supra,* at 994, proponents of this approach ultimately fall back on the argument that it is better for the defendant to pay sixfold or more damages than for an injured party to go uncompensated. *E. g.,* Comment, 72 Colum. L. Rev., *supra,* at 411; Tr. of Oral Arg. 58 ("a little slopover on the shoulders of the wrongdoers . . . is acceptable"). We do not find this risk acceptable.

Moreover, even if ways could be found to bring all potential plaintiffs together in one huge action, the complexity thereby introduced into treble-damages proceeding argues strongly for retaining the *Hanover Shoe* rule. See part III, *infra.*

[12] That this rationale was more important in the decision to bar the pass-on defense than the second reason—the concern that if pass-on defenses were permitted indirect purchasers would lack the incentive to sue and antitrust violators would retain their ill-gotten gains, see *supra,* at 725-726, is shown by the fact that the Court recognized an exception for pre-existing cost-plus contracts, which "mak[e] it *easy to prove* that [the direct purchaser] has not been damaged." 392 U. S., at 494. (Emphasis added.) The amount of the stake that the customers of the direct purchaser have in a lawsuit against the overcharge is not likely to depend on whether they buy under a cost-plus contract or in a competitive market, but the Court allowed a pass-on defense in the former situation because the pre-existing cost-plus contract makes easy the normally complicated task of demonstrating that the overcharge has not been absorbed by the direct purchaser. See Note, The Effect of Hanover Shoe on the Offensive Use of the Passing-on Doctrine, 46 So. Cal. L. Rev. 98, 108 (1972).

[13] Offensive use of pass-on by the last purchaser in the distribution chain is simpler in one respect than defensive use of pass-on against a direct purchaser that sells a product to other customers. In the latter case, even if the defendant shows that as a result of the overcharge the direct purchaser increased its price by the full amount of the overcharge, the direct purchaser may still claim injury from a reduction in the volume of its sales caused by its higher prices. This additional element of injury from reduced volume is not present in the suit by the final purchaser of the overcharged goods, where the issue regarding injury will be whether the defendant's overcharge caused the plaintiff to pay a higher price for whatever it purchased. But the final purchaser still will have to trace the overcharge through each step in the distribution chain. In our view, the difficulty of reconstructing the pricing decisions of intermediate purchasers at each step in the chain beyond the direct purchaser generally will outweigh any gain in simplicity from not having to litigate the effects of the passed-on overcharge on the direct purchaser's volume.

[14] We are urged to defer to evidence in the legislative history of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 90 Stat. 1394-1396, 15 U. S. C. § 15c *et seq.* (1976 ed.), that Congress understood *Hanover Shoe* as applying only to defendants. *Post,* at 756-758 (BRENNAN, J., dissenting); Brief for 47 States as *Amici Curiae* 14-15, n. 6; Brief for United States as *Amicus Curiae* 14-15, and n. 12. The House Report (apparently viewing the issue as one of standing, cf. n. 7, *supra*) endorsed the Ninth Circuit's view of "the pro-enforcement thrust of *Hanover Shoe*" in *In re Western Liquid Asphalt Cases, supra,* and criticized lower court decisions barring pass-on arguments by plaintiffs. H. R. Rep. No. 94-499, p. 6 n. 4 (1975). In addition, one of the sponsors of this legislation, Representative Rodino, clearly assumed that the issue of offensive use of pass-on under § 4 would be resolved favorably to plaintiffs by this Court. See 122 Cong. Rec. H10295 (daily ed., Sept. 16, 1976).

Congress made clear, however, that this legislation did not alter the definition of which overcharged persons were injured within the meaning of § 4. It simply created a new procedural device—*parens patriae* actions by States on behalf of their citizens—to enforce existing rights of recovery under § 4. The House Report quoted above stated that the *parens patriae* provision "creates no new substantive liability"; the relevant language of the newly enacted § 4C (a) of the Clayton Act tracks that of existing § 4. showing that it was intended only as "an alternative means . . . for the vindication of existing substantive claims." H. R. Rep. No. 94-499, *supra,* at 9. "The establishment of an alternative remedy does not increase any defendant's liability." *Ibid.* Representative Rodino himself acknowledged in the remarks cited above that this legislation did not create a right of recovery for consumers where one did not already exist.

We thus cannot agree with the dissenters that the legislative history of the 1976 Antitrust Improvements Act is dispositive as to the interpretation of § 4 of the Clayton Act, enacted in 1914, or the predecessor section of the Sherman Act, enacted in 1890. *post,* at 756-758. The cases cited by MR. JUSTICE BRENNAN, *post,* at 765 n. 24, to support his reliance on this legislation all involved specific statutory language that was thought to clarify the meaning of an earlier statute. *E. g.,* *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S.

367, 380-381 (1969) (language in 1959 amendment to § 315 of the Communications Act approved fairness doctrine adopted by FCC under the "public interest" standard of the original Act). Here, by contrast, Congress borrowed the language of § 4 in adding the *parens patriae* section. The views expressed by particular legislators as to the meaning of that language in § 4 "cannot serve to change the legislative intent of Congress . . . `since the statements were [made] after passage of the [Clayton] Act.' " *Regional Rail Reorganization Act Cases,* 419 U. S. 102, 132 (1974), quoting *National Woodwork Mfrs. Assn.* v. *NLRB,* 386 U. S. 612, 639 n. 34 (1967).

While we do not lightly disagree with the reading of *Hanover Shoe* urged by these legislators, we think the construction of § 4 adopted in that decision cannot be applied for the exclusive benefit of plaintiffs. Should Congress disagree with this result, it may, of course, amend the section to change it. But it has not done so in the recent *parens patriae* legislation.

[15] In a separate trial pursuant to Fed. Rule Civ. Proc. 42 (b), the District Court held that the defendant shoe machinery manufacturer was not permitted to assert a pass-on defense against its customer. 185 F. Supp. 826 (MD Pa.), aff'd, 281 F. 2d 481 (CA3), cert. denied, 364 U. S. 901 (1960). The District Court indicated that pass-on defenses were barred against "consumers" who use the defendant's product to make their own but not against "middlemen" who simply resell the defendant's product. 185 F. Supp., at 830-831. Both on interlocutory appeal and after trial on the merits, the Court of Appeals affirmed on the basis of the District Court's reasoning. See 392 U. S. at 488 n. 6.

[16] Another situation in which market forces have been superseded and the pass-on defense might be permitted is where the direct purchaser is owned or controlled by its customer. Cf. *Perkins* v. *Standard Oil Co.,* 395 U. S. 642, 648 (1969); *In re Western Liquid Asphalt Cases,* 487 F. 2d, at 197, 199.

[17] The sole dissenting Justice in *Hanover Shoe* did not reach the pass-on question. 392 U. S., at 513.

[18] In this Part, we assume that use of pass-on will be permitted symmetrically, if at all. This assumption, of course, reduces the substantial risk of multiple liability for defendants that is posed by allowing indirect purchasers to recover for the overcharge passed on to them while at the same time allowing direct purchasers automatically to collect the entire overcharge. See *supra,* at 730-731. But the possibility of inconsistent judgments obtained by conflicting claimants remains nonetheless. Even this residual possibility justifies bringing potential and actual claimants together in one action if possible.

[19] See n. 11, *supra.* Interpleader under Fed. Rule Civ. Proc. 22 (1) often would be unavailable because service of process for rule interpleader, as contrasted with statutory interpleader, does not run nationwide. See 3A J. Moore, Federal Practice ¶ 22.04[2] (1974).

[20] For example, a condition precedent for invoking statutory interpleader is the posting of a bond for the amount in dispute, 28 U. S. C. § 1335 (a) (2), see 3A J. Moore, *supra,* ¶ 22.10, and a defendant may be unwilling to put up a bond for the huge amounts normally claimed in multiple-party treble-damages suits. For a discussion of other circumstances in which statutory interpleader may be "impractical," see McGuire, The Passing-On Defense and the Right of Remote Purchasers to Recover Treble Damages under Hanover Shoe, 33 U. Pitt. L. Rev. 177, 197-198 (1971).

[21] Rule 19 (a) provides in part:

"A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest."

[22] See the comment of the Advisory Committee on the 1966 Amendment to Rule 19: "In some situations it may be desirable to advise a person who has not been joined of the fact that the action is pending, and in particular cases the court in its discretion may itself convey this information by directing a letter or other informal notice to the absentee." 28 U. S. C. App., p. 7760.

[23] *E. g., Philadelphia Housing Auth* v. *American Radiator & Standard Sanitary Corp.,* 50 F. R. D. 13 (ED Pa. 1970), aff'd *sub nom. Mangano* v. *American Radiator & Standard Sanitary Corp.,* 438 F. 2d 1187 (CA3 1971) (suit against manufacturers of plumbing fixtures on behalf of all homeowners in the United States). There often will be more levels of distribution or manufacture between the defendant and the ultimate consumers than the two levels (masonry and general contractors) in this case. For example, in *Philadelphia Housing Auth., supra,* the plaintiffs included homeowners who had bought used rather than new homes and who therefore had to show that each time their houses changed hands the sellers passed on part of the plumbing manufacturers' original overcharge. 50 F. R. D., at 19-20, 25-26. Treble-damages suits by ultimate consumers against any of the manufacturers of industrial raw materials or equipment that have been charged in recent Government price-fixing suits would involve not only several levels within a distribution chain, but also several separate chains of distribution; for example, chromite sand is used to make ingots, ingots

are used to make steel, and steel is used to make consumer products. Handler & Blechman, *supra* n. 7, at 640 n. 77, and see *id.,* at 636-637 (citing Justice Department price-fixing suits against defendants far removed from consumers).

[24] *E. g., Donson Stores, Inc.* v. *American Bakeries Co.,* 58 F. R. D. 481 (SDNY 1973) (motion to intervene by a putative class of 20 million consumers of bread in treble-damages action against bread manufacturers). Cf. Handler & Blechman, *supra,* n. 7, at 653 (arguing that the effect of legislation authorizing States to bring treble-damages actions on behalf of their citizens, see n. 14, *supra,* will be to interject claims on behalf of large classes of consumers into treble-damages suits brought by middlemen). Thus in this case the plaintiff housing authorities, App. 20, presumably have passed on part of the alleged overcharge to their tenants and subtenants, who would have to be brought into the suit before damages could be fairly apportioned.

[25] An overcharge imposed by an antitrust violator or group of violators on their customers is analytically equivalent to an excise tax imposed on the violator's product in the amount of the overcharge. The effect of such an overcharge can be calculated using the economic theorems for the incidence of an excise tax. See Schaefer, Passing-On Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis, 16 Wm. & Mary L. Rev. 883, 887, 893 (1975), and sources cited in *id.,* at 887 n. 21.

[26] Thus, in the instant case respondents have offered to prove that general and masonry contractors calculate their bids by adding a percentage markup to the cost of their materials, Brief for Respondents 20-23, rather than by attempting to equate marginal cost and marginal revenue as required by an explicit profit-maximizing strategy.

[27] MR. JUSTICE BRENNAN in dissent argues that estimating a passee's damages requires nothing more than estimating what the passer's price would have been absent the violation, and suggests that apportioning the overcharge throughout the distribution chain is "no different from and no more complicated" than the initial task of estimating the amount of the overcharge itself. *Post,* at 758-759, and n. 14. But as the dissent recognizes, *post,* at 749 n. 3. unless the indirect purchaser is at the end of the distribution chain it can claim damages not only from the portion of the overcharge it absorbs but also from the portion it passes on, which causes a reduction in sales volume under less than perfectly inelastic demand conditions. See n. 13, *supra.* The difficulties of the task urged upon us by the dissenters cannot be so easily brushed aside.

In any event, as we understand the dissenters' argument, it reduces to the proposition that because antitrust cases are already complicated there is little harm in making them more so. We disagree.

[28] See, *e. g., West Virginia* v. *Chas. Pfizer & Co.,* 314 F. Supp. 710, 745-746 (SDNY 1970), aff'd, 440 F. 2d 1079 (CA2 1971); *Boshes* v. *General Motors Corp.,* 59 F. R. D., at 597.

[29] We note that supporters of the offensive use of pass-on, other than litigants in particular cases, generally have not contended for a halfway rejection of *Hanover Shoe* that would permit offensive use of pass-on in some types of market situations but not in others. See, *e. g.,* Tr. of Oral Arg. 57 (United States as *amicus curiae*); Note, The Defense of "Passing On" in Treble Damage Suits Under the Antitrust Laws, 70 Yale L. J. 469, 476, 478 (1961); commentators cited in n. 11, *supra.*

[30] See, *e. g., In re Western Liquid Asphalt Cases,* 487 F. 2d, at 198; Wheeler, Antitrust Treble-Damage Actions: Do They Work? 61 Calif. L. Rev. 1319, 1325 (1973).

[31] Commentators have noted that recoveries in treble-damages actions aggregating large numbers of small claims often have failed to compensate the individuals on behalf of whom the suits have ben brought. *E. g.,* Handler, The Shift from Substantive to Procedural Innovations in Antitrust Suits—the Twenty-Third Annual Antitrust Review, 71 Colum. L. Rev. 1, 9-10 (1971); Wheeler, *supra,* n. 30, at 1339; Kirkham, Complex Civil Litigation—Have Good Intentions Gone Awry?, 70 F. R. D. 199, 206-207 (1976).

The dissenting opinion of MR. JUSTICE BRENNAN appears to suggest that the 1976 *parens patriae* legislation, see n. 14, *supra,* provides an answer to this problem of compensating indirect purchasers for small injuries. *Post,* at 764 n. 23. Quite to the contrary, the Act "recognizes that rarely, if ever, will all potential claimants actually come forward to secure their share of the recovery," and that "the undistributed portion of the fund . . . will often be substantial." H. R. Rep. No. 94-499, p.16 (1975). The portion of the fund recovered in a *parens patriae* action that is not used to compensate the actual injuries of antitrust victims is to be used as "a civil penalty . . . deposited with the State as general revenues," Clayton Act § 4E (2), 15 U. S. C. § 15e (2) (1976 ed.), enacted by the 1976 Act, or "for some public purposes benefiting, as closely as possible, the class of injured persons," such as reducing the price of the overcharged goods in future sales. H. R. Rep. No. 94-499, *supra,* at 16. That Congress chose to provide such innovative methods of distributing damages awarded in a *parens patriae* action under newly enacted § 4C of the Clayton Act, 15 U. S. C. § 15c (1976 ed.), does not eliminate the obstacles to compensating indirect purchasers bringing traditional suits under § 4.

[1] The block was sold to various general and special contractors who had successfully bid to construct public buildings. The State was thus an indirect purchaser of the block.

[2] There is, of course, a point beyond which antitrust defendants should not be held responsible for the remote consequences of their

actions. See the discussion in Part III, *infra,* at 760-761.

[3] The portion of an illegal overcharge that a direct purchaser can pass on depends upon the elasticity of demand in the relevant product market. If the market is relatively inelastic, he may pass on a relatively large portion. If demand is relatively elastic, he may not be able to raise his price and will have to absorb the increase, making it up by decreasing other costs or increasing sales volume. It is extremely unlikely that a middleman could pass on the entire cost increase. But rarely would he have to absorb the entire increase. R. Posner, Antitrust Cases, Economic Notes, and Other Materials 147-149 (1974).

[4] The opinion recognizes that "there might be situations—for instance, when an overcharged buyer has a pre-existing `cost-plus' contract, thus making it easy to prove that he has not been damaged—where the considerations requiring that the passing-on defense not be permitted in this case would not be present." 392 U. S., at 494.

[5] *Hanover Shoe,* did not involve the consumers of the plaintiff's shoes, to whom the overcharge allegedly was passed. United's passing-on argument is referred to as "defensive" passing on. The State's position, seeking recovery of illegal overcharges allegedly passed on to it and its citizens, is referred to as "offensive" passing on.

[6] Hanover alleged that United monopolized the shoe machinery industry in violation of § 2 of the Sherman Act by its practice of leasing but refusing to sell its shoemaking machinery.

[7] In *Darnell-Taenzer,* shippers brought suit for reparations against a railroad claiming that the railroad had charged unreasonable rates. The railroad argued that the shippers had in turn passed on to their customers any excess over the reasonable rate.

[8] "[T]he impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different . . . , he would have chosen a different price. . . ." 392 U. S., at 492-493. The Court further observed that it is equally difficult to ascertain "what effect a change in a company's price will have on its total sales"; and it is all but impossible to demonstrate that the particular plaintiff "could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued." *Id.,* at 493. See generally Posner, *supra,* n. 3, at 147-149.

[9] The pass-on defense in *Hanover Shoe* was asserted by a defendant against whom a prima facie case of liability had already been made out. The Clayton Act provides: "A final judgment . . . rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws . . . shall be prima facie evidence against such defendant . . . ." 15 U. S. C. § 16 (a). The Government had secured a judgment against United in *United States* v. *United Shoe Machinery Corp.,* 110 F. Supp. 295 (Mass. 1953), summarily aff'd, 347 U. S. 521 (1954).

[10] Commentators almost unanimously conclude that, despite *Hanover Shoe,* § 4 should be construed to authorize indirect purchasers to recover upon proof that increases were passed on to them. See, *e. g.,* Comment, Standing to Sue in Antitrust Cases: The Offensive Use of Passing-on, 123 U. Pa. L. Rev. 976 (1975); Comment, *Mangano* and Ultimate-Consumer Standing: The Misuse of the *Hanover* Doctrine, 72 Colum. L. Rev. 394 (1972); Note, The Effect of Hanover Shoe on the Offensive Use of the Passing-on Doctrine, 46 So. Cal. L. Rev. 98 (1972). But see Handler & Blechman, Antitrust and the Consumer Interest: The Fallacy of *Parens Patriae* and A Suggested New Approach, 85 Yale L. J. 626, 638-655 (1976). In addition, most courts have read *Hanover Shoe* as not preventing indirect purchasers from attempting to prove that they have been injured. See, *e. g., Yoder Bros., Inc.* v. *California-Florida Plant Corp.,* 537 F. 2d 1347 (CA5 1976); *In re Western Liquid Asphalt Cases,* 487 F. 2d 191 (CA9 1973), cert. denied *sub nom.* *Standard Oil Co. of Cal.* v. *Alaska,* 415 U. S. 919 (1974); *Illinois* v. *Bristol-Myers Co.,* 152 U. S. App. D. C. 367, 470 F. 2d 1276 (1972); *West Virginia* v. *Chas. Pfizer & Co.,* 440 F. 2d 1079 (CA2), cert, denied *sub nom.* *Cotler Drugs, Inc.* v. *Chas. Pfizer & Co.,* 404 U. S. 871 (1971); *In re Master Key Antitrust Litigation,* 1973-2 Trade Cas. ¶ 74,680 (Conn.).

[11] A further indication of Congress' desire to create a remedy for all persons, including consumers, even though their individual injuries might be comparatively slight, was the elimination of the jurisdictional-amount requirement for antitrust actions. See 21 Cong. Rec. 2612, 3148-3149 (1890) (remarks of Sens. Sherman and Edmunds).

[12] The fact that damages are trebled both aids deterrence and provides the incentive of compensation, since it encourages suits for relatively minor injuries.

[13] Congress rejected earlier Court of Appeals and District Court decisions erecting standing barriers to suits by indirect purchasers and chose instead to pattern the Act "after such innovative decisions as *In re Western Liquid Asphalt Cases,* 487 F. 2d 191 (9th Cir. 1973); *In re Master Key Litigation,* 1973 Trade Cases ¶ 74,680 and 1975 Trade Cases ¶ 60,377 (DC Conn.); *State of Illinois* v. *Ampress Brick Co.,* 1975 Trade Cases ¶ 60,295 (DC Ill.) [this case below]; *Carnivale Bag Co.* v. *Slide Rite Mfg.,* 1975 Trade Cases ¶ 60,370 (S. D. N. Y.); *In re Antibiotics Antitrust Actions,* 333 F. Supp. 278 (S. D. N. Y. 1971); and *West Virginia* v. *Charles Pfizer & Co.,* 440 F. 2d 1079 (2d Cir. 1971)." Congress accepted these decisions as correctly stating the law. S. Rep. No. 94-803, pp. 42-43 (1976).

[14] In *Hanover Shoe,* the measure of damages was the difference between the amount Hanover paid for the lease and the amount it

would have paid had United agreed to sell the machinery. It has been suggested that the burden of demonstrating a pass-on may be no more difficult or speculative than the plaintiff's initial task of proving an overcharge in the first instance. See Pollock, Automatic Treble Damages and the Passing-on Defense: The Hanover Shoe Decision, 13 Antitrust Bull. 1183, 1210 (1968).

[15] One commentator has suggested that, in deciding w hether to permit recovery by indirect purchasers in a particular case, courts should consider the number of intervening hands the product has passed through and the extent of its change in the process. P. Areeda, Antitrust Analysis: Problems, Text, Cases 75 (2d ed. 1974).

[16] This holding is consistent w ith the Court's continuing concern for the effectiveness of the treble-damages action, w hich has been sustained even w hen the plaintiff w as "no less morally reprehensible than the defendant" w ith w hom he had conspired. *Perma Life Mufflers, Inc.* v. *International Parts Corp.,* 392 U. S. 134, 139 (1968).

[17] See, *e. g., Loeb* v. *Eastman Kodak Co.,* 183 F. 704 (CA3 1910).

[18] Earlier this Term, *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.,* disallow ed a treble-damages recovery, stating that in order to recover antitrust plaintiffs must prove "*antitrust* injury, w hich is to say injury of the type the antitrust law s w ere intended to prevent and that flow s from that w hich makes [the] defendants' acts unlaw ful." 429 U. S., at 489. At least one Court of Appeals has rephrased the target-area test in terms of w hether the injury to the plaintiff is a reasonably foreseeable consequence of the defendant's illegal conduct. *Mulvey* v. *Samuel Goldwyn Productions,* 433 F. 2d 1073 (CA9 1970), cert. denied, 402 U. S. 923 (1971).

[19] If direct and indirect purchasers bring suit in the same court, the cases may be consolidated and damages allocated in accordance w ith Fed. Rule Civ. Proc. 42 (a). See *West Virginia* v. *Chas. Pfizer & Co.,* 440 F. 2d 1079 (CA2 1971).

[20] For a discussion of this process, see Note, The Judicial Panel and the Conduct of Multidistrict Litigation, 87 Harv. L. Rev. 1001 (1974); Comment, The Experience of Transferee Courts Under the Multidistrict Litigation Act, 39 U. Chi. L. Rev. 588 (1972).

[21] Petitioners suggest that interpleader may be an impractical alternative for some defendants, since it requires a defendant to complicate the suit by bringing in ultimate consumers and to post bond for the amount in controversy. See 28 U. S. C. § 1335 (a) (2). Although § 1335 clearly places a burden upon defendants w ho elect to use it in order to avoid potential multiple liability, that burden is not unique to antitrust cases, and Congress has clearly indicated that it considers the burden justified. See S. Rep. No. 94-803, p. 44 (1976).

[22] The problem of potential multiple recoveries is not present in this case. All suits against petitioners w ere filed in the Northern District of Illinois. Petitioners never sought consolidation under Fed. Rule Civ. Proc. 42 (a) and stipulated in settlements w ith direct purchasers that the settlement w ould not affect the rights of indirect purchasers.

[23] The opinion for the Court "recognize[s] that direct purchasers sometimes may refrain from bringing a treble-damages suit for fear of disrupting relations w ith their suppliers," but concludes that "on balance, and until there are clear directions from Congress to the contrary, w e conclude that the legislative purpose in creating a group of `private attorneys general' to enforce the antitrust law s . . . is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it." *Ante,* at 746. But the intent of Congress in enacting the *parens patriae* provision of the 1976 Act w as clearly to provide a mechanism to permit recovery by consumers, and this purpose is not furthered by a rule that w ill keep most consumers out of court.

The Court's opinion further observes that "[m]any of the indirect purchasers barred from asserting pass-on claims . . . have such a small stake in the law suit that even if they w ere to recover as part of a class, only a small fraction w ould be likely to come forw ard to collect their damages." *Ante,* at 747. Yet it w as precisely because of judicially perceived w eaknesses in the class action as a device for consumer recovery for antitrust violations that Congress enacted the *parens patriae* provision of the 1976 Act.

[24] Abundant authority sanctions deference to congressional indications in subsequent legislation regarding the congressional meaning in earlier Acts w orded consistently w ith that meaning. *NLRB* v. *Bell Aerospace Co.,* 416 U. S. 267, 275 (1974); *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 380 (1969); *FHA* v. *The Darlington, Inc.,* 358 U. S. 84, 90 (1958); *United States* v. *Stafoff,* 260 U. S. 477, 480 (1923); *New York & Norfolk R. Co.* v. *Peninsula Exchange,* 240 U. S. 34, 39 (1916). Although it is true, as the Court's opinion states, *ante,* at 734 n. 14, that the post-enactment statements of "particular legislators" w ho participated in the enactment of a statute cannot change its meaning, see *Regional Rail Reorganization Act Cases,* 419 U. S. 102, 132 (1974), quoting *National Woodwork Manufacturers Assn.* v. *NLRB,* 386 U. S. 612, 639 n. 34 (1967), in this case, the House and Senate Reports accompanying the amendments to § 4 of the Clayton Act clearly reveal the 94th Congress' interpretation of that section as permitting the kind of consumer action w hich the Court now prohibits. Moreover, it is no answ er to this to say that the new *parens patriae* provision w ill not in all cases directly compensate indirect purchasers, *ante,* at 747 n. 31, for it is clear that despite the difficulty of distributing benefits to such injured persons the new Act authorizes recovery by the State on their behalf.

DEPARTMENT OF JUSTICE

"FREQUENTLY ASKED QUESTIONS REGARDING THE ANTITRUST DIVISION'S LENIENCY PROGRAM AND MODEL LENIENCY LETTERS (November 19, 2008)"

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**FREQUENTLY ASKED QUESTIONS
REGARDING THE ANTITRUST DIVISION'S LENIENCY PROGRAM
AND MODEL LENIENCY LETTERS
(November 19, 2008)**

The Antitrust Division first implemented a leniency program in 1978 and substantially revised the program with the issuance of a Corporate Leniency Policy in 1993 and a Leniency Policy for Individuals in 1994.[1] Through the Division's leniency program, a corporation can avoid criminal conviction and fines, and individuals can avoid criminal conviction, prison terms, and fines, by being the first to confess participation in a criminal antitrust violation, fully cooperating with the Division, and meeting other specified conditions.

The Division has issued several speeches providing guidance on how the leniency program is implemented. It has also adopted model conditional leniency letters for both corporate and individual applicants to memorialize the agreement made with a leniency applicant.[2] The vast majority of the information in this paper restates what is available in prior policy statements. Therefore, this paper is meant to be a comprehensive and updated resource, and to provide guidance, on recurring issues regarding the implementation of the Division's Corporate Leniency Policy and Individual Leniency Policy. This paper discusses: (1) leniency application procedures; (2) the criteria for obtaining leniency under the Corporate Leniency Policy; (3) the criteria for obtaining leniency under the Individual Leniency Policy; (4) the conditional leniency letter; (5) the final, unconditional leniency letter and potential revocation of conditional leniency; and (6) confidentiality regarding leniency applications.

The Division's implementation of its leniency program has been greatly influenced by the views and input of the private bar and business community. The Division will continue to solicit their suggestions on how to make the program fair, transparent, and predictable. Therefore, we expect that we will periodically update and reissue these Frequently Asked Questions. Updated versions will be identified by a new posting date in the title of the paper.

[1] The Division's Corporate Leniency Policy and Leniency Policy for Individuals are available at http://www.usdoj.gov/atr/public/criminal/leniency.htm.

[2] The model conditional leniency letters are available at http://www.usdoj.gov/atr/public/criminal/leniency.htm.

I. Leniency Application Procedures

Application Contact Information

1. *Who does counsel for a potential applicant contact to apply for leniency?*

The Division's Deputy Assistant Attorney General for Criminal Enforcement ("Criminal DAAG") reviews all requests for leniency.[3] An applicant's counsel may contact the Criminal DAAG directly at 202-514-3543 to apply for leniency. However, counsel is not required to call the Criminal DAAG to initiate an application, but instead may contact any one of the three Division field offices or the Division's National Criminal Enforcement Section in Washington, D.C.[4] For example, if there is an existing investigation involving the subject matter of the application, it likely will be more expeditious for counsel to contact the investigating staff. In such cases, Division staff will promptly alert the Criminal DAAG of the application.

Securing a Marker

The Division understands that when corporate counsel first obtains indications of a possible criminal antitrust violation, authoritative personnel for the company may not have sufficient information to know for certain whether the corporation has engaged in such a violation, an admission of which is required to obtain a conditional leniency letter.[5] Counsel should understand, however, that time is of the essence in making a leniency application. The Division grants only one corporate leniency per conspiracy, and in applying for leniency, the company is in a race with its co-conspirators and possibly its own employees who may also be preparing to apply for individual leniency. On a number of occasions, the second company to inquire about a leniency application has been beaten by a prior applicant by only a matter of hours. Thus, the Division has established a marker system to hold an applicant's place in the line for leniency while the applicant gathers more information to support its leniency application.

[3] Note that the Corporate Leniency Policy, which was issued in 1993, states that the Director of Operations reviews corporate leniency applications, and the Leniency Policy for Individuals, which was issued in 1994, states that the Deputy Assistant Attorney General for Litigation reviews individual leniency applications. Both of the leniency policies were written before the Division created the Criminal DAAG position and gave that position oversight of the Division's criminal enforcement program, including the Division's leniency program.

[4] The phone numbers for making leniency applications to the field offices and Washington criminal section are: Chicago Field Office 312-353-7523; National Criminal Enforcement Section 202-307-1166; New York Field Office 212-264-0390; and San Francisco Field Office 415-436-6677.

[5] See discussion at question 5 below.

2. ***What is a marker, and how is it used in the leniency application process?***

The Division frequently gives a leniency applicant a "marker" for a finite period of time to hold its place at the front of the line for leniency while counsel gathers additional information through an internal investigation to perfect the client's leniency application. While the marker is in effect, no other company can "leapfrog" over the applicant that has the marker.

To obtain a marker, counsel must: (1) report that he or she has uncovered some information or evidence indicating that his or her client has engaged in a criminal antitrust violation; (2) disclose the general nature of the conduct discovered; (3) identify the industry, product, or service involved in terms that are specific enough to allow the Division to determine whether leniency is still available and to protect the marker for the applicant; and (4) identify the client.[6] As noted above, when corporate counsel first obtains indications of a possible criminal antitrust violation, authoritative personnel for the company may not have sufficient information to enable them to admit definitively to such a violation. While confirmation of a criminal antitrust violation is not required at the marker stage, in order to receive a marker counsel must report that he or she has uncovered information or evidence suggesting a possible criminal antitrust violation, e.g. price fixing, bid rigging, capacity restriction, or allocation of markets, customers, or sales or production volumes. With respect to the product or service involved in the violation, in some cases, an identification of the industry will be sufficient for the Division to determine whether leniency is available. For example, there may be no pending investigations of any products or services in that particular industry. In other cases, an identification of the specific product or service or other identifying information, such as the geographic location of affected customers or one or more of the subject companies, may be necessary in order for the Division to determine whether leniency is available.

Because companies are urged to seek leniency at the first indication of wrongdoing, the evidentiary standard for obtaining a marker is relatively low, particularly in situations where the Division is not already investigating the wrongdoing. For example, if an attorney gave a compliance presentation and after the presentation an employee reported to the attorney a conversation the employee had overheard about his employer's potential price-fixing activities, this information would be sufficient to obtain a marker. However, the burden is higher when the Division already is in possession of information about the illegal activity. For example, it is not enough for counsel to state merely that the client has received a grand jury subpoena or has been searched during a

[6] It is also possible in limited circumstances for counsel to secure a very short-term "anonymous" marker without identifying his or her client. An anonymous marker is given when counsel wants to secure the client's place first in line for leniency by disclosing the other information listed above, but needs more time to verify additional information before providing the client's name. For example, the Division might give counsel two or three days to gather additional information and to report the client's identity to the Division.

Division investigation and that counsel wants a marker to investigate whether the client has committed a criminal antitrust violation.

A marker is provided for a finite period. The length of time an applicant is given to perfect its leniency application is based on factors such as the location and number of company employees counsel needs to interview, the amount and location of documents counsel needs to review, and whether the Division already has an ongoing investigation at the time the marker is requested. A 30-day period for an initial marker is common, particularly in situations where the Division is not yet investigating the wrongdoing. If necessary, the marker may be extended at the Division's discretion for an additional finite period as long as the applicant demonstrates it is making a good-faith effort to complete its application in a timely manner.

II. Corporate Leniency Criteria

3. ***What are the criteria for obtaining corporate leniency, and is corporate leniency available both before and after an investigation has begun?***

Leniency is available for corporations either before or after a Division investigation has begun. The Corporate Leniency Policy includes two types of leniency, Type A Leniency and Type B Leniency. Type A Leniency is available only before the Division has received any information about the activity being reported from any source, while Type B is available even after the Division has received information about the activity. Detailed below are the criteria for each type of leniency.

Leniency Before an Investigation Has Begun ("Type A Leniency")

Leniency will be granted to a corporation reporting illegal antitrust activity before an investigation has begun if the following six conditions are met:

(1) At the time the corporation comes forward, the Division has not received information about the activity from any other source.

(2) Upon the corporation's discovery of the activity, the corporation took prompt and effective action to terminate its participation in the activity.

(3) The corporation reports the wrongdoing with candor and completeness and provides full, continuing, and complete cooperation to the Division throughout the investigation.

(4) The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials.

(5) Where possible, the corporation makes restitution to injured parties.

(6) The corporation did not coerce another party to participate in the activity and clearly was not the leader in, or the originator of, the activity.

If the corporation does not meet all six of the Type A Leniency conditions, it may still qualify for leniency if it meets the conditions of Type B Leniency.

Alternative Requirements for Leniency ("Type B Leniency")

A company will qualify for leniency even after the Division has received information about the illegal antitrust activity, whether this is before or after an investigation is formally opened, if the following conditions are met:

(1) The corporation is the first to come forward and qualify for leniency with respect to the activity.

(2) At the time the corporation comes in, the Division does not have evidence against the company that is likely to result in a sustainable conviction.

(3) Upon the corporation's discovery of the activity, the corporation took prompt and effective action to terminate its part in the activity.

(4) The corporation reports the wrongdoing with candor and completeness and provides full, continuing, and complete cooperation that advances the Division in its investigation.

(5) The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials.

(6) Where possible, the corporation makes restitution to injured parties.

(7) The Division determines that granting leniency would not be unfair to others, considering the nature of the activity, the confessing corporation's role in the activity, and when the corporation comes forward.

The "First-in-the-Door" Requirement

4. *Can more than one company qualify for leniency?*

No. Under both Type A and Type B, only the first qualifying corporation may be granted leniency for a particular antitrust conspiracy. Condition 1 of Type A leniency requires that the Division has not yet received information about the illegal antitrust activity being reported from any other source, and Condition 1 of Type B leniency requires that the company is the first to come forward and qualify for leniency. Under the policy that only the first qualifying corporation receives conditional leniency,[7] there have been dramatic differences in the disposition of the criminal liability of corporations

[7] The conditional nature of the Division's leniency letters is discussed in Section IV below.

whose respective leniency applications to the Division were very close in time. Thus, companies have a huge incentive to make a leniency application as quickly as possible.

Criminal Violation

5. *Does a leniency applicant have to admit to a criminal violation of the antitrust laws before receiving a conditional leniency letter?*

Yes. The Division's leniency policies were established for corporations and individuals "reporting their illegal antitrust activity," and the policies protect leniency recipients from criminal conviction. Thus, the applicant must admit its participation in a criminal antitrust violation involving price fixing, bid rigging, capacity restriction, or allocation of markets, customers, or sales or production volumes before it will receive a conditional leniency letter. Applicants that have not engaged in criminal violations of the antitrust laws have no need to receive leniency protection from a criminal violation and will receive no benefit from the leniency program.

When the model corporate conditional leniency letter was first drafted, the Division did not employ a marker system. Thus, companies received conditional leniency letters far earlier in the process, often before the company had an opportunity to conduct an internal investigation. However, the Division's practice has changed over time. The Division now employs a marker system, and the Division provides the company with an opportunity to investigate thoroughly its own conduct. While the applicant may not be able to confirm that it committed a criminal antitrust violation when it seeks and receives a marker, by the end of the marker process, before it is provided with a conditional leniency letter, it should be in a position to admit to its participation in a criminal violation of the Sherman Act. The Division may also insist on interviews with key executives of the applicant who were involved in the violation before issuing the conditional leniency letter. A company that argues that an agreement to fix prices, rig bids, restrict capacity, or allocate markets might be inferred from its conduct but that cannot produce any employees who will admit that the company entered into such an agreement generally has not made a sufficient admission of criminal antitrust violation to be eligible for leniency. A company that, for whatever reason, is not able or willing to admit to its participation in a criminal antitrust conspiracy is not eligible for leniency. Previously the model conditional leniency letters referred to the conduct being reported as "*possible* [. . . price fixing, bid rigging, market allocation] or other conduct violative of Section 1 of the Sherman Act." (emphasis added). Because applicants must report a criminal violation of the antitrust laws before receiving a conditional leniency letter, the word "possible" has been deleted from the model letter, and a reference to "or other conduct constituting a criminal violation of Section 1 of the Sherman Act" has been added to the model letters.[8]

[8] Model Corporate Conditional Leniency Letter, introductory paragraph and paragraph #1; *see also* Model Individual Conditional Leniency Letter, introductory paragraph and paragraph #1.

Non-Antitrust Crimes

6. ***Does the Division's leniency program apply to any non-antitrust crimes?***

As explained below, in some instances, the Division's leniency program provides some protection for non-antitrust violations, and in some instances, it does not. The model corporate conditional leniency letter provides leniency from the Antitrust Division "for any act or offense [the applicant] may have committed [time period covered] in connection with the anticompetitive activity being reported." Thus, this language provides leniency from the Antitrust Division not only for a criminal antitrust violation, but also for other offenses committed in connection with the antitrust violation. For example, conduct that is usually integral to the commission of a criminal antitrust violation, such as mailing, faxing, or emailing bids agreed upon with competitors, can constitute other offenses, such as mail or wire fraud violations or conspiracies to defraud. On occasion, other types of offenses may also occur in connection with a criminal antitrust violation. A cartelist may bribe a purchasing agent to steer contracts to the designated winning bidders in connection with a bid-rigging scheme, or payoffs received in connection with a bid-rigging scheme may not be reported as income to the Internal Revenue Service. As stated above, the protections of a conditional leniency letter apply to such additional offenses that are committed in connection with the antitrust violation.

The conditional leniency letter, however, only binds the Antitrust Division, and not other federal or state prosecuting agencies. For example, if a qualifying leniency applicant participated in a bid-rigging conspiracy and also bribed a foreign public official in return for steering contracts in violation of the Foreign Corrupt Practices Act ("FCPA"), the Antitrust Division would not prosecute the leniency applicant for either the bid-rigging conspiracy or the FCPA violation if the FCPA violation was committed in connection with the bid rigging. If the FCPA violation was not committed in connection with the bid rigging, the leniency letter would provide no protection from the Antitrust Division with respect to the FCPA violation. Moreover, the leniency letter would not prevent the Criminal Division of the U.S. Justice Department or any other prosecuting agency from prosecuting the applicant for a FCPA violation regardless of whether that violation was committed in connection with the antitrust offense. If the applicant has exposure for an antitrust and non-antitrust violation, the applicant may seek non-prosecution protection for the non-antitrust violation in a separate agreement in return for self-reporting that violation to the relevant prosecuting agency pursuant to the Department's Principles of Federal Prosecution of Business Organizations.[9] The factors that will be weighed in deciding whether to prosecute a company for non-antitrust conduct can be found at U.S.A.M. 9-28.300. To date, in situations where the additional offense has consisted of conduct that is usually integral to the commission of any criminal antitrust violation, such as mail or wire fraud or conspiracy to defraud resulting from the mailing or wire transmission of announcements of fixed prices, there have been

[9] U.S. Attorney's Manual ("U.S.A.M.") 9-28.000, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm.

no instances where a separate prosecuting agency has elected to prosecute such conduct by a leniency applicant.

<u>Expanding Leniency Protection for Subsequently Discovered Conduct</u>

7. ***If during the course of its internal investigation, an applicant discovers evidence that the anticompetitive activity was broader than originally reported, for example, in terms of its geographic scope or the products covered by the conspiracy, will the applicant's leniency protection be expanded to include the newly discovered conduct?***

Yes, under the conditions discussed below. Companies frequently apply for leniency before completing their own internal investigations in order to ensure their place at the front of the line. As a result, the Division may learn from one of the applicant's employees of anticompetitive activity that is more extensive than the conduct originally reported and thus that falls outside the scope of the conditional leniency letter. For example, an applicant's executives may report evidence showing that the anticompetitive activity was broader in terms of its geographic scope or the products covered by the conspiracy. In such cases, assuming that the applicant has not tried to conceal the conduct, that it is providing full, continuing, and complete cooperation, *and that the applicant can meet the criteria for leniency on the newly discovered conduct it reported,* the leniency coverage will be expanded to include such conduct. If the newly discovered conduct is part of the original conspiracy reported, the leniency protection for the expanded conduct typically will be accomplished by issuing an addendum to the original leniency letter. However, if the newly discovered conduct constitutes a separate conspiracy, the new leniency protection will be provided in a separate corporate conditional leniency letter.

<u>"Amnesty Plus"</u>

8. ***If a company is under investigation for one antitrust conspiracy but is too late to obtain leniency for that conspiracy, can it receive any benefits in its plea agreement for that conspiracy by reporting its involvement in a separate antitrust conspiracy?***

Yes. A large percentage of the Division's investigations have been initiated as a result of evidence developed during an investigation of a completely separate conspiracy. This pattern has led the Division to take a proactive approach to attracting leniency applications by encouraging subjects and targets of investigations to consider whether they may qualify for leniency in other markets where they compete. For example, consider the following hypothetical fact pattern.

> *As a result of cooperation received pursuant to a leniency application in the widgets market, a grand jury is investigating the other four producers in that market, including XYZ, Inc., for their participation in an international cartel. As part of its internal investigation, XYZ, Inc., uncovers information of its executives' participation not only in a widgets cartel but also in a separate conspiracy in the sprockets market. The*

government has not detected the sprockets cartel because the leniency applicant was not a competitor in that market and no other investigation has disclosed the cartel activity. XYZ, Inc. is interested in cooperating with the Division's widgets investigation and seeking leniency by reporting its participation in the sprockets conspiracy. Assuming XYZ, Inc. qualifies for leniency with respect to the sprockets conspiracy, what benefits can XYZ, Inc. receive by following this path?

XYZ, Inc. can obtain what the Division refers to as "Amnesty Plus." In such a case, the Division would grant leniency to XYZ, Inc. in the sprockets investigation, meaning that XYZ, Inc. would pay zero dollars in fines for its role in the sprockets conspiracy and none of its officers, directors, and employees who admitted to the Antitrust Division their knowledge of, or participation in, the sprockets conspiracy and fully and truthfully cooperated with the Division would receive prison terms or fines in connection with the sprockets conspiracy. *Plus*, the Division would recommend to the sentencing court that XYZ, Inc. receive a substantial additional discount in its fine for its participation in the widgets cartel-- *i.e.*, a discount that takes into consideration the company's cooperation in both the widgets and sprockets investigations,[10] and would, therefore, be greater than the discount it would have received for cooperation in the widgets investigation alone. Consequently, XYZ, Inc. would receive dual credit for coming forward and cooperating in the sprockets investigation both in terms of obtaining leniency in that matter and in terms of receiving a greater reduction in the recommended widgets fine.

9. *How is the Amnesty Plus discount calculated?*

The size of the Amnesty Plus discount depends on a number of factors, including: (1) the strength of the evidence provided by the cooperating company in the leniency product; (2) the potential significance of the violation reported in the leniency application, measured in such terms as the volume of commerce involved, the geographic scope, and the number of co-conspirator companies and individuals; and (3) the likelihood the Division would have uncovered the additional violation absent the self-reporting, *i.e.,* if there were little or no overlap in the corporate participants and/or the culpable executives involved in the original cartel under investigation and the Amnesty Plus matter, then the credit for the disclosure would be greater. Of these three factors, the first two are given the most weight.[11]

[10] *See* United States Sentencing Guidelines §8C4.1 (substantial assistance departure), *available at* http://www.ussc.gov/guidelin.htm.

[11] For a fuller discussion of the Division's Amnesty Plus program as well as the benefits generally of providing "second-in-the-door" cooperation, see Scott D. Hammond, Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations, Speech Before the ABA Antitrust Section 2006 Spring Meeting (March 29, 2006), *available at* http://www.usdoj.gov/atr/public/speeches/215514.htm.

10. ***If the leniency applicant is a subject or target of, or a defendant in, a separate investigation, will the applicant's conditional leniency letter contain any changes from the model corporate conditional leniency letter?***

Yes. An additional paragraph will be included when necessary in the model corporate conditional leniency letter to make clear that the protection afforded to the company and its executives pursuant to the letter, as well as their cooperation obligations, extend only to the activity reported pursuant to the leniency application and not to the separate investigation. In so doing, the letter will detail the company's acknowledgement of its status and that of its directors, officers, and employees as subjects, targets, or defendants in the separate investigation; the lack of effect of the conditional leniency letter on the ability of the United States to prosecute it and its directors, officers, and employees in that separate investigation; and the lack of effect of the separate investigation on the cooperation obligations of the company and its directors, officers, and employees under the conditional leniency letter. Specifically, the model paragraph for such a situation is as follows:

> 5. **Gadget Investigation**: Applicant acknowledges that it is a [subject/target of] [defendant in] a separate investigation into [price-fixing, bidding-rigging, and market-allocation] activity, or other conduct constituting a criminal violation of Section 1 of the Sherman Act, 15 U.S.C. § 1,[and related statutes,] in the gadget industry [insert geographic scope--e.g. in the United States and elsewhere] and that some of its current and former directors, officers, or employees are, or may become, subjects, targets, or defendants in that separate investigation. Nothing in this Agreement limits the United States from criminally prosecuting Applicant or any of its current or former directors, officers, or employees in connection with the gadget investigation. The status of Applicant or any of its current or former directors, officers, or employees as a subject, target, or defendant in the gadget investigation does not abrogate, limit, or otherwise affect Applicant's cooperation obligations under paragraph 2 above, including its obligation to use its best efforts to secure the ongoing, full, and truthful cooperation of covered employees, or the cooperation obligations of covered employees under paragraph 4 above. A failure of a covered employee to comply fully with his or her obligations described in paragraph 4 above includes, but is not limited to, regardless of any past or proposed cooperation, not making himself or herself available in the United States for interviews and testimony in trials, grand jury, or other proceedings upon the request of attorneys and agents of the United States in connection with the anticompetitive activity being reported because he or she has been, or anticipates being, charged, indicted, or arrested in the United States for violations of federal antitrust [and related statutes]involving the gadget industry. Such a failure also includes, but is not limited to, not responding fully and truthfully to all inquiries of the United States in connection with the anticompetitive activity being reported because his or her responses may also relate to, or tend to incriminate him or her in, the gadget investigation. Failure to comply fully with his or her cooperation obligations further includes,

> but is not limited to, not producing in the United States all documents, including personal documents and records, and other materials requested by attorneys and agents of the United States in connection with the anticompetitive activity being reported because those documents may also relate to, or tend to incriminate him or her in, the gadget investigation. The cooperation obligations of paragraph 4 above do not apply to requests by attorneys and agents of the United States directed at [price-fixing, bid-rigging, or market-allocation] activity in the gadget industry if such requests are not, in whole or in part, made in connection with the anticompetitive activity being reported. The Antitrust Division may use any documents, statements, or other information provided by Applicant or by any of its current or former directors, officers, or employees to the Division at any time pursuant to this Agreement against Applicant or any of its current or former directors, officers, or employees in any prosecution arising out of the gadget investigation, as well as in any other prosecution.[12]

In addition, directors, officers and employees of the applicant who are subjects, targets, or defendants in the separate investigation but who are interviewed by the Division in connection with his or her employer's leniency application will be given a separate letter in which the individual acknowledges his or her status in the separate investigation and acknowledges that the leniency letter governs the conditions of the individual's eligibility for leniency protection with respect to the anticompetitive activity being reported pursuant to the leniency letter. Specifically, the model letter for these acknowledgements states:

> Dear [Name]:
>
> On ____ __, 20XX the Antitrust Division of the United States Department of Justice and [Generic Company, Ltd. ("Applicant")] entered into an agreement granting Applicant conditional leniency for its participation in [price fixing, bid rigging, and market allocation] or other conduct constituting a criminal violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, in the widget industry [insert geographic scope: e.g., in the United States and elsewhere] ("Applicant Agreement"). A copy of the Applicant Agreement is attached. You are a "covered employee" as defined in paragraph 2(c) of the Applicant Agreement. You are also a [subject/target of] [defendant in] the Antitrust Division's gadget investigation as referenced in paragraph 5 of the Applicant Agreement.
>
> The Applicant Agreement governs the terms and conditions of your eligibility for leniency protection in the widget investigation. Your signature below signifies that you have read, understood, and will comply with the terms

[12] Paragraph #5, Model Dual Investigations Leniency Letter, *available at* http://www.usdoj.gov/atr/public/criminal/leniency.htm.

and conditions of the Applicant Agreement. Please sign, and have your attorney sign, below in acknowledgment.[13]

<u>Meaning of "Discovery of the Illegal Activity"</u>

11. ***Both Type A and Type B leniency require that "[t]he corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity." How does the Division interpret "discovery of the illegal activity being reported," especially when high-level officials of the company participated in the cartel?***

Questions have arisen about what it means for the corporation to "discover" the illegal activity being reported. More specifically, in cases (usually involving small, closely held corporations) where the top executives, board members, or owners participated in the conspiracy, it has been suggested that the corporation may not be eligible for leniency because the corporation's "discovery" of the activity arguably occurred when those participants joined the conspiracy.

The Division, however, generally considers the corporation to have discovered the illegal activity at the earliest date on which either the board of directors or counsel for the corporation (either inside or outside) was first informed of the conduct at issue. Thus, the fact that top executives, individual board members, or owners participated in the conspiracy does not necessarily bar the corporation from eligibility for leniency. The purpose of this interpretation is to ensure that as soon as the authoritative representatives of the company for legal matters -- the board or counsel representing the corporation -- are advised of the illegal activity, they take action to cease that activity. In the case of a small closely held corporation in which the board of directors is never formally advised of the activity, because all members of the board are conspirators, the corporation still may qualify under this provision if the activity is terminated promptly after legal counsel is first informed of the activity.

[13] Model Dual Investigations Acknowledgement Letter for Employees, *available at* http://www.usdoj.gov/atr/public/criminal/leniency.htm.

12. ***Does the grant of conditional leniency always cover activity up until the date of the conditional leniency letter?***

The grant of conditional leniency usually protects the applicant for any activity committed in connection with a criminal antitrust violation prior to the date of the conditional leniency letter. This is because, in the vast majority of cases, leniency applicants approach the Division promptly after discovery of the anticompetitive activity in order to enhance the likelihood that they are the first applicant and that a co-conspirator or an employee does not beat them in the race to obtain leniency. In such cases, paragraph #3 of the Division's model corporate conditional leniency letter provides that "[T]he Antitrust Division agrees not to bring any criminal prosecution against Applicant for any act or offense it may have committed prior to the date of this letter in connection with the anticompetitive activity being reported." In rare cases in which there is a significant lapse in time between the date the applicant discovered the anticompetitive activity being reported and the date the leniency application was made, and hence there is a significant lapse in time between the date the applicant was required to take prompt and effective action to terminate its participation in the conspiracy and the date the applicant reported the activity to the Division, the Division reserves the right to grant conditional leniency only up to the date the applicant represents it terminated its participation in the activity. Thus, in such cases, the Division also likely will insist on insertion of a discovery date and a termination date in paragraph #1 of the corporate conditional leniency letter. The discovery date and termination date representations would be that the applicant "discovered the anticompetitive activity being reported in or about [month/year] and terminated its participation in the activity in or about [month/year]."[14] The applicant bears the burden of proving the accuracy of this representation.[15]

Termination of Participation in Anticompetitive Activity

13. ***What constitutes "prompt and effective action to terminate [the applicant's] participation in the anticompetitive activity being reported upon discovery of the activity?"***

The model corporate conditional leniency letter requires a leniency applicant to promptly terminate its participation in the anticompetitive activity being reported upon

[14] *See* n.2, Model Corporate Conditional Leniency Letter.

[15] Model Corporate Conditional Leniency Letter, paragraph #1. ("Applicant agrees that it bears the burden of proving its eligibility to receive leniency, including the accuracy of the representations made in this paragraph and that it fully understands the consequences that might result from a revocation of leniency as explained in paragraph 3 of this Agreement.") Logically, the applicant, as the party seeking leniency and representing that it is eligible, has the burden of establishing its eligibility for leniency.

discovering the illegal conduct.[16] This prerequisite to obtaining leniency exists because, as a matter of good public policy, the Division does not believe that it would be appropriate to provide leniency to a company that discovers illegal conduct but then elects to continue engaging in that conduct. What constitutes prompt and effective action will, of course, depend on the particular circumstances in each leniency matter. A primary consideration is what steps are taken by management in response to the discovery of the anticompetitive activity being reported. For example, a company must not use managers or executives who were involved in the anticompetitive activity to investigate the activity, to formulate the company's response to the discovery of such activity, or to determine the appropriate disciplinary action against employees who participated in the activity. Other considerations are the size of the applicant corporation, its corporate structure, the complexity of its operations involved in the reported activity (including its geographic scope), and the nature of the reported activity.

A company terminates its part in anticompetitive activity by stopping any further participation in that activity, unless continued participation is with Division approval in order to assist the Division in its investigation. The Division will not disqualify a leniency applicant whose illegal conduct ended promptly after it was discovered merely because the applicant did not take some particular action. Moreover, as an exercise of prosecutorial discretion, if the Division was persuaded that the company and its high-level management had done everything that could reasonably be expected of them to terminate the company's involvement in the anticompetitive activity being reported, the Division would not revoke a company's conditional acceptance into the leniency program because a lower-level employee in one of the company's remote offices continued for some short period of time to have conspiratorial contacts with his or her counterpart. On the other hand, if any of the applicant's executives or high-level managers who were members of the conspiracy prior to discovery, continue to act in furtherance of the conspiracy despite that company's remedial actions, then the company should recognize that the Division may decide that the applicant did not promptly and effectively end its participation in the conspiracy.

A company that seeks a marker from the Division immediately after discovering anticompetitive conduct, and that effectively terminates its involvement in that activity at about the same time, will be viewed by the Division as having taken prompt and effective action. To date, almost every company that has sought leniency from the Division has done so shortly after discovering the anticompetitive activity being reported. On the other hand, an applicant that discovers anticompetitive activity but, instead of reporting the activity to the Division, keeps the culpable employees in the same positions with no repercussions or inadequate supervision and fails to prevent those employees from continuing to engage in the anticompetitive activity, can expect the Division to decline to grant it conditional leniency. As with the discovery representation, the applicant has the

[16] *Id.* ("Applicant represents . . . that . . . it . . . took prompt and effective action to terminate its participation in the anticompetitive activity being reported upon discovery of the activity.")

burden of proving that it took prompt and effective action, and will not receive final leniency unless it satisfies its burden of proof.[17]

Leniency applicants most commonly effectuate termination by reporting the anticompetitive activity to the Division and refraining from further participation - unless continued participation is with Division approval. Applicants may be asked to assist the Division in the conduct of a covert investigation, by, for example, participating in consensually monitored discussions with other members of the conspiracy.[18] Whether the Division's investigation is overt or covert, however, there is a risk of obstruction resulting from unauthorized disclosures about the application or the investigation. Therefore, at the outset of the leniency application, the applicant should discuss with the Division staff who within the company can be told about the leniency application as well as when and how they should be informed.

Not the Leader or Originator of the Activity

Part A of the Corporate Leniency Policy, section A6, requires that "[t]he corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity." Similarly, Part B of the Corporate Leniency Policy, section B7, requires that:

> The Division determine[] that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporation's role in it, and when the corporation comes forward.

The model corporate conditional leniency letter incorporates this requirement in paragraph #1, which requires the applicant to represent that it "did not coerce any other party to participate in the anticompetitive activity being reported and was not the leader in, or the originator of, the activity." As with the discovery and termination representations, the applicant bears the burden of proving the accuracy of this representation.[19]

14. ***How does the Division define what it means to be "the leader in, or originator of, the activity"?***

The leniency policy refers to "*the* leader" and "*the* originator of the activity," rather than "*a*" leader or "*an*" originator. Applicants are disqualified from obtaining

[17] *Id.*, *supra* note 15.

[18] When an applicant's employees are participating in cartel meetings and communications at the direction of the Antitrust Division to assist with a covert investigation, the employees are deemed to be agents of the Antitrust Division under U.S. law and are no longer deemed co-conspirators.

[19] Model Corporate Conditional Leniency Letter, paragraph #1, *supra* note 15.

leniency only if they were clearly the single organizer or single ringleader of a conspiracy. If, for example, there are two ringleaders in a five-firm conspiracy, then all of the firms, including the two leaders, are potentially eligible for leniency. Or, if in a two-firm conspiracy, each firm played a decisive role in the operation of the cartel, both firms may qualify for leniency. In addition, an applicant will not be disqualified under this condition just because it is the largest company in the industry or has the greatest market share if it was not clearly the single organizer or single ringleader of the conspiracy. Wherever possible, the Division has construed or interpreted its program in favor of accepting an applicant into the leniency program in order to provide the maximum amount of incentives and opportunities for companies to come forward and report their illegal activity.

<u>Cooperation Obligations</u>

15. ***What are the corporate applicant's cooperation obligations?***

Type A leniency requires that "[t]he corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation." Type B leniency requires that "[t]he corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation that advances the Division in its investigation." Both Type A and Type B leniency require that "[t]he confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials." Paragraph #2 of the model corporate conditional leniency letter describes specific cooperation obligations of the applicant, such as provision of documents, information, and materials wherever located; using its best efforts to secure the cooperation of its current directors, officers, and employees;[20] and paying restitution to victims.

<u>Production of Attorney-Client or Work-Product Privileged Communications or Documents</u>

16. ***As part of the applicant's cooperation obligations, will the applicant be required to provide communications or documents protected by the attorney-client privilege or work-product doctrine?***

Paragraphs #2 and #4 of the model corporate conditional leniency letter state that the applicant and its directors, officers, and employees are not required to produce communications or documents protected by the attorney-client privilege or work-product doctrine as part of their cooperation. Moreover, as stated in the introductory paragraph of the model leniency letter, the Division does not consider disclosures made by counsel in furtherance of the leniency application to constitute a waiver of the attorney-client privilege or the work-product privilege. While the Division does not require or request

[20] In specific cases, the Division, in its discretion, may also agree to cover former employees. See discussion at question 19 below.

the production of privileged communications or documents and does not refuse to grant leniency because a corporation has not produced such privileged information, some corporations, after consulting its counsel, have concluded that a voluntary disclosure of privileged communications and/or documents was in the best interest of the corporation.

Effect of Refusal of Individual Executives to Cooperate

17. ***If one or more individual corporate executives refuse to cooperate, will the corporate applicant be barred from leniency on the basis that the confession is no longer a "corporate act" or that the corporation is not providing "full, continuing, and complete" cooperation?***

In order for the confession of wrongdoing to be a "corporate act" and in order for the cooperation to be considered "full, continuing, and complete," the corporation must, in the Division's judgment, be taking all legal, reasonable steps to cooperate with the Division's investigation. The model corporate conditional leniency letter requires the company to use "its best efforts to secure the ongoing, full, and truthful cooperation of [its] directors, officers and employees."[21] If the corporation is unable to secure the full and truthful cooperation of one or more individuals, that would not necessarily prevent the Division from granting the leniency application. However, the number and significance of the individuals who fail to cooperate, and the steps taken by the company to secure their cooperation, would be relevant to the Division's determinations of whether there is a corporate confession, whether the corporation's cooperation is truly "full, continuing, and complete," and whether the Division is receiving the benefit of the bargain if certain key executives are not cooperating. Of course, in such situations, the non-cooperating individuals would lose the protection given to cooperating employees under the corporate conditional leniency letter, and the Division would be free to prosecute such individuals for the antitrust crime and any related offenses.

Definition of Current Employees

18. ***How is "current director, officer, or employee" defined for purposes of the cooperation obligations and leniency protection of the corporate conditional leniency letter?***

Status as a "current director, officer, or employee" is defined at the time the corporate conditional leniency letter is signed. Thus, leniency coverage for individuals who are directors, officers and employees of the applicant at the time the letter is signed will continue even if they leave their employment as long as they satisfy the obligations of the corporate conditional leniency letter.

[21] Model Corporate Conditional Leniency Letter, paragraph #2(c).

Coverage of Former Employees

19. ***Can an applicant's former directors, officers, and employees be included in the scope of the conditional leniency letter?***

The Corporate Leniency Policy does not refer to former directors, officers or employees, so the Division is under no obligation to grant leniency to those former representatives. However, the Division has the authority to agree not to prosecute former directors, officers and employees who come forward to cooperate and often reaches such agreements. It is therefore possible, and in many cases advisable, for the applicant to seek to include in the corporate conditional leniency letter protection for former directors, officers or employees or certain named former directors, officers, or employees on the same basis as current ones. The model letter provides optional language for the inclusion of former directors, officers or employees in paragraphs #2(c)-(f), #3, and #4. As noted in footnote 3 of the model corporate conditional leniency letter, whether the Division includes former directors, officers, or employees in the agreement depends on a number of factors, such as whether the applicant is interested in protecting these persons and, most importantly, whether it has the ability to secure the cooperation of key former directors, officers, and employees.

Restitution

20. ***What is the meaning of the qualifier in the Corporate Leniency Policy that "[w]here possible, the corporation makes restitution to injured parties"?***

There is a strong presumption in favor of requiring restitution in leniency situations. Restitution is excused only where, as a practical matter, it is not possible. Examples of situations in which an applicant might be excused from making restitution include situations where the applicant is in bankruptcy and is prohibited by court order from undertaking additional obligations, or where there was only one victim of the conspiracy and it is now defunct. Another example of a situation where the Division will not require the applicant to pay full restitution is if doing so will substantially jeopardize the organization's continued viability. Paragraph #2(g) of the model letter requires that the applicant make "all reasonable efforts, to the satisfaction of the Antitrust Division, to pay restitution." Thus, the applicant must demonstrate to the Division that it has satisfied its obligation to pay restitution before it will be granted final leniency. Restitution is normally resolved through civil actions with private plaintiffs. Under the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, Title 2, §§ 211-214, 118 Stat. 661, 666-668, a leniency applicant may qualify for detrebling of damages if the applicant cooperates with plaintiffs in their civil actions while the applicant's former co-conspirators will remain liable for treble damages on a joint and several basis.

<u>No Criminal Case</u>

21. ***What are the applicant's restitution obligations if the Division ultimately brings no criminal case?***

In certain cases where a corporation has otherwise met the requirements for leniency and has agreed to pay restitution, the Division may ultimately determine that either (1) the leniency applicant has not engaged in any criminal antitrust conduct or (2) even though the leniency applicant has engaged in criminal antitrust conduct, prosecution of the other conspiracy participants is not justified under the Principles of Federal Prosecution given the weakness of the evidence or other problems with the case. The issue has arisen as to whether, in such cases, the leniency applicant still has to pay restitution as agreed in the corporate conditional leniency letter.

If the Division's investigation ultimately reveals that the leniency applicant has not engaged in any criminal antitrust conduct, the Division will not grant leniency because it is unnecessary. Obligations placed on the applicant by the Leniency Policy or the applicant's conditional leniency letter with the Division no longer apply once the Division determines there is no underlying criminal antitrust conduct. In such cases, the Division will so advise the applicant in writing and the applicant will have no duty to pay restitution. If the leniency applicant has already paid restitution or is in the process of doing so, the applicant must resolve the matter with the recipient. Once the Division decides not to grant leniency, the applicant has no duty toward the Division, nor does the Division have any duty to help "reverse" any steps taken by the applicant to make restitution. Due to the Division's use of a marker system, however, this situation is much less likely to occur today. Through the marker system, the applicant has the opportunity to conduct a thorough internal investigation and the Division has the opportunity to interview key corporate executives before a conditional leniency letter is issued. Thus, any issues regarding whether a criminal antitrust violation occurred should be resolved during the marker stage.

If, on the other hand, the Division concludes that the leniency applicant has engaged in criminal antitrust activity and conditionally grants the leniency application, but later closes the investigation without charging any other entity in the conspiracy, the obligation to pay restitution will remain in effect. In such a case, the Division will notify the leniency applicant and the subjects of the investigation in writing that the investigation has been closed. In such cases, the leniency applicant may withdraw its application if it so chooses, and, if it does, the obligations undertaken by the applicant pursuant to the conditional leniency letter - including the payment of restitution - will no longer be in effect. If the applicant withdraws its application, the Division, for its part, will technically no longer be prohibited from prosecuting the applicant and will not provide any additional assurances of non-prosecution. Again, the Division will not assist in restoring any restitution already paid if the leniency application is withdrawn. Moreover, if the applicant chooses to withdraw its leniency application, it will not qualify for detrebling of civil damages under the Antitrust Criminal Penalty Enhancement and Reform Act of 2004. Also, once an applicant has fulfilled all of the conditions for leniency and the Division has issued a final leniency letter, the Division does not permit the leniency recipient to withdraw its leniency application.

Foreign Parties

22. ***What are the applicant's restitution obligations to foreign parties in international conspiracies?***

The 2008 revisions to the model corporate conditional leniency letter explicitly recognize the holdings of F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) and Empagran S.A. v. F. Hoffmann-La Roche Ltd., 417 F.3d 1267 (D.C. Cir. 2005), that damages for violations of the Sherman Antitrust Act do not include foreign effects independent of and not proximately caused by any adverse domestic effect. Paragraph #2(g) of the model letter now states: "However, Applicant is not required to pay restitution to victims whose antitrust injuries are independent of any effects on United States domestic commerce proximately caused by the anticompetitive activity being reported."

Leniency for Corporate Directors, Officers, and Employees

23. ***What are the conditions for leniency protection for the applicant's directors, officers, and employees?***

If a corporation qualifies for Type A leniency, all directors, officers, and employees of the corporation who admit their involvement in the criminal antitrust violation as part of the corporate confession will also receive leniency if they admit their wrongdoing with candor and completeness and continue to assist the Division throughout the investigation. In addition, the applicant's directors, officers, and employees who did not participate in the conspiracy but who had knowledge of the conspiracy and cooperate with the Division are also covered by the conditional leniency letter, as detailed below. If their corporation qualifies for Type B leniency, the Corporate Leniency Policy states that individuals who come forward with the corporation will still be considered for immunity from criminal prosecution on the same basis as if they had approached the Division individually. In practice, however, the Division ordinarily provides leniency to all qualifying current employees of Type B applicants in the same manner that it does for Type A applicants.

Paragraph #4 of the corporate conditional leniency letter details the specific conditions for leniency protection for the applicant's directors, officers, and employees who had knowledge of, or participated in, the anticompetitive activity being reported by the applicant. The conditions are: (1) verification of the applicant's representations in paragraph #1 of the corporate conditional leniency letter; (2) the applicant's full, continuing, and complete cooperation as defined in paragraph #2 of the letter; (3) admission by the pertinent director, officer, or employee of his or her knowledge of, or participation in, the anticompetitive activity being reported; and (4) the individual's full and truthful cooperation with the Division in its investigation of the activity. The specific cooperation obligations of the individuals are also defined in paragraph #4 of the corporate conditional leniency letter, such as the provision of documents, records and other materials and information; participation in interviews; and the provision of testimony. As noted below, the Division reserves the right to revoke the conditional protections of the corporate conditional leniency letter with respect to any director, officer, or employee who the Division determines caused the corporate applicant to be ineligible for leniency, who continued to participate in the anticompetitive activity being reported after the corporation took action to terminate its participation in the activity and notified the individual to cease his or her participation in the activity, or who obstructed or attempted to obstruct an investigation of the anticompetitive activity at any time, whether the obstruction occurred before or after the date of the corporate conditional leniency letter.[22]

III. Criteria under the Leniency Policy for Individuals

24. ***What are the criteria for leniency under the Leniency Policy for Individuals?***

An individual who approaches the Division on his or her own behalf to report illegal antitrust activity may qualify for leniency under the Leniency Policy for Individuals. As with a corporate applicant, an individual leniency applicant is required to admit to his or her participation in a criminal antitrust violation.[23] The individual must not have approached the Division previously as part of a corporate approach seeking leniency for the same conduct. Once a corporation attempts to qualify for leniency under the Corporate Leniency Policy, individuals who come forward and admit their involvement in the criminal antitrust violation as part of the corporate confession will be considered for leniency solely under the provisions of the Corporate Leniency Policy. They may not be considered for leniency under the Leniency Policy for Individuals.

Leniency will be granted to an individual reporting illegal antitrust activity before an investigation has begun if the following three conditions are met.[24]

[22] See Section V below and Model Corporate Conditional Leniency Letter, paragraph #4.

[23] See also discussion at question 6 above regarding the Division's policy regarding coverage of non-antitrust crimes, which applies to individual leniency applicants as well as to corporate applicants.

[24] As with the model corporate conditional leniency letter, the model individual conditional leniency letter provides that the leniency protection applies to "any act or offense [the applicant] may have committed prior to the date of this letter in connection with the anticompetitive activity being reported." Model Individual Conditional Leniency Letter, paragraph #3. With respect to an individual leniency applicant, if a significant lapse in time occurs between the applicant's termination of his or her participation in the anticompetitive activity being reported and the date the applicant reported the activity to the Division, the Division reserves the right to grant conditional

(1) At the time the individual comes forward to report the activity, the Division has not received information about the activity being reported from any other source.

(2) The individual reports the wrongdoing with candor and completeness and provides full, continuing, and complete cooperation to the Division throughout the investigation.

(3) The individual did not coerce another party to participate in the activity and clearly was not the leader in, or the originator of, the activity.

Any individual who does not qualify for leniency under the individual or corporate leniency policies may still be considered for statutory or informal immunity.

Paragraph #2 of the model individual conditional leniency letter describes specific cooperation obligations of the individual applicant, such as the production of documents, records and other materials and information; participation in interviews; and provision of testimony. As is the case with a corporate applicant, an individual applicant is not required, and will not be asked, to produce communications or documents privileged under the attorney-client privilege or work-product doctrine.[25]

Regarding the leadership condition, an individual leniency applicant is required to represent in his or her leniency letter that, "in connection with the anticompetitive activity being reported, [he/she] did not coerce any other party to participate in the activity and was not the leader in, or the originator of, the activity" in order to establish his or her eligibility for leniency. The applicant bears the burden of proving the accuracy of this representation.[26] As with a corporate applicant, an individual applicant would only be disqualified from obtaining leniency based on leadership role if he or she is clearly the single organizer or single ringleader of a conspiracy. Accordingly, in situations where the conspirators are viewed as co-equals or where there are two or more conspirators that

leniency only up to the date applicant terminated his or her participation in the activity. Model Individual Conditional Leniency Letter, n.2.

[25] Model Individual Conditional Leniency Letter, paragraph #2(a), (d). Of course, as with a corporate applicant, an individual, after consulting with counsel, may conclude that a voluntary disclosure of privileged communications or documents is in his or her best interest.

[26] Model Individual Conditional Leniency Letter, paragraph #1 ("Applicant agrees that [he/she] bears the burden of proving [his/her] eligibility to receive leniency, including the accuracy of the representations made in this paragraph and that [he/she] fully understands the consequences that might result from a revocation of leniency as explained in paragraph 3 of this Agreement.").

are viewed as leaders or originators, any of the participants may qualify under the Individual Leniency Policy.

IV. The Conditional Leniency Letter

25. ***What is the conditional leniency letter, and why is it conditional?***

The conditional leniency letter is the initial leniency letter given to a leniency applicant. The Division has a model corporate conditional leniency letter and a model individual conditional leniency letter.[27] The initial grant of leniency pursuant to the letters is conditional because a final grant of leniency depends upon the applicant performing certain obligations over the course of the criminal investigation and any resulting prosecution of co-conspirators, such as establishment of its eligibility; its full, truthful and continuing cooperation; and its payment of restitution to victims, as set forth in the letter, and the final grant also depends on the Division verifying the applicant's representations regarding its eligibility. Only those who qualify for leniency should receive its rewards. After all of the applicant's obligations have been satisfied (usually after the investigation and prosecution of co-conspirators have been concluded) and the Division has verified the applicant's representations regarding eligibility, the Division will issue the applicant a final leniency letter confirming that the conditions of the conditional leniency letter have been satisfied and that the leniency application has been granted.

The conditional nature of the leniency initially granted is reflected in the model leniency letters. The introductory paragraph of the model corporate and individual conditional leniency letters states that the agreement "is conditional." Further, the letters state in paragraph #3 that, "[s]ubject to verification of Applicant's representations in paragraph 1 above, and subject to [Applicant's/its] full, continuing, and complete cooperation, as described in paragraph 2 above, the Antitrust Division agrees conditionally to accept Applicant into [Part A/Part B of the Corporate Leniency Program/the Individual Leniency Program]." The letters also state in the introductory paragraph that the agreement "depends upon Applicant (1) establishing that [it/he or she] is eligible for leniency as [it/he or she] represents in paragraph 1 of [the] Agreement, and (2) cooperating in the Antitrust Division's investigation as required by paragraph 2 of [the] Agreement." As noted above, the applicant, as the party seeking leniency, has the burden of establishing its eligibility for leniency.[28] The introductory paragraph further notes that, "[a]fter Applicant establishes that [it/he or she] is eligible to receive leniency and provides the required cooperation, the Antitrust Division will notify Applicant in writing that [it/he or she] has been granted unconditional leniency."

[27] Both model conditional letters are available at http://www.usdoj.gov/atr/public/criminal/leniency.htm.

[28] *See supra* n.15.

Although many of the leniency requirements are fulfilled during the criminal investigation, the Division understands that applicants want assurances up front, even if conditional, that they will receive non-prosecution protection at the conclusion of the investigation if they fulfill the requirements of the leniency program. The Division's conditional leniency letters address that need. In contrast, many voluntary disclosure programs of other prosecuting agencies do not provide any upfront assurances regarding non-prosecution. Thus, the alternative to the conditional letter would be for the Division to give no assurances until the conclusion of the investigation and prosecution of co-conspirators. The conditional leniency letters, however, provide companies and their executives with a transparent and predictable disclosure program, and have been very effective both for the Division in setting forth the requirements of leniency and for applicants in meeting those requirements.

V. The Final Leniency Letter

26. ***How and when does an applicant receive a final, unconditional leniency letter?***

As noted above and in the model corporate and individual conditional leniency letters, after the applicant "establishes that [it/he/she] is eligible to receive leniency," as represented in paragraph #1 of the conditional leniency letter, "and provides the required cooperation," as set forth in paragraph #2 of the conditional leniency letter, "the Antitrust Division will notify Applicant in writing that [it/he/she] has been granted unconditional leniency."[29] Normally this would occur after the investigation and any resulting prosecutions of the applicant's co-conspirators are completed.

27. ***Before an applicant is granted final, unconditional leniency, under what circumstances can the Division revoke an applicant's conditional leniency, and will the Division provide the applicant with any advance notice of a staff recommendation to revoke conditional leniency?***

If the Division determines, before it grants an applicant a final, unconditional leniency letter, that the applicant "(1) contrary to [its/his/her] representations in paragraph 1 of [the conditional leniency letter], is not eligible for leniency or (2) has not provided the cooperation required by paragraph 2 of [the conditional leniency letter]," the Division may revoke the applicant's conditional acceptance into the leniency program.[30] Before the Division makes a final determination to revoke a corporate applicant's conditional leniency, it will notify applicant's counsel in writing of staff's recommendation to revoke the leniency and provide counsel with an opportunity to meet with the staff and Office of

[29] Model Corporate Conditional Leniency Letter, introductory paragraph; Model Individual Conditional Leniency Letter, introductory paragraph.

[30] Model Corporate Conditional Leniency Letter, paragraph #3; Model Individual Conditional Leniency Letter, paragraph #3.

Criminal Enforcement regarding the revocation.[31] During the time that a recommendation to revoke an applicant's leniency is under consideration, the Division will suspend the applicant's obligation to cooperate so that the applicant is not put in the position of continuing to provide evidence that could be used against it should the conditional leniency be revoked. In the history of the Division's leniency program, the Division has revoked only one conditional leniency letter out of the more than 100 conditional leniency letters entered.

28. ***When can an applicant or its employees judicially challenge a Division decision to revoke conditional leniency?***

Paragraph #3 of the model corporate and individual conditional leniency letters states that the applicant "understands that the Antitrust Division's Leniency Program is an exercise of the Division's prosecutorial discretion, and [it/he/she] agrees that [it/he/she] may not, and will not, seek judicial review of any Division decision to revoke [its/his/her] conditional leniency unless and until [it/he/she] has been charged by indictment or information for engaging in the anticompetitive activity being reported." Paragraph #4 of the model corporate conditional leniency letter also notes that "[j]udicial review of any Antitrust Division decision to revoke [an individual's] conditional non-prosecution protection granted [under the corporate conditional leniency letter] is not available unless and until the individual has been charged by indictment or information." The Division's leniency program is an exercise of prosecutorial discretion generally not subject to judicial review. Accordingly, the proper avenue to challenge a revocation of a leniency letter is to raise the letter as a defense post-indictment. Stolt-Nielsen, S.A. v. United States, 442 F.3d 177, 183-187 (3d Cir. 2006).

29. ***If a corporate conditional leniency letter is revoked, what will happen to the protection provided in the letter for the corporation's directors, officers, and employees?***

If the Division revokes a corporation's conditional acceptance into the leniency program, the conditional leniency letter it received "shall be void."[32] Thus, the protection provided to employees pursuant to the letter no longer exists. However, as a matter of prosecutorial discretion, even if the Division revokes a company's conditional leniency letter, the Division will elect not to prosecute individual employees, so long as they had fully cooperated with the Division prior to the revocation and, in the Division's view, were not responsible for the revocation.

[31] Model Corporate Conditional Leniency Letter, paragraph #3. The individual conditional corporate leniency letter provides this notice will be given absent exigent circumstances, such as risk of flight. Model Individual Conditional Leniency Letter, paragraph #3.

[32] Model Corporate Conditional Leniency Letter, paragraph #3.

30. ***Under what circumstances can the protection granted to an individual under a corporate conditional leniency letter be revoked?***

As noted in the model corporate conditional leniency letter, if an director, officer, or employee covered by the leniency letter fails to comply with his or her obligations under the letter, the Division may revoke any conditional leniency, immunity, or non-prosecution granted to the individual under the letter.[33] Also, the Division reserves the right to revoke the conditional non-prosecution protections of the corporate conditional leniency letter with respect to any director, officer, or employee who the Division determines caused the corporate applicant to be ineligible for leniency under paragraph #1 of the corporate conditional leniency letter, who continued to participate in the anticompetitive activity being reported after the corporation took action to terminate its participation in the activity and notified the individual to cease his or her participation in the activity,[34] or who obstructed or attempted to obstruct an investigation of the anticompetitive activity at any time, whether the obstruction occurred before or after the date of the corporate conditional leniency letter.[35]

31. ***What notice or process will be given to an individual if the Division is contemplating revoking his or her conditional protections provided in a corporate conditional leniency letter?***

Absent exigent circumstances, such as risk of flight, before the Division makes a final determination to revoke an individual's conditional leniency, immunity, or non-prosecution provided under a corporate conditional leniency letter, it will notify in writing the individual's counsel and the corporate applicant's counsel of staff's recommendation to revoke the protections provided in the letter and provide counsel with an opportunity to meet with the staff and Office of Criminal Enforcement regarding the revocation.[36] During the time that a revocation recommendation is under consideration, the Division will suspend the individual's obligation to cooperate so that the individual is not put in the position of continuing to provide evidence that could be used against him or her should his or her conditional protections be revoked. If the Division revokes

[33] Model Corporate Conditional Leniency Letter, paragraph #4.

[34] Such notice ordinarily is part of the corporation's prompt and effective action to terminate its participation in the anticompetitive activity being reported. It need not be specific to the individual or the individual's particular conduct so long as it reasonably notifies the director, officer, or employee that he or she should not participate in the illegal activity. General instructions or guidance by the corporation not to engage in cartel or illegal conduct generally, made prior to the corporation's discovery of the anticompetitive activity being reported, do not constitute such notice for purposes of this provision.

[35] Model Corporate Conditional Leniency Letter, paragraph #4.

[36] *Id.*

conditional leniency, immunity, or non-prosecution granted to a director, officer, or employee of a corporate applicant, the Division may use against such individual any evidence provided at any time by the corporate applicant, the individual, or other directors, officers, or employees of the applicant.[37]

VI. Confidentiality

32. ***What confidentiality assurances are given to leniency applicants?***

The Division holds the identity of leniency applicants and the information they provide in strict confidence, much like the treatment afforded to confidential informants. Therefore, the Division does not publicly disclose the identity of a leniency applicant or information provided by the applicant, absent prior disclosure by, or agreement with, the applicant, unless required to do so by court order in connection with litigation.

33. ***Will the Division disclose information from a leniency applicant to a foreign government?***

The leniency program has been the Division's most effective generator of international cartel prosecutions. Invariably, however, when a company is considering whether to report its involvement in international cartel activity, a concern is raised as to whether the Division will be free to disclose the information to any foreign governments in accordance with its obligations under bilateral antitrust cooperation agreements. As noted above, the Division's policy is to treat the identity of, and information provided by, leniency applicants as a confidential matter, much like the treatment afforded to confidential informants. Moreover, the Division has an interest in maximizing the incentives for companies to come forward and self-report antitrust offenses. In that vein, it would create a strong disincentive to self-report and cooperate if a company believed that its self-reporting would result in investigations in other countries and that its cooperation - in the form of admissions, documents, employee statements, and witness identities - would be provided to foreign authorities pursuant to antitrust cooperation agreements, and then possibly used against the company.

While the Division has been at the forefront in advocacy and actions to enhance international cartel enforcement, and the Division has received substantial assistance from foreign governments in obtaining foreign-located evidence in a number of cases, in the final analysis, the Division's overriding interest in protecting the viability of the leniency program has resulted in a policy of not disclosing to foreign antitrust agencies information obtained from a leniency applicant unless the leniency applicant agrees first to the disclosure. This aspect of the Division's leniency nondisclosure policy will not insulate the leniency applicant from proceedings in other countries. But it will ensure that cooperation provided by a leniency applicant will not be disclosed by the Division to its foreign counterparts pursuant to antitrust cooperation agreements without the prior

[37] *Id.*

consent of the leniency applicant. The Division first announced this policy in 1999, and it is the Division's understanding that virtually every other jurisdiction that has considered the issue has adopted a similar policy.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA v. EAGLE EYES TRAFFIC INDUSTRIAL CO., LTD.; E-LITE AUTOMOTIVE, INC.; HOMY HONG-MING HSU; and YU-CHU LIN, aka David Lin, Defendants.	No. CR 11- 0488 RS **SUPERSEDING INDICTMENT** VIOLATION: Title 15, United States Code, Section 1 (Price Fixing) San Francisco Venue

The Grand Jury charges:

I.

DESCRIPTION OF THE OFFENSE

1. The following corporations and individuals are hereby indicted and made defendants on the charge stated below:

(a) EAGLE EYES TRAFFIC INDUSTRIAL CO., LTD.;

(b) E-LITE AUTOMOTIVE, INC.;

//

(c) HOMY HONG-MING HSU; and

(d) YU-CHU LIN.

2. The defendants and other coconspirators entered into and engaged in a combination and conspiracy to suppress and eliminate competition for aftermarket auto lights, which began at least as early as July 2001 and continued until at least as late as September 2008, the exact dates being unknown to the Grand Jury ("the period covered by this Indictment"), by agreeing to fix the prices of aftermarket auto lights sold to customers in the United States and elsewhere. The combination and conspiracy engaged in by the defendants and other coconspirators was in unreasonable restraint of interstate and foreign trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

3. The charged combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendants and other coconspirators, the substantial terms of which were to agree to fix the prices of aftermarket auto lights in the United States and elsewhere.

4. For the purpose of forming and carrying out the charged combination and conspiracy, the defendants and other coconspirators did those things that they combined and conspired to do, including, among other things:

(a) participated in meetings, conversations, and communications among competitors in Taiwan and the United States to discuss the price structure for aftermarket auto lights;

(b) agreed, during those meetings, conversations, and communications, to set prices for aftermarket auto lights in accordance with pricing formulas jointly determined among competitors;

(c) issued list price announcements to customers in accordance with the jointly determined price structure;

(d) collected and exchanged information on prices of aftermarket auto lights for the purpose of monitoring and enforcing adherence to the jointly determined price structure;

(e) authorized, ordered, and consented to the participation of subordinate employees in the conspiracy; and

(f) took steps to conceal the conspiracy and conspiratorial contacts, conversations, and communications through various means.

II.

DEFENDANTS AND COCONSPIRATORS

5. During the period covered by this Indictment, defendant EAGLE EYES TRAFFIC INDUSTRIAL CO., LTD. was an incorporated entity organized and existing under the laws of Taiwan. Since at least July 2003, its principal place of business has been located in Yongkang City, Tainan County, Taiwan. Defendant EAGLE EYES TRAFFIC INDUSTRIAL CO., LTD. joined and participated in the conspiracy from at least as early as July 2001 and continuing at least until in or about September 2008. During the period covered by this Indictment, EAGLE EYES TRAFFIC INDUSTRIAL CO., LTD. was a manufacturer of aftermarket auto lights sold in the United States and elsewhere.

6. Within the period covered by this Indictment, defendant E-LITE AUTOMOTIVE, INC. was an incorporated entity organized and existing under the laws of the State of California with its principal place of business located in Chino, California. Defendant E-LITE AUTOMOTIVE, INC. joined and participated in the conspiracy from in or about March 2006 and continuing at least until in or about September 2008. Within the period covered by this Indictment, E-LITE AUTOMOTIVE, INC. distributed aftermarket auto lights to customers located in the United States.

7. Defendant HOMY HONG-MING HSU is a resident of Taiwan. During the period covered by this Indictment, defendant HOMY HONG-MING HSU was Vice Chairman of defendant EAGLE EYES TRAFFIC INDUSTRIAL CO., LTD. Defendant HOMY HONG-MING HSU joined and participated in the conspiracy from at least as early as November 2001 and continuing at least until in or about September 2008.

8. Defendant YU-CHU LIN is a resident of Taiwan. During the period covered by this Indictment, defendant YU-CHU LIN was Chairman of defendant EAGLE EYES

TRAFFIC INDUSTRIAL CO., LTD. Defendant YU-CHU LIN joined and participated in the conspiracy from at least as early as July 2001 and continuing at least until in or about September 2008.

9. Various corporations and individuals not made defendants in this Indictment participated as coconspirators in the offense charged in this Indictment and performed acts and made statements in furtherance of it.

10. Whenever in this Indictment reference is made to any act, deed, or transaction of any corporation, the allegation means that the corporation engaged in the act, deed, or transaction by or through its officers, directors, employees, agents, or other representatives while they were actively engaged in the management, direction, control, or transaction of its business or affairs.

III.

TRADE AND COMMERCE

11. Aftermarket auto lights are lighting components incorporated into an automobile after its original sale, usually as repairs following a collision, but also as accessories and upgrades. Lighting components include items such as headlights, taillights, fog lights, turn signals, brake signals, and reflectors.

12. During the period covered by this Indictment, the defendants and their coconspirators sold and distributed aftermarket auto lights in a continuous and uninterrupted flow of interstate and foreign trade and commerce to customers located in states or countries other than the states or countries in which the defendants and their coconspirators produced aftermarket auto lights.

13. During the period covered by this Indictment, the business activities of the defendants and their coconspirators that are the subject of this Indictment were within the flow of, and substantially affected, interstate and foreign trade and commerce.

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IV.

JURISDICTION AND VENUE

14. The combination and conspiracy charged in this Indictment was carried out, in part, in the Northern District of California, within the five years preceding the filing of this Indictment.

ALL IN VIOLATION OF TITLE 15, UNITED STATES CODE, SECTION 1.

DATED: November 29, 2011

A TRUE BILL

[redacted]

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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Courts for the District of Columbia

UNITED STATES OF AMERICA v. SINGAPORE AIRLINES CARGO PTE LTD., Defendant.	Criminal No. 10-CR-00322 JDB Filed: February 8, 2011 Violation: 15 U.S.C. §1 (Sherman Act)

PLEA AGREEMENT

The United States of America and Singapore Airlines Cargo Pte Ltd. ("defendant"), a corporation organized and existing under the laws of Singapore, hereby enter into the following Plea Agreement pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure ("Fed. R. Crim. P."):

RIGHTS OF DEFENDANT

1. The defendant understands its rights:

(a) to be represented by an attorney;

(b) to be charged by Indictment;

(c) as a corporation organized and existing under the laws of Singapore, to decline to accept service of the Summons in this case, and to contest the jurisdiction of the United States to prosecute this case against it in the United States District Court for the District of Columbia;

(d) to plead not guilty to any criminal charge brought against it;

(e) to have a trial by jury, at which it would be presumed not guilty of the charge and the United States would have to prove every essential element of the charged offense beyond a reasonable doubt for it to be found guilty;

(f) to confront and cross-examine witnesses against it and to subpoena witnesses in its defense at trial;

(g) to appeal its conviction if it is found guilty; and

(h) to appeal the imposition of the sentence against it.

AGREEMENT TO PLEAD GUILTY AND WAIVE CERTAIN RIGHTS

2. The defendant knowingly and voluntarily waives the rights set out in Paragraph 1(b)-(g) above, including all jurisdictional defenses to the prosecution of this case, and agrees voluntarily to consent to the jurisdiction of the United States to prosecute this case against it in the United States District Court for the District of Columbia. The defendant also agrees to waive any objection or defense it may have to the prosecution of the charged offense in the United States District Court for the District of Columbia based on venue. The defendant also knowingly and voluntarily waives the right to file any appeal, any collateral attack, or any other writ or motion, including but not limited to an appeal under 18 U.S.C. § 3742, that challenges the sentence imposed by the Court if that sentence is consistent with or below the recommended sentence in Paragraph 8 of this Plea Agreement, regardless of how the sentence is determined by the Court. This agreement does not affect the rights or obligations of the United States as set forth in 18 U.S.C. § 3742(b)-(c). Nothing in this paragraph, however, shall act as a bar to the defendant perfecting any legal remedies it may otherwise have on appeal or collateral attack respecting claims of ineffective assistance of counsel or prosecutorial misconduct. The

defendant agrees that there is currently no known evidence of ineffective assistance of counsel or prosecutorial misconduct. Pursuant to Fed. R. Crim. P. 7(b), the defendant will waive indictment and plead guilty at arraignment to a one-count Information to be filed in the United States District Court for the District of Columbia. The Information will charge that the defendant participated in a combination and conspiracy to suppress and eliminate competition by fixing the cargo rates charged to certain customers in the United States and elsewhere for certain international air shipments, that began as early as February 2002 until at least February 14, 2006, in violation of the Sherman Antitrust Act, 15 U.S.C. § 1.

3. The defendant, pursuant to the terms of this Plea Agreement, will plead guilty to the criminal charge described in Paragraph 2 above and will make a factual admission of guilt to the Court in accordance with Fed. R. Crim. P. 11, as set forth in Paragraph 4 below.

FACTUAL BASIS FOR OFFENSE CHARGED

4. Had this case gone to trial, the United States would have presented evidence sufficient to prove the following facts against the defendant:

(a) For purposes of this Plea Agreement, the "relevant period" is that period that began as early as February 2002 until at least February 14, 2006. During the relevant period, the defendant was a corporation organized and existing under the laws of Singapore. The defendant has its principal place of business in Singapore. During the relevant period, the defendant provided international air transportation services for cargo ("air cargo services") on routes to and from the United States and employed more than 200, but less than 1000, individuals. For the purposes of this Plea Agreement, "air cargo services" shall mean the shipment by air transportation for any portion of transit of any good, property, mail, product, container or item, such as heavy equipment, perishable commodities, and consumer goods. For its air cargo services, the defendant charged its customers a rate that consisted of both a base rate and, at times during the relevant period, various surcharges, such as a fuel surcharge and a security surcharge. The amount of the base rate charged by the defendant could vary based on the type and weight of the shipment, the origin and/or destination of the shipment, the nature of the goods or products being shipped, and the time when the shipments were transported. The base rate and surcharges charged to customers by the defendant are collectively referred to herein as the "cargo rate." During the relevant period, the defendant's sales of air cargo services on certain routes from the United States totaled approximately $85.6 million.

(b) During the relevant period, the defendant, through its officers and employees, including high-level personnel of defendant, participated in a conspiracy with one or more providers of air cargo services, a primary purpose of which was to suppress and eliminate competition by fixing one or more components of the cargo rates charged to certain customers for air cargo services. In furtherance of the conspiracy, the defendant, through its officers and employees, engaged in discussions and attended meetings with representatives of one or more providers of air cargo services. During these discussions and meetings, agreements were reached to fix one or more components of the cargo rates to be charged to certain purchasers of certain air cargo services.

(c) During the relevant period, certain air cargo shipments transported by one or more of the conspirator carriers, and aircraft necessary to transport the air cargo shipments, as well as payments for the air cargo shipments, traveled in interstate and foreign trade and commerce. Certain of the business activities of the defendant and its co-conspirators in connection with the sale and provision of air cargo services affected by this conspiracy were within the flow of, and substantially affected, interstate and foreign trade and commerce.

POSSIBLE MAXIMUM SENTENCE

5. The defendant understands that the statutory maximum penalty which may be imposed against it upon conviction for a violation of Section One of the Sherman Antitrust Act is a fine in an amount equal to the greatest of:

(a) $100 million (15 U.S.C. § 1);

(b) twice the gross pecuniary gain the conspirators derived from the crime (18 U.S.C. § 3571(c) and (d)); or

(c) twice the gross pecuniary loss caused to the victims of the crime by the conspirators (18 U.S.C. § 3571(c) and (d)).

6. In addition, the defendant understands that:

(a) pursuant to 18 U.S.C. § 3561(c)(1), the Court may impose a term of probation of at least one year, but not more than five years;

(b) pursuant to §8B1.1 of the United States Sentencing Guidelines ("U.S.S.G.," "Sentencing Guidelines," or "Guidelines") or 18 U.S.C. § 3563(b)(2) or 3663(a)(3), the Court may order it to pay restitution to the victims of the offense; and

(c) pursuant to 18 U.S.C. § 3013(a)(2)(B), the Court is required to order the defendant to pay a $400 special assessment upon conviction for the charged crime.

SENTENCING GUIDELINES

7. The defendant understands that the Sentencing Guidelines are advisory, not mandatory, but that the Court must consider the Guidelines in effect on the day of sentencing,

along with the other factors set forth in 18 U.S.C. § 3553(a), in determining and imposing sentence. The defendant understands that the Guidelines determinations will be made by the Court by a preponderance of the evidence standard. The defendant understands that although the Court is not ultimately bound to impose a sentence within the applicable Guidelines range, its sentence must be reasonable based upon consideration of all relevant sentencing factors set forth in 18 U.S.C. § 3553(a). Pursuant to U.S.S.G. §1B1.8, the United States agrees that self-incriminating information that the defendant provides to the United States pursuant to this Plea Agreement will not be used to increase the volume of affected commerce attributable to the defendant or in determining the defendant's applicable Guidelines range, except to the extent provided in U.S.S.G. §1B1.8(b).

SENTENCING AGREEMENT

8. Pursuant to Fed. R. Crim. P. 11(c)(1)(C), the United States and the defendant agree that the appropriate disposition of this case is, and agree to recommend jointly that the Court impose, a sentence requiring the defendant to pay to the United States a criminal fine of $48 million, payable in installments as set forth below with interest accruing under 18 U.S.C. § 3612(f)(1)-(2) ("the recommended sentence"). The parties agree that there exists no aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the U.S. Sentencing Commission in formulating the Sentencing Guidelines justifying a departure pursuant to U.S.S.G. §5K2.0. The parties agree not to seek or support any sentence outside of the Guidelines range nor any Guidelines adjustment for any reason that is not set forth in this Plea Agreement. The parties further agree that the recommended sentence set forth in this Plea Agreement is reasonable.

(a) Pursuant to U.S.S.G. § 8C2.5, the defendant's culpability score is 7. This number is calculated by starting with 5 points pursuant to U.S.S.G. § 8C2.5(a); adding 3 points because the organization has more than 200, but less than 1000, employees and an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense, pursuant to U.S.S.G. § 8C2.5(b)(3)(A); and subtracting 1 point because the defendant clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, pursuant to U.S.S.G. §8C2.5(g)(3). Accordingly, the minimum multiplier to be applied to the base fine is 1.4 and the maximum multiplier is 2.8, pursuant to U.S.S.G § 8C2.6;

(b) The base fine is 20% of the volume of commerce, pursuant to U.S.S.G. § 2R1.1(d)(1) and §8C2.4(a) and (b). The parties agree that the affected volume of commerce attributable to the defendant for purposes of the Information is $85.6 million. The base fine for relevant air cargo shipments from the United States is $17.12 million (20% of $85.6 million). Applying the multipliers of 1.4 and 2.8 to this amount, the fine range for the relevant air cargo shipments from the United States is $24 million to $48 million.

(c) The volume of affected commerce calculation in paragraph 8(b) above does not include commerce related to the defendant's cargo shipments on routes into the United States. The defendant takes the position that any agreements reached with competitors with respect to cargo shipments on routes into the United States should not be included in the defendant's volume of affected commerce calculation pursuant to U.S.S.G. § 2R1.1(d)(1). The United States disputes the defendant's position and contends that the defendant's cargo shipments into the United States during the charged period violated the U.S. antitrust laws. Moreover, the United States asserts that a Guidelines fine calculation that fails to account for cargo shipments into the United States affected by the charged cargo conspiracy would understate the seriousness of, and the harm caused to U.S. victims by, the offense and would not provide just punishment.

(d) The parties recognize the complexity of litigating the issues set forth in Paragraph 8(c) and the resulting burden on judicial and party resources, and agree that the appropriate resolution of this issue is to impose a fine at the top of the Guidelines sentencing range consistent with the timing of cooperation provided by the defendant in this matter. The parties agree that the appropriate fine for the commerce affected by defendant's participation in the charged conspiracy is $48 million payable as set forth in paragraph 8 above.

(e) The United States and the defendant agree to recommend, in the interest of justice pursuant to 18 U.S.C. § 3572(d)(1) and U.S.S.G. §8C3.2(b), that the fine be paid in the following installments: within thirty (30) days of imposition of sentence -- $20 million (plus any accrued interest); and by April 29, 2011 -- $28 million (plus any accrued interest); provided, however, that the defendant shall have the option at any time before April 29, 2011, of prepaying the remaining balance (plus any accrued interest) then owing on the fine.

(f) The defendant understands that the Court will order it to pay a $400 special assessment, pursuant to 18 U.S.C. § 3013(a)(2)(B), in addition to any fine imposed.

(g) Based on the defendant's improvements to its corporate compliance program, the United States and the defendant will jointly recommend that no term of probation be imposed, but the parties understand that the Court's denial of this request will not void this Plea Agreement.

(h) The United States and the defendant jointly submit that this Plea Agreement, together with the record that will be created by the United States and the defendant at the plea and sentencing hearings, and the further disclosure described in Paragraph 9, will provide sufficient information concerning the defendant, the crime charged in this case, and the defendant's role in the crime to enable the meaningful exercise of sentencing authority by the Court under 18 U.S.C. § 3553. The United States and defendant agree to request jointly that the Court accept the defendant's guilty plea and impose sentence on an expedited schedule as early as the date of arraignment, based upon the record provided by the defendant and the United States, under the provisions of Fed. R. Crim. P. 32(c)(1)(A)(ii) and U.S.S.G. §6A1.1. The Court's denial of the request to impose sentence on an expedited schedule will not void this Plea Agreement.

9. Subject to the ongoing, full, and truthful cooperation of the defendant described in Paragraph 12 of this Plea Agreement, and before sentencing in the case, the United States will fully advise the Court and the Probation Office of the fact, manner, and extent of defendant's cooperation and its commitment to prospective cooperation with the United States' investigation and prosecutions, all material facts relating to the defendant's involvement in the charged offense, and all other relevant conduct.

10. The United States and the defendant understand that the Court retains complete discretion to accept or reject the recommended sentence provided for in Paragraph 8 of this Plea

Agreement.

(a) If the Court does not accept the recommended sentence, the United States and the defendant agree that this Plea Agreement, except for Paragraph 10(b) below, shall be rendered void.

(b) If the Court does not accept the recommended sentence, the defendant will be free to withdraw its guilty plea (Fed. R. Crim. P. 11(c)(5) and (d)). If the defendant withdraws its plea of guilty, this Plea Agreement, the guilty plea, and any statement made in the course of any proceedings under Fed. R. Crim. P. 11 regarding the guilty plea or this Plea Agreement or made in the course of plea discussions with an attorney for the government shall not be admissible against the defendant in any criminal or civil proceeding, except as otherwise provided in Fed. R. Evid. 410. In addition, the defendant agrees that, if it withdraws its guilty plea pursuant to this subparagraph of the Plea Agreement, the statute of limitations period for any offense referred to in Paragraph 14 of this Plea Agreement shall be tolled for the period between the date of the signing of the Plea Agreement and the date the defendant withdrew its guilty plea or for a period of sixty (60) days after the date of the signing of the Plea Agreement, whichever period is greater.

11. In light of pending civil class action lawsuits filed against the defendant, which potentially provide for a recovery of a multiple of actual damages, the United States agrees that it will not seek restitution for the offense charged in the Information.

DEFENDANT'S COOPERATION

12. The defendant and its subsidiaries will cooperate fully and truthfully with the United States in the prosecution of this case, the conduct of the current federal investigation of violations of federal antitrust and related criminal laws involving the sale of air cargo services, any other federal investigation resulting therefrom, and any litigation or other proceedings arising or resulting from any such investigation to which the United States is a party ("Federal Proceeding"). The ongoing, full, and truthful cooperation of the defendant and its subsidiaries shall include, but not be limited to:

(a) producing to the United States all non-privileged documents, information, and other materials (with translations into English), wherever located, in the possession, custody, or control of defendant or its subsidiaries, requested by the United States in connection with any Federal Proceeding; and

(b) using its best efforts to secure the ongoing, full, and truthful cooperation, as defined in Paragraph 13 of this Plea Agreement, of the current and former directors, officers, and employees of the defendant or any of its subsidiaries as may be requested by the United States, but excluding Stephen Lek, including making these persons available in the United States and at other mutually agreed-upon locations, at the defendant's expense, for interviews and the provision of testimony in grand jury, trial, and other judicial proceedings in connection with any Federal Proceeding.

13. The ongoing, full, and truthful cooperation of each person described in Paragraph 12(b) above will be subject to the procedures and protections of this paragraph, and shall

include, but not be limited to:

(a) producing in the United States and at other mutually agreed-upon locations all non-privileged documents, including claimed personal documents, and other materials, wherever located, requested by attorneys and agents of the United States;

(b) making himself or herself available for interviews in the United States and at other mutually agreed-upon locations, not at the expense of the United States, upon the request of attorneys and agents of the United States;

(c) responding fully and truthfully to all inquiries of the United States in connection with any Federal Proceeding, without falsely implicating any person or intentionally withholding any information, subject to the penalties of making false statements (18 U.S.C. § 1001) and obstruction of justice (18 U.S.C. § 1503, *et seq.*);

(d) otherwise voluntarily providing the United States with any non-privileged material or information not requested in (a) - (c) of this paragraph that he or she may have that is related to any Federal Proceeding;

(e) when called upon to do so by the United States in connection with any Federal Proceeding, testifying in grand jury, trial, and other judicial proceedings in the United States fully, truthfully, and under oath, subject to the penalties of perjury (18 U.S.C. § 1621), making false statements or declarations in grand jury or court proceedings (18 U.S.C. § 1623), contempt (18 U.S.C. §§ 401-402), and obstruction of justice (18 U.S.C. § 1503, *et seq.*); and

(f) agreeing that, if the agreement not to prosecute him or her in this Plea Agreement is rendered void under Paragraph 15(c), the statute of limitations period for any Relevant Offense as defined in Paragraph 15(a) shall be tolled as to him or her for the period between the date of the signing of this Plea Agreement and six (6) months after the date that the United States gave notice of its intent to void its obligations to that person under the Plea Agreement.

GOVERNMENT'S AGREEMENT

14. Upon acceptance of the guilty plea called for by this Plea Agreement and the imposition of the recommended sentence, and subject to the cooperation requirements of Paragraph 12 of this Plea Agreement, the United States agrees that it will not bring further criminal charges against the defendant or any of its subsidiaries for any act or offense committed before the date of this Plea Agreement that was undertaken in furtherance of an antitrust conspiracy involving the sale of air cargo services. The nonprosecution terms of this paragraph do not apply to civil matters of any kind, to any violation of the federal tax or securities laws, or to any crime of violence.

15. The United States agrees to the following:

(a) Upon the Court's acceptance of the guilty plea called for by this Plea Agreement and the imposition of the recommended sentence and subject to the exceptions noted in Paragraph 15(c), the United States will not bring criminal charges against any current or former director, officer, or employee of the defendant or its subsidiaries for any act or offense committed before the date of this Plea Agreement and while that person was acting as a director, officer, or employee of the defendant or its subsidiaries that was undertaken in furtherance of an antitrust conspiracy involving the sale of air cargo services ("Relevant Offense"), except that the protections granted in this paragraph shall not apply to Stephen Lek;

(b) Should the United States determine that any current or former director, officer, or employee of the defendant or its subsidiaries may have information relevant to any Federal Proceeding, the United States may request that person's cooperation under the terms of this Plea Agreement by written request delivered to counsel for the individual (with a copy to the undersigned counsel for the defendant) or, if the individual is not known by the United States to be represented, to the undersigned counsel for the defendant;

(c) If any person requested to provide cooperation under Paragraph 15(b) fails to comply with his or her obligations under Paragraph 13, then the terms of this Plea Agreement as they pertain to that person, and the agreement not to prosecute that person granted in this Plea Agreement, shall be rendered void;

(d) Except as provided in Paragraph 15(e), information provided by a person described in Paragraph 15(b) to the United States under the terms of this Plea Agreement pertaining to any Relevant Offense, or any information directly or indirectly derived from that information, may not be used against that person in a criminal case, except in a prosecution for perjury (18 U.S.C. § 1621), making a false statement or declaration (18 U.S.C. §§ 1001, 1623), or obstruction of justice (18 U.S.C. § 1503, *et seq.*);

(e) If any person who provides information to the United States under this Plea Agreement fails to comply fully with his or her obligations under Paragraph 13 of this Plea Agreement, the agreement in Paragraph 15(d) not to use that information or any information directly or indirectly derived from it against that person in a criminal case shall be rendered void;

(f) The nonprosecution terms of this paragraph do not apply to civil matters of any kind, to any violation of the federal tax or securities laws, or to any crime of violence; and

(g) Documents provided under Paragraphs 12(a) and 13(a) shall be deemed responsive to outstanding grand jury subpoenas issued to defendant or any of its subsidiaries.

16. The United States agrees that when any person travels to the United States for interviews, grand jury appearances, or court appearances pursuant to this Plea Agreement, or for meetings with counsel in preparation therefor, the United States will take no action, based upon any Relevant Offense, to subject such person to arrest, detention, or service of process, or to prevent such person from departing the United States. This paragraph does not apply to an individual's commission of perjury (18 U.S.C. § 1621), making false statements (18 U.S.C. § 1001), making false statements or declarations in grand jury or court proceedings (18 U.S.C. § 1623), obstruction of justice (18 U.S.C. § 1503, *et seq.*), or contempt (18 U.S.C. §§ 401-402) in connection with any testimony or information provided or requested in any Federal Proceeding.

17. The defendant understands that it may be subject to administrative action by federal or state agencies other than the United States Department of Justice, Antitrust Division, based upon the conviction resulting from this Plea Agreement, and that this Plea Agreement in no way controls whatever action, if any, other agencies may take. However, the United States agrees that, if requested, it will advise the appropriate officials of any governmental agency considering such administrative action of the fact, manner, and extent of the cooperation of the

defendant and its subsidiaries as a matter for that agency to consider before determining what administrative action, if any, to take.

REPRESENTATION BY COUNSEL

18. The defendant has been represented by counsel and is fully satisfied that its attorneys have provided competent legal representation. The defendant has thoroughly reviewed this Plea Agreement and acknowledges that counsel has advised it of the nature of the charge, any possible defenses to the charge, and the nature and range of possible sentences.

VOLUNTARY PLEA

19. The defendant's decision to enter into this Plea Agreement and to tender a plea of guilty is freely and voluntarily made and is not the result of force, threats, assurances, promises, or representations other than the representations contained in this Plea Agreement. The United States has made no promises or representations to the defendant as to whether the Court will accept or reject the recommendations contained within this Plea Agreement.

VIOLATION OF PLEA AGREEMENT

20. The defendant agrees that, should the United States determine in good faith, during the period that any Federal Proceeding is pending, that the defendant or any of its subsidiaries have failed to provide full and truthful cooperation, as described in Paragraph 12 of this Plea Agreement, or has otherwise violated any provision of this Plea Agreement, the United States will notify counsel for the defendant in writing by personal or overnight delivery or facsimile transmission and may also notify counsel by telephone of its intention to void any of its obligations under this Plea Agreement (except its obligations under this paragraph), and the defendant and its subsidiaries shall be subject to prosecution for any federal crime of which the

United States has knowledge including, but not limited to, the substantive offense relating to the investigation resulting in this Plea Agreement. The defendant and its subsidiaries agree that, in the event that the United States is released from its obligations under this Plea Agreement and brings criminal charges against the defendant or its subsidiaries for any offense referred to in Paragraph 14 of this Plea Agreement, the statute of limitations period for such offense shall be tolled for the period between the date of the signing of this Plea Agreement and six (6) months after the date the United States gave notice of its intent to void its obligations under this Plea Agreement.

21. The defendant understands and agrees that in any further prosecution of it or its subsidiaries resulting from the release of the United States from its obligations under this Plea Agreement, because of the defendant's or its subsidiaries' violation of the Plea Agreement, any documents, statements, information, testimony, or evidence provided by it, its subsidiaries, or current or former directors, officers, or employees of it or its subsidiaries to attorneys or agents of the United States, federal grand juries, or courts, and any leads derived therefrom, may be used against it or its subsidiaries in any such further prosecution. In addition, the defendant unconditionally waives its right to challenge the use of such evidence in any such further prosecution, notwithstanding the protections of Fed. R. Evid. 410.

ENTIRETY OF AGREEMENT

22. This Plea Agreement constitutes the entire agreement between the United States and the defendant concerning the disposition of the criminal charge in this case. This Plea Agreement cannot be modified except in writing, signed by the United States and the defendant.

23. The undersigned is authorized to enter this Plea Agreement on behalf of the defendant as evidenced by the Resolution of the Board of Directors of the defendant attached to, and incorporated by reference in, this Plea Agreement.

24. The undersigned attorneys for the United States have been authorized by the Attorney General of the United States to enter this Plea Agreement on behalf of the United States.

25. A facsimile signature shall be deemed an original signature for the purpose of executing this Plea Agreement. Multiple signature pages are authorized for the purpose of executing this Plea Agreement.

DATED as of November 29, 2010

BY:______________________________
Singapore Airlines Cargo Pte Ltd.
By: Brenton Wu
Its: Vice President, Legal

BY:______________________________
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Federal "Unemption" of

State Antitrust Enforcement

Remarks By

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Chief, Antitrust Bureau
Office of the Attorney General
of the State of New York

Presented to

Antitrust, Competition and Trade Committee
of LEX MUNDI

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FEDERAL "UN-EMPTION" OF STATE ANTITRUST ENFORCEMENT

Jay L. Himes[1]

This paper summarizes the authority of state officials to enforce the antitrust laws independent of decisions by federal antitrust officials. As the discussion below will make clear, recognition of the States' role in this particular enforcement regime is well-established – so much so that I find the term "un-emption" appropirately to capture the relationship between state and federal antitrust authority as it exists today. In addition to reviewing this current state of affairs, I also respond to views expressed by Circuit Judge Richard A. Posner, a leading advocate for curtailing state antitrust enforcement authority.

The Historical Setting of State Enforcement

The States' critical role in the nation's antitrust enforcement regime began during the period that gave rise to the federal antitrust laws. By 1890, when the Sherman Act was passed, twenty-one States had enacted either constitutional or statutory antitrust provisions, and several had both.[2] During this period, States brought a number of important enforcement actions, including a successful suit by New York to dissolve a member of the Sugar Trust, and one by Ohio against the Standard Oil Co., which resulted

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[1] The author is the Chief of the Antitrust Bureau of the Office of the Attorney General of the State of New York. The views expressed are those of the author and do not necessarily reflect those of Office of the Attorney General of the State of New York, or of its Antitrust Bureau. Parts of the paper expand, and other parts distill, views expressed elsewhere. *See* Jay L. Himes, *Exploring the Antitrust Operating System: State Enforcement of Federal Antitrust Law in the Remedies Phase of the Microsoft Case*, 11 GEO. MASON L. REV. 37 (2002); Jay L. Himes, *The Antitrust Bureau of the New York Attorney General's Office, Antitrust Federalism and Multistate Antitrust Enforcement* (April 8, 2002), in Association of the Bar of the City of New York, ANTITRUST PLAINTIFFS' PERSPECTIVE: PUBLIC & PRIVATE ENFORCEMENT IN COMPLEX LITIGATION 142 (2002); Memorandum of the State of New York, dated March 15, 2002, filed in New York v. Microsoft Corporation, Civ. Action No. 98-1233-CKK (D.D.C.).

[2] Hans B. Thorelli, THE FEDERAL ANTITRUST POLICY 155 (1955) ("Thorelli, *Federal Antitrust Policy*").

in an order to sever the company's connection with the Standard Oil Trust.[3]

In passing the Sherman Act in 1890, Congress intended the new federal law to supplement—not to supercede—state antitrust laws. Thus, "the legislative history of the Sherman Act is replete with statements that the Act was designed to supplement rather than to abrogate existing state antitrust enforcement. . . ."[4] Accordingly, state antitrust enforcement continued after Congress enacted the Sherman Act:

> Between 1890 and 1902, twelve states brought a total of twenty-eight antitrust actions, while in the same period the DOJ instituted a total of nineteen antitrust suits. Although federal activity increased dramatically in subsequent years, at least certain states simultaneously continued active enforcement efforts of their own for another decade or more.[5]

During this early period, New York and Texas were "[t]he leading states" in pursuing actions against the trusts.[6]

Although federal enforcement dominated the antitrust landscape during much of

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3 People v. North River Sugar Refining Co., 121 N.Y. 582, 24 N.E. 834 (1890); State ex rel. Attorney General v. Standard Oil Co., 49 Ohio St. 137, 30 N.E. 279 (1892). *See also* Thorelli, *Federal Antitrust Policy, supra* n. 2, at 156-57, 259-65; William Letwin, LAW AND ECONOMIC POLICY IN AMERICA 82-83 (Phoenix ed. 1981) (describing actions against trusts by Louisiana, California, Nebraska and Illinois in the years immediately preceding enactment of the Sherman Act); James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918*, 135 U. PA. L. REV. 495, 495-501 (1987) ("May, *The Formative Era*"); California v. Van de Kamp, 46 Cal.3d 1147, 1154-62, 762 P.2d 385, 388-93 (1988) (detailing development of state antitrust laws beginning shortly before the Sherman Act).

4 Herbert Hovenkamp, *State Antitrust in the Federal Scheme*, 58 IND. L.J. 375, 378 (1983). *See generally id.* at 379-84. *See also* 21 Cong. Rec. 2457 (1890) (remarks of Sen. Sherman: the proposed legislation was intended to "supplement the enforcement of the established rules of the common and statute law by the courts of the several states"); Andrew I. Gavil, *Reconstructing the Jurisdictional Foundation of Antitrust Federalism,* 61 GEO. WASH. L. REV. 658, 658-61, 688-91 (1993) ("Gavil, *The Jurisdictional Foundation*"); James May, *The Formative Era*, *supra* n. 3, 135 U. PA. L. REV. at 504; Roger W. Stone, *Reviving State Antitrust Enforcement: The Problems With Putting New Wine in Old Wine Skins*, 4 J. CORP. L. 547, 557-68 (1979) ("Stone, *New Wine*").

5 May, *The Formative Era*, *supra* n. 3, 135 U. Pa. L. Rev. at 500-01 (1987). *See generally* Walton Hamilton & Irene Till, *Antitrust in Action* 23 & Appendix G (1940), *reprinted in* Senate Temporary National Economic Committee, *Investigation of Concentration of Economic Power*, Monograph No. 16, 76th Cong., 3d Sess. (Sen. Comm. Print 1941) ("Hamilton & Till, *Economic Power*").

6 Thorelli, *Federal Antitrust Policy, supra* n. 2, at 265. *See also id*. at 259-65 (discussing cases involving Ohio, Kansas, Kentucky, Missouri, New Jersey, Tennessee, and Wisconsin); Stone, *New Wine*, *supra* n. 4, 4 J. CORP. L. at 552-54.

the twentieth century, significant state antitrust enforcement resumed in the 1960's, largely through treble-damage class actions claiming injury to the States and their consumers.[7] State activity increased further after Congress enacted the *parens patriae* provisions of the 1976 Hart-Scott-Rodino Antitrust Improvements Act, and provided funds to expand state antitrust enforcement under an amendment to the Crime Control Act.[8] The Hart-Scott-Rodino Act empowered state attorneys general to sue for damages on behalf of injured consumers. Complementary authority to sue for equitable relief to redress injury to a State's general economy or to its citizenry-at-large already existed under established case law.[9]

Active state enforcement continued during the Reagan era in response to a sharp decline in antitrust enforcement at the federal level.[10] This increase in State antitrust enforcement is reflected in, among other things: (1) a set of vertical restraints guidelines, first issued by the National Association of Attorneys General ("NAAG") in 1985, and thereafter revised;[11] (2) a NAAG set of horizontal merger guidelines first adopted in

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[7] *See, e.g.,* In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 333 F.Supp. 278 (S.D.N.Y.), *amended*, 333 F.Supp. 291 (S.D.N.Y.), *mandamus denied sub nom.*, Pfizer, Inc. v. Lord, 449 F.2d 119 (2nd Cir. 1971); West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2nd Cir.), *cert. denied sub nom.* Cotler Drugs, Inc. v. Chas. Pfizer & Co., 404 U.S. 871 (1971); Illinois v. Harper & Row Publishers, Inc., 301 F.Supp. 484 (N.D. Ill.1969); *In re Ampicillin Antitrust Litigation*, 55 F.R.D. 269 (D.D.C. 1972); Philadelphia Electric Co. v. Anaconda American Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968). *See also* Illinois v. Bristol-Myers Co., 470 F.2d 1276, 1277 (D.C. Cir. 1972).

[8] *See* Pub. L. No. 94-435, 90 Stat. 1394 (1976) (codified, as amended, at 15 U.S.C. §§ 15c-15h); Pub. L. No. 94-503, §309, 90 Stat. 2414 (1976).

[9] Georgia v. Pennsylvania Railroad Co., 324 U.S. 439 (1945). *See also* Hawaii v. Standard Oil Co., 405 U.S. 251, 259 (1972); Burch v. Goodyear Tire & Rubber Co., 544 F.2d 633, 635 (4th Cir. 1977) (noting that the 1976 Act provided only for damage actions because Congress recognized that "state attorneys general suing as *parens patriae* clearly have standing to seek injunctive relief under Section 16 of the Clayton Act").

[10] *See, e.g.,* Donald L. Flexner & Mark A. Racanelli, *State and Federal Antitrust Enforcement in the United States: Collision or Harmony,* 9 CONN. J. INT'L L. 501 (1994); Lloyd Constantine, *Antitrust Federalism*, 29 WASHBURN L.J. 163 (1990).

[11] NAAG Vertical Restraints Guidelines (1995), *published in* 4 Trade Reg. Rep. (CCH) ¶ 13,400.

1987, and similarly later revised;[12] (3) a merger disclosure compact, signed by various States to facilitate state merger investigations;[13] and (4) a protocol between state and federal enforcers to facilitate joint merger investigations.[14]

Independent State Antitrust Enforcement Today

States thus are endowed with extensive authority to enforce federal antitrust law. Moreover, the Supreme Court has consistently upheld individual state antitrust laws against arguments of federal pre-emption[15] and other constitutionally-based objections.[16] Antitrust federalism is, therefore, an established part of the nation's antitrust enforcement regime.[17] One of its core principles is that federal and state enforcement decisions, in any

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12 NAAG Horizontal Merger Guidelines (1993), *published in* 4 Trade Reg. Rep. (CCH) ¶ 13,406.

13 Voluntary Pre-Merger Disclosure Compact (1994), *published in* 4 Trade Reg. Rep. (CCH) ¶ 13,410.

14 Protocol for Joint Federal-State Merger Investigations (1994), *published in* 4 Trade Reg. Rep. (CCH) ¶ 13,420.

15 *See* California v. ARC America Corp., 490 U.S. 93 (1989) (no pre-emption of state indirect purchaser statutes); Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) (no pre-emption of state law prohibiting oil company ownership of retail service stations and requiring uniform pricing terms); Puerto Rico v. Shell Co., 302 U.S. 253 (1937) (no pre-emption of Puerto Rico's local antitrust law).

16 *See* Tigner v. Texas, 310 U.S. 141 (1940) (rejecting equal protection argument based on exemption for agricultural activity, and overruling Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902)); Standard Oil Company of Kentucky v. Tennessee, 217 U.S. 413 (1919) (rejecting commerce clause and equal protection arguments); International Harvester Co. v. Missouri, 234 U.S. 199 (1914) (rejecting equal protection and due process/"freedom of contract" arguments); National Cotton Oil Co. v. Texas, 197 U.S. 115 (1905) (same); *Smiley v. Kansas*, 196 U.S. 447 (1905) (same). *Cf.* Carroll v. Greenwich Ins. Co., 199 U.S. 401 (1905) (rejecting fourteenth amendment and "freedom of contract" arguments seeking to invalidate state statute prohibiting joint activity by fire insurance companies). In earlier periods, state antitrust laws occasionally were invalidated on vagueness grounds, or as outside the scope of state authority under then-prevailing legislative jurisdictional limitations. *See generally* May, *The Formative Era*, *supra* n. 3, 135 U. PA. L. REV. at 521-39; ABA Section of Antitrust Law, Monograph No. 15, ANTITRUST FEDERALISM: THE ROLE OF STATE LAW 3 n.13, 17-19 (1988).

17 *See generally* Richard Wolfram & Spencer Weber Waller, *Contemporary Antitrust Federalism: Cluster Bombs or Rough Justice?*, *published in* Robert L. Hubbard & Pamela Jones Harbour, ANTITRUST LAW IN NEW YORK STATE 1 (2nd ed. 2002); Jonathan Rose, *State Antitrust Enforcement, Mergers and Politics*, 41 WAYNE ST. L. REV. 71 (1994); Andrew I. Gavil,, *The Jurisdictional Foundation*, *supra* n. 4, 61 GEO. WASH. L. REV. at 661-62; Robert M. Langer, *The State of State Antitrust Enforcement*, 60 ANTITRUST L.J. 198 (1991); James May, *The Role of the States in the First Century of the Sherman Act and the Larger Picture of Antitrust History*, 59 ANTITRUST L. J. 93 (1990); Michael F. Brockmeyer, *Report on the NAAG Multi-State Task Force*, 58 ANTITRUST L.J. 215 (1989); Jason Lynch, Note, *Federalism, Separation of Powers and the Role of State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998, 2005-06 (2001).

given instance, will not necessarily be the same. The fact that federal enforcers take a particular course of action in response to a particular set of facts – or take no action at all – does not preclude action by state enforcers. As the Supreme Court has noted, antitrust rights of action are "designated to be cumulative, not mutually exclusive . . . . 'They may proceed simultaneously or in disregard of each other.'"[18]

More specifically, in the merger context, in *California v. American Stores Co.*,[19] the Supreme Court upheld California's authority to sue for equitable relief against a retail merger after the merging parties had reached a settlement with the Federal Trade Commission permitting them to consummate the transaction. The FTC had investigated a proposed merger involving American Stores, a chain operating retail grocery stores in 40 States, and Lucky Stores, which operated in seven western and midwestern States. The FTC negotiated a settlement that included limited store divestitures, and the merger proceeded. California then filed a *parens patriae* complaint challenging the transaction and seeking divestiture of all of Lucky Stores' assets in the State. Upholding the State's suit, the Supreme Court emphasized that "[p]rivate enforcement of the [Clayton] Act" – that is, enforcement by persons other than the Antitrust Division and the FTC – "was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition." [20]

[18] United States v. Borden Co., 347 U.S. 514, 518, 519 (1954) (quoting United States v. Bendix Home Appliances, 10 F.R.D. 73, 77 (S.D.N.Y. 1949)).

[19] 495 U.S. 271 (1990).

[20] *Id.* at 284 (1990). *See generally* ABA Section of Antitrust Law, Monograph No. 21, STATE MERGER ENFORCEMENT 40 (1995) (noting that "recent Supreme Court decisions seem to recognize the legitimacy of an active role for state antitrust enforcement"); Thorelli, *Federal Antitrust Policy*, *supra* n. 2, at 225 (Congress sought to "not only to provide redress for private wrongs but also to build into the act the feature of self-enforcement that had been typical in cases of restraint of trade at common law"); Hamilton & Till, *Economic Power, supra* n. 5, at 10 ("a criminal action, a plea in equity, a libel [i.e., forfeiture] against the goods, a private suit for three times the damage and the recovery of cost were intended to put teeth in the [Sherman] act"); 82 ("In provision for private suit Congress intended to make the Sherman Act self-operative. An industry generally law abiding was to be its own policeman");

Thus, States may, and regularly do, sue under federal and state antitrust law, regardless of the willingness or disinclination of federal antitrust enforcers to act. By way of example, in *Hartford Fire Ins. Co. v. California*,[21] States and private parties challenged collusive activity involving domestic and foreign participants in the insurance industry nationwide. "The Justice Department declined even to investigate this industry, purportedly because the Federal Trade Commission, during a brief investigation, failed to uncover any evidence of collusion and because 'collusion is highly unlikely in unconcentrated industries like the property and casualty insurance industry'."[22] After the Supreme Court's 1993 decision upholding the case, the litigation settled under terms that reformed significant features of the national commercial liability insurance industry.[23]

Moreover, as *American Stores* reflects, the fact that federal enforcers have secured antitrust relief does not affect – much less bar subsequent litigation by a State or private

51 Cong. Rec. 16319 (October 8, 1914) (remarks of Rep. Floyd: "We have taken, by these provisions [§§ 4, 5, and 16 of the Clayton Act], the business public into our confidence as allies of the Government in enforcing the antitrust laws, and given the business men of the country who are being imposed upon by unlawful combinations remedies by which they can recover their own damages without waiting upon the slow and tortuous course of prosecution on the part of the Government").

[21] 509 U.S. 764 (1993).

[22] Michael F. Brockmeyer, *State Antitrust Enforcement*, 57 ANTITRUST L.J. 169, 170 (1988) (fn. omitted) (quoting letter from Assistant Attorney General Douglas H. Ginsburg to Jay Angoff, dated April 22, 1986). *See also, e.g.,* New York v. Kraft Gen. Foods, Inc., 862 F. Supp.1030 (S.D.N.Y.), *aff'd without published opinion*, 14 F.3d 590 (2nd Cir. 1993), *denied on renewal*, 862 F. Supp. 1035 (S.D.N.Y. 1994), *decision on liability trial*, 926 F. Supp. 321 (S.D.N.Y. 1995) (after federal enforcers declined to take action, New York challenged Nabisco's 1993 sale of its ready-to-eat cereal assets to Kraft. The District Court denied preliminary injunctive relief, and subsequently dismissed for failure to show a substantial lessening of competition in the relevant market); Bon-Ton Stores, Inc. v. May Dep't Stores Co., 881 F. Supp. 860 (W.D.N.Y.1994), *consent decree,* 1995-1 Trade Cas. (CCH) ¶ 70,917 (W.D.N.Y. 1995) (after federal enforcers declined to act, New York challenged a proposed retail department store merger in an action that was consolidated with a private case. The District Court grant a preliminary injunction against the transaction, and the case was subsequently settled); Washington v. Texaco Refining and Marketing, Inc., 1991-1 Trade Cas. (CCH) ¶69,346 (W.D. Wash. 1991) (Washington sued after federal authorities granted early termination of a proposed purchase by Texaco of Shell's service stations in the Seattle-Tacoma area. The District Court granted a temporary restraining order, and Texaco entered a consent decree that directed divestiture of a number of the stations under purchase. *See* Gordon Lee, *Texaco Buyout of Shell Gets Go-Ahead*, The Seattle Times, January 23, 1991, at F6.).

[23] *See Insurance Companies Settle Multistate Conspiracy Charges*, 67 Antitrust & Trade Reg. Rep. (BNA) 434 (October 13, 1994).

party. For example, in *In re Multidistrict Private Civil Treble Damage Antitrust Litigation,*[24] States and private parties brought an antitrust case based on the same conspiracy as that underlying a case previously settled by the DOJ. Denying a motion to dismiss, the District Court noted:

> It may well be that a trial judge, *after* hearing the evidence may determine that the grant of an injunction which parallels the relief of the consent decree in action 69-75-JWC [the United States case] is unwarranted. But pre-judging at this stage of the litigation, that plaintiffs may not be able to present some peculiar need *for further injunctive relief* is not the function of this Court.[25]

The *Microsoft* case – in which the district court rejected Microsoft's application to dismiss the litigating States' effort to secure remedies beyond those included in the consent decree agreed to by the DOJ and nine other States – is but a recent illustration of these established principles of antitrust federalism.[26] Many other decisions similarly illustrate that antitrust enforcement by federal officials has no preclusive effect.[27]

Likewise, in antitrust cases brought by the United States, non-parties not uncommonly seek to intervene in consent decree approval proceedings. Courts routinely

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[24] 52 F.R.D. 398 (C.D. Cal. 1970).

[25] *Id.* at 402 (emphasis and bracketed matter added).

[26] *See* New York v. Microsoft Corp., 209 F. Supp. 2d 132 (D.D.C. 2002).

[27] *See* Battle v. Liberty Nat'l Life Ins. Co., 493 F.2d 39, 53 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975) (prior antitrust consent decree by the DOJ did not bar a subsequent private suit because the government decree "may not have gone far enough to prevent further injury to the private plaintiffs"); United States v. Associated Milk Producers, Inc., 394 F. Supp. 29, 44 (W.D. Mo. 1975) (non-parties who believed that a DOJ consent decree needed "more stringent relief" were "in no way foreclosed from urging that view in the [then-pending] private litigation"), *aff'd*, 534 F.2d 113 (8th Cir.), *cert. denied*, 429 U.S. 940 (1976); United States v. Carter Products, Inc., 211 F. Supp. 144, 148 (S.D.N.Y.1962) (non-party objecting to a consent decree "would retain all its legal remedies as though no final judgment had been entered"); Arvin Industries v. Maremont Corp., 1973-1 Trade Cas. (CCH) ¶ 74,416 at 93,883 (S.D. Ind. 1973) (FTC consent decree arising from mergers did not bar a subsequent private action: "a private party has an independent right of action pursuant to the antitrust laws that is not contingent on any action or lack of action by the [FTC]"). *Cf.* United States v. Long Island Jewish Medical Center, 983 F. Supp. 121 (E.D.N.Y. 1997) (after the New York Attorney General entered a settlement permitting the merger of two hospital systems, subject to conditions designed to improve the delivery of health services in Long Island, the Court denied the DOJ injunctive relief to block the transaction).

deny such motions, in part, because, regardless of the disposition of the DOJ's action, "the rights of [proposed intervenors] to prosecute their own claims is not otherwise affected."[28] As the Supreme Court noted in *Sam Fox Publishing Co. v. United States,*[29] "[w]e regard it as fully settled that a person whose private interests coincide with the public interest in government antitrust litigation is nonetheless *not bound* by the eventuality of such litigation, and hence may not, as of right, intervene in it."[30]

In sum, the law is well-settled. As the Fifth Circuit has written, "numerous cases have held that the federal antitrust laws are not pre-emptive of state antitrust regulation."[31] Accordingly, a decision by federal antitrust enforcers – whether to settle or simply not to pursue an antitrust action – does not impair a State's right to pursue all available federal and state antitrust claims.

Judge Posner's Criticisms

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[28] United States v. Automobile Mfrs. Ass'n, 307 F. Supp. 617, 621 (C.D. Cal. 1969), *aff'd per curiam sub nom.* City of New York v. United States, *and appeal dismissed sub nom.* Grossman v. Automobile Mfrs. Ass'n, *397 U.S. 248 (1970). See also* United States v. American Bar Ass'n, 118 F.3d 776, 781 (D.C. Cir. 1997) (affirming denial of a motion to intervene in the DOJ's civil equitable case in part because the DOJ's consent decree "has no [*res judicata*, collateral estoppel or stare decisis] effect"); United States v. Visa U.S.A., Inc., 2000-2 Trade Cas. (CCH) ¶ 73,005 at 88,517-18 (S.D.N.Y. 2000) ("[a]ny judgment entered on the United States' complaint in this case . . . would not impair [proposed intervenor] Discover's ability to seek relief in a private antitrust action or otherwise to protect any legitimate interest adversely affected by anti-competitive conduct"); United States v. ASCAP, 331 F.2d 117, 124 (2nd Cir.) ("[i]f appellants' position in fact has the merit under the antitrust laws which they assert, they have effective remedies available, either by persuading the Department of Justice to apply under Section XVII for a modification of the Judgment, or by a private suit which our ruling here in no way affects"), *cert. denied sub nom.* Shenandoah Valley Broadcasting, Inc. v. ASCAP, 377 U.S. 997 (1964).

[29] 366 U.S. 683 (1961).

[30] *Id.* at 689 (emphasis added).

[31] Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286, 1313 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) (vacating an injunction against prosecution of a state case issued in a pending federal antitrust action). *See also* Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 993 (9th Cir. 2000) ("the Supreme Court has made clear that neither the Sherman Act nor the Commerce Clause preempts state antitrust law"); Matthews Conveyer Co. v. Palmer-Bee Co., 135 F.2d 73, 82 (6th Cir. 1943) ("while Congress has the power to legislate with regard to interstate commerce, declaring certain contracts illegal if they tend to lessen competition, the states are not thereby pre-empted of the right to legislate as to matters of public policy with reference to contracts in restraint of trade").

State antitrust enforcement does not, of course, go unchallenged. Circuit Judge Richard Posner, a influential antitrust scholar and jurist, is a leading critic of antitrust enforcement by state attorneys general. In a 2001 paper, Judge Posner asserted that state attorneys general should be stripped of their power to bring *parens patriae* suits.[32] He elaborated on his views in a 2003 address.[33] My immediate predecessor as antitrust bureau chief, NYU Professor Harry First, has responded to Judge Posner far better than I can.[34] However, I would like to take just a few moments to comment on several of the Judge's objections.

First, Judge Posner maintains that, as elected political officials, state attorneys general are likely to bring high profile antitrust cases on behalf of state residents – "including corporations that have headquarters or extensive operations in the state"[35]– and impose the costs of those cases on businesses located elsewhere. This, as Judge Posner describes it, is "a form of protectionism."[36]

I do not know what facts lead the Judge to form the view that this sort of thing is going on to a degree that suggests a systemic deficiency. His concerns certainly do not describe circumstances in New York during the three years that I have headed the

[32] Hon. Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 940-41 (2001) ("ABA Article")

[33] Hon. Richard A. Posner, *Is Federalism Overrated?*, before the American Enterprise Institute for Public Policy Research, Washington, D.C. (April 21, 2003) ("AEI Address") at http://www.federalismproject.org/masterpages/Antitrust/Posner.pdf.

[34] *See* Harry First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 Geo. Wash. L. Rev. 1004, 1014 (2001). For articles reporting recent state enforcement in general, *see* Patricia A. Conners, *Current Trends and Issues in State Antitrust Enforcement*, 16 LOYOLA CONS. L. REV. 37 (2003); Antitrust Committee of the Commerical and Federal Litigation Section of the New York State Bar Association, *The State of State Antitrust Enforcement*, 8 NY LITIGATOR 4 (No. 1, Winter 2003).

[35] AEI Address at 6. *See also* ABA Article, 68 ANTITRUST L.J. at 941 (noting that "[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").

[36] AEI Address at 7.

Antitrust Bureau in Attorney General Spitzer's office. Indeed, Attorney General Spitzer's willingness to take on home-grown business interests is well-known. Nothing is more New York home-grown than the securities industry – not even the mutual funds industry – and, as you all know, our Attorney General's office has taken on both.

There's nothing any different going on in the antitrust area in New York. For example, last year we filed an *amicus curiae* brief in the United States Supreme Court in an antitrust case called *Trinko*.[37] We believed that the case raised important questions concerning the duty of a monopolist to deal with competitors, and so we filed – although our position was adverse to one of New York's largest employers, Verizon, the defendant in the case. We took a similarly adverse position to Verizon in an *amicus* brief that we filed in the United States Court of Appeals for the D.C. Circuit six months earlier.[38]

New York also agreed to settle the Microsoft case,[39] along with the U.S. DOJ, in 2001. I think that it is fair to say our settlement decision was not favorably received by IBM, one of the State's leading corporate citizens.

Now, I am mindful that my response here concerns only one State, and, indeed, the conditions surrounding only a particular incumbent attorney general in that State. And while I do not have direct exposure to what happens in other States, let me at least elaborate on what I have experienced in New York.

As I reflect on Judge Posner's comment, I am struck by just how different the state of affairs in New York is than the one he posits. We regularly receive complaints

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[37] Brief for the States of New York and Others As Amici in Support of Respondent, filed July 25, 2003 in Verizon Communications Inc. v. Law Offices of Curtis Trinko, LLP, Docket No. 02-682 (U.S.), *decided*, ___ U.S. ___, 124 S.Ct. 872 (2004).

[38] Brief for Amici Curiae States of New York and Others In Support of Reversal of the Order Appealed From, dated December 17, 2002, filed in Covad v. Bell Atlantic Corp., Docket No. 02-7057 (D.C. Cir.).

[39] New York v. Microsoft Corp., 98-1233-CKK (D.D.C.); United States v. Microsoft Corp., 98-1232-CKK (D.D.C.).

from *non*-New York businesses concerning the conduct of companies – frequently competitors, of course – where there is nothing New York-distinctive about the claimed competitive impact. Those kinds of complaints lead me to ponder whether the New York Antitrust Bureau should commit resources to investigating a complaint about anticompetitive conduct that commonly is national in scope. Sometimes we do so, and sometimes not. Protecting local business is not a consideration. The very enforcement decision rarely even percolates up past the Antitrust Bureau itself.

Second, Judge Posner criticizes state *parens patriae* litigation as unnecessary, given the availability of class actions. According to the Judge, "while class actions have plenty of problems, I know of no evidence that *parens patriae* suits solve them."[40] I do not understand that protestation at all. Congress passed the federal *parens patriae* provisions in 1976[41] *because* it regarded the class action device as insufficient to protect consumer interests. No one who looks seriously at the legislative history of that law could conclude otherwise.[42]

That legislative history is replete with statements showing that *parens patriae* proponents believed restrictive court rulings, together with practical problems of proving damages, had rendered Rule 23 class actions impotent to remedy the injury that

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40 AEI Address at 8.

41 Pub. L. No. 94-435, 90 Stat. 1394 (1976) (codified, as amended, at 15 U.S.C. §§ 15c-15h).

42 *See generally* Sen. Rep. No. 94-803, Pt. 1, 94th Cong., 2nd Sess., at 6 (1976) ("consumers have found little relief under the class action provisions of the Federal Rules because of restrictive judicial interpretations of the notice and manageability provisions of Rule 23 and practical problems in the proof of individual consumers' damages under section 4 of the Clayton Act"); *id.* at 40-41 (the statute is a "legislative response to the restrictive judicial interpretations of the notice and manageability provisions of Rule 23"); H.R. No. 94-499, 94th Cong., 1st Sess., at 4-9 (1976), *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 2575, 2573-78; 122 Cong. Rec. 15974 (May 28, 1976) (written remarks of Sens. Hart and Scott); 10 Earl W. Kintner, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 10-16 (1985) ("Kintner, *Antitrust Legislative History*"); Susan Beth Farmer, *More Lessons from the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought by State Attorneys General*, 68 FORD. L. REV. 361, 370-81 (1999) ("Farmer, *Cy Pres Distributions*").

individual consumers sustained from antitrust violations.[43] Thus, the United States Court of Appeals for the Second Circuit has correctly observed that the 1976 parens patriae provisions were enacted "to overcome obstacles to private class actions through enabling state attorneys general to function more efficiently as consumer advocates."[44]

Third, Judge Posner asserts that state attorneys general are not likely to "be sources of innovative antitrust doctrine or methods of proof; and in fact I know of no examples where they have been."[45] Again, Judge Posner seems not to have done necessary homework. Some here may recall that New York, California and a group of other states brought the *Hartford Insurance*[46] case, referred to earlier, which went to the United States Supreme Court a decade ago. A distinguished antitrust practitioner has called that Supreme Court decision one of the "Ten Milestones in 20th Century Antitrust Law"[47] – the ruling that "established an expansive scope for U.S. antitrust enforcement against foreign conduct by foreign parties, paving the way for today's exceptionally aggressive international enforcement program . . . ."[48]

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[43] *See* 122 Cong. Rec. 30879 (September 16, 1976) (remarks of Rep. Rodino); *id*. at 29146 (September 7, 1976) (remarks of Rep. Abourezk); *id.* at 15810 (May 27, 1976) (remarks of Sen. Bayh); *id.* at 15311, 15312 (May 25, 1976) (remarks of Sen. Hart); *id.* at 14691 (May 19, 1976) (remarks of Sen. Tunney); *id*. at 7034 (March 18, 1976) (remarks of Rep. Seiberling); *id.* at 7029 (March 18, 1976) (remarks of Rep. McClory); letter from Thomas E. Kauper to Hon. Peter W. Rodino, Jr., dated September 25, 1975, *reprinted in* 10 Kintner, *Antitrust Legislative History*, *supra* n. 42, at 120, 121.

[44] New York v. Reebok International Ltd., 96 F.3d 44, 48 (2nd Cir. 1996) (quoting In re Grand Jury Investigation of Cuisinarts, 665 F.2d 24, 35 (2nd Cir. 1981), *cert. denied sub nom.* Connecticut v. Cuisinarts, Inc., 460 U.S. 1068 (1983)). *See also* Illinois v. Abbott & Associates, Inc., 460 U.S. 557, 573 n.29 (1983) (Section 4C is designed to remedy problems inherent in private Rule 23 antitrust class actions); Pennsylvania v. Mid-Atlantic Toyota Distributors, Inc., 704 F.2d 125, 128 (4th Cir. 1983) (the law "was aimed primarily at enlarging the potential for consumer recovery . . . by effectively bypassing the burdensome requirements of Rule 23"); Farmer, *Cy Pres Distributions*, *supra* n. 42, 68 FORD. L. REV. at 380-87.

[45] AEI Address at 7.

[46] Hartord Fire Insurance Co. v. California, 509 U.S. 764 (1993).

[47] Robert A. Skitol & James A. Meyers, *Ten Milestones in 20th Century Antitrust Law and Their Importance to the Decade Ahead*, at http://www.dbr.com/media_html.asp?id=522.

[48] *Id.*

There's also a case called "*Illinois Brick.*"[49] The plaintiff in that case was Illinois, together with hundreds of government entities, which purchased construction projects that included bricks whose prices had been fixed. I frankly don't care much for how that case came out. As many of you know the Supreme Court refused to permit the suit because Illinois and the other government bodies had not dealt directly with the price-fixers. Certainly, however, the Supreme Court's 1977 ruling has influenced an entire generation of antitrust law in non-federal government cases.

There's a case called "*American Stores*,"[50] which I similarly mentioned earlier. The plaintiff was California. The Supreme Court's decision upholds the right of a plaintiff besides the DOJ and the FTC to obtain divestiture as relief for a merger violation, and also holds that additional divestiture is available even where government enforcers have already secured divestiture relief as a condition to permitting the merger to proceed unchallenged.

Finally, there's a case called "*Maricopa County Medical Society*,"[51] in which the Supreme Court reaffirmed the applicability of the antitrust laws to professions. The plaintiff was Arizona.

I'm offering you only a few rulings by the United States Supreme Court in cases where State-commenced litigation had a real, substantial impact on the development of antitrust law and practice. Judge Posner surely may be presumed to know about these decisions. Much as it pains me to say it, his refusal to acknowledge their existence suggests that intellectual honesty has fallen victim to agenda.

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[49] Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

[50] California v. American Stores Co., 495 U.S. 271 (1990).

[51] Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982).

Conclusion

One commentator has reminded that:

> Federalism serves antitrust jurisprudence, society, and democracy by giving voice to the diversity of opinion and by allowing the states to find ways to serve their citizens' varying (and, at times, conflicting) concerns.
>
> *   *   *
>
> Federalism allows for the experimentation, the successes, and the failures needed to find the best approach for a given time and a given market. It reminds legislators, courts, and scholars that, on many key issues, reasonable minds may differ and that, because society has conflicting and overlapping desires, there may not be one single answer. The last thing we ought to do is short cut the federalism-protected experimentation and innovation.[52]

Thus, the prevailing state of affairs in the antitrust context reflects a working model of the very essence of our nation's federalism.

[52] Jean Wegman Burns, *Embracing Both Faces of Antitrust Federalism:* Parker and ARC America Corp., 68 ANTITRUST L.J. 29, 43, 44 (2000) (fn. omitted).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2006

(Argued: June 14, 2007 Decided: September 4, 2007)

Docket No. 06-3128-cv

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In re ELEVATOR ANTITRUST LITIGATION

TRANSHORN, LTD., 1775 HOUSING ASSOCIATES, ROCHDALE VILLAGE, INC., BIRMINGHAM BUILDING TRADES TOWERS, INC., TRIANGLE HOUSING ASSOCIATES, L.P., BAY CREST CONDOMINIUM ASSOCIATION, OLEN COMMERCIAL REALTY CORP., RIVERBAY CORP., 181 MAPLE AVENUE ASSOCIATES, D.F. CHASE, INC., LENOX ROAD ASSOCIATES and TOWERS OF CORAL SPRINGS LTD.,

Plaintiffs-Appellants,

JOSEPH M. BENNARDI, doing business as BUILDING SUPERS OF CAMDEN, INC., doing business as NEDMAC MANAGEMENT, INC.,

Consolidated-Plaintiff-Appellant,

-v.-

UNITED TECHNOLOGIES CORPORATION, OTIS ELEVATOR COMPANY, KONE CORPORATION, KONE, INC., SCHINDLER HOLDING, LTD., SCHINDLER ELEVATOR CORPORATION, THYSSENKRUPP AG, THYSSENKRUPP ELEVATOR CAPITAL CORP., and THYSSENKRUPP ELEVATOR CORP., Defendants-Appellees.

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Before: JACOBS, Chief Judge, STRAUB and B.D. PARKER, Circuit Judges.

Appeal from a judgment entered by the United States District Court for the Southern District of New York (Griesa, J.) on June 6, 2006, granting defendants-appellees' motion to dismiss the complaint and denying leave to re-plead. We affirm.

ERIC ALAN ISAACSON (Mark Solomon, Christopher M. Burke, David W. Mitchell, Tami Falkenstein Hennick, on the brief), Lerach, Coughlin, Stoia, Geller, Rudman & Robbins LLP, San Diego, CA, for Plaintiffs-Appellants.

Mary Jane Fait, Wolf Haldenstein Adler Freeman & Herz, LLP, New York, NY, for Plaintiffs-Appellants.

Nadeem Faruqi, Antonio Vozzolo, Beth A. Keller, Faruqi & Faruqi, LLP, New York, NY, for Plaintiffs-Appellants.

MARK LEDDY (Leah Brannon, on the brief), Cleary Gottlieb Steen & Hamilton, LLP, Washington, DC, for Defendants-Appellees United Technologies Corporation and Otis Elevator Company.

Kenneth M. Kramer (Jerome S. Fortinsky, Paula Howell, on the brief), Shearman & Sterling LLP, New York, NY, for Defendants-Appellees Schindler Holding Ltd. and Schindler Elevator Corporation.

Gerald Zingone (Michael Evan Jaffe, on the brief), Thelen Reid Brown Raysman & Steiner LLP, Washington, DC, for Defendants-Appellees Kone Corporation and Kone, Inc.

Terry Myers (Anthony A. Dean, on the brief), Gibbons Del Deo, Dolan, Griffinger & Vecchione, P.C., New York, NY, for Defendant-Appellee ThyssenKrupp AG.

Scott Martin (Christopher V. Roberts, on the brief), Weil Gotshal & Manges LLP, New York, NY, for Defendants-Appellees Thyssenkrupp Elevator Capital Corp., and Thyssenkrupp Elevator Corp.

A. Paul Victor, Dewey Ballantine LLP, New York, NY, for Defendants-Appellees Thyssenkrupp Elevator Capital Corp., and Thyssenkrupp Elevator Corp.

PER CURIAM:

This appeal is taken from a judgment of the United States District Court for the Southern District of New York

(Griesa, J.), dismissing a complaint alleging that defendant elevator companies conspired to engage in anticompetitive conduct in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. § 1 et seq. (the "conspiracy claims"), and that they unilaterally monopolized and attempted to monopolize the maintenance market for their elevators, in violation of Section 2 of the Sherman Act (the "unilateral-monopolization claims"). We affirm. The conspiracy claims provide no plausible ground to support the inference of an unlawful agreement, and the allegations of unilateral monopolization fail to allege a prior course of dealing. Finally, the district court did not abuse its discretion by refusing leave to amend the complaint.

I

Plaintiffs represent a putative class of persons who "purchased elevators and/or elevator maintenance and repair services from defendants," sellers of elevators and maintenance services.[1] 2d Am. Compl. ¶¶ 5, 20-28. The complaint alleges that:

> (1) Defendants conspired to fix prices for the sale and the continuing maintenance of elevators, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (Count I);
>
> (2) Defendants conspired to monopolize the markets for the sale and maintenance of elevators, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2 (Count II); and
>
> (3) Each defendant unilaterally monopolized and attempted to monopolize the maintenance market for its own elevators by making it difficult for independent maintenance companies (and each other) to service each defendant's elevators, in

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[1] Defendants are: United Technologies Corporation and Otis Elevator Company (collectively "Otis"); Kone Corporation and Kone, Inc. (collectively "Kone"); Schindler Holding Ltd. and Schindler Elevator Corporation (collectively "Schindler"); ThyssenKrupp AG, ThyssenKrupp Elevator Corporation, and ThyssenKrupp Elevator Capital Corporation (collectively "Thyssen").

violation of Section 2 of the Sherman Act (Counts III – X).[2]

As to the conspiracy claims, plaintiffs allege that, beginning in 2000, defendants agreed:

> to suppress and eliminate competition in the sale and service of elevators by fixing the price of elevators [and] replacement parts and services, rigging bids for contracts for elevator sales, allocating markets and customers for elevator sales and maintenance services, and rigging bids for contracts for elevator maintenance and repair services.

2d Am. Compl. ¶ 41. Plaintiffs assert that the conspiracy was undertaken (and its effects felt) in Europe as well as in the United States, and that the conspiracy was effected by price fixing, bid rigging, and collusion to drive independent repair companies out of business. 2d Am. Compl. ¶¶ 41-43. The complaint references various investigations into alleged antitrust violations by defendants and their affiliates, one in Italy (1998) and another by the European Commission (2004). 2d Am. Compl. ¶¶ 62-69.

As to the unilateral-monopolization claims, plaintiffs assert that each defendant monopolized the maintenance market for its own elevators by such measures as interfering

[2] Counts III and IV are against Otis, V and VI, Kone; VII and VIII, Schindler; and IX and X, Thyssen.

with delivery of replacement parts and intentionally designing their elevators to require proprietary maintenance tools which are not made available to competing service companies (e.g., embedded computer systems that can only be interfaced with defendant-controlled handheld units). 2d Am. Compl. ¶¶ 50-57.

The district court granted defendants' Rule 12(b)(6) motion to dismiss on the ground that the claims lacked the requisite factual predicate. In re Elevator Antitrust Litig., No. 04 Civ. 1178, 2006 WL 1470994 (S.D.N.Y. May 30, 2006). The court denied leave to re-plead and entered judgment in favor of defendants. Id. at *12. This appeal followed.

II

We review the district court's grant of a Rule 12(b)(6) motion de novo, see In re Tamoxifen Citrate Antitrust Litig., 466 F.3d 187, 200 (2d Cir. 2006), cert. denied, 127 S. Ct. 3001 (2007), "draw[ing] all reasonable inferences in plaintiffs' favor," Freedom Holdings Inc. v. Spitzer, 357 F.3d 205, 216 (2d Cir. 2004) and accepting as true all the factual allegations in the complaint, see Roth v. Jennings, 489 F.3d 499, 501 (2d Cir. 2007).

We affirm the district court's dismissal of the conspiracy claims because plaintiffs are unable to allege facts that would provide "plausible grounds to infer an agreement," Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1965 (2007). "Considerable uncertainty" surrounds the breadth of the Supreme Court's recent decision in Twombly. Iqbal v. Hasty, 490 F.3d 143, 155 (2d Cir. 2007). But we need not draw fine lines here; our precedents support application of Twombly to the conspiracy claims asserted under both Section 1 and Section 2.[3] To survive a motion to dismiss under Twombly, it is not enough to make allegations of an antitrust conspiracy that are consistent with an unlawful agreement; to be viable, a complaint must contain

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[3] A narrow view of Twombly would have limited its holding to the antitrust context, or perhaps only to Section 1 claims; but we have concluded that Twombly affects pleading standards somewhat more broadly. See Iqbal, 490 F.3d at 157 ("We are reluctant to assume that all of the language of Bell Atlantic[v. Twombly] applies only to section 1 allegations based on competitors' parallel conduct or, slightly more broadly, only to antitrust cases."); ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., ___ F.3d ___, No. 05-5132, 2007 WL 1989336, at *15 n.2 (2d Cir. July 11, 2007) ("We have declined to read Twombly's flexible 'plausibility standard' as relating only to antitrust cases." (citing Iqbal, 2007 WL 1717803, at *11)).

"enough factual matter (taken as true) to suggest that an agreement [to engage in anticompetitive conduct] was made." Twombly, 127 S. Ct. at 1965 (citation and internal quotation marks omitted). While Twombly does not require heightened fact pleading of specifics, it does require enough facts to "nudge[plaintiffs'] claims across the line from conceivable to plausible."[4] Twombly, 127 S. Ct. at 1974.

Plaintiffs argue that a plausible inference can be drawn from three sources in the complaint: [A] averments of agreements made at some unidentified place and time; [B] averments of parallel conduct; and [C] evidence suggesting anticompetitive wrongdoing by certain defendants in Europe. These allegations are insufficient to establish a plausible inference of agreement, and therefore to state a claim.

[A] Conclusory Allegations of Agreement. As the district court observed, the complaint enumerates "basically

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[4] The potentially enormous cost of fact discovery was cited as a factor in Twombly; the Court explained that, while judges should "be cautious before dismissing an antitrust complaint in advance of discovery," they must also keep in mind that "proceeding to antitrust discovery can be expensive." Id. at 1966-67. Accordingly, district courts "'retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.'" Id. at 1967 (quoting Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 528 n.17 (1983)).

every type of conspiratorial activity that one could imagine . . . . The list is in entirely general terms without any specification of any particular activities by any particular defendant[; it] is nothing more than a list of theoretical possibilities, which one could postulate without knowing any facts whatever."[5] In re Elevator Antitrust Litig., 2006 WL 1470994, at *2-*3 (citing 2d Am. Compl. ¶¶ 43, 78, 85). Such "conclusory allegation[s] of agreement at some unidentified point do[] not supply facts adequate to show illegality." Twombly, 127 S. Ct. at 1966; cf. Amron v. Morgan Stanley Inv. Advisors Inc., 464 F.3d 338, 344 (2d Cir. 2006) (concluding that, in resisting a motion to

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[5] Specifically, plaintiffs assert that, in order to effect the conspiracy, defendants:

> (a) Participated in meetings in the United States and Europe to discuss pricing and market divisions;
> (b) Agreed to fix prices for elevators and services;
> (c) Rigged bids for sales and maintenance;
> (d) Exchanged price quotes;
> (e) Allocated markets for sales and maintenance;
> (f) "Collusively" required customers to enter long-term maintenance contracts; and
> (g) Collectively took actions to drive independent repair companies out of business.

2d Am. Compl. ¶ 43.

dismiss, "bald assertions and conclusions of law will not suffice").

[B] Parallel Conduct. Plaintiffs argue that certain parallel conduct evinces a conspiracy, such as similarities in contractual language, pricing, and equipment design. 2d Am. Compl. ¶¶ 41-42, 61-70. But these allegations do not constitute "plausible grounds to infer an agreement" because, while that conduct is "consistent with conspiracy, [it is] just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." Twombly, 127 S. Ct. at 1964. Similar contract terms can reflect similar bargaining power and commercial goals (not to mention boilerplate); similar contract language can reflect the copying of documents that may not be secret; similar pricing can suggest competition at least as plausibly as it can suggest anticompetitive conspiracy; and similar equipment design can reflect the state of the art. "An allegation of parallel conduct . . . gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of entitlement to relief." Id. at 1966 (internal quotation marks omitted).

[C] European Misconduct. Plaintiffs assert that the conspiracy claims are rendered plausible by specific factual allegations of defendants' apparent anticompetitive misconduct in Europe. (The particulars are set out in the margin.[6]) The European misconduct is alleged to reflect the existence of a worldwide conspiracy; and even if the misconduct took place only in Europe, it is alleged that the market in elevators is a "global market, such that prices

[6] Plaintiffs allege: that the Italian Antitrust Authority and the European Commission have initiated investigations into possible wrongdoing by the defendants, 2d Am. Compl. ¶¶ 62-66; that the European Commission raided the offices of each defendant and issued a statement that it "has good reason to believe that the manufacturers [including . . . Kone Corporation, Schindler Holding, and ThyssenKrupp AG] may have shared between themselves the tenders for sale & installation of elevators . . . and may have colluded to restrict competition with regard to after-sales services, 2d Am. Compl. ¶ 66; that news reports claim that UTC and Kone Corporation have admitted wrongdoing by some of its European employees, 2d Am. Compl. ¶¶ 67-69; and that (subsequent to the filing of the complaint) extraordinary fines have been levied by the European Commission against defendants and their affiliates for various antitrust violations. **[Pl. Ltr. Br. (June 6, 2007) at 3].**

charged in the European market affect the prices in the United States and vice versa."[7] 2d Am. Compl. ¶ 61.

Plaintiffs provide an insufficient factual basis for their assertions of a worldwide conspiracy affecting a global market for elevators and maintenance services. Allegations of anticompetitive wrongdoing in Europe--absent any evidence of linkage between such foreign conduct and conduct here--is merely to suggest (in defendants' words) that "if it happened there, it could have happened here." And, regarding the nature of the elevator market, plaintiffs offer nothing more than conclusory allegations: for example, there are no allegations of global marketing or fungible products, see Empagran S.A. v. F. Hoffmann-LaRoche, Ltd., 417 F.3d 1267, 1270 (D.C. Cir. 2005), no indication that participants monitored prices in other markets, see Dee-K Enters., Inc. v. Heveafil Sdn. Bhd, 299 F.3d 281, 295 (4th Cir. 2002), and no allegations of the actual pricing of elevators or maintenance services in the United

[7] Plaintiffs allege: that the "effects [of defendants' conspiracy] were felt by plaintiffs . . . in the United States," that "the prices charged in the European market affect the prices in the United States and vice versa," and that pricing in Europe and the United States is "intertwined."

States or changes therein attributable to defendants' alleged misconduct. See generally Todd v. Exxon Corp., 275 F.3d 191, 200 (2d Cir. 2001) ("To survive a Rule 12(b)(6) motion to dismiss, an alleged product market must bear a rational relation to the methodology courts prescribe to define a market for antitrust purposes--analysis of the interchangeability of use or the cross-elasticity of demand, and it must be plausible." (citations and internal quotation marks omitted)). Without an adequate allegation of facts linking transactions in Europe to transactions and effects here, plaintiffs' conclusory allegations do not "nudge[their] claims across the line from conceivable to plausible."[8] Twombly, 127 S. Ct. at 1974.

III

It is also alleged that each defendant unilaterally employed "exclusionary conduct" to acquire and attempt to acquire a monopoly in the maintenance market for its own

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[8] Because the pleadings do not state a claim, we need not consider the extra-territorial reach of the Sherman Act. See Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993) ("[T]he Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.").

elevators, such as: designing the elevators to prevent servicing by other providers (including each other); refusing to sell competitors the parts, tools, software or diagrams necessary to service the elevators; and obstructing competitors' attempts to purchase elevator parts. 2d Am. Compl. ¶¶ 51-58. Thus, plaintiffs contend that defendants' refusal to deal with third-party maintenance providers violates Section 2 of the Sherman Act. 2d Am. Compl. ¶¶ 89, 94, 100, 106, 112, 118, 124, 130. But because plaintiffs do not allege that defendants terminated any prior course of dealing--the sole exception to the broad right of a firm to refuse to deal with its competitors--the allegations are insufficient to state a unilateral-monopolization claim.

In Verizon Commc'ns v. Trinko, 540 U.S. 398 (2004), the Supreme Court explained that a refusal to deal with competitors does not typically violate § 2:

> Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law . . . . [C]ompelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion. Thus, as a general matter, the Sherman Act "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private

> business, freely to exercise his own independent discretion as to parties with whom he will deal."

Id. at 407-08 (quoting United States v. Colgate & Co., 250 U.S. 300, 307 (1919)); see also MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d 1124, 1131 (9th Cir. 2004). Here, obvious commercial interests would justify a competitor in assuring its own control over the maintenance of the elevators it markets, because maintenance is important in upholding the product's reputation for reliability and safety (no small considerations when it comes to elevators).

Trinko cautioned that the right to refuse to deal, while capacious, is not unlimited: "'The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified.'" 540 U.S. at 408 (quoting Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601 (1985)). Observing that it has been "very cautious" in creating exceptions to the right to refuse to deal, the Trinko Court noted a sole exception, set forth in the earlier case of Aspen Skiing, which Trinko described as situated "at or near the outer boundary of § 2 liability." Id. at 409. That exception applies when a monopolist seeks to terminate a prior (voluntary) course of dealing with a competitor. Id. (observing that "[t]he refusal to deal alleged in the present case does not fit within the limited exception recognized in Aspen Skiing. The complaint does not allege that Verizon voluntarily engaged in a course of dealing with its rivals . . . ."). The Trinko Court explained the relevance of a prior course of dealing in antitrust analysis: "The unilateral termination of a voluntary (and thus presumably profitable) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end." Id. (emphasis in original).

Plaintiffs argue that Trinko only applies where there is a "pervasive regulatory scheme," which diminishes the likelihood of antitrust harm. In arriving at its holding, Trinko did address the telecommunications regulatory scheme, along with at least two other considerations, which militated against creating further exceptions to the right of refusal to deal. Id. at 412-14. But these considerations were not essential to Trinko's holding. And neither of two other Supreme Court cases dealing with this exception involves a regulated industry. See Aspen Skiing, 472 U.S. at 587 (ski resorts); Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451 (1992) (photocopiers).

The limited nature of this exception to the right of refusal to deal is further supported by Eastman Kodak. After five years working with independent service organizations ("ISOs") to provide maintenance services on Kodak copiers, Kodak suddenly implemented a policy of refusing to do business with the ISOs; as a result, "ISOs were unable to obtain parts . . . and many were forced out of business." Id. at 458. The Court concluded that "[i]f Kodak adopted its [refusal to deal] policies as part of a scheme of willful acquisition or maintenance of monopoly power, it will have violated § 2." Id. at 483. While Eastman Kodak does not expressly say that a Section 2 claim premised on a refusal to deal cannot survive absent a prior course of dealing, it was decided in that fact context, and has been read to support that proposition:

> [Initially,] Kodak sold copiers that customers could service themselves (or through independent service organizations). Having achieved substantial sales, Kodak then moved to claim all of the repair work for itself. That change had the potential to raise the total cost of copier-plus-service above the competitive level-and . . . above the price that Kodak could have charged had

it followed a closed-service model from the outset.

Schor v. Abbott Labs., 457 F.3d 608, 614 (7th Cir. 2006), cert. denied, 127 S. Ct. 1257 (2007).

The unilateral-monopolization claims in this case do not fall within the sole exception to the right of refusal-to-deal: the complaint does not allege that defendants terminated a prior relationship with elevator service providers--a change which (by taking advantage of their customers' sunk costs) could evince monopolistic motives.

IV

We review a district court's denial of a motion to amend for abuse of discretion. See Gorman v. Consol. Edison Corp., 488 F.3d 586, 592 (2d Cir. 2007). The district court concluded that plaintiffs' second amended complaint (at issue here) contains as much specificity as plaintiffs can muster consistent with Federal Rule of Civil Procedure 11.[9]

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[9] At argument in district court, an attorney for plaintiffs suggested that she knew of facts supporting more specific allegations of misconduct in the United States; but when pressed as to the substance of those facts, or for an explanation for why they don't appear in the complaint, she replied: "Your honor, I really don't feel at liberty to [disclose the information]. It is confidential."

In re Elevator Antitrust Litig., No. 04 Civ. 1178, 2006 WL 1470994, at *12 (S.D.N.Y. May 30, 2006). Based on the record before us, we cannot say that this conclusion falls outside the district court’s discretion.

* * *

Plaintiffs’ remaining arguments are less substantial and without merit. The judgment of the district court is affirmed.

The *linkLine* Decision: Section 2 Gets Squeezed Further

Scott Martin

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The *linkLine* Decision: Section 2 Gets Squeezed Further

By Scott Martin*

Though antitrust cases have appeared with surprising frequency on the U.S. Supreme Court's docket in recent years, certain issues of real interest to practitioners and especially businesspersons continue to elude scrutiny. (Bundling, anyone?) However, the Court's February 25, 2009 decision in *linkLine*[1]—a purported "price squeeze" action, the lone antitrust matter on the Court's current docket, and its tenth consecutive ruling in favor of a private antitrust defendant over the past five years[2]—can afford little comfort to plaintiffs pursuing claims under Section 2 of the Sherman Act.

Background Facts

linkLine involves allegations that AT&T is a monopolist in much of California of "DSL" (digital subscriber line) services, by which high-speed connections to the Internet are accomplished over telephone lines. A 2005 condition imposed by the Federal Communications Commission ("FCC") as part of a merger settlement obligated AT&T to provide wholesale DSL transport services to independent internet service providers ("ISPs"), which provide DSL services to consumers at retail. In addition to selling DSL transport services at wholesale, AT&T competes with ISPs in providing retail DSL services.

The *linkLine* plaintiffs are four such independent ISPs competing with AT&T in the retail DSL market, who claimed that AT&T violated Section 2 by allegedly setting a high wholesale price for DSL transport services sold to independent ISPs and a low retail price for its own DSL internet services to consumers—thus squeezing the profit margins for competing ISPs in the retail DSL market. Relying on the 1945 *Alcoa* decision, price squeeze plaintiffs historically have asserted that "defendants must leave them a 'fair' or 'adequate' margin between the wholesale price and the retail price."[3] According to the *linkLine* plaintiffs, the squeeze here "exclude[d] and unreasonably

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[1] Pacific Bell Telephone Co. v. linkLine Communications, Inc., ___ U.S. ___, 129 S. Ct. 1109 (2009).

[2] In addition to *linkLine* and the *Trinko* and *Twombly* decisions discuseed *infra*, see Credit Suisse Securities USA (LLC) v. Billing, 551 U.S. 264, 127 S. Ct. 2383 (2007); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 127 S. Ct. 2705 (2007); Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc., 549 U.S. 312, 127 S. Ct. 1069 (2007); Illinois Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28, 126 S. Ct. 1281 (2006); Texaco Inc. v. Dagher, 547 U.S. 1, 126 S. Ct. 1276 (2006); Volvo Trucks N.A., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 126 S. Ct. 860 (2006); and F. Hoffmann La Roche v. Empagran, 542 U.S. 155, 124 S. Ct. 2359 (2004).

[3] *Id.* at 1118. See United States v. Aluminum Co. of America, 148 F. 2d 416 (2d Cir. 1945)

impede[d] competition" and allowed AT&T to "preserve and maintain its monopoly control of DSL access to the Internet."[4]

The Supreme Court's Decision

Writing a majority opinion joined by Justices Scalia, Kennedy, Thomas, and Alito, Chief Justice Roberts reasoned that AT&T's conduct did not violate Section 2 for the most fundamental of reasons—one rooted in a 90-year-old precedent still on terra firma, the *Colgate*[5] decision: AT&T was under no general antitrust duty to deal with the plaintiffs *at all*, [6] so the prices it charged at wholesale, if it elected to deal with plaintiffs, did not give rise to a violation. Notably, in a motion for judgment on the pleadings at the district court level, AT&T had argued that the Supreme Court's decision in the 2004 *Trinko*[7] case foreclosed plaintiffs' claims, citing the *Trinko* holding that a firm with no antitrust duty to deal with rivals cannot be challenged under the antitrust laws for providing "insufficient assistance."[8]

However, the district court, and the Ninth Circuit on interlocutory appeal, held that *Trinko* did not address the viability of price-squeeze claims, and certiorari was granted on that question: whether a plaintiff can bring price-squeeze claims under Section 2 in the absence of an antitrust duty to deal. The issue was readily resolved by the Supreme Court:

> the reasoning of *Trinko* applies with equal force to price-squeeze claims. . . . If AT&T had simply stopped providing DSL transport service to the plaintiffs, it would not have run afoul of the Sherman Act. Under these circumstances, AT&T was not required to offer this service at the wholesale prices the plaintiffs would have preferred[9]

Having disposed of the "upstream" component of the price-squeeze claim, Chief Justice Roberts then turned to the other half of the price-squeeze equation: "the assertion that the defendant's *retail* prices are 'too low.'"[10] Of course, survival prospects have been especially dim for claims challenging low prices since the Supreme Court's 1993 *Brooke Group*[11] decision, and the Court made it clear in *linkLine* that there could be no unlawful

[4] *Id.* at 1115 (citation omitted).

[5] U.S. v. Colgate & Co., 250 U.S. 300, 39 S. Ct. 465 (1919) (as a general rule, businesses are free to choose the parties with whom they deal).

[6] In *linkLine*, a duty to deal had been imposed upon AT&T, but that duty arose under a consent decree with the FCC, not antitrust law.

[7] Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 124 S. Ct. 872 (2004).

[8] *Id.* at 410, 124 S. Ct. at 872. In *Trinko*, defendant Verizon was alleged to have denied its competitors access to local telephone network interconnection support services.

[9] *linkLine*, 129 S. Ct. at 1119 (emphasis added).

[10] *Id.* (emphasis in original).

[11] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 113 S. Ct. 2578 (1993). Although *Brooke Group* involved Robinson-Patman Act claims, it has resonated perhaps even more loudly in Section 2, albeit with a requirement of a somewhat more difficult showing (dangerous probability) for recoupment.

price squeeze unless both of *Brooke Group*'s predatory pricing requirements were met—*i.e.*, that AT&T's retail DSL prices were below an appropriate measure of its costs *and* there was a "dangerous probability" that AT&T would be able to recoup its "investment" in such below-cost prices.[12] *linkLine* was not a case in which the pleading at issue would satisfy the *Brooke Group* test,[13] and the Court was unwilling to recognize a price-squeeze claim for retail pricing above cost, lest firms "refrain from aggressive price competition to avoid potential antitrust liability."[14]

In short, by separately employing *Brooke Group* and *Trinko* to dissect the alleged price squeeze, the Court found the claim to be "nothing more than an amalgamation of a meritless claim at the retail level and a meritless claim at the wholesale level;" in the absence of predatory pricing at retail and an antitrust duty to deal at wholesale, "a firm is certainly not required to price *both* of these services in a manner that preserves its rivals' profit margins."[15]

Actually, price-squeeze claims have been recognized by the Circuit Courts for decades, dating back to Judge Learned Hand's 1945 opinion in *Alcoa*,[16] based upon retail prices that were higher than a "fair price."[17] Similar to Justice Souter's polite pronouncement two years ago that the "no set of facts" Federal Rule 8(a) pleading standard had "earned its retirement"[18] after a half-century, Chief Justice Roberts in *linkLine* observed that "[g]iven developments in economic theory and antitrust jurisprudence since *Alcoa*, we find our recent decisions in *Trinko* and *Brooke Group* more pertinent to the question before us."[19]

<u>Implications of linkLine and Trinko</u>

As a practical matter, *linkLine* represents the end of the price squeeze as an independent antitrust claim. If the wholesale and retail prices are independently lawful, the monopolist avoids liability under a price-squeeze theory. And faced with the *Aspen Skiing*[20] precedent that is virtually *sui generis* insofar as the limited circumstances in which an antitrust duty to deal with a rival may arise,[21] coupled with a predatory

[12] *linkline*, 129 S. Ct. at 1120 (citing *Brooke Group*, 509 U.S. at 222-224).

[13] The issue was addressed in what the Court conceded was an "unusual posture" because the plaintiffs asserted before the Court that they agreed with a dissenting opinion below that price-squeeze claims must satisfy *Brooke Group*; plaintiffs thus "ask[ed] for a mulligan" by having the decision below in their favor vacated and the case remanded with instructions to grant them leave to amend to allege a *Brooke Group* claim. *See linkLine*, 129 S. Ct. at 1117.

[14] *Id.* at 1120.

[15] *Id.* (emphasis in original).

[16] U.S. v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

[17] *See id.* at 438.

[18] Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 563, 127 S. Ct. 1955, 1969 (2007) (referring to Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99 (1957)).

[19] *linkLine*, 129 S. Ct. at 1120 n.3.

[20] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S. Ct. 1847 (1985) (describing certain limited circumstances in which a firm's unilateral refusal to deal with a competitor can lead to antitrust liability).

[21] Indeed, what was a narrow set of circumstances may now be almost imperceptibly thin. In *Trinko*, the Court characterized *Aspen Skiing* as residing "at or near the outer boundary of Section 2 liability." 540 U.S. at 409. And this year,

pricing test that consistently has doomed plaintiffs to ultimate failure since it was adopted 16 years ago, even the most aggressive price squeezers have little to fear so long as their competitive prices are above cost.

Chief Justice Roberts took care to explain the importance of the Court's rationale for evaluating price squeezes in light of "more pertinent" recent jurisprudence (as opposed to a previously articulated standard among the lower courts that was dependent upon whether rivals have a "fair" or "adequate" margin between the wholesale and retail prices) in terms of establishing clear rules of antitrust law and a safe harbor for firms that seek to avoid price-squeeze liability.[22] More fundamentally, however, the decision reflects the Court's aversion to potentially creating false positives of potential liability, as well as chilling innovation and price competition through antitrust jurisprudence. That does not bode well for plaintiffs in other unilateral conduct cases involving dominant company defendants.

With respect to bundling, for example, the amorphous standard of exclusionary conduct found in the Third Circuit's *LePage's*[23] decision—a case with no showing that the plaintiff-rival had to sell below cost, only that certain key accounts were lost—almost certainly should not survive scrutiny under the Supreme Court's stated concern for providing clear antitrust rules of law. Moreover, neither *LePage's* (which involved no allegations of below-cost sales by the defendant) *nor* the Ninth Circuit's *PeaceHealth*[24] decision would pass a "strict" application of the *Brooke Group* test. Under *PeaceHealth*, Section 2 liability for a bundled price offered by a monopolist potentially lies when an imputed price of the bundled (competitive) product—attributing to it all of the discounts for the bundle, including those for the bundling (monopoly) product—would be below cost.[25] That potential liability may exist even if the bundle and each of the products within it separately are priced above cost, circumstances which instead would seem to merit a safe harbor under *Brooke Group*, and indeed may ultimately frame the relevant standard if the Supreme Court addresses bundling in the near future.

Similarly, the Court's broad application of *Trinko*—putting to rest any expectation that the holding might be limited to the telecommunications regulatory scheme or otherwise to an extension of potential Section 2 liability to the claims at issue there—puts into a new perspective the earlier statement of *Trinko*'s author, Justice Scalia,

the Tenth Circuit's decision affirming dismissal of the complaint in Christy Sports, LLC v. Deer Valley Resort Co., Ltd., 555 F. 3d 1188 (2009)—which, like *Aspen Skiing*, involved alleged monopolization by a ski resort that terminated a prior course of dealing with a rival—distinguished *Aspen Skiing* on the ground that the defendant had a valid business reason for the termination whereas the defendant in *Aspen Skiing* was willing to forsake short-term profits to achieve an anticompetitive goal.

[22] *See linkLine*, 129 S. Ct. at 1120-21.

[23] LePage's Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003).

[24] Cascade Health Solutions v. PeaceHealth, 502 F.3d 895 (9th Cir. 2007).

[25] Notably, *PeaceHealth*, unlike *Brooke Group* (or the approach to bundling recommended by the Antitrust Modernization Commission) also does not have a separate recoupment requirement.

that "[w]here a defendant maintains substantial market power, his activities are examined through a special lens: Behavior that might otherwise not be of concern to the antitrust laws—or that might even be viewed as pro-competitive—can take on exclusionary connotations when practiced by a monopolist."[26] As characterized by supporters of the Court's more recent decisions, having courts rather than markets determine "how many players a particular industry 'needs'" is the sort of "industrial planning" that may be popular with European regulators, but they contend should have no place in modern American antitrust jurisprudence.[27]

In the short term, meanwhile, the *linkLine* plaintiffs themselves were presented with quite a challenge on remand concerning leave to amend their Complaint to try to state a *Brooke Group* predatory pricing claim. The Court's admonishment may well sum up the steep hill faced by Section 2 plaintiffs in the future: "if AT&T could bankrupt the plaintiffs by refusing to deal altogether, the plaintiffs must demonstrate why the law prevents AT&T from putting them out of business by pricing them out of the market."[28]

[26] Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 488, 112 S. Ct. 2072, 2093 (1992) (Scalia, J., dissenting).

[27] *See Supreme Opportunity*, at wsj.com, Jan. 26, 2008.

[28] *linkLine*, 129 S. Ct. at 1123. The court indicated early in its decision that the relevant market included cable and satellite services – not just DSL services. Clearly, AT&T did not have market power in the broader market identified by the Court.

Horizontal Merger Guidelines

U.S. Department of Justice

and the

Federal Trade Commission

Issued: August 19, 2010

Table of Contents

1. Overview

These Guidelines outline the principal analytical techniques, practices, and the enforcement policy of the Department of Justice and the Federal Trade Commission (the "Agencies") with respect to mergers and acquisitions involving actual or potential competitors ("horizontal mergers") under the federal antitrust laws.[1] The relevant statutory provisions include Section 7 of the Clayton Act, 15 U.S.C. § 18, Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Most particularly, Section 7 of the Clayton Act prohibits mergers if "in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

The Agencies seek to identify and challenge competitively harmful mergers while avoiding unnecessary interference with mergers that are either competitively beneficial or neutral. Most merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not. Given this inherent need for prediction, these Guidelines reflect the congressional intent that merger enforcement should interdict competitive problems in their incipiency and that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal.

These Guidelines describe the principal analytical techniques and the main types of evidence on which the Agencies usually rely to predict whether a horizontal merger may substantially lessen competition. They are not intended to describe how the Agencies analyze cases other than horizontal mergers. These Guidelines are intended to assist the business community and antitrust practitioners by increasing the transparency of the analytical process underlying the Agencies' enforcement decisions. They may also assist the courts in developing an appropriate framework for interpreting and applying the antitrust laws in the horizontal merger context.

These Guidelines should be read with the awareness that merger analysis does not consist of uniform application of a single methodology. Rather, it is a fact-specific process through which the Agencies, guided by their extensive experience, apply a range of analytical tools to the reasonably available and reliable evidence to evaluate competitive concerns in a limited period of time. Where these Guidelines provide examples, they are illustrative and do not exhaust the applications of the relevant principle.[2]

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[1] These Guidelines replace the Horizontal Merger Guidelines issued in 1992, revised in 1997. They reflect the ongoing accumulation of experience at the Agencies. The Commentary on the Horizontal Merger Guidelines issued by the Agencies in 2006 remains a valuable supplement to these Guidelines. These Guidelines may be revised from time to time as necessary to reflect significant changes in enforcement policy, to clarify existing policy, or to reflect new learning. These Guidelines do not cover vertical or other types of non-horizontal acquisitions.

[2] These Guidelines are not intended to describe how the Agencies will conduct the litigation of cases they decide to bring. Although relevant in that context, these Guidelines neither dictate nor exhaust the range of evidence the Agencies may introduce in litigation.

The unifying theme of these Guidelines is that mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise. For simplicity of exposition, these Guidelines generally refer to all of these effects as enhancing market power. A merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives. In evaluating how a merger will likely change a firm's behavior, the Agencies focus primarily on how the merger affects conduct that would be most profitable for the firm.

A merger can enhance market power simply by eliminating competition between the merging parties. This effect can arise even if the merger causes no changes in the way other firms behave. Adverse competitive effects arising in this manner are referred to as "unilateral effects." A merger also can enhance market power by increasing the risk of coordinated, accommodating, or interdependent behavior among rivals. Adverse competitive effects arising in this manner are referred to as "coordinated effects." In any given case, either or both types of effects may be present, and the distinction between them may be blurred.

These Guidelines principally describe how the Agencies analyze mergers between rival suppliers that may enhance their market power as sellers. Enhancement of market power by sellers often elevates the prices charged to customers. For simplicity of exposition, these Guidelines generally discuss the analysis in terms of such price effects. Enhanced market power can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation. Such non-price effects may coexist with price effects, or can arise in their absence. When the Agencies investigate whether a merger may lead to a substantial lessening of non-price competition, they employ an approach analogous to that used to evaluate price competition. Enhanced market power may also make it more likely that the merged entity can profitably and effectively engage in exclusionary conduct. Regardless of how enhanced market power likely would be manifested, the Agencies normally evaluate mergers based on their impact on customers. The Agencies examine effects on either or both of the direct customers and the final consumers. The Agencies presume, absent convincing evidence to the contrary, that adverse effects on direct customers also cause adverse effects on final consumers.

Enhancement of market power by buyers, sometimes called "monopsony power," has adverse effects comparable to enhancement of market power by sellers. The Agencies employ an analogous framework to analyze mergers between rival purchasers that may enhance their market power as buyers. See Section 12.

2. Evidence of Adverse Competitive Effects

The Agencies consider any reasonably available and reliable evidence to address the central question of whether a merger may substantially lessen competition. This section discusses several categories and sources of evidence that the Agencies, in their experience, have found most informative in predicting the likely competitive effects of mergers. The list provided here is not exhaustive. In any given case, reliable evidence may be available in only some categories or from some sources. For each category of evidence, the Agencies consider evidence indicating that the merger may enhance competition as well as evidence indicating that it may lessen competition.

2.1 Types of Evidence

2.1.1 Actual Effects Observed in Consummated Mergers

When evaluating a consummated merger, the ultimate issue is not only whether adverse competitive effects have already resulted from the merger, but also whether such effects are likely to arise in the future. Evidence of observed post-merger price increases or other changes adverse to customers is given substantial weight. The Agencies evaluate whether such changes are anticompetitive effects resulting from the merger, in which case they can be dispositive. However, a consummated merger may be anticompetitive even if such effects have not yet been observed, perhaps because the merged firm may be aware of the possibility of post-merger antitrust review and moderating its conduct. Consequently, the Agencies also consider the same types of evidence they consider when evaluating unconsummated mergers.

2.1.2 Direct Comparisons Based on Experience

The Agencies look for historical events, or "natural experiments," that are informative regarding the competitive effects of the merger. For example, the Agencies may examine the impact of recent mergers, entry, expansion, or exit in the relevant market. Effects of analogous events in similar markets may also be informative.

The Agencies also look for reliable evidence based on variations among similar markets. For example, if the merging firms compete in some locales but not others, comparisons of prices charged in regions where they do and do not compete may be informative regarding post-merger prices. In some cases, however, prices are set on such a broad geographic basis that such comparisons are not informative. The Agencies also may examine how prices in similar markets vary with the number of significant competitors in those markets.

2.1.3 Market Shares and Concentration in a Relevant Market

The Agencies give weight to the merging parties' market shares in a relevant market, the level of concentration, and the change in concentration caused by the merger. See Sections 4 and 5. Mergers that cause a significant increase in concentration and result in highly concentrated markets are presumed to be likely to enhance market power, but this presumption can be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power.

2.1.4 Substantial Head-to-Head Competition

The Agencies consider whether the merging firms have been, or likely will become absent the merger, substantial head-to-head competitors. Such evidence can be especially relevant for evaluating adverse unilateral effects, which result directly from the loss of that competition. See Section 6. This evidence can also inform market definition. See Section 4.

2.1.5 Disruptive Role of a Merging Party

The Agencies consider whether a merger may lessen competition by eliminating a "maverick" firm, i.e., a firm that plays a disruptive role in the market to the benefit of customers. For example, if one of the merging firms has a strong incumbency position and the other merging firm threatens to disrupt market conditions with a new technology or business model, their merger can involve the loss of actual or potential competition. Likewise, one of the merging firms may have the incentive to take the lead in price cutting or other competitive conduct or to resist increases in industry prices. A firm that may discipline prices based on its ability and incentive to expand production rapidly using available capacity also can be a maverick, as can a firm that has often resisted otherwise prevailing industry norms to cooperate on price setting or other terms of competition.

2.2 Sources of Evidence

The Agencies consider many sources of evidence in their merger analysis. The most common sources of reasonably available and reliable evidence are the merging parties, customers, other industry participants, and industry observers.

2.2.1 Merging Parties

The Agencies typically obtain substantial information from the merging parties. This information can take the form of documents, testimony, or data, and can consist of descriptions of competitively relevant conditions or reflect actual business conduct and decisions. Documents created in the normal course are more probative than documents created as advocacy materials in merger review. Documents describing industry conditions can be informative regarding the operation of the market and how a firm identifies and assesses its rivals, particularly when business decisions are made in reliance on the accuracy of those descriptions. The business decisions taken by the merging firms also can be informative about industry conditions. For example, if a firm sets price well above incremental cost, that normally indicates either that the firm believes its customers are not highly sensitive to price (not in itself of antitrust concern, see Section 4.1.3[3]) or that the firm and its rivals are engaged in coordinated interaction (see Section 7). Incremental cost depends on the relevant increment in output as well as on the time period involved, and in the case of large increments and sustained changes in output it may include some costs that would be fixed for smaller increments of output or shorter time periods.

Explicit or implicit evidence that the merging parties intend to raise prices, reduce output or capacity, reduce product quality or variety, withdraw products or delay their introduction, or curtail research and development efforts after the merger, or explicit or implicit evidence that the ability to engage in such conduct motivated the merger, can be highly informative in evaluating the likely effects of a merger. Likewise, the Agencies look for reliable evidence that the merger is likely to result in efficiencies. The Agencies give careful consideration to the views of individuals whose responsibilities, expertise, and experience relating to the issues in question provide particular indicia of reliability. The financial terms of the transaction may also be informative regarding competitive effects. For example, a purchase price in excess of the acquired firm’s stand-alone market value may indicate that the acquiring firm is paying a premium because it expects to be able to reduce competition or to achieve efficiencies.

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3 High margins commonly arise for products that are significantly differentiated. Products involving substantial fixed costs typically will be developed only if suppliers expect there to be enough differentiation to support margins sufficient to cover those fixed costs. High margins can be consistent with incumbent firms earning competitive returns.

2.2.2 Customers

Customers can provide a variety of information to the Agencies, ranging from information about their own purchasing behavior and choices to their views about the effects of the merger itself.

Information from customers about how they would likely respond to a price increase, and the relative attractiveness of different products or suppliers, may be highly relevant, especially when corroborated by other evidence such as historical purchasing patterns and practices. Customers also can provide valuable information about the impact of historical events such as entry by a new supplier.

The conclusions of well-informed and sophisticated customers on the likely impact of the merger itself can also help the Agencies investigate competitive effects, because customers typically feel the consequences of both competitively beneficial and competitively harmful mergers. In evaluating such evidence, the Agencies are mindful that customers may oppose, or favor, a merger for reasons unrelated to the antitrust issues raised by that merger.

When some customers express concerns about the competitive effects of a merger while others view the merger as beneficial or neutral, the Agencies take account of this divergence in using the information provided by customers and consider the likely reasons for such divergence of views. For example, if for regulatory reasons some customers cannot buy imported products, while others can, a merger between domestic suppliers may harm the former customers even if it leaves the more flexible customers unharmed. See Section 3.

When direct customers of the merging firms compete against one another in a downstream market, their interests may not be aligned with the interests of final consumers, especially if the direct customers expect to pass on any anticompetitive price increase. A customer that is protected from adverse competitive effects by a long-term contract, or otherwise relatively immune from the merger's harmful effects, may even welcome an anticompetitive merger that provides that customer with a competitive advantage over its downstream rivals.

> *Example 1:* As a result of the merger, Customer C will experience a price increase for an input used in producing its final product, raising its costs. Customer C's rivals use this input more intensively than Customer C, and the same price increase applied to them will raise their costs more than it raises Customer C's costs. On balance, Customer C may benefit from the merger even though the merger involves a substantial lessening of competition.

2.2.3 Other Industry Participants and Observers

Suppliers, indirect customers, distributors, other industry participants, and industry analysts can also provide information helpful to a merger inquiry. The interests of firms selling products complementary to those offered by the merging firms often are well aligned with those of customers, making their informed views valuable.

Information from firms that are rivals to the merging parties can help illuminate how the market operates. The interests of rival firms often diverge from the interests of customers, since customers normally lose, but rival firms gain, if the merged entity raises its prices. For that reason, the Agencies do not routinely rely on the overall views of rival firms regarding the competitive effects of the merger. However, rival firms may provide relevant facts, and even their overall views may be instructive, especially in cases where the Agencies are concerned that the merged entity may engage in exclusionary conduct.

> *Example 2:* Merging Firms A and B operate in a market in which network effects are significant, implying that any firm's product is significantly more valuable if it commands a large market share or if it is interconnected with others that in aggregate command such a share. Prior to the merger, they and their rivals voluntarily interconnect with one another. The merger would create an entity with a large enough share that a strategy of ending voluntary interconnection would have a dangerous probability of creating monopoly power in this market. The interests of rivals and of consumers would be broadly aligned in preventing such a merger.

3. Targeted Customers and Price Discrimination

When examining possible adverse competitive effects from a merger, the Agencies consider whether those effects vary significantly for different customers purchasing the same or similar products. Such differential impacts are possible when sellers can discriminate, e.g., by profitably raising price to certain targeted customers but not to others. The possibility of price discrimination influences market definition (see Section 4), the measurement of market shares (see Section 5), and the evaluation of competitive effects (see Sections 6 and 7).

When price discrimination is feasible, adverse competitive effects on targeted customers can arise, even if such effects will not arise for other customers. A price increase for targeted customers may be profitable even if a price increase for all customers would not be profitable because too many other customers would substitute away. When discrimination is reasonably likely, the Agencies may evaluate competitive effects separately by type of customer. The Agencies may have access to information unavailable to customers that is relevant to evaluating whether discrimination is reasonably likely.

For price discrimination to be feasible, two conditions typically must be met: differential pricing and limited arbitrage.

First, the suppliers engaging in price discrimination must be able to price differently to targeted customers than to other customers. This may involve identification of individual customers to which different prices are offered or offering different prices to different types of customers based on observable characteristics.

> *Example 3:* Suppliers can distinguish large buyers from small buyers. Large buyers are more likely than small buyers to self-supply in response to a significant price increase. The merger may lead to price discrimination against small buyers, harming them, even if large buyers are not harmed. Such discrimination can occur even if there is no discrete gap in size between the classes of large and small buyers.

In other cases, suppliers may be unable to distinguish among different types of customers but can offer multiple products that sort customers based on their purchase decisions.

Second, the targeted customers must not be able to defeat the price increase of concern by arbitrage, e.g., by purchasing indirectly from or through other customers. Arbitrage may be difficult if it would void warranties or make service more difficult or costly for customers. Arbitrage is inherently impossible for many services. Arbitrage between customers at different geographic locations may be impractical due to transportation costs. Arbitrage on a modest scale may be possible but sufficiently costly or limited that it would not deter or defeat a discriminatory pricing strategy.

4. Market Definition

When the Agencies identify a potential competitive concern with a horizontal merger, market definition plays two roles. First, market definition helps specify the line of commerce and section of the country in which the competitive concern arises. In any merger enforcement action, the Agencies will normally identify one or more relevant markets in which the merger may substantially lessen competition. Second, market definition allows the Agencies to identify market participants and measure market shares and market concentration. See Section 5. The measurement of market shares and market concentration is not an end in itself, but is useful to the extent it illuminates the merger's likely competitive effects.

The Agencies' analysis need not start with market definition. Some of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition, although evaluation of competitive alternatives available to customers is always necessary at some point in the analysis.

Evidence of competitive effects can inform market definition, just as market definition can be informative regarding competitive effects. For example, evidence that a reduction in the number of significant rivals offering a group of products causes prices for those products to rise significantly can itself establish that those products form a relevant market. Such evidence also may more directly predict the competitive effects of a merger, reducing the role of inferences from market definition and market shares.

Where analysis suggests alternative and reasonably plausible candidate markets, and where the resulting market shares lead to very different inferences regarding competitive effects, it is particularly valuable to examine more direct forms of evidence concerning those effects.

Market definition focuses solely on demand substitution factors, i.e., on customers' ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service. The responsive actions of suppliers are also important in competitive analysis. They are considered in these Guidelines in the sections addressing the identification of market participants, the measurement of market shares, the analysis of competitive effects, and entry.

Customers often confront a range of possible substitutes for the products of the merging firms. Some substitutes may be closer, and others more distant, either geographically or in terms of product attributes and perceptions. Additionally, customers may assess the proximity of different products differently. When products or suppliers in different geographic areas are substitutes for one another to varying degrees, defining a market to include some substitutes and exclude others is inevitably a simplification that cannot capture the full variation in the extent to which different products compete against each other. The principles of market definition outlined below seek to make this inevitable simplification as useful and informative as is practically possible. Relevant markets need not have precise metes and bounds.

Defining a market broadly to include relatively distant product or geographic substitutes can lead to misleading market shares. This is because the competitive significance of distant substitutes is unlikely to be commensurate with their shares in a broad market. Although excluding more distant substitutes from the market inevitably understates their competitive significance to some degree, doing so often provides a more accurate indicator of the competitive effects of the merger than would the alternative of including them and overstating their competitive significance as proportional to their shares in an expanded market.

> *Example 4:* Firms A and B, sellers of two leading brands of motorcycles, propose to merge. If Brand A motorcycle prices were to rise, some buyers would substitute to Brand B, and some others would substitute to cars. However, motorcycle buyers see Brand B motorcycles as much more similar to Brand A motorcycles than are cars. Far more cars are sold than motorcycles. Evaluating shares in a market that includes cars would greatly underestimate the competitive significance of Brand B motorcycles in constraining Brand A's prices and greatly overestimate the significance of cars.

Market shares of different products in narrowly defined markets are more likely to capture the relative competitive significance of these products, and often more accurately reflect competition between close substitutes. As a result, properly defined antitrust markets often exclude some substitutes to which some customers might turn in the face of a price increase even if such substitutes provide alternatives for those customers. However, a group of products is too narrow to constitute a relevant market if competition from products outside that group is so ample that even the complete elimination of competition within the group would not significantly harm either direct customers or downstream consumers. The hypothetical monopolist test (see Section 4.1.1) is designed to ensure that candidate markets are not overly narrow in this respect.

The Agencies implement these principles of market definition flexibly when evaluating different possible candidate markets. Relevant antitrust markets defined according to the hypothetical monopolist test are not always intuitive and may not align with how industry members use the term "market."

Section 4.1 describes the principles that apply to product market definition, and gives guidance on how the Agencies most often apply those principles. Section 4.2 describes how the same principles apply to geographic market definition. Although discussed separately for simplicity of exposition, the principles described in Sections 4.1 and 4.2 are combined to define a relevant market, which has both a product and a geographic dimension. In particular, the hypothetical monopolist test is applied to a group of products together with a geographic region to determine a relevant market.

4.1 Product Market Definition

When a product sold by one merging firm (Product A) competes against one or more products sold by the other merging firm, the Agencies define a relevant product market around Product A to evaluate the importance of that competition. Such a relevant product market consists of a group of substitute products including Product A. Multiple relevant product markets may thus be identified.

4.1.1 The Hypothetical Monopolist Test

The Agencies employ the hypothetical monopolist test to evaluate whether groups of products in candidate markets are sufficiently broad to constitute relevant antitrust markets. The Agencies use the hypothetical monopolist test to identify a set of products that are reasonably interchangeable with a product sold by one of the merging firms.

The hypothetical monopolist test requires that a product market contain enough substitute products so that it could be subject to post-merger exercise of market power significantly exceeding that existing absent the merger. Specifically, the test requires that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products ("hypothetical monopolist") likely would impose at least a small but significant and non-transitory increase in price ("SSNIP") on at least one product in the market, including at least one product sold by one of the merging firms.[4] For the purpose of analyzing this issue, the terms of sale of products outside the candidate market are held constant. The SSNIP is employed solely as a methodological tool for performing the hypothetical monopolist test; it is not a tolerance level for price increases resulting from a merger.

Groups of products may satisfy the hypothetical monopolist test without including the full range of substitutes from which customers choose. The hypothetical monopolist test may identify a group of products as a relevant market even if customers would substitute significantly to products outside that group in response to a price increase.

> *Example 5:* Products A and B are being tested as a candidate market. Each sells for $100, has an incremental cost of $60, and sells 1200 units. For every dollar increase in the price of Product A, for any given price of Product B, Product A loses twenty units of sales to products outside the candidate market and ten units of sales to Product B, and likewise for Product B. Under these conditions, economic analysis shows that a hypothetical profit-maximizing monopolist controlling Products A and B would raise both of their prices by ten percent, to $110. Therefore, Products A and B satisfy the hypothetical monopolist test using a five percent SSNIP, and indeed for any SSNIP size up to ten percent. This is true even though two-thirds of the sales lost by one product when it raises its price are diverted to products outside the relevant market.

When applying the hypothetical monopolist test to define a market around a product offered by one of the merging firms, if the market includes a second product, the Agencies will normally also include a third product if that third product is a closer substitute for the first product than is the second product. The third product is a closer substitute if, in response to a SSNIP on the first product, greater revenues are diverted to the third product than to the second product.

> *Example 6:* In Example 5, suppose that half of the unit sales lost by Product A when it raises its price are diverted to Product C, which also has a price of $100, while one-third are diverted to Product B. Product C is a closer substitute for Product A than is Product B. Thus Product C will normally be included in the relevant market, even though Products A and B together satisfy the hypothetical monopolist test.

The hypothetical monopolist test ensures that markets are not defined too narrowly, but it does not lead to a single relevant market. The Agencies may evaluate a merger in any relevant market

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4 If the pricing incentives of the firms supplying the products in the candidate market differ substantially from those of the hypothetical monopolist, for reasons other than the latter's control over a larger group of substitutes, the Agencies may instead employ the concept of a hypothetical profit-maximizing cartel comprised of the firms (with all their products) that sell the products in the candidate market. This approach is most likely to be appropriate if the merging firms sell products outside the candidate market that significantly affect their pricing incentives for products in the candidate market. This could occur, for example, if the candidate market is one for durable equipment and the firms selling that equipment derive substantial net revenues from selling spare parts and service for that equipment.

satisfying the test, guided by the overarching principle that the purpose of defining the market and measuring market shares is to illuminate the evaluation of competitive effects. Because the relative competitive significance of more distant substitutes is apt to be overstated by their share of sales, when the Agencies rely on market shares and concentration, they usually do so in the smallest relevant market satisfying the hypothetical monopolist test.

> *Example 7:* In Example 4, including cars in the market will lead to misleadingly small market shares for motorcycle producers. Unless motorcycles fail the hypothetical monopolist test, the Agencies would not include cars in the market in analyzing this motorcycle merger.

4.1.2 Benchmark Prices and SSNIP Size

The Agencies apply the SSNIP starting from prices that would likely prevail absent the merger. If prices are not likely to change absent the merger, these benchmark prices can reasonably be taken to be the prices prevailing prior to the merger.[5] If prices are likely to change absent the merger, e.g., because of innovation or entry, the Agencies may use anticipated future prices as the benchmark for the test. If prices might fall absent the merger due to the breakdown of pre-merger coordination, the Agencies may use those lower prices as the benchmark for the test. In some cases, the techniques employed by the Agencies to implement the hypothetical monopolist test focus on the difference in incentives between pre-merger firms and the hypothetical monopolist and do not require specifying the benchmark prices.

The SSNIP is intended to represent a "small but significant" increase in the prices charged by firms in the candidate market for the value they contribute to the products or services used by customers. This properly directs attention to the effects of price changes commensurate with those that might result from a significant lessening of competition caused by the merger. This methodology is used because normally it is possible to quantify "small but significant" adverse price effects on customers and analyze their likely reactions, not because price effects are more important than non-price effects.

The Agencies most often use a SSNIP of five percent of the price paid by customers for the products or services to which the merging firms contribute value. However, what constitutes a "small but significant" increase in price, commensurate with a significant loss of competition caused by the merger, depends upon the nature of the industry and the merging firms' positions in it, and the Agencies may accordingly use a price increase that is larger or smaller than five percent. Where explicit or implicit prices for the firms' specific contribution to value can be identified with reasonable clarity, the Agencies may base the SSNIP on those prices.

> *Example 8:* In a merger between two oil pipelines, the SSNIP would be based on the price charged for transporting the oil, not on the price of the oil itself. If pipelines buy the oil at one end and sell it at the other, the price charged for transporting the oil is implicit, equal to the difference between the price paid for oil at the input end and the price charged for oil at the output end. The relevant product sold by the pipelines is better described as "pipeline transportation of oil from point A to point B" than as "oil at point B."

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5 Market definition for the evaluation of non-merger antitrust concerns such as monopolization or facilitating practices will differ in this respect if the effects resulting from the conduct of concern are already occurring at the time of evaluation.

Example 9: In a merger between two firms that install computers purchased from third parties, the SSNIP would be based on their fees, not on the price of installed computers. If these firms purchase the computers and charge their customers one package price, the implicit installation fee is equal to the package charge to customers less the price of the computers.

Example 10: In Example 9, suppose that the prices paid by the merging firms to purchase computers are opaque, but account for at least ninety-five percent of the prices they charge for installed computers, with profits or implicit fees making up five percent of those prices at most. A five percent SSNIP on the total price paid by customers would at least double those fees or profits. Even if that would be unprofitable for a hypothetical monopolist, a significant increase in fees might well be profitable. If the SSNIP is based on the total price paid by customers, a lower percentage will be used.

4.1.3 Implementing the Hypothetical Monopolist Test

The hypothetical monopolist's incentive to raise prices depends both on the extent to which customers would likely substitute away from the products in the candidate market in response to such a price increase and on the profit margins earned on those products. The profit margin on incremental units is the difference between price and incremental cost on those units. The Agencies often estimate incremental costs, for example using merging parties' documents or data the merging parties use to make business decisions. Incremental cost is measured over the change in output that would be caused by the price increase under consideration.

In considering customers' likely responses to higher prices, the Agencies take into account any reasonably available and reliable evidence, including, but not limited to:

- how customers have shifted purchases in the past in response to relative changes in price or other terms and conditions;
- information from buyers, including surveys, concerning how they would respond to price changes;
- the conduct of industry participants, notably:
    - o sellers' business decisions or business documents indicating sellers' informed beliefs concerning how customers would substitute among products in response to relative changes in price;
    - o industry participants' behavior in tracking and responding to price changes by some or all rivals;
- objective information about product characteristics and the costs and delays of switching products, especially switching from products in the candidate market to products outside the candidate market;
- the percentage of sales lost by one product in the candidate market, when its price alone rises, that is recaptured by other products in the candidate market, with a higher recapture percentage making a price increase more profitable for the hypothetical monopolist;
- evidence from other industry participants, such as sellers of complementary products;

- legal or regulatory requirements; and
- the influence of downstream competition faced by customers in their output markets.

When the necessary data are available, the Agencies also may consider a "critical loss analysis" to assess the extent to which it corroborates inferences drawn from the evidence noted above. Critical loss analysis asks whether imposing at least a SSNIP on one or more products in a candidate market would raise or lower the hypothetical monopolist's profits. While this "breakeven" analysis differs from the profit-maximizing analysis called for by the hypothetical monopolist test in Section 4.1.1, merging parties sometimes present this type of analysis to the Agencies. A price increase raises profits on sales made at the higher price, but this will be offset to the extent customers substitute away from products in the candidate market. Critical loss analysis compares the magnitude of these two offsetting effects resulting from the price increase. The "critical loss" is defined as the number of lost unit sales that would leave profits unchanged. The "predicted loss" is defined as the number of unit sales that the hypothetical monopolist is predicted to lose due to the price increase. The price increase raises the hypothetical monopolist's profits if the predicted loss is less than the critical loss.

The Agencies consider all of the evidence of customer substitution noted above in assessing the predicted loss. The Agencies require that estimates of the predicted loss be consistent with that evidence, including the pre-merger margins of products in the candidate market used to calculate the critical loss. Unless the firms are engaging in coordinated interaction (see Section 7), high pre-merger margins normally indicate that each firm's product individually faces demand that is not highly sensitive to price.[6] Higher pre-merger margins thus indicate a smaller predicted loss as well as a smaller critical loss. The higher the pre-merger margin, the smaller the recapture percentage necessary for the candidate market to satisfy the hypothetical monopolist test.

Even when the evidence necessary to perform the hypothetical monopolist test quantitatively is not available, the conceptual framework of the test provides a useful methodological tool for gathering and analyzing evidence pertinent to customer substitution and to market definition. The Agencies follow the hypothetical monopolist test to the extent possible given the available evidence, bearing in mind that the ultimate goal of market definition is to help determine whether the merger may substantially lessen competition.

4.1.4 Product Market Definition with Targeted Customers

If a hypothetical monopolist could profitably target a subset of customers for price increases, the Agencies may identify relevant markets defined around those targeted customers, to whom a hypothetical monopolist would profitably and separately impose at least a SSNIP. Markets to serve targeted customers are also known as price discrimination markets. In practice, the Agencies identify price discrimination markets only where they believe there is a realistic prospect of an adverse competitive effect on a group of targeted customers.

> *Example 11:* Glass containers have many uses. In response to a price increase for glass containers, some users would substitute substantially to plastic or metal containers, but baby food manufacturers would not. If a

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[6] While margins are important for implementing the hypothetical monopolist test, high margins are not in themselves of antitrust concern.

> hypothetical monopolist could price separately and limit arbitrage, baby food manufacturers would be vulnerable to a targeted increase in the price of glass containers. The Agencies could define a distinct market for glass containers used to package baby food.

The Agencies also often consider markets for targeted customers when prices are individually negotiated and suppliers have information about customers that would allow a hypothetical monopolist to identify customers that are likely to pay a higher price for the relevant product. If prices are negotiated individually with customers, the hypothetical monopolist test may suggest relevant markets that are as narrow as individual customers (see also Section 6.2 on bargaining and auctions). Nonetheless, the Agencies often define markets for groups of targeted customers, i.e., by type of customer, rather than by individual customer. By so doing, the Agencies are able to rely on aggregated market shares that can be more helpful in predicting the competitive effects of the merger.

4.2 Geographic Market Definition

The arena of competition affected by the merger may be geographically bounded if geography limits some customers' willingness or ability to substitute to some products, or some suppliers' willingness or ability to serve some customers. Both supplier and customer locations can affect this. The Agencies apply the principles of market definition described here and in Section 4.1 to define a relevant market with a geographic dimension as well as a product dimension.

The scope of geographic markets often depends on transportation costs. Other factors such as language, regulation, tariff and non-tariff trade barriers, custom and familiarity, reputation, and service availability may impede long-distance or international transactions. The competitive significance of foreign firms may be assessed at various exchange rates, especially if exchange rates have fluctuated in the recent past.

In the absence of price discrimination based on customer location, the Agencies normally define geographic markets based on the locations of suppliers, as explained in subsection 4.2.1. In other cases, notably if price discrimination based on customer location is feasible as is often the case when delivered pricing is commonly used in the industry, the Agencies may define geographic markets based on the locations of customers, as explained in subsection 4.2.2.

4.2.1 Geographic Markets Based on the Locations of Suppliers

Geographic markets based on the locations of suppliers encompass the region from which sales are made. Geographic markets of this type often apply when customers receive goods or services at suppliers' locations. Competitors in the market are firms with relevant production, sales, or service facilities in that region. Some customers who buy from these firms may be located outside the boundaries of the geographic market.

The hypothetical monopolist test requires that a hypothetical profit-maximizing firm that was the only present or future producer of the relevant product(s) located in the region would impose at least a SSNIP from at least one location, including at least one location of one of the merging firms. In this exercise the terms of sale for all products produced elsewhere are held constant. A single firm may operate in a number of different geographic markets, even for a single product.

> *Example 12:* The merging parties both have manufacturing plants in City X. The relevant product is expensive to transport and suppliers price their products for pickup at their locations. Rival plants are some distance away in City Y. A hypothetical monopolist controlling all plants in City X could profitably impose a SSNIP at these plants. Competition from more distant plants would not defeat the price increase because supplies coming from more distant plants require expensive transportation. The relevant geographic market is defined around the plants in City X.

When the geographic market is defined based on supplier locations, sales made by suppliers located in the geographic market are counted, regardless of the location of the customer making the purchase.

In considering likely reactions of customers to price increases for the relevant product(s) imposed in a candidate geographic market, the Agencies consider any reasonably available and reliable evidence, including:

- how customers have shifted purchases in the past between different geographic locations in response to relative changes in price or other terms and conditions;
- the cost and difficulty of transporting the product (or the cost and difficulty of a customer traveling to a seller's location), in relation to its price;
- whether suppliers need a presence near customers to provide service or support;
- evidence on whether sellers base business decisions on the prospect of customers switching between geographic locations in response to relative changes in price or other competitive variables;
- the costs and delays of switching from suppliers in the candidate geographic market to suppliers outside the candidate geographic market; and
- the influence of downstream competition faced by customers in their output markets.

4.2.2 Geographic Markets Based on the Locations of Customers

When the hypothetical monopolist could discriminate based on customer location, the Agencies may define geographic markets based on the locations of targeted customers.[7] Geographic markets of this type often apply when suppliers deliver their products or services to customers' locations. Geographic markets of this type encompass the region into which sales are made. Competitors in the market are firms that sell to customers in the specified region. Some suppliers that sell into the relevant market may be located outside the boundaries of the geographic market.

The hypothetical monopolist test requires that a hypothetical profit-maximizing firm that was the only present or future seller of the relevant product(s) to customers in the region would impose at least a SSNIP on some customers in that region. A region forms a relevant geographic market if this price increase would not be defeated by substitution away from the relevant product or by arbitrage,

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[7] For customers operating in multiple locations, only those customer locations within the targeted zone are included in the market.

e.g., customers in the region travelling outside it to purchase the relevant product. In this exercise, the terms of sale for products sold to all customers outside the region are held constant.

> *Example 13:* Customers require local sales and support. Suppliers have sales and service operations in many geographic areas and can discriminate based on customer location. The geographic market can be defined around the locations of customers.

> *Example 14:* Each merging firm has a single manufacturing plant and delivers the relevant product to customers in City X and in City Y. The relevant product is expensive to transport. The merging firms' plants are by far the closest to City X, but no closer to City Y than are numerous rival plants. This fact pattern suggests that customers in City X may be harmed by the merger even if customers in City Y are not. For that reason, the Agencies consider a relevant geographic market defined around customers in City X. Such a market could be defined even if the region around the merging firms' plants would not be a relevant geographic market defined based on the location of sellers because a hypothetical monopolist controlling all plants in that region would find a SSNIP imposed on all of its customers unprofitable due to the loss of sales to customers in City Y.

When the geographic market is defined based on customer locations, sales made to those customers are counted, regardless of the location of the supplier making those sales.

> *Example 15:* Customers in the United States must use products approved by U.S. regulators. Foreign customers use products not approved by U.S. regulators. The relevant product market consists of products approved by U.S. regulators. The geographic market is defined around U.S. customers. Any sales made to U.S. customers by foreign suppliers are included in the market, and those foreign suppliers are participants in the U.S. market even though located outside it.

5. Market Participants, Market Shares, and Market Concentration

The Agencies normally consider measures of market shares and market concentration as part of their evaluation of competitive effects. The Agencies evaluate market shares and concentration in conjunction with other reasonably available and reliable evidence for the ultimate purpose of determining whether a merger may substantially lessen competition.

Market shares can directly influence firms' competitive incentives. For example, if a price reduction to gain new customers would also apply to a firm's existing customers, a firm with a large market share may be more reluctant to implement a price reduction than one with a small share. Likewise, a firm with a large market share may not feel pressure to reduce price even if a smaller rival does. Market shares also can reflect firms' capabilities. For example, a firm with a large market share may be able to expand output rapidly by a larger absolute amount than can a small firm. Similarly, a large market share tends to indicate low costs, an attractive product, or both.

5.1 Market Participants

All firms that currently earn revenues in the relevant market are considered market participants. Vertically integrated firms are also included to the extent that their inclusion accurately reflects their competitive significance. Firms not currently earning revenues in the relevant market, but that have committed to entering the market in the near future, are also considered market participants.

Firms that are not current producers in a relevant market, but that would very likely provide rapid supply responses with direct competitive impact in the event of a SSNIP, without incurring significant sunk costs, are also considered market participants. These firms are termed "rapid entrants." Sunk costs are entry or exit costs that cannot be recovered outside the relevant market. Entry that would take place more slowly in response to adverse competitive effects, or that requires firms to incur significant sunk costs, is considered in Section 9.

Firms that produce the relevant product but do not sell it in the relevant geographic market may be rapid entrants. Other things equal, such firms are most likely to be rapid entrants if they are close to the geographic market.

> *Example 16:* Farm A grows tomatoes halfway between Cities X and Y. Currently, it ships its tomatoes to City X because prices there are two percent higher. Previously it has varied the destination of its shipments in response to small price variations. Farm A would likely be a rapid entrant participant in a market for tomatoes in City Y.

> *Example 17:* Firm B has bid multiple times to supply milk to School District S, and actually supplies milk to schools in some adjacent areas. It has never won a bid in School District S, but is well qualified to serve that district and has often nearly won. Firm B would be counted as a rapid entrant in a market for school milk in School District S.

More generally, if the relevant market is defined around targeted customers, firms that produce relevant products but do not sell them to those customers may be rapid entrants if they can easily and rapidly begin selling to the targeted customers.

Firms that clearly possess the necessary assets to supply into the relevant market rapidly may also be rapid entrants. In markets for relatively homogeneous goods where a supplier's ability to compete depends predominantly on its costs and its capacity, and not on other factors such as experience or reputation in the relevant market, a supplier with efficient idle capacity, or readily available "swing" capacity currently used in adjacent markets that can easily and profitably be shifted to serve the relevant market, may be a rapid entrant.[8] However, idle capacity may be inefficient, and capacity used in adjacent markets may not be available, so a firm's possession of idle or swing capacity alone does not make that firm a rapid entrant.

5.2 Market Shares

The Agencies normally calculate market shares for all firms that currently produce products in the relevant market, subject to the availability of data. The Agencies also calculate market shares for other market participants if this can be done to reliably reflect their competitive significance.

Market concentration and market share data are normally based on historical evidence. However, recent or ongoing changes in market conditions may indicate that the current market share of a particular firm either understates or overstates the firm's future competitive significance. The Agencies consider reasonably predictable effects of recent or ongoing changes in market conditions when calculating and interpreting market share data. For example, if a new technology that is important to long-term competitive viability is available to other firms in the market, but is not available to a particular firm, the Agencies may conclude that that firm's historical market share

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8 If this type of supply side substitution is nearly universal among the firms selling one or more of a group of products, the Agencies may use an aggregate description of markets for those products as a matter of convenience.

overstates its future competitive significance. The Agencies may project historical market shares into the foreseeable future when this can be done reliably.

The Agencies measure market shares based on the best available indicator of firms' future competitive significance in the relevant market. This may depend upon the type of competitive effect being considered, and on the availability of data. Typically, annual data are used, but where individual transactions are large and infrequent so annual data may be unrepresentative, the Agencies may measure market shares over a longer period of time.

In most contexts, the Agencies measure each firm's market share based on its actual or projected revenues in the relevant market. Revenues in the relevant market tend to be the best measure of attractiveness to customers, since they reflect the real-world ability of firms to surmount all of the obstacles necessary to offer products on terms and conditions that are attractive to customers. In cases where one unit of a low-priced product can substitute for one unit of a higher-priced product, unit sales may measure competitive significance better than revenues. For example, a new, much less expensive product may have great competitive significance if it substantially erodes the revenues earned by older, higher-priced products, even if it earns relatively few revenues. In cases where customers sign long-term contracts, face switching costs, or tend to re-evaluate their suppliers only occasionally, revenues earned from recently acquired customers may better reflect the competitive significance of suppliers than do total revenues.

In markets for homogeneous products, a firm's competitive significance may derive principally from its ability and incentive to rapidly expand production in the relevant market in response to a price increase or output reduction by others in that market. As a result, a firm's competitive significance may depend upon its level of readily available capacity to serve the relevant market if that capacity is efficient enough to make such expansion profitable. In such markets, capacities or reserves may better reflect the future competitive significance of suppliers than revenues, and the Agencies may calculate market shares using those measures. Market participants that are not current producers may then be assigned positive market shares, but only if a measure of their competitive significance properly comparable to that of current producers is available. When market shares are measured based on firms' readily available capacities, the Agencies do not include capacity that is committed or so profitably employed outside the relevant market, or so high-cost, that it would not likely be used to respond to a SSNIP in the relevant market.

> *Example 18:* The geographic market is defined around customers in the United States. Firm X produces the relevant product outside the United States, and most of its sales are made to customers outside the United States. In most contexts, Firm X's market share will be based on its sales to U.S. customers, not its total sales or total capacity. However, if the relevant product is homogeneous, and if Firm X would significantly expand sales to U.S. customers rapidly and without incurring significant sunk costs in response to a SSNIP, the Agencies may base Firm X's market share on its readily available capacity to serve U.S. customers.

When the Agencies define markets serving targeted customers, these same principles are used to measure market shares, as they apply to those customers. In most contexts, each firm's market share is based on its actual or projected revenues from the targeted customers. However, the Agencies may instead measure market shares based on revenues from a broader group of customers if doing so would more accurately reflect the competitive significance of different suppliers in the relevant market. Revenues earned from a broader group of customers may also be used when better data are thereby available.

5.3 Market Concentration

Market concentration is often one useful indicator of likely competitive effects of a merger. In evaluating market concentration, the Agencies consider both the post-merger level of market concentration and the change in concentration resulting from a merger. Market shares may not fully reflect the competitive significance of firms in the market or the impact of a merger. They are used in conjunction with other evidence of competitive effects. See Sections 6 and 7.

In analyzing mergers between an incumbent and a recent or potential entrant, to the extent the Agencies use the change in concentration to evaluate competitive effects, they will do so using projected market shares. A merger between an incumbent and a potential entrant can raise significant competitive concerns. The lessening of competition resulting from such a merger is more likely to be substantial, the larger is the market share of the incumbent, the greater is the competitive significance of the potential entrant, and the greater is the competitive threat posed by this potential entrant relative to others.

The Agencies give more weight to market concentration when market shares have been stable over time, especially in the face of historical changes in relative prices or costs. If a firm has retained its market share even after its price has increased relative to those of its rivals, that firm already faces limited competitive constraints, making it less likely that its remaining rivals will replace the competition lost if one of that firm's important rivals is eliminated due to a merger. By contrast, even a highly concentrated market can be very competitive if market shares fluctuate substantially over short periods of time in response to changes in competitive offerings. However, if competition by one of the merging firms has significantly contributed to these fluctuations, perhaps because it has acted as a maverick, the Agencies will consider whether the merger will enhance market power by combining that firm with one of its significant rivals.

The Agencies may measure market concentration using the number of significant competitors in the market. This measure is most useful when there is a gap in market share between significant competitors and smaller rivals or when it is difficult to measure revenues in the relevant market. The Agencies also may consider the combined market share of the merging firms as an indicator of the extent to which others in the market may not be able readily to replace competition between the merging firms that is lost through the merger.

The Agencies often calculate the Herfindahl-Hirschman Index ("HHI") of market concentration. The HHI is calculated by summing the squares of the individual firms' market shares,[9] and thus gives proportionately greater weight to the larger market shares. When using the HHI, the Agencies

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[9] For example, a market consisting of four firms with market shares of thirty percent, thirty percent, twenty percent, and twenty percent has an HHI of 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). The HHI ranges from 10,000 (in the case of a pure monopoly) to a number approaching zero (in the case of an atomistic market). Although it is desirable to include all firms in the calculation, lack of information about firms with small shares is not critical because such firms do not affect the HHI significantly.

consider both the post-merger level of the HHI and the increase in the HHI resulting from the merger. The increase in the HHI is equal to twice the product of the market shares of the merging firms.[10]

Based on their experience, the Agencies generally classify markets into three types:

- Unconcentrated Markets: HHI below 1500
- Moderately Concentrated Markets: HHI between 1500 and 2500
- Highly Concentrated Markets: HHI above 2500

The Agencies employ the following general standards for the relevant markets they have defined:

- *Small Change in Concentration:* Mergers involving an increase in the HHI of less than 100 points are unlikely to have adverse competitive effects and ordinarily require no further analysis.
- *Unconcentrated Markets:* Mergers resulting in unconcentrated markets are unlikely to have adverse competitive effects and ordinarily require no further analysis.
- *Moderately Concentrated Markets:* Mergers resulting in moderately concentrated markets that involve an increase in the HHI of more than 100 points potentially raise significant competitive concerns and often warrant scrutiny.
- *Highly Concentrated Markets:* Mergers resulting in highly concentrated markets that involve an increase in the HHI of between 100 points and 200 points potentially raise significant competitive concerns and often warrant scrutiny. Mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power. The presumption may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power.

The purpose of these thresholds is not to provide a rigid screen to separate competitively benign mergers from anticompetitive ones, although high levels of concentration do raise concerns. Rather, they provide one way to identify some mergers unlikely to raise competitive concerns and some others for which it is particularly important to examine whether other competitive factors confirm, reinforce, or counteract the potentially harmful effects of increased concentration. The higher the post-merger HHI and the increase in the HHI, the greater are the Agencies' potential competitive concerns and the greater is the likelihood that the Agencies will request additional information to conduct their analysis.

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10 For example, the merger of firms with shares of five percent and ten percent of the market would increase the HHI by 100 ($5 \times 10 \times 2 = 100$).

6. Unilateral Effects

The elimination of competition between two firms that results from their merger may alone constitute a substantial lessening of competition. Such unilateral effects are most apparent in a merger to monopoly in a relevant market, but are by no means limited to that case. Whether cognizable efficiencies resulting from the merger are likely to reduce or reverse adverse unilateral effects is addressed in Section 10.

Several common types of unilateral effects are discussed in this section. Section 6.1 discusses unilateral price effects in markets with differentiated products. Section 6.2 discusses unilateral effects in markets where sellers negotiate with buyers or prices are determined through auctions. Section 6.3 discusses unilateral effects relating to reductions in output or capacity in markets for relatively homogeneous products. Section 6.4 discusses unilateral effects arising from diminished innovation or reduced product variety. These effects do not exhaust the types of possible unilateral effects; for example, exclusionary unilateral effects also can arise.

A merger may result in different unilateral effects along different dimensions of competition. For example, a merger may increase prices in the short term but not raise longer-term concerns about innovation, either because rivals will provide sufficient innovation competition or because the merger will generate cognizable research and development efficiencies. See Section 10.

6.1 Pricing of Differentiated Products

In differentiated product industries, some products can be very close substitutes and compete strongly with each other, while other products are more distant substitutes and compete less strongly. For example, one high-end product may compete much more directly with another high-end product than with any low-end product.

A merger between firms selling differentiated products may diminish competition by enabling the merged firm to profit by unilaterally raising the price of one or both products above the pre-merger level. Some of the sales lost due to the price rise will merely be diverted to the product of the merger partner and, depending on relative margins, capturing such sales loss through merger may make the price increase profitable even though it would not have been profitable prior to the merger.

The extent of direct competition between the products sold by the merging parties is central to the evaluation of unilateral price effects. Unilateral price effects are greater, the more the buyers of products sold by one merging firm consider products sold by the other merging firm to be their next choice. The Agencies consider any reasonably available and reliable information to evaluate the extent of direct competition between the products sold by the merging firms. This includes documentary and testimonial evidence, win/loss reports and evidence from discount approval processes, customer switching patterns, and customer surveys. The types of evidence relied on often overlap substantially with the types of evidence of customer substitution relevant to the hypothetical monopolist test. See Section 4.1.1.

Substantial unilateral price elevation post-merger for a product formerly sold by one of the merging firms normally requires that a significant fraction of the customers purchasing that product view products formerly sold by the other merging firm as their next-best choice. However, unless pre-merger margins between price and incremental cost are low, that significant fraction need not approach a majority. For this purpose, incremental cost is measured over the change in output that would be caused by the price change considered. A merger may produce significant unilateral effects for a given product even though many more sales are diverted to products sold by non-merging firms than to products previously sold by the merger partner.

> *Example 19:* In Example 5, the merged entity controlling Products A and B would raise prices ten percent, given the product offerings and prices of other firms. In that example, one-third of the sales lost by Product A when its price alone is raised are diverted to Product B. Further analysis is required to account for repositioning, entry, and efficiencies.

In some cases, the Agencies may seek to quantify the extent of direct competition between a product sold by one merging firm and a second product sold by the other merging firm by estimating the diversion ratio from the first product to the second product. The diversion ratio is the fraction of unit sales lost by the first product due to an increase in its price that would be diverted to the second product. Diversion ratios between products sold by one merging firm and products sold by the other merging firm can be very informative for assessing unilateral price effects, with higher diversion ratios indicating a greater likelihood of such effects. Diversion ratios between products sold by merging firms and those sold by non-merging firms have at most secondary predictive value.

Adverse unilateral price effects can arise when the merger gives the merged entity an incentive to raise the price of a product previously sold by one merging firm and thereby divert sales to products previously sold by the other merging firm, boosting the profits on the latter products. Taking as given other prices and product offerings, that boost to profits is equal to the value to the merged firm of the sales diverted to those products. The value of sales diverted to a product is equal to the number of units diverted to that product multiplied by the margin between price and incremental cost on that product. In some cases, where sufficient information is available, the Agencies assess the value of diverted sales, which can serve as an indicator of the upward pricing pressure on the first product resulting from the merger. Diagnosing unilateral price effects based on the value of diverted sales need not rely on market definition or the calculation of market shares and concentration. The Agencies rely much more on the value of diverted sales than on the level of the HHI for diagnosing unilateral price effects in markets with differentiated products. If the value of diverted sales is proportionately small, significant unilateral price effects are unlikely.[11]

Where sufficient data are available, the Agencies may construct economic models designed to quantify the unilateral price effects resulting from the merger. These models often include independent price responses by non-merging firms. They also can incorporate merger-specific efficiencies. These merger simulation methods need not rely on market definition. The Agencies do not treat merger simulation evidence as conclusive in itself, and they place more weight on whether their merger simulations consistently predict substantial price increases than on the precise prediction of any single simulation.

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[11] For this purpose, the value of diverted sales is measured in proportion to the lost revenues attributable to the reduction in unit sales resulting from the price increase. Those lost revenues equal the reduction in the number of units sold of that product multiplied by that product's price.

A merger is unlikely to generate substantial unilateral price increases if non-merging parties offer very close substitutes for the products offered by the merging firms. In some cases, non-merging firms may be able to reposition their products to offer close substitutes for the products offered by the merging firms. Repositioning is a supply-side response that is evaluated much like entry, with consideration given to timeliness, likelihood, and sufficiency. See Section 9. The Agencies consider whether repositioning would be sufficient to deter or counteract what otherwise would be significant anticompetitive unilateral effects from a differentiated products merger.

6.2 Bargaining and Auctions

In many industries, especially those involving intermediate goods and services, buyers and sellers negotiate to determine prices and other terms of trade. In that process, buyers commonly negotiate with more than one seller, and may play sellers off against one another. Some highly structured forms of such competition are known as auctions. Negotiations often combine aspects of an auction with aspects of one-on-one negotiation, although pure auctions are sometimes used in government procurement and elsewhere.

A merger between two competing sellers prevents buyers from playing those sellers off against each other in negotiations. This alone can significantly enhance the ability and incentive of the merged entity to obtain a result more favorable to it, and less favorable to the buyer, than the merging firms would have offered separately absent the merger. The Agencies analyze unilateral effects of this type using similar approaches to those described in Section 6.1.

Anticompetitive unilateral effects in these settings are likely in proportion to the frequency or probability with which, prior to the merger, one of the merging sellers had been the runner-up when the other won the business. These effects also are likely to be greater, the greater advantage the runner-up merging firm has over other suppliers in meeting customers' needs. These effects also tend to be greater, the more profitable were the pre-merger winning bids. All of these factors are likely to be small if there are many equally placed bidders.

The mechanisms of these anticompetitive unilateral effects, and the indicia of their likelihood, differ somewhat according to the bargaining practices used, the auction format, and the sellers' information about one another's costs and about buyers' preferences. For example, when the merging sellers are likely to know which buyers they are best and second best placed to serve, any anticompetitive unilateral effects are apt to be targeted at those buyers; when sellers are less well informed, such effects are more apt to be spread over a broader class of buyers.

6.3 Capacity and Output for Homogeneous Products

In markets involving relatively undifferentiated products, the Agencies may evaluate whether the merged firm will find it profitable unilaterally to suppress output and elevate the market price. A firm may leave capacity idle, refrain from building or obtaining capacity that would have been obtained absent the merger, or eliminate pre-existing production capabilities. A firm may also divert the use of capacity away from one relevant market and into another so as to raise the price in the former market. The competitive analyses of these alternative modes of output suppression may differ.

A unilateral output suppression strategy is more likely to be profitable when (1) the merged firm's market share is relatively high; (2) the share of the merged firm's output already committed for sale at prices unaffected by the output suppression is relatively low; (3) the margin on the suppressed output is relatively low; (4) the supply responses of rivals are relatively small; and (5) the market elasticity of demand is relatively low.

A merger may provide the merged firm a larger base of sales on which to benefit from the resulting price rise, or it may eliminate a competitor that otherwise could have expanded its output in response to the price rise.

> *Example 20:* Firms A and B both produce an industrial commodity and propose to merge. The demand for this commodity is insensitive to price. Firm A is the market leader. Firm B produces substantial output, but its operating margins are low because it operates high-cost plants. The other suppliers are operating very near capacity. The merged firm has an incentive to reduce output at the high-cost plants, perhaps shutting down some of that capacity, thus driving up the price it receives on the remainder of its output. The merger harms customers, notwithstanding that the merged firm shifts some output from high-cost plants to low-cost plants.

In some cases, a merger between a firm with a substantial share of the sales in the market and a firm with significant excess capacity to serve that market can make an output suppression strategy profitable.[12] This can occur even if the firm with the excess capacity has a relatively small share of sales, if that firm's ability to expand, and thus keep price from rising, has been making an output suppression strategy unprofitable for the firm with the larger market share.

6.4 Innovation and Product Variety

Competition often spurs firms to innovate. The Agencies may consider whether a merger is likely to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger. That curtailment of innovation could take the form of reduced incentive to continue with an existing product-development effort or reduced incentive to initiate development of new products.

The first of these effects is most likely to occur if at least one of the merging firms is engaging in efforts to introduce new products that would capture substantial revenues from the other merging firm. The second, longer-run effect is most likely to occur if at least one of the merging firms has capabilities that are likely to lead it to develop new products in the future that would capture substantial revenues from the other merging firm. The Agencies therefore also consider whether a merger will diminish innovation competition by combining two of a very small number of firms with the strongest capabilities to successfully innovate in a specific direction.

The Agencies evaluate the extent to which successful innovation by one merging firm is likely to take sales from the other, and the extent to which post-merger incentives for future innovation will be lower than those that would prevail in the absence of the merger. The Agencies also consider whether the merger is likely to enable innovation that would not otherwise take place, by bringing together

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12 Such a merger also can cause adverse coordinated effects, especially if the acquired firm with excess capacity was disrupting effective coordination.

complementary capabilities that cannot be otherwise combined or for some other merger-specific reason. See Section 10.

The Agencies also consider whether a merger is likely to give the merged firm an incentive to cease offering one of the relevant products sold by the merging parties. Reductions in variety following a merger may or may not be anticompetitive. Mergers can lead to the efficient consolidation of products when variety offers little in value to customers. In other cases, a merger may increase variety by encouraging the merged firm to reposition its products to be more differentiated from one another.

If the merged firm would withdraw a product that a significant number of customers strongly prefer to those products that would remain available, this can constitute a harm to customers over and above any effects on the price or quality of any given product. If there is evidence of such an effect, the Agencies may inquire whether the reduction in variety is largely due to a loss of competitive incentives attributable to the merger. An anticompetitive incentive to eliminate a product as a result of the merger is greater and more likely, the larger is the share of profits from that product coming at the expense of profits from products sold by the merger partner. Where a merger substantially reduces competition by bringing two close substitute products under common ownership, and one of those products is eliminated, the merger will often also lead to a price increase on the remaining product, but that is not a necessary condition for anticompetitive effect.

> *Example 21:* Firm A sells a high-end product at a premium price. Firm B sells a mid-range product at a lower price, serving customers who are more price sensitive. Several other firms have low-end products. Firms A and B together have a large share of the relevant market. Firm A proposes to acquire Firm B and discontinue Firm B's product. Firm A expects to retain most of Firm B's customers. Firm A may not find it profitable to raise the price of its high-end product after the merger, because doing so would reduce its ability to retain Firm B's more price-sensitive customers. The Agencies may conclude that the withdrawal of Firm B's product results from a loss of competition and materially harms customers.

7. Coordinated Effects

A merger may diminish competition by enabling or encouraging post-merger coordinated interaction among firms in the relevant market that harms customers. Coordinated interaction involves conduct by multiple firms that is profitable for each of them only as a result of the accommodating reactions of the others. These reactions can blunt a firm's incentive to offer customers better deals by undercutting the extent to which such a move would win business away from rivals. They also can enhance a firm's incentive to raise prices, by assuaging the fear that such a move would lose customers to rivals.

Coordinated interaction includes a range of conduct. Coordinated interaction can involve the explicit negotiation of a common understanding of how firms will compete or refrain from competing. Such conduct typically would itself violate the antitrust laws. Coordinated interaction also can involve a similar common understanding that is not explicitly negotiated but would be enforced by the detection and punishment of deviations that would undermine the coordinated interaction. Coordinated interaction alternatively can involve parallel accommodating conduct not pursuant to a prior understanding. Parallel accommodating conduct includes situations in which each rival's response to competitive moves made by others is individually rational, and not motivated by retaliation or deterrence nor intended to sustain an agreed-upon market outcome, but nevertheless emboldens price increases and weakens competitive incentives to reduce prices or offer customers better terms. Coordinated interaction includes conduct not otherwise condemned by the antitrust laws.

The ability of rival firms to engage in coordinated conduct depends on the strength and predictability of rivals' responses to a price change or other competitive initiative. Under some circumstances, a merger can result in market concentration sufficient to strengthen such responses or enable multiple firms in the market to predict them more confidently, thereby affecting the competitive incentives of multiple firms in the market, not just the merged firm.

7.1 Impact of Merger on Coordinated Interaction

The Agencies examine whether a merger is likely to change the manner in which market participants interact, inducing substantially more coordinated interaction. The Agencies seek to identify how a merger might significantly weaken competitive incentives through an increase in the strength, extent, or likelihood of coordinated conduct. There are, however, numerous forms of coordination, and the risk that a merger will induce adverse coordinated effects may not be susceptible to quantification or detailed proof. Therefore, the Agencies evaluate the risk of coordinated effects using measures of market concentration (see Section 5) in conjunction with an assessment of whether a market is vulnerable to coordinated conduct. See Section 7.2. The analysis in Section 7.2 applies to moderately and highly concentrated markets, as unconcentrated markets are unlikely to be vulnerable to coordinated conduct.

Pursuant to the Clayton Act's incipiency standard, the Agencies may challenge mergers that in their judgment pose a real danger of harm through coordinated effects, even without specific evidence showing precisely how the coordination likely would take place. The Agencies are likely to challenge a merger if the following three conditions are all met: (1) the merger would significantly increase concentration and lead to a moderately or highly concentrated market; (2) that market shows signs of vulnerability to coordinated conduct (see Section 7.2); and (3) the Agencies have a credible basis on which to conclude that the merger may enhance that vulnerability. An acquisition eliminating a maverick firm (see Section 2.1.5) in a market vulnerable to coordinated conduct is likely to cause adverse coordinated effects.

7.2 Evidence a Market is Vulnerable to Coordinated Conduct

The Agencies presume that market conditions are conducive to coordinated interaction if firms representing a substantial share in the relevant market appear to have previously engaged in express collusion affecting the relevant market, unless competitive conditions in the market have since changed significantly. Previous express collusion in another geographic market will have the same weight if the salient characteristics of that other market at the time of the collusion are comparable to those in the relevant market. Failed previous attempts at collusion in the relevant market suggest that successful collusion was difficult pre-merger but not so difficult as to deter attempts, and a merger may tend to make success more likely. Previous collusion or attempted collusion in another product market may also be given substantial weight if the salient characteristics of that other market at the time of the collusion are closely comparable to those in the relevant market.

A market typically is more vulnerable to coordinated conduct if each competitively important firm's significant competitive initiatives can be promptly and confidently observed by that firm's rivals. This is more likely to be the case if the terms offered to customers are relatively transparent. Price transparency can be greater for relatively homogeneous products. Even if terms of dealing are not transparent, transparency regarding the identities of the firms serving particular customers can give rise to coordination, e.g., through customer or territorial allocation. Regular monitoring by suppliers of one another's prices or customers can indicate that the terms offered to customers are relatively transparent.

A market typically is more vulnerable to coordinated conduct if a firm's prospective competitive reward from attracting customers away from its rivals will be significantly diminished by likely responses of those rivals. This is more likely to be the case, the stronger and faster are the responses the firm anticipates from its rivals. The firm is more likely to anticipate strong responses if there are few significant competitors, if products in the relevant market are relatively homogeneous, if customers find it relatively easy to switch between suppliers, or if suppliers use meeting-competition clauses.

A firm is more likely to be deterred from making competitive initiatives by whatever responses occur if sales are small and frequent rather than via occasional large and long-term contracts or if relatively few customers will switch to it before rivals are able to respond. A firm is less likely to be deterred by whatever responses occur if the firm has little stake in the status quo. For example, a firm with a small market share that can quickly and dramatically expand, constrained neither by limits on production nor by customer reluctance to switch providers or to entrust business to a historically small provider, is unlikely to be deterred. Firms are also less likely to be deterred by whatever responses occur if competition in the relevant market is marked by leapfrogging technological innovation, so that responses by competitors leave the gains from successful innovation largely intact.

A market is more apt to be vulnerable to coordinated conduct if the firm initiating a price increase will lose relatively few customers after rivals respond to the increase. Similarly, a market is more apt to be vulnerable to coordinated conduct if a firm that first offers a lower price or improved product to customers will retain relatively few customers thus attracted away from its rivals after those rivals respond.

The Agencies regard coordinated interaction as more likely, the more the participants stand to gain from successful coordination. Coordination generally is more profitable, the lower is the market elasticity of demand.

Coordinated conduct can harm customers even if not all firms in the relevant market engage in the coordination, but significant harm normally is likely only if a substantial part of the market is subject to such conduct. The prospect of harm depends on the collective market power, in the relevant market, of firms whose incentives to compete are substantially weakened by coordinated conduct. This collective market power is greater, the lower is the market elasticity of demand. This collective market power is diminished by the presence of other market participants with small market shares and little stake in the outcome resulting from the coordinated conduct, if these firms can rapidly expand their sales in the relevant market.

Buyer characteristics and the nature of the procurement process can affect coordination. For example, sellers may have the incentive to bid aggressively for a large contract even if they expect strong responses by rivals. This is especially the case for sellers with small market shares, if they can realistically win such large contracts. In some cases, a large buyer may be able to strategically undermine coordinated conduct, at least as it pertains to that buyer's needs, by choosing to put up for bid a few large contracts rather than many smaller ones, and by making its procurement decisions opaque to suppliers.

8. Powerful Buyers

Powerful buyers are often able to negotiate favorable terms with their suppliers. Such terms may reflect the lower costs of serving these buyers, but they also can reflect price discrimination in their favor.

The Agencies consider the possibility that powerful buyers may constrain the ability of the merging parties to raise prices. This can occur, for example, if powerful buyers have the ability and incentive to vertically integrate upstream or sponsor entry, or if the conduct or presence of large buyers undermines coordinated effects. However, the Agencies do not presume that the presence of powerful buyers alone forestalls adverse competitive effects flowing from the merger. Even buyers that can negotiate favorable terms may be harmed by an increase in market power. The Agencies examine the choices available to powerful buyers and how those choices likely would change due to the merger. Normally, a merger that eliminates a supplier whose presence contributed significantly to a buyer's negotiating leverage will harm that buyer.

> *Example 22:* Customer C has been able to negotiate lower pre-merger prices than other customers by threatening to shift its large volume of purchases from one merging firm to the other. No other suppliers are as well placed to meet Customer C's needs for volume and reliability. The merger is likely to harm Customer C. In this situation, the Agencies could identify a price discrimination market consisting of Customer C and similarly placed customers. The merger threatens to end previous price discrimination in their favor.

Furthermore, even if some powerful buyers could protect themselves, the Agencies also consider whether market power can be exercised against other buyers.

> *Example 23:* In Example 22, if Customer C instead obtained the lower pre-merger prices based on a credible threat to supply its own needs, or to sponsor new entry, Customer C might not be harmed. However, even in this case, other customers may still be harmed.

9. Entry

The analysis of competitive effects in Sections 6 and 7 focuses on current participants in the relevant market. That analysis may also include some forms of entry. Firms that would rapidly and easily enter the market in response to a SSNIP are market participants and may be assigned market shares. See Sections 5.1 and 5.2. Firms that have, prior to the merger, committed to entering the market also will normally be treated as market participants. See Section 5.1. This section concerns entry or adjustments to pre-existing entry plans that are induced by the merger.

As part of their full assessment of competitive effects, the Agencies consider entry into the relevant market. The prospect of entry into the relevant market will alleviate concerns about adverse competitive effects only if such entry will deter or counteract any competitive effects of concern so the merger will not substantially harm customers.

The Agencies consider the actual history of entry into the relevant market and give substantial weight to this evidence. Lack of successful and effective entry in the face of non-transitory increases in the margins earned on products in the relevant market tends to suggest that successful entry is slow or difficult. Market values of incumbent firms greatly exceeding the replacement costs of their tangible assets may indicate that these firms have valuable intangible assets, which may be difficult or time consuming for an entrant to replicate.

A merger is not likely to enhance market power if entry into the market is so easy that the merged firm and its remaining rivals in the market, either unilaterally or collectively, could not profitably raise price or otherwise reduce competition compared to the level that would prevail in the absence of the merger. Entry is that easy if entry would be timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern.

The Agencies examine the timeliness, likelihood, and sufficiency of the entry efforts an entrant might practically employ. An entry effort is defined by the actions the firm must undertake to produce and sell in the market. Various elements of the entry effort will be considered. These elements can include: planning, design, and management; permitting, licensing, or other approvals; construction, debugging, and operation of production facilities; and promotion (including necessary introductory discounts), marketing, distribution, and satisfaction of customer testing and qualification requirements. Recent examples of entry, whether successful or unsuccessful, generally provide the starting point for identifying the elements of practical entry efforts. They also can be informative regarding the scale necessary for an entrant to be successful, the presence or absence of entry barriers, the factors that influence the timing of entry, the costs and risk associated with entry, and the sales opportunities realistically available to entrants.

If the assets necessary for an effective and profitable entry effort are widely available, the Agencies will not necessarily attempt to identify which firms might enter. Where an identifiable set of firms appears to have necessary assets that others lack, or to have particularly strong incentives to enter, the Agencies focus their entry analysis on those firms. Firms operating in adjacent or complementary markets, or large customers themselves, may be best placed to enter. However, the Agencies will not presume that a powerful firm in an adjacent market or a large customer will enter the relevant market unless there is reliable evidence supporting that conclusion.

In assessing whether entry will be timely, likely, and sufficient, the Agencies recognize that precise and detailed information may be difficult or impossible to obtain. The Agencies consider reasonably available and reliable evidence bearing on whether entry will satisfy the conditions of timeliness, likelihood, and sufficiency.

9.1 Timeliness

In order to deter the competitive effects of concern, entry must be rapid enough to make unprofitable overall the actions causing those effects and thus leading to entry, even though those actions would be profitable until entry takes effect.

Even if the prospect of entry does not deter the competitive effects of concern, post-merger entry may counteract them. This requires that the impact of entrants in the relevant market be rapid enough that customers are not significantly harmed by the merger, despite any anticompetitive harm that occurs prior to the entry.

The Agencies will not presume that an entrant can have a significant impact on prices before that entrant is ready to provide the relevant product to customers unless there is reliable evidence that anticipated future entry would have such an effect on prices.

9.2 Likelihood

Entry is likely if it would be profitable, accounting for the assets, capabilities, and capital needed and the risks involved, including the need for the entrant to incur costs that would not be recovered if the entrant later exits. Profitability depends upon (a) the output level the entrant is likely to obtain, accounting for the obstacles facing new entrants; (b) the price the entrant would likely obtain in the post-merger market, accounting for the impact of that entry itself on prices; and (c) the cost per unit the entrant would likely incur, which may depend upon the scale at which the entrant would operate.

9.3 Sufficiency

Even where timely and likely, entry may not be sufficient to deter or counteract the competitive effects of concern. For example, in a differentiated product industry, entry may be insufficient because the products offered by entrants are not close enough substitutes to the products offered by the merged firm to render a price increase by the merged firm unprofitable. Entry may also be insufficient due to constraints that limit entrants' competitive effectiveness, such as limitations on the capabilities of the firms best placed to enter or reputational barriers to rapid expansion by new entrants. Entry by a single firm that will replicate at least the scale and strength of one of the merging firms is sufficient. Entry by one or more firms operating at a smaller scale may be sufficient if such firms are not at a significant competitive disadvantage.

10. Efficiencies

Competition usually spurs firms to achieve efficiencies internally. Nevertheless, a primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products. For example, merger-generated efficiencies may enhance competition by permitting two ineffective competitors to form a more effective competitor, e.g., by combining complementary assets. In a unilateral effects context, incremental cost reductions may reduce or reverse any increases in the merged firm's incentive to elevate price. Efficiencies also may lead to new or improved products, even if they do not immediately and directly affect price. In a coordinated effects context, incremental cost reductions may make coordination less likely or effective by enhancing the incentive of a maverick to lower price or by creating a new maverick firm. Even when efficiencies generated through a merger enhance a firm's ability to compete, however, a merger may have other effects that may lessen competition and make the merger anticompetitive.

The Agencies credit only those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects. These are termed merger-specific efficiencies.[13] Only alternatives that are practical in the business situation faced by the merging firms are considered in making this determination. The Agencies do not insist upon a less restrictive alternative that is merely theoretical.

Efficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the merging firms. Moreover, efficiencies projected reasonably and in good faith by the merging firms may not be realized. Therefore, it is incumbent upon the merging firms to substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific.

Efficiency claims will not be considered if they are vague, speculative, or otherwise cannot be verified by reasonable means. Projections of efficiencies may be viewed with skepticism, particularly when generated outside of the usual business planning process. By contrast, efficiency claims substantiated by analogous past experience are those most likely to be credited.

Cognizable efficiencies are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service. Cognizable efficiencies are assessed net of costs produced by the merger or incurred in achieving those efficiencies.

The Agencies will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market.[14] To make the requisite determination, the Agencies consider whether cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm customers in the relevant market, e.g., by preventing price

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[13] The Agencies will not deem efficiencies to be merger-specific if they could be attained by practical alternatives that mitigate competitive concerns, such as divestiture or licensing. If a merger affects not whether but only when an efficiency would be achieved, only the timing advantage is a merger-specific efficiency.

[14] The Agencies normally assess competition in each relevant market affected by a merger independently and normally will challenge the merger if it is likely to be anticompetitive in any relevant market. In some cases, however, the Agencies in their prosecutorial discretion will consider efficiencies not strictly in the relevant market, but so inextricably linked with it that a partial divestiture or other remedy could not feasibly eliminate the anticompetitive effect in the relevant market without sacrificing the efficiencies in the other market(s). Inextricably linked efficiencies are most likely to make a difference when they are great and the likely anticompetitive effect in the relevant market(s) is small so the merger is likely to benefit customers overall.

increases in that market.[15] In conducting this analysis, the Agencies will not simply compare the magnitude of the cognizable efficiencies with the magnitude of the likely harm to competition absent the efficiencies. The greater the potential adverse competitive effect of a merger, the greater must be the cognizable efficiencies, and the more they must be passed through to customers, for the Agencies to conclude that the merger will not have an anticompetitive effect in the relevant market. When the potential adverse competitive effect of a merger is likely to be particularly substantial, extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive. In adhering to this approach, the Agencies are mindful that the antitrust laws give competition, not internal operational efficiency, primacy in protecting customers.

In the Agencies' experience, efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great. Efficiencies almost never justify a merger to monopoly or near-monopoly. Just as adverse competitive effects can arise along multiple dimensions of conduct, such as pricing and new product development, so too can efficiencies operate along multiple dimensions. Similarly, purported efficiency claims based on lower prices can be undermined if they rest on reductions in product quality or variety that customers value.

The Agencies have found that certain types of efficiencies are more likely to be cognizable and substantial than others. For example, efficiencies resulting from shifting production among facilities formerly owned separately, which enable the merging firms to reduce the incremental cost of production, are more likely to be susceptible to verification and are less likely to result from anticompetitive reductions in output. Other efficiencies, such as those relating to research and development, are potentially substantial but are generally less susceptible to verification and may be the result of anticompetitive output reductions. Yet others, such as those relating to procurement, management, or capital cost, are less likely to be merger-specific or substantial, or may not be cognizable for other reasons.

When evaluating the effects of a merger on innovation, the Agencies consider the ability of the merged firm to conduct research or development more effectively. Such efficiencies may spur innovation but not affect short-term pricing. The Agencies also consider the ability of the merged firm to appropriate a greater fraction of the benefits resulting from its innovations. Licensing and intellectual property conditions may be important to this enquiry, as they affect the ability of a firm to appropriate the benefits of its innovation. Research and development cost savings may be substantial and yet not be cognizable efficiencies because they are difficult to verify or result from anticompetitive reductions in innovative activities.

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15 The Agencies normally give the most weight to the results of this analysis over the short term. The Agencies also may consider the effects of cognizable efficiencies with no short-term, direct effect on prices in the relevant market. Delayed benefits from efficiencies (due to delay in the achievement of, or the realization of customer benefits from, the efficiencies) will be given less weight because they are less proximate and more difficult to predict. Efficiencies relating to costs that are fixed in the short term are unlikely to benefit customers in the short term, but can benefit customers in the longer run, e.g., if they make new product introduction less expensive.

11. Failure and Exiting Assets

Notwithstanding the analysis above, a merger is not likely to enhance market power if imminent failure, as defined below, of one of the merging firms would cause the assets of that firm to exit the relevant market. This is an extreme instance of the more general circumstance in which the competitive significance of one of the merging firms is declining: the projected market share and significance of the exiting firm is zero. If the relevant assets would otherwise exit the market, customers are not worse off after the merger than they would have been had the merger been enjoined.

The Agencies do not normally credit claims that the assets of the failing firm would exit the relevant market unless all of the following circumstances are met: (1) the allegedly failing firm would be unable to meet its financial obligations in the near future; (2) it would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act; and (3) it has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger.[16]

Similarly, a merger is unlikely to cause competitive harm if the risks to competition arise from the acquisition of a failing division. The Agencies do not normally credit claims that the assets of a division would exit the relevant market in the near future unless both of the following conditions are met: (1) applying cost allocation rules that reflect true economic costs, the division has a persistently negative cash flow on an operating basis, and such negative cash flow is not economically justified for the firm by benefits such as added sales in complementary markets or enhanced customer goodwill;[17] and (2) the owner of the failing division has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed acquisition.

12. Mergers of Competing Buyers

Mergers of competing buyers can enhance market power on the buying side of the market, just as mergers of competing sellers can enhance market power on the selling side of the market. Buyer market power is sometimes called “monopsony power.”

To evaluate whether a merger is likely to enhance market power on the buying side of the market, the Agencies employ essentially the framework described above for evaluating whether a merger is likely to enhance market power on the selling side of the market. In defining relevant markets, the Agencies

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[16] Any offer to purchase the assets of the failing firm for a price above the liquidation value of those assets will be regarded as a reasonable alternative offer. Liquidation value is the highest value the assets could command for use outside the relevant market.

[17] Because the parent firm can allocate costs, revenues, and intra-company transactions among itself and its subsidiaries and divisions, the Agencies require evidence on these two points that is not solely based on management plans that could have been prepared for the purpose of demonstrating negative cash flow or the prospect of exit from the relevant market.

focus on the alternatives available to sellers in the face of a decrease in the price paid by a hypothetical monopsonist.

Market power on the buying side of the market is not a significant concern if suppliers have numerous attractive outlets for their goods or services. However, when that is not the case, the Agencies may conclude that the merger of competing buyers is likely to lessen competition in a manner harmful to sellers.

The Agencies distinguish between effects on sellers arising from a lessening of competition and effects arising in other ways. A merger that does not enhance market power on the buying side of the market can nevertheless lead to a reduction in prices paid by the merged firm, for example, by reducing transactions costs or allowing the merged firm to take advantage of volume-based discounts. Reduction in prices paid by the merging firms not arising from the enhancement of market power can be significant in the evaluation of efficiencies from a merger, as discussed in Section 10.

The Agencies do not view a short-run reduction in the quantity purchased as the only, or best, indicator of whether a merger enhances buyer market power. Nor do the Agencies evaluate the competitive effects of mergers between competing buyers strictly, or even primarily, on the basis of effects in the downstream markets in which the merging firms sell.

> *Example 24:* Merging Firms A and B are the only two buyers in the relevant geographic market for an agricultural product. Their merger will enhance buyer power and depress the price paid to farmers for this product, causing a transfer of wealth from farmers to the merged firm and inefficiently reducing supply. These effects can arise even if the merger will not lead to any increase in the price charged by the merged firm for its output.

13. Partial Acquisitions

In most horizontal mergers, two competitors come under common ownership and control, completely and permanently eliminating competition between them. This elimination of competition is a basic element of merger analysis. However, the statutory provisions referenced in Section 1 also apply to one firm's partial acquisition of a competitor. The Agencies therefore also review acquisitions of minority positions involving competing firms, even if such minority positions do not necessarily or completely eliminate competition between the parties to the transaction.

When the Agencies determine that a partial acquisition results in effective control of the target firm, or involves substantially all of the relevant assets of the target firm, they analyze the transaction much as they do a merger. Partial acquisitions that do not result in effective control may nevertheless present significant competitive concerns and may require a somewhat distinct analysis from that applied to full mergers or to acquisitions involving effective control. The details of the post-acquisition relationship between the parties, and how those details are likely to affect competition, can be important. While the Agencies will consider any way in which a partial acquisition may affect competition, they generally focus on three principal effects.

First, a partial acquisition can lessen competition by giving the acquiring firm the ability to influence the competitive conduct of the target firm. A voting interest in the target firm or specific governance rights, such as the right to appoint members to the board of directors, can permit such influence. Such influence can lessen competition because the acquiring firm can use its influence to induce the target firm to compete less aggressively or to coordinate its conduct with that of the acquiring firm.

Second, a partial acquisition can lessen competition by reducing the incentive of the acquiring firm to compete. Acquiring a minority position in a rival might significantly blunt the incentive of the acquiring firm to compete aggressively because it shares in the losses thereby inflicted on that rival. This reduction in the incentive of the acquiring firm to compete arises even if cannot influence the conduct of the target firm. As compared with the unilateral competitive effect of a full merger, this effect is likely attenuated by the fact that the ownership is only partial.

Third, a partial acquisition can lessen competition by giving the acquiring firm access to non-public, competitively sensitive information from the target firm. Even absent any ability to influence the conduct of the target firm, access to competitively sensitive information can lead to adverse unilateral or coordinated effects. For example, it can enhance the ability of the two firms to coordinate their behavior, and make other accommodating responses faster and more targeted. The risk of coordinated effects is greater if the transaction also facilitates the flow of competitively sensitive information from the acquiring firm to the target firm.

Partial acquisitions, like mergers, vary greatly in their potential for anticompetitive effects. Accordingly, the specific facts of each case must be examined to assess the likelihood of harm to competition. While partial acquisitions usually do not enable many of the types of efficiencies associated with mergers, the Agencies consider whether a partial acquisition is likely to create cognizable efficiencies.

Hart-Scott-Rodino

Premerger notification Program

Introductory Guide I

What is the Premerger Notification Program?

An Overview

Revised March 2009

AN OVERVIEW

Guide I is the first in a series of guides prepared by the Federal Trade Commission's Premerger Notification Office ("PNO"). It is intended to provide a general overview of the Premerger Notification Program (the "Program") and to help the reader in determining which types of business transactions are reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (§ 7A of the Clayton Act or "the Act"). *Guide I* describes the basic reportability requirements and how the program works. It also provides a list of alternative information sources to assist you in deciding whether or not you need to file. This Guide will introduce you to certain terminology and concepts regarding the Act and the Premerger Notification Rules (the "Rules"), 16 C.F.R. Parts 801, 802 and 803. Additional information can be obtained on the Federal Trade Commission's website at http://www.ftc.gov/bc/hsr.

Other Guides in this series provide more detailed information. Guide II explains in greater detail certain terms used in the Act and the Rules, and analyzes a hypothetical transaction to determine whether it is reportable and Guide III contains "A Model Request for Additional Information and Documentary Material (Second Request)."

The Guides are not intended to address specific proposed transactions. If you are analyzing a transaction, we suggest that you not only consult the Act, the Rules, and the other Guides in this series, but also the additional material referenced in Section XII of this Guide. If you have specific questions not addressed in these reference sources, call the PNO between the hours of 8:30AM and 5:00PM, Monday through Friday, except holidays, at (202) 326-3100.

I. INTRODUCTION

The Act requires that parties to certain mergers or acquisitions notify the Federal Trade Commission and the Department of Justice (the "enforcement agencies") before consummating the proposed acquisition. The parties must wait a specific period of time while the enforcement agencies review the proposed transaction. The Program became effective September 5, 1978, after final promulgation of the Rules.[1]

The Program was established to avoid some of the difficulties and expense that the enforcement agencies encounter when they challenge anticompetitive acquisitions after they have occurred. In the past, the enforcement agencies found that it is often impossible to restore competition fully once a merger takes place. Furthermore, any attempt to reestablish competition after the fact is usually very costly for the parties and the public. Prior review under the Program enables the Federal Trade Commission ("FTC" or the "Commission") and the Department of Justice ("DOJ") to determine which acquisitions are likely to be anticompetitive and to challenge them at a time when remedial action is most effective.

In general, the Act requires that certain proposed acquisitions of voting securities, non-corporate interests ("NCI") or assets be reported to the FTC and the DOJ prior to consummation. The parties must then wait a specified period, usually 30 days (15 days in the case of a cash tender offer or a bankruptcy sale), before they may complete the transaction. Much of the information needed for a preliminary antitrust evaluation is included in the notification filed with the agencies by the parties to proposed transactions and thus is immediately available for review during the waiting period.

Whether a particular acquisition is subject to these requirements depends upon the value of the acquisition and the size of the parties, as measured by their sales and assets. Small acquisitions, acquisitions involving small parties and other classes of acquisitions that are less likely to raise antitrust concerns are excluded from the Act's coverage.

If either agency determines during the waiting period that further inquiry is necessary, it is authorized by Section 7A(e) of the Clayton Act to request additional information or documentary materials from the parties to a reported transaction (a "second request"). A second request extends the waiting period for a specified period, usually 30 days (ten days in the case of a cash tender offer or a bankruptcy sale), after all parties have complied with the request (or, in the case of a tender offer or a bankruptcy sale, after the acquiring person complies). This additional time provides the reviewing agency with the opportunity to analyze the submitted information and to take appropriate action before the transaction is consummated. If the reviewing agency believes that a proposed transaction may violate the antitrust laws, it may seek an injunction in federal district court to prohibit consummation of the transaction.

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[1] The Premerger Notification Rules are found at 16 C.F.R. Parts 801, 802 and 803. The Rules also are identified by number, and each Rule beginning with Rule 801.1 corresponds directly with the section number in the C.F.R. (so that Rule 801.40 would be found in 16 C.F.R. § 801.40). In this Guide, the Rules are cited by Rule number.

The Program has been a success. Compliance with the Act's notification requirements has been excellent, and has minimized the number of post-merger challenges the enforcement agencies have had to pursue. In addition, although the agencies retain the power to challenge mergers post-consummation, and will do so under appropriate circumstances, the fact that they rarely do has led many members of the private bar to view the Program as a helpful tool in advising their clients about particular acquisition proposals.

The Rules, which govern compliance with the Program, are necessarily technical and complex. We have prepared Guide I to introduce some of the Program's specially defined terms and concepts. This should assist you in determining if proposed business transactions are subject to the requirements of the Program.

II. DETERMINING REPORTABILITY

The Act requires persons contemplating proposed business transactions that satisfy certain size criteria to report their intentions to the enforcement agencies before consummating the transaction. If the proposed transaction is reportable, then both the acquiring person and the person whose business is being acquired must submit information about their respective business operations to the enforcement agencies and wait a specific period of time before consummating the proposed transaction. During that waiting period, the enforcement agencies review the antitrust implications of the proposed transaction. Whether a particular transaction is reportable is determined by application of the Act, the Rules, and formal and informal staff interpretations.

As a general matter, the Act and the Rules require both acquiring and acquired persons to file notifications under the Program if all of the following conditions are met:

1. As a result of the transaction, the acquiring person will hold an aggregate amount of voting securities, NCI and/or assets of the acquired person valued in excess of \$200 million (as adjusted)[2], regardless of the sales or assets of the acquiring and acquired persons[3]; or

2. As a result of the transaction, the acquiring person will hold an aggregate amount of voting securities, NCI and/or assets of the acquired person valued in excess of \$50 million (as adjusted) but at \$200 million (as adjusted) or less; and

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[2] The 2000 amendments to the Act require the Commission to revise certain thresholds annually based on the change in the level of gross national product. A parenthetical "(as adjusted)" has been added where necessary throughout the Rules (and in this guide) to indicate where such a change in statutory threshold value occurs. The term "as adjusted" is defined in subsection 801.1 (n) of the Rules and refers to a table of the adjusted values published in the Federal Register notice titled "Revised Jurisdictional Thresholds for Section 7A of the Clayton Act." The notice contains a table showing adjusted values for the rules and is published in January of each year.

[3] *See* § 7A(a)(2) of the Act.

3. One person has sales or assets of at least $100 million (as adjusted); and

4. The other person has sales or assets of at least $10 million (as adjusted).

A. Size of Transaction Test

The first step is to determine what voting securities, NCI, assets, or combination thereof are being transferred in the proposed transaction. Then you must determine the value of the voting securities, NCI, and/or assets as well as the percentage of voting securities and NCI that will be "held as a result of the acquisition." Calculating what will be held as a result of the acquisition (referred to as the "size of the transaction") is complicated and requires the application of several rules, including Rules 801.10, 801.12, 801.13, 801.14 and 801.15. Generally, the securities and/or NCI held as a result of the transaction include those that will be acquired in the proposed transaction, as well as any voting securities and/or NCI of the acquired person, or entities within the acquired person, that the acquiring person already holds. Assets held as a result of the acquisition include those that will be acquired in the proposed transaction as well as certain assets of the acquired person that the acquiring person has purchased within the time limits outlined in Rule 801.13.[4]

If the value of the voting securities, NCI, assets or combination thereof exceeds $200 million (as adjusted) and no exemption applies, the parties must file notification and observe the waiting period before closing the transaction.

If the value of the voting securities, NCI, assets or combination thereof exceeds $50 million (as adjusted) but is $200 million (as adjusted) or less, the parties must look to the size of person test.

B. Acquiring and Acquired Persons/Acquired Entity

The first step in determining the size of person is to identify the "acquiring person" and "acquired person." "Person" is defined in Rules 801.1(a)(1) and is the "ultimate parent entity" or "UPE" of the buyer or seller. That is, it is the entity that ultimately controls the buyer or seller.[5] The "acquired entity" is the specific entity whose assets, NCI or voting securities are being acquired. The acquired entity may also be its own UPE or it may be an entity within the acquired person.

Thus, in an asset acquisition, the acquiring person is the UPE of the buyer, and the acquired person is the UPE of the seller. The acquired entity is the entity whose assets are being acquired. In a voting securities acquisition, the acquiring person is the UPE of the buyer, the acquired person is the UPE of the entity whose securities are being bought, and the acquired entity is the

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[4] The Rules on when to aggregate the value of previously acquired voting securities and assets with the value of the proposed acquisition are discussed in greater detail in Guide II.

[5] *See* "control" under 801.1(b).

issuer of the securities being purchased. In an acquisition of NCI, the acquiring person is the UPE of the buyer, the acquired person is the UPE of the entity whose NCI are being bought, and the acquired entity is the entity whose NCI are being acquired. Oftentimes the acquired person and acquired entity are the same.

In many voting securities acquisitions, the acquiring person proposes to buy voting securities from minority shareholders of the acquired entity, rather than from the entity itself (tender offers are an example of this type of transaction). These transactions are subject to Rule 801.30, which imposes a reporting obligation on the acquiring person and on the acquired person, despite the fact that the acquired person may have no knowledge of the proposed purchase of its outstanding securities.[6] For this reason, the Rules also require that a person proposing to acquire voting securities directly from shareholders rather than from the issuer itself serve notice on the issuer of the shares to ensure the acquired person knows about its reporting obligation.[7]

C. Size of Person Test

Once you have determined who the acquiring and acquired persons are, you must determine whether the size of each person meets the Act's minimum size criteria. This "size of person" test generally measures a company based on the person's last regularly prepared annual statement of income and expenses and its last regularly prepared balance sheet.[8] The size of a person includes not only the entity that is making the acquisition or whose assets or securities are being acquired, but also the UPE and any other entities the UPE controls.[9]

If the value of the voting securities, NCI, assets or combination thereof exceeds $50 million (as adjusted) but is $200 million (as adjusted) or less, the size of person test is met, and no exemption applies, the parties must file notification and observe the waiting period before closing the transaction.

D. Notification Thresholds

An acquisition that will result in a buyer holding more than $50 million (as adjusted) worth of the voting securities of another issuer crosses the first of five staggered "notification thresholds."[9] The rules identify four additional thresholds: voting securities valued at $100 million (as adjusted) or greater but less than $500 million (as adjusted); voting securities valued at $500 million (as adjusted) or greater; 25 percent of the voting securities of an issuer, if the 25 percent (or any amount above 25% but less than 50%) is valued at greater than $1 billion (as adjusted);

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[6] *See* Rule 801.1; Rule 801.30.

[7] *See* Rule 803.5.

[8] *See* Rule 801.11.

[9] *See* Rule 801.1(a)(1).

and 50 percent of the voting securities of an issuer if valued at greater than $50 million (as adjusted).

The thresholds are designed to act as exemptions to relieve parties of the burden of making another filing every time additional voting shares of the same person are acquired. As such, when notification is filed, the acquiring person is allowed one year from the end of the waiting period to cross the threshold stated in the filing.[10] If within that year the person reaches the stated threshold (or any lower threshold), it may continue acquiring voting shares up to the next threshold for five years from the end of the waiting period.[11] For example, if you file to acquire $100 million (as adjusted) of the voting securities of Company B and cross that threshold within one year, you would be able to continue to acquire voting securities of Company B for a total of five years without having to file again so long as your total holding of Company B's voting securities did not exceed either $500 million (as adjusted) or 50 percent, *i.e.*, additional notification thresholds. Once an acquiring person holds 50 percent or more of the voting securities of an issuer, all subsequent acquisitions of securities of that issuer are exempt.[12]

These notification thresholds apply only to acquisitions of voting securities. The 50 percent threshold is the highest threshold regardless of the corresponding dollar value.

E. Exempt Transactions

In some instances, a transaction may not be reportable even if the size of person and the size of transaction tests have been satisfied. The Act and the Rules set forth a number of exemptions, describing particular transactions or classes of transactions that need not be reported despite meeting the threshold criteria.[13] For example, certain acquisitions of assets in the ordinary course of a person's business are exempted, including new goods and current supplies (*e.g.*, an airline purchases new jets from a manufacturer, or a supermarket purchases its inventory from a wholesale distributor).[14] The acquisition of certain types of real property also would not require notification. These include certain new and used facilities, not being acquired with a business, unproductive real property (*e.g.*, raw land), office and residential buildings, hotels (excluding hotel casinos), certain recreational land, agricultural land and retail rental space and warehouses.[15] In addition, the acquisition of foreign assets would be exempt where the sales in or

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[10] *See* Rule 803.7.

[11] *See* Rule 802.21.

[12] *See* § 7A(c)(3) of the Act, 15 U.S.C. § 18a(c)(3).

[13] *See* § 7A(c) of the Act, 15 U.S.C. § 18a(c), and Part 802 of the Rules, 16 C.F.R. Part 802.

[14] *See* Rules 802.1(b) and 802.1(c).

[15] *See* Rules 802.2(c) - (h).

into the U.S. attributable to those assets were $50 million (as adjusted) or less.[16] Once it has been determined that a particular transaction is reportable, each party must submit its notification to the FTC and the DOJ. In addition, each acquiring person must pay a filing fee to the FTC for each transaction that it reports (with a few exceptions, *see* IV below).

III. THE FORM

The Notification and Report Form ("the Form") solicits information that the enforcement agencies use to help evaluate the antitrust implications of the proposed transaction. Copies of the Form, Instructions, and Style Sheet are available from the PNO, (202) 326-3100, as well as the FTC website at http://www.ftc.gov/bc/hsr.

A. Information Reported

In general, a filing party is required to identify the persons involved and the structure of the transaction. The reporting person also must provide certain documents such as balance sheets and other financial data, as well as copies of certain documents that have been filed with the Securities and Exchange Commission. In addition, the parties are required to submit certain planning and evaluation documents that pertain to the proposed transaction.

The Form also requires the parties to disclose whether the acquiring person and acquired entity currently derive revenue from businesses that fall within any of the same industry and product North American Industry Classification System ("NAICS") codes,[17] and, if so, in which geographic areas they operate. Identification of overlapping codes may indicate whether the parties engage in similar lines of business. Acquiring persons must also describe certain previous acquisitions in the last five years of companies or assets engaged in businesses in any of the overlapping codes identified. Please note that an acquiring person must complete the Form for all of its operations; an acquired person, on the other hand, must limit its response in Items 5 through 7 to the business or businesses being sold and does not need to answer Item 8.[18] In addition, the acquired person does not need to respond to Item 6 in a pure asset transaction.

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16 *See* Rules 802.50 and 802.51.

17 For information concerning NAICS codes *see* the *North American Industry Classification System, 2002*, published by the Executive Office of the President, Office of Management and Budget and available from the National Technical Information Service, 5285 Port Royal Road, Springfield VA 22161 (Order Number PB 2002-101430) or online at http://www.ntis.gov/search/product.aspx?ABBR=PB2002101430; and The *2002 Economic Census Numerical List of Manufactured and Mineral Products* published by Bureau of the Census, available from the Government Printing Office or online at http://www.census.gov/prod/ec02/02numlist/m31r-nl.pdf. Information regarding NAICS also is available at the Bureau of the Census website at http://www.census.gov/epcd/www/naics.html.

18 *See* 803.2(b).

B. Contact Person

The parties are required to identify an individual (listed in Item 1(g) of the Form) who is a representative of the reporting person and is familiar with the content of the Form. This contact person is, in most cases, either counsel for the party or an officer of the company. This person must be available during the waiting period.

C. Certification and Affidavits

Rule 803.5 describes the affidavit that must accompany certain Forms. In transactions where the acquiring person is purchasing voting securities from non-controlling shareholders, only the acquiring person must submit an affidavit. The acquiring person must state in the affidavit that it has a good faith intention of completing the proposed transaction and that it has served notice on the acquired person as to its potential reporting obligations.[19] In all other transactions, each of the acquired and acquiring persons must submit an affidavit with their Forms, attesting to the fact that a contract, an agreement in principle, or a letter of intent has been executed and that each person has a good faith intention of completing the proposed transaction. These required statements govern when the parties may make a premerger notification filing. The affidavit is intended to assure that the enforcement agencies will not be presented with hypothetical transactions for review.[20]

Rule 803.6 provides that the Form must be certified and the rule specifies who must make the certification.[21] One of the primary purposes of the certification is to preserve the evidentiary value of the filing. It also is intended to place responsibility on an individual to ensure that information reported is true, correct, and complete. Both the certification and the affidavit must be notarized, or may be signed under penalty of perjury.[22]

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[19] See Rule 803.5(a)(i)(I) through (vi) for the full requirements of such notice. In tender offers, the acquiring person also must affirm that the intention to make the tender offer has been publicly announced. See Rule 803.5(a)(2).

[20] *See* Statement of Basis and Purpose to Rule 803.5, 43 Fed. Reg. 33510-33511 (1978).

[21] The certification may be signed by a general partner of a partnership; an officer or director of a corporation; or, in the case of a natural person, the natural person or his/her legal representative.

[22] 28 U.S.C. § 1746 allows use of the following statement in lieu of a notary's jurat: "I declare (or certify, verify or state) under penalty of perjury *under the laws of the United States of America* that the foregoing is true and correct. Executed on (date) [and] (Signature)." The italicized text is necessary only if signed outside the territorial United States.

D. Voluntary Information

The rules provide that reporting persons also may submit information that is not required by the Form.[23] If persons voluntarily provide information or documentary material that is helpful to the competitive analysis of the proposed transaction, the enforcement agencies' review of a proposed transaction may be more rapid. However, voluntary submissions do not guarantee a speedy review. Voluntary submissions are included in the confidentiality coverage of the Act and the Rules.

E. Confidentiality

Neither the information submitted nor the fact that a notification has been filed is made public by the agencies except as part of a legal or administrative action to which one of the agencies is a party or in other narrowly defined circumstances permitted by the Act.[24] However, in response to inquiries from interested parties who wish to approach the agencies with their views about a transaction, the agencies may confirm which agency is handling the investigation of a publicly announced merger.[25] The fact that a transaction is under investigation also may become apparent if the agencies interview third parties during their investigation.

F. Filing Procedures

The parties should complete and return the original and one copy of the Form, along with one set of documentary attachments, to the Premerger Notification Office, Bureau of Competition, Room 303, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580. Three copies of the Form, along with one set of documentary attachments, should be sent to the Department of Justice, Antitrust Division, Office of Operations, Premerger Notification Unit, 950 Pennsylvania Avenue, NW, Room 3335, Washington, DC 20530 (for non-USPS deliveries, use zip code 20004).

IV. THE FILING FEE

In connection with the filing of a Form, Congress also mandated the collection of a fee from each acquiring person. The filing fee is based on a three-tiered system that ties the amount paid to the total value of the voting securities, NCI or assets held as a result of the acquisition:[26]

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[23] *See* Rule 803.1(b).

[24] *See* Section 7A(h) of the Act.

[25] A publicly announced merger is one in which a party to the merger has disclosed the existence of the transaction in a press release or in a public filing with a governmental body.

[26] The filing fee thresholds are adjusted annually for changes in the GNP during the previous year. The fees themselves are not adjusted.

VALUE OF VOTING SECURITIES, NCI OR ASSETS TO BE HELD	FEE AMOUNT
greater than $50 million (as adjusted) but less than $100 million (as adjusted)	**$45,000**
$100 million (as adjusted) or greater but less than $500 million (as adjusted)	**$125,000**
$500 million (as adjusted) or greater	**$280,000**

For transactions in which more than one person is deemed to be the acquiring person, each acquiring person must pay the appropriate fee (except in consolidations and in transactions in which there are two acquiring persons that would have exactly the same responses to Item 5 of the Form).[27] In addition, an acquiring person will have to pay multiple filing fees if a series of acquisitions are separately reported.[28]

The filing fee must be paid at the time of filing to "The Federal Trade Commission" by electronic wire transfer, bank cashier's check or certified check. Rule 803.9 contains specific instructions for payment of the filing fee. In addition, information is available at http://www.ftc.gov/bc/hsr/filing2.htm.

V. THE WAITING PERIOD

After filing, the filing parties must then observe a statutory waiting period during which they may not consummate the transaction. The waiting period is 15 days for reportable acquisitions by means of a cash tender offer, as well as acquisitions subject to certain federal bankruptcy provisions, and 30 days for all other types of reportable transactions.[29] The waiting period may be extended by issuance of a request for additional information and documentary material.[30] Any waiting period that would end on a Saturday, Sunday or legal public holiday will expire on the next regular business day.

A. Beginning of the Waiting Period

In most cases, the waiting period begins after both the acquiring and acquired persons file completed Forms with both agencies. However, for certain transactions in which a person buys

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[27] For example, if two separate UPEs jointly control an acquisition vehicle and own no other entities, their Item 5 responses would be identical.

[28] *See* Rule 803.9(a) - (c).

[29] *See* Rule 803.10; 11 U.S.C. § 363(b)(2), as amended (1994).

[30] *See* Section VIII(C), *infra*.

voting securities from persons other than the issuer (third party and open market transactions), the waiting period begins after the acquiring person files a complete Form. In a reportable joint venture formation, the waiting period begins after all acquiring persons required to file submit complete Forms.[31] It is important to note that failure to pay the filing fee or the submission of an incorrect or incomplete filing will delay the start of the waiting period.[32]

B. Early Termination

Any filing person may request that the waiting period be terminated before the statutory period expires. Such a request for "early termination" will be granted only if (1) at least one of the persons specifies it on the Form; (2) all persons have submitted compliant Forms; and (3) both antitrust agencies have completed their review and determined not to take any enforcement action during the waiting period.[33]

The PNO is responsible for informing the parties that early termination has been granted. The Act requires that the FTC publish a notice in the Federal Register of each early termination granted. Moreover, grants of early termination also appear on the FTC's website at http://www.ftc.gov/bc/earlyterm/index.html.

When it's requested, early termination is granted for most transactions. On the average, requests for early termination are granted within two weeks from the beginning of the waiting period. In any particular transaction, however, the time that it takes to grant a request for early termination depends on many factors, including the complexity of the proposed transaction, its potential competitive impact, and the number of filings from other parties that the enforcement agencies must review at the same time.

VI. REVIEW OF THE FORM

Once a Form has been filed, the enforcement agencies begin their review. The FTC is responsible for the administration of the Program. As a result, the PNO determines whether the Form complies with the Act and the Rules.

The Form is assigned to a member of the PNO staff to assess whether the transaction was subject to the reporting requirements and whether the Form was completed accurately. If the filing appears to be deficient, the staff member will notify the contact person as quickly as possible so that errors can be corrected. It is important to correct the errors as soon as possible because the waiting period does not begin to run until the Form is filled out accurately, all required

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[31] The joint venture entity does not file. *See* Rule 802.41.

[32] *See* Rules 803.3 and 803.10(a).

[33] *See* Formal Interpretation 13 issued August 20, 1982.

information and documentary material are supplied and payment of the filing fee is received.[34]

When the PNO determines that the Forms comply with all filing requirements, letters are sent to the parties identifying the beginning and ending of the waiting period, as well as the transaction number assigned to the filing. The conclusion that the parties have complied with the Act and the Rules may be modified later, however, if circumstances warrant.

VII. ANTITRUST REVIEW OF THE TRANSACTION

Initially, both agencies undertake a preliminary substantive review of the proposed transaction. The agencies analyze the filings to determine whether the acquiring and acquired firms are competitors, or are related in any other way such that a combination of the two firms might adversely affect competition. Staff members rely not only on the information included on the Form but also on publicly available information. The individuals analyzing the Form often have experience either with the markets or the companies involved in the particular transaction. As a result, they may have industry expertise to aid in evaluating the likelihood that a merger may be harmful.

If, after preliminary review, either or both agencies decide that a particular transaction warrants closer examination, the agencies decide between themselves which one will be responsible for the investigation. Only one of the enforcement agencies will conduct an investigation of a proposed transaction. Other than members of the PNO, no one at either agency will initiate contact with any of the persons or any third parties until it has been decided which agency will be responsible for investigating the proposed transaction.[35] This clearance procedure is designed to minimize the duplication of effort and the confusion that could result if both agencies contacted individual persons at different times about the same matter. The clearance decision is made pursuant to an agreement that divides the antitrust work between the two agencies.

Of course, any interested person, including either of the parties, is free to present information to either or both agencies at any time. However, if the clearance decision has not yet been resolved, the person must make a presentation, or provide written information or documents, to both agencies. If you are representing a party that wishes to make a presentation, or provide written information or documents, you may inform the PNO of that fact; the PNO will let staff attorneys at both agencies who are reviewing the matter know that persons wish to come in and make a presentation, or provide written information or documents.

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[34] For transactions in which a person buys voting securities from someone other than the issuer (third party and open market transactions), the waiting period begins after the acquiring person submits a complete and accurate Form. An incorrect or incomplete Form from the acquired person will not stop the running of the waiting period. However, the acquired person still is obligated to correct any deficiencies in its filing.

[35] Staff at either agency may initiate contact with a person prior to the resolution of which agency will handle the matter by first notifying the other agency and offering the other agency the opportunity to participate.

VIII. SECOND REQUESTS

Once the investigating agency has clearance to proceed, it may ask any or all persons to the transaction to submit additional information or documentary material to the requesting agency. The request for additional information is commonly referred to as a "second request."[36] As discussed above, although both agencies review each Form submitted to them, only one agency will issue second requests to the parties in a particular transaction.

A. Information Requested

Generally, a second request will solicit information on particular products or services in an attempt to assist the investigative team in examining a variety of legal and economic questions. A typical second request will include interrogatory-type questions as well as requests for the production of documents. A model second request has been produced jointly by the FTC and DOJ for internal use by their attorneys and is contained in *Guide III*. Because every transaction is unique, however, the model second request should be regarded only as an example.

B. Narrowing the Request

Parties that receive a second request and believe that it is broader than necessary to obtain the information that the enforcement agency needs are encouraged to discuss the possibility of narrowing the request with the staff attorneys reviewing the proposed transaction. Often, the investigative team drafts a second request based only on information contained in the initial filing and other available material. At this point, the investigative team may not have access to specific information about the structure of the company or its products and services. By meeting with staff, representatives of the company have an opportunity to narrow the issues and to limit the required search for documents and other information. If second request modification issues cannot be resolved through discussion with staff, the agencies also have adopted a formal internal appeals process that centralizes in one decision maker in each agency the review of issues relating to the scope of and compliance with second requests.[37]

The enforcement agency issuing the second request may have determined that certain data sought in the request can resolve one or more issues critical to the investigation. In such a situation, the agency's staff may suggest use of the informal "quick look" procedure. Under the quick look, the staff will request the parties to first submit documents and other information, which specifically address the critical issues (*e.g.*, product market definition or ease of entry). If the submitted information resolves the staff's concerns in these areas, the waiting period will be terminated on a *sua sponte* basis and the parties will not have to expend the time and cost of responding to the full second request. Of course, if the submitted information does not resolve the staff's concerns on determinative issues, then the parties will need to respond to the full

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[36] *See* Rule 803.20(a)(1) for the identities of persons and individuals that are subject to such request.

[37] *See* 66 Fed. Reg. 8721-8722, February 1, 2001.

second request.

C. Extension of the Waiting Period

The issuance of a second request extends the statutory waiting period until 30 days (or in the case of a cash tender offer or certain bankruptcy filings,[38] 10 days) after both parties are deemed to have complied with the second request (or in the case of a tender offer and bankruptcy, until after the acquiring person has complied).[39] During this time, the attorneys investigating the matter may also be interviewing relevant parties and using other forms of compulsory process to obtain information.

The second request must be issued by the enforcement agency before the waiting period expires. If the waiting period expires and the agencies have not issued a second request to any person to the transaction, then the parties are free to consummate the transaction. The fact that the agencies do not issue second requests does not preclude them from initiating an enforcement action at a later time.[40] All of the agencies' other investigative tools are available to them in such investigations.[41]

IX. AGENCY ACTION

After analyzing all of the information available to them, the investigative staff will make a recommendation to either the Commission or the Assistant Attorney General (depending on which agency has clearance).

A. No Further Action

If the staff finds no reason to believe competition will be reduced substantially in any market, it will recommend no further action. Assuming that the agency concurs in that recommendation, the parties are then free to consummate their transaction upon expiration of the waiting period. As with a decision not to issue a second request, a decision not to seek injunctive relief at that time does not preclude the enforcement agencies from initiating a post-merger enforcement action at a later time.

B. Seeking Injunctive Relief

If the investigative staff believes that the transaction is likely to be anticompetitive, it may recommend that the agency initiate injunction proceedings in U.S. district court to halt the

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[38] See 11 U.S.C. § 363(b), as amended (1994).

[39] *See* § 7A(e) of the Act.

[40] *See* § 7(A)(i)(1) of the Act.

[41] *See* § 7(A)(i)(2) of the Act.

acquisition. If the Commission or the Assistant Attorney General concurs in the staff's recommendation, then the agency will file suit in the appropriate district court. If it is a Commission case, the FTC is required to file an administrative complaint within twenty days (or a lesser time if the court so directs) of the granting of its motion for a temporary restraining order or for a preliminary injunction.[42] The administrative complaint initiates the FTC's administrative proceeding that will decide the legality of the transaction. If it is a DOJ case, the legality of the transaction is litigated entirely in district court.

C. Settlements

During an investigation, the investigative staff may, if appropriate, discuss terms of settlement with the parties. The staff of the FTC is permitted to negotiate a proposed settlement with the parties; however, it must then be presented to the Commission, accepted by a majority vote, and placed on the public record for a notice and comment period before it can be made final. A proposed settlement negotiated by DOJ staff must be approved by the Assistant Attorney General and also placed on the public record for a notice and comment period before it will be entered by a district court pursuant to the provisions of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h).

X. FAILURE TO FILE

A. Civil Penalties

If you consummate a reportable transaction without filing the required prior notification or without waiting until the expiration of the statutory waiting period, you may be subject to civil penalties. The Act provides that "any person, or any officer, director or partner thereof" shall be liable for a penalty of up to $16,000 a day for each day the person is in violation of the Act. The enforcement agencies may also obtain other relief to remedy violations of the Act, such as an order requiring the person to divest assets or voting securities acquired in violation of the Act.[43]

B. Reporting Omissions

If you have completed a transaction in violation of the Act, it is important to bring the matter to the attention of the PNO and to file a notification as soon as possible. Even a late filing provides information to the enforcement agencies that assists them in conducting antitrust screening of transactions and antitrust investigations. The parties should include a letter with the notification from an officer or director of the company explaining why the notification was not filed in a timely manner, how and when the failure was discovered, and what steps have been taken to prevent a violation of the Act in the future. The letter should be addressed to the Deputy Director, Bureau of Competition, Federal Trade Commission, 600 Pennsylvania Ave., NW,

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[42] FTC Act Section 13(b).

[43] *See* § 7A(g) of the Act, as amended by the Debt Collection Improvements Act of 1996, Pub. L. No. 104134 (Apr. 26, 1996); 61 Fed. Reg. 54548 (Oct. 21, 1996); 61 Fed. Reg. 55840 (Oct. 29, 1996).

Washington DC 20580.

C. Deliberate Avoidance

The Rules specifically provide that structuring a transaction to avoid the Act does not alter notification obligations if the substance of the transaction is reportable.[44] For example, the agencies will seek penalties where the parties split a transaction into separate parts that are each valued below the current filing threshold in order to avoid reporting the transaction, but the fair market value of the assets being acquired is actually above the threshold.[45]

XI. OTHER GUIDES IN THIS SERIES

Guide I is the first in a series of guides prepared by the PNO. Others include:

Guide II: *To File Or Not To File -- When You Must File a Premerger Notification Report Form*, which explains certain basic requirements of the program and takes you through a step-by-step analysis for determining whether a particular transaction must be reported.

Guide III: *A Model Request for Additional Information and Documentary Material (Second Request)*, which contains materials designed for the attorneys of the antitrust enforcement agencies in preparing requests for additional information. It is included in this series to provide an example of what you might expect if either enforcement agency issues a second request.

XII. OTHER MATERIALS

To make effective use of these guides, you must be aware of their limitations. They are intended to provide only a very general introduction to the Act and Rules and should be used only as a starting point. Because it would be impossible, within the scope of these guides, to explain all of the details and nuances of the premerger requirements, you must not rely on them as a substitute for reading the Act and the Rules themselves. To determine premerger notification requirements, you should consult:

1. Section 7A of the Clayton Act, 15 U.S.C. § 18a, as amended by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, 90 Stat. 1390, and amended by Pub. L. No. 106-553, 114 Stat. 2762.

2. The Premerger Notification Rules, 16 C.F.R. Parts 801 – 803. (2008).

3. The Statement of Basis and Purpose for the Rules, 43 Fed. Reg. 33450 (July 31, 1978); 48 Fed. Reg. 34428 (July 29, 1983); 52 Fed. Reg. 7066

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[44] *See* Rule 801.90.

[45] *See, e.g., United States v. Sara Lee Corp.*, 1996-1 Trade Cas. (CCH) ¶ 71,301 (D.D.C. 1996).

(March 6, 1987); 52 Fed. Reg. 20058 (May 29, 1987); 61 Fed. Reg. 13666 (March 28, 1996); 66 Fed. Reg. 8680 (February 1, 2001); 66 Fed. Reg. 23561 (May 9, 2001); 66 Fed. Reg. 35541 (July 6, 2001); 67 Fed. Reg. 11898 (March 18, 2002); 67 Fed. Reg. 11904 (March 18, 2002); 68 Fed. Reg. 2425 (January 17, 2003); 70 Fed. Reg. 4987 (January 31, 2005); 70 Fed. Reg. 11502 (March 8, 2005); 70 Fed. Reg. 73369 (December 12, 2005); 71 Fed. Reg. 35995 (June 23, 2006).

4. The formal interpretations issued pursuant to the Rules, compiled in 6 Trade Reg. Rep. (CCH) at ¶ 42,475.

It is advisable to check the Federal Register for more recent Rules changes that have not yet been incorporated into the Code of Federal Regulations or these guides. For an up-to-date list of Federal Register notices related to the Statement of Basis and Purpose, see http://www.ftc.gov/bc/hsr/basispurp.shtm. For other HSR-related rulemakings, see http://www.ftc.gov/bc/hsr/rulemaking.shtm. Amendments and formal interpretations, as well as the other material referenced above, are available on the Premerger Notification Office website at http://www.ftc.gov/bc/hsr.

There are also non-governmental publications that, while not officially endorsed by the FTC, contain useful compilations of materials relevant to the Program:

1. Commerce Clearing House's *Trade Regulation Reporter* reprints the Act, the Rules, the Form, and the Formal Interpretations.

2. The American Bar Association's Section of Antitrust Law publishes a *Premerger Notification Practice Manual (2007 Edition)* that provides a collection of informal interpretations of the PNO.

3. A loose-leaf treatise by Axinn, Fogg, Stoll and Prager, *Acquisitions under the Hart-Scott-Rodino Antitrust Improvements Act* (published by Law Journal SeminarsPress), explains requirements of the Form, the Rules, and the Act, and includes a discussion of the legislative history of the Act.

Finally, if you have questions about the program or a particular transaction not answered by the Commission's HSR website, the staff of the PNO is available to assist you. The PNO answers thousands of inquiries each year and is prepared to provide prompt informal advice concerning the potential reportability of a transaction and completion of the Form. For general questions, contact the PNO at (202) 326-3100.

Hart-Scott-Rodino

Premerger notification Program

Introductory Guide II

To File or Not to File

When You Must File a Premerger Notification Report Form

Revised September 2008

AN OVERVIEW

Guide II is the second in a series of guides prepared by the Federal Trade Commission's Premerger Notification Office ("PNO"). It describes the criteria used to determine whether a transaction is subject to the requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (§ 7A of the Clayton Act or "the Act"), and uses a hypothetical transaction to illustrate the application of the Premerger Notification Rules (the "Rules").

Other Guides in this series provide additional information. Guide I is an overview of the program and the way it operates and Guide III contains "A Model Request for Additional Information and Documentary Material (Second Request)."

The Guides are not intended to address specific proposed transactions. If you are analyzing a transaction, we suggest that you consult the Act, the Rules, and the other Guides in this series, as well as the Federal Trade Commission's website at http://www.ftc.gov/bc/hsr. If you have a specific question on a proposed transaction and your question is not addressed in these reference sources, call the PNO between the hours of 8:30AM and 5:00PM, Monday through Friday, except holidays, at (202) 326-3100.

I. INTRODUCTION

Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 established the Federal Premerger Notification Program (the "Program"). The Program is designed to provide the Federal Trade Commission (the "FTC" or "Commission") and the Department of Justice (the "DOJ") with information about large mergers and acquisitions before they occur. The parties to certain proposed transactions must submit a Notification and Report Form for Certain Mergers and Acquisitions (the "Form")[1] with information about their businesses to the enforcement agencies and wait a specified period of time before consummating the transactions. During that "waiting period," the antitrust enforcement agencies analyze the likely competitive effects of the proposed transaction. If either agency believes that further information is needed in order to complete the competitive analysis, then it may request additional information and documentary material from the parties. Issuance of this "second request" extends the waiting period for a specified period, usually 30 days, after the parties have complied with the request. The additional time provides the reviewing agency with the opportunity to analyze the information and to take appropriate action before the transaction is consummated. If the agency believes that a proposed transaction may violate the antitrust laws, it may seek an injunction in federal district court to prohibit consummation of the acquisition.

The Rules are divided into three parts:[2]

1) <u>Coverage</u>: The first part, 16 C.F.R. Part 801, encompasses the coverage rules. These include definitions of important terms, methods for determining dollar values and percentages, and specific instructions for the treatment of particular types of transactions.

2) <u>Exemptions</u>: The second part, 16 C.F.R. Part 802, contains certain exemptions for types of transactions that otherwise would be reportable. Before filing, you should consult these exemption rules, as well as the exemptions set out in the statute itself, to determine whether any of them apply.

3) <u>Transmittal</u>: The third part, 16 C.F.R. Part 803, sets out premerger notification filing, waiting period and second request procedures.

This Guide focuses primarily on the coverage rules, 16 C.F.R. Part 801.

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[1] FTC Form C4 (rev. 06/06/06).

[2] The Premerger Notification Rules are found at 16 C.F.R. Parts 801, 802 and 803. The Rules also are identified by number, and each Rule beginning with Rule 801.1 corresponds directly with the section number in the C.F.R. (so that Rule 801.40 would be found in 16 C.F.R. § 801.40). In this Guide, the Rules are cited by Rule number.

II. JURISDICTIONAL REQUIREMENTS

For the Act to apply to a particular transaction, it must satisfy three tests: the commerce test of Section 7A(a)(1) as well as the size of transaction test and the size of person test of Section 7A(a)(2).

An acquisition will satisfy the commerce test if either of the parties to a transaction is engaged in commerce or in any activity affecting commerce. The size of transaction test is met if, as a result of the transaction, the acquiring person will hold an aggregate amount of voting securities, non-corporate interests ("NCI") and assets of the acquired person valued at more than $50 million (as adjusted).[3] The size of person test is met if one of the parties has sales or assets of at least $100 million (as adjusted) and the other party has sales or assets of at least $10 million (as adjusted).[4]

III. HYPOTHETICAL TRANSACTION

Throughout this Guide, we will refer to the following hypothetical transaction (italicized in the document). The hypothetical places you in the position of legal counsel to a corporation that is about to be acquired. However, the principles it illustrates should be of use to readers in other circumstances.

The President of Beta Products, Inc., walks into your law office and informs you that the Zed Corporation is acquiring her company. She remarks that Zed Corporation mentioned something about the Hart-Scott-Rodino Act and filing a notification and report form within the next few weeks. Although you have handled certain business transactions for Beta Products in the past, this is the first time that the possibility of a premerger notification filing has been involved. You want to determine, therefore, whether the transaction must be reported, and if so, how.

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[3] The 2000 amendments to the Act require the Commission to revise certain thresholds annually based on the change in the level of gross national product. A parenthetical "(as adjusted)" has been added where necessary throughout the Rules (and in this guide) to indicate where such a change in statutory threshold value occurs. The term "as adjusted" is defined in subsection 801.1 (m) of the Rules and refers to a table of the adjusted values published in the Federal Register notice titled "Revised Jurisdictional Thresholds for Section 7A of the Clayton Act." The notice contains a table showing adjusted values for the rules and is published in January of each year. The values contained therein are effective as of the date published in the Federal Register notice and remain effective until superceded in the next calendar year.

[4] The size of person test is not applicable if, as a result of the transaction, the acquiring person will hold an aggregate amount of voting securities, NCI and/or assets of the acquired person valued in excess of $200 million (as adjusted). *See* § 7A (a)(2) of the Act.

IV. PRELIMINARY QUESTIONS

In determining whether a particular transaction must be reported, you should begin by answering several preliminary questions:

1) What is being acquired?

2) What are the amount and the nature of the consideration?

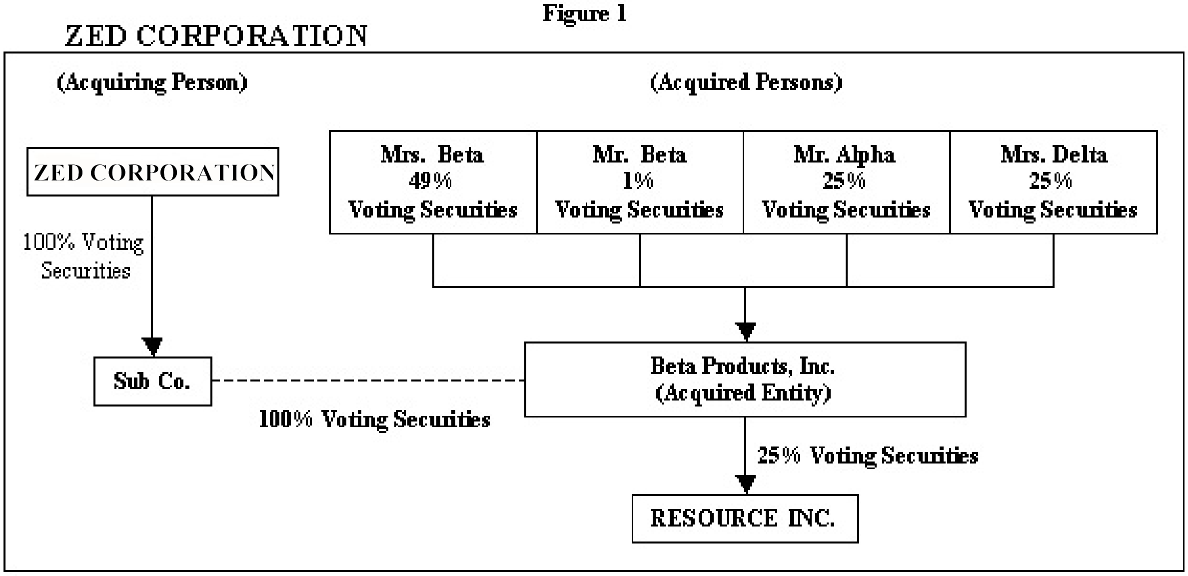
3) Who are the parties involved in the transaction?

4) When and under what conditions will the transaction take place?

In exploring these preliminary questions about the hypothetical transaction, you have learned that Zed Corporation has entered into agreements with the shareholders of Beta Products to buy all of Beta Products' outstanding voting stock for $90 million. Further investigation reveals, however, that Zed Corporation does not plan to purchase the voting stock directly; rather, Zed Corporation's wholly-owned subsidiary, Sub Co., will buy the shares from Beta Products' shareholders. You already know who those shareholders are: Mrs. Beta holds 49 percent of the outstanding voting securities and her husband owns one percent, while Mrs. Delta, her sister-in-law, and Mr. Alpha, an unrelated private investor, each own 25 percent. You also know from your previous work that Beta Products holds 4500 shares of common stock, which constitute 25 percent of the voting securities of Resource Inc. Beta Products is the largest holder of Resource Inc. voting securities.

To clarify the relationships among the parties and the structure of the transaction, it is often helpful to draw a diagram of the transaction such as the one in Figure 1 below. *As you will see*

Figure 1



later, the Rules treat this transaction as two separate acquisitions, either or both of which may be reportable. In both acquisitions, the acquiring person is Zed Corporation. Mrs. and Mr. Beta, together, are the acquired person in the acquisition of Beta Products, Inc. In addition, because the acquisition of Beta Products will result in Zed Corporation holding voting securities of Resource Inc., the Rules treat this aspect of the transaction as a different acquisition in which Resource Inc. also is an acquired person.

V. STEPS TO DETERMINE REPORTABILITY

Once you have outlined the basic transaction, you are ready to analyze it to determine whether it must be reported. The important steps in this process include:

1) Determining the size of the transaction and the relevant reporting threshold;

2) Identifying the acquiring and acquired persons (the "ultimate parent entity") of each party; and

3) Determining the size of each person involved in the transaction.

A. The Size of Transaction Test

The size of transaction test, as its name suggests, is concerned with the value of what is being acquired. Because the objective of the Program is to analyze the effects of combining once separate businesses, the Rules generally require that assets, voting securities or NCI of the acquired person that have already been acquired must be aggregated with those that will be acquired in the proposed transaction. When what has previously been purchased plus what will be bought in the present acquisition meets the size of transaction criteria, the transaction becomes reportable unless an exemption applies.

1. Value of voting securities, NCI and assets to be held

In order to determine whether a transaction meets the size of transaction test, you must compute the value of the voting securities, NCI and assets, which you will hold as a result of the acquisition. The phrase "held as a result of the acquisition" has a technical meaning under the Rules. It includes not only those securities, NCI and assets that are currently being acquired, but also voting securities, NCI, and, in some circumstances, assets previously acquired from the same person. Rule 801.13[5] determines what is held as a result of the acquisition, and Rules 801.13 and 801.14[6] specify how such voting securities, NCI and assets should be aggregated and valued.

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[5] *See* 16 C.F.R. § 801.13.

[6] *See* 16 C.F.R. §§ 801.13, 801.14.

a. "Held as a result of the acquisition"

All voting securities, NCI and assets currently being acquired are held as a result of the acquisition. In addition, Rule 801.13[7] explains when you must aggregate previously-acquired voting securities, NCI or assets with those that you plan to acquire in order to determine what is held as a result of the acquisition. Different principles apply to asset, voting securities and NCI acquisitions.

(1) Aggregating previously-acquired voting securities or NCI

Rule 801.13(a)(1)[8] requires that you add any voting securities that you currently hold of the same issuer to any voting securities that you propose to acquire to determine what voting securities of that issuer will be held as a result of the planned acquisition. There are some special circumstances, however, described in Rule 801.15,[9] in which the prior, simultaneous, or subsequent acquisition is exempt from notification and need not be included in the calculation.

Rule 801.14,[10] requires that you aggregate the value of all of the voting securities of all of the issuers included within the acquired person that you will hold as a result of the acquisition. Thus, if you hold less than 50% of the voting securities of one subsidiary company and plan to acquire voting securities of the parent or a different subsidiary of the same parent, you would aggregate these holdings to determine the value of the securities held.

Rule 801.13(c)(1)[11] requires that you add any NCI that you currently hold of the same non-corporate entity to any NCI that you propose to acquire to determine what NCI will be held as a result of the planned acquisition. Rule 801.14,[12] requires that you aggregate the value of all NCI included within the acquired person that you will hold as a result of the acquisition as determined by Rule 801.13(c). Under Rule 801.13(c)(2),[13] an acquisition of NCI which does not confer control of the unincorporated entity is not aggregated with any other assets or voting securities which have been or are currently being acquired from the same acquired person.

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[7] *See* 16 C.F.R. § 801.13.

[8] *See* 16 C.F.R. § 801.13(a)(1).

[9] *See* 16 C.F.R. § 801.15.

[10] *See* 16 C.F.R. § 801.14.

[11] *See* 16 C.F.R. § 801.13(c)(1).

[12] *See* 16 C.F.R. § 801.14.

[13] *See* 16 C.F.R. § 801.13(c)(2).

(2) Aggregating assets and voting securities

In some circumstances, the size of transaction test requires acquiring persons to add the value of an issuer's voting securities that it holds and will hold with the value of assets that have been acquired or will be acquired from that issuer or the person controlling that issuer. Whether the acquisitions of assets and voting securities are both to be considered "held as a result of the transaction" depends on the order of the transactions. If a noncontrolling percentage of voting securities were purchased in a nonreportable transaction and will be held at the time assets are to be acquired, then both the voting securities and assets are held as a result of the transaction. Their combined value is included to determine if the size of transaction test is satisfied. If, however, the asset transaction precedes the voting securities transaction, then the assets are not held as a result of the later acquisition of voting securities and the value of the assets is not included. The Commission explained the exclusion of assets in the second instance when it promulgated Rule 801.13:[14] "once assets are sold, they confer no continuing ability to participate in the affairs of the acquired person, and so prior acquisitions of assets need not be considered for purposes of subsequent acquisitions of voting securities."[15]

(3) Aggregating previously-acquired assets

Generally, the acquisition by an acquiring person of assets from the same acquired person is not aggregated unless: the second acquisition is made pursuant to a signed letter of intent or agreement, and within the previous 180 days the acquiring person has signed a letter of intent or agreement in principle to acquire assets from the same acquired person, which is still in effect but has not been consummated; or the acquiring person has acquired assets from the same acquired person which it still holds; and the previous acquisition (whether consummated or still contemplated) was not subject to the requirements of the Act.[16] If the previous asset acquisition (or aggregated asset acquisitions) was reported properly to the enforcement agencies, aggregation is not required. In addition, if a single agreement calls for multiple closings on purchases of assets from the same person, the purchases must be aggregated to the extent that those closings are within one year.

b. Valuation

Once you have determined what is held as a result of the acquisition, you must value those securities, NCI and assets. Again, different methods are used for valuation, depending on whether voting securities, NCI or assets will be held as a result of an acquisition.

Voting securities fall into one of two groups for valuation purposes: publicly traded and untraded, *i.e.*, those not traded on a national securities exchange or quoted in NASDAQ. Under

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[14] *See* 16 C.F.R. § 801.13.

[15] *See* 43 Fed. Reg. 33478-9 (1978).

[16] *See* 16 C.F.R. § 801.13 (b)(1) and (b)(2).

the Rules, the value of publicly traded voting securities that are to be acquired is the higher of "market price" or "acquisition price." Thus, if the voting securities are trading at $50 a share, and you have a contract to buy a block for $60 a share, the $60 value is used. If the acquisition price of publicly-traded shares has not been determined, the value is the market price. For non-publicly traded voting securities, the securities are valued at their "acquisition price" or, if the "acquisition price" has not been determined, at "fair market value." Previously acquired securities are valued in similar ways pursuant to Rules 801.10 and 801.13.[17] NCI are valued in the same manner as non-publicly traded voting securities. In an acquisition of assets, Rule 801.10(b)[18] provides that the assets must be valued at their "fair market value" or, "if determined and greater than the fair market value," at their "acquisition price."

The terms "market price," "acquisition price," and "fair market value" are defined for premerger notification purposes in Rule 801.10(c).[19] For useful information concerning the "valuation rule", please visit http://www.ftc.gov/bc/hsr/hsrvaluation.shtm and http://www.ftc.gov/bc/hsr/801.10summary.shtm.

(1) Determining market price

In transactions subject to § 801.30, *e.g.*, open market stock purchases, the "market price" is the lowest closing quotation or bid price within 45 days prior to receipt by the issuer of the notice required by Rule 803.5(a) from the acquiring person, which must be delivered to start the waiting period. In transactions to which Rule § 801.30 does not apply, *e.g.*, purchases from a "controlling" stockholder or directly from the issuer, the "market price" is the lowest closing quotation or bid price within the 45 calendar days preceding the closing of the acquisition, but not extending back prior to the day before execution of the agreement or letter of intent to merge or acquire. The "45-day rule" will enable you to determine whether a particular transaction will meet the size of transaction test even though the price of the voting securities may be fluctuating significantly on the open market.

(2) Determining acquisition price

Rule 801.10(c)(2)[20] states that the "acquisition price" includes the value of all consideration for the voting securities, NCI and assets being acquired. This consideration includes any cash, voting securities, tangible assets, and intangible assets that the acquiring person is exchanging with the seller. In an asset transaction, it also includes the value of any liabilities that the acquiring person will assume. Thus, if you will pay $85 million in cash for a factory and, in

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[17] *See* 16 C.F.R. §§ 801.10 and 801.13.

[18] *See* 16 C.F.R. 801.10(b).

[19] *See* 16 C.F.R. S 801.10(c).

[20] *See* 16 C.F.R. § 801.10(c)(2).

addition, will assume $10 million in liabilities, the acquisition price is $95 million.

(3) Determining fair market value

"Fair market value" must be determined in good faith by the board of directors of the ultimate parent entity of the acquiring person (or the board's designee).[21] Such a determination must be made within 60 days of filing or, if no filing is required, within 60 days of consummation of the acquisition. Thus, if the parties neither file nor consummate within 60 days of the determination, they cannot rely on it. If a filing is made within the 60 days, however, a new fair market value determination is not required regardless of the consummation date.

(4) Voting securities and assets previously acquired

Voting securities that were acquired in an earlier transaction are valued on the basis of their current worth, not their historical purchase price.[22] If the securities are publicly traded, you should use their current market price, as determined by the 45-day rule under Rule 801.10(c)(1).[23] Otherwise, they are valued at their current fair market value, as determined by Rule 801.10(c)(3).[24] NCI are valued in the same manner as non-publicly traded voting securities. Previously acquired assets should be valued according to Rule 801.10(b)[25] at the greater of their current fair market value or the acquisition price at the time they were acquired.

Since Beta Products, Inc., is a closely-held company and the stock is not publicly traded, the applicable Rule is 16 C.F.R. § 801.10(a)(2). This Rule provides that the value of the voting securities will be the acquisition price, if determined, or, if the acquisition price has not been determined, the fair market value of the voting securities as set by the board of directors of the acquiring person. Sub Co. and Beta Products' shareholders have agreed on a total purchase price of $90 million for 100 percent of the voting securities of Beta Products, Inc. Therefore, you will not have to get the board of directors of Zed Corporation to determine the fair market value of Beta Products' stock. Rather, you can rely on the acquisition price of $90 million to conclude that the acquisition meets the size of transaction test.

To determine whether Zed Corporation and Resource Inc. must report, you will have to calculate the value of the voting securities of Resource Inc. that will be held by Zed as a result of acquiring Beta Products. Because the acquisition price of the Resource securities is not

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[21] *See* 16 C.F.R. § 801.10(c)(3).

[22] *See* Rule 801.13(a), 16 C.F.R. § 801.13(a).

[23] *See* 16 C.F.R. § 801.10(c)(1).

[24] *See* 16 C.F.R. § 801.10(c)(3).

[25] *See* 16 C.F.R. § 801.10(b).

separately identified, the Rules require that the value be determined by the market price.[26] *In this transaction, the market price can be determined because the voting securities are publicly traded. Resource shares sell, at the time of your research, for $100 a share; thus, the value of the 4500 Resource shares that Zed will obtain is likely to be about $4.5 million.*[27] *If Zed already owned other Resource voting securities, you would add the current market price of those shares to determine if the total value of the voting securities held as a result of the acquisition meets the size of transaction test. After reviewing Zed's holdings, you determine that it does not hold any other Resource securities. Accordingly, the secondary acquisition does not meet the size of transaction test and is not reportable.*

c. Calculating percentage of voting securities to be acquired

Rule 801.12 sets out a formula to be used whenever the Act or Rules require calculation of the percentage of voting securities of an issuer to be held or acquired, *e.g.*, in determining control.[28] The Rule is designed to recognize weighted voting rights and different classes of voting securities. As illustrated below, the percentage is derived from the ratio of two numbers: the number of votes for directors of the issuer that the holder of a class of voting securities is presently entitled to cast, or, as a result of the acquisition, will become entitled to cast, divided by the total number of votes for directors which presently may be cast by that class, multiplied by the number of directors elected by that class, divided by the total number of directors.

$$\frac{\textit{\# of Votes of Class A Held}}{\textit{Total Votes of Class A}} \times \frac{\textit{Directors Elected by Class A Stock}}{\textit{Total \# of Directors}} = \%$$

The resulting percentage should be calculated separately for each class, and then totaled to determine an acquiring person's voting power. You should omit authorized but unissued voting securities or treasury securities, as well as convertible voting securities that have not yet been converted and do not have a present right to vote, unless you are filing notification for their acquisition or conversion.

2. The Notification Thresholds

Rule 801.1(h), 16 C.F.R. § 801.1(h), establishes five notification thresholds for acquisitions of

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[26] *See* Rule 801.10(a)(1)(ii), 16 C.F.R. § 801.10(a)(1)(ii).

[27] *See* Rule 801.10(c)(1), 16 C.F.R. § 801.10 (c)(1).

[28] *See* 16 C.F.R. § 801.12(b).

voting securities[29]:

a) $50 million (as adjusted);

b) $100 million (as adjusted);

c) $500 million (as adjusted);

d) 25%, if valued at greater than $1 billion (as adjusted); and

e) 50%, if valued at greater than $50 million (as adjusted).

Because the Rules provide that all voting securities held by the acquiring person after an acquisition are "held as a result of the acquisition," the thresholds are designed to act as exemptions to relieve parties of the burden of making another filing every time additional shares of the same person are acquired. As such, when notification is filed, the acquiring person is allowed one year from the end of the waiting period to cross the threshold it indicated in the filing.[30] If within that year the person reaches the stated threshold or any lower threshold, it may continue acquiring shares up to the next threshold for five years measured from the end of the waiting period. The acquiring person must file again, however, before it can cross that next higher threshold. The 50 percent threshold is the highest threshold regardless of the corresponding dollar value, because it indicates the acquisition of control.

Because Zed is acquiring 100% of the voting securities of Beta Products, it will indicate the 50% filing threshold in its filing regardless of the transaction value.

B. Identifying the Acquiring and Acquired Persons

If the hypothetical transaction were valued in excess of $200 million (as adjusted), the transaction would be reportable unless an exemption applied. But, because the hypothetical transaction is valued at $90 million, you must also turn to the size of person test, as you must for all transactions valued in excess of $50 million (as adjusted) but at $200 million (as adjusted) or less. The first step in determining your size of person is to identify the "acquiring person" and the "acquired person." Under the Act, the obligation to report depends on the size of the "persons" involved. "Person" is defined in Rule 801.1 (a)(1) and is the "ultimate parent entity" of the buyer or seller. That is, it is the entity that ultimately controls the buyer or seller.[31]

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[29] The notification thresholds do not apply to acquisitions of assets or NCI.

[30] *See* 803.7.

[31] *See* "control" under 801.1 (b).

1. The Ultimate Parent Entity

An ultimate parent entity or "UPE" is the company, individual or other entity that controls a party to the transaction and is not itself controlled by anyone else. For example, the UPE may be a corporate parent of a subsidiary company that has signed a contract to purchase a plant, or it could be a partnership or an individual that owns a majority of the voting securities of the acquiring company. The ultimate parent entity may be separated from the company whose name appears on the sale agreement by many layers of controlled subsidiaries, or the UPE may actually be entering into the transaction in its own name.

2. Control

Identifying the ultimate parent entity involves tracing the chain of "control," a term defined in Rule 801.1(b).[32] Control is established by the "holding" of 50 percent or more of the outstanding voting securities of an issuer. In the case of an entity that has no outstanding voting securities, control is established by the right to 50 percent or more of the profits, or the right, in the event of dissolution, to 50 percent or more of the assets of the entity. Control also is accomplished by having the contractual power presently to designate 50 percent or more of the board of directors of a corporation.

As a result, more than one person may be deemed to control an entity at the same time. For example, one person may hold 50 percent of the voting securities of the entity while another person has the contractual power to appoint 50 percent of the board of directors.

3. "Hold" and "Beneficial Ownership"

To determine control of a corporation you first must identify the individuals or entities that "hold" its voting securities. The holder of voting securities, according to Rule 801.1(c),[33] is the individual or entity that has beneficial ownership. Although the term "beneficial ownership" is not defined in the Rules, the Statement of Basis and Purpose accompanying the Rules provides examples of some indicators of beneficial ownership, including the right to receive an increase in the value of the voting securities, the right to receive dividends, the obligation to bear the risk of loss, and the right to vote the stock.[34] Thus, a person would be the "holder" of voting securities even though the shares were physically held by the person's stockbroker and listed under the broker's street name.

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[32] *See* 16 C.F.R. § 801.1(b).

[33] *See* 16 C.F.R. § 801.1(c).

[34] *See* The Statement of Basis and Purpose, 43 Fed. Reg. 33458 and subparts 2 through 8 of Rule 801.1(c), 16 C.F.R. § 801.1(c).

In the hypothetical, Sub Co. is not a UPE because Zed Corporation holds 50 percent or more of its outstanding voting securities. Assume that no one person holds as much as 50 percent of Zed Corporation's voting securities nor does anyone have the contractual power to appoint 50 percent of its board of directors. Under the Rules, therefore, Zed Corporation is not controlled by anyone else, and is the UPE of a "person" consisting of Zed Corporation and any other entities that it controls. In this situation, Beta Products, Inc., does not have a single 50 percent shareholder nor does any person have the contractual power to appoint 50 percent of its board of directors. However, our analysis cannot end here. Under Rule 801.1(c)(2),[35] *the holdings of spouses and their minor children must be aggregated. Thus, Mrs. Beta and Mr. Beta hold 50 percent of Beta Products, Inc., (49 percent and one percent, respectively), and together are its ultimate parent entity. Because they are individuals, the Betas cannot be controlled by any other entity.*

C. The Size of Person Test

1. The basic test

The next step in the analysis is to determine the size of the persons you have defined as the ultimate parent entities of the parties. The basic "size of person test" established by Section 7A(a)(2) of the Act requires a filing in transactions valued in excess of $50 million (as adjusted) but at $200 million (as adjusted) or less only where at least one of the persons involved in the transaction has $100 million (as adjusted) or more in annual net sales or total assets, and the other has $10 million (as adjusted) or more.[36] If these size thresholds are not met, the transaction need not be reported. Thus, for example, filings would not be required for a merger between two $99 million companies.[37]

There is one exception to the basic size of person test. Where an acquired person is not engaged in manufacturing only its total assets (unless its sales are $100 million (as adjusted) or more) are considered in determining its size. In addition, you should be aware that the size of person test is eliminated in transactions valued in excess of $200 million (as adjusted).

2. Calculating annual net sales and total assets

The procedures for calculating the annual net sales and total assets of a person are set out in Rule 801.11.[38] In the majority of cases, you will easily be able to determine whether the size of

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[35] *See* 16 C.F.R. § 801.1(c)(2).

[36] *See* 15 U.S.C. § 18a(a)(2).

[37] Provided, of course, that GDP has not declined resulting in the size of person test consequently declining to less than $99 million.

[38] *See* 16 C.F.R. § 801.11.

person test is satisfied. Generally, a person's annual net sales[39] and total assets are as stated on its last regularly prepared annual statement of income and last regularly prepared balance sheet. These financial statements must be as of a date not more than 15 months old, and have been prepared in accordance with procedures normally used by the filing person.[40]

A person should continue to rely on its regularly prepared financial statements until the next regularly prepared statements are available, even if subsequent changes in income or assets have occurred. For example, the most recently prepared statements may show $9 million in annual net sales and $8 million in total assets in the previous year, although the person's sales have increased in the current fiscal year such that its annual revenue will exceed $10 million (as adjusted) when its next statement is issued. For premerger notification purposes, however, the person will not be considered a $10 million (as adjusted) person until the annual income statement reflecting the increased revenue is prepared. The same analysis would be applied, however, if sales in the current fiscal year have decreased. A company's sales and assets may not be relied on until they are reflected in regularly prepared financial statements.

a. Including controlled entities

The size of person test includes the sales and assets of all entities, both domestic and foreign, included within the person. Any entities controlled by the UPE whose sales and assets are not consolidated in its financial statements must be added to determine the total size of the person. Unconsolidated sales and assets should be added, however, only to the extent that such additions are "nonduplicative." If the UPE's interest in the subsidiary is already reflected on the parent's balance sheet as an asset, then adding together the total assets of the subsidiary and the total assets of the parent would result in double counting at least part of the value of the subsidiary's assets. Accordingly, you should add only the subsidiary's total assets after subtracting the value of the interest in the subsidiary as it is carried on the parent's balance sheet.[41]

b. Natural persons

The total assets of a natural person include his or her investment assets (cash, deposits in financial institutions, other money market instruments, and instruments evidencing government obligations), voting securities, and other income-producing property, together with the total assets of any entity he or she controls. Property is income-producing if it is held either for

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[39] As used in the rule, "net sales" means gross revenues less returns, discounts, excise taxes, and the like. "Net sales" is not the equivalent of profits or "net income," however, and therefore the cost of raw materials, wages, interest, and other expenses may not be deducted. *See* The Statement of Basis and Purpose at 43 Fed. Reg. 33472-73.

[40] *See* 16 C.F.R. § 801.11(b)(2).

[41] *See* the statement of basis and purpose at 43 Fed. Reg. 33473 which provides additional information concerning consolidating a person's sales or assets.

investment or for the production of income, whether or not it actually produces income. You will have to refer to the definitions of "hold" and "control" to determine whether the individual (together with spouse and minor children) "holds" such property and to determine what entities he or she may "control." You may omit from the calculation the value of residences, cars, and personal property not held for the purpose of producing income. The annual net sales of an individual are the sum of the net sales of the entities he or she controls, including proprietorships, as well as income derived from investments.

c. Newly-formed person

A newly formed person, who has not yet prepared financial statements, may need to prepare a special statement of its sales and assets in order to calculate its size. Typically, these entities are formed for the purpose of making an acquisition. Under 801.11(e), a UPE without a regularly prepared balance sheet may exclude funds which will be used to make an acquisition in determining its size.[42] The Rule applies until the UPE, or any entity within it, has a regularly prepared balance sheet.

In the hypothetical, you have already identified Zed Corporation as its own ultimate parent entity and have concluded that Mr. and Mrs. Beta together are the ultimate parent entity of Beta Products, Inc. Assume that you also know that Zed Corporation is a large diversified company which probably has several hundred million dollars in annual sales. To be certain, you can consult Zed Corporation's annual report and refer to the 10-K and 10-Q reports that the company has filed with the Securities and Exchange Commission. In this instance, assume that Zed Corporation's annual report confirms that last year the company had annual revenues of $545 million. Since the current year has not yet ended and Zed Corporation used the calendar year for accounting purposes, there is no more recent annual income figure. Thus, Zed Corporation is clearly a $100 million (as adjusted) person. If it were necessary to consider total assets, you would want to look for the company's most recent regularly prepared balance sheet showing total assets. Note, however, that the balance sheets included in the firm's annual report or SEC filing may not be the company's most recent regularly prepared statements, since many corporations prepare quarterly or monthly statements of assets apart from those filed.

Applying the size of person test to Mr. and Mrs. Beta is a bit more involved since neither regularly prepares a financial statement. A good starting point, though, would be to add together the sales and assets of all the companies they control. You would not include the sales and assets of Resource Inc. because the Betas do not control that company but hold only a minority interest with no contractual power to appoint 50 percent or more of the board of directors. Assume here that Beta Products, Inc., is the only company controlled by Mr. and Mrs. Beta. Accordingly, you need not consolidate on one balance sheet the sales and assets of several entities. The minimum annual net sales for Mr. and Mrs. Beta can thus be found in the annual revenue figure from Beta Products' yearly statement of income. Assume that statement shows

[42] *See* 16 C.F.R. § 801.11(e).

sales to be $9 million. It also shows total assets to be $9 million. If either figure had been $10 million (as adjusted), you could have stopped there and concluded that the size of person in the case of Mr. and Mrs. Beta was at least $10 million (as adjusted).

In the absence of such a simple solution, however, you must next consider the value of any additional investments owned by Mr. and Mrs. Beta, and any additional revenues these may generate. As provided by Rule 801.11 (d),[43] you should not consider Mr. Beta's country residence or the sports car he drives in computing his total assets; similarly, the value of Mrs. Beta's luxury condominium should be omitted from the calculation of her total assets. You should also exclude the value of the Resource Inc. voting securities because, although they are investment assets, their value is already reflected on Beta Products' balance sheet.

However, Mr. and Mrs. Beta also hold in their own names some voting securities in other corporations, a vacation cottage that is rented out during the summer months, and a racehorse. Since these assets are all held to produce income or as investments, you will have to determine their value and include them in your calculation of the value of Mr. and Mrs. Beta's total assets.

You determine that these additional voting securities and income producing properties are worth at least $10 million. Adding this to the total assets of Beta Products, Inc., puts Mr. and Mrs. Beta's total assets over $10 million (as adjusted). You conclude, therefore, that Mr. and Mrs. Beta together satisfy the size of person requirement. Because you have now determined that the acquiring person is a $100 million (as adjusted) person and the acquired person is a $10 million (as adjusted) person (they will need to stipulate to this size of person in their filing), you know that the parties to the proposed transaction meet the size of person test.

Zed's acquisition of Beta is valued at $90 million and the parties meet the size of person test. Thus, unless an exemption applies, the parties in this hypothetical transaction must file and observe the statutory waiting period.

VI. ADDITIONAL CONSIDERATIONS

Note that this Guide does not cover all reporting obligations. The formation of corporate joint ventures and unincorporated entities may be reportable if the parties and the newly-formed entities meet certain criteria.[44] Also, transactions involving foreign businesses are subject to distinct treatment under the Rules.[45]

You also should be aware of Rule 801.90, which is designed to limit the ability of parties to

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[43] *See* 16 C.F.R. § 801.11 (d).

[44] *See* Rule 801.40 - 801.50, 16 C.F.R. § 801.40 - 801.50.

[45] *See* Rules 802.50 - 802.53, 16 C.F.R. §§ 802.50 - 802.53.

evade the Act's filing requirements. It states that: "Any transaction(s) or other device(s) entered into or employed for the purpose of avoiding the obligation to comply with the requirements of the act shall be disregarded, and the obligation to comply shall be determined by applying the act and these rules to the substance of the transaction."[46]

Finally, it is important to consider the many exemptions provided in the Act and the Rules. The Program is designed to facilitate antitrust review. It, therefore, does not require notification for transactions that have been determined to be unlikely to violate the antitrust laws. For example:

1) Stock splits that do not increase the percentages owned by any person are exempt;[47]

2) Acquisitions of small percentages of an issuer's voting securities solely for the purpose of investment are exempt;[48]

3) Acquisitions of additional voting securities by persons who already hold 50 percent of the voting shares of an issuer are not reportable;[49]

4) Acquisitions in the ordinary course of business, such as purchases of current supplies and used durable goods also are exempt;[50]

5) Acquisitions of several categories of real property, such as unproductive real property, office and residential property, and hotels are not reportable.[51]

6) Acquisitions in regulated industries, whose competitive effects are reviewed by other agencies, may be exempt or subject to modified reporting requirements.[52]

Although the premerger notification Rules tend to be complex and technical, the discussion in this Guide should help you determine whether a particular transaction must be reported. That

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[46] *See* Rule 801.90, 16 C.F.R. § 801.90.

[47] *See* § 7A(c)(10), 15 U.S.C. § 18a(c)(10), and Rule 802.10, 16 C.F.R.§ 802.10.

[48] *See* § 7A(c)(9), 15 U.S.C. § 18a(c)(9), and Rule 802.9, 16 C.F.R. § 802.9.

[49] *See* § 7A(c)(3), 15 U.S.C. § 18a(c)(3), and Rule 802.30, 16 C.F.R. § 802.30.

[50] *See* § 7A(c) (1), 15 U.S.C. § 18a (c)(1) and Rules 802.1(b), 802.1(c), 16 C.F.R. § 802.1(b), § 802.1(c)

[51] *See* § 7A(d)(2)(B), 15 U.S.C. § 18A(d)(2)(B); and Rules 802.2(c), 802.2(d), 802.2(e), 16 C.F.R. § 802.2(c), 802.2(d), 802.2(e).

[52] *See* § 7A(c)(6), 15 U.S.C. § 18a(c)(6), and Rule 802.6, 16 C.F.R. § 802.6.

said, you should not rely on this Guide alone to determine your filing obligation. As indicated earlier, you should refer to the Act, the relevant Rules and the Formal Interpretations of the Rules to understand points that are not discussed in this general introduction. Appendix 1, below, provides a quick reference to certain Rules relevant to determining reportability.

If you conclude that a transaction must be reported, you may want to consult the Federal Trade Commission's website at http://www.ftc.gov/bc/hsr for help in completing the Form. In addition, take the time to read the instructions to the Form carefully. They have been written to help you avoid the most common mistakes.

After consulting each of the sources mentioned here and in Guide I, if you still have questions, contact the PNO at (202) 326-3100.

Appendix 1: Relevant Rule – Quick Reference

Identifying Acquiring and Acquired Persons	
"UPE"	§ 801.1(a)(3)
"Person"	§ 801.1(a)(1)
"Control"	§ 801.1(b)
"Hold"	§ 801.1(c)

Size of Transaction Test	
Aggregation of Holdings	§§ 801.13 - 801.15
Value of Acquisition	§ 801.10
Percentage of Voting Securities	§ 801.12
Notification Thresholds	§ 801.1(h)

Size of Person Test	
Annual Net Sales and Total Assets	§ 801.11

Other Considerations	
Exemptions: Investment Only Intraperson Ordinary Course of Business Real Property Regulated Industries Foreign Transactions	 § 7A(c)(9); § 802.9 § 7A(c)(3); § 802.30 § 7A(c)(1); § 802.1 § 802.2; § 802.5 § 7A(c)(6); § 802.6 § § 802.50 - 802.53
Secondary Acquisitions	§ 801.4
Joint Venture Formations: Corporations Unincorporated Entities	 § 801.40 § 801.50
Avoidance	§ 801.90

FEDERAL TRADE COMMISSION

INTRODUCTORY GUIDE III
to the
PREMERGER NOTIFICATION PROGRAM

Model Request for Additional Information and Documentary Material (Second Request)

Premerger Notification Office, Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W., Room 303
Washington, D.C. 20580
Phone 202-326-3100 Fax 202-326-2624
www.ftc.gov

Revised May 2007

AN OVERVIEW

Guide III is one in a series of guides prepared by the Federal Trade Commission's Premerger Notification Office ("PNO"). *Guide III* provides background information on the process for a Request for Additional Information and Documentary Materials ("Second Request") and contains a sample model of a Second Request. Also, the Antitrust Division of the Department of Justice Second Request Internal Appeal Procedure has been provided as reference.

The Guides are intended to provide a general overview and do not address specific proposed transactions. Because the premerger notification program applies to many different types of reporting persons and to many different types of transactions, the rules implementing the program are necessarily technical and complex. In order to assist those unfamiliar with the program, the PNO has published a variety of helpful information, including guides, procedures, announcements, speeches, rules and regulations, and interpretations of the rules. This information is available at the Federal Trade Commission web site (www.ftc.gov) and from the PNO, 600 Pennsylvania Avenue N.W., Room 301, Washington, D.C. 20580

If you have a specific question on a proposed transaction and your question is not addressed by these reference resources, call the PNO between the hours of 8:30AM and 5:00PM, Eastern Standard Time, Monday through Friday, except holidays, at (202) 326-3100.

Introduction

Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 § 7A of the Clayton Act or (the Act), established the Federal Premerger Notification Program (the Program). The Act requires that parties to certain mergers or acquisitions notify the Federal Trade Commission ("FTC") and the Department of Justice ("DOJ") (the enforcement agencies) before consummating the proposed acquisition. The parties must wait a specific period of time, usually 30 days (15 days in the case of a cash tender offer or a bankruptcy sale)[1], while the enforcement agencies complete their review. Much of the information needed for a preliminary antitrust evaluation is included in the notification filed with the agencies by the parties to proposed transactions and thus is immediately available for review during the waiting period. The Program became effective September 5, 1978, after final promulgation of the Premerger Notification Rules (the Rules)[2].

Second Request Process

If either the FTC or the DOJ determines during the waiting period that further inquiry is necessary, the determining agency is authorized by Section 7A(e) of the Clayton Act to request additional information and documentary materials from any person required to file notification. A second request extends the waiting period for a specified period, usually 30 days (10 days in the case of a cash tender offer or a bankruptcy sale) [3], after all parties have complied with the request (or, in the case of a tender offer or bankruptcy, after the acquiring person has complied)[4]. This additional time provides the reviewing agency with the opportunity to analyze the information and to take appropriate action, if necessary, before the transaction is consummated. If the reviewing agency believes that a proposed transaction may violate the antitrust laws, it may seek an injunction in federal district court to prohibit consummation of the transaction.

[1] 16 CFR Section 803.10(a).
[2] 43 FR 33537, effective July 31, 1978.
[3] 16 CFR Section 803.20(c).
[4] 16 CFR Section 803.20(c).

FTC Review Process

The FTC has implemented procedures to make merger investigations more effective and more efficient.[5] Procedures include a review process, conferences, modification procedures and an appeals process.

Second Requests are prepared by the Bureau of Competition ("BC") litigation staff. BC senior management reviews all second requests before issuance to ensure that specifications are as precisely and narrowly framed as possible and consistent with the needs of the investigation.

Soon after the issuance of a second request, the BC staff will convene a second request conference with the parties to the transaction. At the conference, the BC staff will discuss with the parties the competitive issues raised by the proposed transaction, if known, and consider which information and documents may be obtained relating to the competitive issues raised.

FTC Second Request Appeals Process[6]

All Requests for Additional Information issued by the FTC invite recipients to discuss possible modifications with staff. If the recipient of a Request from the FTC believes that compliance with portions of the Request should not be required and the recipient has exhausted reasonable efforts to obtain modification of the Request from the lead staff attorney and the BC Assistant Director supervising the investigation, the recipient may petition the General Counsel of the FTC to hear an appeal on unresolved issues.

The petition for an appeal shall be made by letter to the General Counsel, with a copy to the lead staff attorney. The petition shall be no longer than 2 pages in length and shall address petitioner's efforts to obtain modification from BC staff.

1. Within 2 business days of receipt of such a petition, the General Counsel shall set a date for a conference with the petitioner and investigating staff.
2. Such conference shall take place within 7 business days of receipt of the petition, unless petitioner agrees to a longer time period before the conference or waives his right to a conference.
3. No later than 3 business days before the date of the conference, the petitioner and investigating staff may each submit to the General Counsel written briefs regarding the issues presented in the appeal petition. The briefs shall be no longer than 5 pages double spaced, shall be exchanged with opposing counsel on the same day they are submitted to the General Counsel, and shall include:
   (a) a concise explanation of the reasons why the petitioner believes compliance should not be required or of the reasons why investigating staff believe compliance is necessary; and
   (b) modifications that the petitioner proposes.
4. The General Counsel shall render a decision on the appeal within 3 business days following the conference.

A petition for an appeal made pursuant to this procedure must be made before the petitioner asserts substantial compliance with the Request for Additional Information, and the petitioner must agree to defer asserting substantial compliance until after this appeal process is completed or the petitioner withdraws its appeal.

[5] Reforms to the Merger Review Process: Announcement By Deborah Platt Majoras, Chairman, Federal Trade Commission dated February 16, 2006. http://www.ftc.gov/os/2006/02/mergerreviewprocess.pdf See also Federal Trade Commission, Bureau of Competition - Memo to staff dated May 16, 2000, http://www.ftc.gov/bc/hsr/MergerReform.htm

[6] 66 FR 8721, effective February 1, 2001, http://www.ftc.gov/bc/hsr/appeal~1.htm

DOJ Second Request Appeals Process[7]

A. Appeals Regarding Modifications

If the recipient of a second request from the Department of Justice believes that the request is unreasonably cumulative, unduly burdensome, or duplicative and, after exhausting reasonable efforts, has been unable to reach agreement with the section chief regarding a modification, the recipient may appeal the matter to a Deputy Assistant Attorney General, who does not have direct responsibility for the review of any enforcement recommendation concerning the transaction at issue (the "Reviewer"). The appeal shall be in writing, no longer than ten (10) pages double spaced, and shall include:

1. A concise explanation of the reasons why the recipient believes that compliance would be unduly burdensome, including a summary of compliance discussions at the staff and section chief level; and
2. the modifications that the recipient proposes.

All appeals should be sent to the Office of Operations (Attn: Second Request Appeals), which will immediately forward the request to the appropriate Deputy Assistant Attorney General. Upon receipt of a written appeal, the Reviewer may request additional information from or a telephone conference with the recipient within two (2) business days. The Reviewer will render a decision on the appeal within seven (7) days after the recipient has provided all necessary information.

An appeal must be made prior to assertion of compliance by the recipient, and the recipient must agree to defer asserting compliance until after the appeal process has been completed or the recipient has withdrawn its appeal.

B. Appeals Regarding Substantial Compliance

If the recipient of a second request has certified that it is in substantial compliance with the request and, after exhausting reasonable efforts, has been unable to reach agreement with the section chief regarding compliance, the recipient, after receiving the deficiencies believed to exist from the section chief, may appeal the matter to a Deputy Assistant Attorney General, who does not have direct responsibility for the review of any enforcement recommendation concerning the transaction at issue (the "Reviewer"). The appeal shall be in writing, no longer than ten (10) pages double spaced, and shall include a concise explanation of the reasons why the recipient believes that it is in compliance, including a summary of compliance discussions at the staff and section chief level.

All appeals should be sent to the Office of Operations (Attn: Second Request Appeals), which will immediately forward the request to the appropriate Deputy Assistant Attorney General. Upon receipt of a written appeal, the Reviewer may request additional information from or a telephone conference with the recipient within two (2) business days. The Reviewer will render a decision on the appeal within three (3) business days after the recipient has provided all necessary information.

If the Reviewer determines that the recipient is in substantial compliance, the date of certification of substantial compliance will be the date on which the waiting period is determined to have begun. If the Reviewer determines that the recipient is not in substantial compliance, the Reviewer will recommend that a formal deficiency letter be issued.

[7] http://www.usdoj.gov/atr/public/8430.htm

SAMPLE - MODEL REQUEST for ADDITIONAL INFORMATION and DOCUMENTARY INFORMATION (SECOUND REQUEST) with Comments May 2007

The model request for additional information and documentary material is based on the fictitious transaction between Weebyewe Ltd. and Beeside Corporation. Following the model request is a sample certification page and a sample document index.

This model request addresses issues typically encountered in a merger investigation. This model request contains only suggestions for language and the particular circumstances of the merger being investigated will determine the information that will be requested. The purpose of the model request for additional information is to provide the basic framework of a request for additional information. Comments follow each specification explaining how the information that is sought relates to the issues involved in a merger investigation.

REQUEST FOR ADDITIONAL INFORMATION AND DOCUMENTARY MATERIAL ISSUED TO WEEBYEWE CORPORATION

Unless modified by agreement with the staff of the Federal Trade Commission, each specification of this Request requires a complete search of "the company" as defined in Paragraph "A" of the Definitions and Instructions which appear after the following Specifications. If the company believes that the required search or any other part of the Request can be narrowed in any way that is consistent with the Commission's need for documents and information, you are encouraged to discuss such questions and possible modifications with the Commission representatives identified on the last page of this Request. All modifications to this Request must be agreed to in writing by those representatives. You may find it useful to provide the response to Specification 1 of this Request promptly and discuss limiting the required search with the Commission's representatives before you begin your search.

SPECIFICATIONS

1. Submit (a) one copy of each organization chart and personnel directory in effect since January 1, [Yr-2] for the company as a whole and for each of the company's facilities or divisions involved in any activity relating to any relevant product [service] and (b) a list of all agents and representatives of the company, including, but not limited to, all attorneys, consultants, investment bankers, product distributors, sales agents, and other persons retained by the company in any capacity relating to the proposed acquisition of Beeside by Weebyewe or any relevant product or relevant area covered by this Request (excluding those retained solely in connection with [environmental, tax,] human resources, pensions, benefits, ERISA, or OSHA issues).

2. List each relevant product manufactured or sold [service provided] by the company, and (a) provide a detailed description of the product [including its end uses] [service]; and (b) state [the brand name] and the division, subsidiary, or affiliate of the company that manufactures or sells [provides] or has manufactured or sold [provided] the product [service].

3. For each relevant product listed in response to Specification 2 above, state:

(a) the company's sales to all customers in each relevant area, stated separately in units and dollars;

[(b) that portion of the company's sales to customers in each relevant area, stated separately, in units and dollars, that were of products manufactured in the U.S.;]

[(c) that portion of the company's sales to customers in each relevant area, stated separately in units and dollars, that were of products manufactured outside the U.S.;]

(d) that portion of the company's sales to customers in each relevant area, stated separately, in units and dollars, that were of products purchased from sources outside the company and resold by the company rather than of products manufactured by the company;

(e) the names and addresses of the [company's 20 largest customers] 20 persons who purchased the greatest unit and dollar amounts of the relevant product from the company in each relevant area; and

(f) the name, address, estimated sales, and estimated market share of the company and each of the company's competitors in each relevant area in the [relevant service] manufacture or sale of the product.

4. State the location of each facility that manufactures or sells [including distribution centers, etc.], or has manufactured or sold, any relevant product [provides any relevant service] for the company, and for each such facility state:

(a) whether the facility was leased, acquired, or built by or for the company, and, if not built by the company, the name of the person who built the facility for the company or from whom the facility was leased or acquired;

(b) the date of the facility's opening or acquisition, the length of time and cost in dollars required to open the facility from initial plan to full production, and its current estimated replacement cost and time necessary to replace it; and

(c) the current nameplate and practical capacity and the annual capacity utilization rate for production of each relevant product manufactured at the facility, specifying all other factors used to calculate capacity, the number of shifts normally used at the facility, and the feasibility of increasing capacity [by X% or more], including the costs and time required.

If the company believes that this Specification may be narrowed in any way that is consistent with the Commission's need for documents and information it is encouraged to discuss possible modifications with Commission representatives who will consider modifying this Specification on a case-by-case basis.

5. For each relevant product [service], submit (a) one copy of all current selling aids and promotional materials and (b) all documents relating to advertising plans and strategies.

6. Submit all documents relating to the company's or any other person's plans relating to any relevant product [service], including, but not limited to, business plans, short term and long range strategies and objectives; budgets and financial projections; expansion or retrenchment plans; research and development efforts; and presentations to management committees, executive committees, and boards of directors. For regularly prepared budgets and financial projections, the company need only submit one copy of final year-end documents and cumulative year to date documents for the current year.

7. Submit all documents relating to competition in the manufacture or sale of any relevant product [each relevant service], including, but not limited to, market studies, forecasts and surveys, and all other documents relating to (a) the market share or competitive position of the company or any of its competitors; (b) the relative strength or weakness of companies producing or selling each relevant product [providing each relevant service]; (c) supply and demand conditions; (d) attempts to win customers from other companies and losses of customers to other companies, [including, but not limited to, all sales personnel call reports]; (e) allegations

by any person that any company that manufactures or sells any relevant product [provides any relevant service] is not behaving in a competitive manner, including, but not limited to, customer and competitor complaints, threatened, pending, or completed lawsuits, and federal and state investigations; and (f) any actual or potential effect on the supply, demand, cost or price of any relevant product [service] as a result of competition from any other possible substitute product [service].

8. Submit all documents relating to the company's or any other person's price lists, pricing plans, pricing policies, pricing forecasts, pricing strategies, pricing analyses, and pricing decisions relating to any relevant product [service].

9. State the name and address of each person that has entered or attempted to enter into, or exited from, the manufacture or sale of each relevant product [any relevant service] in any relevant area from [Yr-10] to the present. For each such person, identify the relevant product(s) it manufactures or sells or manufactured or sold [service(s) it provides or provided], the relevant area in which it sells or sold the product(s) [provided the services], and the date of its entry into or exit from the market. For each entrant, state whether the entrant built a new facility, converted assets previously used for another purpose (identifying that purpose), or began using facilities that were already being used for the same purpose.

10. For each relevant product [service], identify or describe (including the bases for your response) and submit all documents relating to:

(a) requirements for entry into the production or sale of the product [providing the relevant service] in each relevant area including, but not limited to, research and development, planning and design, production requirements, distribution systems, service requirements, patents, licenses, sales and marketing activities, and any necessary governmental and customer approvals, and the time necessary to meet each such requirement;

(b) the total costs required for entry into the production or sale of the product [providing the relevant service]; the amount of such costs that would be recoverable if the entrant were unsuccessful or elected to exit the manufacture or sale of the product [providing the relevant service]; the methods and amount of time necessary to recover such costs; and the total sunk costs entailed in satisfying the requirements for entry;

(c) possible new entrants into the manufacture or sale of the product [providers of the service] in each relevant area; and

(d) the minimum viable scale, the minimum and optimum plant size, production line size, capacity utilization rate, production volume, requirements for multi-plant, multiproduct, or vertically integrated operations, or other factors required to attain any available cost savings or other efficiencies necessary to compete profitably in the manufacture or sale of the product [providing the relevant service] {deleting references as appropriate for service industries}.

11. Submit all documents (except engineering and architectural plans and blueprints) relating to any plans of the company or any other person for the construction of new facilities, the closing of any existing facilities, or the expansion, conversion, or modification (if such modification has a planned or actual cost of more than $xxxxxxxx) of current facilities for [providing any relevant service] the manufacture or sale of any relevant product.

12. Submit all documents relating to actual and potential imports into, or exports from, each relevant area of any relevant product, including, but not limited to, documents showing: the names of importers or exporters; the market share or position of such importers or exporters; the quality or quantity of products imported or exported in total or by any person; and any costs or barriers to imports or exports. Describe all quotas, tariffs, and transportation costs relating to imports into, or exports from, each relevant area of any relevant product.

13. Identify, and state whether the company is a member of or subscribes to, all trade associations, information services, and other organizations relating to the production or sale of any relevant product [relating to any relevant service]. Submit one copy of all documents that discuss or describe production, sale, prices, competition or entry conditions relating to the relevant product submitted by the company or any other person to each such association, service and organization or its agents. Submit one copy of all documents that discuss or describe production, sale, prices, competition or entry conditions relating to the relevant product received by the company or any other person from each such association, service and organization or its agents.

14. Submit all documents relating to any plans of, interest in, or efforts undertaken by the company or any other person for any acquisition, divestiture, joint venture, alliance or merger of any kind involving the manufacture or sale of any relevant product [any relevant service] other than the proposed acquisition of Beeside by Weebyewe.

15. Submit all documents (except documents solely relating to [environmental, tax,] human resources, OSHA, or ERISA issues) relating to the proposed acquisition of Beeside by Weebyewe and provide:

(a) a timetable for the proposed acquisition, a description of all actions that must be taken prior to consummation of the proposed acquisition, and any harm that will result if the acquisition is not consummated;

(b) a detailed description of (including the rationale for, and identification of all documents directly or indirectly used to prepare the company's response to this sub-part) all plans for changes in Weebyewe's and Beeside's operations, structure, policies, strategies, corporate goals, financing, business, officers, employees or any other area of corporate activity as a result of the proposed acquisition;

(c) a detailed description of (including the identification of all documents directly or indirectly used to prepare the company's response to this sub-part and quantification, if possible, of all cost savings, economies or other efficiencies) the reasons for the proposed acquisition and the benefits, costs, and risks anticipated as a result of the proposed acquisition, including, but not limited to, all cost savings, economies, or other efficiencies of whatever kind; and

(d) a detailed description of all statements or actions by any person (identifying the person by name, title, and business address) in support of, in opposition to, or otherwise expressing opinions about the proposed acquisition or its effects.

16. Submit documents sufficient to show and, to the extent not reflected in such documents, describe in detail the company's policies and procedures relating to the retention and destruction of documents.

17. List (a) each federal judicial district (e.g., District of Columbia, Southern District of New York) within the United States in which the company has an agent to receive service of process as well as each such agent's name, current business and home addresses, and telephone numbers; (b) each federal judicial district within the United States in which the company is incorporated or licensed to do business or currently is doing business; and (c) each federal judicial district within the United States in which the company has an office or a facility, and, for each such office or facility, list the address and the individual in charge (with his or her title).

18. Identify the person(s) responsible for preparing the response to this Request and submit a copy of all instructions prepared by the company relating to the steps taken to respond to this Request. Where oral instructions were given, identify the person who gave the instructions and describe the content of the instructions and the person(s) to whom the instructions were given. For each specification, identify the individual(s) who assisted in the preparation of the response, with a listing of the persons (identified by name and corporate title or job description) whose files were searched by each.

DEFINITIONS AND INSTRUCTIONS

For the purposes of this Request, the following definitions and instructions apply:

A. The term "the company" or "Weebyewe" means Weebyewe Ltd., plc, its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and all directors, officers, employees, agents and representatives of the foregoing. The terms "subsidiary", "affiliate" and "joint venture" refer to any person in which there is partial (25 percent or more) or total ownership or control between the company and any other person.

B. The term "Beeside" means Beeside Corporation, Inc., its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents and representatives of the foregoing. The terms "subsidiary", "affiliate" and "joint venture" refer to any person in which there is partial (25 percent or more) or total ownership or control between Beeside and any other person.

C. The term "documents" means all computer files and written, recorded, and graphic materials of every kind in the possession, custody or control of the company. The term "documents" includes, without limitation: electronic mail messages; electronic correspondence and drafts of documents; metadata and other bibliographic or historical data describing or relating to documents created, revised, or distributed on computer systems; copies of documents that are not identical duplicates of the originals in that person's files; and copies of documents the originals of which are not in the possession, custody or control of the company.

(1) Unless otherwise specified, the term "documents" excludes (a) bills of lading, invoices, purchase orders, customs declarations, and other similar documents of a purely transactional nature; (b) architectural plans and engineering blueprints; and (c) documents solely relating to [environmental, tax, human resources, OSHA, or ERISA issues].

(2) The term "computer files" includes information stored in, or accessible through, computer or other information retrieval systems. Thus, the company should produce documents that exist in machine-readable form, including documents stored in personal computers, portable computers, workstations, minicomputers, mainframes, servers, backup disks and tapes, archive disks and tapes, and other forms of offline storage, whether on or off company premises. If the company believes that the required search of backup disks and tapes and archive disks and tapes can be narrowed in any way that is consistent with the Commission's need for documents and information, you are encouraged to discuss a possible modification to this instruction with the Commission representatives identified on the last page of this Request. The Commission representative will consider modifying this instruction to:

(a) exclude the search and production of files from backup disks and tapes and archive disks and tapes unless it appears that files are missing from files that exist in personal computers, portable computers, workstations, minicomputers, mainframes, and servers searched by the company;

(b) limit the portion of backup disks and tapes and archive disks and tapes that needs to be searched and produced to certain key individuals, or certain time periods or certain specifications identified by Commission representatives; or

(c) include other proposals consistent with Commission policy and the facts of the case.

(3) If the company intends to utilize any De-duplication or Near-de-duplication software or services when collecting or reviewing information that is stored in the company's computer systems or electronic storage media in response to this Request, or if the company's computer systems contain or utilize such software, the company must contact Commission representatives to determine, with the assistance of the appropriate government technical officials, whether and in what manner the company may use such software or services when producing materials in response to this Request.

D. The term "person" includes the company and means any natural person, corporate entity, partnership, association, joint venture, government entity, or trust.

E. The term "relating to" means in whole or in part constituting, containing, concerning, discussing, describing, analyzing, identifying, or stating.

F. The terms "and" and "or" have both conjunctive and disjunctive meanings.

G. The term "plans" means tentative and preliminary proposals, recommendations, or considerations, whether or not finalized or authorized, as well as those that have been adopted.

H. The term "sales" means net sales, i.e., total sales after deducting discounts, returns, allowances and excise taxes. "Sales" includes sales of the relevant product whether manufactured by the company itself or purchased from sources outside the company and resold by the company in the same manufactured form as purchased.

I. The term "relevant product [service]" as used herein means, and information shall be provided separately for, each [name or list of product(s) or service(s) at issue].

J. The term "relevant area" means, and information shall be provided separately for, (a) the United States and (b) worldwide [or regional or local market(s)].

K. The term "minimum viable scale" means the smallest amount of production [smallest service volume] at which average costs equal the price currently charged for the relevant product [service]. It should be noted that minimum viable scale differs from the concept of minimum efficient scale, which is the smallest scale at which average costs are minimized.

L. The term "sunk costs" means the acquisition costs of tangible and intangible assets necessary to manufacture and sell the relevant product [provide the relevant service] that cannot be recovered through the redeployment of these assets for other uses.

M. All references to year refer to calendar year. Unless otherwise specified, each of the specifications calls for: (1) documents for each of the years from [WPE - 2 years] to the present; and (2) information for each of the years from January 1, [Yr-3] to the present. Where information, rather than documents, is requested, provide it separately for each year; where yearly data is not yet available, provide data for the calendar year to date. If calendar year information is not available, supply the company's fiscal year data indicating the twelve month period covered, and provide the company's best estimate of calendar year data.

N. This Request shall be deemed continuing in nature so as to require production of all documents <u>responsive to any specification included in this Request</u> produced or obtained by the company up to forty-five calendar days prior to the date of the company's full compliance with this Request. [*If warranted add the following language*: <u>except</u> for documents responsive to Specification 7 or Specification 15, for which the date is (*insert #*) calendar days prior to the date of the company's full compliance with this Request.]

O. The company shall discuss the form and method of production of responsive documents with the Commission representative identified on the last page of this request. The company shall be permitted to use any form and method of production of responsive documents that the Commission representative approves in writing. The Commission can support the following production forms and methods:

(1) In lieu of original paper documents, the company may submit either paper or electronic copies of original documents. If the documents are provided electronically as TIFF images, they should be accompanied by OCR;

(2) In lieu of original documents stored electronically, the company may submit documents in the following forms:

(a) Electronically stored documents, except Microsoft Excel files and Access databases, may be produced as single-page TIFF images with a corresponding file containing the extracted text from the document, accompanied by a Summation DII file. Metadata and custodian information shall be provided in a delimited

ASCII format. Microsoft Excel and Access files shall be provided natively.

(b) Electronically stored documents, excluding e-mail other than Microsoft Outlook, may be produced natively when accompanied by a Summation Class II DII file containing document control numbers for each document.

(3) Electronic productions may be submitted in the following methods:

(a) Responsive documents may be submitted through an online repository maintained by an independent vendor;

(b) Responsive documents may be submitted directly to the Bureau on any combination of the listed media types; however, the Bureau prefers IDE hard drives for productions over 10GB:

- CD-R CD-ROM formatted to ISO 9660 specifications;
- DVD-ROM for Windows-compatible personal computers;
- IDE and EIDE hard disk drives, formatted in Microsoft Windows-compatible, uncompressed data.
- USB 2.0 Flash Drives

(4) Documents submitted in hard copy shall be submitted in sturdy cartons not larger than 1.5 cubic feet. Number each such box and mark each such box with corporate identification and the name(s) of the person(s) whose files are contained in the box.

P. All documents responsive to this request, regardless of format or form and regardless of whether submitted in paper or electronic form:

(1) shall be produced in complete form, unredacted unless privileged, and in the order in which they appear in the company's files and shall not be shuffled or otherwise rearranged. For example:

(a) if in their original condition papers were stapled, clipped or otherwise fastened together or maintained in file folders, binders, covers or containers, they shall be produced in such form, and any documents that must be removed from their original folders, binders, covers or containers in order to be produced shall be identified in a manner so as to clearly specify the folder, binder, cover or container from which such documents came; and

(b) if in their original condition electronic documents were maintained in folders or otherwise organized, they shall be produced in such form and information shall be produced so as to clearly specify the folder or organization format;

(2) if written in a language other than English, shall be translated into English, with the English translation attached to the foreign language document;

(3) shall be produced in color where necessary to interpret the document;

(4) shall be marked on each page with corporate identification and consecutive document control numbers;

(5) shall be accompanied by an affidavit of an officer of the company stating that the copies are true, correct and complete copies of the original documents;

(6) shall be accompanied by an index that identifies: (i) the name of each person from whom responsive documents are submitted; and (ii) the corresponding consecutive document control number(s) used to identify that person's documents, and if submitted in paper form, the box number containing such documents. If the index exists as a computer file(s), provide the index both as a printed hard copy and in machine-readable form (provided that Commission representatives determine prior to submission that the machine-readable form would be in a format that allows the agency to use the computer files). The Commission representative will provide a sample index upon request.

Q. If any documents created prior to the company's HSR filing are withheld from production based on a claim of privilege, provide a statement of the claim of privilege and all facts relied upon in support thereof, in the form of a log [hereinafter Complete Log] that includes each document's authors, addressees, date, a description of each document, and all recipients of the original and any copies. Attachments to a document should be identified as such and entered separately on the log. For each author, addressee, and recipient, state the person's full name, title, and employer or firm, and denote all attorneys with an asterisk. The description of the subject matter shall describe the nature of each document in a manner that, though not revealing information itself privileged, provides sufficiently detailed information to enable Commission staff, the Commission, or a court to assess the applicability of the privilege claimed. For each document withheld under a claim that it constitutes or contains attorney work product, also state whether the company asserts that the document was prepared in anticipation of litigation or for trial and, if so, identify the anticipated litigation or trial upon which the assertion is based. Submit all nonprivileged portions of any responsive document (including nonprivileged or redactable attachments) for which a claim of privilege is asserted (except where the only nonprivileged information has already been produced in response to this instruction), noting where redactions in the document have been made. Documents authored by outside lawyers representing the company that were not directly or indirectly furnished to the company or any third-party, such as internal law firm memoranda, may be omitted from the log.

In place of a Complete Log of all documents withheld from production based on a claim of privilege, the company may elect to submit a Partial Privilege Log ("Partial Log") for each person searched by the company whose documents are withheld based on such claim and a Complete Log for a subset of those persons, as specified below:

(1) The Partial Log will contain the following information: (a) the name of each person from whom responsive documents are withheld on the basis of a claim of privilege; and (b) the total number of documents that are withheld under a claim of privilege (stating the number of attachments separately) contained in each such person's files. Submit all nonprivileged portions of any responsive document (including nonprivileged or redactable attachments) for which a claim of privilege is asserted (except where the only nonprivileged information has already been produced in response to this instruction), noting where redactions in the document have been made.

(2) Within five (5) business days after receipt of the Partial Log, Commission staff may identify in writing five individuals or ten percent of the total number of persons searched, whichever is greater, for which the company will be required to produce a Complete Log in order to certify compliance with this Request.

(3) For the company to exercise the option to produce a Partial Log, the company must provide a signed statement in which the company acknowledges and agrees that, in consideration for being permitted to submit a Partial Log:

(a) the Commission retains the right to serve a discovery request or requests regarding documents withheld on grounds of privilege in the event the Commission seeks relief through judicial or administrative proceedings;

(b) the company will produce a Complete Log of all documents withheld from production based on a claim of privilege no later than fifteen (15) calendar days after such a discovery request is served, which will occur promptly after the filing of the Commission's complaint; and

(c) the company waives all objections to such discovery, including the production of a Complete Log of all documents withheld from production based on a claim of privilege, except for any objections based strictly on privilege.

(4) The company retains all privileged documents that are responsive to this Request until the expiration of the Hart Scott Rodino waiting period or the completion of any litigation challenging the acquisition of Beeside by Weebyewe.

(5) The Commission will retain the right to require the company to produce a

Complete Log for all persons searched in appropriate circumstances.

R. If the company is unable to answer any question fully, supply such information as is available. Explain why such answer is incomplete, the efforts made by the company to obtain the information, and the source from which the complete answer may be obtained. If books and records that provide accurate answers are not available, enter best estimates and describe how the estimates were derived, including the sources or bases of such estimates. Estimated data should be followed by the notation "est." If there is no reasonable way for the company to make an estimate, provide an explanation.

S. If documents responsive to a particular specification no longer exist for reasons other than the ordinary course of business or the implementation of the company's document retention policy as disclosed or described in response to Specification 16 of this Request, but the company has reason to believe have been in existence, state the circumstances under which they were lost or destroyed, describe the documents to the fullest extent possible, state the specification(s) to which they are responsive, and identify persons having knowledge of the content of such documents.

T. In order for the company's response to this Request to be complete, the attached certification form must be executed by the official supervising compliance with this Request, notarized, and submitted along with the responsive materials.

Any questions you have relating to the scope or meaning of anything in this Request or suggestions for possible modifications thereto should be directed to (appropriate staff) at (telephone number). The response to the Request shall be addressed to the attention of (appropriate staff) and delivered between 8:30 a.m. and 5:00 p.m. on any business day to Federal Trade Commission. If you wish to submit your response by United States mail, please call one of the staff listed above for mailing instructions.

CERTIFICATION

As required by § 803.6 of the implementing rules for the Hart-Scott-Rodino Antitrust Improvements Act of 1976, this response to the Request for Additional Information and Documentary Material, together with any and all appendices and attachments thereto, was prepared and assembled under my supervision in accordance with instructions issued by the Federal Trade Commission. Subject to the recognition that, where so indicated, reasonable estimates have been made because books and records do not provide the required information, the information is, to the best of my knowledge, true, correct, and complete in accordance with the statute and rules.

Where copies rather than original documents have been submitted, the copies are true, correct, and complete. If the Commission uses such copies in any court or administrative proceeding, the company will not object based on the Commission not offering the original document.

____
(Signature)

____
(Type or Print Name and Title)

Subscribed and sworn to before me at the City of _________________________________,

State of ___________________________, this _________day of ___________________, 19_____.

____
(Notary Public)

____
______(Date Commission Expires)

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NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

JSC

UNITED STATES OF AMERICA, *Plaintiff,* v. BAZAARVOICE, INC. *Defendant.*	Case No.: C 13 0133

COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil action to obtain equitable relief remedying the June 2012 acquisition of PowerReviews, Inc. ("PowerReviews") by Defendant Bazaarvoice, Inc. ("Bazaarvoice"). The United States alleges as follows:

INTRODUCTION

1. Many retailers and manufacturers purchase product ratings and reviews platforms ("PRR platforms") to collect and display consumer-generated product ratings and reviews online. Bazaarvoice provides the market-leading PRR platform, and PowerReviews was its closest competitor. No other PRR platform competitor has a significant number of PRR platform customers in the United States. By acquiring PowerReviews, Bazaarvoice eliminated its most significant rival and effectively insulated itself from meaningful competition.

2. The acquisition of PowerReviews was a calculated move by Bazaarvoice that was intended to eliminate competition. Bazaarvoice's senior executives spent more than a year considering whether buying PowerReviews would reduce pricing pressure and diminish competition in the marketplace. As a result of their extensive deliberations, the company's business documents are saturated with evidence that Bazaarvoice believed the acquisition of PowerReviews would eliminate its most significant competitive threat and stem price competition.

3. In April 2011, Brant Barton, one of Bazaarvoice's co-founders, outlined the benefits of the acquisition in an e-mail to senior Bazaarvoice executives. He noted that acquiring PowerReviews would "[e]liminat[e] [Bazaarvoice's] primary competitor" and provide "relief from [] price erosion." He also discussed the absence of competitive alternatives for customers, concluding that Bazaarvoice would "retain an extremely high percentage of [PowerReviews] customers," because available alternatives for disgruntled customers were "scarce" and "low-quality."

4. On May 4, 2011, Brett Hurt, Bazaarvoice's Chief Executive Officer, supported Barton's analysis and advocated the company's pursuit of PowerReviews in an e-mail to the

Bazaarvoice board of directors. According to Hurt, the acquisition of PowerReviews was an opportunity to "tak[e] out [Bazaarvoice's] only competitor, who . . . suppress[ed] [Bazaarvoice] price points []by as much as 15% . . . ."

5. Two days later, Barton, Hurt, and Stephen Collins, Bazaarvoice's Chief Financial Officer, met with senior PowerReviews executives to discuss the potential acquisition. In his notes from the meeting, Barton wrote that the transaction would enable the combined company to "avoid margin erosion" caused by "tactical 'knife-fighting' over competitive deals." He later prepared a presentation for Bazaarvoice's board of directors in which he claimed the transaction would "[e]liminate [Bazaarvoice's] primary competitor" and "reduc[e] comparative pricing pressure."

6. In October 2011, Collins e-mailed other senior Bazaarvoice executives to provide his perspective regarding the potential acquisition. He recommended that Bazaarvoice continue its pursuit of PowerReviews because he feared price competition with PowerReviews would impair the long-term value of Bazaarvoice's business. Collins believed that Bazaarvoice had "literally, no other competitors," and he expected "pricing accretion" from the combination of the two firms. In November 2012, Stephen Collins replaced Brett Hurt as Bazaarvoice's Chief Executive Officer.

7. In November 2011, Hurt sought permission from Bazaarvoice board members to continue exploring a potential deal with PowerReviews, observing that Bazaarvoice would have "[n]o meaningful direct competitor" after acquiring PowerReviews, thereby reducing "pricing dilution."

8. In December 2011, Collins and Barton met with PowerReviews representatives again. Following the meeting, Collins prepared a memorandum for Bazaarvoice's board of

directors to outline the expected benefits of the acquisition. He wrote that the acquisition of PowerReviews would (1) "eliminat[e] feature driven one-upmanship and tactical competition;" (2) "[c]reate[] significant competitive barriers to entry;" (3) "eliminate the cost in time and money to take [PowerReviews'] accounts;" and (4) "reduce [Bazaarvoice's] risk of account losses as [PowerReviews] compete[d] for survival."

9. In May 2012, Bazaarvoice executives completed their due diligence for the acquisition. To support their recommendation to proceed with the acquisition of PowerReviews, they prepared a 73-page memorandum for the company's board of directors. In this memorandum, the executives touted the transaction's dampening effect on competition, concluding the acquisition would "block[] entry by competitors" and "ensure [Bazaarvoice's] retail business [was] protected from direct competition and premature price erosion."

10. Bazaarvoice's acquisition of PowerReviews closed on June 12, 2012. The purchase price, including cash and non-cash consideration, was approximately $168.2 million.

THE DEFENDANT AND THE TRANSACTION

11. Bazaarvoice is a publicly traded Delaware corporation and is headquartered in Austin, Texas. During its 2012 fiscal year, Bazaarvoice earned approximately $106.1 million in revenue.

12. PowerReviews was a privately held Delaware corporation. Before the transaction, PowerReviews was headquartered in San Francisco, California. During the 2011 calendar year, the company earned approximately $11.5 million in revenue.

JURISDICTION

13. The United States brings this action under Section 15 of the Clayton Act, 15 U.S.C. § 25, to restrain Bazaarvoice's violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

14. This Court has subject matter jurisdiction over this action under Section 15 of the Clayton Act, 15 U.S.C. §§ 4 and 25, and 28 U.S.C. §§ 1345 and 1331. This Court also has subject matter jurisdiction under 28 U.S.C. § 1337, as Bazaarvoice is engaged in a regular, continuous, and substantial flow of interstate commerce and activities substantially affecting interstate commerce. Bazaarvoice sells PRR platforms throughout the United States.

15. This Court has personal jurisdiction over the Defendant. Bazaarvoice transacts business and is found within the Northern District of California.

VENUE

16. Venue is proper under Section 12 of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. § 1391(b) and (c).

INTRADISTRICT ASSIGNMENT

17. Assignment to the San Francisco Division is proper because this action arose in San Francisco County. A substantial part of the events that gave rise to the claim occurred in San Francisco, and PowerReviews' headquarters and principal place of business was located in San Francisco before the transaction. Bazaarvoice continues to use PowerReviews' former headquarters as its San Francisco office.

PRR PLATFORMS

18. PRR platforms enable manufacturers and retailers to collect, organize, and display consumer-generated product ratings and reviews online. Consumer-generated product ratings and reviews ("ratings and reviews") represent feedback from consumers regarding their experiences with a product. These submissions are displayed on a retailer's or manufacturer's website, allowing other consumers to read feedback from previous buyers before making a purchasing decision. PRR platforms can range from simple software solutions a company has

developed with internal resources to sophisticated commercial platforms offering a combination of software, moderation services, and data analytics tools.

19. Ratings and reviews are a popular feature for retailers and manufacturers to display on their websites. Ratings and reviews can provide highly relevant, product-specific information on a retailer's or manufacturer's website near the time of purchase. The additional information provided by ratings and reviews can increase sales, decrease product returns, and attract more consumers to a retailer's or manufacturer's website. Ratings and reviews also can provide valuable data about consumer preferences and behavior, which retailers and manufacturers can use to make inventory purchasing or product design decisions.

20. Ratings and reviews may also benefit a retailer or manufacturer by boosting a product's ranking on a search engine results page. Internet search engine algorithms generally assign higher rankings to websites with fresh and unique content. Ratings and reviews are frequently updated, and this content is highly tailored to the retailer's or manufacturer's product catalog. Accordingly, when ratings and reviews are indexed by a search engine, the underlying product pages will likely receive a higher ranking on a search engine results page.

21. From a consumer's perspective, ratings and reviews are useful because they can provide authentic information regarding another consumer's experience with a particular product. Feedback from other consumers can help a prospective buyer make a more informed purchasing decision. Product ratings and reviews often provide information that is not easily ascertainable when shopping online (*e.g.*, quality of construction, fit, durability).

22. The software component of a PRR platform provides the user interface and review form for the collection and display of ratings and reviews. Most review forms prompt consumers to rate a product on a five-star scale and offer consumers an option to write an open-

ended comment about their experience with the product. Other forms also allow consumers to rate products along several dimensions (*e.g.*, product appearance, ease of assembly, value).

23. In addition to the technology components of their respective platforms, some PRR platform providers also provide moderation services. After a consumer submits a review, the PRR platform provider applies software algorithms to scan the submission for inappropriate or fraudulent content. After the automated scan, a human moderator examines each submission to ensure it complies with a particular client's moderation standards. These moderation standards may vary between clients. For example, some clients may prefer not to display references to their competitors on their websites.

24. After moderation, the PRR platform publishes approved submissions in a display interface on a client's website. Many PRR platforms display a summary of a product's rating and review information and allow consumers to view individual reviews for more detailed information. The review summary may display the number of reviews, the product's average overall rating, a review distribution histogram, or information related to particular product attributes. The display interface may also allow consumers to filter reviews according to their interests.

25. Sophisticated PRR platforms allow manufacturers to share, or "syndicate," ratings and reviews with their retail partners. Through the syndication network, retailers can display reviews that were originally collected by a product's manufacturer. Syndication helps retailers obtain more content than they could independently. Manufacturers and retailers both benefit from the ability to display more reviews at the point of sale. Syndication between a manufacturer and a retailer using different PRR platforms is possible, but requires expensive, customized integration work to connect the platforms.

26. Some PRR platforms also include analytics software that manufacturers and retailers use to analyze information collected from ratings and reviews. With these tools, manufacturers and retailers can track and analyze real-time consumer sentiment. Manufacturers and retailers can use this information to identify product design defects, make product design decisions, or identify consumers for targeted marketing efforts.

27. PRR platforms are sold by Bazaarvoice and other commercial suppliers in direct sales processes that require a significant amount of time and negotiation. Prices are individually negotiated, and each customer's price is independent of the prices that other customers receive. Arbitrage, or indirect purchasing from other customers, is not possible because customers cannot re-sell PRR platforms that they have purchased from a commercial supplier. Accordingly, customers commonly receive different prices, even when purchasing similar products and services.

28. PRR platform providers negotiate prices in light of each customer's demand characteristics, taking into account competitive alternatives. Bazaarvoice calls this method of setting prices "value-based" pricing, meaning "the more value the [client] perceives, the higher [Bazaarvoice's] price point." During the sales process, it is typical for a salesperson to ask the prospective customer to divulge detailed information related to its business, which may include information related to (1) annual volume of online sales; (2) product return rates; (3) historic conversion rates; (4) e-commerce vendor relationships; or (5) project budgets. This process enables the PRR platform provider to assess the prospect's willingness to pay for a PRR platform. After acquiring as much information as possible about the prospect, the PRR platform provider offers a price that aligns closely with its perception of the prospect's willingness to pay for its product.

29. Throughout the course of the sales process, a salesperson will also ask whether a prospective customer is considering other competitive alternatives. In most cases, the presence of competition is relatively transparent. Prospects routinely reveal the identity of competitors during negotiations and may even reveal the terms of competitive offers to improve their bargaining position. Accordingly, suppliers adjust their pricing to account for other competitive offers, depending on the nature of the threat posed by the competition.

RELEVANT MARKET

30. PRR platforms used by retailers and manufacturers are a relevant product market and "line of commerce" within the meaning of Section 7 of the Clayton Act.

31. The United States is a relevant geographic market. PowerReviews was routinely the only significant competitive threat that Bazaarvoice faced in U.S.-based sales opportunities. As a result of the transaction, Bazaarvoice will be able to profitably impose targeted price increases on retailers and manufacturers based in the United States.

ELIMINATION OF HEAD-TO-HEAD COMPETITION BETWEEN BAZAARVOICE AND POWERREVIEWS WILL HARM RETAILERS AND MANUFACTURERS

A. Bazaarvoice's acquisition of PowerReviews eliminated the company's closest competitor and is likely to substantially lessen competition.

32. Before the acquisition, Bazaarvoice was the leading commercial supplier of PRR platforms, and PowerReviews was its closest competitor by a wide margin. Bazaarvoice's former CEO acknowledged that "PowerReviews is [Bazaarvoice's] biggest competitor," and the company's decision to acquire PowerReviews was bolstered by its current CEO's belief that there are "literally, no other competitors" in the market. Through the removal of its most significant rival, Bazaarvoice acquired the ability to profitably raise the price of its platform

above pre-merger levels. In fact, Bazaarvoice's current CEO pressed for the company to acquire PowerReviews because he anticipated "pricing accretion" due to the consolidation of the two firms.

33. Prospective customers routinely played Bazaarvoice and PowerReviews against each other during negotiations. Consequently, a Bazaarvoice "playbook" for competing with PowerReviews mandated that "[p]ricing only [be] delivered when [the customer's] BATNA and ZOPA have been clearly identified." BATNA and ZOPA are acronyms which stand for "best alternative to negotiated agreement" and "zone of possible agreement." For many manufacturers and retailers, PowerReviews was the best alternative to a negotiated agreement with Bazaarvoice. Accordingly, competitive pressure from PowerReviews frequently forced Bazaarvoice to offer substantial price discounts.

34. Other commercial suppliers of PRR platforms are not sufficiently close substitutes to Bazaarvoice's platform to prevent a significant post-merger price increase. PowerReviews was the most substantial restraint on Bazaarvoice's conduct in the United States before the merger, and no other competitor was a comparable rival. Bazaarvoice now faces virtually the same competitive landscape of "scarce" and "low quality" alternatives that Brant Barton identified in April 2011.

35. The absence of other meaningful competitors also has been recognized by both industry analysts and PowerReviews' former CEO, Pehr Luedtke, in calling the PRR platform market a "duopoly." Erin Defossé, Bazaarvoice's Vice President of Strategy, has agreed that "[t]here really isn't a market . . . to understand (as it relates [to ratings and reviews]), it is [Bazaarvoice] or PowerReviews." Additionally, PowerReviews' CEO, Ken Comée, and PowerReviews' Chief Financial Officer, Keith Adams, acknowledged that the combination of

Bazaarvoice and PowerReviews would create a "[m]onopoly in the market" when evaluating the anticipated benefits of the acquisition.

36. The commanding position occupied by Bazaarvoice and PowerReviews is also readily apparent from their combined market share in the Internet Retailer 500 ("IR 500"), which is an annual ranking of the 500 largest internet retailers in North America according to online sales revenue. Bazaarvoice regularly tracks its IR 500 market position, and company executives considered the impact that the acquisition of PowerReviews would have on Bazaarvoice's IR 500 market share. For example, in the diligence memorandum prepared for the company's board of directors, Bazaarvoice executives wrote, "[PowerReviews'] customer base includes 86 IR 500 retailers who have resisted becoming Bazaarvoice customers despite significant attempts to displace [PowerReviews] from these accounts" and noted that the acquisition of PowerReviews would "immediately increase the IR 500 penetration of Bazaarvoice by 49%." Within the IR 500, more than 350 retailers collect and display ratings and reviews. Approximately 70% of these firms use a PRR platform provided by Bazaarvoice or PowerReviews. Most of the remaining websites use in-house PRR solutions.

37. In addition to purchasing a PRR platform from a commercial supplier, a retailer or manufacturer seeking to include ratings and reviews on its website may elect to develop an in-house PRR solution. For many retailers and manufacturers, however, it is impractical and cost-prohibitive to build an internal solution that can satisfy their business requirements. Accordingly, the acquisition particularly harms retailers and manufacturers for which an in-house solution is not an economically viable alternative.

38. For many retailers and manufacturers, in-house PRR solutions are not sufficiently close substitutes to Bazaarvoice's platform to impede a post-merger price increase by

Bazaarvoice. It would be prohibitively expensive for many customers to develop a PRR solution with functionality comparable to the features offered by Bazaarvoice, and it would be difficult to maintain the same pace of innovation. Moreover, it would be very complex and expensive for a customer to perform the same level of moderation. In-house solutions are only a viable option for customers that are not interested in the full feature set offered by Bazaarvoice (including moderation and syndication services), or customers that are willing to invest heavily in ongoing platform development to maintain the software and create new features.

39. Bazaarvoice is able to use information obtained during the sales process to determine whether an in-house PRR solution is an economically viable alternative for a particular customer. Accordingly, in light of the merger, it will be a profit-maximizing strategy for Bazaarvoice to impose targeted price increases on customers that do not consider in-house solutions to be a viable alternative. Faced with an anticompetitive post-merger price increase, these customers would not develop an in-house solution or abandon ratings and reviews altogether.

40. Other social commerce products, including community platforms, forums, and question and answer ("Q&A") platforms, are also not substitutes for PRR platforms. These other social commerce products do not collect the same type of structured, product-level data associated with ratings and reviews. Because PRR platforms and other social commerce products serve different purposes, retailers and manufacturers routinely use PRR platforms in combination with one or more other social commerce products.

41. As a result of Bazaarvoice's acquisition of PowerReviews, customers will lose critical negotiating leverage. The elimination of PowerReviews has significantly enhanced Bazaarvoice's ability and incentive to obtain more favorable contract terms. Accordingly, many

retailers and manufacturers will now obtain less favorable prices and contract terms than Bazaarvoice and PowerReviews would have offered separately absent the merger.

B. PowerReviews' "scorched earth approach to pricing" applied significant pressure to Bazaarvoice in competitive deals.

42. Price competition with Bazaarvoice was a core component of PowerReviews' business strategy. PowerReviews positioned itself as a low-price alternative to Bazaarvoice and aggressively pursued Bazaarvoice's largest clients. The company set an internal goal to "[b]e in every deal [Bazaarvoice] is in," and encouraged price competition by building a "cost structure to support price compression." As a result of price competition between Bazaarvoice and PowerReviews, manufacturers and retailers obtained substantial discounts—sometimes in excess of 60%.

43. PowerReviews' aggressive approach to pricing frequently forced Bazaarvoice to defend its more expensive list prices. Responding to competitive pressure from PowerReviews in July 2011, Bazaarvoice's Vice President of Retail Sales warned, "[PowerReviews] has been VERY active in almost all of our deals from small to large" (emphasis in original). He claimed that PowerReviews had adopted a "scorched earth approach to pricing," which "force[d] all of [Bazaarvoice's] current prospects and customers to at least understand how and why there is such a [difference] in price."

44. If a prospective customer was unwilling to pay a premium over the PowerReviews price, Bazaarvoice often responded with substantial price discounts. Bazaarvoice frequently matched the PowerReviews price or offered a more favorable price than PowerReviews. Tony Capasso, a Vice President of Sales for Bazaarvoice, described this trend in a 2011 e-mail regarding an apparel manufacturer's consideration of PowerReviews: "[L]ate

adopters see us as the stronger brand but struggle to justify 2X-3X greater costs for a solution that looks somewhat the same. Even when we do show differences some [prospects] don't put enough stock in those differences to justify the price [difference]. We may need to battle on price in this case . . . ." Bazaarvoice ultimately offered to match the price that PowerReviews had offered the apparel retailer, which represented a substantial discount from its initial proposal.

45. Even if PowerReviews was unable to win a customer's business, its low prices set the bar for negotiations and compressed Bazaarvoice's margins. Bazaarvoice employees viewed PowerReviews as "an ankle-biter that cause[d] price pressure in deals," and acknowledged that many customers brought PowerReviews into negotiations as a "lever to knock [Bazaarvoice] down on price."

46. PowerReviews also pursued Bazaarvoice's installed customer base. In some cases, PowerReviews convinced Bazaarvoice customers to switch platforms. In other cases, an offer from PowerReviews provided additional leverage for the customer to negotiate more favorable terms from Bazaarvoice. In 2011, Alan Godfrey, Bazaarvoice's General Manager of North American Retail, described this competitive dynamic as a "full frontal assault" by PowerReviews that was "successfully penetrating the [executive] ranks of [Bazaarvoice's] anchor clients and convincing them to evaluate alternatives, or at least, negotiate [Bazaarvoice] to lower price points."

47. PowerReviews' efforts to target existing Bazaarvoice customers did not go unnoticed. In July 2011, PowerReviews convinced a large electronics retailer to reevaluate its relationship with Bazaarvoice. Afterwards, Mike Svatek, Bazaarvoice's Chief Strategy Officer, expressed concern that Bazaarvoice was "seeing new competitive pressure" from PowerReviews through an "aggressive blitz campaign." Svatek believed Bazaarvoice needed to "eradicate"

PowerReviews, and he proposed a counterattack on the PowerReviews base. He advocated an "aggressive" approach to "unseat" PowerReviews from three of its largest accounts.

48. It was common for Bazaarvoice to pursue PowerReviews customers in this fashion. For example, in response to a PowerReviews campaign targeting Bazaarvoice's manufacturing clients, Bazaarvoice put into motion a plan to "steal one or more major [PowerReviews] clients . . . by offering them something they can't refuse." This strategy was intended to send a signal to PowerReviews that Bazaarvoice was willing "to absorb some pain in return for handing [PowerReviews] major client losses." In at least two cases, Bazaarvoice offered to provide its PRR platform to large PowerReviews customers for free.

49. Before the acquisition, a number of manufacturers and retailers switched between the Bazaarvoice and PowerReviews platforms. Many times these switches were spurred by aggressive offers that were intended to displace the incumbent PRR platform provider. As a result of the acquisition, however, Bazaarvoice will no longer need to "absorb some pain" to attract PowerReviews clients to the Bazaarvoice platform or retain customers in the face of lower prices from PowerReviews. When recommending the transaction to the company's board of directors, Bazaarvoice executives noted that the transaction would enable Bazaarvoice to acquire large PowerReviews customers that had "resisted becoming Bazaarvoice customers despite significant attempts to displace [PowerReviews]." Absent the transaction, they believed it was "unlikely that [Bazaarvoice could] attract these retailers to [its] platform in the foreseeable future nor [sic] without significant cost."

C. Bazaaarvoice and PowerReviews engaged in "feature driven one-upmanship," which drove both firms to innovate and develop new PRR platform features.

50. As PowerReviews and Bazaarvoice grappled to differentiate their product offerings, they developed new features and improved the functionality offered by their respective platforms. Pehr Luedtke, PowerReviews' former CEO, described the pattern of innovation competition between Bazaarvoice and PowerReviews in a 2010 e-mail to a large consumer products retailer: "[T]here are a lot of similarities between Bazaar[v]oice and PowerReviews when it comes to features . . . we have constantly traded places in terms of who leads and who fast follows." Feature-driven competition between Bazaarvoice and PowerReviews hastened the pace of innovation and made ratings and reviews an increasingly attractive proposition for manufacturers and retailers.

51. For example, PowerReviews began offering an "in-line SEO solution" in January 2009. This was the first PRR platform feature to allow ratings and reviews to be indexed by search engines directly from the product webpage, rather than a separate website designed for search engine optimization. PowerReviews positioned its SEO feature as a best-in-class offering and targeted the shortcomings of Bazaarvoice's SEO offering during sales calls. Bazaarvoice quickly responded by developing comparable functionality.

52. Bazaarvoice, on the other hand, was the first company to create a review syndication network that connected manufacturers and retailers. PowerReviews responded by creating a similar review syndication feature for its clients. PowerReviews eventually pushed the envelope even further, aggressively marketing an "open" content syndication platform that facilitated syndication between manufacturers that were not PowerReviews clients and retailers using the PowerReviews platform. When PowerReviews announced its open syndication network, it invited all Bazaarvoice manufacturing clients to try its syndication service for free for twelve months.

53. Bazaarvoice's manufacturing clients began to ask Bazaarvoice to syndicate their reviews to retail partners on the PowerReviews platform. Bazaarvoice initially resisted, in an attempt to maintain its "closed" syndication platform. In communicating this approach to Bazaarvoice's sales leadership team, Michael Osborne, Bazaarvoice's Chief Revenue Officer wrote, "[T]ell all of your teams . . . that we do not support syndication outside of our network – and if we get requests for it, escalate to the top immediately. There's a new competitive battle coming." Internally, Bazaarvoice acknowledged that it was "making a strategic choice not to create a custom (and safe) version of [the content] feed for retailers outside of [the Bazaarvoice] network."

54. Finally, Bazaarvoice relented to customer pressure and began developing a new offering to syndicate content to PowerReviews' retailers. In an internal announcement, Erin Defossé, Bazaarvoice's Head of Product Strategy, acknowledged that this move was in response to PowerReviews' open syndication network. Brett Hurt was optimistic about his company's new approach, stating, "I cannot wait until we turn the tables on PowerReviews with their aggressive push. Our strategy is going to rock them and put them on their heels." He pushed for Bazaarvoice to execute on its plan to "destroy" PowerReviews, urging "[PowerReviews] is not waiting for us . . . . I want to aim a big bazooka in their direction."

D. The anticompetitive effects of the transaction will not be counteracted by entry, repositioning, or merger-specific efficiencies.

55. Entry or expansion by other firms is unlikely to alleviate the competitive harm caused by the transaction. Since its founding, Bazaarvoice has been the largest commercial provider of PRR platforms, and PowerReviews was its closest competitor. Other providers exist,

but they have struggled to win customers and gain market share. Bazaarvoice's competitive position is protected by substantial barriers to entry.

56. Bazaarvoice's syndication network is a formidable barrier to entry in the market for PRR platforms. As more manufacturers purchase Bazaarvoice's PRR platform, the Bazaarvoice network becomes more valuable to retailers because it will allow them to gain access to a greater volume of ratings and reviews. Similarly, as more retailers purchase Bazaarvoice's PRR platform, the Bazaarvoice network becomes more valuable for manufacturers because it will allow them to syndicate content to a greater number of retail outlets. The feedback between manufacturers and retailers creates a network effect that is a significant and durable competitive advantage for Bazaarvoice.

57. Bazaarvoice has acknowledged the importance of its syndication network as a substantial barrier to entry that protects its dominant position. Before its initial public offering in February 2012, Bazaarvoice prepared a document for an investor roadshow in which it explained the "powerful network economies" created by linking retailers to manufacturers. Bazaarvoice claimed that it competes in a "winner-take-all" market, and identified its "ability to leverage the data" from its customer base as "a key barrier [to] entry." During investor roadshows, the company boasted, "[A]ny company entering the market would have to start from the beginning by securing all of the retail clients," which would be difficult because most of the largest retail clients are already using the Bazaarvoice platform. Since its IPO, Bazaarvoice's SEC filings have continued to identify "powerful network effects" from syndication as a "competitive strength[] [that] differentiate[s] [Bazaarvoice] from [] competitors and serve[s] as [a] barrier to entry."

58. The acquisition of PowerReviews will extend the reach of Bazaarvoice's network and deprive its remaining competitors of the scale that is necessary to truly compete. Even before the acquisition, the company boasted to potential investors, "[T]he power of [Bazaarvoice's] network effect and significant advantage on a global scale is starting to crowd out competition." As Stephen Collins predicted in October 2011, Bazaarvoice's acquisition of PowerReviews threatens to "tip the scales in [Bazaarvoice's] permanent favor on the network front." During its diligence process for the transaction, Bazaarvoice anticipated that the assimilation of major PowerReviews retailers into the Bazaarvoice network would "further increase[] . . . switching costs" and "deepen[] [its] protective moat."

59. Bazaarvoice cannot demonstrate merger-specific efficiencies sufficient to counteract the acquisition's anticompetitive effects.

CAUSE OF ACTION

(Violation of Section 7 of the Clayton Act by Bazaarvoice)

60. The United States realleges and incorporates paragraphs 1 through 59 as if set forth fully herein.

61. Bazaarvoice's acquisition of PowerReviews is likely to substantially lessen competition in interstate trade and commerce in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

62. Among other things, the transaction has had the following anticompetitive effects:

(a) Significant head-to-head competition between Bazaarvoice and PowerReviews has been extinguished;

(b) Bazaarvoice has significantly reduced incentives to discount prices, increase the quality of its services, or invest in innovation;

(c) Prices will likely increase to levels above those that would have prevailed absent the transaction, forcing retailers and manufacturers to pay higher prices for PRR platforms; and

(d) Quality and innovation for PRR platforms will likely be less than the levels that would have prevailed absent the transaction.

REQUEST FOR RELIEF

63. The United States requests that:

(a) Bazaarvoice's acquisition of PowerReviews be adjudged to violate Section 7 of the Clayton Act, 15 U.S.C. § 18;

(b) the Court order Bazaarvoice to divest assets, whether possessed originally by PowerReviews, Bazaarvoice, or both, sufficient to create a separate, distinct, and viable competing business that can replace PowerReviews' competitive significance in the marketplace;

(c) the United States be awarded the costs of this action; and

(d) the United States be awarded any other equitable relief the Court deems just and proper.

Dated: January 10, 2013

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and

COMMONWEALTH OF VIRGINIA
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Plaintiffs,

v.

US AIRWAYS GROUP, INC.
111 W. Rio Salado Parkway
Tempe, AZ 85281

and

AMR CORPORATION
4333 Amon Carter Boulevard
Fort Worth, TX 76155

Defendants.

AMENDED COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, and the States of Arizona, Florida, Michigan, Tennessee, Texas, the Commonwealths of Pennsylvania and Virginia, and the District of Columbia ("Plaintiff States"), acting by and through their respective Attorneys General, bring this civil action under federal antitrust law to enjoin the planned merger of two of the nation's five major airlines, US Airways Group, Inc. ("US Airways") and AMR Corporation ("American"), and to obtain equitable and other relief as appropriate.

I. INTRODUCTION

1. Millions of passengers depend on the airline industry to travel quickly, efficiently, and safely between various cities in the United States and throughout the world. Since 1978, the nation has relied on competition among airlines to promote affordability, innovation, and service and quality improvements. In recent years, however, the major airlines have, in tandem, raised fares, imposed new and higher fees, and reduced service. Competition has diminished and consumers have paid a heavy price. This merger—by creating the world's largest airline—would, in the words of US Airways' management, "finish[ ] industry evolution." It would reduce the number of major domestic airlines from five to four, and the number of "legacy" airlines—today, Delta, United, American, and US Airways—from four to three. In so doing, it threatens substantial harm to consumers. Because of the size of the airline industry, if this merger were approved, even a small increase in the price of airline tickets, checked bags, or flight change fees would cause hundreds of millions of dollars of harm to American consumers annually.

2. American and US Airways compete directly on thousands of heavily traveled nonstop and connecting routes. Millions of passengers benefit each year from head-to-head competition that this merger would eliminate. With less competition, airlines can cut service and raise prices with less fear of competitive responses from rivals.

3. This merger will leave three very similar legacy airlines—Delta, United, and the new American—that past experience shows increasingly prefer tacit coordination over full-throated competition. By further reducing the number of legacy airlines and aligning the economic incentives of those that remain, the merger of US Airways and American would make it easier for the remaining airlines to cooperate, rather than compete, on price and service. That enhanced

cooperation is unlikely to be significantly disrupted by Southwest and JetBlue, which, while offering important competition on the routes they fly, have less extensive domestic and international route networks than the legacy airlines.

4. US Airways' own executives—who would run the new American—have long been "proponents of consolidation." US Airways believes that the industry—before 2005—had "too many" competitors, causing an "irrational business model." Since 2005, there has been a wave of consolidation in the industry. US Airways has cheered these successive mergers, with its CEO stating in 2011 that "fewer airlines" is a "good thing." US Airways' President explained this thinking that same year: "Three successful fare increases – [we are] able to pass along to customers *because of consolidation*." (emphasis added). Similarly, he boasted at a 2012 industry conference: "Consolidation has also . . . allowed the industry to do things like ancillary revenues [e.g., checked bag and ticket change fees] . . . . That is a structural permanent change to the industry and one that's impossible to overstate the benefit from it." In essence, industry consolidation has left fewer, more-similar airlines, making it easier for the remaining airlines to raise prices, impose new or higher baggage and other ancillary fees, and reduce capacity and service. This merger positions US Airways' management to continue the trend—at the expense of consumers.

5. US Airways intends to do just that. If this merger were approved, US Airways would no longer need to offer low-fare options for certain travelers. For example, US Airways employs "Advantage Fares," an aggressive discounting strategy aimed at undercutting the other legacy airlines' nonstop fares with cheaper connecting service. US Airways' hubs are in cities that generate less lucrative nonstop traffic than the other legacy airlines' hubs. To compensate, US

Airways uses its Advantage Fares to attract additional passengers on flights connecting through its hubs.

6. The other legacy airlines take a different approach. If, for example, United offers nonstop service on a route, and Delta and American offer connecting service on that same route, Delta and American typically charge the same price for their connecting service as United charges for its nonstop service. As American executives observed, the legacy airlines "generally respect the pricing of the non-stop carrier [on a given route]," even though it means offering connecting service at the same price as nonstop service. But American, Delta, and United frequently *do* charge lower prices for their connecting service on routes where US Airways offers nonstop service. They do so to respond to US Airways' use of Advantage Fares on other routes.

7. If the merger were approved, US Airways' economic rationale for offering Advantage Fares would likely go away. The merged airline's cost of sticking with US Airways' one-stop, low-price strategy would increase. Delta and United would likely undercut the merged firm on a larger number of nonstop routes. At the same time, the revenues generated from Advantage Fares would shrink as American's current nonstop routes would cease to be targets for Advantage Fares. The bottom line is that the merged airline would likely abandon Advantage Fares, eliminating significant competition and causing consumers to pay hundreds of millions of dollars more.

8. Consumers will likely also be harmed by the planned merger because American had a standalone plan to emerge from bankruptcy poised to grow. American planned to expand domestically and internationally, adding service on nearly 115 new routes. To support its plan, American recently made the largest aircraft order in industry history.

9. American's standalone plan would have bucked current industry trends toward capacity reductions and less competition. US Airways called American's growth plan "industry destabilizing" and worried that American's plan would cause other carriers to react "with their own enhanced growth plans . . . ." The result would be to increase competitive pressures throughout the industry. After the merger, US Airways' current executives—who would manage the merged firm—would be able to abandon American's efforts to expand and instead continue the industry's march toward higher prices and less service. As its CEO candidly stated earlier this year, US Airways views this merger as "the last major piece needed to fully rationalize the industry."

10. Passengers to and from the Washington, D.C. area are likely to be particularly hurt. To serve Ronald Reagan Washington National Airport ("Reagan National"), a carrier must have "slots," which are government-issued rights to take off and land. US Airways currently holds 55% of the slots at Reagan National and the merger would increase the percentage of slots held by the combined firm to 69%. The combined airline would have a monopoly on 63% of the nonstop routes served out of the airport. Competition at Reagan National cannot flourish where one airline increasingly controls an essential ingredient to competition. Without slots, other airlines cannot enter or expand the number of flights that they offer on other routes. As a result, Washington, D.C. area passengers would likely see higher prices and fewer choices if the merger were approved.

11. Notwithstanding their prior unequivocal statements about the effects of consolidation, the defendants will likely claim that the elimination of American as a standalone competitor will benefit consumers. They will argue that Advantage Fares will continue, existing capacity levels and growth plans will be maintained, and unspecified or unverified "synergies" will materialize,

creating the possibility of lower fares. The American public has seen this before. Commenting on a commitment to maintain service levels made by two other airlines seeking approval for a merger in 2010, the CEO of US Airways said: "I'm hopeful they're just saying what they need . . . to get this [transaction] approved." By making claims about benefits that are at odds with their prior statements on the likely effects of this merger, that is precisely what the merging parties' executives are doing here—saying what they believe needs to be said to pass antitrust scrutiny.

12. There is no reason to accept the likely anticompetitive consequences of this merger. Both airlines are confident they can and will compete effectively as standalone companies. A revitalized American is fully capable of emerging from bankruptcy proceedings on its own with a competitive cost structure, profitable existing business, and plans for growth. US Airways today is competing vigorously and earning record profits. Executives of both airlines have repeatedly stated that they do not need this merger to succeed.

13. The merger between US Airways and American would likely substantially lessen competition, and tend to create a monopoly, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. Therefore, this merger should be permanently enjoined.

II. JURISDICTION, INTERSTATE COMMERCE, AND VENUE

14. The United States brings this action, and this Court has subject-matter jurisdiction over this action, under Section 15 of the Clayton Act, as amended, 15 U.S.C. § 25, to prevent and restrain US Airways and American Airlines from violating Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

15. The Plaintiff States bring this action under Section 16 of the Clayton Act, 15 U.S.C. § 26, to prevent and restrain US Airways and American Airlines from violating Section 7 of the

Clayton Act, as amended, 15 U.S.C. § 18. The Plaintiff States, by and through their respective Attorneys General, bring this action as *parens patriae* on behalf of the citizens, general welfare, and economy of each of their states.

16. The defendants are engaged in, and their activities substantially affect, interstate commerce, and commerce in each of the Plaintiff States. US Airways and American Airlines each annually transport millions of passengers across state lines throughout this country, generating billions of dollars in revenue while doing so.

17. Venue is proper under Section 12 of the Clayton Act, 15 U.S.C. § 22. This Court also has personal jurisdiction over each defendant. Both defendants are found and transact business in this judicial district.

III. THE DEFENDANTS AND THE TRANSACTION

18. Defendant US Airways Group, Inc., is a Delaware corporation headquartered in Tempe, Arizona. Last year, it flew over fifty million passengers to approximately 200 locations worldwide, taking in more than $13 billion in revenue. US Airways operates hubs in Phoenix, Charlotte, Philadelphia, and Washington, D.C.

19. US Airways is performing exceptionally well. In 2012, it enjoyed record profits. It is operating at high load factors—the percentage of seats sold on its flights—and has a national and international route network, alliances with international airlines, a strong brand name, modern equipment, and a competitive cost structure. In mid-2012, US Airways' CEO, touting the airline's "record second quarter results," told Dow Jones that the company "has a great business model that works and we certainly don't need to merge with another airline."

20. Defendant AMR Corporation is a Delaware corporation headquartered in Fort Worth, Texas. AMR Corporation is the parent company of American Airlines. Last year, American

flew over eighty million passengers to approximately 250 locations worldwide, taking in more than $24 billion in revenue. American operates hubs in New York, Los Angeles, Chicago, Dallas, and Miami. The American Airlines brand is “one of the most recognized . . . in the world.”

21. In November 2011, American filed for bankruptcy reorganization and is currently under the supervision of the Bankruptcy Court for the Southern District of New York. American adopted and implemented a standalone business plan designed “to restore American to industry leadership, profitability and growth.” While in bankruptcy, American management “pursued and successfully implemented” key provisions of this plan, including revenue and network enhancements, as well as “restructuring efforts [that] have encompassed labor cost savings, managerial efficiencies, fleet reconfiguration, and other economies . . . .” That work has paid off. American reported that its revenue growth has “outpaced” the industry since entering bankruptcy and in its most recent quarterly results reported a company record-high $5.6 billion in revenues, with $357 million in profits. Under experienced and sophisticated senior management, American’s restructuring process has positioned it to produce “industry leading profitability.” As recently as January 8, 2013, American’s management presented plans to emerge from bankruptcy that would increase the destinations American serves in the United States and the frequency of its flights, and position American to compete independently as a profitable airline with aggressive plans for growth.

22. US Airways sees American the same way. Its CEO observed in December 2011 that “A[merican] is not going away, they will be stronger post-bankruptcy because they will have less debt and reduced labor costs.” A US Airways’ executive vice president similarly wrote in July 2012 that “[t]here is <u>NO</u> question about AMR’s ability to survive on a standalone basis.”

23. US Airways and American agreed to merge on February 13, 2013. US Airways shareholders would own 28 percent of the combined airline, while American shareholders, creditors, labor unions, and employees would own 72 percent. The merged airline would operate under the American brand name, but the new American would be run by US Airways management.

IV. THE RELEVANT MARKETS

A. Scheduled Air Passenger Service Between Cities

24. Domestic scheduled air passenger service enables consumers to travel quickly and efficiently between various cities in the United States. Air travel offers passengers significant time savings and convenience over other forms of travel. For example, a flight from Washington, D.C. to Detroit takes just over an hour of flight time. Driving between the two cities takes at least eight hours. A train between the two cities takes more than fifteen hours.

25. Due to time savings and convenience afforded by scheduled air passenger service, few passengers would substitute other modes of transportation (car, bus, or train) for scheduled air passenger service in response to a small but significant industry-wide fare increase. Another way to say this, as described in the *Fed. Trade Comm'n & U.S. Dep't of Justice Horizontal Merger Guidelines* (2010), and endorsed by courts in this Circuit, is that a hypothetical monopolist of all domestic scheduled air passenger service likely would increase its prices by at least a small but significant and non-transitory amount. Scheduled air passenger service, therefore, constitutes a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

26. A "city pair" is comprised of a flight's departure and arrival cities. For example, a flight departing from Washington and arriving in Chicago makes up the Washington-Chicago city pair.

Passengers seek to depart from airports close to where they live and work, and arrive at airports close to their intended destinations. Most airline travel is related to business, family events, and vacations. Thus, most passengers book flights with their origins and destinations predetermined. Few passengers who wish to fly from one city to another would likely switch to flights between other cities in response to a small but significant and non-transitory fare increase.

27. Airlines customarily set fares on a city pair basis. For each city pair, the degree and nature of the competition from other airlines generally plays a large role in an airline's pricing decision.

28. Therefore, a hypothetical monopolist of scheduled air passenger service between specific cities likely would increase its prices by at least a small but significant and non-transitory amount. Accordingly, each city pair is a relevant geographic market and section of the country under Section 7 of the Clayton Act.

29. Consumer preferences also play a role in airline pricing and are relevant for the purpose of analyzing the likely effects of the proposed merger. Some passengers prefer nonstop service because it saves travel time; some passengers prefer buying tickets at the last minute; others prefer service at a particular airport within a metropolitan area. For example, most business customers traveling to and from downtown Washington prefer service at Reagan National over other airports in the Washington, D.C. metropolitan area. Through a variety of fare restrictions and rules, airlines can profitably raise prices for some of these passengers without raising prices for others. Thus, the competitive effects of the proposed merger may vary among passengers depending on their preferences for particular types of service or particular airports.

B. Takeoff and Landing Slots at Reagan National Airport

30. Reagan National is one of only four airports in the country requiring slots for takeoffs and landings. Slots are expensive (often valued at over $2 million per slot), difficult to obtain, and only rarely change hands between airlines. There are no alternatives to slots for airlines seeking to enter or expand their service at Reagan National.

31. Reagan National is across the Potomac River from Washington, D.C., and, due to its proximity to the city and direct service via the Metro, airlines actively seek to serve passengers flying into and out of Reagan National. Airlines do not view service at other airports as adequate substitutes for service offered at Reagan National for certain passengers, and thus they are unlikely to switch away from buying or leasing slots at Reagan National in response to a small but significant increase in the price of slots. Airlines pay significant sums for slots at Reagan National, despite having the option of serving passengers through the region's other airports. A hypothetical monopolist of slots at Reagan National likely would increase its prices by at least a small but significant and non-transitory amount. Thus, slots at Reagan National Airport constitute a line of commerce, section of the country, and relevant market within the meaning of Section 7 of the Clayton Act.

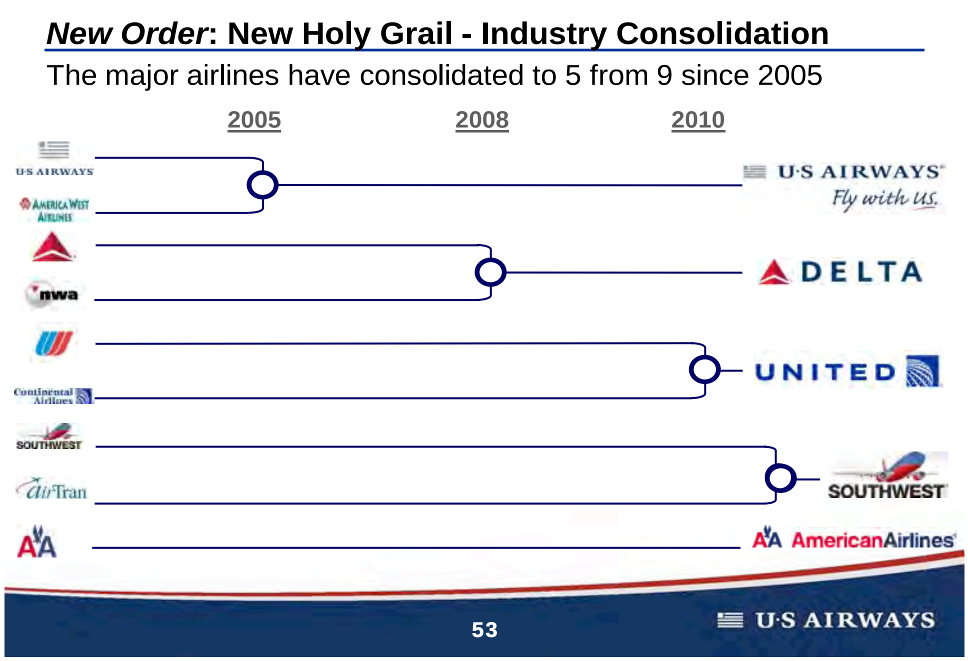
V. THE MERGER IS LIKELY TO RESULT IN ANTICOMPETITIVE EFFECTS

A. Industry Background

32. Today, four network or "legacy" airlines remain in the United States: American, US Airways, United, and Delta. These four have extensive national and international networks, connections to hundreds of destinations, established brand names, and strong frequent flyer reward programs. In addition, there are non-network airlines, including Southwest Airlines and a handful of smaller firms, which typically do not offer "hub-and-spoke" service.

33. Airlines compete in many ways. One is the price of a ticket. Airlines also compete based on: nonstop versus connecting flights; number of destinations served; convenient flight schedules; passenger comfort and seating policies; choices for classes of service; carry-on baggage policies; the degree of personal service at ticket counters and boarding areas; onboard meal and drink service; in-flight entertainment; and the quality and generosity of frequent flyer programs.

34. Since 2005, the U.S. airline industry has undergone significant consolidation. The consolidation "wave" started with the 2005 merger between US Airways and America West, creating today's US Airways. In 2008, Delta and Northwest Airlines merged; in 2010, United and Continental merged; and in 2011, Southwest Airlines and AirTran merged. The chart below, in which one of US Airways' executive vice presidents referred to industry consolidation as the "New Holy Grail," demonstrates that since 2005 the number of major airlines has dropped from nine to five.



35. Increasing consolidation among large airlines has hurt passengers. The major airlines have copied each other in raising fares, imposing new fees on travelers, reducing or eliminating service on a number of city pairs, and downgrading amenities. An August 2012 presentation from US Airways observes that consolidation has resulted in "Fewer and Larger Competitors." The structural change to "fewer and larger competitors" has allowed "[t]he industry" to "reap the benefits." Those benefits to the industry are touted by US Airways in the same presentation as including "capacity reductions" and new "ancillary revenues" like bag fees.

B. Many Relevant Markets Are Highly Concentrated and the Planned Merger Would Significantly Increase that Concentration

36. In 2005, there were nine major airlines. If this merger were approved, there would be only four. The three remaining legacy airlines and Southwest would account for over 80% of the domestic scheduled passenger service market, with the new American becoming the biggest airline in the world.

37. Market concentration is one useful indicator of the level of competitive vigor in a market, and the likely competitive effects of a merger. The more concentrated a market, and the more a transaction would increase concentration in a market, the more likely it is that a transaction would result in a meaningful reduction in competition. Concentration in relevant markets is typically measured by the Herfindahl-Hirschman Index ("HHI"). Markets in which the HHI exceeds 2,500 points are considered highly concentrated. Post-merger increases in HHI of more than 200 points are considered to be significant increases in concentration.

38. In more than 1,000 of the city pair markets in which American and US Airways currently compete head-to-head, the post-merger HHI would exceed 2,500 points and the merger would increase the HHI by more than 200 points. For example, on the Charlotte-Dallas city pair, the post-merger HHI will increase by 4,653 to 9,324 (out of 10,000). In these markets, US Airways

and American annually serve more than 14 million passengers and collect more than $6 billion in fares. The substantial increases in concentration in these highly concentrated markets demonstrate that in these relevant markets, the merger is presumed, as a matter of law, to be anticompetitive. The relevant markets described in this paragraph are listed in Appendix A.

39. Other city pairs across the country would likely be affected by the loss of competition stemming from this planned merger. In some of these markets, US Airways and American compete head-to-head, often offering consumers discounted fares. If approved, this merger will likely end much of that discounting, significantly harming consumers in the process. Moreover, the loss of competition in these markets would increase the likelihood that the remaining airlines can coordinate to raise price, reduce output, and diminish the quality of their services. In these relevant markets, the merger is likely also to substantially lessen competition.

40. In the market for slots at Reagan National, the merger would result in a highly concentrated market, with a post-merger HHI of 4,959. The merger would also significantly increase concentration by 1,493 points. As a result, the merger should be presumed, as a matter of law, to be anticompetitive.

C. This Merger Would Increase the Likelihood of Coordinated Behavior Among the Remaining Network Airlines Causing Higher Fares, Higher Fees, and More Limited Service

41. The structure of the airline industry is already conducive to coordinated behavior: Few large players dominate the industry; each transaction is small; and most pricing is readily transparent.

42. For example, the legacy airlines closely watch the pricing moves of their competitors. When one airline "leads" a price increase, other airlines frequently respond by following with price increases of their own. The initiating carrier will lead the price increase and then see if the

other carriers will match the increase. If they do not, the initiating carrier will generally withdraw the increase shortly thereafter.

43. The legacy airlines also use what they call "cross-market initiatives," or "CMIs," to deter aggressive discounting and prevent fare wars. A CMI occurs where two or more airlines compete against each other on multiple routes. If an airline offers discounted fares in one market, an affected competitor often responds with discounts in another market—a CMI—where the discounting airline prefers a higher fare. CMIs often cause an airline to withdraw fare discounts. For example, in the fall of 2009, US Airways lowered fares and relaxed restrictions on flights out of Detroit (a Delta stronghold) to Philadelphia. Delta responded by offering lower fares and relaxed restrictions from Boston to Washington (a US Airways stronghold).
US Airways' team lead for pricing observed Delta's move and concluded "[w]e have more to lose in BOSWAS . . . I think we need to bail on the [Detroit-Philadelphia] changes."

44. There is also past express coordinated behavior in the industry. For example, all airlines have complete, accurate, and real-time access to every detail of every airline's published fare structure on every route through the airline-owned Airline Tariff Publishing Company ("ATPCO"). US Airways' management has called ATPCO "a dedicated price-telegraph network for the industry." The airlines use ATPCO to monitor and analyze each other's fares and fare changes and implement strategies designed to coordinate pricing. Airlines have previously used ATPCO to engage in coordinated behavior. In 1992, the United States filed a lawsuit to stop several airlines, including both defendants, from using their ATPCO filings as a signaling device to facilitate agreements on fares. That lawsuit resulted in a consent decree, now expired.

45. US Airways also has communicated directly with a competitor when it was upset by that competitor's efforts to compete more aggressively. In 2010, one of US Airways' larger rivals

extended a "triple miles" promotion that set off a market share battle among legacy carriers. The rival airline was also expanding into new markets and was rumored to be returning planes to its fleet that had been mothballed during the recession. US Airways' CEO complained about these aggressive maneuvers, stating to his senior executives that such actions were "hurting [the rival airline's] profitability – and unfortunately everyone else's." US Airways' senior management debated over email about how best to get the rival airline's attention and bring it back in line with the rest of the industry. In that email thread, US Airways' CEO urged the other executives to "portray[ ] these guys as idiots to Wall Street and anyone else who'll listen." Ultimately, to make sure the message was received, US Airways' CEO forwarded the email chain—and its candid discussion about how aggressive competition would be bad for the industry—directly to the CEO of the rival airline. (The rival's CEO immediately responded that it was an inappropriate communication that he was referring to his general counsel.)

46. Coordination becomes easier as the number of major airlines dwindles and their business models converge. If not stopped, the merger would likely substantially enhance the ability of the industry to coordinate on fares, ancillary fees, and service reductions by creating, in the words of US Airways executives, a "Level Big 3"of network carriers, each with similar sizes, costs, and structures.

47. Southwest, the only major, non-network airline, and other smaller carriers have networks and business models that differ significantly from the legacy airlines. Traditionally, Southwest and other smaller carriers have been less likely to participate in coordinated pricing or service reductions. For example, Southwest does not charge customers for a first checked bag or ticket change fees. Yet that has not deterred the legacy carriers from continuing, and even increasing, those fees. In November 2011, a senior US Airways executive explained to her boss the reason:

"Our employees know full well that the real competition for us is [American], [Delta], and [United]. Yes we compete with Southwest and JetBlue, but the product is different and the customer base is also different."

1. The Merger Would Likely Result in the Elimination of US Airways' Advantage Fares

48. On routes where one legacy airline offers nonstop service, the other legacies "generally respect the pricing of the non-stop carrier," as American has put it. Thus, if American offers nonstop service from Washington to Dallas at $800 round-trip, United and Delta will, "[d]espite having a service disadvantage," price their connecting fares at the level of American's nonstop fares. The legacy carriers do this because if one airline, say Delta, were to undercut fares in markets where American offers nonstop service, American would likely do the same in Delta's nonstop markets. To Delta, the cost of being undercut in its nonstop markets exceeds the benefit it would receive from winning additional passengers in American nonstop markets.

49. US Airways, alone among the legacy carriers, has a different cost-benefit analysis for pricing connecting routes. Although it too is a national network carrier, US Airways has hubs in cities that generate less revenue from passengers flying nonstop than the other legacy airlines' hubs. Because US Airways' hubs generate less revenue from passengers flying nonstop, US Airways must gain more revenue from connecting passengers. It gets that revenue by offering connecting service that is up to 40% cheaper than other airlines' nonstop service. US Airways calls this program "Advantage Fares."

50. Millions of consumers have benefitted. Advantage Fares offer consumers, especially those who purchase tickets at the last minute, meaningfully lower fares. The screenshot below from ITA Software, Airfare Matrix ("ITA"), taken on August 12, 2013, for travel departing on

August 13 and returning August 14 from Miami to Cincinnati, shows the benefits of US Airways' Advantage Fare program to passengers[1]:

All flights	US Airways, Inc.	Multiple Airlines	American Airlines Inc.	United Airlines, Inc.	Delta Air Lines Inc.
Nonstop	--	--	From $740	--	--
1 stop	From $471	From $686	From $751	From $762	From $762

American is the only airline on this route to offer nonstop service, charging $740. Delta and United do not meaningfully compete. Both charge more for their connecting service than American charges for nonstop service. Thus, on this particular route, a passenger who chose Delta or United would pay more for an inferior product. In contrast, US Airways' fares today are significantly lower than American's fares, and offer consumers a real choice. Those consumers who are more price conscious receive the benefit of a substantially lower-fare option. In this case, a customer who purchased a US Airways one-stop ticket would save $269 compared to American's nonstop service.

51. The benefits from Advantage Fares extend to hundreds of other routes, including those where more than one carrier offers nonstop service. The screenshot below from ITA, taken on August 12, 2013, for travel departing on August 13 and returning August 14 from New York to Houston, demonstrates just how dramatic the savings can be:

[1] "Multiple Airlines" refers to an itinerary where a passenger uses different airlines for their departing and returning flights.

	US Airways, Inc.	Jetblue Airways Corporation	AirTran Airways, Inc.	Multiple Airlines	United Airlines, Inc.	Delta Air Lines Inc.	American Airlines Inc.
All flights		jetBlue					
Nonstop	--	From $907	--	--	From $1,445	From $1,457	From $1,477
1 stop	From **$575**	From $1,618	From $909	From $1,006	From $1,331	From $1,467	From $1,467

US Airways' connecting fare is $870 cheaper than the other legacy carriers' nonstop flights, and beats JetBlue and AirTran's fares by more than $300. Although Southwest does not participate in the standard online travel sites, a cross-check against the Southwest website demonstrates that US Airways also beats Southwest's $887 nonstop fare by more than $300.

52. Other airlines have chosen to respond to Advantage Fares with their own low connecting fares in markets where US Airways has nonstop service. That is, the other legacy airlines undercut US Airways' nonstop fares the same way that US Airways undercuts their nonstop fares. The screenshot below from ITA, taken on August 12, 2013, for travel on August 13 and returning August 14 from Charlotte to Syracuse, shows how the other legacy carriers respond to Advantage Fares to the benefit of consumers:

	Delta Air Lines Inc.	United Airlines, Inc.	Multiple Airlines	US Airways, Inc.	Jetblue Airways Corporation	American Airlines Inc.
All flights					jetBlue	
Nonstop	--	--	--	From $685	--	--
1 stop	From **$375**	From $395	From $458	From $696	From $691	From $1,258

Here, US Airways is the only airline to offer nonstop service, charging $685. Delta and United undercut that price by charging $375 and $395, respectively, for connecting service. Once again, consumers benefit by having the option of far less expensive connecting service. A customer who buys a Delta one-stop flight saves $310 over US Airways' nonstop service.

53. There are over 100 routes where other carriers offer nonstop service on which US Airways does not offer Advantage Fares. Consumers in these markets are not given the option of a low-cost connecting alternative and are forced to pay significantly more for service. For example, US Airways does not currently offer Advantage Fares on flights from Cincinnati to Pittsburgh. Without the option of a low connecting fare, consumers see significantly higher prices, as illustrated by a screenshot from ITA, taken on August 12, 2013, for travel on August 13 and returning August 14:

All flights	Delta Air Lines Inc.	Multiple Airlines	US Airways, Inc.	United Airlines, Inc.	American Airlines Inc.
Nonstop	From $892	--	--	--	--
1 stop	From $1,298	From $902	From $911	From $914	From $1,363

.

54. Advantage Fares have proven highly disruptive to the industry's overall coordinated pricing dynamic. An American executive expressed her frustration in September 2011 with US Airways' Advantage Fares, noting that US Airways was "still way undercutting us [on flights from Boston and New York to Dallas] and getting significant share." One response American considered was to lower its fares on the same route. Another option was "to take up this battle w/them again," in an attempt to force US Airways to limit or abandon its strategy.

55. US Airways' President acknowledged in September 2010 that its Advantage Fare strategy "would be different if we had a different route network . . . ." Currently, US Airways'

network structure precludes Delta and United from preventing US Airways' aggressive "one-stop pricing." Because US Airways' hubs have relatively less nonstop traffic, the other legacy airlines cannot respond sufficiently to make Advantage Fares unprofitable. But by increasing the size and scope of US Airways' network, the merger makes it likely that US Airways will have to discontinue its Advantage Fares.

56. American's executives agree. American believes that Advantage Fares will be eliminated because of the merger. Internal analysis at American in October 2012 concluded that "[t]he [Advantage Fares] program would have to be eliminated in a merger with American, as American's large non-stop markets would now be susceptible to reactionary pricing from Delta and United." Another American executive observed that same month: "The industry will force alignment to a single approach—one that aligns with the large legacy carriers as it is revenue maximizing."

57. US Airways believes that it currently gains "most of its advantage fare value from AA," meaning that Advantage Fares provide substantial value for US Airways on routes where American is the legacy airline offering nonstop service. Post-merger, continuing Advantage Fares would mean that US Airways was taking that value away from itself by undercutting its own nonstop prices. Plainly, this would make no sense. Thus, for US Airways post-merger, the benefits of Advantage Fares would go down, and its costs would go up.

58. By ending Advantage Fares, the merger would eliminate lower fares for millions of consumers. Last year, more than 2.5 million round-trip passengers—including more than 250,000 passengers from the greater Washington, D.C. area; another 250,000 passengers in the Dallas-Fort Worth area; half a million passengers in the greater New York City area; and 175,000 passengers from Detroit—bought an Advantage Fare ticket. Hundreds of thousands of

other passengers flying nonstop on US Airways, particularly from their hubs in Phoenix, Charlotte, and Philadelphia, benefited from responsive fares offered by the legacy airlines.

2. The Merger Would Likely Lead to Increased Industry-Wide "Capacity Discipline," Resulting in Higher Fares and Less Service

59. Legacy airlines have taken advantage of increasing consolidation to exercise "capacity discipline." "Capacity discipline" has meant restraining growth or reducing established service. The planned merger would be a further step in that industry-wide effort. In theory, reducing unused capacity can be an efficient decision that allows a firm to reduce its costs, ultimately leading to lower consumer prices. In the airline industry, however, recent experience has shown that capacity discipline has resulted in fewer flights and higher fares.

60. Each significant legacy airline merger in recent years has been followed by substantial reductions in service and capacity. These capacity reductions have not consisted simply of cancellation of empty planes or empty seats; rather, when airlines have cut capacity after a merger, the number of passengers they carry on the affected routes has also decreased.

61. US Airways has recognized that it benefitted from this industry consolidation and the resulting capacity discipline. US Airways has long taken the position that the capacity cuts achieved through capacity discipline "enabled" fare increases and that "pricing power" results from "reduced industry capacity." US Airways' CEO explained to investors in 2006 that there is an "inextricable link" between removing seats and raising fares.

62. In 2005, America West—managed then by many of the same executives who currently manage US Airways—merged with US Airways. America West had hubs in Phoenix and Las Vegas while the former US Airways had hubs in Pittsburgh, Charlotte, and Philadelphia. Following the merger, the combined firm reduced capacity, including significant cuts in Pittsburgh and Las Vegas. In 2010, the Chief Financial Officer for US Airways explained:

> We believe in the hub system. I just think there's too many hubs. If you look across the country, you can probably pick a few that are smaller hubs and maybe duplicative to other hubs that airlines have that they could probably get out of. In our example, we merged with US Airways [and] . . . what we have done over time, which is unfortunate for the cities, but we couldn't hold a hub in Pittsburgh and we couldn't hold a hub in Las Vegas. So over time we have consolidated and condensed our operation back, which is really important, condensed it back to our major hubs.

A post-merger US Airways analysis confirmed that it succeeded in obtaining a "3% to 4% capacity reduction."

63. In 2006, on the heels of the America West/US Airways merger, the combined firm submitted an ultimately unsuccessful hostile bid for Delta Air Lines. US Airways' management had concluded that a merged US Airways/Delta could reduce the combined carrier's capacity by 10 percent, which would lead to higher revenues for the combined firm and for the industry. In 2007, following the rejection of the hostile bid, US Airways' CEO explained to investors how the deal would have increased industry profits:

> It's part of what we tried to impress upon people as we were going through our run at Delta, was that . . . it was good for US Airways [and] good for the entire industry. We're going to take out 4% of the industry capacity as we did that. Everyone's 2008 numbers would look a (expletive) of a lot better had that transaction happened . . . .

64. In 2008, Delta merged with Northwest Airlines. Despite promises to the contrary, the combined airline reduced capacity, including significant cuts at its former hubs in Cincinnati and Memphis. US Airways' CEO was "quite happy" to see the merger and advocated for further consolidation. He explained that an industry structure of "five different hub and spoke airlines with who knows how many hubs across the United States . . . results in all of us fighting for the same connecting passengers over numerous hubs." Left unsaid was that fewer airlines meant less competition and higher fares.

65. In May 2010, United Airlines and Continental Airlines announced their planned merger. The announcement caused speculation about the future of each airline's hubs, including Continental's Cleveland hub. In Congressional testimony, an industry analyst stated that he did not believe the merger would cause reductions in Cleveland. On June 18, 2010, upon seeing the testimony, US Airways' CEO wrote an email to other US Airways executives stating, "[s]urely these guys [United/Continental] aren't really planning to keep Cleveland open. I'm hopeful they're just saying what they need to (including to [the analyst]) to get this approved." United and Continental closed their deal on October 1, 2010. The combined firm has reduced capacity at nearly all of its major hubs (including Cleveland) and at many other airports where the two airlines previously competed. Similarly, Southwest/AirTran has reduced service in a number of its focus cities and on many of AirTran's former routes following its 2011 merger.

66. The defendants are fully aware of these earlier mergers' effects. A 2012 American Airlines analysis concluded that "following a merger, carriers tend to remove capacity or grow more slowly than the rest of the industry." US Airways' management concluded that although industry consolidation has been a success, as its CEO stated publicly in 2010, the industry had yet to hit its "sweet spot," and additional consolidation was needed because the industry remained "overly fragmented."

67. A merger with American would allow US Airways to hit the "sweet spot." For consumers, however, it would be anything but sweet. US Airways believes that merging with American "finishes industry evolution" by accomplishing US Airways' goal of "reduc[ing] capacity more efficiently." When first considering a combination with American, US Airways projected that the merged firm could reduce capacity by as much as 10 percent. Similarly, American expects that the merger will lead to capacity reductions that would negatively impact

"communities," "people," "customers," and "suppliers." Higher fares would be right around the corner.

3. The Planned Merger Would Likely Block American's Standalone Expansion Plans, Thwarting Likely Capacity Increases

68. American does not need this merger to thrive, let alone survive. Before the announcement of this merger, a key component of American's standalone plan for exiting bankruptcy revolved around substantial expansion, including increases in both domestic and international flights. Thus, in 2011, American placed the largest order for new aircraft in the industry's history.

69. US Airways executives feared that American's standalone growth plan would disrupt the industry's capacity discipline "momentum." In a 2012 internal presentation, US Airways executives recognized that while "[i]ndustry mergers and capacity discipline expand margins," American's standalone "growth plan has potential to disrupt the new dynamic" and would "Reverse Industry Capacity Trends." Moreover, US Airways believed that if American implemented its growth plans, other airlines would "react to AMRs plans with their own enhanced growth plans destabilizing industry." US Airways believed that American's standalone capacity growth would "negatively impact" industry revenues and threaten industry pricing.

70. US Airways thought that a merger with American was a "lower risk alternative" than letting American's standalone plan come to fruition because US Airways management could maintain capacity discipline. American's executives have observed that "the combined network would likely need to be rationalized," especially given the merged carrier's numerous hubs, and that it is "unlikely that [a combined US Airways/American] would pursue growth . . . ."

4. The Merger Would Likely Result in Higher Fees

71. Since 2008, the airline industry has increasingly charged consumers fees for services that were previously included in the price of a ticket. These so-called ancillary fees, including those for checked bags and flight changes, have become very profitable. In 2012 alone, airlines generated over $6 billion in fees for checked bags and flight changes. Even a small increase in these fees would cost consumers millions.

72. Increased consolidation has likely aided the implementation of these fees. The levels of the ancillary fees charged by the legacy carriers have been largely set in lockstep. One airline acts as the "price leader," with others following soon after. Using this process, as a US Airways strategic plan observed, the airlines can raise their fees without suffering "market share impacts." For example, American announced that it would charge for a first checked bag on May 21, 2008. On June 12, 2008, both United and US Airways followed American's lead. Similarly, over a period of just two weeks this spring, all four legacy airlines increased their ticket change fee for domestic travel from $150 to $200.

73. The legacy airlines recognize that the success of any individual attempt to impose a new fee or fee increase depends on whether the other legacies follow suit. When, in July 2009, American matched the other legacy carriers by raising its checked bag fee to $20, but did not join the others in offering a $5 web discount, US Airways was faced with the decision of whether to "match" American by either eliminating its own web discount, or raising its price to $25, with a $5 discount. US Airways' CEO gave his view:

> I can't believe I'm saying this, but I think we should stand still on this for now. I recognize that increases the chances of everyone standing still . . . the [dollars] aren't compelling enough for us to stick our necks out first. I do think D[elta] or U[nited] won't let them have an advantage, so it'll get matched – I'm just not sure we should go first. If a couple weeks go by and no one's moved, we can always jump in.

74. Similarly, when US Airways was considering whether to raise its second checked bag fee to $100 to match Delta's fee, a US Airways executive observed: "Wow - $100 is a lot for second bag. I would think there's big passenger gag reflex associated with that, but if we can get it, we should charge it. Do you think we should wait for [United] or [American] to move first, though?"

75. Conversely, in 2008, when US Airways began charging passengers for soft drinks, the other legacy airlines did not follow its lead, and US Airways backed off. US Airways' CEO explained: "With US Airways being the only network carrier to charge for drinks, we are at a disadvantage." Had US Airways not rescinded this fee, it would have lost passengers to the other legacy airlines.

76. At times, the airlines consider new fees or fee increases, but hold off implementing them while they wait to see if other airlines will move first. For example, on April 18, United announced that it was increasing its ticket change fee from $150 to $200. American decided that "waiting for [Delta] and then moving to match if [Delta] comes along" would be its best strategy. Over the next two weeks, US Airways, Delta, and American each fell in line, leading a US Airways executive to observe on May 1: "A[merican] increased their change fees this morning. The network carriers now have the same $200 domestic . . . change fees."

77. Post-merger, the new American would likely lead new fee increases. A December 2012 discussion between US Airways executives included the observation that after the merger, "even as the world's largest airline we'd want to consider raising some of the baggage fees a few dollars in some of the leisure markets."

78. New checked bag fees on flights from the United States to Europe are a likely target. Both US Airways and American have considered imposing a first checked bag fee on flights to

Europe but have refrained from doing so. US Airways seriously considered leading such a price move but was concerned that other airlines would not match: "We would hope that [other airlines] would follow us right away . . . but there is no guarantee . . . ." Ultimately, US Airways concluded it was "too small" to lead additional checked bag fees for flights to Europe. Post-merger, that would no longer be true. The merged firm would be the world's largest airline, giving it sufficient size to lead industry fee and price increases across the board.

79. Some fee increases are likely to result from US Airways raising American's existing fees. Today, "US Airways generally charges higher bag fees than AA" for travel from the United States to international destinations. Post-merger, US Airways would likely raise American's ancillary fees to US Airways' higher fee levels as part of a "fee harmonization" process. US Airways' own documents estimate that "fee harmonization" would generate an additional $280 million in revenue annually—directly harming consumers by the same amount. A US Airways presentation from earlier this year analyzing the merger identifies American's lower bag fees as a "value lever" that US Airways "will likely manage differently with tangible financial upside." The analysis concludes that "[i]ncreasing AA baggage fees to match US creates significant revenue impact." US Airways also plans to institute its fees ($40 on average) for the redemption of frequent flyer tickets on American's existing frequent fliers, who currently are not charged for mileage redemption.

80. The merger would also likely reduce the quality and variety of ancillary services offered by the legacy airlines—a side effect of consolidation anticipated and embraced by US Airways' CEO. In a 2011 email exchange lamenting the need for US Airways to deploy wireless internet on all of its airplanes, a senior US Airways executive groused:

> [N]ext it will be more legroom. Then industry standard labor contracts. Then better wines. Then the ability to book on Facebook. Penultimately, television commercials. Then, finally, we will pay the NYSE an exorbitant fee to change our ticker symbol [from LCC].

US Airways' CEO responded: "Easy now. Consolidation will help stop much of the stupid stuff but inflight internet is not one of them."

81. If the planned merger is enjoined, both American and US Airways will have to compete against two larger legacy rivals, and against each other. The four legacy airlines will not look exactly the same. As the smallest of the legacy airlines, American and US Airways will have greater incentives to grow and compete aggressively through lower ancillary fees, new services, and lower fares.

D. The Merger Would Eliminate Head-to-Head Competition in Hundreds of Relevant Markets and Entrench US Airways' Dominance at Reagan National Airport

82. American and US Airways engage in head-to-head competition with nonstop service on 17 domestic routes representing about $2 billion in annual industry-wide revenues. American and US Airways also compete directly on more than a thousand routes where one or both offer connecting service, representing billions of dollars in annual revenues. The merger's elimination of this head-to-head competition would create strong incentives for the merged airline to reduce capacity and raise fares where they previously competed.

83. The combined firm would control 69% of the slots at Reagan National Airport, almost six times more than its closest competitor. This would eliminate head-to-head competition at the airport between American and US Airways. It would also effectively foreclose entry or expansion by other airlines that might increase competition at Reagan National.

84. The need for slots is a substantial barrier to entry at Reagan National. The FAA has occasionally provided a limited number of slots for new service. In almost all cases, however, a

carrier wishing to begin or expand service at Reagan National must buy or lease slots from an airline that already owns them.

85. This merger would thwart any prospect for future entry or expansion at Reagan National. US Airways, which already has 55% of the airport's slots, does not sell or lease them because any slot that goes to another airline will almost certainly be used to compete with US Airways. The merger would only increase US Airways' incentives to hoard its slots. Today, US Airways provides nonstop service to 71 airports from Reagan National, and it faces no nonstop competitors on 55 of those routes. After this merger, the number of US Airways routes with no nonstop competition would increase to 59, leaving, at best, only 21 routes at the entire airport with more than one nonstop competitor. Unsurprisingly, Reagan National is US Airways' second most-profitable airport.

86. Potential entrants would likely not be able to turn to other airlines to obtain slots. When allocating their slots, airlines prioritize their most profitable routes, typically those where they have a frequent, significant pattern of service. If a carrier has a small portfolio of slots, it is likely to allocate almost all of its slots to its most profitable routes. If it has additional slots beyond what is needed to serve those routes, a carrier will then work its way down to other routes or sell or lease those slots to other airlines. Over the last several years, US Airways has purchased nearly all of the slots that might otherwise be available to interested buyers. Thus, before this planned merger, American was the only airline at Reagan National with the practical ability to sell or lease additional slots.

87. In March 2010, American and JetBlue entered into an arrangement in which JetBlue traded slots at New York's JFK International Airport to American in exchange for American trading slots at Reagan National to JetBlue. And until American reached agreement with

US Airways to merge, it had been negotiating to sell those slots and ten other Reagan National slots to JetBlue.

88. JetBlue's entry on four routes, particularly Reagan National to Boston, has generated stiff price competition. Fares on the route have dropped dramatically. US Airways estimated that after JetBlue's entry, the last-minute fare for travel between Reagan National and Boston dropped by over $700. The combined firm will have the right to terminate the JetBlue leases and thereby eliminate, or at least diminish, JetBlue as a competitor on some or all of these routes.

89. The merger would also eliminate the potential for future head-to-head competition between US Airways and American on flights at Reagan National. In 2011, US Airways planned to start service from Reagan National to Miami and St. Louis, which would directly compete with American's existing service. US Airways argued to the Department of Transportation that this new competition would "substantial[ly] benefit[]" consumers, and so asked DOT to approve the purchase of slots from Delta that would make the service possible. DOT ultimately approved that purchase. When it developed its plan to merge with American, however, US Airways abandoned its plans to enter those markets and deprived consumers of the "substantial benefits" it had promised.

90. By acquiring American's slot portfolio, US Airways would eliminate existing and future head-to-head competition, and effectively block other airlines' competitive entry or expansion.

VI. ABSENCE OF COUNTERVAILING FACTORS

91. New entry, or expansion by existing competitors, is unlikely to prevent or remedy the merger's likely anticompetitive effects. New entrants into a particular market face significant barriers to success, including difficulty in obtaining access to slots and gate facilities; the effects of corporate discount programs offered by dominant incumbents; loyalty to existing frequent

flyer programs; an unknown brand; and the risk of aggressive responses to new entry by the dominant incumbent carrier. In addition, entry is highly unlikely on routes where the origin or destination airport is another airline's hub, because the new entrant would face substantial challenges attracting sufficient local passengers to support service.

92. United and Delta are unlikely to expand in the event of anticompetitive price increases or capacity reductions by the merged airline. Indeed, those carriers are likely to benefit from and participate in such conduct by coordinating with the merged firm.

93. The remaining airlines in the United States, including Southwest and JetBlue, have networks and business models that are significantly different from the legacy airlines. In particular, most do not have hub-and-spoke networks. In many relevant markets, these airlines do not offer any service at all, and in other markets, many passengers view them as a less preferred alternative to the legacy carriers. Therefore, competition from Southwest, JetBlue, or other airlines would not be sufficient to prevent the anticompetitive consequences of the merger.

94. There are not sufficient acquisition-specific and cognizable efficiencies that would be passed through to U.S. consumers to rebut the presumption that competition and consumers would likely be harmed by this merger.

VII. VIOLATION ALLEGED

95. The effect of the proposed merger, if approved, likely will be to lessen competition substantially, or tend to create a monopoly, in interstate trade and commerce in the relevant markets, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

96. Unless enjoined, the proposed merger likely would have the following effects in the relevant markets, among others:

(a) actual and potential competition between US Airways and American Airlines would be eliminated;

(b) competition in general among network airlines would be lessened substantially;

(c) ticket prices and ancillary fees would be higher than they otherwise would;

(d) industry capacity would be lower than it otherwise would;

(e) service would be lessened; and

(f) the availability of slots at Reagan National would be significantly impaired.

VIII. REQUEST FOR RELIEF

97. Plaintiffs request:

(a) that US Airways' proposed merger with American Airlines be adjudged to violate Section 7 of the Clayton Act, 15 U.S.C. § 18;

(b) that Defendants be permanently enjoined from and restrained from carrying out the planned merger of US Airways and American or any other transaction that would combine the two companies;

(c) that Plaintiffs be awarded their costs of this action, including attorneys' fees to Plaintiff States; and

(d) that Plaintiffs be awarded such other relief as the Court may deem just and proper.

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APPENDIX A

CITY PAIRS WHERE THE MERGER IS PRESUMPTIVELY ILLEGAL

- HHIs in this appendix are calculated based on publicly available non-stop and one-stop airline ticket revenue data for 2012 from Department of Transportation's Airline Origin and Destination Survey (DB1B) database, available at: http://www.transtats.bts.gov/DatabaseInfo.asp?DB_ID=125&Link=0

- Routes are listed only once but include flights at all airports within the metropolitan area and in both directions. For example, the entry

CITY PAIR	Post-Merger HHI	HHI
Charlotte, NC (CLT) - Dallas, TX (DFW)	9,324	4,653

includes flights from Charlotte, North Carolina, to airports in and around Dallas, Texas, including both Dallas-Fort Worth International Airport (DFW) and Love Field (DAL), and it includes flights from both airports to Charlotte.

CITY PAIR	Post-Merger HHI	Δ HHI
Charlotte, NC (CLT) - Durango, CO (DRO)	10,000	4,742
Charlotte, NC (CLT) - Dallas, TX (DFW)	9,324	4,653
Charlotte, NC (CLT) - St. Croix, VI (STX)	10,000	4,647
Dallas, TX (DFW) - Philadelphia, PA (PHL)	9,083	4,497
Kahului, HI (OGG) - Tampa, FL (TPA)	9,040	4,478
Kapaa, HI (LIH) - St. Louis, MO (STL)	8,930	4,448
Fresno, CA (FAT) - Tampa, FL (TPA)	8,659	4,259
Dallas, TX (DFW) - Phoenix, AZ (PHX)	8,921	4,205
Miami, FL (MIA) - Monterey, CA (MRY)	9,540	4,079
Indianapolis, IN (IND) - Kahului, HI (OGG)	8,174	4,006
El Paso, TX (ELP) - Fresno, CA (FAT)	8,320	3,866
Columbus, OH (CMH) - Palm Springs, CA (PSP)	7,704	3,703
Miami, FL (MIA) - Santa Barbara, CA (SBA)	8,042	3,634
Kapaa, HI (LIH) - Miami, FL (MIA)	8,439	3,619
El Paso, TX (ELP) - Monterey, CA (MRY)	8,415	3,612
Pittsburgh, PA (PIT) - St. Croix, VI (STX)	10,000	3,600
Dallas, TX (DFW) - Greensboro, NC (GSO)	8,120	3,557
Hilo, HI (KOA) - Miami, FL (MIA)	7,329	3,528
Hilo, HI (KOA) - St. Louis, MO (STL)	7,785	3,418
Kahului, HI (OGG) - St. Louis, MO (STL)	8,888	3,331
Dallas, TX (DFW) - Norfolk-Virginia Beach, VA (ORF)	7,786	3,312
Greensboro, NC (GSO) - St. Croix, VI (STX)	10,000	3,299
Monterey, CA (MRY) - St. Louis, MO (STL)	6,982	3,277
El Paso, TX (ELP) - Kapaa, HI (LIH)	9,185	3,206
Charlotte, NC (CLT) - Palm Springs, CA (PSP)	8,016	3,185
Charlotte, NC (CLT) - Fresno, CA (FAT)	7,903	3,165
Fresno, CA (FAT) - Milwaukee, WI (MKE)	7,185	3,164
Palm Springs, CA (PSP) - St. Louis, MO (STL)	6,753	3,085
Austin, TX (AUS) - Santa Barbara, CA (SBA)	6,499	3,068
Dallas, TX (DFW) - Richmond, VA (RIC)	8,372	3,048
Charleston, WV (CRW) - New York, NY (NYC)	6,407	3,034
Kahului, HI (OGG) - Omaha, NE (OMA)	6,897	3,033
Austin, TX (AUS) - Monterey, CA (MRY)	6,547	3,027
Charlotte, NC (CLT) - Kahului, HI (OGG)	10,000	3,022
Austin, TX (AUS) - Kapaa, HI (LIH)	6,499	3,006
Palm Springs, CA (PSP) - Tampa, FL (TPA)	6,968	2,985
Milwaukee, WI (MKE) - Palm Springs, CA (PSP)	6,319	2,966
Chicago, IL (CHI) - Charlottesville, VA (CHO)	8,865	2,949
Fresno, CA (FAT) - Miami, FL (MIA)	9,061	2,948

CITY PAIR	Post-Merger HHI	Δ HHI
Dallas, TX (DFW) - Monterey, CA (MRY)	7,448	2,938
Pittsburgh, PA (PIT) - Palm Springs, CA (PSP)	6,446	2,932
El Paso, TX (ELP) - Honolulu, HI (HNL)	8,116	2,923
Fresno, CA (FAT) - Indianapolis, IN (IND)	6,099	2,905
Fresno, CA (FAT) - San Antonio, TX (SAT)	6,197	2,895
Dallas, TX (DFW) - Kapaa, HI (LIH)	7,991	2,892
Raleigh-Durham, NC (RDU) - St. Thomas, VI (STT)	6,493	2,845
Phoenix, AZ (PHX) - St. Thomas, VI (STT)	6,178	2,843
Austin, TX (AUS) - Palm Springs, CA (PSP)	6,428	2,839
El Paso, TX (ELP) - Kahului, HI (OGG)	6,861	2,808
Columbus, OH (CMH) - Fresno, CA (FAT)	6,320	2,801
Austin, TX (AUS) - Fresno, CA (FAT)	7,074	2,795
Dallas, TX (DFW) - Fresno, CA (FAT)	8,423	2,774
Kansas City, MO (MCI) - Kahului, HI (OGG)	6,274	2,772
Dallas, TX (DFW) - Ontario, CA (ONT)	8,978	2,770
Des Moines, IA (DSM) - Kahului, HI (OGG)	6,793	2,753
Milwaukee, WI (MKE) - Kahului, HI (OGG)	6,867	2,717
Kapaa, HI (LIH) - Tucson, AZ (TUS)	6,680	2,700
Charlotte, NC (CLT) - Reno, NV (RNO)	6,887	2,672
Dallas, TX (DFW) - Hilo, HI (KOA)	6,671	2,664
Detroit, MI (DTW) - Fresno, CA (FAT)	6,057	2,662
Santa Barbara, CA (SBA) - St. Louis, MO (STL)	5,691	2,656
Columbus, OH (CMH) - St. Croix, VI (STX)	8,177	2,621
Albuquerque, NM (ABQ) - Monterey, CA (MRY)	6,759	2,575
El Paso, TX (ELP) - Hilo, HI (KOA)	9,515	2,574
Atlanta, GA (ATL) - Fresno, CA (FAT)	5,717	2,571
Charlotte, NC (CLT) - Tucson, AZ (TUS)	5,647	2,567
Charlotte, NC (CLT) - Ontario, CA (ONT)	5,750	2,503
Fresno, CA (FAT) - Pittsburgh, PA (PIT)	6,024	2,501
Detroit, MI (DTW) - Palm Springs, CA (PSP)	5,443	2,491
Albuquerque, NM (ABQ) - Kapaa, HI (LIH)	6,473	2,484
Charlotte, NC (CLT) - Grand Junction, CO (GJT)	6,077	2,475
Kansas City, MO (MCI) - Palm Springs, CA (PSP)	5,473	2,455
Albuquerque, NM (ABQ) - Santa Barbara, CA (SBA)	6,410	2,455
Hilo, HI (KOA) - Orlando, FL (MCO)	5,588	2,454
Hartford, CT (BDL) - St. Thomas, VI (STT)	5,373	2,444
Charlottesville, VA (CHO) - St. Louis, MO (STL)	6,691	2,438
Dallas, TX (DFW) - Palm Springs, CA (PSP)	8,959	2,428
Miami, FL (MIA) - Palm Springs, CA (PSP)	7,592	2,423

CITY PAIR	Post-Merger HHI	Δ HHI
Denver, CO (DEN) - St. Thomas, VI (STT)	5,838	2,407
Minneapolis, MN (MSP) - St. Croix, VI (STX)	5,878	2,402
Miami, FL (MIA) - Kahului, HI (OGG)	7,973	2,388
Columbus, OH (CMH) - Kahului, HI (OGG)	7,136	2,383
Philadelphia, PA (PHL) - St. Thomas, VI (STT)	9,203	2,362
Indianapolis, IN (IND) - St. Croix, VI (STX)	8,140	2,349
Dallas, TX (DFW) - Raleigh-Durham, NC (RDU)	7,889	2,341
Palm Springs, CA (PSP) - San Antonio, TX (SAT)	5,514	2,313
Albuquerque, NM (ABQ) - Fresno, CA (FAT)	5,708	2,305
Greensboro, NC (GSO) - Miami, FL (MIA)	5,699	2,278
Charlotte, NC (CLT) - Key West, FL (EYW)	5,573	2,268
Charlotte, NC (CLT) - Orange County, CA (SNA)	5,196	2,265
Albuquerque, NM (ABQ) - Hilo, HI (KOA)	7,026	2,237
Albuquerque, NM (ABQ) - Honolulu, HI (HNL)	5,692	2,227
Monterey, CA (MRY) - Tucson, AZ (TUS)	7,706	2,199
Indianapolis, IN (IND) - Palm Springs, CA (PSP)	5,055	2,198
Dallas, TX (DFW) - Pittsburgh, PA (PIT)	8,393	2,191
Fresno, CA (FAT) - St. Louis, MO (STL)	5,756	2,185
Dallas, TX (DFW) - Westchester County, NY (HPN)	5,037	2,168
Philadelphia, PA (PHL) - Palm Springs, CA (PSP)	6,764	2,137
Atlanta, GA (ATL) - Palm Springs, CA (PSP)	5,169	2,119
Hartford, CT (BDL) - Dallas, TX (DFW)	8,326	2,118
Columbia, SC (CAE) - Dallas, TX (DFW)	7,648	2,113
Raleigh-Durham, NC (RDU) - San Juan, PR (SJU)	4,765	2,109
Philadelphia, PA (PHL) - Tucson, AZ (TUS)	4,757	2,098
Miami, FL (MIA) - Phoenix, AZ (PHX)	4,928	2,090
Phoenix, AZ (PHX) - San Juan, PR (SJU)	4,755	2,075
Chicago, IL (CHI) - Charlotte, NC (CLT)	5,982	2,051
Detroit, MI (DTW) - St. Croix, VI (STX)	8,834	2,039
Chattanooga, TN (CHA) - Chicago, IL (CHI)	6,818	2,039
Charleston, SC (CHS) - Miami, FL (MIA)	5,380	2,037
St. Thomas, VI (STT) - Washington, DC (WAS)	4,617	2,022
Austin, TX (AUS) - Hilo, HI (KOA)	5,363	2,008
Santa Barbara, CA (SBA) - Tucson, AZ (TUS)	7,273	2,004
Boston, MA (BOS) - Key West, FL (EYW)	6,327	1,984
Norfolk-Virginia Beach, VA (ORF) - St. Thomas, VI (STT)	5,239	1,968
Dallas, TX (DFW) - Reno, NV (RNO)	8,668	1,953
San Juan, PR (SJU) - Sacramento, CA (SMF)	4,709	1,950
Boston, MA (BOS) - Palm Springs, CA (PSP)	4,922	1,947

CITY PAIR	Post-Merger HHI	Δ HHI
Kapaa, HI (LIH) - Orlando, FL (MCO)	5,457	1,946
Greensboro, NC (GSO) - St. Thomas, VI (STT)	5,466	1,944
Dallas, TX (DFW) - Savannah, GA (SAV)	7,094	1,936
Hartford, CT (BDL) - Key West, FL (EYW)	4,983	1,931
Dallas, TX (DFW) - Santa Barbara, CA (SBA)	6,048	1,909
Kahului, HI (OGG) - San Antonio, TX (SAT)	5,275	1,901
Las Vegas, NV (LAS) - San Juan, PR (SJU)	4,883	1,885
Nashville, TN (BNA) - St. Thomas, VI (STT)	5,903	1,877
Charlotte, NC (CLT) - Honolulu, HI (HNL)	5,637	1,845
Charleston, SC (CHS) - St. Thomas, VI (STT)	5,230	1,844
Orlando, FL (MCO) - Kahului, HI (OGG)	4,514	1,834
Dallas, TX (DFW) - Sacramento, CA (SMF)	7,494	1,833
Fresno, CA (FAT) - Philadelphia, PA (PHL)	5,844	1,831
Cincinnati, OH (CIN) - St. Croix, VI (STX)	8,601	1,831
Charlotte, NC (CLT) - San Jose, CA (SJC)	5,038	1,815
El Paso, TX (ELP) - Santa Barbara, CA (SBA)	8,179	1,805
Miami, FL (MIA) - Norfolk-Virginia Beach, VA (ORF)	4,355	1,801
Kahului, HI (OGG) - Pittsburgh, PA (PIT)	5,506	1,800
Omaha, NE (OMA) - Palm Springs, CA (PSP)	4,635	1,799
Austin, TX (AUS) - Kahului, HI (OGG)	5,961	1,791
Anchorage, AK (ANC) - El Paso, TX (ELP)	7,220	1,789
Boston, MA (BOS) - Tucson, AZ (TUS)	5,168	1,780
Houston, TX (HOU) - St. Thomas, VI (STT)	7,185	1,771
Dallas, TX (DFW) - Greenville, SC (GSP)	6,372	1,759
Fresno, CA (FAT) - Orlando, FL (MCO)	5,123	1,750
Kahului, HI (OGG) - Tucson, AZ (TUS)	5,099	1,728
Boston, MA (BOS) - Fresno, CA (FAT)	5,173	1,713
Fresno, CA (FAT) - Minneapolis, MN (MSP)	4,959	1,705
Charlottesville, VA (CHO) - Fayetteville, AR (XNA	5,258	1,702
Key West, FL (EYW) - Philadelphia, PA (PHL)	4,530	1,697
Austin, TX (AUS) - Charlotte, NC (CLT)	5,600	1,693
Austin, TX (AUS) - Tucson, AZ (TUS)	5,300	1,687
San Diego, CA (SAN) - San Juan, PR (SJU)	4,198	1,678
Charlottesville, VA (CHO) - Minneapolis, MN (MSP)	4,883	1,669
Fresno, CA (FAT) - Tucson, AZ (TUS)	7,380	1,667
Las Vegas, NV (LAS) - St. Thomas, VI (STT)	7,530	1,665
Charlotte, NC (CLT) - Miami, FL (MIA)	7,087	1,646
San Juan, PR (SJU) - St. Louis, MO (STL)	4,512	1,599
San Antonio, TX (SAT) - Tucson, AZ (TUS)	4,923	1,597

CITY PAIR	Post-Merger HHI	Δ HHI
Dallas, TX (DFW) - Knoxville, TN (TYS)	7,796	1,589
Greensboro, NC (GSO) - San Juan, PR (SJU)	4,835	1,574
Orlando, FL (MCO) - Palm Springs, CA (PSP)	4,336	1,571
Buffalo, NY (BUF) - Fayetteville, AR (XNA)	4,703	1,555
Syracuse, NY (SYR) - Fayetteville, AR (XNA)	4,609	1,545
Miami, FL (MIA) - Philadelphia, PA (PHL)	5,610	1,543
Honolulu, HI (HNL) - San Antonio, TX (SAT)	4,711	1,541
St. Louis, MO (STL) - St. Thomas, VI (STT)	6,580	1,541
Albuquerque, NM (ABQ) - Charlotte, NC (CLT)	4,986	1,540
Honolulu, HI (HNL) - Omaha, NE (OMA)	4,545	1,531
Charlotte, NC (CLT) - San Antonio, TX (SAT)	5,158	1,519
Norfolk-Virginia Beach, VA (ORF) - San Juan, PR (SJU)	5,474	1,517
Miami, FL (MIA) - Reno, NV (RNO)	4,566	1,502
Orlando, FL (MCO) - Monterey, CA (MRY)	5,045	1,492
Dallas, TX (DFW) - San Jose, CA (SJC)	9,421	1,489
Chattanooga, TN (CHA) - Dallas, TX (DFW)	6,641	1,489
Westchester County, NY (HPN) - Phoenix, AZ (PHX)	4,437	1,484
Charlottesville, VA (CHO) - Dallas, TX (DFW)	4,745	1,476
Richmond, VA (RIC) - St. Thomas, VI (STT)	5,002	1,466
Little Rock, AR (LIT) - Syracuse, NY (SYR)	4,209	1,462
Savannah, GA (SAV) - St. Croix, VI (STX)	5,215	1,462
Seattle, WA (SEA) - San Juan, PR (SJU)	3,824	1,462
Charleston, SC (CHS) - Dallas, TX (DFW)	5,316	1,457
Cleveland, OH (CLE) - St. Croix, VI (STX)	7,993	1,449
Chicago, IL (CHI) - Huntsville, AL (HSV)	4,974	1,446
Cleveland, OH (CLE) - St. Thomas, VI (STT)	4,286	1,431
Minneapolis, MN (MSP) - Kahului, HI (OGG)	4,426	1,430
Chicago, IL (CHI) - St. Thomas, VI (STT)	4,065	1,425
Chicago, IL (CHI) - Palm Springs, CA (PSP)	6,637	1,420
New Orleans, LA (MSY) - St. Thomas, VI (STT)	5,276	1,418
Durango, CO (DRO) - Miami, FL (MIA)	5,283	1,417
Dallas, TX (DFW) - Syracuse, NY (SYR)	4,010	1,409
Charlottesville, VA (CHO) - Des Moines, IA (DSM)	5,161	1,397
Denver, CO (DEN) - San Juan, PR (SJU)	3,816	1,381
Honolulu, HI (HNL) - Tucson, AZ (TUS)	4,340	1,380
Philadelphia, PA (PHL) - Fayetteville, AR (XNA)	4,537	1,377
Des Moines, IA (DSM) - Honolulu, HI (HNL)	4,983	1,371
Minneapolis, MN (MSP) - St. Thomas, VI (STT)	4,568	1,370
Des Moines, IA (DSM) - Reno, NV (RNO)	4,282	1,350

CITY PAIR	Post-Merger HHI	Δ HHI
Philadelphia, PA (PHL) - St. Croix, VI (STX)	9,330	1,331
Honolulu, HI (HNL) - Indianapolis, IN (IND)	3,926	1,328
Boston, MA (BOS) - Fayetteville, AR (XNA)	4,474	1,327
Albuquerque, NM (ABQ) - Kahului, HI (OGG)	5,134	1,322
Charlottesville, VA (CHO) - Phoenix, AZ (PHX)	6,867	1,319
Charlotte, NC (CLT) - El Paso, TX (ELP)	5,268	1,317
Des Moines, IA (DSM) - Fresno, CA (FAT)	5,037	1,311
Dallas, TX (DFW) - San Diego, CA (SAN)	6,869	1,310
Dallas, TX (DFW) - Jacksonville, FL (JAX)	7,106	1,304
Dallas, TX (DFW) - San Juan, PR (SJU)	7,234	1,303
Palm Springs, CA (PSP) - Washington, DC (WAS)	4,360	1,300
Des Moines, IA (DSM) - Tucson, AZ (TUS)	4,786	1,292
Fresno, CA (FAT) - Omaha, NE (OMA)	3,874	1,292
St. Louis, MO (STL) - Tucson, AZ (TUS)	4,306	1,273
Nashville, TN (BNA) - San Juan, PR (SJU)	4,957	1,262
Austin, TX (AUS) - Honolulu, HI (HNL)	4,531	1,259
Key West, FL (EYW) - Raleigh-Durham, NC (RDU)	4,746	1,247
Charlottesville, VA (CHO) - Omaha, NE (OMA)	5,087	1,237
Chattanooga, TN (CHA) - San Francisco, CA (SFO)	5,000	1,225
Columbus, OH (CMH) - Honolulu, HI (HNL)	3,984	1,225
Des Moines, IA (DSM) - Palm Springs, CA (PSP)	4,797	1,223
Washington, DC (WAS) - Fayetteville, AR (XNA)	4,214	1,221
Dallas, TX (DFW) - Huntsville, AL (HSV)	8,135	1,218
Miami, FL (MIA) - Louisville, KY (SDF)	3,843	1,217
Philadelphia, PA (PHL) - San Jose, CA (SJC)	3,728	1,215
Boston, MA (BOS) - Kapaa, HI (LIH)	5,009	1,210
Kahului, HI (OGG) - Philadelphia, PA (PHL)	5,157	1,199
St. Thomas, VI (STT) - Tallahassee, FL (TLH)	5,006	1,192
Raleigh-Durham, NC (RDU) - Fayetteville, AR (XNA)	4,878	1,190
Honolulu, HI (HNL) - Milwaukee, WI (MKE)	4,656	1,187
Fresno, CA (FAT) - Kansas City, MO (MCI)	3,980	1,184
Des Moines, IA (DSM) - Ontario, CA (ONT)	4,661	1,179
Indianapolis, IN (IND) - St. Thomas, VI (STT)	4,761	1,179
Boston, MA (BOS) - Santa Barbara, CA (SBA)	5,013	1,174
New York, NY (NYC) - Palm Springs, CA (PSP)	3,955	1,174
Dallas, TX (DFW) - Washington, DC (WAS)	7,095	1,163
Dallas, TX (DFW) - Tallahassee, FL (TLH)	5,582	1,152
Columbus, OH (CMH) - St. Thomas, VI (STT)	4,530	1,146
Westchester County, NY (HPN) - Louisville, KY (SDF)	4,898	1,145

CITY PAIR	Post-Merger HHI	Δ HHI
Cincinnati, OH (CIN) - Dallas, TX (DFW)	6,098	1,143
Charlotte, NC (CLT) - New York, NY (NYC)	5,427	1,141
Hilo, HI (KOA) - Tucson, AZ (TUS)	4,981	1,138
Los Angeles, CA (LAX) - St. Thomas, VI (STT)	7,828	1,136
Dallas, TX (DFW) - Fort Myers, FL (RSW)	7,652	1,136
Dallas, TX (DFW) - Harrisburg, PA (MDT)	3,722	1,134
Tampa, FL (TPA) - Tucson, AZ (TUS)	3,663	1,128
Dallas, TX (DFW) - Lexington, KY (LEX)	7,647	1,128
El Paso, TX (ELP) - Minneapolis, MN (MSP)	5,393	1,121
Detroit, MI (DTW) - Kahului, HI (OGG)	4,623	1,115
Dallas, TX (DFW) - Tucson, AZ (TUS)	8,370	1,111
Orlando, FL (MCO) - Santa Barbara, CA (SBA)	4,729	1,110
Chicago, IL (CHI) - Philadelphia, PA (PHL)	3,773	1,110
Pittsburgh, PA (PIT) - St. Thomas, VI (STT)	6,199	1,105
Chicago, IL (CHI) - Phoenix, AZ (PHX)	3,835	1,105
Boston, MA (BOS) - Reno, NV (RNO)	3,228	1,097
Miami, FL (MIA) - Washington, DC (WAS)	3,354	1,097
Miami, FL (MIA) - Fayetteville, AR (XNA)	5,213	1,089
Tampa, FL (TPA) - Fayetteville, AR (XNA)	4,809	1,089
Chicago, IL (CHI) - Kapaa, HI (LIH)	4,812	1,089
Charlottesville, VA (CHO) - Seattle, WA (SEA)	3,998	1,073
Fort Myers, FL (RSW) - Fayetteville, AR (XNA)	4,835	1,066
Orlando, FL (MCO) - Tucson, AZ (TUS)	3,508	1,059
Dallas, TX (DFW) - Orange County, CA (SNA)	9,283	1,057
Charlottesville, VA (CHO) - San Diego, CA (SAN)	3,640	1,055
New York, NY (NYC) - Fayetteville, AR (XNA)	4,353	1,054
Dallas, TX (DFW) - St. Thomas, VI (STT)	6,531	1,050
Norfolk-Virginia Beach, VA (ORF) - Fayetteville, AR (XNA)	4,322	1,049
Dallas, TX (DFW) - Honolulu, HI (HNL)	6,579	1,049
Orlando, FL (MCO) - Fayetteville, AR (XNA)	4,751	1,047
Fresno, CA (FAT) - New York, NY (NYC)	4,255	1,046
Santa Barbara, CA (SBA) - Salt Lake City, UT (SLC	4,720	1,043
Austin, TX (AUS) - Columbia, SC (CAE)	4,351	1,043
Fresno, CA (FAT) - Washington, DC (WAS)	4,112	1,038
Fresno, CA (FAT) - Houston, TX (HOU)	4,575	1,036
Detroit, MI (DTW) - Tucson, AZ (TUS)	3,293	1,027
Chicago, IL (CHI) - San Juan, PR (SJU)	4,623	1,023
Philadelphia, PA (PHL) - Orange County, CA (SNA)	3,113	1,021
Phoenix, AZ (PHX) - Richmond, VA (RIC)	3,462	1,018

CITY PAIR	Post-Merger HHI	Δ HHI
Cleveland, OH (CLE) - Dallas, TX (DFW)	4,486	1,013
Indianapolis, IN (IND) - Tucson, AZ (TUS)	3,763	1,013
Los Angeles, CA (LAX) - San Juan, PR (SJU)	4,164	1,012
Dallas, TX (DFW) - West Palm Beach (PBI)	8,081	1,010
San Francisco, CA (SFO) - San Juan, PR (SJU)	3,252	1,009
Durango, CO (DRO) - San Antonio, TX (SAT)	5,052	1,007
San Juan, PR (SJU) - Fayetteville, AR (XNA)	4,985	1,000
San Francisco, CA (SFO) - St. Thomas, VI (STT)	4,846	995
Ontario, CA (ONT) - Tampa, FL (TPA)	3,341	992
Charlotte, NC (CLT) - Los Angeles, CA (LAX)	5,485	989
Boston, MA (BOS) - St. Thomas, VI (STT)	4,575	979
Boston, MA (BOS) - Little Rock, AR (LIT)	3,387	969
Key West, FL (EYW) - Phoenix, AZ (PHX)	5,114	968
Westchester County, NY (HPN) - San Diego, CA (SAN)	3,559	965
New York, NY (NYC) - Tucson, AZ (TUS)	3,967	963
Knoxville, TN (TYS) - Fayetteville, AR (XNA)	4,759	958
Harrisburg, PA (MDT) - St. Louis, MO (STL)	3,526	954
Louisville, KY (SDF) - San Juan, PR (SJU)	4,899	951
New York, NY (NYC) - Ontario, CA (ONT)	3,084	950
Boston, MA (BOS) - Ontario, CA (ONT)	3,066	928
Charlotte, NC (CLT) - San Diego, CA (SAN)	5,734	926
Honolulu, HI (HNL) - Philadelphia, PA (PHL)	3,978	925
Pittsburgh, PA (PIT) - Fayetteville, AR (XNA)	4,235	917
Ontario, CA (ONT) - San Antonio, TX (SAT)	4,014	914
Charleston, SC (CHS) - San Juan, PR (SJU)	5,048	912
Dallas, TX (DFW) - Rochester, NY (ROC)	3,776	910
Chicago, IL (CHI) - Fresno, CA (FAT)	4,549	908
Honolulu, HI (HNL) - St. Louis, MO (STL)	4,515	907
Atlanta, GA (ATL) - Grand Junction, CO (GJT)	3,588	893
Nashville, TN (BNA) - New York, NY (NYC)	3,481	892
Kansas City, MO (MCI) - Tucson, AZ (TUS)	3,780	890
St. Louis, MO (STL) - Syracuse, NY (SYR)	3,539	890
Birmingham, AL (BHM) - St. Thomas, VI (STT)	5,001	889
Huntsville, AL (HSV) - Phoenix, AZ (PHX)	3,944	885
Charlottesville, VA (CHO) - Kansas City, MO (MCI)	5,451	883
Dallas, TX (DFW) - Kahului, HI (OGG)	8,258	882
Detroit, MI (DTW) - St. Thomas, VI (STT)	3,512	879
Grand Junction, CO (GJT) - Philadelphia, PA (PHL)	4,499	878
Austin, TX (AUS) - Philadelphia, PA (PHL)	2,915	878

CITY PAIR	Post-Merger HHI	Δ HHI
Chicago, IL (CHI) - Santa Barbara, CA (SBA)	4,819	878
Boston, MA (BOS) - Dallas, TX (DFW)	5,606	877
Charlotte, NC (CLT) - San Juan, PR (SJU)	7,386	875
Philadelphia, PA (PHL) - San Antonio, TX (SAT)	2,927	874
Richmond, VA (RIC) - Fayetteville, AR (XNA)	4,157	873
Honolulu, HI (HNL) - Kansas City, MO (MCI)	3,287	869
Detroit, MI (DTW) - El Paso, TX (ELP)	4,561	864
New York, NY (NYC) - Santa Barbara, CA (SBA)	4,872	863
Westchester County, NY (HPN) - Fayetteville, AR (XNA)	4,657	863
Chicago, IL (CHI) - West Palm Beach (PBI)	6,093	860
Harrisburg, PA (MDT) - Fayetteville, AR (XNA)	4,567	860
Columbus, OH (CMH) - Orange County, CA (SNA)	3,066	855
Chicago, IL (CHI) - El Paso, TX (ELP)	5,120	853
Austin, TX (AUS) - Greensboro, NC (GSO)	4,490	852
Montgomery, AL (MGM) - Fayetteville, AR (XNA)	5,064	848
Montgomery, AL (MGM) - Phoenix, AZ (PHX)	5,152	846
El Paso, TX (ELP) - Philadelphia, PA (PHL)	3,902	843
Austin, TX (AUS) - Orange County, CA (SNA)	3,439	843
Phoenix, AZ (PHX) - Knoxville, TN (TYS)	3,700	838
Westchester County, NY (HPN) - St. Louis, MO (STL)	3,322	838
Miami, FL (MIA) - Ontario, CA (ONT)	3,305	837
Little Rock, AR (LIT) - Philadelphia, PA (PHL)	3,482	832
Dallas, TX (DFW) - Grand Junction, CO (GJT)	7,233	823
Birmingham, AL (BHM) - St. Croix, VI (STX)	10,000	821
Lexington, KY (LEX) - Phoenix, AZ (PHX)	4,181	819
Houston, TX (HOU) - Palm Springs, CA (PSP)	4,929	817
Charlotte, NC (CLT) - Fayetteville, AR (XNA)	5,930	816
Las Vegas, NV (LAS) - Santa Barbara, CA (SBA)	5,004	814
Little Rock, AR (LIT) - Miami, FL (MIA)	3,847	807
Orlando, FL (MCO) - Ontario, CA (ONT)	2,953	805
Fort Myers, FL (RSW) - St. Thomas, VI (STT)	5,127	801
New Orleans, LA (MSY) - San Juan, PR (SJU)	5,674	799
Little Rock, AR (LIT) - Rochester, NY (ROC)	3,500	799
Kapaa, HI (LIH) - Washington, DC (WAS)	4,887	796
Louisville, KY (SDF) - St. Thomas, VI (STT)	4,886	795
Columbus, OH (CMH) - Tucson, AZ (TUS)	3,397	785
Des Moines, IA (DSM) - Phoenix, AZ (PHX)	5,219	784
Charlottesville, VA (CHO) - Denver, CO (DEN)	4,302	784
Boston, MA (BOS) - Gainesville, FL (GNV)	5,346	783

CITY PAIR	Post-Merger HHI	Δ HHI
Charlottesville, VA (CHO) - Los Angeles, CA (LAX)	3,900	782
Charlotte, NC (CLT) - Sacramento, CA (SMF)	3,986	777
Austin, TX (AUS) - Richmond, VA (RIC)	3,835	776
Pittsburgh, PA (PIT) - Tucson, AZ (TUS)	3,255	773
Key West, FL (EYW) - Washington, DC (WAS)	3,876	772
Hartford, CT (BDL) - Fayetteville, AR (XNA)	4,199	772
Tucson, AZ (TUS) - Washington, DC (WAS)	3,981	767
Charlottesville, VA (CHO) - Milwaukee, WI (MKE)	5,375	764
Kahului, HI (OGG) - Washington, DC (WAS)	4,700	761
Dallas, TX (DFW) - Portland, OR (PDX)	4,765	756
Greensboro, NC (GSO) - San Antonio, TX (SAT)	4,719	751
Little Rock, AR (LIT) - Harrisburg, PA (MDT)	4,050	750
Seattle, WA (SEA) - St. Thomas, VI (STT)	4,204	748
San Antonio, TX (SAT) - Orange County, CA (SNA)	3,570	748
Dallas, TX (DFW) - Montgomery, AL (MGM)	8,376	746
Los Angeles, CA (LAX) - St. Louis, MO (STL)	4,736	744
Omaha, NE (OMA) - Tucson, AZ (TUS)	3,272	736
Birmingham, AL (BHM) - Miami, FL (MIA)	3,586	733
Honolulu, HI (HNL) - Pittsburgh, PA (PIT)	4,474	729
El Paso, TX (ELP) - Seattle, WA (SEA)	4,387	728
Honolulu, HI (HNL) - Miami, FL (MIA)	4,481	726
Honolulu, HI (HNL) - Tampa, FL (TPA)	3,403	725
Miami, FL (MIA) - Raleigh-Durham, NC (RDU)	3,319	724
Gainesville, FL (GNV) - San Juan, PR (SJU)	6,576	724
Dallas, TX (DFW) - New York, NY (NYC)	5,162	723
Westchester County, NY (HPN) - Indianapolis, IN (IND)	3,744	723
Des Moines, IA (DSM) - San Jose, CA (SJC)	3,651	718
Chattanooga, TN (CHA) - Phoenix, AZ (PHX)	5,224	718
Columbia, SC (CAE) - Fayetteville, AR (XNA)	5,277	716
Detroit, MI (DTW) - Grand Junction, CO (GJT)	3,495	714
Little Rock, AR (LIT) - New York, NY (NYC)	2,997	712
Chattanooga, TN (CHA) - Los Angeles, CA (LAX)	5,159	711
Buffalo, NY (BUF) - Dallas, TX (DFW)	3,590	708
Chicago, IL (CHI) - Hilo, HI (KOA)	4,809	708
Rochester, NY (ROC) - Fayetteville, AR (XNA)	4,513	705
Detroit, MI (DTW) - Ontario, CA (ONT)	2,905	699
Miami, FL (MIA) - Tucson, AZ (TUS)	4,278	696
Little Rock, AR (LIT) - Raleigh-Durham, NC (RDU)	3,707	693
Raleigh-Durham, NC (RDU) - Washington, DC (WAS)	3,411	692

CITY PAIR	Post-Merger HHI	Δ HHI
San Jose, CA (SJC) - St. Louis, MO (STL)	3,553	689
Pittsburgh, PA (PIT) - Orange County, CA (SNA)	2,862	687
Hartford, CT (BDL) - Phoenix, AZ (PHX)	3,045	687
Chicago, IL (CHI) - Tucson, AZ (TUS)	4,811	686
West Palm Beach (PBI) - San Francisco, CA (SFO)	3,238	684
Durango, CO (DRO) - Tampa, FL (TPA)	5,017	682
Boston, MA (BOS) - Kahului, HI (OGG)	4,044	682
Miami, FL (MIA) - San Diego, CA (SAN)	2,993	682
Richmond, VA (RIC) - St. Louis, MO (STL)	2,976	681
Chicago, IL (CHI) - Syracuse, NY (SYR)	4,598	678
Philadelphia, PA (PHL) - San Diego, CA (SAN)	4,906	676
Columbus, OH (CMH) - New York, NY (NYC)	3,140	674
Nashville, TN (BNA) - St. Croix, VI (STX)	9,444	671
Phoenix, AZ (PHX) - Fort Myers, FL (RSW)	2,711	670
Westchester County, NY (HPN) - Seattle, WA (SEA)	3,511	668
Reno, NV (RNO) - Tampa, FL (TPA)	3,854	663
Columbus, OH (CMH) - Dallas, TX (DFW)	7,592	662
Savannah, GA (SAV) - Fayetteville, AR (XNA)	4,952	659
Little Rock, AR (LIT) - Pittsburgh, PA (PIT)	3,419	659
Columbia, SC (CAE) - Los Angeles, CA (LAX)	3,605	657
New York, NY (NYC) - Reno, NV (RNO)	2,886	656
Orange County, CA (SNA) - Tampa, FL (TPA)	2,872	655
Albuquerque, NM (ABQ) - Philadelphia, PA (PHL)	3,204	655
Westchester County, NY (HPN) - Las Vegas, NV (LAS)	2,975	655
Cleveland, OH (CLE) - San Juan, PR (SJU)	3,338	653
San Juan, PR (SJU) - Tallahassee, FL (TLH)	5,177	651
Cincinnati, OH (CIN) - St. Thomas, VI (STT)	4,816	649
Des Moines, IA (DSM) - Philadelphia, PA (PHL)	3,270	645
Houston, TX (HOU) - Kahului, HI (OGG)	5,285	645
Richmond, VA (RIC) - San Francisco, CA (SFO)	3,125	645
Boston, MA (BOS) - Monterey, CA (MRY)	5,303	644
Atlanta, GA (ATL) - Kahului, HI (OGG)	4,665	643
Dallas, TX (DFW) - Indianapolis, IN (IND)	7,197	643
Detroit, MI (DTW) - Key West, FL (EYW)	5,219	641
Orlando, FL (MCO) - San Jose, CA (SJC)	2,754	640
Gainesville, FL (GNV) - Los Angeles, CA (LAX)	5,109	639
Huntsville, AL (HSV) - Syracuse, NY (SYR)	4,545	636
Columbus, OH (CMH) - San Jose, CA (SJC)	3,066	635
Cincinnati, OH (CIN) - Westchester County, NY (HPN)	4,686	634

CITY PAIR	Post-Merger HHI	Δ HHI
West Palm Beach (PBI) - Phoenix, AZ (PHX)	3,204	633
Boston, MA (BOS) - Lexington, KY (LEX)	4,454	630
Chicago, IL (CHI) - Richmond, VA (RIC)	4,250	628
San Juan, PR (SJU) - Knoxville, TN (TYS)	4,579	628
Jacksonville, FL (JAX) - Fayetteville, AR (XNA)	5,211	624
Pensacola, FL (PNS) - Fayetteville, AR (XNA)	4,492	622
Ontario, CA (ONT) - Philadelphia, PA (PHL)	3,569	620
Chattanooga, TN (CHA) - Denver, CO (DEN)	5,343	614
Kansas City, MO (MCI) - San Juan, PR (SJU)	3,085	612
Orange County, CA (SNA) - St. Louis, MO (STL)	3,356	609
Columbia, SC (CAE) - San Antonio, TX (SAT)	4,511	606
Boston, MA (BOS) - Orange County, CA (SNA)	3,047	606
Indianapolis, IN (IND) - San Juan, PR (SJU)	3,250	605
Charlottesville, VA (CHO) - San Francisco, CA (SF	4,599	605
Ontario, CA (ONT) - Washington, DC (WAS)	2,910	604
Milwaukee, WI (MKE) - Tucson, AZ (TUS)	2,533	602
Westchester County, NY (HPN) - Little Rock, AR (LIT)	4,494	601
Detroit, MI (DTW) - Orange County, CA (SNA)	2,798	601
Hartford, CT (BDL) - Little Rock, AR (LIT)	3,258	599
Westchester County, NY (HPN) - Minneapolis, MN (MSP)	3,448	596
Columbus, OH (CMH) - San Juan, PR (SJU)	3,131	594
Chicago, IL (CHI) - Monterey, CA (MRY)	5,356	591
Key West, FL (EYW) - San Francisco, CA (SFO)	6,164	591
Westchester County, NY (HPN) - Knoxville, TN (TYS)	4,688	589
Chattanooga, TN (CHA) - St. Louis, MO (STL)	5,385	587
Philadelphia, PA (PHL) - Reno, NV (RNO)	3,257	586
Detroit, MI (DTW) - San Juan, PR (SJU)	3,339	583
Chicago, IL (CHI) - Harrisburg, PA (MDT)	4,947	583
Kansas City, MO (MCI) - Knoxville, TN (TYS)	4,543	580
Des Moines, IA (DSM) - West Palm Beach (PBI)	5,020	580
Charlotte, NC (CLT) - St. Thomas, VI (STT)	9,177	579
Boston, MA (BOS) - Louisville, KY (SDF)	3,335	577
Charlotte, NC (CLT) - San Francisco, CA (SFO)	6,566	577
Miami, FL (MIA) - San Jose, CA (SJC)	3,313	577
Chicago, IL (CHI) - Knoxville, TN (TYS)	4,427	575
Lexington, KY (LEX) - Kansas City, MO (MCI)	3,795	570
Nashville, TN (BNA) - Rochester, NY (ROC)	3,840	567
West Palm Beach (PBI) - Fayetteville, AR (XNA)	5,232	566
Hilo, HI (KOA) - New York, NY (NYC)	2,683	565

CITY PAIR	Post-Merger HHI	Δ HHI
Nashville, TN (BNA) - Westchester County, NY (HPN)	4,351	565
St. Thomas, VI (STT) - Knoxville, TN (TYS)	5,261	564
Minneapolis, MN (MSP) - San Juan, PR (SJU)	3,176	564
Jacksonville, FL (JAX) - Phoenix, AZ (PHX)	3,050	564
Minneapolis, MN (MSP) - Ontario, CA (ONT)	2,857	563
Fort Myers, FL (RSW) - San Francisco, CA (SFO)	2,681	563
Pittsburgh, PA (PIT) - San Jose, CA (SJC)	2,903	560
Columbus, OH (CMH) - Westchester County, NY (HPN)	6,310	560
Detroit, MI (DTW) - Reno, NV (RNO)	3,275	558
Charleston, SC (CHS) - Key West, FL (EYW)	5,545	557
San Antonio, TX (SAT) - Savannah, GA (SAV)	4,287	555
Chattanooga, TN (CHA) - Seattle, WA (SEA)	5,320	555
Austin, TX (AUS) - Ontario, CA (ONT)	4,018	552
Los Angeles, CA (LAX) - Richmond, VA (RIC)	2,905	552
Monterey, CA (MRY) - New York, NY (NYC)	5,542	551
San Antonio, TX (SAT) - Knoxville, TN (TYS)	4,405	551
San Antonio, TX (SAT) - San Jose, CA (SJC)	4,077	548
Des Moines, IA (DSM) - Knoxville, TN (TYS)	4,300	548
Westchester County, NY (HPN) - Los Angeles, CA (LAX)	3,258	548
Charlotte, NC (CLT) - Denver, CO (DEN)	5,189	546
Phoenix, AZ (PHX) - Syracuse, NY (SYR)	3,298	544
Richmond, VA (RIC) - Seattle, WA (SEA)	3,084	544
Birmingham, AL (BHM) - San Juan, PR (SJU)	5,331	543
New York, NY (NYC) - Kahului, HI (OGG)	2,993	543
Norfolk-Virginia Beach, VA (ORF) - Phoenix, AZ (PHX)	3,132	541
Chicago, IL (CHI) - San Jose, CA (SJC)	4,802	539
Orlando, FL (MCO) - Orange County, CA (SNA)	2,750	537
Baton Rouge, LA (BTR) - Lexington, KY (LEX)	4,938	535
Dallas, TX (DFW) - Tampa, FL (TPA)	6,378	535
Austin, TX (AUS) - Reno, NV (RNO)	4,193	534
Santa Barbara, CA (SBA) - Washington, DC (WAS)	5,304	533
Gainesville, FL (GNV) - New York, NY (NYC)	4,830	533
Charlotte, NC (CLT) - Kansas City, MO (MCI)	5,296	533
Charlotte, NC (CLT) - Phoenix, AZ (PHX)	6,243	530
Montgomery, AL (MGM) - San Francisco, CA (SFO)	5,057	529
Hilo, HI (KOA) - Washington, DC (WAS)	4,514	529
San Diego, CA (SAN) - Tampa, FL (TPA)	2,600	528
Chicago, IL (CHI) - St. Croix, VI (STX)	9,841	528
Charlottesville, VA (CHO) - Little Rock, AR (LIT)	5,886	527

CITY PAIR	Post-Merger HHI	Δ HHI
Denver, CO (DEN) - Lexington, KY (LEX)	3,415	526
Kapaa, HI (LIH) - Phoenix, AZ (PHX)	4,543	526
San Antonio, TX (SAT) - Sacramento, CA (SMF)	3,274	524
Phoenix, AZ (PHX) - Tallahassee, FL (TLH)	5,470	523
Key West, FL (EYW) - Greensboro, NC (GSO)	5,612	523
Chicago, IL (CHI) - Jacksonville, FL (JAX)	2,959	520
Pittsburgh, PA (PIT) - San Juan, PR (SJU)	4,171	520
Greensboro, NC (GSO) - Fayetteville, AR (XNA)	4,916	519
Boston, MA (BOS) - Des Moines, IA (DSM)	2,605	518
Columbus, OH (CMH) - Fayetteville, AR (XNA)	4,343	517
Charlotte, NC (CLT) - Seattle, WA (SEA)	4,926	517
Dallas, TX (DFW) - Los Angeles, CA (LAX)	5,187	516
Denver, CO (DEN) - Richmond, VA (RIC)	2,855	516
Kapaa, HI (LIH) - New York, NY (NYC)	2,752	514
Phoenix, AZ (PHX) - Fort Walton Beach, FL (VPS)	3,529	512
Omaha, NE (OMA) - San Juan, PR (SJU)	3,521	508
Los Angeles, CA (LAX) - Tallahassee, FL (TLH)	5,315	504
Kansas City, MO (MCI) - Syracuse, NY (SYR)	3,349	504
Miami, FL (MIA) - Sacramento, CA (SMF)	2,774	503
Cincinnati, OH (CIN) - San Juan, PR (SJU)	3,442	502
Greenville, SC (GSP) - Fayetteville, AR (XNA)	5,272	501
Nashville, TN (BNA) - Washington, DC (WAS)	4,076	499
Dallas, TX (DFW) - Salt Lake City, UT (SLC)	4,506	499
Boston, MA (BOS) - Hilo, HI (KOA)	4,509	498
Dallas, TX (DFW) - Las Vegas, NV (LAS)	6,373	498
Des Moines, IA (DSM) - Raleigh-Durham, NC (RDU)	3,832	498
Dallas, TX (DFW) - Fort Walton Beach, FL (VPS)	9,022	496
Charlottesville, VA (CHO) - Las Vegas, NV (LAS)	5,346	495
Des Moines, IA (DSM) - Jacksonville, FL (JAX)	4,522	495
Ontario, CA (ONT) - St. Louis, MO (STL)	3,842	493
Omaha, NE (OMA) - Syracuse, NY (SYR)	3,346	491
San Jose, CA (SJC) - Tampa, FL (TPA)	3,037	490
Orlando, FL (MCO) - Reno, NV (RNO)	3,072	488
Charleston, SC (CHS) - St. Croix, VI (STX)	9,341	488
Raleigh-Durham, NC (RDU) - Seattle, WA (SEA)	2,590	487
Greensboro, NC (GSO) - Los Angeles, CA (LAX)	3,342	484
Los Angeles, CA (LAX) - Raleigh-Durham, NC (RDU)	2,869	481
Denver, CO (DEN) - Montgomery, AL (MGM)	5,661	476
Nashville, TN (BNA) - Charlottesville, VA (CHO)	6,270	476

CITY PAIR	Post-Merger HHI	Δ HHI
Columbus, OH (CMH) - Reno, NV (RNO)	4,533	476
Kahului, HI (OGG) - Phoenix, AZ (PHX)	4,623	475
El Paso, TX (ELP) - Milwaukee, WI (MKE)	3,620	474
Kansas City, MO (MCI) - Philadelphia, PA (PHL)	4,543	474
Harrisburg, PA (MDT) - Phoenix, AZ (PHX)	3,941	474
Cincinnati, OH (CIN) - Rochester, NY (ROC)	3,105	473
Kansas City, MO (MCI) - Orange County, CA (SNA)	2,507	472
Boston, MA (BOS) - Honolulu, HI (HNL)	4,142	472
Little Rock, AR (LIT) - Richmond, VA (RIC)	4,152	471
Chicago, IL (CHI) - Kahului, HI (OGG)	4,738	467
Richmond, VA (RIC) - San Diego, CA (SAN)	3,411	466
Durango, CO (DRO) - Philadelphia, PA (PHL)	5,257	466
Detroit, MI (DTW) - Gulfport, MS (GPT)	4,883	465
Cincinnati, OH (CIN) - Little Rock, AR (LIT)	4,541	461
Key West, FL (EYW) - St. Louis, MO (STL)	4,897	460
Atlanta, GA (ATL) - San Jose, CA (SJC)	3,691	458
Des Moines, IA (DSM) - Montgomery, AL (MGM)	5,393	456
Los Angeles, CA (LAX) - Montgomery, AL (MGM)	5,000	456
San Francisco, CA (SFO) - Tallahassee, FL (TLH)	5,781	455
Detroit, MI (DTW) - San Jose, CA (SJC)	2,931	454
Hartford, CT (BDL) - Los Angeles, CA (LAX)	2,629	451
Little Rock, AR (LIT) - Fort Myers, FL (RSW)	4,582	451
El Paso, TX (ELP) - New York, NY (NYC)	4,710	450
Chattanooga, TN (CHA) - Syracuse, NY (SYR)	5,225	450
Columbus, OH (CMH) - Los Angeles, CA (LAX)	2,829	450
Raleigh-Durham, NC (RDU) - San Francisco, CA (SFO)	2,659	447
Charlotte, NC (CLT) - St. Louis, MO (STL)	6,103	447
Denver, CO (DEN) - Fort Walton Beach, FL (VPS)	3,761	446
Los Angeles, CA (LAX) - West Palm Beach (PBI)	3,421	445
Miami, FL (MIA) - Orange County, CA (SNA)	3,141	442
Rochester, NY (ROC) - Louisville, KY (SDF)	3,431	441
Nashville, TN (BNA) - Syracuse, NY (SYR)	4,010	440
Houston, TX (HOU) - Lexington, KY (LEX)	3,989	440
Westchester County, NY (HPN) - Kansas City, MO (MCI)	3,029	439
New York, NY (NYC) - Raleigh-Durham, NC (RDU)	2,628	439
Indianapolis, IN (IND) - San Jose, CA (SJC)	3,193	437
Omaha, NE (OMA) - West Palm Beach (PBI)	4,576	436
Anchorage, AK (ANC) - Columbus, OH (CMH)	3,993	435
Key West, FL (EYW) - New York, NY (NYC)	3,735	434

CITY PAIR	Post-Merger HHI	Δ HHI
Pittsburgh, PA (PIT) - San Diego, CA (SAN)	2,625	431
El Paso, TX (ELP) - Portland, OR (PDX)	4,077	431
Chicago, IL (CHI) - Mobile, AL (MOB)	4,718	431
Los Angeles, CA (LAX) - Lexington, KY (LEX)	3,480	431
Chattanooga, TN (CHA) - Las Vegas, NV (LAS)	5,739	431
Chicago, IL (CHI) - Reno, NV (RNO)	4,145	430
New York, NY (NYC) - St. Thomas, VI (STT)	4,727	430
Des Moines, IA (DSM) - Syracuse, NY (SYR)	3,540	430
Raleigh-Durham, NC (RDU) - San Antonio, TX (SAT)	2,819	429
Gainesville, FL (GNV) - Philadelphia, PA (PHL)	5,296	428
Norfolk-Virginia Beach, VA (ORF) - San Francisco, CA (SF(	2,619	427
San Francisco, CA (SFO) - Tampa, FL (TPA)	2,503	427
Raleigh-Durham, NC (RDU) - San Diego, CA (SAN)	2,545	426
Indianapolis, IN (IND) - Miami, FL (MIA)	3,367	426
Las Vegas, NV (LAS) - Miami, FL (MIA)	3,416	424
Pittsburgh, PA (PIT) - Reno, NV (RNO)	3,770	423
Indianapolis, IN (IND) - Ontario, CA (ONT)	4,118	421
Dallas, TX (DFW) - Orlando, FL (MCO)	6,437	419
Las Vegas, NV (LAS) - Richmond, VA (RIC)	2,632	418
Mobile, AL (MOB) - Phoenix, AZ (PHX)	3,393	415
Tallahassee, FL (TLH) - Fayetteville, AR (XNA)	5,582	415
Key West, FL (EYW) - Las Vegas, NV (LAS)	5,533	415
Mobile, AL (MOB) - St. Louis, MO (STL)	4,683	415
Ontario, CA (ONT) - Pittsburgh, PA (PIT)	3,463	414
Chattanooga, TN (CHA) - San Diego, CA (SAN)	5,736	413
Des Moines, IA (DSM) - San Diego, CA (SAN)	2,991	413
Montgomery, AL (MGM) - Seattle, WA (SEA)	5,549	412
Houston, TX (HOU) - Hilo, HI (KOA)	5,437	411
Nashville, TN (BNA) - Key West, FL (EYW)	4,663	404
Jacksonville, FL (JAX) - St. Thomas, VI (STT)	3,969	404
Charlotte, NC (CLT) - Omaha, NE (OMA)	4,495	404
Richmond, VA (RIC) - San Antonio, TX (SAT)	3,512	403
West Palm Beach (PBI) - St. Louis, MO (STL)	3,500	403
Boston, MA (BOS) - Huntsville, AL (HSV)	3,855	402
Philadelphia, PA (PHL) - San Juan, PR (SJU)	8,844	400
Columbus, OH (CMH) - Miami, FL (MIA)	3,540	399
Hartford, CT (BDL) - Baton Rouge, LA (BTR)	5,950	398
San Jose, CA (SJC) - Washington, DC (WAS)	2,594	397
Jackson, MS (JAN) - Phoenix, AZ (PHX)	2,850	397

CITY PAIR	Post-Merger HHI	Δ HHI
Las Vegas, NV (LAS) - Harrisburg, PA (MDT)	3,460	396
Austin, TX (AUS) - San Juan, PR (SJU)	2,692	396
Reno, NV (RNO) - Washington, DC (WAS)	2,700	395
Austin, TX (AUS) - Harrisburg, PA (MDT)	3,369	394
Monterey, CA (MRY) - Phoenix, AZ (PHX)	9,083	393
Boston, MA (BOS) - San Antonio, TX (SAT)	3,126	393
Phoenix, AZ (PHX) - Pensacola, FL (PNS)	3,086	392
Columbus, OH (CMH) - Ontario, CA (ONT)	3,863	390
Denver, CO (DEN) - West Palm Beach (PBI)	3,280	390
Baton Rouge, LA (BTR) - San Juan, PR (SJU)	5,023	390
Austin, TX (AUS) - Durango, CO (DRO)	3,946	389
Miami, FL (MIA) - Pittsburgh, PA (PIT)	4,372	389
Austin, TX (AUS) - Charlottesville, VA (CHO)	4,508	386
Baton Rouge, LA (BTR) - Columbus, OH (CMH)	4,922	386
Phoenix, AZ (PHX) - Tampa, FL (TPA)	4,075	385
Cleveland, OH (CLE) - Fayetteville, AR (XNA)	3,346	385
Chattanooga, TN (CHA) - Houston, TX (HOU)	5,565	384
Charlotte, NC (CLT) - Portland, OR (PDX)	3,828	381
Chicago, IL (CHI) - Fort Walton Beach, FL (VPS)	5,381	381
Atlanta, GA (ATL) - Reno, NV (RNO)	3,073	380
Austin, TX (AUS) - Raleigh-Durham, NC (RDU)	2,774	379
Miami, FL (MIA) - Richmond, VA (RIC)	3,155	378
Charlotte, NC (CLT) - Las Vegas, NV (LAS)	5,711	377
El Paso, TX (ELP) - Los Angeles, CA (LAX)	5,469	377
Lexington, KY (LEX) - Syracuse, NY (SYR)	4,516	377
Miami, FL (MIA) - Salt Lake City, UT (SLC)	3,320	375
Memphis, TN (MEM) - San Juan, PR (SJU)	4,175	372
New York, NY (NYC) - Washington, DC (WAS)	3,200	372
Minneapolis, MN (MSP) - Tucson, AZ (TUS)	4,208	372
Detroit, MI (DTW) - Fayetteville, AR (XNA)	5,675	371
Baton Rouge, LA (BTR) - Richmond, VA (RIC)	5,129	371
Des Moines, IA (DSM) - Orange County, CA (SNA)	3,145	371
Dallas, TX (DFW) - Louisville, KY (SDF)	6,997	370
Kahului, HI (OGG) - Salt Lake City, UT (SLC)	3,497	370
Boston, MA (BOS) - Phoenix, AZ (PHX)	3,563	369
Fort Myers, FL (RSW) - San Juan, PR (SJU)	4,369	368
Columbus, OH (CMH) - San Diego, CA (SAN)	2,702	366
Anchorage, AK (ANC) - Tampa, FL (TPA)	3,503	365
Buffalo, NY (BUF) - Little Rock, AR (LIT)	2,779	365

CITY PAIR	Post-Merger HHI	Δ HHI
Reno, NV (RNO) - San Antonio, TX (SAT)	4,524	361
Chattanooga, TN (CHA) - Fayetteville, AR (XNA)	6,035	360
Chicago, IL (CHI) - Tallahassee, FL (TLH)	5,407	358
Austin, TX (AUS) - Los Angeles, CA (LAX)	3,130	357
Austin, TX (AUS) - Sacramento, CA (SMF)	3,323	357
Chattanooga, TN (CHA) - Kansas City, MO (MCI)	5,869	356
Gulfport, MS (GPT) - Minneapolis, MN (MSP)	5,688	353
Houston, TX (HOU) - Kapaa, HI (LIH)	5,668	353
Boston, MA (BOS) - El Paso, TX (ELP)	5,456	352
Atlanta, GA (ATL) - Ontario, CA (ONT)	3,281	352
Columbus, OH (CMH) - Syracuse, NY (SYR)	3,973	352
Kansas City, MO (MCI) - Raleigh-Durham, NC (RDU)	3,046	351
Little Rock, AR (LIT) - West Palm Beach (PBI)	5,040	350
Des Moines, IA (DSM) - Sacramento, CA (SMF)	2,629	350
Seattle, WA (SEA) - Fort Walton Beach, FL (VPS)	3,723	349
Austin, TX (AUS) - Huntsville, AL (HSV)	3,718	349
Des Moines, IA (DSM) - Greenville, SC (GSP)	4,251	348
New York, NY (NYC) - Norfolk-Virginia Beach, VA (ORF)	3,091	346
Gainesville, FL (GNV) - Louisville, KY (SDF)	5,418	346
Chicago, IL (CHI) - Raleigh-Durham, NC (RDU)	3,326	346
Denver, CO (DEN) - Kapaa, HI (LIH)	5,728	345
St. Louis, MO (STL) - Knoxville, TN (TYS)	5,379	345
Rochester, NY (ROC) - St. Louis, MO (STL)	3,063	343
Harrisburg, PA (MDT) - Seattle, WA (SEA)	3,640	342
Charlotte, NC (CLT) - Des Moines, IA (DSM)	4,500	342
Fort Myers, FL (RSW) - San Diego, CA (SAN)	2,930	342
Jacksonville, FL (JAX) - San Francisco, CA (SFO)	2,638	342
Orange County, CA (SNA) - Washington, DC (WAS)	2,798	341
Reno, NV (RNO) - St. Louis, MO (STL)	3,938	340
West Palm Beach (PBI) - Seattle, WA (SEA)	3,470	339
Los Angeles, CA (LAX) - Fort Myers, FL (RSW)	2,683	339
Charlotte, NC (CLT) - Salt Lake City, UT (SLC)	5,011	338
Lexington, KY (LEX) - San Francisco, CA (SFO)	3,416	338
Austin, TX (AUS) - Lexington, KY (LEX)	4,331	337
Des Moines, IA (DSM) - Mobile, AL (MOB)	4,564	336
El Paso, TX (ELP) - Salt Lake City, UT (SLC)	4,641	336
Austin, TX (AUS) - Savannah, GA (SAV)	4,641	334
Houston, TX (HOU) - Norfolk-Virginia Beach, VA (ORF)	2,739	334
Baton Rouge, LA (BTR) - Cincinnati, OH (CIN)	4,797	333

CITY PAIR	Post-Merger HHI	Δ HHI
Key West, FL (EYW) - Richmond, VA (RIC)	5,833	332
San Jose, CA (SJC) - Tucson, AZ (TUS)	5,027	331
Dallas, TX (DFW) - Detroit, MI (DTW)	4,001	330
Little Rock, AR (LIT) - Washington, DC (WAS)	3,013	329
Kansas City, MO (MCI) - Ontario, CA (ONT)	3,922	328
Huntsville, AL (HSV) - Kansas City, MO (MCI)	5,947	328
Boston, MA (BOS) - Grand Junction, CO (GJT)	5,419	328
Omaha, NE (OMA) - Orange County, CA (SNA)	2,541	327
Pensacola, FL (PNS) - San Juan, PR (SJU)	4,740	327
El Paso, TX (ELP) - San Jose, CA (SJC)	5,326	327
Durango, CO (DRO) - Pittsburgh, PA (PIT)	6,192	326
Chicago, IL (CHI) - Rochester, NY (ROC)	5,020	326
Memphis, TN (MEM) - Miami, FL (MIA)	4,462	325
Des Moines, IA (DSM) - Miami, FL (MIA)	3,715	324
Kansas City, MO (MCI) - Mobile, AL (MOB)	3,917	323
Des Moines, IA (DSM) - Gulfport, MS (GPT)	4,617	323
Cleveland, OH (CLE) - Miami, FL (MIA)	3,748	321
Dallas, TX (DFW) - Miami, FL (MIA)	6,662	321
Kansas City, MO (MCI) - Fort Walton Beach, FL (VP	4,599	321
Anchorage, AK (ANC) - Charlotte, NC (CLT)	4,572	321
Pittsburgh, PA (PIT) - San Antonio, TX (SAT)	2,599	321
Los Angeles, CA (LAX) - Knoxville, TN (TYS)	3,201	320
Des Moines, IA (DSM) - Washington, DC (WAS)	3,420	320
Kansas City, MO (MCI) - Harrisburg, PA (MDT)	3,532	319
Baton Rouge, LA (BTR) - Raleigh-Durham, NC (RDU)	4,815	318
Columbus, OH (CMH) - San Francisco, CA (SFO)	2,615	317
Grand Junction, CO (GJT) - Tampa, FL (TPA)	5,003	317
Jacksonville, FL (JAX) - Omaha, NE (OMA)	5,067	317
St. Louis, MO (STL) - Tallahassee, FL (TLH)	5,690	316
Indianapolis, IN (IND) - Los Angeles, CA (LAX)	2,535	316
Greenville, SC (GSP) - Los Angeles, CA (LAX)	3,094	316
Greensboro, NC (GSO) - Phoenix, AZ (PHX)	4,397	315
Hartford, CT (BDL) - New Orleans, LA (MSY)	2,920	315
Los Angeles, CA (LAX) - Norfolk-Virginia Beach, VA (ORF	2,594	314
Chattanooga, TN (CHA) - San Antonio, TX (SAT)	5,910	313
Jacksonville, FL (JAX) - Seattle, WA (SEA)	2,844	313
Hartford, CT (BDL) - San Diego, CA (SAN)	2,509	312
San Antonio, TX (SAT) - San Juan, PR (SJU)	2,667	311
Baton Rouge, LA (BTR) - Washington, DC (WAS)	3,742	311

CITY PAIR	Post-Merger HHI	Δ HHI
Harrisburg, PA (MDT) - San Antonio, TX (SAT)	3,358	311
Nashville, TN (BNA) - Harrisburg, PA (MDT)	3,909	310
Cleveland, OH (CLE) - Westchester County, NY (HPN)	4,704	310
Harrisburg, PA (MDT) - Miami, FL (MIA)	5,288	310
Boston, MA (BOS) - Fort Walton Beach, FL (VPS)	4,955	309
San Juan, PR (SJU) - Salt Lake City, UT (SLC)	4,901	309
Austin, TX (AUS) - Hartford, CT (BDL)	2,809	309
Des Moines, IA (DSM) - Pittsburgh, PA (PIT)	3,185	308
Des Moines, IA (DSM) - Los Angeles, CA (LAX)	2,525	308
Chattanooga, TN (CHA) - Minneapolis, MN (MSP)	6,035	307
Des Moines, IA (DSM) - Richmond, VA (RIC)	3,387	307
Milwaukee, WI (MKE) - San Jose, CA (SJC)	3,322	307
Omaha, NE (OMA) - Tallahassee, FL (TLH)	6,189	307
Columbia, SC (CAE) - Kansas City, MO (MCI)	4,527	306
San Diego, CA (SAN) - Syracuse, NY (SYR)	2,797	306
Los Angeles, CA (LAX) - Pittsburgh, PA (PIT)	2,933	306
Westchester County, NY (HPN) - San Francisco, CA (SFO)	4,195	305
Boston, MA (BOS) - Tallahassee, FL (TLH)	5,024	304
Dallas, TX (DFW) - St. Croix, VI (STX)	10,000	303
Little Rock, AR (LIT) - Orlando, FL (MCO)	4,050	303
Seattle, WA (SEA) - Syracuse, NY (SYR)	2,852	301
Chicago, IL (CHI) - Key West, FL (EYW)	3,494	300
Sacramento, CA (SMF) - St. Louis, MO (STL)	2,582	299
Cincinnati, OH (CIN) - Miami, FL (MIA)	4,935	299
Austin, TX (AUS) - Norfolk-Virginia Beach, VA (ORF)	2,846	299
Seattle, WA (SEA) - Tallahassee, FL (TLH)	6,209	298
Gainesville, FL (GNV) - New Orleans, LA (MSY)	6,300	298
Phoenix, AZ (PHX) - Savannah, GA (SAV)	4,230	297
Huntsville, AL (HSV) - Las Vegas, NV (LAS)	3,885	297
Omaha, NE (OMA) - Raleigh-Durham, NC (RDU)	2,818	297
Miami, FL (MIA) - St. Louis, MO (STL)	3,803	297
Huntsville, AL (HSV) - Seattle, WA (SEA)	3,345	296
Westchester County, NY (HPN) - Memphis, TN (MEM)	4,067	295
Hilo, HI (KOA) - Phoenix, AZ (PHX)	4,454	295
Monterey, CA (MRY) - Washington, DC (WAS)	5,619	295
Austin, TX (AUS) - Pittsburgh, PA (PIT)	2,609	295
Gulfport, MS (GPT) - New York, NY (NYC)	4,484	295
Boston, MA (BOS) - Baton Rouge, LA (BTR)	4,280	293
El Paso, TX (ELP) - Pittsburgh, PA (PIT)	3,986	293

CITY PAIR	Post-Merger HHI	Δ HHI
Little Rock, AR (LIT) - Tampa, FL (TPA)	3,930	293
Key West, FL (EYW) - Louisville, KY (SDF)	6,170	293
Greensboro, NC (GSO) - San Diego, CA (SAN)	4,099	293
San Francisco, CA (SFO) - St. Louis, MO (STL)	2,810	293
San Francisco, CA (SFO) - Fort Walton Beach, FL (	3,454	293
Hartford, CT (BDL) - San Juan, PR (SJU)	5,673	292
Fort Myers, FL (RSW) - San Antonio, TX (SAT)	2,676	291
Fresno, CA (FAT) - Phoenix, AZ (PHX)	9,574	290
Philadelphia, PA (PHL) - Sacramento, CA (SMF)	2,877	290
Chicago, IL (CHI) - Gulfport, MS (GPT)	4,618	289
Memphis, TN (MEM) - Phoenix, AZ (PHX)	4,808	289
Charleston, SC (CHS) - Los Angeles, CA (LAX)	3,071	289
Los Angeles, CA (LAX) - Harrisburg, PA (MDT)	3,884	288
Honolulu, HI (HNL) - Orlando, FL (MCO)	2,888	288
Denver, CO (DEN) - Greensboro, NC (GSO)	3,382	287
St. Louis, MO (STL) - St. Croix, VI (STX)	9,073	287
Harrisburg, PA (MDT) - Louisville, KY (SDF)	3,581	287
Lexington, KY (LEX) - Fayetteville, AR (XNA)	4,320	287
Jackson, MS (JAN) - Minneapolis, MN (MSP)	4,719	287
Hartford, CT (BDL) - Fort Walton Beach, FL (VPS)	5,478	287
Gulfport, MS (GPT) - Phoenix, AZ (PHX)	4,028	286
Montgomery, AL (MGM) - Minneapolis, MN (MSP)	6,343	286
Syracuse, NY (SYR) - Knoxville, TN (TYS)	4,611	286
West Palm Beach (PBI) - San Diego, CA (SAN)	3,433	286
Sacramento, CA (SMF) - Tampa, FL (TPA)	2,501	285
Little Rock, AR (LIT) - Norfolk-Virginia Beach, VA (ORF)	3,660	285
Omaha, NE (OMA) - Pensacola, FL (PNS)	4,733	285
Orlando, FL (MCO) - Phoenix, AZ (PHX)	4,009	283
Dallas, TX (DFW) - Gainesville, FL (GNV)	6,248	283
Indianapolis, IN (IND) - Syracuse, NY (SYR)	3,346	283
New York, NY (NYC) - Tallahassee, FL (TLH)	4,681	282
Jackson, MS (JAN) - New York, NY (NYC)	3,886	282
St. Louis, MO (STL) - Washington, DC (WAS)	3,562	281
Westchester County, NY (HPN) - Lexington, KY (LEX)	4,864	280
Denver, CO (DEN) - Mobile, AL (MOB)	3,366	280
Philadelphia, PA (PHL) - Seattle, WA (SEA)	4,261	280
San Antonio, TX (SAT) - San Francisco, CA (SFO)	3,404	279
Jacksonville, FL (JAX) - Little Rock, AR (LIT)	5,509	278
Des Moines, IA (DSM) - Huntsville, AL (HSV)	5,237	278

CITY PAIR	Post-Merger HHI	Δ HHI
Key West, FL (EYW) - Pittsburgh, PA (PIT)	3,483	277
Houston, TX (HOU) - San Juan, PR (SJU)	4,844	277
Columbus, OH (CMH) - El Paso, TX (ELP)	4,590	276
Louisville, KY (SDF) - Syracuse, NY (SYR)	3,612	275
Greenville, SC (GSP) - Phoenix, AZ (PHX)	2,929	274
Harrisburg, PA (MDT) - San Diego, CA (SAN)	4,131	272
Phoenix, AZ (PHX) - Rochester, NY (ROC)	2,756	272
Kansas City, MO (MCI) - Rochester, NY (ROC)	2,970	271
Baton Rouge, LA (BTR) - Philadelphia, PA (PHL)	3,775	271
El Paso, TX (ELP) - Indianapolis, IN (IND)	4,014	270
Columbus, OH (CMH) - Little Rock, AR (LIT)	3,273	270
Hartford, CT (BDL) - San Francisco, CA (SFO)	2,657	269
St. Thomas, VI (STT) - Tampa, FL (TPA)	4,436	269
Kansas City, MO (MCI) - West Palm Beach (PBI)	3,537	269
Huntsville, AL (HSV) - Minneapolis, MN (MSP)	5,458	268
El Paso, TX (ELP) - Palm Springs, CA (PSP)	6,530	268
Columbus, OH (CMH) - Seattle, WA (SEA)	2,515	267
Lexington, KY (LEX) - New York, NY (NYC)	4,373	267
Houston, TX (HOU) - Tucson, AZ (TUS)	4,456	267
Charlottesville, VA (CHO) - Indianapolis, IN (IND	4,591	266
Nashville, TN (BNA) - Miami, FL (MIA)	4,483	266
Anchorage, AK (ANC) - Indianapolis, IN (IND)	5,094	266
Milwaukee, WI (MKE) - Knoxville, TN (TYS)	4,213	265
Minneapolis, MN (MSP) - West Palm Beach (PBI)	4,823	264
Philadelphia, PA (PHL) - St. Louis, MO (STL)	4,659	264
Gainesville, FL (GNV) - Washington, DC (WAS)	4,883	263
Gulfport, MS (GPT) - Los Angeles, CA (LAX)	3,661	262
Fort Myers, FL (RSW) - Seattle, WA (SEA)	2,839	262
Charlottesville, VA (CHO) - Louisville, KY (SDF)	7,869	261
Cincinnati, OH (CIN) - Phoenix, AZ (PHX)	4,029	261
Dallas, TX (DFW) - San Francisco, CA (SFO)	4,011	261
Austin, TX (AUS) - Fort Myers, FL (RSW)	2,913	261
Phoenix, AZ (PHX) - Pittsburgh, PA (PIT)	4,126	261
Richmond, VA (RIC) - San Juan, PR (SJU)	2,720	261
Mobile, AL (MOB) - San Francisco, CA (SFO)	3,410	261
New Orleans, LA (MSY) - Philadelphia, PA (PHL)	4,232	260
Salt Lake City, UT (SLC) - Tampa, FL (TPA)	2,876	260
Omaha, NE (OMA) - San Diego, CA (SAN)	2,766	260
Columbia, SC (CAE) - Seattle, WA (SEA)	3,457	259

CITY PAIR	Post-Merger HHI	Δ HHI
Austin, TX (AUS) - Chattanooga, TN (CHA)	5,587	258
Kansas City, MO (MCI) - Fort Myers, FL (RSW)	2,777	258
Harrisburg, PA (MDT) - Omaha, NE (OMA)	3,604	257
Fort Walton Beach, FL (VPS) - Fayetteville, AR (X	4,338	257
Boston, MA (BOS) - Pensacola, FL (PNS)	3,307	257
Minneapolis, MN (MSP) - Fort Walton Beach, FL (VP	6,289	256
Omaha, NE (OMA) - Richmond, VA (RIC)	3,508	256
El Paso, TX (ELP) - Tampa, FL (TPA)	3,311	255
Des Moines, IA (DSM) - Rochester, NY (ROC)	3,396	255
Philadelphia, PA (PHL) - Tallahassee, FL (TLH)	5,014	255
Austin, TX (AUS) - Cincinnati, OH (CIN)	3,879	254
Omaha, NE (OMA) - Savannah, GA (SAV)	5,733	254
Cleveland, OH (CLE) - Little Rock, AR (LIT)	2,934	254
Greensboro, NC (GSO) - Omaha, NE (OMA)	3,827	253
Huntsville, AL (HSV) - Indianapolis, IN (IND)	5,972	252
Des Moines, IA (DSM) - El Paso, TX (ELP)	5,590	252
Raleigh-Durham, NC (RDU) - Tallahassee, FL (TLH)	5,133	249
Boston, MA (BOS) - Mobile, AL (MOB)	4,940	249
Grand Junction, CO (GJT) - Miami, FL (MIA)	5,388	249
Austin, TX (AUS) - Knoxville, TN (TYS)	4,141	249
Gainesville, FL (GNV) - Indianapolis, IN (IND)	5,173	248
El Paso, TX (ELP) - San Francisco, CA (SFO)	5,400	248
Jacksonville, FL (JAX) - Los Angeles, CA (LAX)	2,916	248
Greensboro, NC (GSO) - Houston, TX (HOU)	4,051	248
Miami, FL (MIA) - New Orleans, LA (MSY)	4,060	247
Birmingham, AL (BHM) - Key West, FL (EYW)	4,205	247
Hartford, CT (BDL) - Jackson, MS (JAN)	3,698	247
Detroit, MI (DTW) - Jackson, MS (JAN)	4,440	247
Philadelphia, PA (PHL) - Phoenix, AZ (PHX)	5,660	247
Indianapolis, IN (IND) - Reno, NV (RNO)	3,892	246
Charleston, SC (CHS) - Fayetteville, AR (XNA)	5,979	246
Columbia, SC (CAE) - San Francisco, CA (SFO)	3,428	245
Nashville, TN (BNA) - Boston, MA (BOS)	3,105	245
Los Angeles, CA (LAX) - Tampa, FL (TPA)	3,488	245
St. Louis, MO (STL) - Fort Walton Beach, FL (VPS)	5,733	245
El Paso, TX (ELP) - Orlando, FL (MCO)	3,146	244
Atlanta, GA (ATL) - El Paso, TX (ELP)	4,450	244
Minneapolis, MN (MSP) - Knoxville, TN (TYS)	4,920	243
Las Vegas, NV (LAS) - Lexington, KY (LEX)	3,493	243

CITY PAIR	Post-Merger HHI	Δ HHI
Boston, MA (BOS) - Jackson, MS (JAN)	3,999	243
Houston, TX (HOU) - Knoxville, TN (TYS)	4,051	243
Milwaukee, WI (MKE) - Reno, NV (RNO)	3,832	243
Gulfport, MS (GPT) - Kansas City, MO (MCI)	3,887	242
Huntsville, AL (HSV) - New York, NY (NYC)	4,033	242
San Francisco, CA (SFO) - Knoxville, TN (TYS)	3,400	242
Miami, FL (MIA) - Omaha, NE (OMA)	2,831	240
Lexington, KY (LEX) - Rochester, NY (ROC)	4,466	240
Montgomery, AL (MGM) - San Diego, CA (SAN)	5,257	239
Huntsville, AL (HSV) - San Francisco, CA (SFO)	3,449	239
Savannah, GA (SAV) - San Francisco, CA (SFO)	3,791	239
Los Angeles, CA (LAX) - Philadelphia, PA (PHL)	4,082	239
Gainesville, FL (GNV) - Raleigh-Durham, NC (RDU)	5,092	239
Detroit, MI (DTW) - Honolulu, HI (HNL)	4,822	238
Dallas, TX (DFW) - Seattle, WA (SEA)	4,298	237
Boston, MA (BOS) - Miami, FL (MIA)	3,909	237
Milwaukee, WI (MKE) - Ontario, CA (ONT)	4,742	237
Huntsville, AL (HSV) - Los Angeles, CA (LAX)	3,441	237
Minneapolis, MN (MSP) - Syracuse, NY (SYR)	4,097	236
Phoenix, AZ (PHX) - San Antonio, TX (SAT)	4,728	236
Chicago, IL (CHI) - Montgomery, AL (MGM)	6,507	236
Birmingham, AL (BHM) - Des Moines, IA (DSM)	4,292	235
Hartford, CT (BDL) - San Antonio, TX (SAT)	2,916	235
Cincinnati, OH (CIN) - Fayetteville, AR (XNA)	5,927	235
Baton Rouge, LA (BTR) - Greensboro, NC (GSO)	5,054	234
Los Angeles, CA (LAX) - Savannah, GA (SAV)	4,517	234
Pensacola, FL (PNS) - San Diego, CA (SAN)	3,713	234
Hartford, CT (BDL) - Seattle, WA (SEA)	2,772	233
Pensacola, FL (PNS) - San Francisco, CA (SFO)	2,909	233
Austin, TX (AUS) - Grand Junction, CO (GJT)	4,674	233
Hartford, CT (BDL) - Pensacola, FL (PNS)	4,929	233
Omaha, NE (OMA) - Fort Myers, FL (RSW)	3,008	233
Indianapolis, IN (IND) - Knoxville, TN (TYS)	3,945	232
Baton Rouge, LA (BTR) - Pittsburgh, PA (PIT)	4,397	232
Minneapolis, MN (MSP) - Palm Springs, CA (PSP)	3,824	231
Los Angeles, CA (LAX) - Miami, FL (MIA)	3,410	231
Greenville, SC (GSP) - Little Rock, AR (LIT)	4,770	231
Grand Junction, CO (GJT) - Orlando, FL (MCO)	4,457	231
Key West, FL (EYW) - Los Angeles, CA (LAX)	6,973	230

CITY PAIR	Post-Merger HHI	Δ HHI
Charlottesville, VA (CHO) - San Antonio, TX (SAT)	4,463	230
Jacksonville, FL (JAX) - Kansas City, MO (MCI)	3,399	230
Key West, FL (EYW) - Norfolk-Virginia Beach, VA (ORF)	5,747	230
Dallas, TX (DFW) - Durango, CO (DRO)	4,052	230
Key West, FL (EYW) - Minneapolis, MN (MSP)	6,277	229
Miami, FL (MIA) - Knoxville, TN (TYS)	3,304	229
Indianapolis, IN (IND) - Philadelphia, PA (PHL)	6,700	229
St. Croix, VI (STX) - Washington, DC (WAS)	8,150	229
Des Moines, IA (DSM) - Tallahassee, FL (TLH)	6,416	229
Boston, MA (BOS) - Knoxville, TN (TYS)	5,003	228
Los Angeles, CA (LAX) - Syracuse, NY (SYR)	2,935	227
Columbia, SC (CAE) - San Diego, CA (SAN)	4,515	227
Baton Rouge, LA (BTR) - Norfolk-Virginia Beach, VA (ORF	5,156	226
Memphis, TN (MEM) - Syracuse, NY (SYR)	4,421	226
Austin, TX (AUS) - Phoenix, AZ (PHX)	4,891	226
Indianapolis, IN (IND) - Rochester, NY (ROC)	3,666	226
Charleston, SC (CHS) - Seattle, WA (SEA)	3,380	226
San Diego, CA (SAN) - Knoxville, TN (TYS)	3,233	226
Seattle, WA (SEA) - Knoxville, TN (TYS)	3,046	225
Sacramento, CA (SMF) - Washington, DC (WAS)	2,898	225
Denver, CO (DEN) - Tallahassee, FL (TLH)	5,975	225
Los Angeles, CA (LAX) - Fort Walton Beach, FL (VP	3,815	223
Denver, CO (DEN) - Westchester County, NY (HPN)	3,819	223
Phoenix, AZ (PHX) - Raleigh-Durham, NC (RDU)	3,573	223
Hartford, CT (BDL) - Lexington, KY (LEX)	4,745	222
Atlanta, GA (ATL) - Tucson, AZ (TUS)	4,916	222
Monterey, CA (MRY) - Salt Lake City, UT (SLC)	6,650	221
Little Rock, AR (LIT) - San Juan, PR (SJU)	6,569	220
San Diego, CA (SAN) - Tallahassee, FL (TLH)	6,434	219
Key West, FL (EYW) - Memphis, TN (MEM)	6,557	219
Des Moines, IA (DSM) - Westchester County, NY (HPN)	3,464	219
Baton Rouge, LA (BTR) - Phoenix, AZ (PHX)	4,389	219
Baton Rouge, LA (BTR) - New York, NY (NYC)	3,718	218
Jackson, MS (JAN) - Miami, FL (MIA)	4,304	218
Mobile, AL (MOB) - New York, NY (NYC)	4,452	218
Albuquerque, NM (ABQ) - Tampa, FL (TPA)	3,054	218
Boston, MA (BOS) - Gulfport, MS (GPT)	5,213	218
Houston, TX (HOU) - Reno, NV (RNO)	3,525	217
Norfolk-Virginia Beach, VA (ORF) - Seattle, WA (SEA)	3,247	217

CITY PAIR	Post-Merger HHI	Δ HHI
Mobile, AL (MOB) - Minneapolis, MN (MSP)	5,888	217
Denver, CO (DEN) - Norfolk-Virginia Beach, VA (ORF)	2,598	215
Kansas City, MO (MCI) - Tallahassee, FL (TLH)	6,205	215
Des Moines, IA (DSM) - Harrisburg, PA (MDT)	3,556	215
Columbia, SC (CAE) - Houston, TX (HOU)	3,634	214
Gulfport, MS (GPT) - Washington, DC (WAS)	4,647	214
San Francisco, CA (SFO) - Syracuse, NY (SYR)	3,547	214
Jackson, MS (JAN) - Milwaukee, WI (MKE)	5,568	213
New York, NY (NYC) - San Jose, CA (SJC)	3,002	213
Omaha, NE (OMA) - Knoxville, TN (TYS)	3,596	213
Baton Rouge, LA (BTR) - Indianapolis, IN (IND)	4,240	212
Charleston, WV (CRW) - Dallas, TX (DFW)	4,244	212
Des Moines, IA (DSM) - Fort Myers, FL (RSW)	3,859	211
Houston, TX (HOU) - Santa Barbara, CA (SBA)	6,373	211
Pittsburgh, PA (PIT) - St. Louis, MO (STL)	3,179	211
Westchester County, NY (HPN) - Milwaukee, WI (MKE)	3,142	210
Pensacola, FL (PNS) - St. Thomas, VI (STT)	5,346	210
Harrisburg, PA (MDT) - Minneapolis, MN (MSP)	3,659	208
Pittsburgh, PA (PIT) - Seattle, WA (SEA)	2,610	207
Austin, TX (AUS) - Greenville, SC (GSP)	2,984	207
Albuquerque, NM (ABQ) - Boston, MA (BOS)	3,294	207
Las Vegas, NV (LAS) - Syracuse, NY (SYR)	2,755	207
Houston, TX (HOU) - Monterey, CA (MRY)	6,287	206
Jackson, MS (JAN) - San Juan, PR (SJU)	6,244	205
Chattanooga, TN (CHA) - New York, NY (NYC)	5,046	205
Miami, FL (MIA) - Pensacola, FL (PNS)	5,066	204
Indianapolis, IN (IND) - Harrisburg, PA (MDT)	3,462	203
Gulfport, MS (GPT) - Greenville, SC (GSP)	4,923	203
Norfolk-Virginia Beach, VA (ORF) - Tallahassee, FL (TLH)	5,030	203
Phoenix, AZ (PHX) - Washington, DC (WAS)	3,416	202
Chicago, IL (CHI) - Orange County, CA (SNA)	3,726	201
Austin, TX (AUS) - Charleston, SC (CHS)	3,275	201
Baton Rouge, LA (BTR) - Detroit, MI (DTW)	5,080	201

TITLE 15 - COMMERCE AND TRADE

CHAPTER 1 - MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

§ 13. Discrimination in price, services, or facilities

(a) Price; selection of customers

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Burden of rebutting prima-facie case of discrimination

Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) Payment or acceptance of commission, brokerage, or other compensation

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

(d) Payment for services or facilities for processing or sale

It shall be unlawful for any person engaged in commerce to pay or contact for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) Furnishing services or facilities for processing, handling, etc.

It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

(f) Knowingly inducing or receiving discriminatory price

It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

(Oct. 15, 1914, ch. 323, § 2, 38 Stat. 730; June 19, 1936, ch. 592, § 1, 49 Stat. 1526.)

Amendments

1936—Act June 19, 1936, amended section generally.

Short Title

Act June 19, 1936, which amended this section and added sections 13a, 13b, and 21a of this title, is popularly known as the Robinson-Patman Act, as the Robinson-Patman Antidiscrimination Act, and also as the Robinson-Patman Price Discrimination Act.

SENATE BILL No. 124

AN ACT concerning the Kansas restraint of trade act; amending K.S.A. 50-101, 50-112, 50-158 and 50-161 and repealing the existing sections; also repealing K.S.A. 50-108 and 50-115.

Be it enacted by the Legislature of the State of Kansas:

New Section 1. (a) The purpose of this section, and the amendments to K.S.A. 50-101, 50-112, 50-158 and 50-161 by this act, is to clarify and reduce any uncertainty or ambiguity as to the application of the Kansas restraint of trade act and applicable evidentiary standards to certain types of business contracts, agreements and arrangements that are not intended to unreasonably restrain trade or commerce and do not contravene public welfare.

(b) Except as otherwise provided in subsections (d) and (e), the Kansas restraint of trade act shall be construed in harmony with ruling judicial interpretations of federal antitrust law by the United States supreme court. If such judicial interpretations are in conflict with or inconsistent with the express provisions of subsection (c), the provisions of subsection (c) shall control.

(c) An arrangement, contract, agreement, trust, understanding or combination shall not be deemed a trust pursuant to the Kansas restraint of trade act and shall not be deemed unlawful, void, prohibited or wrongful under any provision of the Kansas restraint of trade act if that arrangement, contract, agreement, trust, understanding or combination is a reasonable restraint of trade or commerce. An arrangement, contract, agreement, trust, understanding or combination is a reasonable restraint of trade or commerce if such restraint is reasonable in view of all of the facts and circumstances of the particular case and does not contravene public welfare.

(d) The Kansas restraint of trade act shall not be construed to prohibit:

(1) Actions or proceedings concerning intrastate commerce;

(2) actions or proceedings by indirect purchasers pursuant to K.S.A. 50-161, and amendments thereto;

(3) recovery of damages pursuant to K.S.A. 50-161, and amendments thereto;

(4) any remedy or penalty provided in the Kansas restraint of trade act, including, but not limited to, recovery of civil penalties pursuant to K.S.A. 50-160, and amendments thereto; and

(5) any action or proceeding brought by the attorney general pursuant to authority provided in the Kansas restraint of trade act, or any other power or duty of the attorney general provided in such act.

(e) The Kansas restraint of trade act shall not be construed to apply to:

(1) Any association that complies with the provisions and application of article 16 of chapter 17 of the Kansas Statutes Annotated, and amendments thereto, the cooperative marketing act;

(2) any association, trust, agreement or arrangement that is governed by the provisions and application of 7 U.S.C. § 291 et seq., the Capper-Volstead act;

(3) any corporation organized under the electric cooperative act, K.S.A. 17-4601 et seq., and amendments thereto, or which becomes subject to the electric cooperative act in any manner therein provided; or any limited liability company or corporation, or wholly owned subsidiary thereof, providing electric service at wholesale in the state of Kansas that is owned by four or more electric cooperatives that provide retail service in the state of Kansas; or any member-owned corporation formed prior to 2004;

(4) any association that is governed by the provisions and application of article 22 of chapter 17 of the Kansas Statutes Annotated, and amendments thereto, the credit union act;

(5) any association, trust, agreement or arrangement that is governed by the provisions and application of 7 U.S.C. § 181 et seq., the packers and stockyards act; and

(6) any franchise agreements or covenants not to compete.

(f) If any provision of this section or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this section which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

(g) This section shall be a part of and supplemental to the Kansas restraint of trade act.

Sec. 2. K.S.A. 50-101 is hereby amended to read as follows: 50-101. *Except as provided in section 1, and amendments thereto,* a trust is a combination of capital, skill, or acts, by two or more persons, for either, any or all of the following purposes:

First. To create or carry out restrictions in trade or commerce~~, or aids to commerce,~~ or to carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this state.

Second. To increase or reduce the price of merchandise, produce or commodities, or to control the cost or rates of insurance.

Third. To prevent competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities~~, or to prevent competition in aids to commerce~~.

Fourth. To fix any standard or figure, whereby such person's price to the public shall be, in any manner, controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this state.

Fifth. To make or enter into, or execute or carry out, any contract, obligation or agreement of any kind or description by which such person shall: (a) Bind or have to bind themselves not to sell, manufacture, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure;

(b) agree in any manner to keep the price of such article, commodity or transportation at a fixed or graded figure;

(c) in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in transportation, sale or manufacture of any such article or commodity; or

(d) agree to pool, combine or unite any interest they may have in connection with the manufacture, sale or transportation of any such article or commodity, that such person's price in any manner is affected. Any such combinations are hereby declared to be against public policy, unlawful and void.

Sec. 3. K.S.A. 50-112 is hereby amended to read as follows: 50-112. *Except as provided in section 1, and amendments thereto,* all arrangements, contracts, agreements, trusts, or combinations between persons made with a view or which tend to prevent full and free competition in the importation, transportation or sale of articles imported into this state, or in the product, manufacture or sale of articles of domestic growth or product of domestic raw material, or for the loan or use of money, or to fix attorney or doctor fees, and all arrangements, contracts, agreements, trusts or combinations between persons, designed or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such products or articles, or to control the cost or rate of insurance, or which tend to advance or control the rate of interest for the loan or use of moneys to the borrower, or any other services, are hereby declared to be against public policy, unlawful and void.

Sec. 4. K.S.A. 50-158 is hereby amended to read as follows: 50-158. The provisions of ~~article 1 of chapter 50 of the Kansas Statutes Annotated, and amendments thereto, and the provisions of K.S.A. 50-158 through 50-160~~ *K.S.A. 50-101 through 50-162 and section 1,* and amendments thereto, may be cited as the Kansas restraint of trade act.

Sec. 5. K.S.A. 50-161 is hereby amended to read as follows: 50-161. (a) As used in this section, the term "person" means any individual, corporation, partnership, firm, company or other association of persons, and such term shall include the state of Kansas and any of its political subdivisions.

(b) Except as provided in K.S.A. 12-205, and amendments thereto, any person who may be damaged or injured by any agreement, monopoly, trust, conspiracy or combination which is declared unlawful by ~~any of the acts contained in chapter 50 of the Kansas Statutes Annotated,and amendments thereto, relating to unlawful acts, agreements, monopolies, trusts, conspiracies or combinations in restraint of trade,~~ *the Kansas restraint of trade act* shall have a cause of action against any person causing such damage or injury. Such action may be brought by any person who is injured in such person's business or property by reason of anything forbidden or declared unlawful by ~~this~~ *the Kansas restraint of trade* act, regardless of whether such injured person dealt directly or indirectly with the defendant. The plaintiff in any action commenced hereunder in the district court of the county wherein such plaintiff resides, or the district court of the county of the defendant's principal place of business, may sue for and recover treble the *actual* damages sustained. In addition, any person who is threatened with injury or additional injury by reason of any person's violation of ~~such acts~~ *the Kansas restraint of trade act* may commence an action in such district court to enjoin any such violation, and any damages suffered may be sued for and recovered in the same action in addition to injunctive relief. Any suit for injunctive relief against a municipality shall be subject to the provisions of K.S.A. 12-205, and amendments thereto.

(c) In any action commenced under this section, the plaintiff may be allowed reasonable attorney fees and costs. The remedies provided herein shall be alternative and in addition to any other remedies now provided by law.

New Sec. 6. Section 1 and the amendments to K.S.A. 50-101 and 50-112 by this act shall be applied retroactively to any choses in action or defenses premised on any provision of the Kansas restraint of trade act amended or repealed by this act, and any such choses in action or defenses that have accrued as of the effective date of this act shall be abated, but causes of action that were pending in any court before the effective date of this act, shall not be abated. All other non-remedial provisions of this section shall be applied prospectively.

Sec. 7. K.S.A. 50-101, 50-112, 50-108, 50-115, 50-158 and 50-161 are hereby repealed.

Sec. 8. This act shall take effect and be in force from and after its publication in the Kansas register.

I hereby certify that the above BILL originated in the SENATE, and passed that body

____

SENATE adopted
Conference Committee Report ____________________

President of the Senate.

Secretary of the Senate.

Passed the HOUSE
as amended ____________________

HOUSE adopted
Conference Committee Report ____________________

Speaker of the House.

Chief Clerk of the House.

APPROVED ____________________

Governor.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

PHAIROJ KAEWSAWANG, Plaintiff, vs. SARA LEE FRESH, INC. ET AL, Defendant	)	Case No.: BC360109 COURT'S RULING ON SUBMITTED MATTER RE DEMURRER AND MOTION TO STRIKE PORTIONS OF FOURTH AMENDED COMPLAINT HEARING DATE: APRIL 2, 2013 DEPARTMENT 308 ASSIGNED TO HON. JANE L. JOHNSON

This court, having received and reviewed the pleadings and authorities cited therein, and having heard oral argument, adopts its April 2, 2013 Tentative Ruling and rules as follows on Defendants' Demurrer and Motion to Strike Portions of the Fourth Amended Complaint.

A. ALLEGATIONS IN FOURTH AMENDED COMPLAINT

Until November 2011, when it was purchased by Defendant Grupo Bimbo, Defendant Sara Lee "was in the business of producing, distributing, and selling baked goods." ¶¶22, 27. According to the Fourth Amended Complaint, the Defendants first "entered into agreements, and/or Customer Marketing Agreements" ("CMA's") with the Chain Stores (listed in ¶32) "whereby Defendants committed to deliver baked goods and the Chain Stores agreed to provide shelf space and displays for Defendants' products." ¶33. See also ¶43. The agreements, which were not always in writing (¶36) generally include some or all of the following terms:

> (1) schematics mandating the type and arrangement of products in specified locations on store shelves, (2) the price at which the Chain Stores will purchase Defendants' baked goods, (3) mandatory promotions for products, (4) mandatory displays for products, (5) mandatory delivery schedules for products, (6) mandatory freshness requirements for products (i.e. the removal of stale products), and (7) mandatory service intervals for products [¶34. See also ¶44]

As for distribution of the products, ¶37 alleges:

> During the Class Period, Defendants distributed baked goods through two distribution systems: (1) Defendants employed certain individuals who distribute baked goods [as defined in ¶31] that Defendants sell directly to retail stores; and (2) Defendants entered into distribution agreements with other individuals, including Plaintiffs and the Class members, who bought baked goods from Defendants and then resold the baked goods to retail stores, including the Chain Stores.

During the class period, there were "three operative versions of the Distribution Agreements: the 1999 Sara Lee Fresh Distribution Agreement ("the 1999 Agreement"), the 2002 Sara Lee Fresh Distribution Agreement (the "2002 Agreement"), and the 2007 Sara Lee Fresh, Inc. Distribution Agreement (the "2007 Agreement"). ¶38. According to ¶¶39-42, all of the Distribution Agreements (1) assign a specific geographic area, known as a "Sales Area" or "Route," in which Plaintiffs distribute Defendants' baked goods to retail stores; (2) require the Plaintiffs to purchase the baked goods from Defendant and resell them to retail stores; (3) Plaintiffs are prohibited from distributing the baked goods outside their geographic area; (4) Plaintiffs cannot compete with Defendants or sell baked goods of competing manufacturers; (5) are deemed to be independent contractors; and (6) Plaintiffs are required to "arrange the goods on the shelves, rotate the stock, display advertising materials…[keep] the shelves neat, full and clean, and must remove damaged and "over-code" [expired] goods."

Plaintiffs assert that the Distribution Agreements are a per se violation of the Cartwright Act in that (1) Plaintiffs "have no ability to negotiate the price or other terms for which they sell baked goods to the Chain Stores" (¶¶65, 70); and (2) improperly limits their geographical territory and permits Plaintiffs from selling to service retail stores (¶83). As ¶¶206 and 210 note:

> …Defendants fix and control the prices that the Representative Plaintiff and Class members charge Chain Stores. Defendants accomplish that price fixing by including provisions in the Distribution Agreements which require Representative Plaintiffs and the Class members to comply with the terms of the agreements reached between Defendants and the Chain Stores and by using hand-held devices and computer systems that are pre-programmed with the prices fixed between Defendants and the Chain Stores.
>
> As a result of the foregoing division of territories and customers, there is no competition among distributors of Defendants' baked goods for the business for the business of retail stores that sell those goods in the Relevant Market [as defined in ¶¶87-90]

The Fourth Amended Class Action complaint alleges the following class:

> All persons or entities that, since March 17, 2002, are or were signatories to one or more of the Distribution Agreements with Defendants for the distribution of Sara Lee baked goods within California. [¶94]

The Fourth Amended Complaint alleges 15 causes of action, only which 3 are relevant to this motion: (1) 12th cause of action – Violation of the Cartwright Act, (2) 13th cause of action – "Spriggs" Violation of the Cartwright Act, and (3) 15th cause of action – Unlawful Business Practices.

B. APPLICABLE LAW

A demurrer tests the sufficiency of a complaint as a matter of law and raises only questions of law. See Cal. Code Civ. Proc., § 589; Schmidt v. Foundation Health, 35 Cal. App. 4th 1702, 1706 (1995). In testing the sufficiency of the complaint, the court must assume the truth of (1) the properly pleaded factual allegations; (2) facts that can be reasonably inferred from those expressly pleaded; and (3) judicially noticed matters. See Blank v. Kirwan, 39 Cal. 3d 311, 318 (1985). Accordingly, "[w]hether the plaintiff will be able to prove the pleaded facts is irrelevant to ruling upon the demurrer." Stevens v. Superior Court, 180 Cal. App. 3d 605, 609-610 (1986).

A general demurrer is proper where the complaint "does not state facts sufficient to constitute a cause of action" or discloses a defense that would bar recovery. See Cal. Code Civ. Proc., § 430.10(e); Casterson v. Superior Court, 101 Cal. App. 4th 177, 183 (2002). If there is a reasonable possibility that a defect in the complaint could be cured by amendment, the court should sustain the demurrer with leave to amend. See City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 68 Cal. App. 4th 445, 459-460 (1998). However, "where the nature of the plaintiff's claim is clear, and under substantive law no liability exists, a court should deny leave to amend because no amendment could change the result." Id.

C. REQUEST FOR JUDICIAL NOTICE

Defendant seeks to have this Court take judicial notice of a JAMS ruling in Dennis Johnson v. Gruma Corporation. The Court will take judicial notice of the existence of this ruling, but will not take judicial notice of any facts or analysis as binding or persuasive authority on this Court.

Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort (2001) 91 Cal.App.4th 875, 882.

D. DEMURRER

1. 12th CAUSE OF ACTION – VIOLATION OF THE CARTWRIGHT ACT

The Cartwright Act is California's version of the Sherman Antitrust Act (15 U.S.C. §1, et seq.). , As the court in Exxon Corp. v. Superior Court (1997) 51 Cal.App.4th 1672 explains at page 1680 :"[t]he Cartwright Act…was enacted to promote free market competition and to prevent conspiracies or agreements in restraint or monopolization of trade." "[F]ederal cases interpreting the Sherman Act are applicable to problems arising under the Cartwright Act." Marin County Bd. of Realtors, Inc. v. Palsson (1976) 16 Cal.3d 920, 925.

Protection of the public is the paramount concern of all anti-trust legislation. Munter v. Eastman Kodak Co. (1915) 28 Cal.App.660, 667. As such, "[t]he purpose of federal and state antitrust laws is to protect and promote competition for the benefit of consumers." Chavez v. Whirlpool Corp. (2001) 93 Cal.App.4th 363, 375. Accordingly, the Cartwright Act prohibits "acts by two or more persons ... to create ... restrictions in trade or commerce." See Ca. Bus. & Prof.C. § 16720. "Although the statutory language is all-encompassing, the courts have limited the Cartwright Act's reach to unreasonable restraints. Certain restraints which lack redeeming virtue are conclusively presumed to be unreasonable and illegal." Morrison v. Viacom, Inc. (1998) 66 Cal.App.4th 534, 540.

Anti-trust laws are framed in terms of horizontal restraints and vertical restraints. See Business Electronics Corp. v. Sharp Electronics Corp. (1998) 485 U.S. 717, 730 ("Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints.")

The elements of a Cartwright Act claim are "(1) the formation and operation of the conspiracy, (2) the wrongful act or acts done pursuant thereto, and (3) the damage resulting from such act or acts. [Citation.]" Quelimane Co. v. Stewart Title Guaranty Co. (1998) 19 Cal.4th 26, 47.

The 12th cause of action for Violation of the Cartwright Act alleges in ¶¶204-206 that Defendants engaged in price fixing as follows:

> Beginning at a time unknown to Representative Plaintiffs, but at least as early as 2002, Defendants combined, conspired, and agreed with Chain Stores to fix the price at which Representative Plaintiffs and the Class sell Defendants' baked goods to the Chain Stores.
>
> In furtherance of its unlawful arrangements, Defendants met, and negotiated agreement with the Chain Stores regarding the pricing of Defendants' product to be charged to the Chain Stores by Representative Plaintiffs and the Class members…
>
> Because of these agreements, Defendants fix and control the prices that the Representative Plaintiffs and Class members charge Chain Stores. Defendants accomplish this price fixing by including provisions in the Distribution Agreements which require Representative Plaintiffs and the Class Members to comply with the terms of the agreements reached between Defendants and the Chain Stores; and by using hand-held devices and computer systems that are pre-programmed with the prices fixed between Defendants and the Chain Stores.

In addition to the price-fixing allegations, Plaintiffs allege unlawful territorial restrictions at ¶¶209-211 as follows:

> Through their Distribution Agreements with Representative Plaintiffs and the Class members, Defendants have divided the territories and customers in the Relevant Markets among the distributors of Defendants' baked goods…
>
> As a result of the foregoing division of territories and customers, there is no competition among distributors of Defendants' baked goods for the business of retail stores that sell those goods in the Relevant Markets.
>
> Since Defendants operate on the distribution level as well as the manufacturing level, the territorial and customer restrictions that Defendants impose on Representative Plaintiffs and the Class members constitute a horizontal restrain on completion in per se violation of the Cartwright Act…

a. PRICE FIXING ALLEGATION

Defendant contends correctly that the facts pled in ¶¶204-206 do not support a price fixing allegation since Plaintiffs admit that, pursuant to the terms of the Distribution Agreement, the parties agreed that Defendant negotiates the price of the baked goods with the Chain Stores. FAC ¶67, 69 ("Chain Stores expect to receive Defendants' baked goods on the terms they negotiate with Defendants.") Plaintiffs concede that, under the Cartwright Act, whether price-fixing occurred depends on "whether the prices have been determined 'by the interplay of the economic forces of supply and demand.'" Pls.' Memo of Ps. & As. In Opp'n to Defs.' Demurrer to Pls.' FAC ("Opp.") at 6:28-7:4 (March 5, 2013). Thus, it would appear that, in this case, the market sets the relevant prices.

Indeed, the first element of a Cartwright Act claim is "the formation and operation of the conspiracy." Thus, because the prices are "negotiated," it is unclear how Defendant and the Chain Stores conspired to engage in price-fixing. ¶204. See Marsh v. Anesthesia Service Medical Group, Inc. (2011) 200 Cal.App.4th 480, 493:

> "An antitrust claim must plead the formation and operation of the conspiracy and the illegal acts done in furtherance of the conspiracy. [Citation.] California requires a 'high degree of particularity' in the pleading of Cartwright Act violations [citation] and therefore generalized allegations of antitrust violations are usually insufficient. [Citation.] ... The absence of factual allegations of specific conduct in furtherance of the conspiracy to eliminate or reduce competition makes the complaint legally insufficient. [Citation.]" (Freeman, supra, 77 Cal.App.4th 171, 196, 91 Cal.Rptr.2d 534.)

Consequently, as there are no alleged facts showing the formation and operation of a conspiracy between the Chain Stores and Defendants, it cannot be determined, as a matter of antitrust law, that a Cartwright Act claim for illegal vertical price-fixing has adequately been alleged. Quelimane Co. v. Stewart Title Guaranty Co. (1998) 19 Cal.4th 26, 47.

(1) PER SE VIOLATION ARGUMENT

Citing Mailand v. Burckle (1978) 20 Cal.3d 367, Plaintiffs contend the alleged facts support a "per se" violation of the Cartwright Act. According to Plaintiff, the California Supreme Court in Mailand v. Burckle held that "all price fixing, whether horizontal or vertical, is per se unlawful under the Cartwright Act." However, this case is factually and legally distinguishable from Mailand v. Burckle (1978) 20 Cal.3d 367, a case in which there was true conspiracy alleged involving a secret agreement between a franchisor and wholesaler of gasoline allowing the franchisor to unilaterally set the price of gasoline sold to its franchisee allowing for an undisclosed rebate to the franchisor.

In making their argument, Plaintiffs acknowledge that the U.S. Supreme Court, in Leegin Creative Leather Products, Inc. v. PSKS, Inc. (2007) 551 U.S. 877 held that vertical price fixing is subject to the rule of reason and not a per se rule. However, Plaintiffs argue that (1) Mailand v. Burckle is binding on this Court, (2) that the Cartwright Act is broader that the federal Sherman Act (citing Cianci v. Superior Court (1985) 40 Cal.3d 903, 920), and (3) that interpretations of federal law are “not conclusive…when construing the Cartwright Act” (citing Aryeh v. Canon Bus. Solutions, Inc. (2013) 55 Cal.4th 1185, 1195).

The problem with Plaintiffs argument, however, is that the Mailand court (as well as the Court in Chavez v. Whirlpool Corp. (2001) 93 Cal.App.4th 363, 369-370) expressly relies on the U.S. Supreme Court’s ruling in Dr. Miles Medical Co. v. Park & Sons Co. It was that case, however, which was expressly overturned by Leegin Creative Leather Products at 900-901. Thus, because the Mailand Court expressly relied on a case that has since been overturned by the U.S. Supreme Court, and because interpretations of the federal Sherman Act are applicable to issues arising under the Cartwright Act (see Marin County Bd. of Realtors, Inc. v. Palsson (1976) 16 Cal.3d 920, 925), it remains unlikely that the Mailand’s court holding is still applicable in light of Leegin[1].

(2) RULE OF REASON ARGUMENT

Plaintiff further argues that even if the per se rule is not applicable to the vertical price-fixing claim, the Cartwright Act claims survives the Rule of Reason because (1) Plaintiffs have properly alleged a relevant market, and (2) Plaintiffs have adequately alleged market power.

However, as the court stated in its ruling on the demurrer to the Third Amended Complaint, Plaintiffs’ market definition ignores the fact that the relationship between the parties is exclusively defined by their contract, which, by its terms, gives Defendant the right to negotiate the price of the baked goods with the Chain Stores.

As fully explained in Queen City Pizza, Inc. v. Domino's Pizza, Inc. (3rd Cir. 1997)124 F.3d 430, 438-441 (discussing franchise contracts):

[1] Thus, there is no need for the Court to engage in the so-called “quick look” analysis. See California ex rel. Brown v. Safeway, Inc. (9th Cir. 2010) 615 F.3d 1171, 1178 (“Quick look review “is usually best reserved for circumstances where the restraint is sufficiently threatening to place it presumptively in the per se class, but lack of judicial experience requires at least some consideration of proffered defenses or justifications.”)

> Were we to adopt plaintiffs' position that contractual restraints render otherwise identical products non-interchangeable for purposes of relevant market definition, any exclusive dealing arrangement, output or requirement contract, or franchise tying agreement would support a claim for violation of antitrust laws. Perhaps for this reason, no court has defined a relevant product market with reference to the particular contractual restraints of the plaintiff.
>
> ….
>
> Here, plaintiffs' acceptance of a franchise package that included purchase requirements and contractual restrictions is consistent with the existence of a competitive market in which franchises are valued, in part, according to the terms of the proposed franchise agreement and the availability of alternative franchise opportunities. Plaintiffs need not have become Domino's franchisees.

Here, the Court concludes that Plaintiffs still have not defined the relevant market nor have they alleged that Defendant has "market power" in that the relationship between Plaintiffs and Defendants is entirely based on the contractual distribution agreement between the parties, to which the contract specifically allows the Defendant to negotiate prices with the Chains (Ralph's, Vons, etc.) on behalf of Plaintiffs.

As the 1999 Agreement states:

> …Nothing herein shall be deemed to prohibit DISTRIBUTOR'S right to carry and distribute merchandise for other companies or engage in other business activity unless and except to the extent that such other merchandise is competitive with or could contaminate the Products…
>
> In order to enable DISTRIBUTOR to pursue business opportunities with Chains, which may require standard terms for all DISTRIBUTORS, DISTRIBUTOR hereby designates SARA LEE FRESH and SARA LEE FRESH hereby agrees to

> act, as DISTRIBUTOR's agent. SARA LEE FRESH shall use commercially reasonable efforts to obtain from Chains authorization to sell Products in the Chains and information regarding the prices and terms at which the Chains would be willing to purchase Products…[See Exhibit A of Third Amended Complaint, §§4.1 and 5.2]

As the 2003 Agreement states:

> In order to enable Company to pursue business opportunities with Chains that may require standard purchasing terms from all Sara Lee Fresh Businesses, Distributor hereby designates Company, and Company hereby agrees to act, as Distributor's agent for the specific purpose of negotiating purchasing agreements with Chains having Outlets in the Sales Area….[See Exhibit B of Third Amended Complaint, §8.1.2]

As the 2007 Agreement states:

> Nothing herein shall be deemed to prohibit DISTRIBUTOR from carrying and distributing merchandise for other companies or otherwise engaging in any other business activity, unless and except that such other merchandise is competitive with Products distributed by COMPANY…
>
> …In order to accommodate the purchasing needs and requests of Chains, and thereby maximize the opportunity for COMPANY's distributors to sell Products to the Chains' Outlets, DISTRIBUTOR agrees that COMPANY may engage in such communications with Chains, address subjects such as uniform or maximum prices being sought by a Chain, standard terms and conditions of sale, centralized billing and similar matters pertaining to the sale and delivery of Products to the Chain's Outlets…[See Exhibit C of Third Amended Complaint, §§4.2 and 5.2]

Accordingly, in that the relationship between Plaintiffs and Defendants is entirely based on the contractual distribution agreement between the parties, there may be a contractual dispute between the parties, but that dispute does not rise to an antitrust level. See United Farmers Agents Ass'n, Inc. v. Farmers Ins. Exchange (5^{th} Cir. 1996) 89 F.3d 233 ("Economic power derived from contractual arrangements such as franchises or in this case, the agents' contract with Farmers', has nothing to do with market power, ultimate consumers' welfare, or antitrust.") See also Eastman Kodak Co. v. Image Technical Services, Inc. (1992) 504 U.S. 451, 464 ("Market power is the power to force a purchaser to do something that he would not do in a competitive market.")

Accordingly, per the foregoing reasons, no claim for violation of the Cartwright Act may properly be alleged under a reasonable rule analysis[2].

b. TERRITORIAL ROUTES – PER SE ANALYSIS

Plaintiffs also assert, in a new allegation, that, separate and apart from the alleged price-fixing scheme, the territorial divisions set forth in the Distribution Agreements are also a per se violation because Defendants are also involved in the distribution of their product. Plaintiff cites to Guild Wineries & Distilleries v. J. Sonick & Son (1980) 102 Cal.App.3d 630.

Guild Wineries involved a wine manufacturer that was also a wholesale distributor of its own products. The court held the manufacturer/distributor's termination of an independent distributor in an attempt to impose territorial or customer restrictions was a horizontal restraint that was manifestly anticompetitive, had no discernible benefits to competition, and therefore was per se unlawful. In a 2-1 decision, the Court noted at pages 633-634:

[2] While Defendant also argues that Plaintiffs have not alleged injury per the reasoning of Judge Neal's opinion (see Request for Judicial Notice, Exhibit 1), the Court finds that damage has adequately been alleged under California law.

> It is settled that distributors cannot lawfully agree to divide territories or customers. Such conduct is sometimes called a "horizontal restraint," and is a per se violation of the Sherman Act. …
>
> Per se principles are formulated where the conduct involved is manifestly anticompetitive and has no clearly discernible benefits to competition…

It is important to note that Guild Winery has been cited by only one published California case and not even for the principle which Plaintiffs assert.[3] Second, the other cases which cite it are federal cases which criticize it. Third, Guild Winery relied on only federal law, which has moved away from the per se rule to the rule of reason, noting that the per se rule is applied when the restraint is manifestly anti-competitive and lacking in any redeeming value. Lastly, the facts of Guild Winery are distinguishable from the facts of this case in a very important and perhaps dispositive way, Unlike Guild Winery, the Sara Lee territories are exclusive and do not permit competition within the territory by Defendant's employees or other distributors. Defendants contend correctly that no court has applied the per se rule to strike down a distribution scheme voluntarily agreed to by the manufacturer distributor and retailer.

The 9th circuit case of Dimidowich v. Bell & Howell (9th Cir. 1986) 803 F.2d 1473, was sharply critical of the Guild Wineries case at page 1482:

> We agree that this court is bound to follow a state court's interpretation of that state's statutes. We disagree, however, that Guild Wineries represents the authoritative interpretation of California's Cartwright Act on this issue…
>
> The court in Guild Wineries decided that a distributor's termination in the context of a dual distributorship arrangement should be judged by per se principles. 102 Cal.App.3d at 633, 162 Cal.Rptr. at 91. It concluded that when a manufacturer "became a distributor," its relationship with its fellow distributors was horizontal,

[3] Kolling v. Dow Jones & Co. (1982) 137 Cal. App.3d 709.

> and it lost the right to dictate territorial divisions to a "fellow distributor." Id. We suggest the analysis in Guild Wineries is flawed. Although a manufacturer's relationship with its distributors has a horizontal aspect when it acts as a distributor itself, it remains primarily a vertical relationship. A manufacturer retains some right to place restraints on its distributors to improve its ability to compete in the product market.

Although one California court has expressly rejected the holding of Guild Wineries, that case is not published and, thus, cannot be cited or relied upon. See Ca. Rules of Court, Rule 8.1115(a). However, it would appear that the facts alleged and the rationale of the law require the court to conclude that the per se rule should not be applied to the alleged territorial restraints in this case.

For the foregoing reasons, the demurrer to the 12th cause of action is sustained.

2. 13th CAUSE OF ACTION – SPRIGGS VIOLATION

In R.E. Spriggs Co., Inc. v. Adolph Coors Company (1979) 94 Cal.App.3d 419, the distributorship contract gave the distributors the right to set the prices. However, if the distributor set the price too high or too low, Defendant would terminate the relationship on 30-day's notice. As the Court noted on page 425:

> Coors' ideas about proper prices at the wholesale and retail level may only have been couched in terms of suggestions, but having in mind Coors' relative economic clout, particularly its power to cancel valuable distributor franchises almost at will, it seems clear that there is evidence that Coors engaged in price maintenance through suggestions which the distributors could not refuse.

Defendant asserts that Plaintiffs cannot claim a Spriggs violation in that they were not coerced into establishing certain prices since the contact between the parties indicates that Defendant was the agent of the distributor "for negotiating the pricing of the product." See Exhibit A, §5.2; Exhibit B, §8.1.2; and Exhibit C, §5.2.

On this basis, any price set was done with the voluntary acquiescence of Plaintiffs since they agreed to the contract terms. ¶¶37-42. See also Kolling v. Dow Jones & Co. (1982) 137 Cal.App.3d 709, 721 ("If, for example, the supplier takes "affirmative action" to bring about the involuntary acquiescence of its dealers, an unlawful combination exists.) Here, there is no "affirmative action" pled that shows that Plaintiffs were forced to sign the agreement, nor is this case like Mailand, supra, wherein the Plaintiffs had no knowledge of a secret side agreement. Mailand at.381-382. Moreover, while ¶221 argues that they were coerced because Defendants have "economic dominance[4]," there is no case law cited which would support this argument. Rather, as Exxon Corp. v. Superior Court (1997) 51 Cal.App.4th 1672, 1686 notes:

> Plaintiffs' real complaint is that they are being oppressed within a contractual relationship with the manufacturer. There are legal remedies for oppressive conduct regarding a contractual relationship, but they are not antitrust remedies. Cases hold that a franchisor's ability to "coerce" its franchisee does not show market power and does not invoke antitrust concerns.

Accordingly, the remedy for any alleged oppressive contract pricing provision to which the Plaintiffs acquiesced is reformation or rescission, and not anti-trust law. Exxon Corp. v. Superior Court, supra ("If the franchise agreement is unconscionable or adhesive it may be subject to rescission or reformation.")

For the foregoing reasons, the demurrer to the 13th cause of action is sustained.

E. MOTION TO STRIKE

[4] "Economic dominance" is distinguishable from Spriggs which stated: "..having in mind Coors' relative economic clout, particularly its power to cancel valuable distributor franchises almost at will, it seems clear that there is evidence that Coors engaged in price maintenance through suggestions which the distributors could not refuse."

The motion to strike seeks to strike the 15th cause of action on the basis that it is entirely dependent upon the 12th and 13th causes of action and, thus, is granted

F. CONCLUSION

For the foregoing reason, the demurrer is sustained and motion to strike is granted without leave to amend. Mercury Cas. Co. v. Sup.Ct. (Garcia) (1986) 179 Cal.App.3d 1027, 1035 (“Permitting plaintiff to amend the complaint would serve no useful purpose given the fact that the actions of petitioner, as set forth in plaintiff's original complaint, cannot give rise to a cause of action.”)

APPENDIX – Additional Relevant Cases

Horizontal Restraints of Trade

American Needle, Inc. v. NFL, 560 U.S. 183 (2010)

United States v. Socony-Vacuum Oil, 310 U.S. 150 (1940)

Continental Television v. GTE Sylvania, 433 U.S. 36 (1977)

Chicago Board of Trade v. United States, 246 U.S. 231 (1918)

American Needle, Inc. v. NFL, 560 U.S. 183 (2010)

BMI v. CBS, 441 U.S. 1 (1979) United States v. Apple, Inc., Case 1:12-cv-02826-DLC (ECF No. 326) Filed 07/10/13.

United States. v. H&R Block, Inc., 833 F. Supp. 2d 36 (D.D.C. 2011)

FTC v. Actavis, Inc., 133 S. Ct. 2223, 570 US __, 186 L. Ed. 2d 343 (2013)

Associated General Contractors, 459 U.S. 519 (1983)

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)

Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993)

In re Electronic Books Antitrust Litigation, No. 11-cv-05750, MDL No. 2293 (S.D.N.Y.)

Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011)

Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013)

Amgen Inc. v. Connecticut Retirement Plans and Trust Funds, 133 S. Ct. 1184 (2013)

Monopolization

Milkovich v. Lorain Journal Co., 497 US 1, 110 S. Ct. 2695 (1990)

U.S. v. Microsoft Corp., 253 F. 3d 34 (D.C. Cir. 2001)

Howard Hess Dental Laboratories v. Dentsply International, 602 F. 3d 237 (3d Cir. 2010)

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 113 S. Ct. 2578 (1993)

Vertical Restraints of Trade

Retail Price Management

Leegin Creative Leather Products v. PSKS, Inc., 551 U.S. 887 (2007)

PSKS, Inc. v. Leegin Creative Leather Prods., 615 F. 3d 412 (5th Cir. 2010)

Annotated Code of Maryland, Commercial Law §11-204(a)(1) (2009)

Kansas Senate Bill 124, amending Kansas Restraint of Trade Act, signed April 16, 2013 (see attached)

Alan Darush MD APC v. Revision LP, No. 12-cv-10296, 2013 WL 1749539 (Apr. 10, 2013), and Alan Darush MD APC v. Revision LP, No. 2:12-cv-10296, Dkt. No. 49 (C.D. Cal. July 16, 2013)

Kaewsawang v. Sara Lee Fresh, Inc., Case No. BC360109 (Cal. Los Angeles Superior Ct. May 6, 2013)

People v. Tempur-Pedic Int'l, Inc., 95 A.D.3d 539 (NY App. Div. 2012)

Robinson-Patman Act

FTC v. Morton Salt Co., 334 U.S. 37 (1948)

Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 146 (2006)

Williams v. Duke Energy International, Inc., 681 F.3d 788 (6th Cir. 2012), cert. denied, 81 U.S.L.W. 3388 (Jan. 14, 2013)

New Albany Tractor, Inc. v. Louisville Tractor, Inc., 2010 U.S. Dist. LEXIS 352 (W.D. Ky. 2010)

Related distribution issues

Howard Hess Dental Laboratories v. Dentsply International, 602 F. 3d 237 (3d Cir. 2010)

United States v. Apple, Inc., Case 1:12-cv-02826-DLC (ECF No. 326) Filed 07/10/13