DEPARTMENT OF JUSTICE

Antitrust and Deregulation

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Remarks as Prepared for Delivery at
American Bar Association Antitrust Section Fall Forum

Washington, DC

November 16, 2017

Thank you so much Jon for that kind introduction and to Svetlana Gans and David Gelfand for their help in organizing this year's Fall Forum. I appreciate the opportunity to address such an experienced audience of antitrust practitioners, academics, enforcers, and experts. The welcome letter for this Fall Forum raises an important question that I've been hearing a lot lately. Given last year's election, it asks: "how does antitrust fare in the required reduction in federal regulations?" I certainly support limited government and a reduction in regulation. But what does that mean for the enforcement of the antitrust laws? Today, with your permission, I'll discuss two related answers to that question.

First, antitrust is law enforcement, it's not regulation. At its best, it supports reducing regulation, by encouraging competitive markets that, as a result, require less government intervention. That is to say, proper and timely antitrust enforcement helps competition police markets instead of bureaucrats in Washington, D.C. doing it. Vigorous antitrust enforcement plays an important role in building a less regulated economy in which innovation and business can thrive, and ultimately the American consumer can benefit.

The second answer relates to remedies—at times antitrust enforcers have experimented with allowing illegal mergers to proceed subject to certain behavioral commitments. That approach is fundamentally regulatory, imposing ongoing government oversight on what should preferably be a free market. And, as 11 Senators wrote to the Attorney General earlier this year, the "lack of enforceability and reliability of such conditions [can] render them insufficient" to protect consumers.[1] As we reduce regulation across the government, I expect to cut back on the

[1] *See* Letter from Senators Franken, Markey, Warren, Wyden, Blumenthal, Merkley, Sanders, Cantwell, Brown, Baldwin, and Booker, to Attorney General Sessions, June 21, 2017, at 6, *available at https://www.franken.senate.gov/files/letter/170621_ATTMergerLetter.pdf.*

number of long-term consent decrees we have in place and to return to the preferred focus on structural relief to remedy mergers that violate the law and harm the American consumer.

I have a lot more to say about both of those points. But before I get into the substance of my remarks let me mention what an honor it is to appear before you as the Assistant Attorney General for the Antitrust Division. I've worked in various jobs in all three branches of the federal government, and I truly believe that working at the Antitrust Division of the Department of Justice is one of the greatest privileges anyone can have. As Attorney General Ashcroft used to remind me, it's the only Department in all the federal government with a moral ideal in its very name.

I have especially enjoyed reconnecting with the career staff that I got to know during my prior service at the Division, and meeting the tremendously talented professionals who have joined since. Anyone who has worked with or at the Antitrust Division knows that it's a unique organization where most of the hard thinking and case development is done at the staff level, and everyone takes seriously our law enforcement mission of protecting free markets and the American consumer.

I should also mention at the outset how pleased I am to have such a capable team of partners working with me. In addition to the career staff, I have an outstanding Front Office. You likely know my good friend and Principal Deputy AAG Andrew Finch, who I have to say did a great job as Acting AAG for a longer stretch than most of us anticipated. Barry Nigro, who is no stranger to this Section; Professor Roger Alford, a world class scholar and academic from Notre Dame Law School and a leader in international law; Don Kempf, a former colleague on the Antitrust Modernization Commission and a legend in litigation (he chaired Kirkland's litigation for decades); and last but not least, Professor Luke Froeb, one of the finest antitrust

economists around who, like me and Andrew, is also making a return appearance at the Division. The rest of the Front Office, including our capable Counsels and talented Directors of Enforcement are all excited for the work to come.

I. The Role of Antitrust and Deregulation

Let me return to the question of the role of antitrust in the ongoing deregulatory push. In my view, antitrust is inherently deregulatory—in other words, competition law enforcement contributes to a well-functioning free market economy, and our prosecution efforts will support a more limited overall federal government role in the markets.

Prior to serving as a distinguished Associate Justice on the U.S. Supreme Court, one of my legal heroes, Robert Jackson, made this point in 1937 when he gave a speech as the Assistant Attorney General for the Antitrust Division. He said it much better than I could: "The antitrust laws represent an effort to avoid detailed government regulation of business by keeping competition in control of prices. It was hoped to … let [government] confine its responsibility to seeing that a true competitive economy functions."[2] This, he said, "is the lowest degree of government control that business can expect."[3]

That reflects a fundamental choice in the relationship between government and the economy. Some economies are centrally planned and others are highly regulated, but in the United States our economy is premised on liberty. We believe that through the give and take of the free market, the competitive process maximizes consumer welfare. As Justice Black wrote in

[2] Robert H. Jackson, AAG for the Antitrust Division, *Should the Antitrust Laws be Revised?*, 71 U.S.L. Rev. 575, 576 (1937) (address before the Trade and Commerce Bar Association and Trade Association Executives, Sept. 17, 1937), *available at* https://www.roberthjackson.org/speech-and-writing/should-the-antitrust-laws-be-revised/.
[3] *Id.*

Northern Pacific,[4] the Sherman Act is a "comprehensive charter of economic liberty," and antitrust enforcement "rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress."[5] This focus on economic liberty and consumer welfare serves our most cherished values.

The economic liberty approach to industrial organization is also good economic policy. F. A. Hayek won the 1974 Nobel Prize in economics for his work on the problems of central planning and the benefits of a decentralized free market system. The price system of the free market, he explained, operates as a mechanism for communicating disaggregated information.[6] "[T]he ultimate decisions must be left to the people who are familiar with the[] circumstances."[7] Regulation, I humbly submit in contrast, involves an arbiter unfamiliar with the circumstances that cannot possibly account for the wealth of information and dynamism that the free market incorporates.

All of this, I think, is well understood and generally accepted. Indeed there has been broad, bipartisan, agreement for several decades on what Robert Bork famously described as the "single goal of consumer welfare in the interpretation of the antitrust laws."[8] I believe that should and will continue. Antitrust seeks to protect the competitive process to maximize consumer welfare, and we rely on economic analysis to effectively serve those goals. In so doing, we minimize the need for regulatory intervention on issues of price, quality, and

[4] *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958).
[5] *Id.* at 4.
[6] Friedrich A. Hayek, *The Use of Knowledge In Society*, 35 AM. ECON. REV. 519, 526-27 (1945).
[7] *Id.* at 524.
[8] Robert H. Bork, THE ANTITRUST PARADOX 89 (1978).

investment.[9] For this reason, the Division, through its various enforcement and advocacy tools, will continue to be active in promoting strong competition policy and reducing regulations that unnecessarily burden the American economy.

II. Remedies

That background provides a framework for thinking about remedies. When competition policy works well, it maintains economic liberty and leaves decision-making to the markets. As Bork explained: "Antitrust was originally conceived as a limited intervention in free and private processes for the purpose of keeping those processes free."[10] Our goal in remedying unlawful transactions should be to let the competitive process play out.

Unfortunately, behavioral remedies often fail to do that. Instead of protecting the competition that might be lost in an unlawful merger, a behavioral remedy supplants competition with regulation; it replaces disaggregated decision making with central planning. That concern was one of the core insights of the 2004 Remedies Guidelines, which were issued while I was last at the Antitrust Division.[11] As the report notes, "conduct remedies generally are not favored in merger cases because they tend to entangle the Division and the courts in the operation of a market on an ongoing basis and impose direct, frequently substantial, costs upon the government and public that structural remedies can avoid."[12]

At the beginning of the last administration, the Division entered into several behavioral consent decrees to resolve vertical mergers it determined to be illegal, such as those in

[9] That is not to say the same is true for all types of regulation. Some, such as environmental or safety regulation, can raise different questions.
[10] *Id.* at 418.
[11] Antitrust Division Policy Guide to Merger Remedies, (Oct. 2004), *available at https://www.justice.gov/atr/archived-antitrust-division-policy-guide-merger-remedies-october-2004#3e*.
[12] *Id.*

Comcast/NBCU, Google/ITA, and LiveNation/TicketMaster. Several observers took issue with this regulatory approach to antitrust enforcement. For example, law professor and economist John Kwoka and Diana Moss of AAI wrote thoughtfully and critically about the problems of using regulatory solutions to address antitrust violations.[13] They pointed out that "allowing the merger and then requiring the merged firm to ignore the incentives inherent in its integrated structure is both paradoxical and likely difficult to achieve." [14] Likewise, in his 2014 book on merger control, Professor Kwoka recognized the "[i]rony that … traditional regulation has fallen out of favor … [and yet] its essential elements have been incorporated in the revised policy and practice toward merger remedies….."[15]

I agree with that skepticism. Like any regulatory scheme, behavioral remedies require centralized decisions instead of a free market process. They also set static rules devoid of the dynamic realities of the market. With limited information, how can antitrust lawyers hope to write rules that distort competitive incentives just enough to undo the damage done by a merger, for years to come? I don't think I'm smart enough to do that.

Behavioral remedies often require companies to make daily decisions contrary to their profit-maximizing incentives, and they demand ongoing monitoring and enforcement to do that effectively. It is the wolf of regulation dressed in the sheep's clothing of a behavioral decree. And like most regulation, it can be overly intrusive and unduly burdensome for both businesses and government.

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[13] John E. Kwoka & Diana L. Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*, 57 ANTITRUST BULL. 979 (2012).
[14] *Id.* at 982.
[15] John Kwoka, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY 139 (MIT Press 2014).

Take so-called arbitration remedies as an example. Rather than permitting price to act as a carrier of information in the market as Hayek described, this type of remedy puts the arbitration backdrop in charge. The arbitrator will certainly have limited information—he or she has no more capability than any central planner—yet the expected arbitration outcome will overshadow every negotiation and distort the competitive process.

In recent years, antitrust enforcers have struggled more and more with the challenges of crafting and enforcing effective behavioral relief. I know that many thought the Comcast/Time Warner Cable deal would be approved subject to behavioral conditions because the two did not compete for downstream customers, but I understand that the FCC and DOJ rejected that approach and the merger was abandoned by the parties. Likewise, when Lam Research sought to acquire KLA-Tencor last year, the transaction raised vertical foreclosure concerns because it combined a manufacturer of semiconductor fabrication tools and a company that made an important input for using those tools.[16] I was not yet at the Division, but as the companies publicly explained upon abandoning, "the U.S. Department of Justice advised [them] that it would not continue with a consent decree that the parties had been negotiating."[17] The ABA Antitrust Section's bi-partisan Presidential Transition report this year appropriately described behavioral remedies as "controversial."[18]

[16] U.S. Dep't of Justice, Press Release, "Lam Research Corp. and KLA-Tencor Corp. Abandon Merger Plans" (Oct. 5, 2016), *available at* https://www.justice.gov/opa/pr/lam-research-corp-and-kla-tencor-corp-abandon-merger-plans.
[17] William McConnell, "LAM, KLA-Tencor Cancel $10.6 Billion Merger Deal," THESTREET.COM, Oct. 5, 2016, *available at* https://www.thestreet.com/story/13843323/1/lam-kla-tencor-cancel-10-6b-deal.html.
[18] American Bar Association, Section of Antitrust Law, Presidential Transition Report: The State of Antitrust Enforcement, January 2017, at 22, *available at* https://www.americanbar.org/content/dam/aba/publications/antitrust_law/state_of_antitrust_enforcement.authcheckdam.pdf.

Without getting into specifics, I can say that behavioral remedies have proven challenging to enforce today. In recent years, the Division has investigated a number of behavioral decree violations, but has found it onerous to collect information or satisfy the exacting standards of proving contempt and seeking relief for violations. We have a limited window into the day-to-day operations of business, and it is difficult to monitor and enforce granular commitments like non-discrimination and information firewalls. Behavioral remedies presume that the Justice Department should serve as a roving ombudsman of the affairs of business; even if we wanted to do that, we often don't have the skills or the tools to do so effectively.

Another problem with behavioral remedies is determining their expiration. A short-term remedy is a band-aid, not a fix, and as FTC Commissioner McSweeny said last year, "the relief at best only delays the merged firm's exercise of market power."[19] On the other hand, if we make behavioral commitments indefinite, then we really are becoming full-time regulators instead of law enforcers.

That is not to say we would never accept behavioral remedies. In certain instances where an unlawful vertical transaction generates significant efficiencies that cannot be achieved without the merger or through a structural remedy, then there's a place for considering a behavioral remedy if it will completely cure the anticompetitive harms. It's a high standard to meet.

To be crystal clear, that cuts both ways—if a merger is illegal, we should only accept a clean and complete solution, but if the merger is legal we should *not* impose behavioral

[19] Reflections on an Active Year in Merger Enforcement, Keynote Remarks of Commissioner Terrell McSweeny, GCR Live 5th Annual Antitrust Law Leaders Forum, at 5-6, Feb. 5, 2016, *available athttps://www.ftc.gov/system/files/documents/public_statements/914983/mcsweeny_-_gcr_miami_keynote_speech_2-5-16.pdf.*

conditions just because we can do so to expand our power and because the merging parties are willing to agree to get their merger through. Meanwhile, we will take seriously our obligations as law enforcers to ensure full compliance with judgments already in place.

So, how should merging parties view the standards for behavioral relief? I believe the Division should fairly review offers to settle but also be skeptical of those consisting of behavioral remedies or divestitures that only partially remedy the likely harm.[20] We should settle federal antitrust violations only where we have a high degree of confidence that the remedy does not usurp regulatory functions for law enforcement, and fully protects American consumers and the competitive process.

Decrees should avoid taking pricing decisions away from the markets, and should be simple and administrable by the DOJ. We have a duty to American consumers to preserve economic liberty and protect the competitive process, and we will not accept remedies that risk failing to do so. I believe this is a bipartisan view. As my friend, former AAG for Antitrust Bill Baer said in Senate testimony last year, "consumers should not have to bear the risks that a complex settlement may not succeed."[21]

III. Strengthening and Improving Decree Enforcement

We're thinking hard about ways that consent decrees can be improved. In my short tenure at the Division we have begun to streamline and improve our use of consent decrees. I was surprised to learn how many longstanding antitrust decrees we still have on the books.

[20] *See* Assistant Attorney General Bill Baer of the Antitrust Division, Testimony before Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, March 9, 2016, *available at https://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-antitrust-division-testifies-senate-judiciary*.
[21] Id.

Believe it or not, we have nearly 1,300 judgments in effect, with some that are well over 100 years old. One dates to 1891. My favorite is the one pertaining to music rolls, still protecting consumers against the ills of anticompetitive behavior in the mechanical organ market. But I understand our Chief Legal Officer Dorothy Fountain prefers the Horseshoer's National Protective Association judgment from 1913. Both are still in effect today. Do you see what I mean about static solutions to the realities of dynamic markets?

We're also taking steps to improve the enforceability of our consent decrees. Although generally a contempt action must be proven by a clear and convincing evidence standard, we are incorporating language that provides for agreement by parties that alleged violations will be evaluated under a preponderance standard. We recently included such a provision in the Entercom-CBS decree, which was a structural remedy. We will also be seeking agreement on attorney's fees and costs provisions to compensate American taxpayers for the burdens of ongoing monitoring and enforcement of consent decrees.

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Let me finish where I started—with how excited and honored I am to represent the Antitrust Division. Every day I walk into Main Justice past a wall filled with the photos of my predecessors—it's humbling to see the photos dating back well before Justice Jackson, with names such as Thurman Arnold, Bill Baxter, and my friend Sandy Litvack —and I'm deeply inspired by all that they did to build and grow this vital institution. The Antitrust Division plays a critical role at the intersection of the American economy and its government, and it is incredibly important to our country that it preserve free market competition through principled application of the antitrust laws. I only hope to continue that work and to leave the Division a little better than I found it. Thank you.