Department of Justice

CORPORATE RESPONSIBILITY FROM THE ANTITRUST STANDPOINT

An Address by

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In Congress, on campuses, in newspapers and in serious literature, much ink is being spilled today in an effort to describe the proper role of corporate management in contemporary society. Some emphasize the central and traditional duty of management to apply shareholder investment to produce profits; others would subordinate profits, arguing for a broader test of social responsibility, both for the corporation and for those who guide its affairs. Antitrust, designed to safeguard and promote a free competitive economy, calls for responsible profit making, in the long as well as in the short range.

As an expression of its confidence in the skills of the Antitrust Division, Congress has authorized an annual $10 million appropriation for the job we have been assigned. Obviously, the hidden item in that budget is the expectation by Congress that the great majority of businessmen will comply voluntarily with the governing rules and standards of antitrust, just as they have for so many years in the tax field.

But aside from the fact that diligent voluntary compliance with the antitrust laws makes fair competition possible, it is also good business in very practical terms.

I.

As most of you probably know, antitrust enforcement responsibility rests initially with the Antitrust Division and the Federal Trade Commission. The Division is authorized to institute civil proceedings for injunctive relief and for money damages, and criminal prosecution seeking fines or imprisonment. Corporations can be fined a maximum of $50,000 for each offense, and legislation now pending in Congress would increase the limit to $500,000. Individuals may be fined up to $50,000 and are also liable to imprisonment for up to one year. In civil cases a remedial decree may prohibit certain kinds of future conduct, some of which might otherwise be lawful standing alone, and also may direct other steps to redress the violation, including divestiture, dissolution, compulsory

patent licensing and the like. The Federal Trade Commission, as an administrative agency, is similarly empowered to institute civil proceedings and issue orders to insure compliance with the law.

But antitrust enforcement is not the province of government alone. The law also authorizes private parties -- individually or in classes -- to sue for treble damages arising from antitrust violations. As you are no doubt aware, these damages can be substantial indeed -- particularly after a government case has blazed a trail: in the electrical equipment cases they exceeded $400 million; in the antibiotics cases, settlements to date run in the area of $100 million; and in the plumbing cases, plaintiffs are seeking $50 million.

This brief catalog of the enforcement arsenal of antitrust may seem impressive enough, but there are additional reasons why a voluntary compliance program is very much in a firm's best interests. For example, under our prevailing policy, in certain cases a firm can reduce the

likelihood of suit by abandoning an unlawful practice before the company has become the subject of an investigation. Abandonment of an illegal course of conduct also militates against criminal prosecution, and can influence our judgment on such questions as sentencing recommendations in criminal cases and the scope of injunctive relief in civil cases.

II.

Fortunately, most of the hazards of the antitrust danger area can be avoided with the advice and assistance of antitrust counsel, and I will have more to say about that in a moment. But if such an effort is to be fully effective, it should rest not merely on the fear of sanctions but on an understanding of the underlying purposes of the antitrust laws and a sense of the benefits to be realized from their application to corporate affairs.

Success of antitrust principles means that competition rather than the bureaucracy regulates the economy. For example, there are two principal ways in which a nation can allocate its economic resources: it can rely on centralized government

regulation, or it can allow the allocation decisions to be made by millions of impersonal, interacting forces in a free market economy. Our choice, with relatively few exceptions, has been the marketplace. And if the marketplace is to perform the job of allocation properly, it must be a free, competitive one -- a marketplace which rewards efficiency, innovation and progress and penalizes inefficiency and stagnation; a marketplace which all are free to enter on nondiscriminatory terms; and one in which performance, not power is the key to success.

Some of you may be thinking: so Phase II really means there has been a failure of competition as a regulator, and a shortfall of antitrust. That is a whole separate subject; suffice to say here that, to whatever extent this may be true, the success of Phase II, and the ultimate removal of governmental controls, will depend upon voluntary compliance in individual decision-making, and the reestablishment of effective competition in the free marketplace.

But notwithstanding the fact that the over-riding goals of a competitive market system are

economic, the system also has a social and political dimension. It seeks to provide mobility for capital and labor, to afford maximum scope for individual initiative and choice, both for its own sake and as a means of shifting resources as the needs of the economy change. And a competitive economy also expresses our conviction that economic and social freedom will promote and foster political freedom as well.

The task of the antitrust laws, therefore, is to see to it that the marketplace is kept free to function in such a way as to promote these objectives. To do this, the laws operate on two levels: market structure and market behavior.

The cardinal tenet of antitrust policy on market structure, widely accepted by lawyers and economists alike, was expressed by the Supreme Court in the Philadelphia National Bank case as follows: "Competition is likely to be greatest when there are many sellers, none of which has any significant market share." 1/

1/ United States v. Philadelphia National Bank, 374 U.S. 321, 363 (1963).

The Celler-Kefauver Act of 1950 2/ was the product of intense congressional concern with the rising tide of economic concentration by merger in this country -- the gravitation of ever greater resources into ever fewer hands. 3/ It sought to enable the government to intervene in the merger process well before actual monopoly results.

Of course, the Celler-Kefauver Act applies to mergers of all varieties -- horizontal mergers of competitors, vertical mergers of suppliers and customers, and conglomerate mergers, in which neither relationship is present. While they naturally differ somewhat in character, each of these kinds of mergers can undermine a competitive market structure. A merger of competitors, or a series of such mergers, each one spurred by the others, can soon convert a competitive market into a rigid oligopoly. The acquisition of a substantial

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2/ 15 U.S.C. § 18.

3/ Brown Shoe Co. v. United States, 370 U.S. 294, 315 (1962).

customer by a major supplier can deprive competing suppliers of access to an important market on competitive terms. Conglomerate mergers may threaten competition in several ways. They can deprive a concentrated market of a potential new entrant; entrench leading firms in concentrated fields; increase the barriers to entry in many lines of business; create the power and opportunity for reciprocal dealing; and stimulate a trend toward further economic concentration by merger.

Thus, preventing mergers which may substantially lessen competition is essential to the maintenance of a climate which is conducive to long run corporate welfare.

But preserving a competitive market structure is only the first step in the effort to promote competition. It is equally necessary to guard against market practices which can undermine the competitive process. Agreements between competitors to fix prices, to boycott suppliers or customers, or to allocate customers or territories are regarded as unlawful per se because of their adverse effects on competition and their lack of any redeeming

virtue. Other kinds of conduct are subjected to a somewhat broader test under the Rule of Reason. Such practices include exclusive dealing arrangements, total requirements contracts, restrictive patent licensing agreements -- in short, practices which, though not in the per se category, can have a substantial adverse impact on competition. Here, too, successful antitrust means a free marketplace, and protection for the law-abiding corporate citizen against being victimized.

But perhaps this brief survey of antitrust specifics has led you to worry less about being victimized by a predatory competitor than by the Antitrust Division. This takes us to the subject of compliance. Let me indicate what a compliance effort usually entails.

III.

First, no one need be in the dark as to current interpretations of the antitrust laws by the enforcement authorities. As antitrust law, like

other bodies of law, evolves to meet new conditions and circumstances, the standards we apply are spelled out in many ways: in the suits we file, the consent decrees we negotiate, the addresses we make before many groups, and in our testimony at congressional hearings. For example, our intention to enforce the law vigorously with respect to conglomerate mergers was clearly set out in my testimony in March of 1969 before the House Ways and Means Committee, and was emphasized by the Attorney General in June of that year in his speech at Savannah, Georgia. In addition, our Business Review Procedure, which has been in effect in the Antitrust Division for many years, provides private parties with the opportunity to consult with us in advance with respect to actions they propose to take and in appropriate cases to learn our enforcement intentions.

A program designed to establish and to maintain corporate compliance with the antitrust laws is a continuing process which requires the cooperation and participation of the entire corporate family. To be sure that current activities are meeting the requirements of the law, a company would be well-advised to

get an "audit" from antitrust counsel. As with most checkups, this will involve both a diagnosis and a prescription. Counsel will have to familiarize himself not only with the many facets of the firm's own operations but also with the industry setting in which the company operates. He will need detailed information about the firm's buying and selling practices, trade association activities, distribution arrangements, patent licensing agreements, and the like. This fact-gathering phase involves not only a review of relevant documents in the company's files, but also will typically require extensive consultation with personnel at various levels in the corporation, from salesmen in the field to top management at company headquarters.

When this review is complete, counsel will be able to make appropriate recommendations to management. Counsel may find that, for the most part, the firm's activities are within permissible limits under the antitrust laws. Some activities may be closer to the danger zone, and in these cases counsel will be able to advise management of the risks involved in continuing the practices and possibly of safer ways

to achieve all or most of the lawful objectives of a doubtful program. Finally, there may be practices which lie in the midst of the antitrust danger zone; and these should be stopped immediately.

An antitrust audit can give rise to some interesting and difficult questions. Let me mention one or two of them.

During the information-gathering process, counsel will interview many officers and employees of the company, and a written record of the substance of the interviews will be prepared. These memoranda may contain disclosures showing that the company has engaged in a questionable or even a clearly illegal course of conduct. Are such communications from employee to antitrust counsel subject to protection under the corporate attorney-client privilege, and thereby protected from involuntary disclosure, or are they discoverable by the government or by private plaintiffs at some future time if litigation arises? Under the "control group" test of the City of Philadelphia case of 1962, 4/ the answer seemed to be that

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4/ City of Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 483 (E.D. Pa. 1962).

the corporate attorney-client privilege would have a rather narrow application in this area. Judge Kirkpatrick in that case indicated that communications from employees who are not members of the group controlling decision-making within the corporation would not be privileged. Under this test, firms might well be discouraged from embarking on an antitrust audit, and the result might be less, rather than more, compliance with the antitrust laws.

A more recent case, however, adopts a less restricted view of the privilege. In Harper & Row v. Decker, the Seventh Circuit, in an opinion affirmed by an equally divided Supreme Court, 5/ held that the privilege would apply to communications from an employee -- even one not a member of the control group -- who furnishes information to counsel at the direction of his superiors with respect to the performance of his duties. This seems to me to be a far better approach, one likely to encourage voluntary compliance programs.

Lest you suspect that counsel conducting the audit does not face problems of similar difficulty,

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5/ Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), aff'd by an equally divided court, 400 U.S. 348 (1971).

I can assure you that that is not the case. Let me give you just one example. Under the Supreme Court decision in 1962 in the Wise case, 6/ a corporate officer who knowingly participates by way of authorization or order in illegal conduct by the corporation may himself be prosecuted criminally under the Sherman Act. Suppose antitrust counsel discovers a hard-core violation at a lower echelon and is unable to persuade the responsible employee to stop it. Should counsel then take the problem to the president or the chairman of the board and thereby place that executive in the position of having knowledge about the violation and expose him to possible prosecution if he does not stop it? 7/ It seems to me that the answer is obviously yes. It is the responsibility of management to see that employees obey the law. No liability can attach to the officer who carries out this responsibility.

6/ United States v. Wise, 370 U.S. 405 (1962).

7/ See 21 A.B.A. Antitrust Section 395.

Assuming that a corporation has brought its affairs into compliance with the antitrust laws, the next step is to insure that it stays in compliance. Such an effort has, I think, three basic parts. First, consultation with antitrust counsel in advance of any new corporate action which could raise antitrust questions; second, continuing education of all corporate personnel in the basic requirements and purposes of the antitrust laws; and, finally, diligent supervision of the entire effort by top management. I am inclined to think that the last element is, in the long run, the most critical.

The importance of the first part -- advance consultation -- need not be belabored. It is always easier to stay out of trouble than to get out. Antitrust litigation, whatever its ultimate outcome, can be expensive, it can injure a corporation's reputation, and it can impose substantial burdens of time and energy on corporate personnel. Such litigation can also result in a partial transfer of control of corporate affairs from management to a federal court fashioning a remedial decree. Today, no corporation would consider a merger of any

consequence without first obtaining the advice of antitrust counsel; but consultation should not be limited to matters of such magnitude. The salesman in the field who seeks to improve his performance by using reciprocity can also bring the corporation into the antitrust danger area. So I advise that you err on the side of over-consultation in dealing with antitrust counsel; I am sure they will not object, and neither for that matter will we.

It goes without saying that meaningful consultation is a search for disinterested advice, not simply for a favorable opinion. Management is entitled to know all the risks which a particular course of action may entail. And house counsel should insure that the full range of opinion is brought to the attention of the directors. Moreover, the objectivity, and the appearance of objectivity, of outside counsel may well be increased if he does not simultaneously serve as a member of the board of directors.

IV.

I have tried to suggest some reasons why voluntary compliance is very much in the interest of the business

community. It is not always an easy task, but it is an essential one. I assure you that we stand ready to lend whatever assistance we can to your efforts.