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VIA EMAIL

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RE: April 26, 2018, USDOJ Roundtable on Antitrust Consent Decrees

Dear Mr. Rathbun:

These comments are submitted following the April 26, 2018, "Roundtable on Antitrust Consent Decrees." The comments submitted in advance, and the discussions during the roundtable itself made a number of points that implicate practicalities that the Division may want to consider as it pursues changes to its practices. My comments are limited to several of those practicalities, based on my extensive experience during my career at the Federal Trade Commission.[1]

The roundtable comments and discussions identified several overall enforcement policies being re-evaluated by the Division: 1) how behavioral provisions should – or should not – be used to remedy merger violations (horizontal and vertical); 2) the extent to which such behavioral provisions should be used to address unlawful anticompetitive conduct; 3) how long remedial decrees should last; and 4) whether and how the Division should deal with existing decrees, many of which are decades old and may well have outlived their usefulness. The policy choices involved in considering the topics are profound, and the discussions revealed important points both in favor and in opposition to a number of enforcement approaches. What seemed to be lacking, however, was a focused discussion of important practical issues that the Division will face as it develops its positions.

Although a discussion limited to practicalities may seem less important than issues going to competitive effects themselves, the filed comments and roundtable discussions pointed out that, as with any enforcement, important decisions will always arise about how the agency's scarce resources can best be used. Time and resources spent re-examining cases, and industries,

[1] For over two decades, until my retirement last year, I was the Assistant Director in the Federal Trade Commission's Bureau of Competition in charge of the Bureau's Compliance Division. In that role, I oversaw several policy initiatives by the Commission, including two decisions in the mid-1990s: 1) to end the practice of "perpetual" orders relating to anticompetitive conduct in violation of section 5 of the Federal Trade Commission Act, and to set aside existing orders older than twenty years; and 2) to end the routine practice of including 10-year "prior approval" provisions in all FTC merger orders – prohibiting specified future acquisitions unless approved in advance by the FTC. Both policy initiatives, and the Compliance Division's involvement in every FTC competition order, revealed a number of important practical issues. Those are the focus of these comments.

subject to long-ago enforcement by necessity is taken away from the ongoing effort to deal with current cases.

I have divided my comments into two broad areas. First, I discuss the duration of remedies, and highlight some questions that arise when considering both structural and non-structural remedies. Because non-structural (or "conduct") remedies are used in both merger and non-merger cases, I discuss them together. Then I discuss how the Division might think about existing decrees, highlighting some important practical issues. Many of the practical questions about conduct remedies are raised when dealing with existing remedies – "legacy" decrees. The practical limits of doing both, with limited resources, call for a careful consideration of the choices to be made.

Duration of Decrees – the Benefits of Rules of Thumb

Structural relief - mergers. Most merger orders from the FTC and decrees obtained by the Division have had ten-year terms. In fact, however, structural remedies are achieved well before that – generally within the first year at most from the decree's start. And the related conduct provisions, such as technical service obligations, supply agreements, and other provisions included to assist the divestiture buyer following divestiture generally run for two years or so from the divestiture. Thus, other than the "re-acquisition ban," included in the Division's merger decrees, the defendant has no real obligations once the structural remedy is achieved. Similarly, the FTC's merger orders have ten-year terms, even though, as for the Division's decrees, all the required relief has been achieved in the early years.

Why then a ten-year term? At the FTC, all merger orders used to include a "prior approval" provision. Such provisions required the order respondent to seek and obtain the FTC's approval of certain specified acquisitions,[2] according to the procedures set out in section 2.41(f) of the FTC's Rules of Practice, 16 C.F.R §2.41(f). The FTC determined in the mid-1990s no longer to routinely include such prior approval provisions in its merger orders, limiting them to cases in which there was a credible risk that the order respondent would attempt to make the same or similar acquisition.[3] The FTC determined that, for most future acquisitions, it would rely on the tools available under the HSR Act.

The use, and retention, of a ten-year term for merger orders was based on a general view that most markets, and most industries, change enough over the course of ten years, that any presumed need for a *special* provision for future acquisitions no longer applied. Obviously,

[2] Covered acquisitions are generally those within the product and geographic markets alleged in the FTC's administrative complaint, sometimes with *de minimis* exceptions.
[3] *See FTC Policy Statement Concerning Prior Approval and Prior Notice Provisions*, issued on June 21, 1995, and published at 60 Fed. Reg. 39,745-47 (August 3, 1995). The FTC reserved the ability to use, instead, a prior notice provision, designed to cover acquisitions that might fall below the HSR thresholds. The important distinction is that a prior notice provision acts much like HSR itself, allowing the FTC to learn about a covered acquisition in advance, but not requiring, as does a prior *approval* provision, the FTC's affirmative approval in advance.

however, some industries and markets change faster or slower than others, and the presumption supporting a ten-year term is just that, a presumption. The value in that working rule, however, is that the agency and parties need not try to determine, in every case, what the precise "right" term is. The importance of that approach cannot be gainsaid. Although some industries (technology) may change faster, for most cases it would be futile to try to determine *ex ante* how long a particular remedy should last. The facts do not exist, and resources would be wasted trying to determine the right answer. Instead, by using the ten-year rule of thumb, the FTC has been able to resolve its merger violations by focusing on remedying the identified harm, and not trying to answer unanswerable questions about what may or may not happen as time goes on.[4] Absent some compelling facts in a particular case, the Division should consider applying the same rule of thumb to its merger decrees, as it appears to be doing currently.

Conduct relief – mergers and non-merger violations. Unlike the structural relief ordered to remedy an unlawful merger, which is usually achieved soon after the decree is entered, conduct relief is intended to last through the duration of the decree.[5] Especially for conduct violations (both single firm conduct and concerted activity), the prohibitions in the conduct remedy are the core relief needed to address and prevent the anticompetitive conduct. Even a simple decree enjoining the defendant from engaging in the violative conduct must last for some time. The obvious question raised in the comments, and the roundtable discussions is how long that should be. Several comments suggested that a remedy should last as long as necessary and no longer, to assure that the defendant is effectively prohibited from re-engaging in the unlawful conduct, but also to avoid imposing unneeded limitations on the defendant's ability to compete, once its violation has been "purged." That attractive concept is unworkable in practice, however, for several reasons.

First, as with merger remedies, it is difficult to know *ex ante* when conditions will have changed sufficiently to allow the remedy's conduct provisions to end. With some rare exceptions, most remedies must be developed at a time when it will be simply impossible to determine with precision when those remedies will no longer be needed. Resources will be spent trying to determine – and negotiate – that end date, likely to no avail.

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[4] Clearly, some cases may present anticipated events that, once they occur, would eliminate the need for continuing relief. Such events might include the known upcoming rescission of a regulation that restricts entry, *e.g.*. In such cases, the remedy *might* automatically terminate upon that event. Alternatively, however, the agency might entertain a respondent's request to set aside the order once the event occurs. The FTC handles such requests pursuant to Rule 2.51(c) of its Rules, 16 C.F.R. § 2.51(c) and section 5(b) of the FTC Act. Similarly, the Division is able to review any request for a decree modification under existing legal standards. *See, e.g.*, Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992).

[5] Some provisions may expire by their own terms before the decree itself ends. This may be so for certain "fencing-in" provisions, which prohibit conduct that might otherwise be lawful but must be prohibited to prevent the defendant from coming dangerously close to a repeat violation of the law.

Second, the suggestion that the Division should retain the ability to *extend* a decree if conditions warrant raises troubling questions about process and burden.[6] Assuming the defendant has fully complied with the decree during its term, what is the test, and who must meet it, for determining that the term should be extended? Some comments suggested a broad test such as whether competitive conditions still require relief. The market may have changed, but not to such an extent that the remedy is clearly unneeded. Trying to answer that question many years after the original investigation would likely require another investigation. If so, what role, and voice, would the defendant have in that process? Will the facts be clear and unarguable? If the Division intends to make that determination in its sole discretion – and include a provision to that effect in the original remedy – it will likely face strong objection from parties at the outset, needlessly delaying settlement.

As with the duration of merger remedies, using a rule of thumb will allow cases to be resolved efficiently and save resources, but will nonetheless allow the case to be revisited if warranted. In the past, the Division has applied a ten-year rule of thumb for the duration of conduct remedies. The FTC, when it revisited the issue of "perpetual orders" in the mid 1990s, determined to use a twenty-year term. In considering what the "right" term is, a few points should be kept in mind.

First, the FTC has not, to my knowledge, seen instances where a respondent who had been relieved of its order obligations (either by expiration on its terms or in response to a petition for relief) engaged in the same conduct once the order had expired. Thus, the concerns that firms should be kept under order indefinitely to avoid recidivism are probably overstated. Whether the term is ten or twenty years, it is likely that the original violator will be no more likely to engage in the unlawful conduct than any other competitor.

Second, both agencies have procedures in place to allow firms under order to request modifications, if they can make the requisite showing. The standard at the FTC is whether the respondent can show that changed conditions of law or fact, or the public interest, warrant modifying (or ending) the order. The Division can entertain requests for decree modifications under a similar standard. The value of this process is precisely that it allows the agency to enter relief for a sufficiently long time that it is confident the conduct will cease, yet still shorten that time if conditions do in fact change.

There is much to be said for taking the position that a remedy's term should err on running long. Extending a decree past its termination date will raise difficult issues going to the then-current facts, the need to expend resources to determine the current need for continuing relief, and the likely objection of the defendant, especially when circumstances aren't clear. Entertaining a request to shorten a decree, however, relies on the defendant – the party in

[6] This is distinguishable from the proposal that a decree should be extended if the defendant has been found to have violated its terms.

possession of the key facts – to come forward and make its case. And, if any burden from the decree is not great enough to induce the defendant to request relief, the Division can safely conclude that the remedy should continue on its terms. Interests of resource conservation, efficient settlement, and an acknowledgement that an *ex ante* decisions about the future are imperfect at best all support using a rule of thumb for determining the duration of a conduct remedy, and erring on the "long" side.

<u>"Legacy" or existing decrees</u>

Many of the points made above can be applied to the question how to deal with decrees that are decades old. The FTC went through this process in the mid-1990s, and its experience may be useful to consider.

At the outset, many of the FTC's older orders involved violations of non-price vertical restraints law, and as a consequence of the Supreme Court's *Sylvania*[7] decision, many respondents had been petitioning to have their orders set aside. Many of these orders prohibited certain otherwise lawful conduct. Indeed, even some RPM orders (based on the then *per se* rule) had long-term prohibitions on non-price restraints, such as pre-ticketing items with the manufacturer's suggested retail price. After many years of entertaining these petitions, and modifying many orders, the FTC determined to take a broader approach. Accordingly, at the time it decided that its future non-merger orders would run for twenty years, it announced that it would review petitions involving older orders using a presumption that the order should be set aside.[8]

The FTC handled a few petitions under its newly announced policy, and granted them all. After that experience, the FTC then decided that the process was still too cumbersome, and simply determined to set aside all such orders, which it did.[9]

As noted earlier, in none of these matters did the now-relieved respondents re-engage in the conduct that had led to an order. But the decision to relieve them of the need to make any particular showing allowed the FTC to remove those orders from its active-cases list.

The advice regarding a wholesale review of the Division's "legacy decrees" would be to avoid having to devote significant resources to the exercise. Especially for decrees involving markets, industries, and parties that may no longer exist, no great cost is incurred in simply leaving them on the books. Such decrees impose no costs on any firm, do not involve the courts

[7] <u>Continental TV Inc. v. GTE Sylvania, Inc.</u>, 433 U.S. 36 (1977).

[8] *Policy Statement With Request for Public Comment Regarding Duration of Competition Orders and Request for Public Comment Regarding Duration of Consumer Protection Orders*, July 22, 1994. Applying this presumption meant that a requesting respondent would no longer have to make a showing that the law or facts had changed. Especially for the fencing-in provisions, this burden shift was significant.

[9] *Policy Statement Regarding Duration of Competition and Consumer Protection Orders*, 60 Fed. Reg. 42569 (1995).

in any oversight, and essentially are relics of old enforcement history. If they can be easily terminated at little cost, that may be wise. But if a review would require any significant commitment of resources, such review should be avoided. This is especially so if no defendant has come forward to request relief. In rare cases, some of which were noted at the roundtable, it may be quickly determined that the decree is still necessary. In those cases, the Division might reach out to the parties and see if they are prepared to make the necessary showing for termination – if they do not respond, the Division can conclude that either the showing cannot be made, or that it is a difficult enough question that the decree should be retained.

To conclude, there are good policy arguments for not having antitrust remedies run in perpetuity. In fact, however, in almost all cases the only long-term injunctive relief prohibits conduct that is itself unlawful. Considering the practical difficulties in determining up front what the correct term should be, the fact that firms under order already have the ability to make their case for relief if and when circumstances change, and the need to conserve scarce resources, the Division should consider using rules of thumb for merger and non-merger cases (to be varied in rare cases where the facts are clear), and should not invest significant resources in reviewing decrees that are many decades old.

Your truly,

Daniel P. Ducore