DEPARTMENT OF JUSTICE

Improving the Antitrust Consensus

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It is a great honor to have been invited to address this distinguished group of lawyers and academics, and I sincerely regret that I cannot be here in person with all of you this evening. Unfortunately I picked up this terrible flu that has been going around, and neither I nor my voice are well enough to deliver these remarks.

The New York State Bar's Antitrust Section is among the nation's most active and influential antitrust groups. America's competition regime depends not just on public enforcers like the Antitrust Division, but very significantly on a private bar and academic community that together counsels clients and provides feedback to enforcers, legislators, and judges on the state of the law. Associations like the Antitrust Section have tremendous importance to our free market system.

The New York State Bar is not only an impressive and important group today, but an institution with a long and proud history. In fact it was eighty years ago just last month that former Supreme Court Justice Robert H. Jackson addressed the New York State Bar Association at a dinner much like this one.

Jackson was not then an Associate Justice of the Supreme Court—in the winter of 1937 he had only recently been appointed President Roosevelt's Assistant Attorney General for Antitrust enforcement. Jackson was such an extraordinary talent and such a thoughtful lawyer that leading the DOJ's antitrust efforts appears as only a footnote on his resume.

AAG Jackson told the assembly that night that "Bar Association after-dinner speeches often voice the high and solemn esteem in which we hold ourselves."[1] Apparently even in the Great Depression speakers opened with jokes and polite laughter.

In keeping with that view, these remarks reflect the value of an active antitrust community, and the progress made, for decades now, to gradually and carefully improve this important body of law. The institutions of antitrust have shown a remarkable propensity for growth and evolution thanks, in large part, to continued collegial dialogue.

That point bears emphasis because we find ourselves, once again, in a time of change in the economy and in perceptions of the role of government. One of your panel topics today talked about the so-called "digital economy," a concept that has been the subject of discussion at nearly every major antitrust event this year. Questions have arisen as to the adequacy of antitrust analysis for new markets and new modes of doing business.

The history of antitrust enforcement, of course, reflects many changes in markets and economic organization, as the great engine of innovation that is the free market builds upon and restructures itself. Throughout that history, the tools of antitrust analysis, particularly those of economics and the consumer welfare standard, have proven time and time again capable of adaptation to meet the needs of changing market circumstances.

I served on the Antitrust Modernization Commission from 2005-2007, after Congress convened a bipartisan group to study the antitrust laws and provide recommendations.[2] One of

[1] Robert H. Jackson, Address before the New York State Bar Association, 60 N.Y.S.B.A. Rep. 292 (1937), *available at* https://www.roberthjackson.org/speech-and-writing/address-before-the-new-york-state-bar-association/

[2] Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, § 11054(h), 116 Stat. 1856, 1857 (2002).

the foremost questions before the Modernization Commission was whether and how antitrust laws should be updated to reflect the so-called "New Economy," in which innovation, intellectual property, and technological change are central features."[3] A similar concept to the "digital economy" you discussed earlier today.

The first recommendations of the commission were that the unique features of those markets could and should be considered by enforcers analyzing market dynamics on a case by case basis. Those recommendations seem apt in our current circumstances. Antitrust law, focused clearly on maximizing consumer welfare through the operation of the free markets, has the flexibility to adapt its analysis to the actual circumstances of those markets. There has been consensus on that viewpoint for decades that should continue.

This speech is entitled "Improving the Antitrust Consensus" because alignment on the ultimate goals of antitrust does not mean our work is done or that the field should not continue to advance. Antitrust enforcers, academics, and practitioners, have long cooperated in refinements and improvements. The leniency program turns 25 this year, while the HSR Act is just over 40. The 2010 Horizontal Merger Guidelines underscored the importance of unilateral effects analysis and of considering the potential efficiencies of transactions.[4] In the coming years, we will continue to build on the work of those who have come before us, to improve on and adapt antitrust enforcement to incorporate new learnings and reflect new market realities.

Two initiatives are underway at the Division to improve antitrust enforcement and benefit the free markets. First, the Division's recent consent decrees reflect several provisions designed

[3] ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 9 (April 2007), *available at https://govinfo.library.unt.edu/amc/*.
[4] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

to ensure we can meaningfully enforce them. Our approach will be to enter into consent decrees only when we can effectively enforce them, and when we do enter into consent decrees, to enforce them effectively. I will explain what we mean by that. Second, we take seriously the role of antitrust enforcement in supporting a deregulatory business environment, and will launch this year a series of roundtables to discuss efforts the Division can take to support deregulation.

1. Effective Enforcement of Consent Decrees

The use of consent settlements to resolve antitrust disputes has become more and more commonplace, to the point that they now resolve all but a handful of Clayton Act filings. As you know, the Division routinely files consent settlements on the day it files complaints to challenge unlawful mergers. These decrees have become so common that one might forget they arise from a conclusion that a transaction was illegal under Section 7 of the Clayton Act. The complaints brought alongside such challenges should not be ignored, however—they reflect a conclusion by the Antitrust Division that a transaction broke the law.

Consent decrees have sometimes been criticized as excessively regulatory, but I submit that they don't have to be so. We should endeavor towards an approach to using consent decrees consistent with a view of the Antitrust Division as a law enforcement agency, not a regulatory one. Antitrust prosecutors have been empowered by Congress to be law enforcers with their allegations ultimately subject to an independent court's findings of fact and conclusions of law. If we remain cognizant of this when agreeing to and enacting decrees, we can avoid stepping too far into the regulatory arena.

Law enforcement carries with it both limitations and obligations. We're bound to uphold the law. Robert F. Kennedy once addressed a different New York audience—the Economic Club

of New York, and specifically described his approach to antitrust enforcement as Attorney General. He said: "I have a constitutional office of the United States Government and I shall perform the duty I have sworn to undertake – to enforce the law, in every field of law without regional bias or political slant."[5] The Antitrust Division takes that duty seriously.

For example, faced with a violation, the Antitrust Division has an obligation to the public to ensure any settlement contains meaningful relief and that the settling parties obey its terms. Filing a consent decree that would be difficult to enforce certainly minimizes litigation risk and provides for a quick win in the press, but it goes without saying that the unenforceable decree provisions would not vindicate the Division's duty to protect competition.

I spoke a few months ago at the ABA's Fall Forum about the difficulties of enforcing behavioral conditions.[6] When a civil settlement purports to bind a company to ignore its own profit incentives, it puts enforcers and corporate counsel in an untenable position—how can a small team of lawyers keep capable executives from doing what executives are trained to do, day after day for years? The free markets depend on businesses taking advantage of their assets to maximize their returns. The risks and penalties of a civil consent decree violation would need to be high enough to deter such conduct. Meanwhile behavioral conditions are fundamentally regulatory, imposing government supervision on what should be free markets. Antitrust enforcers have long preferred structural remedies, in large part for these reasons.

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[5] Remarks of Attorney General Robert F. Kennedy Before the Economic Club of New York, "Vigorous Antitrust Enforcement Assists Business," Nov. 13, 1961, *available at* *https://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/11-13-1961.pdf*.

[6] Antitrust and Deregulation, Remarks of Assistant Attorney General Makan Delrahim at American Bar Association's Antitrust Fall Forum, Nov. 16, 2017, *available at* *https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar*.

The Division has also been improving significantly on the enforceability of the consent decrees it enters into. This past December, in a single week, the Division filed settlements resolving its prosecutions against three unlawful mergers.[7][8][9] In all three, the Division required divestitures, not behavioral restrictions, as a key part of each settlement.

Each of these three consent decrees also contains a set of procedural provisions designed to improve their function and enforceability. The Division will continue to insist that each of these terms be included in future civil merger and non-merger settlements.

First, a key provision relates to the burden of proof should the defendant violate the decree and the United States move for contempt. Contempt proceedings in decrees are rare enough that many practitioners may not be aware that, even though the standard for proving a civil antitrust violation is a preponderance of the evidence, the default rule for seeking contempt on a settlement is clear and convincing evidence.[10] The new terms contract for the same preponderance standard for decree violations as for the underlying offense and for decree interpretations.[11]

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[7] Press Release, Justice Department Requires Vulcan to Divest 17 Aggregate Facilities in Order to Acquire Aggregates USA, Dec. 22, 2017, *available at* *https://www.justice.gov/opa/pr/justice-department-requires-vulcan-divest-17-aggregate-facilities-order-acquire-aggregates*.

[8] Press Release, Justice Department Requires TransDigm Group to Divest Airplane Restraint Businesses Acquired from Takata, Dec. 21, 2017, *available at* *https://www.justice.gov/opa/pr/justice-department-requires-vulcan-divest-17-aggregate-facilities-order-acquire-aggregates*.

[9] Press Release, Justice Department Reaches Settlement with Parker-Hannifin, Dec. 18, 2017, *available at* *https://www.justice.gov/opa/pr/justice-department-reaches-settlement-parker-hannifin*.

[10] *See United States v. Microsoft Corp.*, 147 F.3d 935, 940 (D.C. Cir. 1998) ("A party seeking to hold another in contempt faces a heavy burden, needing to show by 'clear and convincing evidence' that the alleged contemnor has violated a 'clear and unambiguous' provision of the consent decree.").

[11] *See* Competitive Impact Statement, *U.S. v Vulcan Materials Company* (Dec. 22, 2017) ("Vulcan CIS"); Competitive Impact Statement, U.S. v *TransDigm Group Incorporated* (Dec. 21, 2017) ("TransDigm CIS"); Competitive Impact Statement, U.S. v *Parker-Hannifin Corporation* (Dec. 18, 2017) ("Parker-Hannifin CIS").

The default clear and convincing evidence standard makes it difficult for the Division to enforce decrees and is often counterproductive for both parties. It sets up a dynamic where the Division, needing to meet the heightened standard, must engage in extensive investigative efforts to prepare a case on a decree violation. This subjects parties to more burdensome CID investigations reflecting the kind of record the standard requires the Division to build. Meanwhile the party accused of a violation, knowing they will have the benefit of a favorable evidentiary standard, has an incentive to hold out from resolving the dispute and exacerbate the situation. The clear and convincing standard not only makes it more difficult for the Division to enforce its decrees, but in the process adds burden and delay to decree violation investigations—to the detriment of all sides.

Contracting around inefficient legal rules has a long history, and the Division believes that by contracting with settling parties to apply a preponderance standard to contempt proceedings, it will significantly increase the efficacy and efficiency of decree enforcement.

The second decree provision that appeared in all three recent settlements relates to the common practice of parties to a contract agreeing to more efficient fee shifting rules. Under the default rule, the Division bears the costs of decree enforcement investigations and proceedings, even in the presence of a serious violation of the decree and a meritorious judgment from the court. In a 2013 study, Professors Eisenberg and Miller examined several thousand U.S. contracts between public companies and found that in more than half, the parties agreed to contract out of the default rule to provide for some form of fee shifting.[12] The contracting parties

[12] Theodore Eisenberg and Geoffrey P. Miller, *The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts*, 98 Cornell L. Rev. 327 (2013).

settling Division enforcement actions are in most cases familiar with fee-shifting provisions in many of their contracts, and this adjustment simply shifts that approach to the decree context.

The Division's new fee-shifting provision requires defendants to agree to reimburse the United States for attorneys' fees, expert fees, and costs incurred in connection with any successful consent decree enforcement effort.[13] Decree violations, when they happen, impose burdens on taxpayers that would not have arisen absent the Division's agreement to a settlement. The goal of fee shifting is to encourage speedy resolution of decree violation investigations, and to compensate taxpayers for the costs associated with investigation and enforcement necessitated by the violation.

Another provision designed to improve enforcement relates to the term of the decree. If a Court finds that a defendant has violated the consent decree, this term permits the Division to apply for a one-time extension of the term.[14] The Division would of course only do so if appropriate to the market circumstances and the facts of the violation, but having the ability to extend the term should make the relief in decree enforcement proceedings more meaningful, and in so doing discourage violations.

Finally, the Division recognizes that market circumstances can change in ways that obviate the need for a consent decree or even make its continuation counterproductive. As part of our philosophy of enforcing the settlements we accept, we believe it's important to have a mechanism to do away with decrees that no longer make sense for any party. The new

[13] *See* Vulcan CIS; TransDigm CIS; Parker-Hannifin CIS.
[14] *See* Vulcan CIS; TransDigm CIS; Parker-Hannifin CIS.

provisions include a term that permits the United States, after a certain number of years from the date of entry, to terminate the decree upon notice to the Court and the defendant(s).

Practitioners should expect to see these four types of provisions in future decrees: a preponderance standard, fee shifting, and the possibility of extension or early termination. The Antitrust Division believes they will meaningfully increase the enforceability of the settlements we enter into.

2. Roundtable Sessions

As I mentioned at the outset, institutions like the antitrust bar and academic community play an important role in helping the enforcement agencies build on and improve the consensus approach to antitrust enforcement. Another major priority of this Antitrust Division is deregulation—we believe that fostering competition helps markets to regulate themselves and as a result limit the need for regulatory intervention.

The Division plans to launch a new program of roundtable sessions focused on antitrust and deregulation. The program will include speakers from a range of legal and advocacy organizations across the policy spectrum on a series of panels on topics related to deregulation. Though we are still in the planning stages, we wanted to preview these listening sessions and point out how seriously we take the ability to get feedback on possible next steps to support our deregulatory efforts.

We are considering panels on three topics. First, deregulation by eliminating old antitrust consent decrees. This panel follows in the footsteps of Assistant Attorney General Baxter, who in 1981 created the "Judgment Review Project" to systematically review the more than 1200

existing judgments then on the books from the Division's civil cases.[15] The time is ripe to consider taking another look at the 1300 long-standing consent decrees still on the Antitrust Division's books.

This listening session would support these efforts by fostering discussion on (a) the appropriate term for decrees, including whether perpetual decrees should ever be imposed, (b) what role industry reliance on existing decrees should play in the decision whether to terminate decrees, and (c) whether it is appropriate or effective to enter into decrees that constrain market power, rather than restoring the competition lost due to a violation.

Another listening session topic will involve regulatory exemptions from the antitrust laws—if we view antitrust as enabling markets with limited regulation, how should we think about regulatory exemptions to antitrust? For example, how should we think about *Credit Suisse v. Billing*[16] and the impacts of its implied repeal doctrine on competition? Should we think differently about express statutory exemptions than implied ones? Is the state action doctrine, in its current form, right or useful? These are just the kinds of questions where an in depth conversation from a range of constituents will be helpful to the Division in formulating policy positions.

The third listening session we are currently planning would focus on what may be the most important and relevant question to the average American: what are the consumer costs of anticompetitive regulations? This session would focus on whether state and federal agencies take appropriate account for the consumer costs of their regulations, which tools are best for

[15] DeBow, Michael E. "Judicial Regulation of Industry: An Analysis of Antitrust Consent Decrees," *University of Chicago Legal Forum:* Vol. 1987: Iss. 1, Article 14, 353, 359.
[16] *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007).

minimizing regulation, and how federal and state regulators should balance harm to consumers and competition against perceived public benefits of proposed regulation. As advocates of competition, we hope to engender a discussion of how lawmakers can do a better job ensuring government action supports, rather than impairs, the operation of the free markets.

We look forward to working with the antitrust community, including many in this room, as we set out on these listening sessions to help support the Antitrust Division's deregulatory efforts.

3. Conclusion

I will conclude with another quote from Robert Kennedy's 1961 address on antitrust to the Economic Club of New York, remarks titled "Vigorous Antitrust Enforcement Assists Business."[17] He explained that the Sherman Act stands as a "charter of freedom standing for something precious in American life."[18] Attorney General Kennedy recognized that the vast majority of mergers benefit the economy, but that "the history of antitrust law enforcement shows that successful antitrust prosecutions have often strengthened and brought vitality" to the markets.[19] The Antitrust Division's challenge is to leave unrestrained the freedom of the markets, but also to prevent and meaningfully remedy conduct that harms competition itself.

The initiatives I have described tonight have in common an emphasis on treating antitrust as a law enforcement exercise that supports the free markets to maximize consumer welfare. With our focus squarely on those goals, and the addition of improved consent decree

[17] Remarks of Attorney General Robert F. Kennedy Before the Economic Club of New York, "Vigorous Antitrust Enforcement Assists Business," Nov. 13, 1961, *available at* https://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/11-13-1961.pdf.
[18] Id. at 4.
[19] Id. at 7.

enforcement provisions, the Antitrust Division plans to enter into consent decrees only when we can effectively enforce them, and when we do enter into consent decrees, to enforce them effectively. Meanwhile we greatly value the views of those in the bar, academia, and around the world, and look forward to a continued dialog on how to improve on the antitrust consensus.

Thank you.