



U.S. CHAMBER OF COMMERCE

Meeting with Federal Trade Commission Transition Team
December 11, 2008

Antitrust

The Chamber believes that businesses and the economy benefit from the certainty that comes from clear rules consistently applied—from Administration to Administration and Congress to Congress—and sees no need for radical changes that would upset the clear and consistent application of the sound antitrust laws. Significant changes in enforcement or intra-agency disagreements over the law create uncertainty and unpredictability.

We are specifically concerned with the apparent divergence in enforcement between the FTC and the DOJ in certain areas, and particularly how this enhances divergence in antitrust enforcement among foreign jurisdictions. This became particularly pronounced with the recent, public dispute over the proper application of Section 2. A company's antitrust liability should not depend upon whether the DOJ or the FTC investigates the matter.

Given the proliferation in the number of antitrust jurisdictions globally, U.S. businesses are increasingly concerned about divergence internationally and the potential misuse of competition policy to promote industrial policies. This underscores the importance of the international work of the FTC (and DOJ) and demonstrates how domestic divergence only serves to undermine U.S. leadership toward greater antitrust convergence around the world.

Divergence in Enforcement of Section 2 of the Sherman Act

The Chamber believes that Section 2 should be interpreted and enforced carefully and predictably. The lack of a clear legal standard against which to judge unilateral conduct imposes significant costs on the economy by deterring procompetitive, efficiency-enhancing conduct. We urge the FTC to continue to devote resources and work closely with the DOJ to reach consensus. We believe there is substantial agreement between both the FTC and DOJ with respect to many aspects of the DOJ report, despite the public disagreements. The FTC response was disappointing—though our significant concern was the public divergence in views—and we felt the DOJ approach was closer to the mainstream consensus on single-firm policy.

Enforcement Utilizing Section 5 of the FTC Act Should be Limited

There is significant concern that the FTC will challenge procompetitive conduct under Section 5 of the FTC Act that is lawful under the Sherman and Clayton Acts. Given the breadth of the Sherman and Clayton Acts, we believe the FTC's expansive Section 5 authority should be utilized to reach beyond those basic laws only in very narrow instances where the effect of the conduct is clearly anticompetitive, and only after public articulation of what those instances would be. In addition, stand-alone Section 5 enforcement is another area of significant divergence between the DOJ and FTC.

Limit Administrative Merger Litigation

Another area of domestic divergence is the FTC's increasing reliance on administrative litigation in merger cases, including an apparent willingness to pursue such cases even after a district court has denied a preliminary injunction. Unlike some other jurisdictions, U.S. merger enforcement is predicated on the need for the authorities to go to an independent court to enforce their merger decisions. This process produces more rigorous analysis by the authorities and a fairer process for the parties. The Chamber opposes this move by the FTC and supports the judicial process employed by the DOJ and, in the past, by the FTC. We have a number of concerns about the new time and procedural constraints proposed by the FTC for administrative litigation, as noted in the comments we submitted on the Parts 3 and 4 Rules of Practice Rulemaking.

**Greater Coordination between the FTC, DOJ, Department of Commerce, and USTR**

Increasingly competition policies adopted by foreign countries threaten the ability for U.S. firms to compete on equal and fair terms in those markets. The use of competition policy represents a new breed of protectionism and adversely impacts trade relationships. The U.S. business community needs a robust interagency process that delivers a well coordinated message internationally.

Strategically Utilize Technical Assistance Internationally

The Chamber has aggressively supported increased funding for the FTC to conduct more antitrust technical assistance internationally. Well funded technical assistance is critical to U.S. competitiveness to help mitigate the potential for misuse of antitrust enforcement against American companies. Technical assistance should be expanded to include advocacy for the U.S. approach to both emerging and mature jurisdictions.

Improve and Speed Up Merger Clearance Process

The Chamber urges the FTC to work with the DOJ and others in the Congress and the Executive Branch (as appropriate) to develop a mechanism for quick and efficient allocation of responsibility for the review of notified transactions. In addition, the agencies should adopt a reasonably short deadline for resolving disputes.

Reduce Burden of Second Requests

Compliance with second requests typically costs millions of dollars and takes many months, and occasionally more than a year. Positive changes have been made in the past few years, but there is still room for further improvement.

Data Privacy

The Chamber has worked with the FTC on several issues related to data privacy. It is important that the FTC not establish any new, unnecessary regulations in any of these arenas that interfere with innovation.

National Standard for Data Security

The FTC has consistently called for a national standard for data security and breach notification legislation. With more than 40 states with existing or pending laws, the Chamber believes that a narrowly crafted preemptive bill would help set one national standard and replace the existing patchwork of laws.

Careful Consideration on Limitations of Uses of Social Security Numbers (SSNs)

With respect to the protection and possible restrictions on uses of SSNs, recommendations advanced by the FTC have carefully considered legitimate uses of SSNs by the business community. The Chamber looks forward to continued work with the FTC on this complex issue.

Self-Regulation of Behavioral Advertising

The FTC has called for continued self-regulation in the area of online behavioral advertising. The Chamber looks forward to continuing this dialogue with the FTC.