FTC: MEDICAL LAB'S LAX SECURITY LED TO DATA LEAK

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(AP) FTC: Medical lab's lax security led to data leak
By ANNE FLAHERTY
Associated Press
WASHINGTON
The Federal Trade Commission on Thursday accused a small Atlanta-based medical lab that specializes in cancer detection of not doing enough to protect its patients' online records, resulting in the leak of Social Security numbers and birth dates of more than 9,000 consumers.

The complaint against LabMD describes what many consumers fear: being forced to hand over personal information to a doctor's office or hospital, not knowing how that data is handled or who has access to it, only to become vulnerable to identity theft. The allegations also raise questions about the federal government's push for the health care industry to swap paper for electronic records to save money when doing so relies on cybersecurity investments by private companies.

In a statement, LabMD said the company "looks forward to vigorously fighting against the FTC's overreach by seeking recourse through the available legal processes."

Jessica Rich, director of the FTC's bureau of consumer protection, said LabMD's practices put consumers at serious risk of identity theft.

"The FTC is committed to ensuring that firms who collect that data use reasonable and appropriate security measures to prevent it from falling into the hands of identity thieves and other unauthorized users," she said in a statement.

More than half of doctors' offices and 4 out of 5 hospitals have transitioned from paper to electronic medical records, according to the government. Moving to computerized records is the rare consensus issue in health care, enjoying support from across the political spectrum. Taxpayers have already contributed more than $14 billion to help speed the move through an incentive program that was part of the Obama administration's economic stimulus package.

The hope was that going digital would make caring for patients safer and less costly by helping avoid medical mistakes and cutting down on duplicative tests. But concerns have also surfaced about patient privacy and vulnerability to fraud. And progress has been mixed in getting medical computers from different offices to talk to each other, the key to a seamlessly efficient system.

A pair of reports in 2011 by the Health and Human Services inspector general warned that the drive to connect hospitals and doctors electronically was being layered on top of a system that already has privacy problems. The administration said in response it would pursue stronger safeguards.

The complaint filed Thursday means that the allegations will be tried in a formal hearing before an administrative law judge. The FTC wants the judge to order LabMD to institute a comprehensive information security program with professional audits every two years for the next 20 years. The proposed order also would require LabMD to notify consumers whose information was compromised.

LabMD founder Michael Daugherty has objected to these terms and has been fighting the FTC investigation for several years. He claims on his personal website that LabMD is a victim of theft by a cybersecurity firm that he says was trying to sell his company services. Daugherty says that when he refused, the stolen data was supplied to government

regulators, who are using the leak to punish him as a small business owner and justify additional government regulation. Daugherty has written a book on the subject that he says will be published in September.

The trade commission's "enforcement action against LabMD based, in part, on the alleged actions of Internet trolls, is yet another example of the FTC's pattern of abusing its authority to engage in an ongoing witch hunt against private businesses," LabMD said in its statement.

According to the FTC complaint, a LabMD spreadsheet with insurance billing data on more than 9,000 consumers was discovered on a public file-sharing network. The spreadsheet contained Social Security numbers, birth dates, insurance information and medical treatment codes. The FTC says California police later discovered that identity thieves had acquired personal data from at least 500 LabMD consumers.

In its complaint, the FTC said lax security controls at LabMD resulted in the leak of the spreadsheet. Regulators say the company did not maintain a "comprehensive data security program" or use "readily available measures" to identify common vulnerabilities. The company also did not adequately train employees or prevent unauthorized access, according to the FTC.

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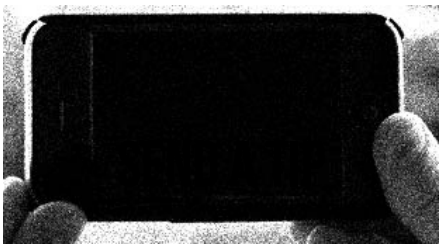

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FTC: Medical lab's lax security led to data leak

By ANNE FLAHERTY Associated Press News Fuze
Posted:

DenverPost.com

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Commissioner Maureen K. Ohlhausen

The FTC's Privacy Agenda for the 2014 Horizon

Forum for EU-U.S. Legal-Economic Affairs

Berlin, Germany

September 14, 2013

Professor Mestmacker and distinguished Berlin Forum Principals, it is an honor to have the opportunity to speak with you. Today, I will share my personal insights on the key privacy issues likely to face the Federal Trade Commission in 2014 and privacy-related activity in the U.S. Congress. My comments today are my own, however, and should not be construed as necessarily representing the views of my fellow Commissioners.

My long experience at the FTC before becoming a Commissioner—in the Office of General Counsel, as Attorney Advisor to Commissioner Orson Swindle, and as head of the Office of Policy Planning—gave me an extensive background in all three areas within the FTC's purview: consumer protection, competition, and economics. This experience guides how I approach all issues at the Commission, including privacy. In this spirit, I would like to discuss privacy in the broader context of the FTC's current statutory authority to protect American consumers against deceptive and unfair practices.

I will start with a discussion of our statutory authority and the enforcement we have undertaken. Then, I will describe another important tool in our arsenal, our business and consumer education function, and the critical role it has played in the privacy area, especially in the online environment. Next, I will identify issues that I believe will be significant for the FTC in 2014, as well as areas of possible Congressional interest. Finally, I will highlight some market developments that reflect a growing emphasis on offering consumers greater privacy options.

After touching on these topics, I look forward to an open exchange with you. Although I will focus on the U.S. approach to consumer privacy, we, like every other country, must consider our policies in the context of the global environment. An important part of my job is to reach out to the global community. I know that I will learn much from our exchange and hope that the discussion will enhance our mutual understanding of our priorities in the privacy arena.

Current U.S. Statutory Framework

We live in exhilarating and challenging times as technology evolves at lightning speed while the world continues to grapple with ways to protect consumer privacy without stifling innovation. I know Europeans care deeply about protecting their personal information as reflected by the fact that in the EU, privacy is viewed as a fundamental human right. The U.S. also values consumer privacy, but, as you know, we have a different approach.

We also sponsor public workshops on a host of consumer issues, which help our staff understand complex issues from a variety of stakeholder perspectives and provide us a forum with which to share our agency expertise. This November we will hold a program on the Internet of Things; other recent workshops have covered mobile privacy disclosures, mobile security, and facial recognition technology. Recent reports include Mobile Apps for Kids, Facial Recognition, and the 2012 report "Protecting Consumer Privacy in an Era of Rapid Change."[9]

I am a strong believer in using all of the tools in the FTC's toolbox, and our education efforts are an essential part of those efforts.

On the Horizon in 2014

Looking to 2014, there are several trends in privacy that I believe will be the primary focus of FTC activity in enforcement, education, and research.

Data Security

Data security will continue to dominate the conversation in the privacy policy community in 2014. It is also an area where I believe new federal legislation would be helpful. Congress has expressed interest in moving forward on data security legislation in the past and 2014 may be the year in which it happens. Although the FTC can proceed using its Section 5 authority—and since 2001 it has brought over forty cases against companies for failing to protect consumer information—there are gaps that could be closed through carefully crafted federal legislation to protect sensitive data or notify individuals when such data is lost, stolen, or accessed without authority. Currently, 47 states have data security laws requiring consumer notification if personal information has been compromised. Although some of the laws are similar, they are not identical and thus companies need to comply with dozens of statutes that may require varying consumer notifications. A single national standard would let companies know what to do and consumers know what to expect when a breach occurs.

Whether or not additional federal legislation is enacted, the FTC will continue to pursue enforcement in the area of data security. Let me give you a few examples.

This summer, the FTC filed a complaint against LabMD, a company that conducts lab tests on consumer specimens. Our complaint alleged that LabMD failed to take reasonable and appropriate measures to prevent the unauthorized disclosure of sensitive consumer data,

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[9] FED. TRADE COM'N, MOBILE APPS FOR KIDS: DISCLOSURES STILL NOT MAKING THE GRADE (2012), *available at* http://business.ftc.gov/sites/default/files/pdf/bus69-protecting-personal-information-guide-business_0.pdf; FED. TRADE COM'N, FACING FACTS: BEST PRACTICES FOR COMMON USES OF FACIAL RECOGNITION TECHNOLOGIES (2012), *available at* http://ftc.gov/os/2012/10/121022facialtechrpt.pdf; FED. TRADE COM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: RECOMMENDATIONS FOR BUSINESSES AND POLICY MAKERS (2012), *available at* http://ftc.gov/os/2012/03/120326privacyreport.pdf.

including health information.[10] We alleged that the company failed to implement a comprehensive data security program, use readily available measures to identify commonly known or reasonably foreseeable risks and vulnerabilities, use adequate measures to prevent employees from accessing personal information not needed to perform their jobs, and use readily available measures to prevent and detect unauthorized access to personal information. As a result of these failures, a LabMD spreadsheet containing sensitive personal information such as Social Security numbers and medical information for more than 9,000 consumers became available on a P2P network. This case is currently in litigation.

In June 2012, the FTC filed a complaint against Wyndham Hotels for its failure to protect consumers' personal information, resulting in three data breaches in less than two years.[11] According to the FTC's complaint, Wyndham and its subsidiaries failed to take security measures such as using complex user IDs and passwords and deploying firewalls and network segmentation between the hotels and the corporate network. In addition, Wyndham allowed improper software configurations that resulted in the storage of sensitive payment card information in clear readable text.

We alleged that these failures led to fraudulent charges on consumers' accounts, millions of dollars in fraud loss, and the export of hundreds of thousands of consumers' account information to an Internet domain address registered in Russia. A central allegation of the Commission's case is that Wyndham's privacy policy misrepresented the security measures that the company and its subsidiaries took to protect consumers' personal information and that its failure to safeguard personal information caused substantial consumer injury. This case is also currently in litigation.

Big Data

A second topic likely to dominate the privacy agenda in 2014 is so-called Big Data. The amount of data in the world is growing exponentially and will continue to increase with the added volume and detail of information collected by entities such as Internet Service Providers (ISPs), operating systems, browsers, social media, and mobile carriers. These trends could lead to increased competition, innovation, and growth in productivity. At the same time, however, the collection and use of very large data sets on individual consumers may raise certain privacy concerns.

In response to these trends, the FTC held a public workshop last December to explore the privacy implications of broad collection of data about consumers' online activities.[12] The

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[10] Press Release, Fed. Trade Com'n, FTC Files Complaint Against LabMD for Failing to Protect Consumers' Privacy (Aug. 29, 2013), *available at* http://ftc.gov/opa/2013/08/labmd.shtm.
[11] Complaint, FTC v. Wyndham Worldwide Corporation, et al. (D. Ariz. 2012) (No. 12 Civ. 1365).
[12] Press Release, Fed. Trade Com'n, FTC to Host Comprehensive Collection of Web Data Workshop Tomorrow (Dec. 5, 2012), *available at* http://www.ftc.gov/opa/2012/12/bigpicture_ma.shtm.

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Federal Trade Commission

Privacy Today and the FTC's 2014 Privacy Agency

Jessica Rich[1]
Director, Bureau of Consumer Protection, FTC

International Association of Privacy Professionals
December 6, 2013

I. Introduction

Hello. I am delighted to be here among so many familiar faces, talking about the important issue of privacy. I want to thank IAPP for inviting me here today.

As we get ready to greet another new year, I can't help but think about how much the world has changed for consumers in the last few decades – and even just the last few years. Not too long ago, cell phones were a novelty. Now, virtually everyone in this country has a mobile device that they take everywhere, and over half of consumers have smartphones.[2]

Companies across many industries are using increasing amounts of data – Big Data – to create better products and services, tailor their messages to consumers in real time, and develop new solutions to nagging global problems. Big Data has the potential to improve the quality of health care while cutting costs; enable forecasters to better predict the weather and spikes in

[1] The views expressed here are my own and do not necessarily represent the views of the Federal Trade Commission or any Commissioner. Special thanks to Molly Crawford for assisting in the preparation of these remarks.
[2] Nielsen Wire, *America's New Mobile Majority: A Look at Smartphone Owners in the U.S.* (May 7, 2012), *available at* http://blog.nielsen.com/nielsenwire/?p=31688.

after the Rule became final. However, as we approach six months since the effective date of the Rule, the FTC will begin to ramp up enforcement where needed to ensure compliance.

The Path case, which I mentioned earlier, illustrates the importance of kids' privacy and COPPA. Social networking app Path didn't just capture personal information from adults' address books; it also captured address book information from kids' devices, including full names, addresses, phone numbers, email addresses, dates of birth and other information, where available. In addition, Path enabled children to create personal journals and upload, store, and share photos, written "thoughts," their precise location, and the names of songs to which the child was listening. According to the complaint, Path did this without obtaining parental consent, in violation of COPPA.[30] The order required Path to pay $800,000 civil penalty, delete information from kids under 13, and prohibits Path from engaging in future violations.

In the area of health data, the FTC recently brought two cases of particular interest. In January, the Commission brought a case against Cbr, a leading cord blood bank, for failing to protect nearly 300,000 customers' personal information, including Social Security numbers, credit and debit card account numbers, and sensitive medical information.[31] The breach occurred when unencrypted back-up files and a laptop were stolen from a backpack left in an employee's car for several days. We also settled related allegations that Cbr failed to take sufficient measures to prevent, detect, and investigate unauthorized access to computer networks.

Most recently, the FTC filed a complaint against LabMD, a medical testing lab whose security we allege is unreasonable.[32] For example, the complaint alleges that LabMD's lax security enabled a high-level official to install a peer-to-peer (P2P) file-sharing application on a

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[30] *U.S. v. Path, Inc.*, No. C-13-0448-JCS (N.D. Cal. Filed Jan. 31, 2013), *available at* http://www.ftc.gov/opa/2013/02/path.shtm.

[31] *In the Matter of Cbr Systems, Inc.*, Docket No. C-4400 (Apr. 29, 2013), *available at* http://www.ftc.gov/os/caselist/1123120/130503cbrcmpt.pdf.

[32] *In the Matter of LabMD, Inc.*, Docket No. 9357 (Aug. 28, 2013), *available at* http://www.ftc.gov/opa/2013/08/labmd.shtm.

work computer. As a result, highly sensitive information from over 9,000 consumers – including consumers' names, dates of birth, Social Security numbers, information relating to laboratory tests conducted, and health insurance policy numbers – was was found on a P2P network. In addition, in 2012, LabMD documents containing sensitive personal information of at least 500 consumers were found in the hands of identity thieves. The LabMD litigation is ongoing.

Finally, financial privacy has been a priority for years. The FTC has brought many data security cases in which companies did not maintain reasonable security for consumers' financial information. Last June, the FTC filed a complaint against Wyndham Hotels for failure to protect consumers' personal information, resulting in three data breaches in less than two years.[33] According to the FTC's complaint, Wyndham and its subsidiaries failed to take reasonable and basic security measures, such as using complex user IDs and passwords and deploying firewalls and network segmentation between the hotels and the corporate network. In addition, Wyndham allegedly permitted improper software configurations that resulted in the storage of sensitive payment card information in clear readable text.

The complaint alleges that these failures resulted in fraudulent charges on consumers' accounts, millions of dollars in fraud loss, and the export of hundreds of thousands of consumers' account information to an Internet domain address registered in Russia. This case, like LabMD, is currently in active litigation. However, let me stress that the standard here – and in all our data security cases – is *reasonable* security, not perfection. We only bring cases where, we allege, a company has clearly fallen below that standard.

IV. Legislation

[33] *FTC v. Wyndham Worldwide Corp. et al.*, No. 2:13-cv-01887-ES-SCM (D.N.J. Mar. 25, 2013), *available at* http://www.ftc.gov/opa/2012/06/wyndham.shtm.

FTC's Jessica Rich Lays Out Ambitious Ad Enforcement Agenda Talks priorities at Advertising Self-Regulatory Council conference By Katy Bachman

September 30, 2013, 11:51 AM EDT | Advertising & Branding

Jessica Rich

Jessica Rich—the Federal Trade Commission's front line to advertising regulation as director of the agency's consumer protection bureau—is energetic and organized. She'll need to be to tackle the ambitious agenda she laid out in her keynote speech to more than 100 marketers and advertising attorneys during the Advertising Self-Regulatory Council's annual conference in New York.

Rich, a 20-year FTC career attorney, is best known for her work in crafting the agency's privacy policies. But now she's head of the division that cracks down on unfair and deceptive advertising practices, too.

Named to her position in June, Rich's remarks marked her first public appearance before the advertising community. Like her predecessor, David Vladeck, Rich said marketers should expect more of the same from the division.

Editor's Picks

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"The FTC has long had a focus on national advertising. We're by no means finished," Rich said.

In addition to continuing the commission's focus on deceptive health and safety claims (making sure claims are backed by scientific evidence), "drip" pricing (hidden fees for services and products that aren't disclosed on websites) and food marketing to children, Rich said the agency will also begin to ramp up enforcement of deceptive environmental claims. The agency will also ramp up its law enforcement in digital marketing and privacy.

The coming crackdown on environmental claims follows an update of the FTC's "green guides," released last year at the ASRC conference.

"A growing number of consumers are looking to buy green products and companies respond with green marketing. But sometimes what companies think green claims mean and what consumers think they mean are two different things," Rich said.

Keeping pace with all the new marketing platforms, Rich signaled she will also expand the agency's law enforcement front in digital. As emphasized in the FTC's recent updated guidance on dot-com disclosures, advertising disclosures on mobile platforms "must be clear and conspicuous."

"This will be an area of increased law enforcement activity in the coming year," Rich said.

The FTC is also expanding its digital enforcement to other digital marketing strategies. It recently updated its search engine guidelines and is beginning to scrutinize whether search engines make it easy for consumers to distinguish paid search results. The FTC is also taking the first steps towards guidance for native advertising, beginning with a workshop scheduled for Dec. 4.

Near and dear to Rich's heart and work at the FTC, Rich called privacy "a huge priority." She said the agency will focus first on big data because it "raises numerous privacy concerns," whether online or on mobile. The FTC's report, based on its investigation of data broker practices, will be released by the end of the year.

"The NSA and [Edward] Stone incidents have done a lot to raise awareness about the collection of consumer data," Rich said. "Consumers should be able to expect basic privacy and security protections," Rich said.

In the privacy area, Rich noted that the agency recently brought its first enforcement case addressing a big priority for chairwoman Edith Ramirez, the "Internet of things" with the case against TrendNet, a company that failed to protect the consumers' personal video monitoring streams. Rich said there were other investigations underway.

Companies that fail to protect consumers' sensitive data, like health, financial, and children's data, are also at risk of enforcement, Rich said, pointing to the agency's two recent actions against Wynham Hotels and LabMD.

New Coppa rules, which went into effect July 1, will be part of the agency's privacy enforcement.

Overall, Rich advised companies to take seriously the FTC's recommendations for best privacy practice by designing privacy into the design of digital platforms, providing transparency to consumers with easy to understand terms of collection and use, and streamlining privacy choices for consumers.

"Consumers should be able to expect basic privacy and security protections," said Rich, summarizing her privacy policy to a simple slogan: "Expect privacy."

Ad of the Day: Apple Ends the Year on a High Note With Delightful Holiday Spot

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

FEDERAL TRADE COMMISSION, Plaintiff, v. WYNDHAM WORLDWIDE CORPORATION, *et al.*, Defendants.	CIVIL ACTION NO. 2:13-CV-01887-ES-SCM **PLAINTIFF'S RESPONSE IN OPPOSITION TO THE MOTION TO DISMISS BY DEFENDANT WYNDHAM HOTELS & RESORTS LLC** **MOTION DATE JUNE 17, 2013**

1194 (10th Cir. 2009) (finding substantial injury from "emotional harm" and "costs in changing telephone providers"). And, in any event, the test is not substantial injury to any one consumer. As courts have noted, "An injury may be sufficiently substantial . . . if it does a small harm to a large number of people, or if it raises a significant risk of concrete harm." *Am. Fin. Servs. Ass'n*, 767 F.2d at 972 (quotation marks and citation omitted). *See also Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1365 (11th Cir. 1988) ("As the Commission noted, although the actual injury to individual customers may be small on an annual basis, this does not mean that such injury is not 'substantial.'" (citation omitted)).

Wyndham compares itself to a "local furniture store" that was robbed, and protests that the FTC is re-victimizing it with this suit. Wyndham Mot. 21. A more accurate analogy would be that Wyndham was a local furniture store that left copies of its customers' credit and debit card information lying on the counter, failed to lock the doors of the store at night, and was shocked to find in the morning that someone had stolen the information. Unlike Wyndham's hypothetical furniture heist, Wyndham's role in this matter was primarily as a vehicle for the victimization of consumers. The FTC is not suing Wyndham for the fact that it was hacked, it is suing Wyndham for mishandling consumers' information such that hackers were able to steal it.

II. THE FTC HAS THE AUTHORITY TO ENFORCE THE FTC ACT AGAINST ENTITIES FOR UNFAIR PRACTICES RELATED TO DATA SECURITY.

As explained above in Part I, the Complaint satisfies the pleading standard for unfair practices. This should end the inquiry. Nonetheless, Wyndham navigates its motion into uncharted territory, arguing that this Court should carve out a data security exception to the FTC's well-established unfairness authority. Moreover, Wyndham claims that it lacked fair notice of the FTC's enforcement authority in this area, notwithstanding the abundance of governmental and non-governmental guidance about what constitutes reasonable data security.

A. Section 5 of the FTC Act Grants the FTC Authority Over Data Security.

Wyndham claims that applying unfairness to data security practices would be inconsistent with the statutory scheme. Wyndham Mot. 7-14. Wyndham does not dispute, however, that Section 5's prohibition of "unfair or deceptive acts or practices in or affecting commerce" should cover deceptive data security practices. Wyndham Mot. 2 ("[Hotels and Resorts] does not dispute that the FTC can bring enforcement actions against companies that make 'deceptive' statements to consumers."). Instead, Wyndham argues that this Court should read a limited, implicit exemption for data security into the middle of the words "unfair" and "deceptive," based on the Supreme Court's decision in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

Wyndham's reliance on *Brown & Williamson* is misplaced. In *Brown & Williamson*, the Supreme Court reversed the FDA's assertion of authority over tobacco due to "extraordinary" circumstances: The FDA for decades had denied that it had such authority, and its assertion of the authority would result in statutory inconsistencies. 529 U.S. at 159; *id*. at 137. Neither of these factors is present here. Indeed, Wyndham contends that the circumstances here only "strongly suggest" that unfairness should not cover data security. Wyndham Mot. 8. Even if there were such a "strong suggestion"—which there is not—the facts here would fall well short of the "extraordinary" circumstances that led the Court to overturn the FDA's assertion of authority over tobacco. *Id*. at 159-60.

1. Data Security Statutes Do Not Limit FTC Authority Under the FTC Act.

First, Wyndham incorrectly argues that several statutes that provide the FTC with legal tools to address data security in specific contexts somehow "preclude" or "foreclose" an interpretation of the FTC Act to cover unfair and deceptive acts or practices related to data security. Wyndham Mot. 7-8. But Wyndham has not argued (nor could it) that there is a

contradiction that requires this Court to reconcile the FTC Act with complementary data security statutes. *Cf. Brown & Williamson*, 529 U.S. at 139 (finding FDA's interpretation to "plainly contradict congressional policy").

Congress deliberately delegated broad power to the FTC under Section 5 of the FTC Act to address unanticipated practices in a changing economy. *See FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 240 (1972) ("Congress . . . explicitly considered, and rejected, the notion that it reduce the ambiguity of the phrase 'unfair methods of competition' by tying the concept of unfairness to a common-law or statutory standard or by enumerating the particular practices to which it was intended to apply."). The legislative history of the FTC Act reflects Congress's concerns about attempting to enumerate specific acts and practices. *See* S. Rep. No. 63-597, at 13 (1914) ("there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others"); H.R. Rep. No. 63-1142, at 19 (1914) (Conf. Rep.) ("It is impossible to frame definitions which embrace all unfair practices."). Indeed, the statute also does not mention any of the established uses of its unfairness provision, including online check drafting and delivery (*see Neovi*, 604 F.3d 1150 (9th Cir. 2010); sale of telephone records (*see Accusearch*, 570 F.3d 1187 (10th Cir. 2009)); unilateral breach of contracts (*see Orkin Exterminating Co. v. FTC*, 849 F.2d 1354 (11th Cir. 1988)); telephone billing practices (*see FTC v. Verity Int'l*, 335 F. Supp. 2d 479, 498-99 (S.D.N.Y. 2004)); unsafe farm equipment (*see In the Matter of Int'l Harvester Co.*, 104 F.T.C. 949 (1984)); or many other practices affecting commerce, all of which courts routinely find to be subject to Section 5 of the FTC Act. The FTC's determination to enforce the FTC Act in these contexts—as well as in the data security context—is entitled to deference. *See Arlington v. FCC*, Nos. 11-1545, 11-1547, 2013 WL 2149789, slip op. at *16-17 (May 20, 2013).

The subsequent enactment of sector-specific laws to enhance regulatory authority over data security in particular industries neither contradicts nor is inconsistent with Congress's grant of broad authority to the FTC to prohibit deceptive and unfair practices that injure consumers. Instead, the sector-specific laws enhance FTC authority with new legal tools. For example, Congress provided the FTC with rulemaking and/or civil penalty authority through the enactment of the Fair Credit Reporting Act ("FCRA"), Gramm-Leach-Bliley Act ("GLB"), and Children's Online Privacy Protection Act ("COPPA"). Similarly, the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and the Health Information Technology for Economic and Clinical Health Act ("HITECH Act") give the Department of Health and Human Services rulemaking and civil penalty authority. By contrast, the FTC is not seeking civil penalties in this matter; rather, the FTC is seeking only equitable relief. *See* Prayer for Relief, Compl.

These statutes and the FTC Act co-exist without contradiction or inconsistency. They are complementary, and by no means irreconcilable. *Cf. Brown & Williamson*, 529 U.S. at 143 (undertaking the "task of reconciling many laws enacted over time, and getting them to 'make sense' in combination." (citing *United States v. Fausto*, 484 U.S. 439, 453 (1988))).

Lastly, Wyndham does not, and cannot, argue that the scope of the FTC Act has been impliedly repealed. The courts will not infer a statutory repeal "unless the later statute 'expressly contradict[s] the original act'" or unless such a construction "is absolutely necessary ... in order that [the] words [of the later statute] shall have any meaning at all." *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662-63 (2007). Wyndham has not met this standard.[2]

[2] Wyndham argues that because the FTC has sought additional data security legislation from Congress, it necessarily lacks authority under Section 5 to challenge data security practices as unfair. *See* Wyndham Mot. 11. Wyndham fails to appreciate that the FTC has sought legislation

2. The FTC Has Always Affirmed, and Never Disavowed, Authority Over Unfair Practices Related to Data Security.

Second, Wyndham argues that the FTC originally disclaimed authority to pursue unfair practices related to data security and that its position in this matter is a "quite recent[]" reversal. Wyndham Mot. 10-11. These claims are contrary to fact: Since 2000, the FTC has brought more than forty data security cases, nineteen of which alleged unfair practices. *See* Legal Resources | BCP Business Center, http://business.ftc.gov/legal-resources/29/35. The FTC has routinely reported and publicized its data security program, including these enforcement activities, to Congress, consumers, and industry. *See, e.g.*, *Identity Theft: Innovative Solutions for an Evolving Problem: Hearing before the Subcomm. on Terrorism, Technology, and Homeland Security of the S. Comm. on the Judiciary*, 110th Cong. at 5-6 (March 21, 2007) (Prepared Statement of the Federal Trade Commission) ("[I]n several of the cases, the alleged security inadequacies led to breaches that caused substantial consumer injury and were challenged as unfair practices under the FTC Act.").[3]

Wyndham incorrectly asserts that the FTC disclaimed its authority in 2000 when it stated that it "lacks authority to require firms to adopt information practice policies." Wyndham Mot. 10 (quoting Federal Trade Commission, *Privacy Online: Fair Information Practices In The Electronic Marketplace* at 33-34 (May 2000) available at http://www.ftc.gov/reports/privacy2000/privacy2000.pdf ("Privacy Report")). Wyndham mischaracterizes the Privacy Report, which states only that FTC Act authority under Section 5 is limited to unfair or deceptive

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to provide additional tools, such as civil penalties, to complement the authority it already has under Section 5.

[3] The FTC has reported to Congress more than thirty times since 2003 on its Section 5 enforcement activities related to data security. In at least a dozen instances, it has specifically stated that failure to maintain reasonable security is an unfair practice. *See, e.g.*, *Hearing Before the Subcomm. on Terrorism, Technology, and Homeland Security of the S. Comm. on the Judiciary*, 110th Cong. (March 21, 2007) (Prepared Statement of the Federal Trade Commission).

practices, and thus would not encompass failure to adopt certain policies absent unfair or deceptive practices. *Id*. The same Privacy Report explicitly states, in a section titled "Current FTC Authority," that "[t]he FTC Act prohibits unfair and deceptive practices in and affecting commerce. It authorizes the Commission to seek injunctive and other equitable relief, including redress, for violations of the Act, and provides a basis for government enforcement of certain fair information practices." *Id*.

Wyndham also selectively quotes former FTC Chairman Pitofsky's 1998 testimony, omitting the fact that his testimony was expressly about online privacy, and not data security: "I appreciate this opportunity to present the Commission's recommendations for addressing the privacy concerns raised by the wide-spread collection of personal information from consumers by commercial sites on the World Wide Web." *Consumer Privacy on the World Wide Web, Hearing Before Subcomm. on Telecomm., Trade and Consumer Protection of the H. Comm. on Commerce*, 105th Cong. (July 21, 1998). Chairman Pitofsky described the problem of the widespread and rampant collection of information online, which, given technology and business practices at the time, had not risen to the level of "injury" necessary to invoke unfairness. Directly addressing that issue, he stated that the FTC is "limited *in this context* to ensuring that Web sites follow their stated information practices." *Id*. (emphasis added). *See also* Wyndham Mot. 10 (excising "in this context" from quote).

Finally, the testimony by former Bureau Director Vladeck does not disclaim authority, as Wyndham claims. Wyndham Mot. 11. Indeed, it ***showcases*** the authority:

> In addition, the Commission enforces the FTC Act's proscription against unfair or deceptive acts or practices in cases where a business makes false or misleading claims about its data security procedures, or *where its failure to employ reasonable security measures causes or is likely to cause substantial consumer injury*.

The Threat of Data Theft to American Consumers: Hearing Before the Subcomm. on Commerce,

Manufacturing, and Trade of the H. Comm. on Energy & Commerce, 112th Cong. 2 (May 4, 2011) (emphasis added). Bureau Director Vladeck immediately followed this comment with a description of two cases, both of which alleged unfair data security practices. *Id*. at 2-4 (describing *In the Matter of Lookout Services, Inc.*, File No. 102 3076 (June 15, 2011); and *In the Matter of Ceridian Corp.*, FTC File No. 102 3160 (June 8, 2011).

Lastly, even if the FTC had originally disavowed its authority, which it did not, that fact would not be controlling. *See Smiley v. Citibank*, 517 U.S. 735, 742 (1996) ("[T]he mere fact that an agency interpretation contradicts a prior agency position is not fatal."). Unlike *Brown & Williamson*, where the FDA had a 70-plus year history of disavowing its authority (529 U.S. at 159), here Wyndham only can point to a few isolated statements, which it misinterprets, to claim disavowal.

3. Legislative and Executive Interest in Data Security Neither Impliedly Nor Explicitly Deprives the FTC of its FTC Act Authority over Unfair and Deceptive Data Security Practices.

Finally, Wyndham suggests that unenacted legislation, an executive order, and the "intense debate among members of Congress" somehow operate by inference to strip the FTC of its established authority over unfair practices pursuant to the FTC Act. Wyndham Mot. 12-13. Wyndham argues that congressional interest in data security, and its failed efforts to pass specific data security legislation, create the presumption that "'Congress could not have intended to delegate'" data security authority to the FTC under the FTC Act. Wyndham Mot. 13 (quoting *Brown & Williamson*, 529 U.S. at 160). This argument is contrary to fact and precedent.

If relevant at all, the facts of the congressional debate over data security affirm FTC authority over unfair practices related to data security. For example, of the six data security bills Wyndham cites in support of its argument, four included savings clauses to preserve the FTC's existing data security authority. *See* S. 1207, 112th Cong. § 6(d) (1st Sess. 2011); H.R. 2577,

112 Cong. § 6(d) (1st Sess. 2011); H.R. 1841, 112 Cong. § 6(d) (1st Sess. 2011); H.R. 1707, 112 Cong. § 6(d) (1st Sess. 2011).[4] Preservation clauses would be unnecessary if the FTC lacked any existing authority. Similarly, Senator Rockefeller, who co-sponsored Senate Bill 1207, asked an FTC representative: "Can you talk about how Senator Pryor's and my bill will complement ***your existing enforcement efforts***?" *Privacy and Data Security: Protecting Consumers in the Modern World: Hearing on S.B. 1207 Before the S. Comm. on Commerce, Science, and Transportation*, 112th Cong. 32 (June 29, 2011) (emphasis added). Thus there is no support for Wyndham's argument that Congress is implying that it believes the FTC lacks authority.

Similarly, the Obama Administration's recent Executive Order on Improving Critical Infrastructure Cybersecurity in no way precludes FTC authority over unfair data security practices. *See* Exec. Order No. 13,636, 78 Fed. Reg. 11739 (Feb. 12, 2013) ("Executive Order") (Hradil Decl., Ex. B). The Executive Order neither addresses FTC authority nor addresses threats to anything other than "Critical Infrastructure," which is defined as "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters." Executive Order § 2. In contrast, this case addresses the protection of consumers' payment card data and seeks to protect consumers'—rather than national security—interests.

Finally, Wyndham's assertion that there is a public controversy regarding the regulation of data security actually supports the FTC's interpretation of the scope of the FTC Act: "[D]eference is particularly appropriate where, as here, an agency's interpretation involves issues

[4] Wyndham's suggestion that the Cyber Intelligence Sharing and Protection Act "would grant immunity" against any action for participating businesses is a gross misreading of the liability exemption provision. H.R. 624, 113th Cong. § 3(b)(3)(A) (1st Sess. 2013). The liability exemption provision is expressly limited to potential liability from complying with that Act. *Id.*

of considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives." *United States v. Rutherford*, 442 U.S. 544, 554 (1979) (citations omitted). Deference also is appropriate where, as here, Congress, after being informed of the agency's interpretation, has amended a statute (*e.g.*, U.S. SAFE WEB Act of 2006, PL 109–455, December 22, 2006, 120 Stat. 3372 (2006)), but not taken any steps to limit the contested interpretation. *See Saxbe v. Bustos*, 419 U.S. 65, 74 (1974) ("This longstanding administrative construction is entitled to great weight, particularly when, as here, congress has revisited the Act and left the practice untouched."); *Bunker Hill Co. v. EPA*, 658 F.2d 1280, 1284 n.2 (9th Cir. 1981) ("[A]n administrative interpretation deserves particular deference where Congress fails to take advantage of an opportunity to alter it." (citations omitted)). Congress's inaction regarding the FTC's longstanding and widely-reported authority over unfair practices related to data security confirms the FTC's position in this litigation.

B. Wyndham Has Fair Notice of What Section 5 Requires.

Wyndham next argues that enforcement of the FTC Act is unconstitutional because "Section 5 itself clearly provides no meaningful notice to regulated parties—it generically prohibits 'unfair and deceptive' business practices without going into any further details as to what practices might be deemed 'unfair' or 'deceptive.'" Wyndham Mot. 17. This extraordinary argument lacks merit. As noted above, the FTC has consistently stated that in the context of data security, reasonableness is the touchstone: unreasonable data security practices are unfair. Wyndham has notice of what it means to have reasonable data security, from both government and industry sources. It is precisely within the expertise of this Court to evaluate the reasonableness of Wyndham's data security program in light of these various types of guidance.

1. Industry Understands the Meaning of Reasonable Data Security.

Wyndham is not operating in the guidance vacuum that it claims. There are a number of

sources of industry guidance on this issue. Indeed, numerous entities have long provided information concerning the various factors companies should consider in addressing data security. *See, e.g.*, NIST Special Publication 800-12, An Introduction to Computer Security: The NIST Handbook (Oct. 1995); Standards.org, http://www.standards.org/standards/listing/pci_dss (describing history of PCI DSS); 27000.org, http://www.27000.org/iso-27001.htm (describing history of ISO/IEC 27001 standard) and http://www.27000.org/iso-27002.htm (describing history of ISO/IEC 27002 standard).[5]

Wyndham cannot and, likely, does not expect to persuade this Court that it simply did not know what it meant to have reasonable data security. Wyndham itself told consumers that it used "industry standard practices" and that it took "commercially reasonable" efforts to create and maintain firewalls. Compl. ¶ 21. In its motion to dismiss, Wyndham twice states that, in fact, it did take substantial security measures: "WHR at the time had substantial security measures in place to protect its network against being hacked." Wyndham Mot. 1. *See also* Wyndham Mot. 2 (describing the breaches as having occurred "notwithstanding the substantial data-security efforts [Hotels and Resorts] undertook both before and after attacks"). Wyndham's claim of "substantial security measures" merely restates the question that the FTC's Complaint puts before the Court—the reasonableness of Wyndham's data security practices.

2. The FTC Provides Notice to Industry Through Business Guidance and Enforcement Actions.

The FTC provides guidance regarding reasonable data security through its public statements. *See, e.g.*, Protecting Personal Information: A Guide for Business (2007),

[5] Wyndham may argue that it did not know *which* standard it was supposed to follow. This argument misses the point. These standards provide guidance that a reasonable person would adapt to the particular needs of the business in question. The purpose of trial is to determine whether Wyndham's data security program was reasonable based on what was known at the time.

http://business.ftc.gov/sites/default/files/pdf/bus69-protecting-personal-information-guide-business_0.pdf. In addition, many of the allegations of Defendants' specific failures, as appear in Paragraph 24 of the FTC's Complaint, correlate to various features of unreasonable data security programs that have been identified in previous FTC enforcement actions. *See, e.g.*, *In the Matter of BJ's Wholesale Club, Inc.*, File No. 042 3160 (Sept. 20, 2005) (alleging failures related to: encryption; passwords; detection; investigation); *In the Matter of Superior Mortgage, Corp.*, File No. 052 3136 (Dec. 14, 2005) (passwords); *In the Matter of DSW, Inc.*, File No. 052 3096 (Mar. 7, 2006) (encryption; passwords; segmentation; detection); *In the Matter of Nations Title Agency, Inc.*, File No. 052 3117 (June 19, 2006) (detection; incident response; investigation); *In the Matter of CardSystems Solutions, Inc.*, File No. 052 3148 (Sept. 5, 2006) (passwords; segmentation; detection; investigation); *In the Matter of Guidance Software, Inc.*, File No. 062 3057 (Mar. 30, 2007) (encryption; detection); *United States v. ValueClick*, No. Civ. 08-01711 (C.D. Cal. Filed Mar. 17, 2008) (encryption); *In the Matter of Life is Good, Inc.*, File No. 072 3046 (Apr. 16, 2008) (encryption; detection); *In the Matter of The TJX Companies, Inc.*, File No. 072 3055 (July 29, 2008) (encryption; passwords; segmentation; detection; investigation); *In the Matter of Reed Elsevier, Inc.*, File No. 052 3094 (July 29, 2008) (passwords).

Although every situation is different, the consent orders in these matters provide industry, including Wyndham, with notice of different features of data security that must be evaluated in order to maintain a reasonable data security program. As the Supreme Court recognized in *General Electric Co. v. Gilbert*, "[T]he rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for

guidance." 429 U.S. 125, 141-42 (1976) (citation omitted).

3. In the Data Security Context, Adjudication is Permitted and Effective.

The FTC's decision to enforce the FTC Act's prohibition of unfair practices through individual enforcement action, or adjudication, rather than rulemaking "lies [within its] informed discretion." *PBW Stock Exch., Inc. v. SEC*, 485 F.2d 718, 732 (3d Cir. 1973) ("The courts have consistently held that where an agency, as in this case, is given an option to proceed by rulemaking or by individual adjudication the choice is one that lies in the informed discretion of the administrative agency." (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947); *NLRB v. Wyman Gordon Co.*, 394 U.S. 759, 772 (1969))). "If the agency affords the party a 'full opportunity to be heard before the [agency] makes its determination' [*NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974)], we cannot second-guess the agency decision whether to interpret a standard by rulemaking or by adjudication. [*Chenery*, 332 U.S. at 203]." *Beazer E., Inc. v. EPA*, 963 F.2d 603, 609-10 (3d Cir. 1992).

Nor would it be practicable in the data security context to establish through rulemaking the highly particularized guidelines that Wyndham requests. Wyndham Mot. 17 (seeking rules dictating, *inter alia*, "what software they must use, how they must deploy firewalls").[6] Certain fields are "so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule." *Chenery*, 332 U.S. at 203. The measure of reasonable data security correlates to the sensitivity of the information collected, the amount of information collected, threats attendant to a particular network structure, the evolving field of commonly-

[6] Although the FTC has sought rulemaking authority in the field of data security, it has not done so in order to establish particularized technical standards. Instead, the FTC has sought authority to establish rules that create procedural requirements, such as mandating periodic risk assessments, similar to the rules promulgated pursuant to the Gramm-Leach-Bliley Act. *See* Standards for Safeguarding Customer Information, 16 C.F.R. § 314.4 (2013).

targeted vulnerabilities, and many other factors.[7] The Supreme Court articulated the importance of case-by-case adjudication in similar circumstances:

> [The National Labor Relations Board] is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion. Although there may be situations where the Board's reliance on adjudication would amount to an abuse of discretion or a violation of the Act, nothing in the present case would justify such a conclusion. Indeed, there is ample indication that adjudication is especially appropriate in the instant context. As the Court of Appeals noted, "(t)here must be tens of thousands of manufacturing, wholesale and retail units which employ buyers, and hundreds of thousands of the latter." [*Bell Aerospace v. NLRB*, 475 F.2d 485, 496 (2d Cir. 1973)]. Moreover, duties of buyers vary widely depending on the company or industry. It is doubtful whether any generalized standard could be framed which would have more than marginal utility.

Bell Aerospace, 416 U.S. at 294 (permitting NLRB to evaluate the definition of "managerial employees" for the purpose of collective bargaining on a case-by-case basis).

Even the amici in support of Wyndham have recognized the importance of this type of regulatory flexibility in the field of data security. The Chamber, despite now imploring the Court to require "formal guidance" (Chamber Br. at 12), has in the past led the charge on Capitol Hill to prevent the adoption of specific regulatory requirements in this area. *See* Ken Dilanian, U.S. Chamber of Commerce leads defeat of cyber-security bill, Los Angeles Times (Aug. 3, 2012), http://articles.latimes.com/2012/aug/03/nation/la-na-cyber-security-20120803 ("[T]he U.S. Chamber of Commerce and other business groups strenuously opposed the measure,

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[7] The United States Chamber of Commerce ("Chamber") endeavors to flip on its head the reasoning of *Chenery*, and asserts that "it is *precisely because* the appropriate standards are difficult to ascertain that businesses cannot be held to a nebulous notion of 'reasonableness,' all without any formal guidance before they find themselves in violation of the law." Proposed Brief of Amici Curiae Chamber of Commerce of the United States of America, Retail Litigation Center, American Hotel & Lodging Association, and National Federal of Independent Business in Support of Defendants, ECF No. 95-2 ("Chamber Br.") 12 (emphasis in original). The Chamber offers no legal support for this argument, which contradicts the holding of *Chenery* that "specialized and varying" fields are best-suited to case-by-case adjudication. *Chenery Corp.*, 332 U.S. at 203.

condemning it as excessive government interference in the free market and arguing that cumbersome federal regulations could hamper companies trying to defend against cyber intrusions."). In its statement discouraging passage of the Cybersecurity Act of 2012, the Chamber discouraged any legislative efforts that would create explicit rules for businesses to follow: "The Chamber urges Congress to not complicate or duplicate existing industry-driven security standards with government mandates and bureaucracies . . . ." *See* U.S. Chamber of Commerce, Key Vote letter on S. 3414, the "Cybersecurity Act of 2012" (July 31, 2012), http://www.uschamber.com/issues/letters/2012/key-vote-letter-s-3414-cybersecurity-act-2012."

The FTC's Complaint aligns with the Chamber's previously-advocated position that data security standards can be enforced in an industry-specific, case-by-case manner.[8] This approach saves regulated entities, such as Wyndham, from having to comply unnecessarily with data security standards that may be excessive in light of the circumstances, and permits regulated entities an opportunity to represent to the finder of fact why it believes—as Wyndham apparently did—that its data security was reasonable.

4. Courts Are Well Suited To Evaluate the Reasonableness of Wyndham's Data Security Practices.

When it passed the FTC Act, Congress observed that courts would have an important role to play in evaluating unfairness. *See FTC v. R.F. Keppel & Bro.*, 291 U.S. 304, 312 n.2 (1934) ("It is believed that the term 'unfair competition' has a legal significance which can be enforced by the commission and the courts, and that it is no more difficult to determine what is unfair

[8] For its part, TechFreedom appears to argue even more explicitly for a judiciary-focused approach: "Those aspects of data security that cannot easily be reduced to rules might well be more amenable to case-by-case adjudication. But without Article III court decisions developing binding legal principles and no other meaningful form of guidance from the FTC, the law will remain unconstitutionally vague." Amici Curiae Brief of TechFreedom, International Center For Law and Economics & Consumer Protection Scholars, No. ECF 94-3 ("TechFreedom Br.") 9. Although the FTC disputes that it has provided no meaningful guidance, it agrees that the field would be aided by a body of law that includes "Article III court decisions."

competition than it is to determine what is a reasonable rate or what is an unjust discrimination." (citing S. Rep. No. 597, at 13 (1914)). It is precisely this role that this court will play in evaluating the reasonableness of Wyndham's data security practices.

Agencies routinely bring enforcement actions where the governing statute or rules lack particularized prohibitions. For example, the National Labor Relations Board requires labor unions, among other things, to bargain on behalf of their employees "in good faith." 29 U.S.C. § 158(d). Courts subsequently have developed this language in a manner that is "consistent with the aim of the [National Labor Relations Act] to promote the resolution of conflict in the labor arena." *NLRB v. New Assocs.*, 35 F.3d 828, 834 (3d Cir. 1994). Similarly, the Occupational Safety and Health Act (OSHA) has a "General Duty Clause" that requires employees to furnish a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654. The Third Circuit has interpreted this obligation as invoking the reasonable person standard, informed in part by industry standards. *Voegele Co., Inc. v. Occupational Safety & Health Review Comm'n*, 625 F.2d 1075, 1078 (3d Cir. 1980). In fact, under the Administrative Procedure Act, courts routinely subject numerous agency actions to a similar reasonableness test. 5 U.S.C. § 706.

Although Wyndham relies on several OSHA cases in its fair notice argument, it neglects discussion of the General Duty Clause, which is most analogous to the unfairness prohibition of the FTC Act. For example, Wyndham cites *Fabi Construction Co. v. Secretary of Labor* for the proposition that Fabi lacked fair notice of OSHA regulations. 508 F.3d 1077, 1088 (D.C. Cir. 2007). This same case, however, includes an extensive reasonableness analysis to evaluate whether Fabi violated the General Duty Clause. In its determination that Fabi did not meet this "general duty," the Court evaluated a number of factors, including whether Fabi followed third-

party technical drawings, whether Fabi complied with industry standard practices, and expert opinion on Fabi's likely familiarity with industry standards. *Id*. at 1084. This is the type of inquiry the FTC asks this Court to undertake in this matter.

Nor is there anything extraordinary about courts using these same tools to evaluate the reasonableness of data security. *See, e.g.*, *United States v. Hanjuan Jin*, 833 F. Supp. 2d 977, 1008-09 (N.D. Ill. 2012) (evaluating, in trade secrets action, the reasonableness of Motorola's data security, including password policies, firewalls, physical security, etc.). There is simply no factual or legal basis for Wyndham and the amici's position that this case is somehow unusual, much less that it is unconstitutional.

5. Wyndham's Fair Notice Cases Are Inapposite.

Wyndham relies principally on the Supreme Court's recent decision in *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012) ("*Fox II*"), to argue that, because the FTC is proceeding through case-by-case enforcement, the FTC Act should be invalidated and this case should be dismissed for lack of fair notice. Wyndham Mot. 14-19. This reliance is badly misplaced. In *Fox II*, the FCC's failure to provide notice had nothing to do with the FCC proceeding by case-by-case enforcement, as Wyndham suggests. Instead, it was undisputed that the FCC had "reversed prior rulings that had found fleeting expletives not indecent." *Id*. at 2314. Indeed, in *Fox I*, the Supreme Court expressly affirmed the FCC's authority to evaluate obscenity on a case-by-case basis: "More fundamentally, however, the agency's decision to consider the patent offensiveness of isolated expletives on a case-by-case basis is not arbitrary or capricious." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 520 (2009). *See also id.* (recognizing that case-by-case enforcement is necessary to distinguish between obscene language uttered at awards shows, which "draw the attention of millions of children" versus, for example, a "recitation of Geoffrey Chaucer's Miller's Tale").

Moreover, in this matter, the FTC is seeking only equitable relief, and doing so in a field that has been the subject of FTC enforcement activity since 2000. By contrast, the cases that Wyndham relies on, including *Fox II*, expressly limit themselves to instances in which one or both of the following are true: the agency had reversed itself, and the agency was seeking to impose punitive (as opposed to equitable) remedies. *See Fox II*, 132 S. Ct. at 2314 (reversal of position); *id*. at 2318 (legal remedies); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2169 (2012) (agency "advanced a different interpretation" previously); *id*. at 2167 (interpretation threatened "massive liability"); *General Electric Co. v. EPA*, 53 F.3d 1324, 1329-30 (D.C. Cir. 1995) ("an agency may not deprive a party of property by imposing civil or criminal liability"); *Gates & Fox Co. v. Occupational Safety & Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986) (invalidating application of regulation appropriate "[w]here the imposition of penal sanctions is at issue"); *Dravo Corp. v. Occupational Safety & Health Review Comm'n*, 613 F.2d 1227, 1229 (3d Cir. 1980) ("reject[ing] the approach taken in another proceeding"); *id*. at 1232 (rejecting expansive interpretation because "we deal here with a penal sanction"); *Fabi Construction*, 508 F.3d at 1086 (agency "interpretation fails to make sense"); *id*. at 1089 (resulting in "citation and fine"); *Trinity Broadcasting of Fla., Inc. v. FCC*, 211 F.3d 618, 631-32 (D.C. Cir. 2000) (company penalized by refusal to renew license after "problematic" interpretation that contradicted earlier interpretation); *United States v. Chrysler Corp.*, 158 F.3d 1350, 1355-56 (D.C. Cir. 1998) (NHTSA's interpretation contradicted its "own test schematic," and would "deprive Chrysler of property no less than a fine").

This action falls within neither of those categories. Here, the FTC is seeking to enforce Section 5 in the same way it has for the last decade. Moreover, rather than seek civil penalties, the FTC here is pursuing only equitable relief. Compl. ¶ 51. *Cf. FTC v. Magazine Solutions,*

representations, the effectiveness of such a disclaimer is a fact-specific inquiry and, as such, inappropriate for a motion to dismiss. *See FTC v. Nat'l Urological Group, Inc.*, 645 F. Supp. 2d 1167, 1189 (N.D. Ga. 2008) ("claims or net impressions communicated to reasonable consumers, is fundamentally a question of fact"). Therefore, it is not appropriate to inquire at the motion to dismiss stage about the effectiveness of the disclaimer Wyndham identifies (in a paragraph that does not mention data security) on the bottom of the fourth page (of five pages) of the privacy policy.

CONCLUSION

For the foregoing reasons, the FTC respectfully requests that the Court deny Wyndham's motion to dismiss.

Dated: May 20, 2013.

Respectfully submitted,
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EXHIBIT

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RPTS MCCONNELL

DCMN HERZFELD

THE FTC AT 100: WHERE DO WE GO FROM HERE?

TUESDAY, DECEMBER 3, 2013

House of Representatives,

Subcommittee on Commerce, Manufacturing, and Trade,

Committee on Energy and Commerce,

Washington, D.C.

The subcommittee met, pursuant to call, at 10:05 a.m., in Room 2123, Rayburn House Office Building, Hon. Lee Terry [chairman of the subcommittee] presiding.

Present: Representatives Terry, Lance, Blackburn, Harper, Guthrie, Olson, Pompeo, Kinzinger, Bilirakis, Johnson, Long, Barton, Upton (ex officio), Schakowsky, Sarbanes, McNerney, Welch, Yarmuth, Dingell, Matheson, Barrow and Christensen.

Staff Present: Charlotte Baker, Press Secretary; Kirby Howard, Legislative Clerk; Nick Magallanes, Policy Coordinator,

CMT; Gib Mullan, Chief Counsel, CMT; Shannon Weinberg Taylor, Counsel, CMT; Michelle Ash, Democratic Chief Counsel, Consumer Protection; and William Wallace, Democratic Professional Staff Member.

Mr. Terry. Commissioner Brill.

STATEMENT OF JULIE BRILL

Ms. Brill. Good morning. My name is Julie Brill. I will highlight some of the significant substantive work under way at the Federal Trade Commission as we approach our 100th anniversary.

Let me begin with our consumer protection mission. The Federal Trade Commission is taking effective actions to protect consumers in a recovering economy. Aggressive enforcement plays a key role, and we actively monitor the marketplace to identify, understand, and eliminate financial scams. Recently we have focused on putting an end to scams that falsely promised to reduce consumers' mortgage payments, prevent foreclosure, or ease credit card debts. And we have stopped debt collectors who violated the law in their efforts to obtain payments from consumers, some of whom did not even owe a debt in the first place. We pay particularly close attention to schemes that target vulnerable consumers, such as the elderly, and military service members and their families.

The FTC is also the Nation's top cop on the consumer, data security, and privacy beat. Our enforcement and policy work in these areas helps to ensure that consumers have confidence in the dynamic and ever-changing marketplace for personal information. We enforce the Fair Credit Reporting Act, and we pay particularly

STATEMENT OF JOSHUA WRIGHT

Mr. Wright. Thank you, Chairman Terry, Ranking Member Schakowsky, and distinguished members of the subcommittee, for this opportunity to speak to you today about the FTC at 100. I want to begin by discussing some of the unique institutional advantages and expertise at the Federal Trade Commission.

As both an economist and a lawyer, I appreciate the unique structure of the FTC and how its organization enhances our ability to protect consumers. As you know, the FTC has three bureaus: Competition, Consumer Protection, and Economics. The Bureau of Competition endeavors to promote and protect free markets and vigorous competition, and the Bureau of Consumer Protection works to prevent fraud, deception, and unfair business practices in the marketplace.

The FTC's dual missions complement each other in promoting consumer welfare, encouraging the disclosure of accurate information to consumers in the marketplace, which, in turn, facilitates free and healthy competition. What is sometimes lost in that discussion, however, is the vital role played by the Bureau of Economics in achieving both of those missions.

The Bureau of Economics provides guidance and support to the agency's antitrust and consumer protection activities. Working with the Bureaus of Competition and Consumer Protection, the

Bureau of Economics participates in the investigation of mergers and alleged anticompetitive, deceptive or unfair acts or practices. The Bureaus provide an independent recommendation on the merits of antitrust and consumer protection matters to the Commission. The Bureau also integrates economic analysis into enforcement proceedings and works with the Bureaus to divide appropriate remedies.

The Bureau of Economics also conducts rigorous economic analyses of various markets and industries. Some recent examples include its consumer fraud survey, which provided insight into the frequency of certain types of consumer fraud and how the incidence of fraud has changed over time. The Bureau of Economics conducts merger retrospectives that help the agency assess how a particular transaction affected the market, and allows the agency to evaluate enforcement decisions to improve future analysis and decisionmaking.

Finally, the Bureau also analyzes the economic impact of government regulation, and provides Congress, the executive branch, and the public with policy recommendations relating to competition and consumer protection issues. Recent examples include the Bureau's work on children's online privacy and protection rule and the endorsement and testimonials guides.

Analyzing the impact of regulations also is one of the main components of the FTC's modernization efforts. To ensure the Commission's regulations and compliance advice remain

cost-effective, the agency has engaged in a systematic regulatory review program for the last two decades. Pursuant to that program, the Commission has rescinded 13 trade rules and 24 guides, and updated dozens of others since the early 1990s. The FTC is committed to continuing its systematic regulatory review program in order to reduce burdens on the business community, while providing real benefits to consumers.

As the FTC enters its second century, it is an appropriate time to reflect upon whether the agency's enforcement and policy tools are being put to the best possible use to help the agency fulfill its mission. One of these tools, the Commission's authority to protect -- to prosecute unfair methods of competition as stand-alone violations of Section 5 of the FTC Act, is particularly suitable, in my view -- is a particularly suitable candidate for evaluation. The historical record reveals an unfortunate gap between the theoretical promise of Section 5 as articulated by Congress and its application and practice by the FTC.

The gap has grown large in part due to the persistent absence of any meaningful guidance articulating what constitutes an unfair method of competition. For at least the past 20 years, Commissioners from both parties have acknowledged that a principal standard for application of Section 5 would be a welcome improvement and have called for formal guidelines. With that goal in mind, I have offered a detailed policy statement articulating

my own views on how best to modernize the agency's Section 5 authority.

The fundamental problem with the Commission's Section 5 enforcement in the unfair methods context is caused by a combination of the agency's administrative process advantages and the vague nature of the Section 5 authority governing unfair methods of competition. This combination gives the FTC the ability in some cases to elicit a settlement even when the conduct in question may benefit consumers. This is because firms typically prefer to settle Section 5 claims rather than go through the lengthy and costly administrative litigation in which they are both shooting at a moving target and may have the chips stacked against them.

Indeed, the empirical evidence documents a near perfect rate at which the Commission rules in favor of FTC staff after administrative adjudication. The evidence also reveals that the FTC's own decisions are reversed by Federal courts of appeal at a much greater rate than those of general district court judges with little or no antitrust experience.

Formal guidelines would help the Commission's mission by focusing the Commission's unfair methods enforcement upon plainly anticompetitive conduct and provide businesses with important guidance about what conduct is lawful and what conduct is unlawful under Section 5. Indeed, the FTC has issued nearly 50 sets of guidelines on a variety of topics, many of them much less

important to our mission than Section 5. The Commission can and should, in my view, provide similar guidance for its signature competition statute.

In closing, the FTC is committed to effectively updating and modernizing to achieve its goals of protecting consumers through its consumer protection and competition missions.

I am happy to answer any questions.

Mr. Terry. Thank you, Commissioners and Chairwoman. I appreciate your testimony. And at this point it is the question-and-answer part where we get to do a little deeper dive into your testimonies. And as I telegraphed in my opening statement, and when we had time to chat beforehand, I am concerned about the CFPB having what appears to be substantially similar jurisdiction, although without the maturity of 100 years of testimony and cases to work from.

So in regard to the FTC's interpretation and guidance on how it interprets unfair and deceptive, are there any indications that they will or will not -- the CFPB is going to follow any of the historical interpretations by the FTC, Chairwoman?

Ms. Ramirez. Chairman, let me say that we have worked very closely with the CFPB. We entered into a Memorandum of Understanding back in January of 2002 -- 2012, excuse me, in which we set out processes and procedures specifying how we would coordinate to avoid duplication of effort, and to avoid double teaming any one company. I also think that -- so we consult in

chairwoman, and ask you to elaborate on the FTC's expertise and experiences with privacy and data security, do you think the FTC has unique expertise for protecting information collected and/or stored online, and are you satisfied with where you are on that?

Ms. Ramirez. We certainly are the primary law enforcer in this arena in the United States. I think we are doing a he effective job with the tools that we have under Section 5. But, as I mentioned earlier, there are limits to what we can do, and I personally believe it would be appropriate for Congress to enact baseline Federal legislation in the privacy arena.

Mr. Harper. Commissioner Brill, if I may ask you, do you think the FTC has enhanced companies' data security efforts through the agency's enforcement actions and, if so, give us an example.

Ms. Brill. Sure. Thank you for the question. I do believe that our enforcement work has raised the issue with respect to data security and privacy protection for companies, and I think, as a result, companies have really taken up the mantel and developed policies. They have put into place chief privacy officers, have brought them into the C suite in certain circumstances, and I think the privacy and data security issue has been enhanced with respect to corporate practices as a result of our enforcement work. So, yes, I do think that our enforcement work has played a key role in enhancing the issue in corporate America.

Mr. Harper. Thank you, and I yield back, Mr. Chairman.

Mr. Terry. At this time, we recognize Donna Christensen for your five minutes.

Dr. Christensen. Thank you, Mr. Chairman.

And welcome to the commissioners. It is great to you have here for this hearing. I want to ask some questions about Reclaim Your Name and data brokers.

Dozens and dozens of information brokers exist that have detailed profiles about each of us; data is collected, aggregated, analyzed and used and disseminated for a wide range of commercial practices. The Web site NextMark, for example, offers 60,000 customer lists for sale on topics that range from mundane and innocuous issues to more sensitive topics. There are consumer lists for sale that target people with addictions, mental illnesses, reproductive concerns, weight loss issues and dozens of other physical and mental health conditions. The list is categorized by past purchase history, including so-called impulse purchases.

So, Chairwoman Ramirez, should there be categories of information, such as health conditions or sexual preferences, that should not be collected?

Ms. Ramirez. Thank you for your question. This is an issue that we addressed in our privacy report that we issued last year, and I believe that when it comes to sensitive information, health information would be among information that I would consider

EXHIBIT

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COMMENTS OF THE ABA SECTION OF ANTITRUST LAW IN RESPONSE TO THE FEDERAL TRADE COMMISSION'S REQUEST FOR PUBLIC COMMENT REGARDING PARTS 3 AND 4 RULES OF PRACTICE RULEMAKING - P072104

November 6, 2008

The Section of Antitrust Law (Section) of the American Bar Association (ABA) is pleased to submit these comments to the Federal Trade Commission (Commission or FTC) in response to its request for public comments regarding Parts 3 and 4 Rules of Practice Rulemaking (P072104) (NPRM).[1] The views expressed herein are being presented on behalf of the Section. They have not been approved by the House of Delegates or the Board of Governors of the ABA and, accordingly, should not be construed as representing the policy of the ABA.

The Section welcomes this opportunity to respond to the request for comments from the Commission. The Section supports strong, effective antitrust enforcement and the Commission's efforts to expedite certain adjudicative proceedings, improve the quality of its adjudicative decision making, and clarify the respective roles of the Administrative Law Judge (ALJ) and the Commission in Part 3 proceedings.[2]

EXECUTIVE SUMMARY

At the core of many of the Commission's proposed rule changes is a desire to expand the Commission's direct involvement in, and accelerate the speed of, Part 3 litigation. This desire appears to be motivated by two concerns: (1) the risk of delay and (2) the risk of substantive error due to the perceived failure of the Part 3 system effectively to incorporate the antitrust expertise of the Commission at appropriate stages of the adjudicatory process. These are legitimate concerns.[3] The Section supports the Commission's desire to expedite (in appropriate cases) and improve the quality of its Part 3 proceedings, and supports the proposed changes that further those objectives, as well as those changes that bring Part 3 rules more in line with the Federal Rules of Civil Procedure (FRCP) and Federal Rules of Evidence (FRE).

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[1] 16 C.F.R. Parts 3 and 4 Rules of Practice, 70 Fed. Reg. 58832 (Oct. 7, 2008) (NPRM).

[2] The Section notes that the 30-day comment period does not allow adequate time to provide more complete comments. For example, although the Section recognizes that the proposed Part 3 rules apply both to antitrust and consumer protection matters, these comments are particularly focused on the impact of the proposed rules on antitrust cases and do not explicitly address consumer protection cases.

[3] Increased reliance on the Commission's expertise would in general seem both beneficial and consistent with the intent of the FTC Act. Antitrust cases "often require the careful development of a factual record and a sensitive application of difficult legal principles. This takes time and expertise." Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission, 58 Antitrust L.J. 43, 120 (1989-90). As the Commission observes in its NPRM, the antitrust expertise of the Commission is a valuable resource. NPRM at 7.

The Section is concerned, however, that some of the proposed rule changes are unnecessary or seek to promote the speed and quality of Part 3 proceedings at the expense of important principles that should not be compromised. More specifically, the Section has concerns about those proposed rule changes that (1) compromise respondents' rights and ability to mount an effective defense; and (2) fail sufficiently to expedite Part 3 proceedings by not imposing a time within which the Commission should issue a final decision.

The Section's comments are organized as follows: Parts I through III discuss the Section's general comments on (1) the proposed adjudicatory process rules, (2) the proposed timing rules, and (3) the proposed discovery and evidence rules. Part IV discusses the Section's specific comments on those rules about which it has the greatest concern.

DISCUSSION

I. Proposed Adjudicatory Process Rules[4]

The proposed amendments to the adjudicatory process rules afford the Commission the opportunity to render initial decisions on a number of issues that are potentially dispositive of a particular case. Earlier Commission involvement in this manner will undoubtedly result in more efficient resolution of these issues. Moreover, it will allow the Commission to apply its antitrust expertise to matters at an earlier stage.

Delay occasioned by an erroneous ALJ decision on a dispositive motion, followed by the dismissal of the complaint, appeal to the Commission, briefing, hearing, and reversal, provides little benefit and exacts a toll on all participants in the process.[5] The main virtue of the proposed adjudication process rule changes is that this source of delay will likely be reduced. And, given that one of the Commission's purposes in such proceedings is to provide antitrust expertise, it seems reasonable to assume that the risk of error is reduced when the Commission, rather than the ALJ, decides substantive motions. However, these changes are at the expense of other principles that merit consideration.

The FTC, like many other administrative agencies, has always had responsibility to function as an investigator-prosecutor, on the one hand, and an adjudicator, on the other. This system, in which the agency defines the scope and extent of the inquiry, issues the complaint, conducts the trial, and resolves the issues in dispute, is inherent in the agency's founding statute, the FTC Act.[6] However, as this Section has noted, "[n]o thoughtful observer is entirely

[4] The Section's comments on proposed rule changes to the adjudicatory process include rules: 3.12(b) and (c); 3.22(a) and (e); 3.23; 3.24; 3.26; and 3.42(a).

[5] In *Unocal*, for example, the administrative complaint was filed on March 4, 2003. An initial decision was provided on November 25, 2003, and vacated by the Commission on July 6, 2004, with the case remanded to the ALJ for further proceedings. The case was finally withdrawn from adjudication on June 8, 2005—no new initial decision having been issued—following the conclusion of a consent order with the respondent more than twenty-seven months after the complaint was filed. *See* Union Oil Co. of California, Docket No. 9305, *available at* http://www.ftc.gov/os/adjpro/d9305/.

[6] Federal Trade Commission Act, 15 U.S.C. §§ 41-58, as amended. This system may also have been—at least in part—a consequence of the changing vision of President Wilson during the passage of the Act, as well as the diversity of views among supporters of the legislation. *See* Marc Winerman, *The Origins of The FTC: Cooperation, Control, and Competition*, 71 Antitrust L.J. 1, 38 (2003-2004) ("When [President Wilson] proposed an investigatory

comfortable with the FTC's (or other agencies') combining of prosecutory and adjudicatory functions. Whenever the same people who issued a complaint later decide whether it should be dismissed, concern about at least the appearance of fairness is inevitable."[7]

Historically, this concern has been tempered by a significant degree of separation, both procedurally and temporally, between the Commission's performance of its duties during the investigative phase and its role as an adjudicator. During the pendency of administrative proceedings, for example, the Commission's own Rules of Practice strictly prohibit communications between persons involved in the decisional process, on the one hand, and those performing investigative or prosecutorial functions, on the other.[8] Moreover, the extended duration of Part 3 proceedings, combined with the regular turnover of Commissioners, has tended to ensure that the Commission that votes to issue a complaint is often different from the Commission that sits in a quasi-judicial function to hear an appeal from an ALJ's initial decision.[9]

The separation of the Commission's Part 2 and Part 3 responsibilities is affected by some of the Commission's proposed rule changes. For example, the proposed revisions to Rules 3.22(a) and 3.42 would permit the Commission to rule immediately on dispositive pre-hearing motions and motions filed during the hearing. These proposed revisions, allowing the Commission to rule on certain issues as a matter of first instance, would, in some cases, likely reduce or avoid delay.[10] However, they also present the prospect that respondents will be forced to address prehearing issues with the Commission shortly after the same Commission has voted in favor of issuing a complaint against the respondent without the benefit of a prior opinion authored by a party who was not involved in crafting and approving the complaint.

Similar difficulties are confronted with respect to dispositive motions made during the hearing. The prospect of a decision maker who had voted to issue the complaint presiding over the pre-hearing proceedings, and/or an entire evidentiary hearing, may avoid delay but raises concerns regarding impartiality and fairness. This would be done without the customary time lapse, without the benefit of an independent opinion and—in the case of early proceedings, at

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commission in January 1914, the House adopted his proposal. When he endorsed a prosecutorial commission in June, the Senate bill and final law embraced that proposal. When he later emphasized the agency's assistive functions, his selection of Commissioners reflected that orientation."). *See also id.* at 59-88 (describing the differing viewpoints regarding—and the changes in—the anticipated functions of both the Commission and § 5 of the Act).

[7] *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 Antitrust L.J. 43, 119 (1989-90).

[8] 32 Fed. Reg. 8,449, 8,458 (codified at 16 C.F.R. § 4.7).

[9] *See Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 Antitrust L.J. 43, 122 (1989-90) ("Given [the length of proceedings and] the regular turnover of commissioners, the unfairness argument is often only theoretical . . . .").

[10] *Compare Unocal* (erroneous initial decision resulting in delay) *with In the Matter of South Carolina State Board of Dentistry*, Docket 9311 Compl. at 7 (filed Dec 7, 2003) *available at*: *http://www.ftc.gov/os/adjpro/d9311/index.shtm*, (the Commission retained jurisdiction to resolve initial dispositive motions).

least—before a fully developed record could be created upon which to persuade the Commission to revisit an issue necessarily close in substance and time to its original adverse determination.

The proposed amendments to these rules also would afford the Commission the opportunity routinely to inject itself into prehearing case management. In addition, other proposed changes limit substantially the effect of an adverse district court decision on the Commission's Part 3 proceeding.[11]

Although all of this is possible under the current rules if the Commission chooses to retain jurisdiction over a matter during all or part of a Part 3 proceeding, converting the exception to the norm seems likely to exacerbate concerns about fairness and impartiality. It is unclear that such a rule change is needed. The Commission is already free to retain jurisdiction over a matter in which it believes the issues merit such a process. At a minimum, regular Commission involvement at the prehearing stage appears likely to have a measurable effect on the course of Part 3 litigation. It seems probable, for example, that motions to dismiss in particular would become rare, as such motions challenge the facial sufficiency of a complaint with inferences drawn in complaint counsel's favor. This standard seems quite difficult to meet if the decision maker had only shortly before concluded that there was a "reason to believe" that the respondent's conduct violated the FTC Act.[12] The practical unavailability of a motion to dismiss in Part 3 litigation would contrast sharply with antitrust litigation in federal court. This deficiency is particularly acute in the challenging, cutting-edge cases it was originally intended the FTC would investigate and decide.[13]

The proposed rules also undercut the possibility of a favorable decision by an ALJ. The ALJs are partitioned from the investigative process and provide the first fresh set of eyes to consider the issues, particularly as those issues are presented for the first time without the *ex parte* communications and other limitations of Part 2. The chance to obtain a favorable ruling from an ALJ who has not been previously involved in the investigation and decision to prosecute, perhaps for later use before a Court of Appeals, provides the parties with a sense of fairness and impartiality. Moreover, the prospect of an independent opinion regarding the merits of the preliminary motion may itself improve the quality of the Commission's determination. The measure of this improvement will, of course, be greater where the ALJ is able to augment

[11] Historically, the Commission has halted Part 3 proceedings, at least temporarily, once a district court has denied its application for preliminary injunctive relief so that it may reconsider whether the administrative action remains in the public interest. This afforded the Commissioners the ability to weigh the district court's decision and to discuss the public interest with the parties and the agency staff in a frank and fair manner, outside the confines of the Part 3 process. Under the proposed amendments to Rule 3.26, however, a Part 3 proceeding would continue unabated even after preliminary injunctive relief has been denied, thus limiting the effect of the district court's ruling and the Commission's ability to discuss the merits of pursuing the case with the parties.

[12] *See* 15 U.S.C. § 45(b) ("Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership or corporation a complaint stating its charges . . . .").

[13] *See* D. Bruce Hoffman and M. Sean Royall, *Administrative Litigation at the FTC: Past, Present, and Future*, 71 Antitrust L.J. 319 (2003), and sources cited therein. If, as commentators suggest, the FTC focuses its Part 3 agenda on cases in which, *inter alia*, the legal theory being advanced is novel or uncertain or the conduct is arguably entitled to an antitrust exception, motions testing the sufficiency of the complaint might be quite valuable.

the Commission's expertise with substantive antitrust or economics experience of his or her own.[14] In short, while this opportunity may not be required by the statutory framework, it does enhance the apparent objectivity of Part 3 proceedings and could improve the quality of the substantive result.

It could be argued that the Part 2 investigative process provides ample opportunity for respondents to present their arguments to the Commission. But the fact is that Part 2 is neither completely transparent to the respondents, nor does it provide the opportunity for the sharply-focused advocacy that Part 3 offers.[15] Lacking access to the full range of facts on which the Commission Staff is recommending a complaint, with often imperfect insight into the nature of the legal theory on which the Staff is proceeding, and faced with the fact that, for perfectly good reasons, much of the communication between the Staff and the Commission during Part 2 is *ex parte*, respondents are often placed in a difficult position when attempting to articulate even threshold legal defenses during Part 2. While Part 2 helps expedite and streamline Part 3, it is not a substitute for it. Finally, while we do not suggest that the FTC abandon its rights to pursue administrative litigation in cases in which the district court has denied preliminary relief, nor that the agency shy away from employing its expertise where appropriate, the Section believes, as the Commission stated in 1995, that such exercises should be the exception rather than the rule.[16]

Accordingly, the Section believes that while it may sometimes be desirable for the Commission to address dispositive motions in the first instance, changing the Part 3 rules to make that the default procedure is unnecessary. At most, the Commission should clarify its ability to retain jurisdiction in cases in which the Commission deems it appropriate under the existing rules.

II. Proposed Timing Rules[17]

The Section has a fundamental concern that the proposed rules do not impose a time limit within which the Commission should issue a final decision. The time between initial decision and final decision can be a significant source of delay and, therefore, should be part of any rule changes designed to expedite Part 3 proceedings.

The Section also has concerns that the proposed rule changes relating to timing do not provide adequate flexibility to account for the fundamental differences between Part 3 cases involving unconsummated mergers, consummated mergers and conduct challenges. Any set of

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[14] *See, e.g.,* Federal Trade Commission Reauthorization Act of 2008, S. 2831, 110th Cong. § 4(a) (2008) (proposed legislation providing that "[i]n appointing administrative law judges under section 3105 of title 5, United States Code, to conduct hearings and render initial decisions in formal adjudicative matters before it, the Federal Trade Commission may give preference to administrative law judges who have experience with antitrust or trade regulation and who are familiar with the kinds of economic analysis associated with such litigation").

[15] *See* J. Thomas Rosch, Remarks at the ABA Antitrust Masters Course IV (Sept. 25, 2008) (stating that the "reason to believe standard means that the staff's pre-complaint (part 2) investigations sometimes take too long and they are neither fair nor transparent").

[16] 60 Fed. Reg. 39,472-473 (Aug. 3, 1995).

[17] The Section's comments on proposed changes to timing rules include rules: 3.1, 3.11, 3.12, 3.41, and 3.51.

procedural rules should attempt to strike an appropriate balance between the need for a swift resolution and provide respondents with adequate time to prepare and present a defense. The weight that should be accorded these considerations differs depending on the nature of the case. For example, obtaining a prompt result is critical in unconsummated merger cases. On the other hand, different timing needs may exist in conduct cases, where complaint counsel typically have engaged in months or years of fact development, and respondents need to have an adequate opportunity to conduct their own discovery.

The proposed rules would set tighter time limits for Part 3 proceedings, including the review of unconsummated mergers. That objective is commendable, as the long delays that characterize Part 3 litigation frequently prompt parties to abandon transactions rather than await final adjudication by the Commission. However, the proposed changes to the complaint-to-initial-hearing timeline are only modest and fall short in that they fail to set any time limits for the Commission itself. The Section is concerned that the proposed rules will not expedite Part 3 proceedings nearly enough to make them practicable for unconsummated mergers. For that reason, the Section believes that Part 3 litigation should not serve as a substitute for fully developed and far quicker proceedings in federal district court. As for consummated mergers, the Section supports the desire to reach a prompt result, but cautions against a one-size-fits-all approach. Factors such as whether the ability to obtain a remedy is compromised by delay, as well as whether the matter was the subject of a preliminary injunction hearing, should be considered.

In cases involving unconsummated mergers, the Commission traditionally has approved a Part 3 complaint along with a district court complaint and accompanying motion for preliminary injunction. The federal complaint is usually quite detailed and the preliminary injunction motion generally includes as attachments, documents transcripts and declarations supporting the application for preliminary relief.

In most instances, the motion for a preliminary injunction has proven determinative. If the Commission prevails on the injunction, as is often the case with mergers (the Commission has a winning record in these matters over the last 15 years), the parties typically abandon the transaction because it is usually impractical, as a business matter, to keep the transaction parties aligned pending an administrative trial. On the other hand, if preliminary relief is denied, the FTC usually abandons the Part 3 action, which has generally been stayed up to that point.[18]

Federal courts typically recognize that, as a practical matter, the preliminary injunction hearing is determinative and, while setting an aggressive schedule, permit an evidentiary hearing with live witnesses. Thus, district court judges typically have allowed the defense to conduct discovery in challenging the FTC's case, including depositions of trial witnesses, third parties, and experts. And the FTC usually deposes defense witnesses, sometimes even those whose testimony was taken in investigational hearings during the Hart-Scott-Rodino (HSR) investigation.

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[18] *See, e.g.,* Press Release, Federal Trade Commission, FTC Closes Its Investigation of Arch Coal's Acquisition of Triton Coal Company's North Rochelle Mine (June 13, 2005), *available at* http://www.ftc.gov/opa/2005/06/archcoal.shtm; Press Release, Federal Trade Commission, FTC Ends Administrative Litigation in Western Refining Case (Oct. 3, 2007), *available at* http://www.ftc.gov/opa/2007/10/western.shtm. *See also* Federal Trade Commission, Administrative Litigation Following the Denial of a Preliminary Injunction: Policy Statement, 50 Fed. Reg. 39,741-45 (Aug. 3, 1995).

Such discovery and live testimony have proven valuable both to the parties and the court, as credibility determinations have been significant in determining whether the FTC has raised the "substantial questions" necessary to justify a Part 3 trial. In *Arch Coal*, for example, the FTC filed declarations of several customers who opposed the deal.[19] All were deposed and a number testified live. Judge Bates of the United States District Court for the District of Columbia heard the testimony, considered the cross examination, and discounted the testimony as not persuasive.[20] Likewise, Judge Hogan in *Staples* rejected the efficiencies testimony of the defense expert and ruled for the FTC.[21] "Evaluating credibility, as the Court must do, the Court credits the testimony … of the Commission's expert … over the testimony and Efficiencies Study of the defendants' efficiencies witness."[22] Discovery, live testimony and cross examination during the preliminary hearing in federal court were helpful to the courts and central to the outcomes in both cases.

The FTC's recent actions in *Federal Trade Commission v. Inova Health Systems Foundation*[23] suggest that it is embarking upon a new approach that would significantly change the role of federal courts in unconsummated merger cases brought by the Commission. In *Inova*, the Commission filed a complaint seeking a preliminary injunction in federal court as it normally does but opposed defendants' request for discovery and an evidentiary hearing. The Commission took the position that it had already started a Part 3 administrative proceeding and had set the Part 3 trial to start in five months, obviating the need for discovery or a hearing in federal court.[24] The district court agreed to decide the preliminary injunction on the papers, and the parties abandoned the transaction a week later. The proposed rules appear designed to reinforce the *Inova* approach, an approach the Section does not support under the existing rules or proposed amendments to those rules.

Assume a hypothetical merger challenge in which the FTC files a complaint on April 1. Assume also that the FTC obtains a preliminary injunction by persuading the court, as it did in *Inova*, that discovery should not be allowed, and that there should be an abbreviated proceeding on the papers. An evidentiary hearing will be set for September 1, consistent with Proposed Rule 3.11. According to Rule 3.41, the ALJ could allow up to 30 trial days, which would extend the proceeding well into October. Assume trial ends on October 10, and proposed findings are submitted on October 11 (even though Proposed Rule 3.46 provides 21 days). An ALJ decision must be forthcoming in 70 days, i.e., by December 20. Then the initial decision is appealed to

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[19] *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 146 (D.D.C. 2004).

[20] *Id.*

[21] *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1089 (D.D.C. 1997).

[22] *Id.*

[23] No. 1:08CV460 (E.D. Va. 2008).

[24] The Commission's recent actions in *In re Red Sky Holdings, LP* suggests that it intends to make the new *Inova* approach the norm. In *Red Sky*, the Commission has filed simultaneous complaints in federal district court and Part 3 and notified the district court that it intends to commence a full administrative trial "no later than January 22, 2009" -- three months from the date of complaint filing. *See* Complaint ¶ 3, F.T.C. v. Red Sky Holdings LP, No. 4:08-cv-03147 (S.D. Tex. Oct. 23, 2008), *available at* http://www.ftc.gov/os/caselist/0810170/081023redskycmpttro.pdf.

the Commission, which faces no deadline whatsoever on its final order. In *Inova*, the FTC agreed to a Commission decision within 90 days of the initial decision. But that would be mid-March in this hypothetical, nearly a year after the filing of the complaint. The parties to most transactions cannot keep the deal intact nearly that long, especially where the deal's closing has already been delayed by a lengthy pre-complaint investigation.

By contrast, full proceedings at the preliminary injunction stage in the district court—the procedure that has been followed for many years—afford an opportunity for prompt but thorough review. In *Arch Coal*, the complaint was filed on April 1, 2004, Judge Bates permitted a two-month discovery period, trial started on June 14, and it ended three weeks later. On August 14, Judge Bates issued a 90-page opinion and the Court of Appeals denied the stay on August 20. The parties closed the transaction. In *Federal Trade Commission v. Cardinal Health, Inc.*, the complaint was filed on March 3, 1998, and Judge Sporkin started trial on June 9. On July 31—less than five months after complaint filing—the court issued a 70- page ruling in favor of the government and the parties abandoned the deals.[25] In *Staples*, the case was to hearing in approximately six weeks, tried in five hearing days, and decided less than three months after it was filed.

In each case, the federal proceedings were comprehensive and fair, and they were over long before the Commission would have issued a final order under its proposed rules. Indeed, in *Arch Coal*, the courts had reached a final decision on the preliminary injunction approximately two weeks before trial would have even started under the FTC's proposed procedures. In all of these cases, both the FTC and the parties had a fair opportunity to prepare and to present their case, and the courts had ample opportunity to prepare thoughtful opinions.

Contrariwise, some of the proposed revisions raise particular concerns for respondents in conduct cases, where the need for highly expedited proceedings is often absent. Generally, the Commission's proposed rule changes would compress the pre-trial discovery and motions period, the trial, and the immediate post-trial briefing and findings period. These changes could reduce the average time from complaint to initial decision in conduct cases to a maximum (assuming no extensions are granted) of approximately 12.5 months.

Although the Section applauds the proposed reforms to require quicker determinations by ALJs and streamline certain of the prehearing aspects of the Part 3 process, the proposed changes fail to address the stage of the proceeding that consumes the greatest time: the time it takes the Commission to rule. A review of the eight Part 3 cases filed since 2000 that have resulted in a Commission final order shows that the average time from complaint to initial decision in conduct cases has been 15.2 months, while the time from initial decision to final Commission order has been 20.3 months.[26]

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[25] *See FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34 (D.D.C. 1998).

[26] These matters are *In the Matters of Schering-Plough Corp., Polygram Holding, Inc., Chicago Bridge & Iron Co., Rambus Inc., Kentucky Household Goods Carriers Ass'n, North Texas Specialty Physicians, Evanston Northwestern Healthcare Corp*., and *Telebrands Corp.* The Commission has brought a ninth Part 3 case, In re *Realcomp II Ltd*,. which is currently pending before the Commission. Briefing on appeal was completed in March 2008, and there has been no action since April 2008. In re *Unocal* is not included in this list as there was no final Commission order.

Moreover, the modest reduction in the average duration of Part 3 proceedings up to the point of initial decision achieved by the proposed reforms in conduct cases (3.1 months) would come at the cost of accelerating some of the deadlines that are most crucial to affording respondents a full and fair opportunity to mount an effective defense. Conduct cases are brought after months—if not years—of pre-complaint investigation by Commission staff often involving the collection of vast amounts of third party discovery. Respondents typically find themselves at a significant informational disadvantage at the time of complaint filing and need a meaningful prehearing period to analyze the Commission's allegations and conduct their own third party discovery. The Section is concerned that some of the proposed changes unduly compress this prehearing period and could compromise the ability of respondents to develop and present their case.

III. Proposed Discovery and Evidentiary Rules[27]

The Section's comments are more specific with respect to the individual changes to the discovery and evidentiary rules and, therefore, are detailed in Part IV below. Generally, the proposed changes to certain rules governing discovery and evidence in Part 3 proceedings reflect an effort to "expedite and improve the quality of the proceedings" as well as "expedite and streamline the evidentiary hearing."[28] The Section supports the FTC's efforts to expedite the pre-hearing process and to better harmonize certain Part 3 procedural rules with the federal rules.

Although the Section recognizes that good reasons may exist for occasional departures from the Federal Rules of Civil Procedure and Federal Rules of Evidence in Part 3 proceedings, given the effect discovery and evidentiary procedures and rulings can have on the outcomes of cases, the Section supports changes designed to improve consistency with these rules. Harmonization of procedural rules can help ensure consistency between federal court proceedings and FTC proceedings, whether the Part 3 matter is an antitrust or consumer protection case. In particular, the Section believes that this consistency is especially important in the context of merger litigation. As the Section has previously stated, and continues to believe, differences in treatment by the antitrust agencies do not serve any public purpose, and should be minimized as much as possible.[29] Therefore, the Section has urged, to the extent that FTC procedural rules differ from those applicable to Department of Justice proceedings in federal court, those differences should, as much as possible, be eliminated.[30]

The Section supports many of the proposed evidentiary rule changes. However, a number of the proposed changes are problematic. Even though these proposed rule changes are intended to reduce protracted Part 3 proceedings, they have the potential unfairly to prejudice respondents. First, some of the proposed rules take broad principles contained in the federal

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[27] The Section's comments on proposed changes to discovery and evidentiary rules include rules: 3.11(c); 3.22(b); 3.31(b), (c) and (d); 3.31A; 3.33(d) and (g)(1); 3.35(b)(2); and 3.43(d)(1).

[28] NPRM at 12-13.

[29] *See, e.g.,* Comments of the Section of Antitrust Law of the American Bar Association in Response to the Antitrust Modernization Commission's Request for Public Comment Regarding Government Enforcement Institutions: Differential Merger Enforcement Standards.

[30] *Id.* at 1.

rules and presume how they should be applied in situations regularly encountered in Part 3 proceedings, as they codify, dictate, or require a specific outcome without regard to the facts. Eliminating an ALJ's discretion to apply a principle of law on a case-by-case basis could disadvantage respondents by prejudging the balance of equities in certain situations and inappropriately shifting burdens.

For example, as discussed in more detail in Part IV, the new limitations imposed on the scope of discoverable FTC materials (Rule 3.31(c)(2)), and the requirements for depositions (Rule 3.33(b)) and interrogatories (Rule 3.35(b)(2)) appear calculated to track the principles contained in the FRCP, but the risk of unfair prejudice to respondents from these changes appears to outweigh any corresponding decrease in the length of Part 3 proceedings. Similarly, eliminating ALJ discretion to draft protective orders on a case-by-case basis may severely impede the ability of respondents to present their case by, for example, imposing a blanket prohibition on the disclosure of confidential material to in-house counsel (Rule 3.31(d)).

Second, other of the proposed rule changes are problematic because they depart dramatically from the federal rules, without sufficient justification, and could disadvantage respondents in Part 3 proceedings in significant ways. In these instances, the proposed changes modify existing FTC rules that previously had been somewhat aligned with the FRCP and FRE presumably because the federal rules provide important and necessary safeguards to the parties, along with a rich history of rulings further delineating their bounds.

For example, the new rules eliminating motions for a more definite statement (Rule 3.11(c)) and, more generally, eliminating the stay for pre-answer motions (Rule 3.22(b)) will likely have the unintended consequence of eliminating any meaningful review of the sufficiency of a complaint. Similarly, the Section believes that the current rule allowing case-by-case determination regarding the admission of hearsay evidence is more appropriate than the new default rule admitting hearsay evidence in every circumstance (Rule 3.43(b)), and that, at a minimum, the new rule should require parties to provide notice when they intend to introduce a particular piece of hearsay evidence in order to increase the efficiency of Part 3 proceedings. In addition, the new rules on expert discovery (Rule 3.31A) unnecessarily impede respondents' ability to call rebuttal experts, and limiting experts to five per "side" rather than five per "party" has the potential to arbitrarily disadvantage respondents in multi-party proceedings.

IV. Comments on Specific Rules

A. Rules Proposing Changes to the Adjudicatory Process

1. Rules Addressing the Commission's Role as Initial Decision Maker on Dispositive Issues

Rule 3.12(b) and (c): *The proposed amendments to these sub-sections of Rule 3.12 would remove the ALJ's authority to render an initial decision when the material allegations of the complaint are admitted or there is a default. Instead, the Commission would render its final decision directly,on the basis of the facts alleged in the Complaint.*

Rule 3.22(a) and (e): *The proposed amendments to these sub-sections of Rule 3.22 would require referral to the Commission in the first instance of motions to strike, motions for summary decision, and pre-hearing motions to dismiss, but would allow the Commission, in its*

discretion, to refer such motions back to the ALJ for initial disposition.[31] *In matters referred back to the ALJ, a decision would be required within 14 days of full briefing.*

Rule 3.24: *The proposed amendments to this Rule provide that dispositive motions are to be decided by the Commission unless referred by the Commission to the ALJ.*[32] *The amendments also would eliminate the 30-day deadline for ruling on such a motion but would allow the Commission to set a deadline for decision when referring the motion to the ALJ. Nonetheless, the filing of a dispositive motion would not stay the proceeding before the ALJ.*

Comments:

The FTC Act envisions the Commission as a repository of antitrust expertise, and in that role, as the body to advance substantive antitrust law by deciding difficult cases. Thus, much of the motivation behind this set of proposed rule changes seems to be the concern that ALJs lacking expertise in antitrust law are likely to make erroneous substantive decisions, necessitating correction by the Commission and wasting time in the process.

While a more immediate disposition of legal questions may save costs and afford respondents a quicker path to the court of appeals, these proposed rule changes bring with them the potential sacrifice of some of the rigor inherent to the process as discussed above. They could reduce the quality of decision making, and may color the perception of the fairness and impartiality of Commission proceedings – a particularly important issue considering that when hearing an appeal, federal courts will give deference to a final FTC decision. As a result, the Section believes concern about improving the quality of the Commission's decisions is better addressed by enhancing the antitrust expertise of the ALJs. To the extent these rules are modified, those modifications should be limited to affirming the Commission's right to retain jurisdiction of dispositive motions, rather than making that the default procedure.

Moreover, by continuing the Part 3 proceeding during the pendency of dispositive motions to the Commission, and by failing to impose tight deadlines on the Commission to resolve such motions, the proposed amendments create the real possibility that litigants (and the ALJ) will be disadvantaged in preparing for and presiding over a Part 3 hearing without advance knowledge of the precise scope that the hearing should take.[33]

2. Rules Addressing the Commission's Role in Case Management

[31] The amendments also provide that the ALJ's consideration of a motion to dismiss made at the close of the evidence offered in support of the complaint based upon an alleged failure to establish a prima facie case shall be deferred until after the entire hearing record is closed.

[32] The amended Rule also would impose a filing deadline for such motions of 30 days before the evidentiary hearing, rather than the current 20 days, and would extend the deadline for filing affidavits in opposition to a summary decision motion from 10 to 14 days.

[33] For example, *In re South Carolina State Board of Dentistry*, FTC Docket No. 9311, over seven months elapsed between the full briefing of the motion to dismiss and the Commission's decision on that motion. While that underlying proceeding was stayed pending resolution of the motion, a rule by which proceedings are not stayed could, in the absence of a tight timeframe for Commission decision on such motions, force parties to litigate without resolution of important prehearing issues.

Rule 3.42(a): *The proposed amendments to this Rule would make explicit provision for the Commission retaining jurisdiction over a matter during some or all of the pre-hearing proceedings and designating one or more Commissioners to preside.*

Comments:

The Commission previously has employed its authority under section 556(b) of the Administrative Procedures Act (APA) to preside over the pretrial portions of specific cases, and now wishes to make explicit provision for such actions in its Part 3 Rules. It is not entirely clear what role the Commission's involvement in pre-hearing proceedings and discovery other than dispositive motions—i.e., the proposed revision to Rule 3.42—is intended or likely to play in expediting the Part 3 litigation process. While the legislative history and literature supports the point that the Commission's antitrust expertise should be particularly valued in resolving substantive antitrust issues, it is not obvious why the Commission, as opposed to the ALJ, is likely to be better situated, or more deeply experienced, than the ALJ in efficiently managing day-to-day nonsubstantive litigation issues.

Given the Commission's stated interest in expediting the pretrial process, however, it is likely that direct Commission oversight will, in many cases, result in some limiting of respondent's discovery opportunities. We urge that the Commission exercise caution in limiting respondents' discovery. Complaint counsel often will have had ample time and substantial advantages during the pretrial investigatory period to discover facts relevant to the case, and respondents ought to be allowed to conduct adequate discovery prior to the hearing.

Moreover, we note that the Commission's management of the case during the discovery phase can diminish the ALJ's ability to learn about the matter prior to the hearing. It may also tie the hands of the ALJ unnecessarily by restricting his or her ability to tailor discovery on critical issues prior to the hearing over which the ALJ will preside. The proposed revisions, by reducing the opportunities for the ALJ to acquaint himself or herself with the facts and issues in the case—perhaps even delaying the involvement of the ALJ until the commencement of the full evidentiary hearing—reduce the information available to that ALJ when hearing the case and rendering a decision on the merits. This concern would seem to be particularly acute where the ALJ lacks extensive antitrust experience or if the suggested, and generally shorter, time limits presented elsewhere in the NPRM are implemented. This raises the specter that the proposed rule changes designed to reduce the risk of error in preliminary dispositive motions could increase the risk of error in the ALJ's initial decisions.

In short, the Section's primary concern is that by "codifying" the Commission's right to interject itself into prehearing case management, it may undermine the integrity of the process, compromise the ALJ, and create an appearance of unfairness. Accordingly, the Section suggests that other measures be adopted to address the underlying concerns of prehearing case management.[34]

[34] If, despite this concern, the proposed amendments are adopted, the Section urges that such Commission oversight be exercised sparingly.

3. Rules Addressing the Commission's Role in Deciding Interlocutory Issues

Rule 3.23: *The proposed amendments to this Rule would permit certain interlocutory appeals only on a specific determination by the ALJ made within three days after a request. In the event the ALJ does not make a timely ruling, the proposed amendments would provide that the party seeking review may file its application with the Commission. Unless the Commission decides to entertain the appeal within three days after the filing of the application and answer, the request for discretionary review would be deemed denied. The proposed amendments also would set shorter deadlines for filing of applications and answers.*

Comments:

This primarily technical change appears designed to ensure quick resolution of applications for interlocutory review, and as such the Section supports it. We suggest, however, that the rule be further modified to make clear that Commission denial of discretionary review would not constitute an affirmation of the ALJ's decision on the merits.[35] The short timeframe anticipated in paragraph (d) of this revision also raises the prospect that the Commission's discretionary power of review might, in practice, be exercised simply by an omission, delay, or even oversight; a positive requirement that the Commission shall affirmatively grant or deny an application for discretionary review should be required.

4. Rules Addressing the Stay and Withdrawal of Proceedings in the Wake of a District Court's Denial of Preliminary Relief

Rule 3.26: *The proposed amendments would revise the current Rule to eliminate the automatic withdrawal from adjudication of the Part 3 case upon the filing of a motion to withdraw from adjudication, and the automatic stay of the proceeding upon the filing of a motion to dismiss, in those instances in which a district court has denied the agency's motion for preliminary injunction. Instead, under the proposed amended Rule, the Part 3 case would proceed unless the Commission determines, on the facts of the particular case, that a withdrawal or stay is appropriate. The proposed amendments also would make explicit that a motion to dismiss or withdraw may be filed only after the Commission has an opportunity to seek reconsideration and appellate review of a denial of injunctive relief.*

Comments:

These proposed amendments reverse the Commission's existing Rule 3.26 framework, under which matters automatically are withdrawn from Part 3 or stayed upon motion of a party following a district court's denial of the Commission's application for preliminary injunction and pending the Commission's review of the matter. In its 1995 Statement of Federal Trade Commission Policy Regarding Administrative Merger Litigation Following the Denial of a Preliminary Injunction, the Commission indicated that it will "assess on a case-by-case basis whether to pursue administrative litigation following the denial of a preliminary injunction."[36] Because the Commission wished to "facilitate reconsideration of the public interest in continuing

[35] This is indicated in the NPRM but not reflected in the proposed revised text.

[36] 60 Fed. Reg. 39472, 39473 (Aug. 3, 1995).

with an administrative case when an administrative complaint already issued,"[37] it "determined to adopt a new rule, 16 CFR § 3.26,"[38] to "ensure parties to a transaction the opportunity to have their views heard by the Commission before it makes its determination"[39] of whether to continue its Part 3 action. This rule thus was designed to allow full reconsideration of the matter in light of the district court's decision, and was specifically designed to afford the merging parties an opportunity to address the public interest with the Commission outside the bounds of Part 3.

The proposed amendments would eliminate automatic withdrawals/stays, setting forth a new "norm . . . that the Part 3 case can proceed even if a court denies preliminary relief." By adopting this change, the Commission would set a clear policy favoring Part 3 adjudication over a district court determination of the matter. Although the Commission always has maintained the discretion to continue with a Part 3 case after its application for preliminary relief has been denied by a federal district court, doing so as a matter of course raises three concerns.

First, it deprives the Commission of the opportunity to hear from both complaint counsel and the parties outside the bounds of Part 3.

Second, the proposed Rule change would impose substantial additional costs on respondents, even where a district judge has raised serious doubts about the Commission's case. Moreover, it creates a cloud of uncertainty around the respondents' ongoing actions (whether integrating a merging entity or continuing on a particular course of conduct) that may inhibit their ability to realize fully the benefits of conduct that the district court has already decided against the FTC.

Third, the proposed amendments would highlight, and in many instances, exacerbate the differences between FTC and DOJ proceedings. Although the Department of Justice maintains substantially overlapping jurisdiction with the FTC, its prosecutions must proceed entirely before a federal district court. In many instances the Department's preliminary and permanent relief proceedings are consolidated into a single trial on the merits, particularly in merger cases. The potential for divergent treatment of cases at the two agencies (including differences in outcome, as well as in time and expense of litigation) have been much discussed over the years. Indeed, differences in merger litigation at the two agencies prompted the Antitrust Modernization Commission in 2007 to recommend:

> The Federal Trade Commission should adopt a policy that when it seeks injunctive relief in Hart Scott Rodino Act merger cases in federal court, it will seek both preliminary and permanent injunctive relief, and will seek to consolidate those proceedings so long as it is able to reach agreement on an appropriate scheduling order with the merging parties.[40]

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[37] *Id.*

[38] *Id.*

[39] *Id.* at 39472.

[40] Antitrust Modernization Commission Report and Recommendations 131 (Apr. 2007), *available at*: www.govinfo.library.unt.edu/amc/report_recommendation/toc.htm.

By giving substantial weight to the district court's preliminary determinations in the past, the FTC has helped to minimize both the perceived and actual differences between the FTC and DOJ process. Creating a new norm under which the district court's preliminary relief decision would be routinely (indeed presumptively) disregarded by the Commission would invite real divergence between the practical outcomes in DOJ cases and FTC proceedings, cutting against the desired outcome of more unified enforcement.

B. Rules Addressing Timing

Rule 3.1: *The proposed amendments to this rule would allow the ALJ or the Commission to shorten the periods set forth by the Rule.*

Comments:

The Section recommends revising Proposed Rule 3.1 to permit the ALJ or Commission to shorten the periods provided under the rules only upon consent of the parties rather than authorizing the ALJ or Commission to shorten these periods unilaterally. In addition, given that conduct cases do not implicate the same timing concerns that exist in the unconsummated merger context (at least to the same degree), it seems unnecessary to authorize the ALJ or Commission to speed up proceedings beyond the deadlines set forth in the rules when the parties themselves do not believe that the circumstances of their case warrant additional expedition.

Rule 3.11: *The proposed amendments to this rule would require an evidentiary hearing before an ALJ take place five months after the filing of the complaint in merger cases and establish an eight-month pre-hearing period in all other cases.*

Comments:

There is reason to doubt that these changes will sufficiently expedite Part 3 proceedings in unconsummated merger cases. Under the current rules, "[e]xtensions of time for discovery, trial, and even the initial decision are often granted, extending what appears to be a year-long process under the Part III rules to often more than two years."[41] Because ALJs and the Commission would retain considerable authority under the new rules to extend deadlines as they see fit, a significant risk of protracted litigation will remain. This risk is magnified because the new rules do not contain any schedule for the Commission to issue its final order after initial decision (potentially a significant source of delay in Part 3 litigation) or issue rulings on dispositive motions that they decide to resolve in the first instance.[42] For these reasons, the proposed rules cannot transform Part 3 litigation into an adequate substitute for robust and more expedited proceedings in federal court.

We applaud the FTC for shortening periods to move its internal procedures along. But whatever happens in that regard, the Section recommends that Part 3 litigation not replace

[41] J. Robert Robertson, Antitrust, 12, 14 (Spring 2006).

[42] The NPRM expresses the FTC's intent to "make its best efforts to expedite its preparation and disposition of final orders," but the new rules do not set any deadlines. NPRM at 10.

discovery and full preliminary injunction proceedings before the district court in unconsummated merger cases. If, however, the FTC intends to pursue unconsummated merger challenges in Part 3 proceedings, the Section believes that the FTC must provide a timetable that is far quicker than that proposed in the new rules. Specifically, instead of providing a five-month period from complaint to *initial hearing*, the Section recommends that Proposed Rule 3.11 be revised to provide a five-month period from complaint issuance to *final Commission order.*[43] This shorter period for unconsummated mergers would bring the FTC's Part 3 proceedings in line with federal district court preliminary injunction proceedings and make them far more practicable from a business perspective.

As for challenges to already consummated and nonreportable mergers, the Section believes that the five-month timetable set forth in Proposed Rule 3.11 may be appropriate in some cases and not in other cases. The Section opposes a one-size-fits-all approach and believes the FTC should consider other factors, such as whether delay may compromise the FTC's ability to obtain relief.

In addition, in order to ensure that Part 3 proceedings reach a prompt conclusion and to eliminate a potential source of delay, the Section recommends amending the new rules to require that the Commission issue its final order no more than 90 days after the initial decision—the same period it committed itself to in *Inova.* This revision will ensure that already consummated merger challenges move quickly, which is particularly important in nonreportable mergers if the passage of time may compromise the FTC's ability to craft meaningful relief.

The Section believes that the eight-month prehearing period established by Proposed Rule 3.11 is too abbreviated to serve as a default rule in conduct cases. In light of the wide variety of anticompetitive conduct alleged from case-to-case and the need for an adequate period of prehearing discovery and preparation, a "one-size-fits-all" approach seems inadvisable. Instead, the Section proposes providing that the parties consult as to an appropriate hearing date based on the specific attributes of their case and that the ALJ set this hearing date at the first scheduling conference.

Rule 3.12: *The proposed amendments to this rule would reduce the time for parties to file an Answer from 20 to 14 days.*

Comments:

The Section opposes Proposed Rule 3.12's reduction of the time to answer from 20 to 14 days. Complaints are often extremely detailed and respondents need ample time to properly

[43] The FTC's recent actions in *Red Sky* and *Whole Foods* provide the roadmap for a more workable system. In its recent complaint in *Red Sky*, the FTC has set an initial hearing date of three months after complaint filing -- i.e., a timetable two months shorter than that established by Proposed Rule 3.11. *See* Complaint at 4, In re Red Sky Holdings, LP, Docket No. 9333 (F.T.C. Oct. 22, 2008), *available at* http://www.ftc.gov/os/adjpro/d9333/081023redskyadmincmpt.pdf. Meanwhile, in its order replacing Commissioner Rosch as ALJ in *Whole Foods*, the Commission has pledged to "make every effort" to issue a final order within 45 days of oral argument. *See* Order Designating Administrative Law Judge at 2, In re Whole Foods Market, Inc., Docket No. 9324 (F.T.C. Oct. 20, 2008), *available at* http://www.ftc.gov/os/adjpro/d9324/081020order.pdf. Although the Section recommends keeping unconsummated merger review in federal district court for all of the reasons stated *supra*, if the Commission does apply the new rules to unconsummated mergers, it should amend the new rules to more closely reflect the expedited timetables set forth in these two cases.

analyze the Commission's factual and legal allegations and prepare a response. The overall time to be saved by the Commission's proposed revision is minimal while the potential unfairness to respondents could be significant. Accordingly, the time to answer should remain at 20 days—the same period provided by Rule 12(a)(1)(A) of the FRCP.

Rule 3.41: *The proposed amendments to this rule would require that trial be restricted to 30 days (or 210 hours) in most cases.*

Comments:

The Section believes that Proposed Rule 3.41's requirement to apply to the Commission to extend the hearing time limit of 210 hours should be accompanied by additional flexibility, especially in nonmerger cases involving multiple parties. The Section recommends that the presiding ALJ retain the flexibility to extend the hearing length for non-merger cases based on the particularities of the case and that the ALJ be required to articulate on the record the basis for the extension.

Rule 3.51: *The proposed amendments to this rule would require that an initial decision by the ALJ be due within 70 days of the last proposed findings of fact and conclusions of law, or within one year of the issuance of the complaint, assuming the Commission does not grant an extension.*

Comments:

While the Section believes that in most cases, expediting the merger review process is a positive step, such timing requirements are not universally applicable. The Section applauds this revision to speed up an ALJ's decision. However, the Section notes that this and other rules fail to address another significant potential source of delay: the time it takes the Commission to issue decisions. Accordingly, the Section recommends that the Commission establish specific and appropriate timelines for issuing its own decisions. Such a limit is particularly important for unconsummated mergers, where time is of the essence.

C. Rules Addressing Discovery and Evidence

Rules 3.11(c) and 3.22(b): *The proposed rules eliminate Rule 3.11(c), which provides respondents with the opportunity to file a motion for a more definite statement and tolls the deadline for filing an answer to the complaint until the motion is resolved. More generally, the proposed rules also eliminate Rule 3.12(a), which permits the filing of any motion to toll the deadline for filing an answer. The proposed rules also add Rule 3.22(b), which provides that certain motions, including motions to dismiss and motions to strike, will be heard directly by the Commission rather than an ALJ, and that proceedings before the ALJ will not be stayed while the motions are being considered by the Commission unless the Commission so orders.*

Comments:

Although the commentary to the proposed rules states that respondents will still be permitted to raise arguments that would otherwise be raised in a motion for more definite statement in a pre-hearing motion to dismiss, the respondent will still be forced to answer the

complaint within 14 days–likely before any motion regarding a vague or ambiguous complaint is resolved by the Commission.

FRCP 12(b), (e), and (f) require a party to file challenges to the sufficiency of a complaint before the party files a responsive pleading. The logic of the rule is clear: if a complaint fails to state a claim or is vague and ambiguous, there is little point in requiring the party to answer the complaint until the complaint's defects are resolved. However, under the proposed rule changes, a respondent could potentially be required to do just that. Even if a respondent could overcome the difficulty of answering a vague or ambiguous complaint, the Commission will not likely grant a motion to dismiss such a complaint because the respondent will have already been forced to file an answer, and, if a complaint can be answered, it must not be vague or ambiguous.

Although it is certainly not necessary for every motion to toll the deadline for a respondent to file an answer, the logic of the FRCP regarding motions challenging the sufficiency of a complaint is clear, compelling, and directly applicable to Part 3 proceedings. Therefore the Section recommends that the proposed rules be modified so that it requires the resolution of such motions (e.g., motion for more definite statement, motion to strike, etc.) before the respondent is required to file an answer. Implementing the proposed rule in its current form would create significant disparities between Part 3 proceedings and proceedings in federal court, and eliminate a significant procedural safeguard for respondents.

Rule 3.31(c)(2): *The proposed rule states that, during discovery, complaint counsel need not search for any materials other than those that were collected or reviewed by the FTC in the course of the investigation or prosecution of the case. The proposed rule further states that additional discovery of materials in the possession of the FTC may only be authorized by an ALJ for good cause. The commentary to the proposed rules explains that these excluded materials are frequently duplicative and almost always protected by privilege or as work product.*

Comments:

The Section opposes this proposed rule change. FRCP 26(b) contains specific limitations on the scope of discovery, and the FRCP generally limit the discovery of evidence that is duplicative, privileged, or work product. Although, in many cases, FTC materials other than those generated during the investigation or prosecution of a case may indeed be undiscoverable, there may be situations in which materials excluded by this rule would not be duplicative, privileged, or work product. Requiring respondents to satisfy a heightened requirement of "good cause" to obtain such materials could disadvantage those respondents and potentially create disparities between the substantive outcomes achieved by parties in Part 3 proceedings and proceedings in federal court, seemingly without justification.

Rule 3.31(d): *The proposed rule requires the ALJ to issue a standard protective order rather than permit the parties to negotiate or modify a protective order for each case.*

Comments:

Although this rule may reduce protracted negotiations and motion practice on the content of protective orders in individual cases, certain provisions of protective orders unavoidably require case-by-case decisions. For example, the standard protective order contained in the proposed rules excludes in-house counsel from access to confidential material.[44] In many cases, exclusion of in-house counsel would inhibit a respondent's ability to defend a case.[45] The Section recommends that the proposed rules be modified to grant the parties more discretion to agree to terms for a protective order that may differ from the terms contained in the proposed standard protective order. FRCP 26(c)(1) permits a federal court to fashion a unique protective order in each case upon the motion of a party. Unmodified, the proposed rule has the potential unfairly to prejudice respondents and to create unwarranted disparities between Part 3 proceedings and proceedings in federal court. Thus, the Section recommends that this proposed change be reconsidered.

Rules 3.31A and 3.31(b) and (c): *The proposed rules eliminate the provisions in Rule 3.31(b) and (c) governing expert discovery and consolidate all the expert discovery provisions into Rule 3.31(A). The new rule limits the number of experts to 5 per side, eliminates the ALJ's ability to dispense with expert reports, and imposes a new timeline for expert discovery: parties must submit lists of experts no later than 1 day after the close of fact discovery; complaint counsel must submit expert reports no later than 14 days after the close of fact discovery; respondent must submit expert reports no later than 28 days after the close of fact discovery; complaint counsel must submit rebuttal experts and reports no later than 38 days after the close of fact discovery; and all depositions must be taken no later than 65 days after the close of fact discovery.*

Comments:

FRCP 26(a)(2) does not limit the number of experts, permits a court to dispense with a written report, and imposes the following timeline for expert discovery: expert and expert report disclosures must be made at least 90 days before trial, or, if rebuttal, within 30 days of the other party's disclosure. The timeline under the current rules is the same as that under the FRCP.

The proposed rule creates two significant problems. First, the new rule does not permit a respondent to have rebuttal experts unless respondent "seek[s] appropriate relief" when complaint counsel presents "material outside the scope of fair rebuttal."[46] In contrast, the FRCP permit both parties potentially to call rebuttal experts. Rebuttal experts are often required by respondents in Part 3 proceedings. The Section therefore recommends that the respondent be given the same opportunity as complaint counsel to call rebuttal experts, particularly given the aggressive new timeframe within which the respondent's initial experts must be disclosed. Without this modification, the proposed rules unfairly discriminate against respondents, and potentially create significant differences in substantive outcomes between Part 3 proceedings and proceedings in federal court.

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[44] NPRM at 69.

[45] For example, in *United States v. Microsoft Corp.*, the protective order contemplated three levels of confidentiality, with in-house counsel only excluded from viewing evidence designated "very confidential." 253 F.3d 34 (D.C. Cir. 2001).

[46] NPRM at 73.

Second, the new rule limits experts to five per "side" rather than five per party. Although limiting the number of experts (and expert testimony) may expedite Part 3 proceedings, there are many cases in which multiple parties may appear before the Commission, particularly in consumer protection matters. These parties may not always have the same interests, and will likely require their own expert witnesses. The Section therefore recommends that, in situations involving multiple respondents, the rules should be modified to permit each respondent to have five expert witnesses.

Rule 3.33(b): *This proposed rule permits ALJs to prohibit the taking of a deposition upon the motion of a party if the deposition would exceed the scope of discovery under Rule 3.31(c) or does not satisfy the standards for the admissibility of evidence under Rule 3.43(b).*

Comments:

This proposed rule imposes a new burden on parties seeking depositions to the explain why deposition testimony would be admissible. Although the FRCP place general limitations on discovery, permission from a federal judge to take a deposition is required under FRCP 30(a)(2) only if the parties have not stipulated to the deposition, and (1) the deposition would result in more than 10 depositions being taken; (2) the deponent has already been deposed; or (3) the party seeks to take the deposition before the time specified in FRCP 26(d).

Notably absent from FRCP 30(a)(2) is a requirement that federal judges attempt to anticipate the admissibility of evidence obtained from a deposition before the deposition is even taken. Although in many circumstances it may indeed be possible for an ALJ to determine, for example, the relevance of evidence obtained from a deposition before the deposition is taken, there could be situations in which an ALJ will be unable to determine the content of a deposition before the deponent has the opportunity to testify.

Therefore, because this proposed change appears unnecessarily to impose a new burden of showing why testimony would be admissible, and because this new burden could be used to prohibit depositions in Part 3 proceedings under circumstances in which such depositions would not be prohibited in federal court, the Section recommends that this proposed rule change be reconsidered or revised to comport with the FRCP.

Rule 3.35(b)(2): *This proposed rule states that parties may decline to answer an interrogatory that "involves an opinion or contention that relates to fact or the application of law to fact" until the close of discovery, the pretrial conference, "or other later time."*[47] *Whereas this revised rule would require proponents of an interrogatory to move the ALJ to compel a response, the current rule (and FRCP 33(a)(2)) requires recipients of interrogatories to move the ALJ for permission not to answer.*

Comments:

The Section believes that this new provision is problematic for two reasons. First, the new rule inexplicably shifts the burden of contesting interrogatories from the recipients of an interrogatory to the proponents of an interrogatory. Whereas the current rule requires recipients

[47] NPRM at 81-82.

of interrogatories to seek permission not to answer, the new rule could potentially impair an interrogatory proponent's discovery efforts in significant ways by permitting recipients not to answer until the proponent moves the ALJ to compel a response. An interrogatory recipient may decline to answer permissible interrogatories either in the hope that the proponent will decline to move the ALJ to compel a response or in the hope that moving the ALJ to compel a response will simply impose additional burdens on the proponent's discovery efforts and impair their ability to prepare their case.

Second, the new rule permits recipients to decline to answer such an interrogatory until an unspecified "other later time," perhaps even arguably after the matter is entirely concluded. Conflict will inevitably arise in cases regarding what "other later time" means. The commentary to the proposed rules does not specify how this amendment would shorten Part 3 proceedings, but, if this is indeed the purpose of the rule, the rule should specify a point in time at which the recipient of an interrogatory must answer. Otherwise, recipients' failure to answer interrogatories could generate significant delays in completing discovery and require more ALJ involvement in resolving disputes than is required under the current rule. Thus, the Section recommends that this proposed change should be augmented to include a definition of or limitation on the phrase "other later time."

Rules 3.43(b) and 3.33(g)(1): *The proposed amendments to this rule would permit the introduction of hearsay evidence if it is "relevant, material, and bears satisfactory indicia of reliability so that its use is fair."*[48] *Similarly, Rule 3.33(g)(1), governing the use of depositions at hearings, is eliminated under the proposed rules because it contains hearsay-based limitations.*

Comments:

Although, as a general rule, hearsay evidence is admissible in federal administrative proceedings,[49] as well as in preliminary injunction proceedings in federal court,[50] explicitly permitting the use of hearsay evidence in Part 3 proceedings creates additional, unnecessary disparities between Part 3 proceedings and federal court proceedings, which could lead to differences in substantive outcomes. Furthermore, even if admitting hearsay evidence under

[48] NPRM at 97-98.

[49] Although many courts have acknowledged that hearsay evidence, standing alone, cannot serve as the basis for administrative decisions under the APA, the majority of courts considering the issue have held that hearsay evidence is admissible in administrative proceedings under APA so long as the evidence is not "irrelevant, immaterial, or unduly repetitious" under 5 U.S.C. § 556(d). *See, e.g.*, *Bennett v. NTSB*, 66 F.3d 1130, 1137 (10th Cir. 1995); *Gray v. United States Dep't. of Agric.*, 39 F.3d 670, 676 (6th Cir. 1994); *Veg-Mix, Inc. v. United States Dep't. of Agric.*, 832 F.2d 601, 606 (D.C. Cir. 1987); *Calhoun v. Bailar*, 626 F.2d 145, 148 (9th Cir. 1980); *NLRB v. Imparato Stevedoring Corp.*, 250 F.2d 297, 302 (3d Cir. 1957). Several courts also have specifically held that hearsay is admissible in proceedings before the FTC. *See, e.g.*, *Buchwalter v. FTC*, 235 F.2d 344 (2d Cir. 1956); *Dolcin Corp. v. FTC*, 219 F.2d 742 (D.C. Cir. 1954); *Concrete Materials Corp. v. FTC,* 189 F.2d 359 (7th Cir. 1951).

[50] *See, e.g.*, *Kos Pharm., Inc., v. Andrx Corp.*, 369 F.3d 700, 718 (3d Cir. 2004); *Levi Strauss & Co. v. Sunrise Int'l Trading, Inc.*, 51 F.3d 982, 985 (11th Cir. 1995); *Sierra Club, Lone Star Chapter, v. FDIC*, 992 F.2d 545, 551 (5th Cir. 1993); *SEC v. Cherif*, 933 F.2d 403, 412 n.8 (7th Cir. 1991); *Republic of the Phil. v. Marcos,* 862 F.2d 1355, 1363 (9th Cir. 1988); *Asseo v. Pan Am. Grain Co.,* 805 F.2d 23, 26 (1st Cir. 1986).

some circumstances could expedite Part 3 proceedings, a case-by-case approach under the current rule is better than codifying a rule increasing the ability to rely on hearsay, given the risks associated with hearsay evidence and the potential to unfairly disadvantage respondents.

Perhaps most importantly, the proposed rule should include a provision that requires complaint counsel to provide notice of its intent to use hearsay evidence to respondents in advance of a hearing. The residual exception to the hearsay rule contained in FRE 807 requires parties to provide such notice, including the content of the hearsay statement and the name and address of the declarant. A similar safeguard in Part 3 proceedings would provide increased fairness to respondents by permitting them to have an opportunity to obtain evidence to rebut the hearsay evidence. A notice requirement would also increase efficiency and help respondents reduce costs (a purported goal of the new rules) because respondents would not have the significant burden of preparing for the possibility that complaint counsel will attempt to introduce any of their investigative material as hearsay evidence at a hearing.

Rule 3.43(d)(1): *This proposed rule states that a party is entitled to present evidence, rebuttal evidence, and such cross examination "as, in the discretion of the Commission or the ALJ, may be required for a full and true disclosure of the facts."*[51] *The commentary to the proposed rule states that the new rule "does not impose an absolute or unlimited right of cross examination."*[52]

Comments:

The Section is concerned with the extent to which the proposed rule might be interpreted to limit or abrogate rights of cross examination inconsistent with the APA. Cross examination is an important hallmark of an adjudicative system, whether in federal district court or administrative proceedings. The APA provides for a right of cross examination if cross examination is "required for a full and true disclosure of the facts."[53] From the text of the proposed rule and the commentary, it is unclear whether the proposed rule is intended to give the Commission and the ALJ unfettered discretion to prevent cross examination when the right to cross examination is so required by the APA. The Section therefore recommends that the proposed rule be modified to make clarify that the Commission and the ALJ do not have the discretion to prevent cross examination when cross examination is required for a full and true disclosure of the facts as provided in the APA.

[51] NPRM at 98-99.

[52] *Id*. at 37-38.

[53] 5 U.S.C. § 556(d) ("A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.").

Comments of Whole Foods Market, Inc.
Parts 3 and 4 Rules of Practice Rulemaking -- P072104

Whole Foods Market, Inc. respectfully submits the following comments on the new and amended regulations to its adjudicative procedures proposed by the Federal Trade Commission on October 7, 2008.[1]

Summary

The Commission's proposals are egregious government regulation that should not be adopted. The proposed rules are unnecessary, ill-advised, and unfair. If adopted, they would create administrative procedures that are unjust and deprive parties litigating before the Commission of their due process rights.

Both the rules and the process by which they are proposed reflect a rush-to-judgment mentality that ill-serves the public interest, as well as a hostility to the open adversarial process that is fundamental to the American legal system. Given the importance of the issues at stake, the Commission should immediately extend the deadline for comment on the proposal to no earlier than January 6, 2009. A thirty-day comment period is wholly inadequate to deal with changes in the number and of the magnitude proposed.

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[1] 73 Fed. Reg. 58,832 (October 7, 2008), *hereinafter* "Notice" or "Commission Notice." These comments are directed to the proposals as applied to merger cases, but would also apply, in relevant part, to any complex competition case adjudicated administratively by the Commission.

Analysis

I. A 30-Day Comment Period For The Radical Changes Proposed By The Commission Is Wholly Inadequate And Should Be Extended To 90 Days.

We agree that the Commission can and should subject its adjudicatory process to periodic review and improvement. But, given the importance of the issues raised by the proposal, far more time than 30 days should be provided for public comment to changes as radical as those proposed in this instance.

Whether or not formal notice-and-comment procedures are required for proposed regulations of this kind,[2] Whole Foods submits that the extreme about-face proposed by these particular proposals merits an extended comment period and serious re-evaluation. As will be seen, these proposals reverse a longstanding policy of the Commission to invest ALJs with plenary authority to manage their cases, seriously compromising their independence, with unfortunate implications for the integrity of the Commission's adjudicatory process. A thirty-day comment period – the absolute minimum allowed for substantive regulations under the Administrative Procedure Act[3] – is wholly inadequate to allow these concerns to be fully brought to light and considered. The last time the Commission proposed changes of this scope to its adjudicatory process, it allowed sixty days for comment[4] for changes that proved less controversial than these.[5]

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2 *See* 5 U.S.C. § 553(b)(A).

3 5 U.S.C. § 553 (d).

4 61 Fed. Reg. 50,640 (Sep. 26, 1996).

5 From the public record, the Commission appears to have solicited suggestions for changes before publishing the 1996 proposal and received four responses. The Commission does not appear to have received any comments on the 1996 proposals once they were published The present proposal has already generated uniformly negative comments. *See, e.g.,* comments of Linda Blumkin and Richard Hallberg. The comments of Ms. Blumkin, a respected antitrust lawyer, also urge the Commission to adopt a longer comment period. *See* http://www.ftc.gov/os/comments/part3and4rules/index.shtm.

If it is appropriate for 180 days to be provided for public comment to an amendment to the platinum section of the Guides for the Jewelry, Precious Metals, and Pewter Industries,[6] and 75 days to the energy labeling requirements for ceiling fans,[7] then the fundamental changes to the process of administrative litigation contemplated by the proposed regulations should require at least a 90-day comment period to ensure thoughtful and useful comments.

II. The Commission's Proposals To Reduce The Authority and Discretion of The ALJs To Manage And Initially Decide The Case Creates An Adjudicatory Process That Is Inherently Unfair To Respondents.

The Commission's proposed rule changes represent a wholesale abandonment of its longstanding practice of investing its Administrative Law Judges (ALJs) with increasing authority and discretion to manage the trials they have been appointed to conduct. In multiple ways, the Commission's proposal has either stripped the ALJs altogether of authority to make decisions previously entrusted to them or eliminated their discretion in favor of inflexible, mandatory dictates.

An independent hearing officer has long been recognized as an essential guarantee of actual and perceived fairness in administrative proceedings, particularly in agencies, such as the Commission, in which the prosecutorial and adjudicatory functions are combined. One of the most serious consequences of implementing these changes will therefore be to compromise the integrity of the Commission's adjudicative proceedings not only in fact, but in the public mind as well.

A. The Independence of The ALJ Is Fundamental To The Integrity of The Commission's Adjudicatory Process.

The structure of Part III adjudication permits the commissioners to act as both prosecutor and judge in the cases they choose to bring. It is the commissioners who, after delving *ex parte* into the evidence developed by the staff's investigation, make the policy decision to

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6 73 Fed. Reg. 22,848 (April 28, 2008).

7 71 Fed. Reg. 35584 (June 21, 2006).

issue a complaint, and it is the same commissioners who act as the ultimate adjudicators of the complaints they have issued.

This combination of prosecutorial and judicial functions has been a continual source of criticism. In 1989 the American Bar Association's Antitrust Section observed that "[t]he debate about the merits of the FTC's dual roles as prosecutor and adjudicator has raged for years."[8] Most important among the commentaries on this subject is the Final Report of the Attorney General's Committee on Administrative Procedure.[9] Issued in 1941 but still authoritative, this Report played a pivotal role in the development of the Administrative Procedure Act under which the Commission and other agencies now operate. The Attorney General's Report found the "commingling of functions of investigation or advocacy with the function of deciding" to be "plainly undesirable."[10] In this regard, the Report singled out the Federal Trade Commission, noting its enforcement role in the "controversial" field of unfair methods of business competition, as an agency "peculiarly in danger of being charged with bias by those against whom the prohibitions are sought to be enforced."[11]

While not advocating a complete separation of prosecutorial and adjudicative functions at the top level of the agency, the Report did recommend "internal but nevertheless real and

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8 REPORT OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW SPECIAL COMMITTEE TO STUDY THE ROLE OF THE FEDERAL TRADE COMMISSION 118 (1989) *hereinafter 1989 ABA Report.*

9 Attorney General's Committee on Administrative Procedure, Final Report (1941), *hereinafter Attorney General's Final Report.* As for the continued authoritativeness of the Report, the Commission itself purports to rely on it, 73 Fed. Reg. 58,833 (2008), although, as will be seen, violates its fundamental principles.

10 *Attorney General's Final Report*, 56, noting how an individual "who has buried himself in one side of an issue is disabled from bringing to its [sic] decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions."

11 *Id.*, 58.

actual separation of the adjudicating and the prosecuting functions" within the agency. The key element in this separation was an independent hearing officer (predecessor to today's Administrative Law Judges), fully empowered to preside at hearings and make findings of fact and conclusions of law, whose findings should not be disturbed "unless error is clearly shown."[12] Courts have subsequently reinforced the importance of the hearing officer as an independent voice by requiring his or her initial decision to be considered in any judicial review of the agency's decision.[13]

As the Attorney General's Report further recognized, effective independence must include plenary power over procedural matters. The Report recommended that hearing officers "should be fully empowered by statute to preside at hearings, issue subpoenas, administer oaths, rule upon motions, [and] carry out other duties incident to the proper conduct of hearings."[14] Indeed, the Supreme Court has observed that the quality of the examiner's decision is enhanced not only by his opportunity to observe the witnesses, but by the fact that he has "lived with the case."[15] The District of Columbia Circuit Court of Appeals has likewise noted the importance of giving the Commission's ALJs plenary control over the adjudicative process as a critical element of a fair process. In *FTC v.*

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12 *Id.*, 51. *See also,* Universal Camera Corp. v. NLRB, 340 U.S. 474, 494 (1951), *hereinafter Universal Camera.* (Legislative history of the Administrative Procedure Act confirms "that enhancement of the status and function of the trial examiner was one of the important purposes of the movement for administrative reform.").

13 *Universal Camera,* 340 U.S. at 493-97; Schering-Plough Corp. v. FTC, 402 F.3d 1056, 1063 (11th Cir. 2005), *cert. denied,* 126 S.Ct. 2929 (2006). The importance of ALJ independence is further reflected by courts' general reluctance to accept an agency's desire to dispense with an examiner's report without showing a satisfactory justification (i.e. demonstrated urgency) for doing so. *See, e.g.*, Cent. & S. Motor Freight Tariff Ass'n v. United States, 273 F. Supp. 823, 833 (D. Del. 1967).

14 *Attorney General's Final Report,* 50.

15 *Universal Camera,* 340 U.S. at 496.

Atlantic Richfield Co.,[16] the court noted that Part III of the Commission's regulations "endeavors to create for the Administrative Law Judge control over the adjudicatory process, including all aspects of discovery, and to make the FTC adjudicatory process as fair to each side in every respect as in a federal court." The court's opinion criticized the Commission's attempt in that case to use materials from an investigation in a separate adjudicative proceeding against the same company as "seemingly tend[ing] to undercut the role of the Administrative Law Judge," which "would subvert completely the essential separation of the adjudicatory and investigatory functions of the Federal Trade Commission...."[17]

Although the Commission's Notice does not rely on this power expressly, we recognize that in the abstract the Administrative Procedure Act allows the Commission or one or more commissioners to act as an Administrative Law Judge.[18] But any effort to justify the current proposals on that basis would miss the point. The fact that the Commission may act as an ALJ does not mean that it is wise as a matter of policy to do so. The APA embodies a set of general principles applicable to all agencies. Many of those agencies do not have the same structure of combined judicial and administrative functions which the Attorney General's Report specifically identified with the Federal Trade Commission.[19] That problem, according to the Report, is best mitigated by plenary delegation to independent hearing officers. Moreover, the proposed rules do not contemplate having the Commission assume the entire role of the ALJ. Instead, it contemplates a hybrid proceeding in which the Commission or individual commissioners can participate in the proceeding at various times for various purposes, but not for others. Such a procedure severely compromises ALJ independence, while, despite the Commission's contrary assertion, likely impairing efficiency as well.

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16 567 F.2d 96 (D.C.Cir. 1977).

17 *Id.*, 103-104.

18 5 U.S.C. § 556 (b) (1)-(2).

19 *See* discussion at p.4 & n. 11, *supra.*

In sum, the Attorney General's Report and the courts have viewed the independence of the hearing examiner (now ALJ) in both substantive and procedural matters as an important safeguard against the potential for prejudgment and bias from the combination of the Commission's prosecutorial and adjudicative functions. Unfortunately, the Commission's effort to overhaul its adjudicative processes eviscerates this function by depriving the ALJ of much of his or her most critical discretion and authority.

B. The Proposed Regulations Severely Compromise The Independence of The ALJ To Manage The Case And To Provide An Unbiased View of The Merits.

The Commission's proposal consistently withdraws from the ALJ previously granted authority to conduct pretrial and trial procedures and to rule initially on the merits of the case.

Proposed Regulation 3.11 requires that the evidentiary hearing in merger cases must commence five months from issuance of the complaint, even though the hearing in other proceedings need only commence within eight months. Relief from this regulation can only be granted by the Commission. This reverses current practice, which allows the ALJ to determine, based on the circumstances of a particular case, the time necessary for discovery and, therefore, the appropriate date on which to commence the evidentiary hearing.

As the Commission and the Department of Justice observed in the introduction to the *Commentary on the Horizontal Merger Guidelines*, merger investigations are "intensely fact driven" and "merger analysis depends heavily on the specific facts of each case."[20]

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[20] Federal Trade Commission and U.S. Department of Justice, *Commentary on the Horizontal Merger Guidelines* 3 (March 2006), *available at* http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf. *See also*, U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* § 0 (1992 rev. 1997) (merger analysis must be applied "reasonably and flexibly to the particular facts and circumstances of each proposed merger"), *available at* http://www.ftc.gov/bc/docs/horizmer.htm.

Imposing the same pretrial and trial schedule cannot possibly serve all merger cases adequately.

The proposed regulation, by truncating fact discovery, would also give a distinct litigation advantage to complaint counsel, who have had months to conduct *ex parte* discovery during their investigation. Respondents do not share this power of the staff to obtain facts via broad, pre-complaint, compulsory process, but must rely entirely on discovery during the period allotted by the Commission's adjudicative rules. This tilt in the playing field is exacerbated by the fact that in many cases the most important defense evidence – on potential entrants, product substitution, customer power and behavior, for example -- is in the hands of third parties, whose cooperation may not be easily or promptly obtained.

Experience strongly suggests that five months is not enough time to overcome this disadvantage. In fact, in the most recent merger case filed for adjudication in Part III the ALJ provided an eight-month discovery period.[21] Whether even this will turn out to be adequate remains to be seen. The Commission has adjudicated two Part III merger cases in the last ten years.[22] The time between complaint and start of hearing in both of these cases was approximately one year. The Commission now proposes to cut that time in all cases by **more than half**. Yet the Commission's request for public comment contains no analysis of its prior experience in those two cases or any other effort to justify this extraordinary truncation.

The assault on ALJ independence is magnified by **Proposed Regulation 3.42**, which expressly provides "authority for the Commission or an individual Commissioner to preside over discovery and other prehearing proceedings before transferring the matter to the ALJ." When exercised, this extraordinary power will curtail the ALJ's independence and greatly risk depriving litigants of a fair trial. Discovery and other pre-hearing

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21 Scheduling Order, Polypore International, Inc., Dkt. No. 9327 (Sep. 9, 2008).

22 Evanston Northwestern Healthcare Corp., Dkt. No. 9315; Chicago Bridge & Iron N.V., Dkt. No. 9300.

proceedings can be outcome-determinative if they deny respondents a fair opportunity to develop their defense. For example, although an independent ALJ was recently appointed in *Whole Foods Market*, the ALJ's independence has been compromised because the Commission issued a scheduling order that, by rushing to trial with only five months for discovery, will deeply compromise Whole Foods Market's ability to mount an adequate defense. Whole Foods Market cannot even ask the ALJ to amend the scheduling order, because the Commission dictated that only it can modify the order.

Proposed Regulation 3.22 gives the Commission the authority to decide all dispositive prehearing motions. Under the proposed regulation, the same Commission members who voted to charge the respondent with a legal violation would also rule on pre-trial motions – including fact-intensive motions for summary decision -- to terminate the charges.

The role of the ALJ, including his or her ability *independently* to assess the merits of the FTC's case, should be preserved. This is especially true of motions for summary decision, which are based in significant part on an interpretation of the facts – a core function of the ALJ. Because such motions usually require extensive parsing of the evidentiary record, they can provide the ALJ with knowledge of the case that can facilitate his or her handling of the trial and in preparation of the initial decision, if one is necessary.

Having summary decision motions decided by the Commission in the first instance deprives the ALJ of that crucial element of "living with the case" that reinforces independent judgment.[23] It also undermines the ALJ's ability to manage discovery in the case. As Congress recognized in structuring the legislation for multidistrict litigation, the ability to rule on dispositive motions is intimately tied to the ability to manage

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[23] *See Universal Camera*, 340 U.S. at 496.

discovery.[24] By depriving the ALJ of the former, the Commission will inevitably compromise the latter.

Equally worrisome is the threat which a Commission summary decision poses to the independence of the ALJ's initial decision. If the Commission denies a motion for summary decision, the ALJ is no longer writing on a clean slate when preparing the initial decision. His or her views will inevitably be skewed by the now entirely transparent views of the Commission delivered on less than a full record. Ruling on such an interim motion thus allows the Commission prior to trial to influence the ALJ's views in a very direct way that further compromises the separation between the Commission's dual role as prosecutor and judge.[25]

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[24] *See* Richard L. Marcus, *The Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Panel's Transfer Power*, 82 TULANE L. REV. 2245 (2008):

> One view in Congress was that the transferee judge could only handle and coordinate discovery. But merely as a matter of discovery supervision, a narrow grant of authority would be insufficient. The scope and topics of discovery could not easily be separated from the question whether certain claims could withstand scrutiny on a motion to dismiss; if not, discovery about them would not be warranted. And discovery might well be limited or tailored by rulings on summary judgment....As a result, the statute [28 U.S.C. section 1407] as enacted authorizes the transferee court to conduct all pretrial proceedings.'

Id., 2262-63 (footnotes omitted, *citing* Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 805-08 (1985)).

[25] The only situation in which it would even arguably be appropriate for the Commission to bypass the ALJ on a dispositive motion would appear to be in the limited situation of a motion to dismiss raising purely legal defenses at the outset of a case, *see, e.g.,* Union Oil Co. of Cal., 138 F.T.C. 1 (2004) – a situation which the Commission has recognized as "undoubtedly rare." 66 Fed. Reg. 17,622 (April 3, 2001). But even here, the Commission is eliminating the important function of the ALJ to act as an independent check on the Commission's potential prejudgment of the case it has already decided to prosecute.

Consistent with the overall theme, the Commission seeks to bridle the ALJ's discretion in other ways. **Proposed Regulation 3.31A** eliminates the ALJ's discretion over the number of experts who can testify, regardless of the nature and complexity of the case. **Proposed Regulation 3.22(e)** requires the ALJ to rule on all motions, regardless of complexity, within 14 days of briefing. Tellingly, the Commission imposes no such time limit on motions it decides to rule on. **Proposed Regulation 3.42** imposes a 210-hour limit on the length of the hearing. The current rule leaves the length of the hearing to the ALJ's discretion. Most recently, on October 22, 2008 the ALJ entered a scheduling order in *Polypore* that contained no limit on the number of trial days – a recognition of the injudiciousness of boxing in the trial schedule so early in the proceeding. **Proposed Regulation 3.46** revokes the ALJ's discretion over the timing of proposed findings of fact, conclusions of law and briefs in favor of rigid, one-size-fits-all time schedules.

Thus, in numerous ways, the Commission will deprive the ALJs of essential authority to perform the managerial functions they have been appointed to perform. When an ALJ cannot exercise basic adjudicative functions such as scheduling (Proposed Regulation 3.11) or ruling on dispositive pre-hearing motions (Proposed Regulation 3.42), any appearance of independence is illusory. By compromising that independence, the Commission has weakened one of the essential pillars supporting the integrity and efficiency of its decision-making process.

C. The Commission Has Offered No Convincing Justification For Revoking The ALJs' Discretion and Authority.

The Commission offers no convincing rationale for any of these provisions beyond conclusory generalizations – generally untethered to particular provisions – that do not withstand scrutiny.

Importantly, the Commission acknowledges that expeditious adjudications "may impose costs on the parties or the agency that they may not need to bear" under a "more leisurely process" and that attempts to improve efficiency and cut costs could impair the decisional

quality.[26] The Commission cites several considerations that supposedly offset these admitted disadvantages of potentially higher costs and lower quality : (1) the possibility that parties faced with protracted proceedings in a merger case may abandon their transaction; (2) a desire to squeeze out "nonessential discovery and motion practice"; (3) the shibboleth – unexamined in this context -- that "justice delayed is justice denied"; (4) the importance of inserting the commissioners' "expertise" earlier into the decisional process; and (5) the limited ability – often exercisable solely by the Commission and not by the ALJ – for a party to obtain relief from provisions "in extraordinary circumstances." These considerations do not survive even a cursory examination.

Transaction abandonment. Abandonment of a transaction because of delays in the Commission's Part III procedures is only relevant where the parties have not yet closed. Yet the only two Commission Part III merger proceedings in the past ten years have been litigated after the parties have closed. Possible transaction abandonment does not offer a justification for the Commission's proposed regulation in these situations. Nevertheless the proposal treats both situations identically.

Moreover, for pre-closing situations in which the parties wish an expedited proceeding to avoid having to abandon their transaction, the Commission already has an **optional** fast-track procedure in place that will produce an earlier decision than under the present rules.[27] While this is currently available only where the Commission files a collateral case in federal court seeking preliminary injunctive relief, there is no reason why the Commission cannot amend its rules to provide a similar option in all merger cases. That would adequately deal with any abandonment concern without forcing all of the

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[26] 73 Fed. Reg. 58,883.

[27] The fast-track procedure commits the Commission to issue its final decision within 13 months after the Part III litigation essentially commences. 16 C.F.R. § 3.11A (c) (3). Even assuming the Commission takes only 6.5 months (the time it effectively allows itself under fast-track) to decide an appeal under the new proposed regulations (the actual appeal time in *Evanston Hospital* and *Chicago Bridge* cases was roughly three times that long), the fast track procedure is at least four months faster than the new proposal.

Commission's merger respondents into the Procrustean bed constructed by these proposals.

The Commission offers no evidence that shortening the process to the length contemplated by the proposals will make it any less likely that parties will abandon transactions. There has been in place since 1996 a "fast track" procedure for mergers that guarantees a Commission decision in thirteen months, which has never been invoked. The Commission's proposal, even under the most optimistic assumption about the length of time required for its own appellate opinion, would take nearly eighteen months. The Commission fails to explain why parties who have been abandoning transactions when faced with a thirteen-month "fast-track" procedure will not abandon them when faced with an eighteen-month procedure under its latest proposals. On the contrary, if anything, the perceived inequity of the proposed procedures would be more likely to contribute to transaction abandonment, with no offsetting benefit from a possible shortening of what will still be a drawn-out process.

Eliminating "Non-Essential" Discovery And Motion Practice. The Commission's apparent notion is that forcing complaint counsel and respondents into a mandatory compressed discovery schedule will leave them no time to take "non-essential" discovery and file motions – and that this is a good thing. Of course, there is no reason to think that an inflexible five-month discovery period represents just the right point beyond which – presumptively **in every case** -- discovery requests and motion practice become "non-essential." In fact, there is every reason to believe, based on recent experience, that a five-month cut-off might preclude essential discovery. Pretrial proceedings took approximately **twelve** months in *Evanston Northwestern* and *Chicago Bridge*. The Commission has offered no reason to believe, based on the experience of these cases, that these periods were excessive.

If the Commission is concerned about excessive discovery and motion practice, it is the proper job of the ALJ -- who ought to be in the best position to separate the wheat from the chaff – to control it on a case-by-case basis. The Commission can provide guidance in its decisions and internally promulgate best practices that attack the problem directly.

Imposing an arbitrary, grinding discovery schedule that bears little logical relation to the problem in order simply to preempt discovery and motions -- regardless of merit -- will not solve the problem. It will, however, risk depriving the parties of essential discovery necessary for due process.

Whole Foods Market[28] is a prime example of the unfairness inherent in the Commission's "one-size fits all" approach, regardless of a particular matter's complexity. The complaint in *Whole Foods Market* refers to 29 distinct "geographic markets" across the country. By contrast , a merger complaint filed earlier this year against Inova Health System alleges only a single relevant market.[29] Yet the Commission in *Whole Foods Market*, and Commissioner Rosch, acting as ALJ in *Inova*, imposed nearly identical five-month periods for discovery and other pretrial activities in the two cases. Contrast this further with the eight-month discovery period allowed by Administrative Law Judge Chappell in *Polypore*, involving only five markets,[30] and the potential for arbitrary and unfair treatment becomes apparent. Requiring respondents to file a motion with the Commission to secure a scheduling order that fairly provides an opportunity to defend against claims in the administrative complaint, as the proposed regulation would do, is a costly and ineffective solution to this systemic infringement of fundamental due process that the regulation itself creates.

"Justice Delayed Is Justice Denied." Summary justice is not justice. The Commission, of course, has a legitimate interest in seeing that truly anticompetitive mergers are remedied without undue delay. But the key to fulfilling this mission, as the Commission recognizes, is "high quality decisionmaking."[31] This requires not only an adequate

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28 Whole Foods Market, Inc., Dkt. No. 9324

29 Complaint, Inova Health System Found., Dkt. No. 9326 (May 8, 2008).

30 Scheduling Order, Polypore International, Inc., Dkt. No. 9327 (Sept. 9, 2008). The complaint alleged four narrower markets and, alternatively, one broader market.

31 73 Fed. Reg. 58,833.

factual record coupled with due process to the respondents, but also public confidence in the integrity of the decision-making process. A slogan is no substitute for factual and logical analysis of that trade-off. The Commission has failed to demonstrate, or even articulate, the extent to which existing adjudicatory procedures have failed to produce timely "justice," or how its arbitrary deadlines will correct that problem – assuming it exists – while still preserving respondents' due process rights.[32]

Applying The Commission's Expertise. The Commission suggests that its proposed changes are intended to "bring the Commission's expertise into play earlier and more often during the Part 3 process."[33] If the Commission is referring to its *substantive* expertise, then this is the very type or intrusion into the function of the ALJ -- to act as an independent filter of the Commission's prosecutorial decision -- which the Attorney General's Report and the Administrative Procedure Act decry. If, on the other hand, the Commission is referring to some sort of *procedural* expertise, then the Commission has it backwards. The expertise to manage pretrial and trial procedures clearly resides in the ALJs; it is their core business. It does not reside in the commissioners, who historically have no experience in managing pretrial and trial procedures.[34]

Availability of Relief From The Commission. The proposals often provide the theoretical availability for the Commission, or occasionally the ALJ, to grant relief from certain provisions. The relief is often illusory. In **Proposed Regulation 3.1**, for example,

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32 By further shortening the adjudicatory timetable, the Commission has unwittingly eliminated another safeguard to the prosecutor/adjudicator problem. The ABA Antitrust Section's 1989 report on the Commission felt that the combination of prosecutorial and adjudicative functions was tolerable in part because the length of Commission proceedings reduced the possibility that the same commissioners who voted out the complaint would still be serving when the case was appealed after trial. *1989 ABA Report* 124. That source of comfort would of course be less available under the FTC's proposed "rocket docket."

33 73 Fed. Reg. 58,834.

34 In contrast with the Judge Chappell, who has had nine years' experience as an ALJ at the Commission, we are aware of no sitting commissioner or any recent commissioner who has had any experience as a judge.

the only "relief" permitted from the Commission's tight time lines is to "shorten" them further; there appears to be no right to have those deadlines extended. In many other situations, the relief is available only from the Commission, not the ALJ. Of course, this expands the intrusion of the Commission into the day-to-day management of the case in a way that is precisely what the Attorney General's Report and the Administrative Procedure Act did not intend. It creates a mechanism by which the commissioners – having already decided that the respondents should be prosecuted – can, through critical procedural decisions, influence the outcome of the proceedings long before the matter comes before them on appeal.

In sum, the Commission's purported rationales do not support the radical changes it is proposing to its adjudicative rules.

III. The Commission's Acknowledgement That It Has Reversed Its Formal Policy Statement On Follow-On Part III Proceedings Without Any Public Discussion Is Procedurally Inexcusable And Substantively Insupportable.

The Commission's Notice contains the following statement concerning its policy of filing a Part III case when it has unsuccessfully sought a preliminary injunction:

> [T]he Commission believes the **norm** should be that the Part 3 case can proceed even if a court denies preliminary relief.[35]

This is an extraordinary statement. It represents a stark, unjustifiable about-face from the Commission's prior policy statement on this subject and a reversal of its prior practice.

On June 21, 1995, the Commission issued a formal statement of its policy on whether to proceed with administrative litigation following denial of a preliminary in merger cases.[36] The Commission declared that "the determination to continue a merger challenge in administrative litigation [after a federal district court has refused to grant a preliminary injunction sought by the Commission] is not, and cannot be, either automatic or

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35 73 Fed. Reg. 58,837 (emphasis added).

36 60 Fed. Reg. 39,741 (Aug. 3, 1995), *hereinafter the Policy Statement.*

indiscriminate."[37] Rather, the Policy Statement is absolutely clear that there is to be no presumption either for or against proceeding with a Part III litigation, and the Commission intended to look to five factors in making its decision.[38] There is nothing in the Commission's formal Policy Statement suggesting that a follow-on Part III proceeding after denial of a preliminary injunction would be the "norm." In fact, the Policy Statement incontestably rejected that notion.

Nor is there any basis in prior practice for concluding that follow-on Part III proceedings following an unsuccessful preliminary injunction challenge have become the "norm." On the contrary, one recent Chairman of the Commission and at least one sitting commissioner have stated that the Commission should do so only in highly unusual circumstances, if at all.[39]

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37 *Id.*, 39,742.

38 *Id*, 39,743. ("[T]he Commission believes that it would not be in the public interest to forego an administrative trial solely because a preliminary injunction has been denied. Nor would it be in the public interest to require an administrative trial in every case in which a preliminary injunction has been denied.").

The five factors were: ("(i) the factual findings and legal conclusions of the district court or any appellate court, (ii) any new evidence developed during the course of the preliminary injunction proceeding, (iii) whether the transaction raises important issues of fact, law, or merger policy that need resolution in administrative litigation, (iv) an overall assessment of the costs and benefits of further proceedings , and (v) any other matter that bears on whether it would be in the public interest to proceed with the merger challenge."

39 "Assessing Part III Administrative Litigation: Interview with Timothy J. Muris," *Antitrust* 6, 9 (2006) (When asked whether the Commission should "ever take a merger case into Part III after losing a preliminary injunction trial," the former Chairman responded: "In almost all cases, the answer is no."); Remarks of J. Thomas Rosch, Commissioner, Federal Trade Commission, at the ABA Antitrust Modernization Commission Conference, Georgetown University Law Center 4 (June 8, 2006), *available at* http://www.ftc.gov/speeches/rosch/Rosch-AMC%20Remarks.June8.final.pdf ("no real threat" the Commission will initiate administrative proceedings after a federal court denies a preliminary injunction

The Commission's record further contradicts the notion of a "norm" that favors Part III challenges following a preliminary injunction denial. From at least fifteen years prior to 2007 the Commission had never pursued a full administrative trial after denial of a preliminary injunction.[40] More recently, the Commission has declined to proceed into Part III in two out of four cases following denial of a preliminary injunction[41] – a statistic hardly indicating that proceeding is the "norm."

Nor should the pursuit of follow-on Part III proceedings after the Commission has lost a preliminary injunction be the "norm." The 2007 Report and Recommendations of the Antitrust Modernization Commission (the AMC) strongly recommended that the Commission adopt a policy to forswear administrative litigation in merger cases governed by the Hart-Scott-Rodino Act and resort entirely to the federal courts for preliminary and permanent injunctive relief.[42] The AMC found that the threat of follow-on administrative litigation creates a disparity in treatment between enforcement by the FTC and by the Department of Justice which "undermines the public trust" and "can impose unreasonable costs and uncertainty on parties whose mergers are reviewed by the FTC, as compared to the DOJ."[43] The AMC dismissed the argument made by the Commission's General Counsel[44] that administrative litigation gives the FTC "an avenue

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"absent extraordinary circumstances – for example, where a court decision is obviously a home town decision").

40 Antitrust Modernization Commission: Report and Recommendations 139-40 (2007) *hereinafter AMC Report.*

41 The Commission decided not to pursue Part III adjudication in Arch Coal, Inc., Dkt. 9316 (Statement of the Commission, June 13, 2005); and Western Refining, Inc., Dkt. 9323 (Statement of the Commission, Oct. 3, 2007). It has pursued Part III adjudication in Equitable Resources, Inc., Dkt. No. 9322 (transaction abandoned by the parties) and Whole Foods Market, Inc., Dkt. 9324 (Order Rescinding Stay of Administrative Proceeding, Aug. 8, 2008).

42 *AMC Report*, 139-40.

43 *Id.*

to develop the law" as "unlikely to add significant value" and "significantly outweighed by the costs it imposes on merging parties in uncertainty and in litigation costs."[45]

As the five factors in the Policy Statement suggest, and the *Arch Coal* and *Western Refining* matters confirm, the injunction proceeding will often have thoroughly examined the issues raised by the complaint based upon an adequate evidentiary record. Moreover, there is a significant probability – higher than would justify a presumption in favor of proceeding in Part III -- that the Commission will ultimately conclude after a full administrative trial that the merger was not unlawful.[46]

Finally, the Commission's creation of a "norm" is not only substantively without foundation. It is procedurally remarkable. If the Commission intends to reverse an explicit, previously issued policy statement, it should follow the same procedure used to implement the policy it is reversing. It should announce the policy change directly and explicitly, with supporting analysis and public comment specifically directed at the proposal. It should not – as it has done here – silently change the policy; slip "notice" of it into a peripheral document; and then present what is a clear reversal of policy as if it has always been the "norm." It should particularly not do so having represented to the Antitrust Modernization Commission "that follow-on administrative litigation following the denial of a preliminary injunction is inappropriate except in highly unusual contexts" – a representation that several AMC commissioners relied on in making their

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44 *See* Comments of William Blumenthal, General Counsel, Federal Trade Commission, to the Antitrust Modernization Commission 3-4 (Nov. 5, 2005).

45 *Id.*, 140-41.

46 Of the five cases cited in the Commission's statement accompanying the Policy Statement in which in the prior ten years the Commission had proceeded in Part III following denial of a preliminary injunction, the Commission dismissed the complaint after a full administrative trial in two (R.R. Donnelley & Sons, Dkt. 9243, and Owens-Illinois, Inc., Dkt. No. 9212); one resulted in a consent order for divestiture (Promodes, S.A., Dkt. No 9928); and one was dismissed after the transaction was restructured to eliminate the competitive problem (Lee Memorial Hospital, Dkt. No. 9265).

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recommendations.[47] Ultimately, if there is to be any regulatory change to reform the administrative litigation process, it should be change that will implement rather than ignore the AMC recommendations and that will minimize rather than exacerbate the differences between FTC and DOJ merger enforcement.

IV. The Cumulative Effect of The Commission's Proposals Creates An Indefensible Double Standard In Merger Enforcement Between The Commission And The Department of Justice.

The double standard between merger enforcement by the Commission and the Justice Department created by the Commission's reversal of its Policy Statement is amplified by the cumulative effect of the Commission's other proposals, which exacerbate the procedural differences between the two agencies. If a company happens to be under FTC jurisdiction, it will face a rushed administrative hearing, without a truly independent ALJ, that carries serious risks of due process violations. Companies under Department of Justice jurisdiction will get a completely independent trial on the merits, conducted according to a reasonable schedule, presided over by an independent federal judge, and guided by the Federal Rules of Evidence. There is no justification for affording unmitigated due process rights to companies in the airline, financial institution, steel and other industries that are subject to DOJ merger review, but not to supermarkets and companies in other industries subject to FTC merger review.

Conclusion

The proposed regulations should not be adopted. If the Commission is inclined to adopt these regulations, either in whole or in part, it should act only after a more extensive comment period than contemplated in the proposal. A deadline for comments of no earlier than January 6, 2009 is required to ensure proper consideration of the important issues implicated by the proposal.

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[47] *AMC Report*, 140 fn.

P072104 - Parts 3 and 4 Rules of Practice Rulemaking

Comments of Robert Pitofsky[1] and Michael N. Sohn[2]

November 6, 2008

The Commission's proposal to amend its Part 3 rules has become a topic of controversy. To some, the controversy may seem unexpected. Why would anyone oppose changes which expedite administrative trials? Is the controversy merely one ginned up by advocates who have a pending merger case about to be tried before the Commission?

Of course, expediting Part 3 proceedings is a step in the right direction. We are filing this comment to urge caution by the Commission as it addresses the appropriate role of Part 3 adjudication of Section 7 merger challenges.

I. The Appropriate Role for Administrative Proceedings in Merger Cases

As a general matter, the argument for administrative decision-making as superior to judicial decision-making in the antitrust area rests significantly on one's belief in the benefits of the FTC's expertise in developing and applying enforcement policies through the adjudicative process.[3] The

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[1] Mr. Pitofsky is Counsel to Arnold & Porter LLP and Sheehy Professor of Trade Regulation Law, Georgetown University Law Center. He served as Chairman of the Federal Trade Commission from 1995-2001 and prior to that held numerous other positions within the Agency. Mr. Pitofsky's practice focuses on antitrust and consumer protection matters.

[2] Mr. Sohn is a Senior Partner in the Antitrust Practice Group at Arnold & Porter LLP. He served as General Counsel to the Federal Trade Commission from 1977-1980. Mr. Sohn's antitrust practice focuses on mergers and acquisitions.

[3] As the Commission noted in its Federal Register Notice ("Notice") announcing the proposed rule changes:

> "Congress determined that the Commission could use its expertise and administrative adjudicative powers as a "uniquely effective vehicle for the development of antitrust law in complex settings in which the agency's expertise [could] make a measurable difference." Certainty, consistency and accuracy in Commission decisions could serve as a tool not only to improve the resolution of individual cases, but to provide broad guidance to industry and the public and help set the policy agenda."

Footnote continued on next page

argument for Part 3 trials thus is strongest in those areas of antitrust enforcement policy where consensus is lacking and the Commission can furnish expert guidance in the development of the law.

Section 2 is one such area where consensus is lacking and the development of consensus enforcement policy might well benefit by the application of the Commission's expertise in an adjudicatory setting.[4] Similarly, some vertical arrangements, including examination of rule of reason approaches to minimum resale price maintenance could benefit from careful Commission review.

Today, however, there is considerable consensus regarding the core principles which should govern Section 7 horizontal merger enforcement. This consensus is a product of the Merger Guidelines jointly adopted by the FTC and the Antitrust Division of the Department of Justice and the ensuing decades-long dialogue between the enforcement agencies and the courts which has taken place mostly in the context of preliminary injunction proceedings.

Thus, it is a subject of legitimate debate whether the Commission's expertise has a significant role to play, beyond its decision to seek judicial relief to prevent consummation of mergers. The downsides of the current FTC process have been articulated by the Antitrust Modernization Commission ("AMC"), which focused on the very different process which applies when the FTC rather than the Antitrust Division takes action to block a transaction. While noting criticisms of the time it takes to litigate before the Commission, the AMC raised broader concerns which flow from the fact that DOJ preliminary and permanent injunction proceedings in merger cases are consolidated, thus putting DOJ to its ultimate burden of proof before a court if a merger is to be blocked.[5]:

Footnote continued from previous page
Rules of Practice, 73 Fed. Reg. 58832, 58833 (proposed Oct. 7, 2008) (footnotes omitted).

[4] *See* Statement of Commissioners, Harbour, Liebowitz and Rosch, On the Issuance of the Section 2 Report By the Department of Justice (Sept. 8, 2008).

[5] "[T]he FTC and the DOJ take different approaches when seeking an injunction from a court to block a merger, in part because of the different statutes governing their authority in such instances. The DOJ generally seeks a permanent injunction (along with a preliminary injunction) against mergers it believes are anticompetitive, resolving the question fully and completely in a single proceeding before a judge. If the DOJ fails to obtain the permanent injunction it seeks, the parties can consummate the merger without further antitrust litigation (assuming the DOJ does not appeal). In

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The AMC made two recommendations in this regard:

> 24. The Federal Trade Commission should adopt a policy that when it seeks injunctive relief in Hart-Scott-Rodino Act merger cases in federal court, it will seek both preliminary and permanent injunctive relief, and will seek to consolidate those proceedings so long as it is able to reach agreement on an appropriate scheduling order with the merging parties.
>
> 25. Congress should amend Section 13(b) of the Federal Trade Commission Act to prohibit the Federal Trade Commission from pursuing administrative litigation in Hart-Scott-Rodino Act merger cases**.**

Antitrust Modernization Commission, Report and Recommendations, at 131.

Footnote continued from previous page
contrast, the FTC seeks only preliminary injunctions—not permanent injunctions—in federal district court when challenging mergers it believes are anticompetitive. The FTC's approach permits it to seek permanent relief in administrative Part III proceedings if it fails to obtain a preliminary injunction. Thus, although the parties can consummate the proposed transaction (absent a stay), antitrust litigation may continue for the merged parties while the FTC pursues permanent relief via Part III proceedings. Such administrative litigation can be lengthy, leaving a completed transaction in the limbo of litigation for over a year. In addition, the statutory standard governing when the FTC is entitled to preliminary relief is arguably more favorable to the government than is the general standard governing motions by the DOJ for preliminary relief.

"Some believe that these differences in DOJ and FTC practices and standards result in mergers' [sic] being treated differently depending on which agency is involved. . . . Regardless of the degree of effect, these factors have led some knowledgeable practitioners to believe that companies whose mergers are investigated by the FTC are at a disadvantage as compared with those investigated by the DOJ. Any such differences—real or perceived—can undermine the public's confidence that the antitrust agencies are reviewing mergers efficiently and fairly and that it does not matter which agency reviews a given merger. "

Antitrust Modernization Commission, Report and Recommendations, at 130-31 (April 2007) (emphasis added).

Thus, the AMC opted for elimination of the Part 3 process in merger cases to avoid undermining public confidence in the fairness of the process, irrespective of which enforcement agency launched a merger challenge.

We do not agree that Congress should amend Section 13(b) in this fashion. However, it is worth recalling that the AMC was not the first to articulate these concerns. In 1995, when the Commission adopted its Policy Statement articulating five factors that it would consider in deciding whether to continue with an administrative trial after the denial of its motion for preliminary injunction, it did so in part to respond to similar concerns. The Commission stated:

> "Some commentators have suggested that because the Department of Justice lacks the ability to challenge mergers in the administrative process, the Commission's litigation should be confined to the federal courts in order to bring the two agency's enforcement powers in line with one another. The problem with such an approach is that the significant benefits of administrative litigation outlined above would be lost in such a change in enforcement policy. The business community would be denied the guidance provided by merger decisions based on a complete analysis of a full evidentiary record, and Congress' vision of the FTC's central role in merger enforcement would be subverted."[6]

Under the current rules of practice implementing the 1995 Policy Statement, when the Commission has lost a preliminary injunction proceeding, it removes the matter from Part 3 adjudication and engages, without presumptions one way or the other, in a careful case-by-case review of the adverse judicial ruling before deciding whether to continue the case. The matter is withdrawn from adjudication, and scheduling

[6] This Policy Statement articulated five factors that the Commission would address in deciding whether to continue administrative litigation: (1) the factual findings and conclusions of law of the district court or any appellate court; (2) any new evidence developed during the course of the preliminary injunction proceeding; (3) whether the transaction raises important issues of fact, law, or merger injunction policy that need resolution in administrative litigation; (4) an overall assessment of the costs and benefits of further proceedings; and (5) any other matter that bears on whether it would be in the public interest to proceed with the merger challenge. Administrative Litigation Following the Denial of a Preliminary Injunction: Policy Statement, 60 Fed. Reg. 39,741, 39,743 (Aug. 3, 1995).

orders presumably suspended while the Commission considers the court's ruling. In the ten years following adoption of the 1995 Policy Statement, the Commission elected not to pursue an administrative trial in each and every instance where its motion for a preliminary injunction had been denied.[7]

Under the proposed rule change, the matter is not automatically withdrawn from adjudication and the burdens of that litigation continue unless and until the Commission decides otherwise. The Notice is silent with respect to whether any or all of the five factors will continue to be considered. However, they are implicitly rendered irrelevant by the unqualified assertion that "the norm" henceforth will be continuation of the Part 3 litigation. 60 Fed. Reg. at 58,837.

The FTC's expertise in deciding merger cases is given as the explanation for establishing this presumption in favor of continuing Part 3 litigation. However, in adopting the 1995 Policy Statement, the Commission noted that *only in some cases*, would its expertise warrant continuing with a Part 3 litigation. It clearly rejected any presumption in favor of continuation of the Part 3 litigation when confronted with an adverse preliminary injunction proceeding:

> [T]he determination to continue a merger challenge in administrative litigation is not, and cannot be, either automatic or indiscriminate. In any given case, the evidence, arguments, and/or opinion from the preliminary injunction hearing may, or may not, suggest that further proceedings would be in the public interest. The Commission's guiding principle is that the determination whether to proceed in administrative litigation following the denial of a preliminary injunction and the exhaustion or expiration of all avenues of appeal must be made on a case-by-case basis.

60 Fed. Reg. 39,741.

Two years ago, Commissioner Rosch told the Antitrust Modernization Commission:

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[7] "Since 1995, the FTC has had in place a policy that narrowly restricts its ability to pursue administrative litigation following a loss in federal court, and the FTC has never done so since the policy statement was issued." Statement of Thomas B. Leary Before The Antitrust Modernization Commission (December 1, 2005).

> ". . . I think the perceived difference between DOJ and FTC enforcement posed by the possibility that the FTC will initiate administrative proceedings after a federal court denies a preliminary injunction is mostly theoretical. The FTC hasn't done that for more than 15 years (the *Donnelley* case in 1990 was the last time),[5] and I see no real threat that it will do it in the future, *absent extraordinary circumstances*. . . . I think it would be a mistake to strip the Commission of the power to send matters to Part 3 *if those extraordinary circumstances exist*."

Remarks Before the Antitrust Modernization Commission, J. Thomas Rosch, Commissioner, Federal Trade Commission (June 8, 2006) (emphasis added).

We respectfully submit that those who believe that Part 3 litigation in merger cases is worth retaining best defend that position by leaving unchanged the current practice articulated in the 1995 Policy Statement and its implementing rules of practice. There is no need for erecting a "norm" which presumes the continuation of an administrative litigation. Such a view is far removed from that articulated by a unanimous Commission in 1995 as well as the view expressed by Commissioner Rosch a decade later. Most unfortunately, articulating such a "norm" leaves the impression that the Commission will take little or no notice of what preliminary injunction courts have to say.

For these reasons, the Commission should leave Rule 3.26 unchanged.

II. Expediting Part 3 Trials Will Not Prevent Abandonment of Transactions Which are Preliminarily Enjoined

One reason advanced by the Commission for the proposed rule changes is that "in merger cases . . . protracted proceedings may result in parties abandoning transactions before their antitrust merits can be adjudicated." 73 Fed. Reg. 58832 (Oct. 7, 2008). However, given the six to nine months it often takes to complete the HSR Second Request Process, plus the time for the preliminary injunction proceeding, the administrative trial, an appeal to the Commission, and possible appellate review of the Commission's decision, parties to a deal will continue to abandon it if they lose at the preliminary injunction stage.

The conditions which lead to "yes" in the context of a merger or acquisition agreement are not static. It is a rare seller whose business can withstand the destabilizing effect of years of uncertainty regarding its future ownership during the pendency of an FTC Part 3 proceeding. We are not aware of a

single instance in which the merging parties, having lost a preliminary injunction proceeding brought by the FTC, tried to preserve their deal while litigating the administrative trial on the merits before the Commission. To our knowledge, this has not happened since the adoption of the Hart-Scott-Rodino Act, and it is unlikely to occur in the future even if the proposed rule changes are adopted.

Under the Commission's proposal, it still would take something like three years from the time a deal is announced until the Commission issues its decision. An additional year or so would be necessary if the parties lose before the Commission and seek appellate court review.[8] Even if the Commission were to adopt our suggestion, infra, p. 9, to require issuance of its own decision within six months after the ALJ rules, parties to a preliminarily enjoined merger would still be looking at two years or more before it was clear whether they could consummate their transaction.

While an effort to expedite administrative proceedings is laudable, the Commission should not encourage an unrealistic sense that the currently proposed rule changes will enable parties to litigate Part 3 merger cases in circumstances where they uniformly have been abandoned in the past.

It will remain the case that "[t]he need for caution in issuing a preliminary injunction is particularly important in the merger and acquisition context, because 'the grant of a temporary injunction in a Government antitrust suit is likely to spell the doom of an agreed merger.'" *FTC* v. *Foster*, No. CIV 07-352 JBACT, 2007 WL 1793441, at *51 (D.N.M. May 29, 2007) (quoting *FTC* v. *Great Lakes Chem. Corp.*, 528 F. Supp. 84, 86 (N.D. Ill. 1981)). *See also, FTC* v. *Arch Coal, Inc.*, 329 F.Supp.2d 109, 116 (D.D.C. 2004)

III. The Role of an Independent Administrative Law Judge in Part 3 Proceedings

In the name of expediting Part 3 proceedings, the Commission proposes several changes which limit the role of the Administrative Law Judge ("ALJ"). Again, we urge institutional caution as the Commission considers whether to adopt these changes.

[8] In addition to the time-consuming Second Request process, the preliminary injunction litigation typically take several months, the ALJ's decision would issue a year later, assuming no extensions of time, and the Commission typically takes 18 months to issues its own ruling after the Administrative Law Judge has ruled. Geoffrey D. Oliver & Robert C. Jones, "FTC Rules Change Would Squeeze Litigants," Competition Law 360 (October 10, 2008).

More specifically, several proposed rule changes inject the Commission into areas previously considered the domain of an independent ALJ:

1. The Commission should review carefully those comments which raise questions as to whether respondents may be unfairly limited in their pretrial rights by the universally applied shortened time periods which are proposed. Perhaps it might be wiser to leave it to the independent Administrative Law Judge ("ALJ") supervising the matter to tailor pretrial procedures to the needs of individual cases and litigants, subject to an overall time limit for completion of the trial itself.

2. The proposal to amend Rule 3.22 would require all dispositive pretrial motions to be disposed of by the Commission itself, rather than an independent ALJ, as is the current practice.

3. The proposal to amend Rule 3.42 authorizes the Commission or a single Commissioner to preside over pretrial proceedings before transferring the proceedings to an independent ALJ.

4. The proposal to amend Rule 3.42 also authorizes the Commission or a single Commissioner to preside over the administrative trial itself.

For much of its history, concerns have been expressed about the Commission's dual prosecutorial and judicial roles in finding "reason to believe" that a complaint should issue and thereafter making the ultimate post-trial decision on the validity of that complaint. While those concerns are understandable, we do not share them. However, under the current rules, there is at least a significant passage of time between when the Commission issues its administrative complaint and ceases its prosecutorial role and the time when it begins to function as appellate adjudicator. The more the Commission invades what has heretofore been the province of an independent ALJ, the more it lends credence to concerns regarding the fairness of the Part 3 adjudicative process.

We do not address whether the Commission lacks the statutory authority to take on roles previously left to an independent ALJ, or whether these changes raise due process questions.[9] Rather, our point is that as a

[9] Commissioner Rosch's decision declining to disqualify himself from sitting as the ALJ in the Inova matter fairly states the argument in support of the Commission's authority to take such actions. *In re Inova Health Sys. Found. and Prince William Hosp. Sys., Inc.*, No. 9326 (F.T.C. May 29, 2008) (order certifying Respondents' Motion to Recuse to the Commission and accompanying statement by Commissioner Thomas J. Rosch), available at http://www.ftc.gov/os/adjpro/d9326/080529ordercert.pdf.

prudential matter, the Commission's interest in preserving its role as a fair-minded expert administrative adjudicator is best served if it abstains from exploring the outer limits of what is statutorily and constitutionally permissible.

IV. Time Limits for Commission Decision

The proposed changes to Part 3 do not address the absence in the present rules of any limitation on the Commission's time to render a decision in the event of an appeal from the ALJ's decision. It has been said that since 2000, it has taken the Commission an average of 18 months to render its own decision, even in those cases where no complicated remedial issues requiring further proceedings were involved.[10] This hole should be plugged with a rule change requiring the Commission to render its decision within six months of the ALJ's ruling, except in narrow and unusual circumstances.

[10] Oliver & Jones, supra, n.8.

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Blumkin, Linda #538311-00002

This is a Comment on the **Federal Trade Commission** (FTC) Proposed Rule: **Rules of Practice**

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Comment

I have been a practitioner and teacher of antitrust law from my graduation from
Harvard Law School in 1967 to my recent retirement as a law firm partner
specializing in the antitrust aspects of mergers and acquisitions. A highlight of my
career was my stint from 1977-79 as an Assistant Director for General Litigation in
the FTC's Bureau of Competition.

The FTC that I knew, respected (and, indeed, loved) during my time there and for
many years thereafter was an essentially nonpartisan institution manned to a great
extent by career employees of unquestionable dedication and devotion to serving
the competition mission with fairness and impartiality, and overseen by senior
managers and commissioners who largely shared that public service mindset.

One of the mainstays of FTC practice was the existence of the administrative law
judge who managed the administrative hearing process. The ALJ's actions were, of
course, subject to Commission review and the ultimate Commission decision, but the
ALJ's status – at one remove from the fray, and typically with the respect earned
through years of experience at this important work -- provided both the appearance
and reality of impartiality. And what can be more important than

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