The Clayton and FTC Acts: 100 Years of Looking Ahead
Clayton Act 100th Anniversary Symposium
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Keynote Remarks of Commissioner Terrell McSweeny[1]

Good afternoon. I am happy to be here today to recognize and celebrate the 100th Anniversary of the Clayton Act. I would like to thank the American Bar Association for hosting this symposium.

As I'm sure you are all aware, this year also marks the 100th anniversary of the Federal Trade Commission. This is not an historical accident. The FTC Act and the Clayton Act are siblings born out of the same political and economic climate. So today I'm going to talk about the history of the FTC Act and the Clayton Act – which represent an important shift in the approach to antitrust enforcement in this country – and why a system designed a hundred years ago is still the right approach to protecting consumers and competition.

First – the history.

You're likely already familiar with the historical events which led to the passage of the FTC Act and the Clayton Act. But for those who aren't – here's the cliff notes version: Congress passed the Sherman Act in 1890 to safeguard competition and to prevent the consolidation of economic power. But by the second decade of the 20th century there was a growing recognition that the Sherman Act alone was unequal to the task.[2]

A number of the government's challenges to the trusts that dominated the U.S. economy had failed under the Sherman Act. For example, the government challenged the Knight Company's purchase of four other sugar refineries, which gave Knight control of over 98 percent of domestic sugar refining capacity. But the Supreme Court held that Knight's control over refining would have only an "indirect" effect on trade, "however inevitable and whatever its extent," and was thus outside the purview of the Sherman Act.[3]

By 1914, Senator William Thompson (Kansas) found that over 9,877 previously independent companies had combined to form 628 trusts – with the greatest period of consolidation occurring *after* the enactment of the Sherman Act.[4]

During the election of 1912, combating the economic power of trusts was a significant campaign issue. So in 1913, newly elected President Woodrow Wilson used his first annual

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[1] The views expressed in this speech are my own and do not necessarily reflect those of the Commission or any other Commissioner.
[2] As Kinter's treatise on antitrust law puts it, "[i]ndifference and failure characterized early United States antitrust policy." Bauer, Page, Kinter & Kratzke, 3-18 Fed. Antitrust Law § 18.2.
[3] *United States v. E. C. Knight Co.*, 156 U.S. 1, 16 (1895).
[4] *See* 1-9 Antitrust Laws and Trade Regulation, 2nd Ed. § 9.03; Bauer, Page, Kinter & Kratzke, 3-18 Fed. Antitrust Law § 18.2.

address to Congress to urge legislation "to prevent private monopoly more effectually than it has yet been prevented."[5] The following month, Wilson delivered a special address on trusts and monopolies to a joint session of Congress, in which he called for two things: (1) a "more explicit legislative definition of the policy and meaning of the existing antitrust law," and (2) an "interstate trade commission."[6] Congress answered the President's first call by passing the Clayton Act and his second by passing the Federal Trade Commission Act – significantly restructuring the American approach to antitrust and leading the world in adopting a more modern approach to it.

Forward-looking Antitrust Enforcement: Incipiency as a Motivating Principle

One of the chief shortcomings of the Sherman Act was that it was effectively only backward-looking, particularly in the merger context. As Senator Henry Hollis of New Hampshire noted in 1914, the Sherman Act "does not become effective until a monopoly is full grown, in full panoply."[7] Thus Congress took the somewhat unusual step – through both the FTC Act and the Clayton Act – of enacting legislation that was *forward*-looking and designed to preempt anticompetitive practices in their incipiency.[8] Although we may take that fact for granted today, this represented a pivotal moment in the birth of modern antitrust enforcement.

Ex ante rules are a common feature of regulatory regimes. But forward-looking *enforcement* presents unique challenges. This is particularly true when the conditions and practices capable of producing the harm to be protected against are as wide-ranging as those in the antitrust context.

One hundred years ago, Congress struggled with these issues in drafting the Clayton Act and the FTC Act. The solution Congress arrived at with the Clayton Act was to define a number of specific agreements or business practices to be unlawful where their effect "*may* be to substantially lessen competition or tend to create a monopoly in any line of commerce."[9]

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[5] State of the Union Address: President Woodrow Wilson, Dec. 2, 1913, *as quoted in* William Kolasky, *George Rublee and the Origins of the Federal Trade Commission*, 26 ANTITRUST 1, at 106 (Fall 2011).

[6] Address by President Woodrow Wilson Before a Joint Session of Congress on Additional Legislation for the Control of Trusts and Monopolies, Jan. 20, 1914, *as quoted in* William Kolasky, *George Rublee and the Origins of the Federal Trade Commission*, 26 ANTITRUST 1, at 106 (Fall 2011).

[7] 51 Cong. Rec. 11,103 (1914), *as quoted in* William Kolasky, *George Rublee and the Origins of the Federal Trade Commission*, 26 Antitrust 1, at 108 (Fall 2011).

[8] *See, e.g., Standard Oil Co. v. Fed. Trade Com.*, 282 F. 81, 86 (3d Cir. 1922) ("[T]he Clayton Act, which is a part of the scheme of laws against unlawful restraints and monopolies, does not want for its operation until monopolies have been created and restraints of trade established, but seeks to reach them in their incipiency and stop their growth"); *V. Vivaudou, Inc. v. FTC*, 54 F.2d 273, 275 (2d Cir. 1931) ("[I]t has been held that the purpose of the Clayton Act is to prevent at incipiency forms of combination which the Sherman Law might not reach until the evil existed."); *Judson L. Thomson Mfg. Co. v. FTC*, 150 F.2d 952, 955 (1st Cir. 1945) ("The Clayton Act sought to reach the agreements embraced within its sphere in their incipiency.").

[9] Clayton Act §§ 2, 3, 7 (1914) (emphasis added). The phrase "to substantially lessen" appears five times in the text of the original Clayton Act (once in § 2, once in § 3, and three times in §7). The 1950 Celler-Kefauver Act, in a halfhearted attempt to correct the split infinitive, revised three of the five instances of this phrase to "substantially to lessen."

Congress's choice of the word "may" signified a recognition of the imprecision of the task at hand. As the Supreme Court held in *Brown Shoe*, "Congress used the words '*may be*' … to indicate that its concern was with probabilities, not certainties."[10] Congress could have simply prohibited price discrimination, exclusive dealing, and mergers altogether and in all circumstances. But, as Senator Thompson explained at the time of its passage, the Clayton Act's purpose was to protect the public "from extortion practiced by the trust, but at the same time not to take away from it any advantages of cheapness or better service which honest, intelligent cooperation may bring."[11]

At the opposite extreme, Congress could have required proof that a particular restraint would harm competition before it could be declared unlawful – or, at the very least, established a more stringent standard than "may." But Congress recognized 100 years ago what is still true today – namely that determining the effect of an agreement or business practice is an inherently predictive exercise. In order for enforcement to be both forward-looking and meaningful, we must be willing to accept the possibility of the occasional false positive.

The Supreme Court has time and again recognized the centrality of incipiency to the Clayton Act.[12] In *United States v. Philadelphia National Bank*, Justice Brennan wrote, "the amended section 7 was intended to arrest anticompetitive tendencies in their 'incipiency.'"[13] And in *United States v. E. I. du Pont de Nemours & Co.*, the Supreme Court wrote that Section 7 of the Clayton Act was "designed to arrest in its incipiency not only the substantial lessening of competition from [an acquisition,] but also to arrest in their incipiency restraints or monopolies in a relevant market which, as a reasonable probability, appear at the *time of suit* likely to result from the acquisition by one corporation of all or any part of the stock of any other corporation."[14]

The concept of incipiency was given concrete effect in the Section 7 context by the Hart-Scott-Rodino Act of 1976, which provides the FTC and the Department of Justice with information about mergers above certain thresholds and time to investigate their competitive effects before the parties are permitted to close. The HSR Act reflected an understanding that goes to the heart of the importance of incipiency – namely that it is difficult to undo the harm caused by anticompetitive acts that remove a competitor from the market.

Incipiency was also central to the Federal Trade Commission Act, and in particular, the Commission's Section 5 authority. As originally contemplated, the "interstate trade commission" was to be only a sunshine agency with no actual enforcement powers. Concern arose, however, that it would likely prove "impossible" to define all the potential unfair methods of competition in the draft Clayton Act in a manner that courts would find acceptable. To

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[10] *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962).
[11] 51 Cong. Rec. 14200, 14222 (1914) (statement of Sen. Thompson).
[12] In certain past cases, such as *U.S. v. Von's Grocery Co.*, 384 U.S. 270 (1966), the Supreme Court has also invoked the concept of "incipiency" to justify halting perceived tends towards concentration in particular industries in their very early stages. Although it is important to be mindful of trends towards consolidation in industries, *Von's Grocery* took that principle too far by applying it to a merger in which the parties' combined market share was just under 8 percent. *See id.* at 277. Trends towards consolidation at such early stages do not present cause for competitive concern.
[13] *United States v. Philadelphia National Bank*, 374 U.S. 321, 362 (1963).
[14] *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 589 (1957) (emphasis added).

address this, it was urged that a strong agency be created with the authority and expertise to identify unfair methods of competition so that it could "nip restraint of trade in the bud."[15]

In the interest of time, I'm going to fast forward a few decades through some very important Clayton Act and antitrust evolutions: the 1950 Celler-Kefauver amendments, the ascendance of the Chicago School's economic analysis, the *General Dynamics* case, and the promulgation of the Horizontal Merger Guidelines. We're all relatively familiar with these more modern parts of American antitrust history. I think what it is important to recognize is that two things have remained true over time: (1) that the antitrust framework enacted in 1914 in the form of the Clayton Act and FTC Act have proven adaptable to changing markets and our evolving understanding of competition and (2) that antitrust enforcement remains an inherently predictive, forward-looking exercise. Because it is, it is essential that enforcers avoid, as our current Competition Bureau Director Debbie Feinstein has said, "veering into mere speculation."[16] We do that by focusing on the facts.

The Modern Approach to Clayton Act Enforcement

Today, there is general agreement that whether a particular merger or conduct is likely to harm competition is fundamentally an economic question. The FTC and Department of Justice have worked hand in hand to help develop the modern approach – basing enforcement decisions on the specific facts of each case and the best available economic evidence.

Of course, precisely what the best available economic evidence is will vary from case to case. In some matters, it might be a merger simulation or a natural experiment based on a significant market event. But I think it is important to recognize that party documents and testimony by knowledgeable industry participants are themselves important pieces of economic evidence. The best available economic evidence of the likely competitive effect of some practice might well be a one-page email from an executive explaining why the company should adopt the practice at issue.

Overall, the influence of the economic approach to antitrust law has been important and valuable. Precise and sophisticated econometric models can be incredibly valuable tools, but sufficiently reliable data is frequently unavailable and in other cases features of the market may limit the usefulness of econometric modeling. In those cases, it is important not to ignore the wide array of other types of economic evidence that can demonstrate likely competitive effects, such as party documents, customer testimony, and information from industry participants and observers. And indeed, the agencies' Horizontal Merger Guidelines support this approach.[17]

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[15] George Rublee, *as quoted in* William Kolasky, *George Rublee and the Origins of the Federal Trade Commission*, 26 ANTITRUST 1, at 108 (Fall 2011).

[16] Deborah L. Feinstein, Director, Bureau of Competition, Fed. Trade Comm'n, The Forward-Looking Nature of Merger Analysis, Address at the U.S. Advanced Antitrust Conference, Feb. 6, 2014, at 3, *available at* http://www.ftc.gov/system/files/documents/public_statements/forward-looking-nature-merger-analysis/140206mergeranalysis-dlf.pdf.

[17] The Horizontal Merger Guidelines refer time and again to the fact that the Agencies proceed on the basis of that evidence which is "reasonably available and reliable." U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, 2010 HORIZONTAL MERGER GUIDELINES §§ 1, 2, 2.2, 4.1.3, 4.2.1, 5, 6.1, 9 (2010).

Insisting to the contrary that econometric modeling must "prove" the likelihood of consumer harm may indeed reduce the possibility of false positives in antitrust enforcement by making enforcement less likely. But false negatives in enforcement – those cases that should be brought, but are not – can be every bit as harmful to consumer welfare as false positives. It was, after all, concern with insufficient antitrust enforcement that prompted Congress to pass the Clayton Act and the FTC Act in the first place.

As enforcers our job continues to be to assess the dimensions of competition and the impact of an acquisition on them. The time-tested strength of the framework we're celebrating today is that it allows us to acknowledge that market and competitors can and do change over time. Indeed, last year the Commission unanimously decided to close its investigation of Office Depot's proposed acquisition of Office Max, despite having successfully challenged Staples' proposed acquisition of Office Depot in 1997.[18] The FTC's investigation revealed that "[t]he current competitive dynamics are very different" than in 1997, with customers increasingly turning to mass merchants and online retailers for their office supply needs.[19]

It can be tempting to believe a well-established industry will continue to function as it has been for years or that a highly dynamic industry is changing so rapidly that a merger can't stifle competition. But we shouldn't.[20] As the court in *Bazaarvoice* noted, the task of courts is "to assess the alleged antitrust violations presented, irrespective of the dynamism at the market at issue."[21]

Congress designed the Clayton Act to keep up our dynamic economy. At the same time, it also created the Federal Trade Commission because it saw the value in a specialized independent agency that focuses on competition policy. I'm going to wrap up my remarks today by suggesting that this framework for antitrust remains important. The Commission's opinions have been important in providing guidance to analyze complex merger cases.[22] The detailed fact-finding, analysis of economic evidence, and the thoroughness of opinions produced by the FTC's administrative process provide a valuable record for courts and industry participants. For example, the Sixth Circuit, in its *Promedica* decision earlier this year, commended the FTC for its analysis of the merger as "comprehensive, carefully reasoned, and supported by substantial evidence in the record."[23]

The FTC also makes use of a variety of tools beyond administrative proceedings to examine the competitive benefits and harms of particular practices and to better understand

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[18] *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997).
[19] Fed. Trade Comm'n, Statement of the Commission Concerning the Proposed Merger of Office Depot, Inc. and OfficeMax, Inc., FTC File No. 131-0104 (Nov. 1, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/closing_letters/office-depot-inc./officemax-inc./131101officedepotofficemaxstatement.pdf.
[20] *See, e.g.*, Deborah L. Feinstein, Director, Bureau of Competition, Fed. Trade Comm'n, The Forward-Looking Nature of Merger Analysis, Address at the U.S. Advanced Antitrust Conference, Feb. 6, 2014, at 2-3, *available at* http://www.ftc.gov/system/files/documents/public_statements/forward-looking-nature-merger-analysis/140206mergeranalysis-dlf.pdf.
[21] *United States v. Bazaarvoice, Inc.*, 2014 WL 203966, 260 (N.D. Cal.).
[22] *See* Fed. Trade Comm'n, Administrative Litigation Following the Denial of a Preliminary Injunction: Policy Statement, 60 Fed. Reg. 39,741, 39,743 (Aug. 3, 1995).
[23] *ProMedica Health Sys. v. FTC*, 749 F.3d 559, 573 (6th Cir. 2014).

competitive conditions in particular industries. These tools include workshops, reports, 6(b) studies, and public advocacy, to name just a few. For example, the FTC has used a number of its tools in examining reverse payment settlements by conducting extensive research and issuing numerous reports and studies to supplement enforcement efforts in the area.[24] The FTC is also making use of multiple tools to learn how patent assertion entities (PAEs) do business and to develop a better understanding of how they affect innovation and competition.

In addition, this year the FTC held workshops on conditional pricing practices, health care competition, and naming of follow-on biologics, and hosted our Seventh Annual Microeconomics Conference. The FTC also regularly uses its 6(b) authority to conduct retrospective studies, such as merger and divestiture retrospectives. These studies enhance the agency's expertise, contribute valuable information to the public record, and guide the agency's enforcement efforts – enabling the FTC to predict future competitive effects more accurately.

The Evanston Northwestern Hospital case provides an example of the value of the administrative process as a complement to the FTC's other tools in improving the accuracy of forward-looking enforcement to the benefit of consumers. Prior to Evanston, the FTC and DOJ had lost seven straight hospital merger challenges. The district courts in those cases generally gave little weight to testimony about the effect of consolidation on managed care organizations and rejected the agencies' proposed geographic market definitions. In 2002, then-Chairman Tim Muris announced that the FTC would undertake a retrospective review of hospital mergers.[25] The FTC used public data as well as data collected pursuant to the FTC's 6(b) authority to examine the effects on price and quality of a number of consummated hospital mergers. The study found that certain hospital mergers were in fact leading to significantly higher prices, thereby demonstrating that the approach of the courts in this area had been flawed.[26] In 2004, the FTC issued an administrative complaint challenging Evanston's consummated acquisition of Highland Park Hospital.[27] The administrative law judge devoted eight weeks to the trial, carefully considering the role of managed care organizations as well as the proper approach to geographic market analysis before finding that the transaction violated Section 7 of the Clayton Act. The Commission affirmed the ruling in 2007.[28] The FTC's case in *Evanston* has provided the foundation for the FTC to successfully block a series of anticompetitive mergers in the

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[24] *See, e.g.*, Fed. Trade Comm'n, Pay-For-Delay: How Drug Company Pay-Offs Cost Consumers Billions (Jan. 2010) at 2, *available at* http://www.ftc.gov/os/2010/01/100112payfordelayrpt.pdf; Fed Trade Comm'n, Pay for Delay Media Resources, *available at* http://www.ftc.gov/news-events/media-resources/mergers-and-competition/pay-delay.

[25] *See* Timothy J. Muris, Everything Old is New Again: Health Care and Competition in the 21st Century, Speech at the 7th Annual Competition in Health Care Forum, Chicago, Illinois (Nov. 7, 2002), *available at* http://www.ftc.gov/speeches/muris/murishealthcarespeech0211.pdf.

[26] *See* Steven Tenn, *The Price Effects of Hospital Mergers: A Case Study of the Sutter-Summit Transaction* (Fed. Trade Comm'n Bureau of Economics, Working Paper No. 293, 2008), *available at* http://www.ftc.gov/be/workpapers/wp293.pdf; Michael G. Vita & Seth Sacher, *The Competitive Effects of Not-for-Profit Hospital Mergers: A Case Study*, 49 J. INDUS. ECON. 63 (2001).

[27] Complaint, In the matter of Evanston Nw. Healthcare Corp., FTC Docket No. 9315 (Feb. 10, 2004), *available at* http://www.ftc.gov/os/caselist/0110234/040210emhcomplaint.pdf.

[28] *See* Fed. Trade Comm'n, FTC Issues Final Opinion and Order to Restore the Competition Lost in Evanston Northwestern Healthcare Corporations Acquisition of Highland Park Hospital, *available at* http://www.ftc.gov/news-events/press-releases/2008/04/ftc-issues-final-opinion-and-order-restore-competition-lost.

hospital space over the last seven years – and is a case study in the value of having the Commission study and then bring to bear its expertise on thorny competition issues.

Forward-looking antitrust enforcement is as important and necessary today as it was in 1914. Over the last century, enforcement under the Clayton Act has shifted away from structural presumptions towards consideration of a wider range of relevant economic factors and increasingly sophisticated econometric modelling. I'll conclude today with this observation: given the increase in both the importance and the complexity of economic analysis, the value of an independent and specialized antitrust agency is perhaps even greater than it was when the Clayton Act was passed and the FTC was founded 100 years ago.

Thank you again to the American Bar Association for having me today.