Testimony
United States House of Representatives, Committee on Small Business
"Small Business Competition Policy: Are Markets Open for Entrepreneurs?"
September 25, 2008

Jonathan L. Rubin
Partner, Patton Boggs LLP
Washington, D.C.

PREPARED STATEMENT

Before the

COMMITTEE ON SMALL BUSINESS
UNITED STATES HOUSE OF REPRESENTATIVES

by

Jonathan L. Rubin*

Washington, D.C.
September 25, 2008

I. Introduction

Madam Chairwoman, Ranking Member Chabot, and members of the Committee, I am Jonathan Rubin, an antitrust lawyer with the firm of Patton Boggs here in Washington, D.C. and one of about a hundred members of the Advisory Board of the non-profit organization, American Antitrust Institute. For information about the American Antitrust Institute, visit www.antitrustinstitute.org. I am pleased to appear before you to consider U.S. competition policy as it affects the opportunities for entrepreneurial small businesses.

My task today is limited to presenting the major recommendations of relevance that appear in the upcoming report of the American Antitrust Institute ("AAI"), entitled "The Next Antitrust Agenda: The American Antitrust Institute's Transition Report on Competition Policy to the 44th President." The report will be published as a 430-page paperback approximately October 1, 2008 and will be provided to the Committee. The

---

* These remarks reflect the position of the author or the American Antitrust Institute only, and not Patton Boggs LLP nor any of its clients.

AAI Transition Report sets forth a series of antitrust and competition policy recommendations for consideration by the next administration.

The antitrust laws are among America's greatest contributions to the field of political economy. The AAI is made up of a diverse and bipartisan group of antitrust practitioners, academics, former government officials, and interested citizens and businesses, folks that work in, write about, and follow antitrust. I can assure you that they are almost never in complete agreement on a particular issue, but that they share a conviction that government ought to promote competition and free markets, and that the nation's antitrust laws can and do precisely that, if they are aggressively and creatively employed.

I am honored to have been asked by the AAI to appear before you today to discuss the AAI Transition Report and those of its recommendations that are most vital for opening markets for entrepreneurs and to the nation's community of small businesses, what Chairwoman Velazquez has called, "the lifeblood of the American economy."[1]

II. A Centrist View of Competition

Believing in competitive free markets is one thing, but the facts on the ground may be very different.

Two opposing forces constantly pull on the economy. On one side is the urge by government to control the private sector through regulation. On the other side is the strong belief that free markets and laissez faire policies foster efficient economic growth and protect the private sector from counterproductive governmental control.

Neither path provides a complete policy prescription.

Over-regulation protects inefficient competitors and operates as a drag on the economy.

Complete laissez faire risks a lawless jungle operating without regard for justice.

Antitrust occupies the middle ground between these polar possibilities, and frequently offers nuanced instruments with which to steer markets back to an even keel when market failures occur. It is in this middle ground that opportunities for small business are often created—or destroyed.

---

[1] Statement of the Hon. Nydia M. Velazquez, Chairwoman, United States House of Repetitives, Committee on Small Business, Full Committee Hearing: "The Role of Small Businesses in Stimulating the Economy," (April 24, 2008).

As the equilibrating force between over-regulation and blind faith in an unregulated free-market, antitrust is most effective when evenhandedly applied. It functions best as a lighter, case-by-case form of market regulation that is neither too tolerant of anticompetitive restraints nor too burdensome on productive commercial activity.

III. A Competition Manifesto for Small Business

This inherent need for balance in antitrust is reflected in the positions advocated in the AAI Transition Report. The report embarks from an introductory "Manifesto for Competition," the most important precepts of which for maintaining the openness of markets for entrepreneurs are that

- Competition promotes allocative efficiency by driving prices toward the cost of production;
- Competition on the merits—free of anticompetitive impediments—creates opportunities for entrepreneurs to enter markets and promotes self-determination for all Americans;
- Competitive markets allow for and encourage the rapid introduction of innovation into the stream of commerce;
- Competition gives consumers choice and variety and increased control over their day-to-day lives; and,
- Competition yields even greater consumer benefits when markets are served by more than a few large oligopolists, but also include numerous small businesses.

Many kinds of anticompetitive conduct proscribed by the antitrust laws foreclose opportunities for would-be entrepreneurs with meritorious products, services or innovations. The preservation of our nation as "the land of opportunity" is and should continue to be, therefore, an important foundational goal of antitrust.

IV. The Report's Organization and Recommendations

The AAI Transition Report consists of three main sections. The first section discusses the topics of cartels, monopoly, buyer power, mergers, institutions, and private litigation.

The second part deals with four specific sectors of the economy in greater depth—media, food and agriculture, health care, and energy.

The last part summarizes the report's 127 major recommendations.

The AAI recommendations bearing most on the prospects for open markets for entrepreneurs are these:

1. The enforcement agencies and courts should adopt a more aggressive posture against exclusionary conduct by dominant firms and employ and revitalize the anti-monopolization provision of Section 2 of the Sherman Act;

2. Antitrust analysis should recognize the real conditions in commercial markets by accounting for the economic effects of oligopoly, dominant firm exclusionary strategies, informational asymmetries, consumer lock-in, and impediments to competitive after-markets;

3. The scope for dominant firms with control over essential inputs to refuse to deal with their rivals should be limited according to the sound antitrust principles embodied in Section 2 jurisprudence and an appropriately limited but nonetheless viable essential facilities doctrine;

4. Abandon the intellectually bankrupt cost-based tests for antitrust liability for such exclusionary strategies by dominant firms as bundling and loyalty discounting, which make it difficult or impossible for single-line sellers to compete with multi-line sellers, or smaller capacity sellers to compete with larger capacity rivals;

5. Sharpen the analysis of exclusive agreements by dominant firms that block access by small businesses to territories or supply chains; and,

6. Recognize the concept of vertical market power, and that

    a. Resale price maintenance (RPM) should revert to be unlawful per se, or a structured rule of reason procedure should be employed that recognizes that intrabrand vertical restraints, exclusive dealing, and RPM, are frequently anticompetitive;

    b. Vertical *buyer* power can be exerted up the chain of distribution to manufacturers (as was the case in *FTC v. Toys-R-Us*); and

    c. Vertical *seller* power can be exerted down the chain of distribution (as occurred in *Dentsply, Inc.*).

Scrutiny of RPM and buyer market power—what the report calls "the new kid on the block"—are especially relevant issues for retail businesses.

One unique contribution of the AAI report of special importance to small and middle size businesses is its emphasis on vertical relationships in which dominant firm market power is projected up or down the chain of distribution.

Rejecting the current mantra that only interbrand competition is worthy of antitrust attention, the AAI believes that in multi-stage distribution chains competition on any level of distribution warrants antitrust protection.

V. The Debate over Section 2

I will conclude with a brief summary of the perspectives of the AAI report on the current issues regarding Section 2 and single-firm conduct.

As a general matter, the AAI applauds and encourages deregulation in industries in which ill-advised and overly intrusive regulatory structures are less efficient than an unregulated free market.

As direct economic regulation is replaced by aspirationally competitive markets, however, antitrust should fill the resulting void, and not be constrained by vestigial immunities and doctrines left over from prior regulated regimes.

Thus, legacy monopolists operating in newly deregulated sectors generally should be subject to monopolization law. In the wake of deregulation, however, the Department of Justice has been stepping down its enforcement of Section 2 and monopolization cases (having brought none in this century) and stepping up its advocacy for a narrower role for Section 2.[2] An attitude that emanates from many quarters these days is that monopoly, far from being an evil, should be defended as the mother of invention and the motivator of risk-taking and hard work. This conflates the concepts of harmful *durable* monopoly, which locks up markets and stifles entry, with temporary *quasi*-monopoly, which motivates firms with temporary monopoly rewards for being innovative or first-to-market, until the natural course of competition brings in rivals and prices are again driven toward competitive levels.

[2] See U.S. Department of Justice, "Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act," (September, 2008), available at: http://www.usdoj.gov/atr/public/reports/236681.pdf. See also Statement of Commissioners Harbour, Leibowitz, and Rosch on the Issuance of the Section 2 Report by the Department of Justice (September 8, 2008), available at: http://www.ftc.gov/opa/2008/09/section2.shtm.

In its current posture,[3] U.S. competition law grants broad freedom to private firms in matters of pricing, product development, and marketing. But, antitrust analysis today constrains itself by relying exclusively on effects based analysis and regarding economic efficiency as its sole legitimate goal, while other putative goals for antitrust policy, such as promoting egalitarian, distributional, or small-business values, are rejected. Under current Section 2 enforcement norms, enforcers stay out of firms' way, and presuppose that in time markets will self-correct, ultimately even ameliorating anticompetitive effects of exclusionary conduct by dominant firms (thereby rendering so-called false positives inherently more costly than false negatives).

Current policy also inhibits itself by taking a dim view of the institutional capacities of the competition authorities, courts, and juries, and regards the demands of administering complicated antitrust rules as overly costly for both institutions and private parties, particularly where intervention is improvidently initiated.

In the view of the AAI Transition Report, the current view worries too much about intervening incorrectly (risking a false positive) and not enough about failing to intervene when necessary (risking a false negative). Antitrust is about prediction, and predictions will sometimes be proven incorrect. AAI sees no reason to suppose *a priori* that false positives are inherently more injurious to an efficient economy than are false negatives.

Finally, current antitrust doctrine is unabashed in its distain for the capabilities of agencies, courts, and lay juries to resolve antitrust disputes correctly, and expansive in its estimation of the costs of administering the resolution of such disputes. AAI believes that this lack of confidence in courts and juries is not justified. Limiting access to the courthouse often disadvantages private antitrust plaintiffs, who are frequently small and medium sized businesses.

In short, current antitrust policy leads to a noninterventionist standard of dominant firm exclusionary conduct that the AAI rejects.

The AAI believes that viewing single-firm issues exclusively through the lens of neoclassical price theory and assessing competitive injury solely in terms of its effect on price or quantity imposes artificial limitations on the scope of the antitrust enterprise. Consumer choice, variety, diversity, quality, convenience, and innovation are all also

---

[3] See Statement of Federal Trade Commission Chairman William E. Kovacic, "Modern U.S. Competition Law and the Treatment of Dominant Firms: Comments on the Department of Justice and Federal Trade Commission Proceedings Relating to Section 2 of the Sherman Act," (Sept. 8, 2008), available at: http://www.ftc.gov/opa/2008/09/section2.shtm.

legitimate values worthy of protection in the defense of competition by the operation of the antitrust laws.

The AAI also advocates a consumer surplus standard, which, in contrast to the aggregate welfare standard advocated by many adherents of the Chicago School, requires some positive economic benefit for consumers before welfare may fairly be said to be improved, in addition to the enhancement of allocative efficiency gained by eliminating or reducing monopoly dead-weight loss.

Although the AAI believes in the resourcefulness of private enterprise and the tendency of markets to approach a competitive equilibrium, market failures do arise, and this is sometimes the result of dominant firms engaging in strategies that maintain monopoly. The antitrust tool to address durable monopoly acquired or maintained by improper means—Section 2—is available, but it needs to be sharpened and put back into service.

As a case-by-case form of regulation charged not with promoting competition but with eliminating impediments to it, antitrust exerts an indirect influence on business conduct even where no action is taken. The mere threat of antitrust liability deters anticompetitive conduct. And when litigation does arise, AAI believes that courts and juries take their responsibilities to resolve antitrust cases seriously and that juries in particular bring considerable wisdom to resolving even complex business disputes.

VI. Conclusion

The AAI report sees the 2008 political transition as an opportunity to reassess the present posture of antitrust policy and to make adjustments to it. Many of the issues in the 2008 election boil down to values promoted by the antitrust laws: maintaining fair competition, ensuring equal opportunity for all Americans, and stimulating economic growth at home and competitiveness abroad.

No matter which party will control Congress or who the President will be, the AAI's advice to the next administration is the same:

- Antitrust analysis should be brought more in line with a broader body of modern economic knowledge beyond the narrow application of neoclassical price theory and made better equipped to deal with the realities of markets in a new, digital and globalized millennium;

- More resources and personnel should be devoted to the skillful deployment of antitrust enforcement as a policy instrument to maintain competitive markets; and,

- The institutions, substantive rules and procedures of antitrust should be rejuvenated, particularly as they pertain to the treatment of single-firm conduct.

I thank the Committee for your attention, and would be pleased to answer any questions the Committee may have.

###