UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, DC 20580

Prepared Remarks of Chairman Joseph Simons[1]
Georgetown Law Global Antitrust Enforcement Symposium
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Good afternoon. It is a pleasure to be back at Georgetown and to participate in such a wonderful program today. I was here just two weeks ago to open the FTC's Hearings on Competition and Consumer Protection in the 21st Century. Georgetown did a great job with those proceedings, and I would like to thank Howard Shelanski and Steve Salop again for helping to make them a success.

Naturally, the antitrust bar – and antitrust stakeholders, more generally – are interested in how a new Chairman of the FTC thinks about antitrust issues. Today, I will try to put some color on that. In my case, past is likely to be prologue.

Many of us are a product of our upbringing. That is arguably true of my own upbringing as it relates to my legal career. I was initially trained by four world class antitrusters, roughly in order from "left" to "right": Bob Pitofsky, Steve Salop, Tom Krattenmaker, and Warren Schwartz – all faculty members at the Georgetown University Law Center. It was an incredible pool of antitrust talent, all in one place. Most law schools offer one or maybe two antitrust related courses. I took fifteen credits of antitrust courses while at the Law Center. In addition, these four mentors represented a wide span of the antitrust political spectrum, providing me with

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[1] These remarks reflect my own views. They do not necessarily reflect the views of the Commission or any other individual Commissioner.

an education covering a broad range of antitrust viewpoints. And they had all worked at the FTC at one time or another, in one capacity or another, so they had government experience as well.[2]

I was in law school from 1980 to 1983. Of course, one of the most significant developments in antitrust methodology occurred during this time: the introduction of the 1982 DOJ Merger Guidelines.[3] Professors Pitofsky and Krattenmaker put together a brilliant course on the Guidelines, which is where I got my first real exposure to merger analysis. My merger education was then augmented with some extracurricular work with Professor Salop, writing a "how-to" guide for merger analysis under the new Guidelines (my first antitrust publication).

Professor Salop was also working on his first "Raising Rivals' Cost" (RRC) article with Dave Scheffman at this time, and Steve taught a course, along with Professor Schwartz, that included this new theory. For those of you who did not have the pleasure of knowing Warren, he trained at Chicago and covered wonderfully the Chicago School side of the spectrum. So he and Steve were an amazing combination.

The help from my mentors did not stop at the classroom door. Professor Krattenmaker agreed to co-author a book on antitrust and mergers with some lawyers from a very well respected law firm at the time, and he brought me along as a part-time law clerk.

One day, while I was still a law clerk, someone gave a presentation at lunch about a new matter and asked for suggestions on how to handle it. Having just taken Steve's course, I knew the basic issue was RRC, and I encouraged the firm to hire both Steve and Tom as consultants, which it did. Ultimately, this work led Steve and Tom to collaborate on what became their

[2] My initial interest in antitrust was triggered during college at Cornell. I was an economics major and took an industrial organization class taught by former DOJ economist Rob Masson, with a guest appearance by George Hay (a former chief economist at the Antitrust Division).
[3] Fed. Trade Comm'n & Dep't of Justice, 1982 Merger Guidelines, https://www.justice.gov/archives/atr/1982-merger-guidelines.

famous RRC article in the *Yale Law Review*.[4] So needless to say, I have been a big believer in the RRC approach to analysis of vertical restraints and monopolization for a long time. In essence, I use the RRC framework to think about almost all kinds of potentially exclusionary behavior.

So what does this early personal legal history tell you about the basic way in which I approach antitrust today? I think my approach really grew out of one of the advanced antitrust classes that was co-taught by Steve Salop and Warren Schwartz. They each took turns lecturing, but there was no hesitation on either of their parts to interrupt and argue with the other. I am not sure how much Warren and Steve enjoyed teaching that course, but it was really fun to be in the classroom. After a few weeks, I realized that whoever was assigned to give the lecture was providing what was essentially a textual narrative, with the other one interrupting to provide the footnotes – especially the "but see" citations. Whether intentionally or not, Steve and Warren demonstrated that neither side had a monopoly on truth and analysis, and that there was at least a kernel of validity to what each of them was saying. What I took from this experience is that one should be agnostic on theory, be skeptical about assumptions, try to rely as much as possible on evidence and the data, and re-assess the evidence and data periodically.

A little more personal history will provide some additional clues as to how I intend to approach enforcement. Seventeen years ago, I came to the FTC for the second time as Director of the Bureau of Competition under Chairman Tim Muris. Tim taught me many things about how to effectively manage, and gave me great advice and encouragement. Tim is a big believer in the tradition of bipartisanship at the FTC and the benefits of aggressive enforcement to both American consumers and the agency itself. Aggressive enforcement makes it possible to run the

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[4] Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209 (1986).

agency in a more bipartisan way, keeps staff morale high, and sustains greater credibility with all of the agency's stakeholders.

The last time I was at the FTC, vigorous enforcement was our mantra. We brought more non-merger enforcement actions in 2002-2003 than during any time 20 years before or since, and generally a lot more. And with respect to mergers, we were active there as well, especially if you take into account the relatively low level of merger activity in the economy at the time. My intention is to try to follow a similar path this time around.

When I was sworn in on May 1st, the Bureau of Competition had fourteen active cases in litigation, including four merger cases. I cannot remember a time when the litigation level was that high, either for mergers or non-mergers. It will be hard to beat that level of activism, at least on the litigation front. So the bar is set high – but we will aim high.

The last time I was at the Commission, we laid out four factors that influenced case selection for competition matters.

1 Does the conduct pose a substantial threat to consumers?

2 Does the conduct involve a significant economic sector of the economy?

3 Does the FTC have experience that will allow it to make an impact quickly and efficiently?

4 Does the conduct present a legal issue that would benefit from further study, and potentially have a significant effect on antitrust jurisprudence?

These criteria led us to emphasize, for example, the healthcare industry, including pay-for-delay cases and other types of exclusionary conduct impacting pharmaceuticals, as well as revitalizing our hospital merger program. These are still very important areas for the Commission.

The four criteria remain relevant today, but industry and economic developments require that we add at least one more: unilateral conduct by dominant firms in industries with substantial network effects, where conduct may impede entry or fringe expansion.

Many antitrusters would agree that the most likely places to find anticompetitive conduct are with firms that have market power. This is not to say that big is bad. Firms may get big because they provide good products at good prices, and antitrust should not try to get in the way of that. But firms should not be allowed get big or stay big by engaging in anticompetitive conduct. So it makes sense for the antitrust authorities to look in places where there might be significant market power, to ensure that such firms compete on the merits – and that might include some of the significant high-tech platforms.

One of our interests in this area will be with mergers of high-tech platforms and nascent competitors. These types of transactions are particularly difficult for antitrust enforcers to deal with because the acquired firm is by definition not a full-fledged competitor, and the likely level of future competition with the acquiring firm often is not apparent. But the harm to competition can nonetheless be significant. We are going to be spending some time and resources thinking about these difficult and important issues.

As I described earlier, a non-partisan antitrust enforcement agenda is critical to the success of the FTC. Consistency across the two federal enforcement agencies is also beneficial. For that reason, I think it is important to discuss today some questions in the area of intellectual property, where there may be some potential inconsistency.

We agree with the leadership of the Department of Justice Antitrust Division that a breach of a FRAND commitment, standing alone, is not sufficient to support a Sherman Act case, and the same is true even for a fraudulent promise to abide by a FRAND commitment.

More is needed. Specifically, the breach, fraud or deception must also contribute to the acquisition or maintenance of monopoly power in a properly-defined market, or involve an agreement that unreasonably restrains trade.

As courts have recognized, including the D.C. Circuit in *Rambus*,[5] conduct of this nature in the standard-setting process can be exclusionary or anticompetitive, in that it is not efficiency-enhancing and thus not competition on the merits. The existence of exclusionary conduct is only part of an antitrust violation; but if the rest of the violation exists, there is no special privilege or exemption under the antitrust laws for fraud, deception, or breaches of contract merely because those acts occurred in a standard-setting process.

In this context, it is important to note that we agree with the Division that hold-out in the standard-setting process can raise serious concerns under antitrust law when such hold-out is the result of collusion among potential adopters/licensees. But we also believe that hold-up raises potential antitrust issues, as well. Whether hold-up or hold-out is more likely to occur in the real world is not something we are focused on. If either one occurs, it can be problematic. I want to make clear that the FTC will continue our economically grounded and fact-based enforcement of the antitrust laws in this area.

As I noted earlier, one of the things I took from my professors at Georgetown was that antitrust enforcers should be agnostic on theory, be skeptical about assumptions, try to rely as much as possible on evidence and the data, and re-assess the evidence and data periodically. A short history of merger enforcement provides a good illustration of these lessons and also explains one of the major motivations for initiating our *Hearings on Competition and Consumer Protection in the 21st Century*.[6]

[5] Rambus v. FTC, 522 F.3d 456 (D.C. Cir. 2008).
[6] https://www.ftc.gov/policy/hearings-competition-consumer-protection

Back in the 1950s and 1960s, the economic literature (including substantial empirical work) supported the view that mergers produced anticompetitive results at moderate levels of concentration, and perhaps even relatively low levels. The framework of the DOJ 1968 Merger Guidelines was consistent with this literature. But just about when the Guidelines were issued, that support dissipated as the earlier economic work was discredited.

The next major development was issuance of the 1982 DOJ Merger Guidelines. These Guidelines were revolutionary in their introduction of a rigorous way of doing market definition tied to a well-articulated goal of merger enforcement: to prohibit mergers that create or enhance market power. The 1982 Guidelines switched from using CR4s and market shares (as had been the case in the 1968 Guidelines) to using HHIs, but at least some reports suggest that the HHI thresholds were selected by trying to replicate the CR4s and market share thresholds of the 1968 Guidelines.[7] In other words, the thresholds were pretty low by current standards and without much economic support.

Younger lawyers may be surprised by this, but in the 1980s (in the middle of the Reagan Antitrust Revolution), I participated in merger cases where the post-merger HHIs were below 1500. I think DOJ had similar enforcement actions.

Over time, as the FTC performed its merger enforcement work on a case-by-case basis, the Commission came to the view that the stated thresholds were, in fact, too low. As a result, the concentration levels at which mergers raised concerns at the agency rose – substantially. The use of these increased levels continued through the 1990s and into the George W. Bush and Barack Obama administrations, and was reflected in the 2010 Horizontal Merger Guidelines, which substantially increased the relevant HHI thresholds.

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[7] *See* Stephen Calkins, *The Merger Guidelines and the Herfindahl-Hirschman Index*, 71 CAL. L. REV. 402 (1983).

New empirical work calls these changes into question. Merger retrospectives by FTC economists and others are advancing our understanding of the impacts of recent merger enforcement policy.[8] One can certainly read that body of work as indicating under-enforcement. These are significant issues, and were a primary motivation for our *Hearings on Competition and Consumer Protection in the 21st Century*.

In a similar vein, it is important for us to think about what we can do to improve the empirical bases for our decisions, including establishing a more robust system for doing retrospectives and validating as predictive (or not) the new economic tools we employ or might employ going forward. This topic will be covered in the Hearings as well.

Now is an exciting time in antitrust. I have to admit that, although I personally was excited by antitrust as a young lawyer, most people viewed it as boring and obscure. But today, antitrust law and competition policy are often in the headlines, and antitrust policy debates have returned to Capitol Hill. There is even a House Antitrust Caucus now, and new antitrust principles – a Better Deal on Antitrust – proposed by some in the Senate. There is concern – bipartisan concern – that lax antitrust enforcement has made our economy less competitive and has contributed to inequality in our society.

For all of these reasons, now is an excellent time to be active in our small but dedicated antitrust community, and it is also the right time for us to have a serious conversation about antitrust policy. In closing, I hope you will all take advantage of the opportunity to participate in

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[8] *See* John Kwoka, Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy (2015); Orley Ashenfelter & Daniel Hosken, *The Effect of Mergers on Consumer Prices: Evidence from Five Mergers on the Enforcement Margin*, 53 J.L. & ECON. 417 (2010); Deborah Haas-Wilson & Michael Vita, *Mergers Between Competing Hospitals: Lessons from Retrospective Analyses*, 18 INT'L J. ECON. BUS. 1 (2011); Steven Tenn, *The Price Effects of Hospital Mergers: A Case Study of the Sutter-Summit Transaction*, 18 INT'L J. ECON BUS. 65 (2011); Aileen Thompson, *The Effect of Hospital Mergers on Inpatient Prices: A Case Study of the New Hanover-Cape Fear Transaction*, 18 INT'L J. ECON. BUS. 91 (2011); Michael G. Vita & Seth Sacher, *The Competitive Effects of Not-for-Profit Hospital Mergers: A Case Study*, 49 J. INDUS. ECON. 63 (2001)); and Christopher Garmon, *The Accuracy of Hospital Merger Screening Methods*, 48 RAND J. ECON. 1068 (2017).

our Competition and Consumer Protection Hearings – an opportunity to review and refresh our thinking on these issues.