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B E S T P R A C T I C E S

W O R K S H O P

October 23rd, 2002

Association of the Bar of the City of New York
42 West 44th Street
New York, New York

Moderator: Daniel Ducore, Asst. Director FTC Bureau of Competition

Panelists: Barbara Anthony, Director, Northeast Region
Phillip Broyles, FTC
Mary Coleman, FTC
Christina Perez, FTC
Harold Saltzman, FTC

Chair of the Antitrust Committee: William H. Rooney, Esquire

Presenters: Jim Calder, Esquire
Joseph D. Larson, Esquire
Linda R. Blumkin, Esquire
Ron Bloch
Christopher J. MacAvoy, Esquire
Gary Kubek, Esquire
Albert Foer, Esquire
Michael H. Byowitz, Esquire
Fiona Schaeffer, Esquire

For The Record, Inc.
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MR. ROONEY: Good afternoon. My name is Bill Rooney. And I'm Chair of the Antitrust Committee of the Bar. It's my pleasure to welcome you this afternoon. The Antitrust Committee is pleased to be able to provide the venue for today's FTC workshop on merger remedies, as another in a happy collaboration with the FTC, in particular the northeast region of the FTC, over recent years.

With that, I would like to turn the program over to Barbara Anthony who is the Director of the Northeast Region, who will introduce some of the panel and today's program.

MS. ANTHONY: Thank you very much. Good afternoon, good morning everyone. I guess it's at this point technically afternoon. I'm Barbara Anthony, the Regional Director of the Northeast Regional office of the FTC.

And it's a pleasure to welcome you all. And I want to start off by thanking you very much for coming out today, for coming to this remedies speak out, as it were, and being willing to make a formal presentation or participate in the discussion with remarks or comments about the discussion that is going to take place.

We very much appreciate your willingness to

participate because frankly, we could not do it unless you all came and unless the organized Bar was willing to come out and to talk with us publicly about issues that concern you and issues that you would like to see us address. So we thank you very much for doing that.

I know a number of you were here several months ago when we hosted the best practices merger workshop, which was also co-

be turning it over to my friend and colleague from Washington the Assistant Director of the Compliance Office in the Bureau of Competition, Dan Ducore.

And Dan will introduce of rest of our friends and colleagues.

MR. DUCORE: I'll say this later. What we are going to do today is listen. So you shouldn't feel intimidated by the number of people here. We're not going to say much.

Let me start by thanking on behalf of Joe Simons, the bureau and Tim Muris on the Commission. I want to thank Bill Rooney, the New York City Bar Antitrust and Trade Regulation Committee for co-sponsoring this workshop, for providing the venue and the refreshments. We appreciate that.

Also I want to thank Barbara and Susan Raitt, and other people from the New York Regional, Northeast Regional office for all their work in getting this organized, getting the word out, e-mails and other things, to have such a good turn out. And I want to thank all of you people who both are going to present views and other people who may react to views presented, and anybody who has taken the time and effort to be here today.

In addition to Barbara and myself I'm Dan

Ducore, I'm also -- I'm going left to right Christina Perez, an attorney in one of the merger divisions in the Bureau of Competition, Mary Coleman, Deputy Director in the Bureau of Economics in Washington, Harold Saltzman an economist with the Bureau of Economics Phil Broyles, the Assistant Director for one of the merger divisions in the Bureau of Competition. And also, there is Susan Raitt, from the Northeast Regional office. She did a lot of background work pulling this together.

Naomi Licker, from my office who we have, worked a lot on getting the message out in terms of frequently asked questions, did a lot of the work on the divestiture study that was published a few years ago, and is becoming whether she will admit it or not, an expert on merger remedies.

The June workshop was a good start for the discussion we're trying to have about what works and what could be improved in the area of merger remedies or merger negotiations.

The consents that we work on we're really not talking about litigated orders or the Commission, where the Commission makes its decision whether there is a violation on an order.

The results from the first workshop have been

The underlying position of -- I'll put out so you can understand the context, is that we understand that the parties in specific negotiations are frequently going to disagree about the specifics of a particular remedy. And that is just the nature of the beast, when you settle a potential antitrust case.

But with that understanding and with the understanding that our job at the agency is mainly to assure, once we decide there is a problem and once we agree to try to settle, that that settlement minimizes the risks to consumers that the remedy will fail. That is our going in position. But nonetheless, I'm sure that there are things we have done that could be done perhaps differently or better perhaps, and mainly, what we want to hear about are suggestions for improving, getting to a remedy that gets our goal met, but perhaps can reduce the cost and time and money to the parties.

Some people have already expressed an interest in presenting views. And I get the sense that the fair amount of that may be in the context of supermarket divestitures.

It is not the agenda for today's session. But I think it's probably appropriate that that may be the focus of a lot of the remarks, because those kinds of

cases raise issues like mix and match and clean sweep, just to use colloquial phrases that get handed around at times.

Also raise the question of our use of up front buyers, use of crown jewels, orders to hold separate, issues about third party rights, and all those aspects.

All of those issues that can come up in a merger cases, frequently come up in supermarket merger cases. So I think it's appropriate that as I expect, some of the remarks will be directed at those kinds of cases. But I think it would be also useful to hear about how other industries are different and may call for different treatment and different assumptions on our part when we go into negotiations; for example, are pharmaceutical mergers different enough from other kinds of mergers that they raise issues both in terms of remedy and in terms of delayed negotiations and the whole remedy process should work. How do those particular industries differ from the more general manufacturing kind of industries that we have a lot of cases in, and what things might work in one situation but perhaps don't work in another situation so that we should be aware of that and not make the same assumption when we go into a particular

case.

That is really it. I don't have anything more to add, other than to say, that I'm going to speak -- on behalf of the reporter I'm going to ask that you identify yourself, speak clearly, and the reporter may remind people if they forget to identify who they are.

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count says eight or nine people speaking, ten minutes each. Keep an eye on the clock, although we're not required to be out of here at the strike of 1:30.

MR. CALDER: My name is Jim Calder. I'm here to present, address on behalf of the comments of the Antitrust and Trade Regulations of the City Bar and the Association Bar.

My comments are going to be more of a thematic, conceptual nature. Joe Larson will be more specific.

In putting together the written submission that was made for this program, there is I think an underlying theme that may not be fully expressed, which is, that there seems to be a disconnect between the basic theme or purpose of antitrust which is faith in a belief in the competitive process and competitive markets and the remedies process in merger cases. The talisman for antitrust is that if markets are workably competitive, the government and the rest of us don't need to worry very much, because competition will work its magic.

When it comes however, to divesting assets in a merger case, it seems that we lose faith in the competitive process. And it seems that we distrust an auction process where the highest bidder will presumably be the best person to acquire the divested

assets.

And instead, there is a tendency for lawyers and economists to superimpose their views or sense, or unscientific beliefs on the auction process. And it is ironic indeed, I guess, that for antitrust lawyers we should have this disconnect or loss of faith in the competitive process when it comes to divestiture remedies.

And it seems to, without some real persuasive evidence, that the competitive process fails when it come to divestitures. We shouldn't give up on that process, at least in an auction context when we're dealing with a merger situation.

Now that theme is not a theme that underlies every comment in the Bar Association's submission. But it's a theme that underlies a number of them. And I thought it important to highlight it at the outset of what will otherwise be very brief remarks.

In the submission the committee identified a number of basic principles that we believe should guide the merger remedies process. The first is that the remedies process should be narrow and focused solely on curing the anti-competitive evil that in the commission's view renders the merger either illegal or at least of questionable legality.

Efforts should not be made as an aside. They are in -- other parts of the world do use the remedy merger as a way to re-order or reorganize the market.

The remedy should be limited and surgical in scope to the extent possible so that only that which infects the merger is excised.

The second principle is that in looking at merger remedies and divestitures in particular, a rule of one hundred percent success is probably unrealistic and to a great extent, counter-productive. In the business world as we all know, many, many mergers fail. Many acquisitions of assets fail. It's the nature of the competitive process that things fail, businesses fail, plans fail. To impose on a divestiture remedy

side, we may be losing efficiencies in the basic deal or in the deal that is before the Commission.

Principle number three is the notion of forcing competitors to collaborate as part of the remedies process. I think in an increasing number of transactions there are provisions in consent decrees requiring the parties to the deal to provide assistance to the buyer of the assets or business being divested. Those buyers are now, in many cases, competitors of the divesting parties. And since when we wear our Section 1 hats, we counsel our clients to not talk to their competitors or to have much if anything to do with them, it seems both ironic and somewhat troubling, that we're telling them they are obligated to collaborate with their new competitors or with competitors who are competitors of long standing, but who have now bought some of their assets.

Principle number four, the little guy should not be excluded from the acquisition of divested assets process. There has been a sense perhaps in particular in supermarket mergers, but I'm not going to go there, that smaller acquirers are disfavore heb02.5 0 TD 2 Th f, 25 -12 TD ( ) Tj 0 -12 TD 0.3 2 not have There sleg1 Tw j 532.525 TDTw aw Tw doyou2.5 0 9-12 TD ( ) Tj 0 -12 TD 0.3 T9j 0

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small acquirers are as successful and in some cases, more successful than large acquirers.

That being the case, to the extent there is any concern about small acquirers, it would seem that that concern is ill-founded. That would be especially the case if in an auction, a small buyer wins the auction on the basis of price bid. If a small acquirer is prepared to put up a higher percentage of his assets, to acquire the divested assets than a large buyer, one would think that that is a signal by the market that that will be a committed and an effective acquirer and operator of divested assets.

My last point then, I'll subside and yield to Joe Larson, is the notion of information access. In the divestiture study, one of the key findings that the Commission made, was that when divestitures fail, it's frequently a failure of the information process and notably of the due diligence process. To the extent that that is a real source of divestiture failure, it would seem that the way to fix that problem would not be to engage in the practice of picking and choosing buyers of divested assets or businesses, but rather to look at the information and due diligence process directly, and see what should be done to improve that, to eliminate the risk that the divestiture will fail.

With that, I would like to thank you for your time and attention. And I'll yield to Joe Larson.

MR. LARSON: Joe Larson, from Wachtell, Lipton, Rosen and Katz, on behalf of City Bar. I had a few comments on specific remedies that are addressed more fully in the short paper we submitted. I think probably most importantly is the buyer up front concept does more to distort the remedies process than probably any other provision. What it tends to do is create a very strong incentive for parties to settle as quickly as possible, identify a buyer as quickly as possible, and it effectively makes an auction impossible, because we just -- it would just simply take too long. I think it unnecessarily shortens the due diligence process that a divestiture buyer may want to engage in. Parties may be willing to give in return for less due diligence, simply allow the preferred divestiture buyer to pay less and assume greater risk, because again, the parties are anxious to close their transaction.

In addition it also tends to exclude small buyers from the process because when advising clients, it's the up front buyer that is likely to be most acceptable to the Commission. The large buyer is the buyer with brand name recognition. So the smaller buyer tends to get pushed to the side, in the buyer up

front context even though they may be willing to pay more eventually or whatnot again, with the hope of speeding the process along. The crown jewel provision is a punitive provision, and should be used as such, preferably just in the instance of a demonstrable wrong doing on the part of the parties.

Alternatively, there are situations in which if there is a creative or new divestiture remedy from the main remedy, a crown jewel provision might make sense as a back stop in case a new or creative solution winds up not working.

The single buyer requirement, especially in the context of retail mergers, tends to exclude smaller buyers from consideration. And another important point in terms of the single buyer requirement or allowing multiple buyers is, multiple buyers in a given market may actually be far more pro-competitive, medium to longer term, to the extent it creates multiple additional competitors with toe hold or perhaps even stronger platforms in the market from which they can grow.

And finally on the hold separate provisions, it would -- we would recommend considering moving up the hold separate concepts to earlier in the process, to allow parties to close on non problematic portions of

the transaction, holding separate the potentially problematic assets and allowing the Commission to conduct its investigation of those, and ultimately reach its decision at that point, having held the assets separate so that they are ready for divestiture if need be.

I guess the one question we have is the perception that a number of these requirements are becoming more preferences again as opposed to being imposed as a matter of course or almost automatically, and wondering if there has been a change in the Commission's position in terms of requiring some of these provisions in consent decrees.

MR. DUCORE: I'll answer that. I won't respond to the other point. I think it was probably always an over reaction to view those positions as requirements, things like buyer up front and all of those. But, regardless I think it's true that it got viewed, that position got viewed as an insistence and a

particular case we really don't. And especially with the up front buyers you look at some of the more recent consents where the agency has not been insisting on up front buyers I think. So those -- again it's hard to generalize for each case from just a few cases. But there is a recognition if a business unit is being divested, it's something that has stood alone in the past, it's more likely to be able to -- it raises less of the issues that would lead us to a buyer up front.

So, you're right. And the perception is we're more flexible. I think it is not a dangerous perception for people to have that we're more flexible, although I think people on our side would say whether people recognize it or not, we always thought we were willing to listen on every case.

I don't have any batting order here. So if someone would like to volunteer and speak next or give some reaction to what was just said.

MS. BLUMKIN: Linda R. Blumkin, partner with Fried, Frank, Harris, Shriver. I just had a very few points that I wanted to make. I guess first, I would like to say that putting out the frequently asked questions about merger consent order provisions I thought was a very useful way to communicate what the agency positions actually are, because some of these

have been shifting and evolving over time. And peoples' experiences are so limited in terms of the

instead of in the fifteenth month of an investigation, when obviously enormous resources on the private side and on the FTC side have already been spent.

When I say that remedies should be considered very early on, I don't know that that necessarily involves the participation of Dan and his colleagues. It may or may not, depending upon what the particular remedy is that folks are thinking about. But the concept of why are we doing this, where are we going to end up, what can we do that might solve this possible problem that we're concerned about, is I think a very useful exercise.

One of the things I have never really understood also, is the Commission's reluctance at least in recent history to consider the fix it first solution, to the same extent that the Justice Department does, because in transactions that I have handled before DOJ, this has in appropriate cases been a very efficient and sensible way of resolving situations at a very early moment. I don't know if it has something to do with the institutional framework, or history, or what. But I would urge more consideration of the potential for fix it first whether it's by way of divestiture, licensing or whatever makes sense in the context of a particular transaction.

One thing also I noticed in looking at the transcript of the June workshop, I think it was something Christina said talking about third parties, and the sense I think she said that she had gotten from the private Bar when third party consents are required in order for a remedy to be effective, that the third parties are perceived as extortionists basically. And what I would urge is a healthy skepticism about third parties, but also a healthy skepticism about the parties to the transaction, and what they are saying about the impact that their choice of assets to divest is having on people who have sometimes been their co-venturers, partners who have ongoing relationships with them, who are profoundly impacted when they find their -- even though they have -- they may have contractual provisions saying that agreements cannot be assigned or transferred without their consent, that they are then being told that obviously a consent order takes precedence over everything and they've effectively lost their rights and lost any ability to direct their own future relationship with that bundle of assets, or that business, or whatever it is that is being divested.

That was basically all that I wanted to say, thank you.

MS. PEREZ: I just want to put out there, when I'm negotiating consents, third party rights tend to come up not infrequently and they -- in my experience I have not found a way of being a part of this that is helpful to all sides. I tend to feel like I'm in the middle of the parties, the third parties, the FTC. And I'm always trying to come up with a way to balance all of those interests.

Everyone has a valid point. And I never know which way it goes. So what I would put out to the Bar is if you have a solution when we get to this point, please bring it up to me. I'm open to all points. At this point, I just don't have a remedy to fix this problem. So we're open to suggestions.

MS. BLUMKIN: If I could pick up on that one. I noticed at least one of your recent orders, you have imposed a best efforts obligation on the parties to the transaction to secure necessary consents identifying quite specifically various contracts where consents are required.

But, at least in the context of that one experience, I don't feel that even though it was obvious that somebody at the Commission was sensitive to the issue they were trying, I don't know that the parties to the transaction had really taken that best

efforts obligation as seriously as one would like. And then again, the question is, how someone at the Commission winds up trying to sort that out, dealing with what best efforts means in terms of trying to deal with this kind of issue and secure somebody's consent. I don't know. And I would be curious to know whether that kind of clause is something that is going to become standard in the future, and if so, what mechanism realistically you could have to enforce it.

MR. DUCORE: Let me comment on that last point. I don't think we're going to be enamored of a best efforts test as opposed to an absolute requirement to obtain rights, except in cases where there are other -- and I would have to go back and look at the orders specifically but there may be cases where you know, other protections are in place. If that nevertheless doesn't play out, in other words, if third party rights cannot be obtained, there is some other way to get at the competitive remedy we're trying to get, we're not going to insist that you obtain third parties' rights and put yourself perhaps in the position of being held up. Nevertheless you've got to make best efforts there first. And then if that fails, this other mechanism will trigger.

And I think, depending on the case, if that is

a realistic, a competitively realistic remedy, we'll certainly entertain that. But if it is something where a third party right is critical to the remedy being achieved, we don't get enough in my view, if all we get is a best efforts obligation, because you can make best efforts and the third party may want more than that, we start researching state law and what kind of reasonable best efforts, we may not have a case under the law, but

themselves.

MR. DUCORE: I would underscore what Chris Perez says. Each one of these cases turns on a particular contractual relationship we're talking about and what alternatives may be out there. And the parties are obviously in the best positions to know that. So where we get into these conversations they should not be shy, and say, this is what we can do, this is what we cannot do. This is where we might feel vulnerable if we have to get a consent from a third party.

But this is something else that could actually get you where you need to be FTC and you should entertain that. We really need to hear that early so we can come to grips with it.

MR. BLOCH: Thank you. I just have a few issues to talk about very briefly. There has been some discussion in this workshop and previous workshops about various aspects of the Commission's divestiture policies. Mix and match, zero delta single buyer, up front buyer. I think there is an over arching issue that covers all of those policy questions, and that is everybody should know what the Commission's policy is. It should be a matter of public record, so that everybody knows the rules of the game. And once those policies are adopted, the Commission needs to make sure

that the staff is not sending conflicting signals to the merging parties or to would be buyers of the divestiture, which brings up the second point. There are a number of instances in the up front buyers, the up front buyers have already been mentioned today, that is somewhat in conflict with the ability of smaller would be purchasers of the assets to be divested to get into the game. So, the second point I raise is there must be changes in the mechanics, whether it's going to be an up front buyer or it's going to be a buyer pursuant to a final order, there must be a mechanism adopted by the Commission that assures that all interested purchasers of those assets have knowledge of what the assets are to be divested and have an equal opportunity, regardless of their size, to enter the bidding process.

Third point I would like to deal with is somewhat related to that. And it's the problem of allowing the asset divestiture transaction to close before the public comment period is over.

Now, I will not attribute to the Commission any malevolent thought in doing that. This is especially true in retail generally, grocery industry in particular. There was an order entered into about two years ago that ordered divestiture of a number of

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supermarkets. And the buyer, the up front buyer was able to close on that transaction, before the comment period, is which is -- now it's only thirty days. It

there are circumstances that warrant that kind of an approach, it might be appropriate. But I highly urge you to consider the impact that that kind of a remedy can have on retail stores generally, and grocery stores in particular.

And my final point again, this is applicable to grocery, we have today, the highest level of concentration in the national market that we have ever had. In 1993, the top five firms represented seventeen percent of supermarket sales. By the year 2000, that number had better than doubled to thirty-nine point three percent. At the end of last year, it was over forty percent, forty point four percent.

One of the reasons this is happening is that a tremendous number of mergers of large supermarket operators are analyzed only from the selling side. Where do these people compete and if necessary we'll have some stores dappoa5r, the top five firms roD 0 427.nks yw

only at the selling side of the competition, but look at the buying side. What kind of problems can arise when two chains merge who don't compete as sellers and yet, that merger gets probably early termination from the FTC, and you have allowed perhaps a chain to double its size and double its purchasing clout with its suppliers and further disadvantage smaller competitors in the market.

We say this is a problem that if it isn't faced immediately the Commission is going to lose its opportunity to prevent a market that is dominated by a half dozen or so chains and they will be selling all of our groceries.

MR. DUCORE: Let me ask a question -- two questions. One is, since historically the way, whether it's an up front buyer or a post order divestiture, the way we have done it is to say to the parties, bring us a buyer. If we're going to do things to -- I don't want to weight the argument, if we're going to give smaller firms, the less obvious buyers a better opportunity, seems they have to change the mechanics of even just that process of saying to the parties, bring us somebody. So that is question number one.

And question number two, it sounds like you're saying with this grocery market that buyers up front

can't work because we're compressing everything. And then we have this comment period. It sounds like what you're saying is, we have to have a post merger, a post order divestiture, in grocery cases so we can have this process all play out.

If we do that, then I guess it's a question number three, what do we need to do to protect competition while that's all playing out?

MR. BLOCH: I know the question and it's a good one. Number one, I don't contend that a buyer up front can't work. You have a trade off and it is a reason the buyer up front got started in the first place, between getting a buyer quickly and getting the deal closed or taking a little more time, certainly most of the time is waiting to start shopping the assets until after the divestiture order becomes final.

And I think there is room in the middle between those polar extremes. And I think that the third question, how do you do it, is by adopting some procedures that require the party under order or who will be under order, to make sure that before the buyer up front is chosen, that interested parties get word of the asset package to be divested, and have a chance to do a due diligence and to enter a bid on the assets.

the assets has an opportunity to bid on them. Is an auction process for the goal that we're looking for which is to have the anti-competitive be remedied, is that process the best process. Is that something we should be looking for so that work -- so there should be a broad base and we should leave it for the parties to assess, to go through the party of it to some extent to understand what is happening. But just to put that question out, should that be the role of the Commission to give all people.

MR. LARSON:I think going back to the central theme of the City Bar's comments, I think that should not be the Commission's role. It should be a respect for the competitive marketplace to operate.

And some parties choose even when selling themselves in transactions that raise no competitive issues, some will go with someone up front, get the best deal they can, they will forego an auction process.

Others will choose to go through an auction process. There are a number of ways to structure a deal, to go through a deal, I think, unless there is some reason to think that -- some good reason to think that that market process will fail, I don't think the government should intervene. However, structurally, by

requiring an up front buyer and requiring a single buyer for assets, you're stacking the deck against smaller buyers.

Again with the up front buyer process, the parties are not going to go through a long option process, because they are looking at -- I have got fifteen million dollars or thirty million dollars a month in synergies, that every month I wait, I'm losing time, value of money, let's just get this done, let's just dump this divestiture. And I know if I bring Kroger in as the buyer, I'm going to do a lot better than if I bring in some local chains in terms of getting through quicker.

And on the single buyer issue again, larger pieces are just tough for smaller buyers to swallow, and certainly to bid full value on, and compete with the larger chains.

So I think structurally, those impediments should be removed and that should increase the ability of smaller buyers to play a more active role.

MR. MacAVOY: I'll respond to a couple of these things, including what you were saying and what Joe

staff supervision in the bidding process.

I think the answer to both those questions is no. I do agree with the points that Joe has just made and the City Bar made in their comments. That is, a lot of that problem could be dealt with by having some relaxation in the up front buyer and in the single buyer requirement. Those two things tend to push merger parties in the direction of locking in on a sure thing up front buyer very early.

If you relaxed a little bit on those things, maybe there wouldn't be such an early lock in. But another aspect of this and this may sound like it contradicts the point I just made, as a best practice for merging parties I do think it's a good idea to get thinking about and talking to prospective divestiture

push them in the direction that Ron here has talked about, which is getting backup, plan B, and plan C, and plan D. At least have other people that you're talking to and getting bids from.

If you get tunnel vision and get locked in on a favorite buyer up front, you could be very unhappy if that falls apart for whatever reason or if the staff looks at this person you have brought them and said, this just doesn't do it, their financing is a mess or it falls through or whatever, or maybe it could be the buyer you have locked in, gets buyer's remorse after they have kicked the tires and it backs up for whatever reason. That happens too.

I would like to go back just a little bit to the third party rights question that came up because there are a lot of issues. As I was walking in, I said I hope you talk about something other than supermarkets. In the retail context, the issue of logical consents of course, can be a real problem. It doesn't usually have anything to do with the competitive merits of the divestiture. Yet here you can have one or two landlords who by withholding a lease assignment, can hold up a multi-billion dollar transaction. What do you do?

Well, in my experience we either drop a lot of

money on them or say we're going to go ahead anyway and do this. We're going to come --

on retail divestitures, it's a hundred fifty pages, it's quite a lot, you should take a look at it.

I don't certainly agree with everything that is in there. I think to some extent GAO has come out of

MR. ROONEY: Now we'll hear from Mike Byowitz from Wachtell, Lipton.

MR. BYOWITZ: Thank you Bill. It's nice to see so many friends and so many people I have negotiated consent decrees with over the years both Chris MacAvoy, Ron Bloch, when he was with the FTC, Chris Perez, Phil Broyles and Dan.

In any event, in preparing to say something today, just in case that happened, and I was not the scheduled speaker for my firm, so bear with me on that.

I read over the answers to questions that the FTC was kind enough to put out with regard to divestitures. And I wanted to give some overall reactions to it. The fundamental concern I have with it and I think everybody is trying to do the best possible job. And I understand that the agency's interests diverge from the merging party's interest to some degree and appropriately so. But the concern that I had in reading it is the same concern that I have had with regard to second requests.

Since Bill Rooney and I started working on that process, when in a prior administration we started looking at the second request process and that is in my

dollars in synergies. I'm not saying you should accept that or trade it off. But you need to take it into context.

The solution in a deal where the competitive problem is a hundred percent or ninety percent of the assets, you're weighing this way probably will be different than one which represents one-half of one percent of the assets. I think also you need to keep

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circumstances, how likely is it that the elimination of that firm as a separate competitor is really going to cause a problem.

I would lastly urge that I know there has been some study done and there has been some questioning of some assumptions in the GAO study that Chris referred to. What I would say, is that as welcome as this effort is, and as important as it is, and as important a piece of work. And I don't necessarily agree with it. But as important a piece of work, the FTC study on divestitures was, it only considered half the issue.

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won't in the interest of brevity. Thank you.

MR. ROONEY: Thank you, Mike.

MS. COLEMAN: We can talk now or think about as they are bringing comments, Mike had brought up a good point that Dan and I thought about. Chris brought up this point on the GAO studies, looking at past measures of suggestions as used in the FTC study. But the GAO study seems to be something we have looked at.

To ask the question we have been working on studies, looking at past divestitures and gauging success, what measures would we be looking at to gauge success in divestitures and in doing such a study?

MR. ROONEY: Let us continue with the prepared comments. Then if we have time at the end, we will have a round table discussion. Albert Foer to speak next.

MR. FOER: I'm Burt Foer, from the American Antitrust Institute. Most commentary that we hear naturally comes from representatives of buyers and sellers. And that is truly important. And I compliment you for conducting workshops of this sort which are much more labor intensive than appear sometimes. It's truly important to get into the facts and into the perceptions. And you're doing a good job. When push comes to shove, at the end of the day,

however, the purpose of the remedy is not to facilitate a private transaction, but to assure the public too, competition is not going to be diminished. I know that is the standard the FTC applies. And I think it's absolutely the right standard.

Let me very briefly call your attention to the article that I submitted called Toward Guidelines For Merger Remedies. That is in 52 Case Western Reserve. What the article did was to try to recognize that Hart-Scott-Rodino changed everything, that it really moved merger antitrust from a regimen of post hoc adjudication to ad hoc regulation and pre hoc negotiation.

And what we said was the time has come to develop a more structured and more transparent approach to this, a normal evolution in administrative type of law. So we suggested guidelines for this process that would channel administrative discretion and as part of that, we urged workshops of this sort to think about these problems. So, at least to that extent, we're especially pleased to see this going on. In our approach, we recommended presumptions that would apply to all situations. And then when those presumptions were not built into the remedy, the staff or the Commission would have to explain why not.

It doesn't mean that there would be a great burden. It just means there would be certain established expectations that were always open to deviation with explanation. We also proposed an alternative optional course for giving early consideration to remedy proposals when the parties recognize that they are in a negotiating mode. This was based in part on the European approach, which tries to get a lot of information up front and undertakings up front, with the idea that there is a very good chance that there really is an antitrust issue. Both sides recognize it. And they are going to have to work on it. Since that is not really the topic today I'm not going to get into that anymore other than to say that

that technique will be used more frequently.

Workshops like this are important. And staff reports like the one that was just referred to are terribly important. And I agree with the GAO proposal that an additional report be done to bring things up to date. And when you do that, I think it's going to be important both to include DOJ, get some of this information that does not exist, or at least I'm not aware of any studies. This is symptomatic of an overall problem of not going back and looking at what has been done in the past and carefully evaluating it. We need to put more resources into that generally. I think also, the FTC can do things that -- I don't want -- I wanted to say one other thing.

The next time you do a report I think we need a more robust definition of a what a successful divestiture really is. That is difficult I understand from methodology problems. But I think it's essential to getting fully convincing results. Other things the Commission can do would be for example to explain their decisions very carefully.

As you probably know, we opposed the position the Commission ended up with in the cruise mergers recently. But, they issued a very detailed and thoughtful explanation of why the case was not brought.

giving its remedy experts a larger role and more of an up front role in the development of cases.

It is not enough jyrgiot enough

more and more issues of buyer power and it seems although we need to do a lot of work to confirm whether this is true, that at least in some industries, prior buyer power can be exercised with a much smaller portion of the market than on the seller side.

And so I think inevitably that has to become a more important part of the way we think about the remedy process. So I thank you all for the opportunity to be here today.

MR. ROONEY: Although we're coming to the end of our scheduled time, we actually have three additional speakers who have assisted us by Gary Kubek and has Chris --

MR. MACAVOY: I'm done.

MR. ROONEY: Why don't we hear from Gary and Fiona. Is that okay?

MR. KUBEK: Gary Kubek from Deveoise and Plimpton. I'm going to address several issues, some of which have already been covered by the City Bar Committee's report. And so because of the hour, I will try to move through those much more lightly than I might otherwise.

Obviously, starting point we recognized as private practitioners is the Commission's goal in terms of remedies and divestitures, is to get the best result

for consumers.

Nevertheless, I think it's important that all of the parties including the Commission, recognize as the City Bar Committee, that divestitures like all acquisitions do involve a substantial amount of uncertainty. Acquisitions are risky. Some of them fail. And the fact that a divestiture in fact, doesn't work out, that the buyer ends up not being successful running the business, doesn't necessarily mean that the wrong decision was made in the first instance.

It may be for example, that in fact, the marketplace turned out to be more competitive, post-transaction than either the Commission or maybe the buyer, the divestiture buyer may have thought. And I'm struck by Chris -- this goes back a couple of years, and reading the Commission's study on divestitures which covered a number of excellent points, but also did seem to at least to a private practitioner, to have perhaps an unrealistic perception of how the due diligence process works in other transactions.

And as someone whose practice does encompass some of these issues and occasionally dealing with parties doing transactions that do not have antitrust issues, buyers always complain they don't have enough

access to information. That is why representing the

One final point that I would like to get into, is it would be interesting to see and I'm not sure how would you know one could do this, whether there is any relationship between the speed with which a divestiture has been accomplished and the success of those divestitures ultimately. People have alluded to and mentioned a couple of points during the course of the day where one could see that there might in fact be problems the longer that transactions linger.

You have the issues of unavoidable harm to the divested business, lack of direction, employee morale, employees leaving the company.

It has been my experience, those are things that cannot be easily remedied by even a hold separate order because they are problems that affect not just divestiture sales, but ordinary sales. The longer it lingers, the worse that problem can become.

Now, so this suggests that perhaps expedite the process of approving a divestiture to minimize those risks. And at the same time as people have suggested that, there is a trade off. If you move quickly, have an up front buyer, it may reduce the opportunity for another buyer to come in and participate in the process. What this suggests and perhaps it is easier for us in the private world to say this than it is for

all of you to implement this, is the place to try it and see what we can do to try to shorten the process in terms of the Commission's own review and approval process.

And I think in connection with that, it can be very valuable and usually is very valuable to have the staff that has conducted merger analysis, intimately involved in the divestiture review process.

People sometimes may accuse a compliance group of being, perhaps, too rigid in the way they approach transactions. I tend to think that might be a misguided criticism, but rather they have not been living with the case or the market for however many months the parties and the merger staff have been. And they are suffering from greater uncertainty and lack of information.

So to the extent the merger group can be integrated with the compliance group in evaluating what is appropriate and necessary in a particular case and the real and theoretical cases, that is something that might be, I believe, able to be expedited also.

MR. ROONEY: Thank you.

MS. SCHAEFFER: Fiona Schaeffer from Weil, Gotchel. I think as some of you have commented on the more sexy issues in the merger remedy process, I would

like to go a little more down home and concentrate on some of the process issues in obtaining a final consent decree. I think the first issue which others have touched on is transparency. And again, like others I commend the FTC. And I think the cruise lines decision is a further positive evolution of that.

I guess there is a mutual interest in transparency as Molly Boast said in a recent speech, "The earlier we inform merging parties about our likely concerns, the earlier they can consider proposing an appropriate remedy."

The staff have been quite forthcoming in identifying relatively early in the process of areas their areas for concern and what further facts and information may be helpful in addressing those concerns. This kind of willingness to be up front about the issues and possible remedies often has facilitated the negotiations of a core settlement package in a relatively quick time frame. Ironically, the process of formalizing the settlement package in a consent decree may take much longer than the core settlement negotiations, and in fact, involve much more protracted negotiations itself.

So I think it would be useful to extend the principals of transparency in substantive merger review

into the next stage of the process, for example, the ancillary provision that accompanies the core remedy and the process of vetting and approving a buyer in a divestiture situation, as well as the overall settlement package.

This is an area where there is a real asymmetry of information. There is a limited public record available to the parties whereas the agency has the insider's perspective on prior negotiations and settlements that may materially impact the negotiations at hand.

I recognize as the FTC emphasized in the recent GAO study, that it doesn't use the one size fits all approach and its decision to use particular divestiture solutions including up front buyer process is based other particular facts of the case, and also on proprietary company, such as trade secrets, information that it must protect.

So rather than develop formal guidelines and policies, upon which the staff may choose an appropriate remedy, it prefers to draw upon past experiences and advice of experienced senior staff.

I agree with the FTC that we don't want to make this process too rigid. But I think the reality is there is a body of practice and guidelines that the FTC

is using and those are constantly changing. So I think there may be a middle ground in terms of and guidelines and sometimes ad hoc information and limited guidance that parties have at their disposal when they contemplate settlement discussions.

I think this workshop is a greater part of that process. It's an opportunity for all of us to discuss what the issues are and our concerns. I guess another thought that occurred to me along the transparency and case management lines is how one manages the settlement process towards a final decree.

While most of us are familiar with the formal systems of obtaining a final consent decree, there can be sometimes unexpected turns in the process based on unwritten agency practice or policies.

And as the FTC has recognized there may be unique features of a particular case that complicate the process of finalizing the decree. So one thought I had was once a core settlement package has been reached with the FTC staff it might be useful for example to schedule a settlement conference between the parties, the FTC staff and the compliance people who will be reviewing the settlement package. The objectives of such a process might include one or more of the following. To brief the compliance people who

are likely to have very limited involvement up to that point on the issues raised by the merger and the proposed settlement package; to map out the steps towards approval. What is involved and required from whom, and when, and perhaps to draw up a tentative timeline towards Commission approval taking into account the FTC's practice, the parties' critical timeline, timetable of the transaction, including drop dead dates, the likely timing of finding a purchaser, and the possible interplay with other agencies' reviews. This process might include anticipating specific issues or potential obstacles to approval, such as the need to obtain and the timing of third party consents.

I note that the FTC has adopted a similar procedure in the second request conference. I'm not suggesting that any such settlement conference would be so formal. Certainly the timetable would not be binding, given all the variables involved, but would encourage the parties and the FTC to develop a road map and timetable for the approval process we may well improve the speed and efficiency of implementing FTC settlements to the benefit of all.

I guess a couple of final comments on some of the more substantial issues. Others have said a lot

about the merits of the up front buyer approach. The one comment I would make, I think is there is an interplay between the up front buyer provision and problems that we see with third parties. In essence the up front buyer process often does not the process of commercial bargaining which as others have pointed out often has little to do with competition issues and everything to do with the leverage that a couple of landlords make in a situation.

So I think in any decision, to assess whether or not an up front buyer is necessary, those kind of third party issues should perhaps play more of a role in that determination.

Finally, on the interplay of the crown jewel provision and an up front buyer requirement, I guess my position is there should usually be no need for the FTC to insist on a crown jewel provision where an up front buyer is required given the state of rationale of the crown jewel provision, is to assure parties effectuate relief in a timely and appropriate fashion.

That kind of concern does not usually occur in an up front buyer situation and the implementation of such provision to do so, could be very punitive in that circumstance. Finally, I would just like to encourage the FTC to embark on further study as we have started

divestiture where a landlord essentially held up a company for a large exorbitant payment. It's not something we desire to facilitate or foster. But you have to recognize from a staff standpoint, we're approaching this as if -- with the back drop against an acquisition we have determined to be illegal.

And our primary incentive is to fix that illegality. It is not to enrich or penalize anybody. But that is the mind set with which we go into this.

And, I don't think we have any set policies or preferences. But the idea is to make sure when we negotiate a fix to a problem, we have identified, that the Commission gets the benefit of the bargain that we have negotiated.

So, these things that we talked about, policies or preferences are merely tools that I see us using to achieve the main policy. And that is to remedy the anti-competitive problems that we have identified.

That is not to say that we always have the right -- that is not to say that we always do it in the least costly way to the parties.

And I encourage you to work with us to try to identify those areas in which we can do something less drastic, for lack of a better word, that achieves the Commission's primary goal.

MR. SALTZMAN: I also found the comments to be very, very helpful and enlightening. I had a couple of points I wanted to address. One is the number of people suggesting additional effort be made to assess the effectiveness of the divestitures. And I would just encourage people if you have specific suggestions or ideas of how to go about doing that, at least I would be interested in hearing them. Then I have a question.

Let's say, we do an analysis and determine that it appears that some types of divestitures are more successful than others and particular types of firms seem to be successful, more so than another type of firm, I don't know this to be the case, let's say, smaller firms have -- let me put it this way. Let's say, there have been divestitures to large firms. And they have been successful, then return to the question, should the Commission take actions in some way to alter that outcome? In other words if the objective is to maintain or restore competition and if a particular process seems to do that, and if it turns out that some party is disadvantaged, how do we do that?

I will give you a hypothetical. I'm an economist. Let's say, the parties wanted to do the deal quickly and in order to do the deal quickly it

happy to have Fiona bring up some issues of process; we had not talked about that so much I think. And sometimes the process works well. And sometimes unfortunately, the process drags out a lot longer than any commission or parties would like it to.

And I think any thoughts that people have, I would encourage on ways to streamline the process. And I think where we can do things at the Commission to make the process move more smoothly, as well as, you know obviously it's both sides to the negotiations or can be reasons why it drags on so much longer.

Also thoughts of ways of ensuring the parties not being the reasons why the process is also dragging on so long, the thought that is people have along those lines.

And I encourage people to put together submissions or let us know what thoughts you have on that issue.

MR. ROONEY:

MS. ANTHONY: I think what my colleagues have all said sounds obviously very reasonable. And the only thing that I would add here, just in terms of some of the comment, is that from our perspective I think or speaking for myself, is that the hippocratic oath manager, do no harm, I think when we are involved in

negotiating dealing with remedies in the merger context, we're very mindful of the enormous power that we're vested with, either informally or formally with the law.

And I think as we approach these things we really do try to refrain from what I'll call market engineering or market restructuring, because that really is not our role. And I think that all of the comments mentioned today, re-enforce that, that we we're not trying to restructure or re-engineer.

We're trying to ensure that any competition that would be significant competition that would be displaced would be replaced. How that is done, we would much prefer that the market do, and that our fingerprints in that sense are not on it, because that is not what we're best equipped to do.

One last comment in terms of Ron's issue with respect to more information out there and the bidding process and the auctioning process. And I couldn't agree with you more.

Competition is always enhanced with more information that we have. The problem is it's not the role of the FTC staff to ensure in that auctioning process, one hundred percent information is out there. That is the role, we hope the market will play with

staff expends as much time working on the remedy as we do on investigating the case. We talk to customers. We talk to industry participants. We do interviews. We do depositions. So this is not something we take lightly. We do spend a lot of time on this.

And I just wanted to make sure everybody knew that.

MR. ROONEY: Last word to Dan.

MR. DUCORE: Two quick observations. Then to thank everyone for their input. I think what I'll take away from this meeting, one of the most intriguing areas was the idea of changing the process.

I don't know yet what I think of that. But I think we should give a lot of thought on our side about how we do some of the things we do. I think that implicates transparency. It implicates more parties who may feel like they are cut out of the process. There may be limits as to how far we can go there. It's an area we have not spent so much time on, as on the nuts and bolts, like up front buyer.

But the other point, and I get the sense that we're not communicating this perspective. So I want to leave you with this thought and maybe the word can spread. Bill Blumenthal wrote an article a little while ago. And I generally agree with him on a lot of

points, except where he accused us of engaging in regulatory arrogance, in that we second guess the potential buyers when they cut their deal. And we second guess what the package is when it's put to us as being a competitive fix to the problem we have identified. And if we're perceived as being -- as second guessing, I think we're not really getting our message out.

And the message I would want to get out is we're trying to minimize, not just the risk, but we're trying to minimize the assumptions we think we have to make about a remedy, to decide whether it's workable, so that the more a package or divestiture proposal varies from what the competitive situation looked like before the deal, the more it raises questions that we have to answer. And the harder it is for us to do that, or it, the more assumptions it calls on us to make.

And let me use a quick example. I'm going back to supermarkets because I think it raises these kinds of -- these kinds of cases raise the issue most acutely. You have a merger of two chains, regional or national chains but in a particular geographic market they have a number of stores dispersed around the community, supported by the vertical integration of a parent firm. And that's what you have competitively

going in.

Presumably we want to preserve that competition. We think that is a good thing. And the loss of that is what leads us to conclude we have a law violation. So the question then is, what do we do to get back? If that was working before and the loss of that is our concern, then it seems to me that you need to make the fewest assumptions if the remedy is going to restore the market to something that looks like that after this.

When we start asking questions or if we start considering options like, well we won't divest all of one company’s stores, we'll divest a mix of stores, then we have to start questioning the assumption, is that mix of stores going to have the geographic dispersion that it needs. Are they going to be viable stores individually? The phrase is we don't want a package of the dog stores.

That may be an extreme statement. But we have to look at each property to answer the question: is that individual property going to be a viable competitive contributor to the chain that is going to be now made up and divested.

And that is a question we don't have to ask if one whole side of the transaction is being divested.

Similarly, if we entertain the proposal to take one chain and split it in half and divest to two smaller firms, we then have to ask the question: can those two firms offer the kind of competition in the market that one large firm did before. They may be better. That is true. But they may not be. It's dangerous for us to make the assumption that this is just as good as what we had before.

And the final point along those lines is allowing a divestiture to an incumbent. Let me underscore that there is not a policy against that.

And I'm not sure there is a preference against divestitures to small incumbents. I think the problem we have found, I think in particular cases, is that the incumbent isn't so small. And if you run the concentration numbers, you may not be solving the problem. You may be making it worse. But, be that as it may, the divestiture to a smaller company, eliminates that smaller company. So we have to then weigh the pros of somebody who already knows this market a little bit getting in in a bigger way against a loss of him as an independent now that he is going to take over the position that another firm had.

I'm not saying these are things we reject out of

hand. They are not. There are consents that we have entered that contain all this. Every time you do that and offer that to us, we have to ask a lot more questions than we had to ask before.

Number one, it slows, you know, the process. But number two, it involves us in making those kinds of assessments and making assumptions that frankly we would prefer not to make. We don't want to re-engineer the market. We don't want to be in the position of deciding we had two firms before, now we think one big one and two little ones would be better.

We want to stay away from that. We get forced into considering just those questions when the parties come in and want to offer deals that look post-divestiture, that are going to present a market post-divestiture which is not what the market pre-merger looked like. That is when we get nervous. And we worry about making a lot of assumptions. And that is when we frankly have to get a lot of answers to a lot of questions.

If I could get people to understand we're not eager to do that, we're eager not to do that. But if we're asked to and the parties say, we will take the time to let you do that, we will do that, albeit I think we will do it reluctantly.

MR. ROONEY: Thank you very much. Thank the audience. If you have individual comments, I'm sure the FTC personnel will stay around for a while. Thank you for your participation.

(Time noted: 1:45 P.M.)