CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

R. BRUCE JOSTEN
EXECUTIVE VICE PRESIDENT
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November 6, 2008

The Honorable William Kovacic
Chairman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Re: Parts 3 and 4 Rules of Practice Rulemaking—P072104

Dear Chairman Kovacic

The U.S. Chamber of Commerce, the world's largest business federation representing more than three million businesses and organizations of every size, sector, and region, appreciates the opportunity to comment on this proposed rule, which would make significant changes to Parts 3 and 4 of the Federal Trade Commission's (FTC's) Rules of Practice. However, the Chamber is concerned with the limited length of the comment period for such significant changes, and at a minimum request that it be reopened and extended.

The Chamber appreciates that the stated goals of the proposed rule changes are to "expedite [the FTC's] adjudicative proceedings [and] improve the quality of adjudicative decision making." However, the Chamber is concerned that while the additional changes may speed up certain parts of the process in certain circumstances, they should not be undertaken at the expense of companies' due process rights. Indeed, it appears that the proposed changes are being rushed into place and for the purpose of giving the FTC material, tactical, and procedural advantage in litigating those matters that it decides to bring.

In addition, concerns within the U.S. business community are mounting with respect to the international practices of competition authorities around the globe. A critical element of those concerns is whether proceedings undertaken in foreign jurisdictions afford due process to the non-governmental participants. As the FTC and the Department of Justice Antitrust Division look to substantively influence the economic and legal thinking of these jurisdictions, both agencies have a fiduciary responsibility to adhere to and set the benchmark for the highest due process best practices, procedures, and standards. The proposed changes in this rule send the wrong signal to foreign jurisdictions regarding the importance of due process and certainly hurt the credibility of the FTC when it comments to foreign agencies.

Removing from the ALJ Critical Powers to Manage the Case Removes a Critical Check on the Potential Unfairness Stemming from the FTC's Dual Role of Prosecutor and Judge.

The FTC's proposed regulations work to effectively eliminate the role of the independent Administrative Law Judge (ALJ) to manage and prepare an initial decision for a case. This results in the elimination of a vital check on potential unfairness inherent in the FTC's administrative procedure. Under the FTC's process, the Commissioners act as both prosecutor and judge in administrative trials.[1] Thus, the same individuals who decide to issue the complaint also decide the final appeal of the administrative trial. With such a clear potential for unfairness or conflict of interest at the forefront of FTC administrative adjudication, it is necessary to preserve some sort of fairness check.

This necessary check has historically been present in the form of the trial examiner, predecessor to today's ALJ. The Supreme Court has recognized the value of independent ALJs to the reform of administrative litigation.[2] The 1941 Final Report of the Attorney General's Committee on Administrative Procedure, which prompted the Administrative Procedure Act, echoed this sentiment and concluded that the most important device to avoid unfairness and public distrust in this structure was through the creation of these empowered, independent hearing officers.[3] The Attorney General's Final Report envisioned the ALJs as independent individuals who would preside at hearings and make findings of fact and conclusions of law (such findings not to be disturbed "unless error is clearly shown").[4] The FTC's proposed regulations, by stripping the ALJ of significant powers to manage and initially decide the case, represent a serious about-face and march back towards the structure which the Attorney General's Final Report found so troubling.

Whatever power the FTC has under the Administrative Procedure Act to appoint itself or an individual commissioner to preside over hearings should not be extended to countenance the à la carte approach to the altered powers of the ALJ reflected in the proposed regulations. If, as it should, the FTC chooses to utilize ALJs to oversee hearings on merger challenges, the ALJs should be truly independent with full power and authority to oversee and initially decide all aspects of the administrative litigation. Otherwise, the appearance of independent fact finding is illusory.

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1 This dual role has long been criticized. *See, e.g.*, AMERICAN BAR ASSN SECTION OF ANTITRUST LAW, THE FTC AS AN ANTITRUST ENFORCEMENT AGENCY: ITS STRUCTURE, POWERS AND PROCEDURES, VOLUME II, 67-68 & nn. 252-54 (1981).

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

3 Attorney General's Committee on Administrative Procedure, Final Report (1941), *hereinafter Attorney General's Final Report.*

4 *Id.*, 51.

The FTC's Proposed Regulations Will Put Businesses at a Serious Disadvantage When Litigating Against the FTC.

An alarming disadvantage stems from the FTC's desire to remove power from the ALJ in Proposed Regulation 3.22. The FTC proposes to give itself the power to preside over discovery and other prehearing proceedings—which can often be outcome-determinative—before transferring the matter to the ALJ for the evidentiary hearing. This runs totally counter to the Attorney General's recommendation that all discovery powers be lodged in the hearing officer as a critical dimension of independence. That the FTC proposes to strip the ALJ of his or her ability to rule on dispositive motions, such as motions to dismiss and motions for summary decision, also removes the independent filter that the Attorney General's Committee felt was so important to the integrity of the FTC's decisional process. By arrogating to itself such critical aspects of the administrative process, the FTC reduces the role of the ALJ to a caricature, stripped of the powers necessary to support a true independent decision-making role.

The FTC's Proposal Overturns Its Policy Statement on Whether to Proceed With Administrative Challenges to Mergers After It Has Been Denied a Preliminary Injunction in Federal Court, Contrary to Its Own Position Statement and the Recommendations of the Antitrust Modernization Commission.

In 1995 the FTC issued a formal statement of its policy on whether to proceed with administrative litigation following denial of a preliminary injunction in merger cases.[5] The FTC declared that the decision to continue "is not, and cannot be, either automatic or indiscriminate," but would instead be based on five factors.[6] The FTC's proposed regulation now furtively advises the world that its former Policy Statement is null and void and that "the norm should be that the Part 3 case can proceed even if a court denies preliminary relief."

Contrary to the FTC's assertion, the new policy has never been the "norm." Former FTC Chairman Muris stated that under the Policy Statement the FTC should decide not to proceed with administrative adjudication "in almost all cases" after losing a preliminary injunction trial,[7]

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5 60 Fed. Reg. 39,741 (Aug. 3, 1995).

6 *Id*, 39,743. The five factors were: ("(i) the factual findings and legal conclusions of the district court or any appellate court, (ii) any new evidence developed during the course of the preliminary injunction proceeding, (iii) whether the transaction raises important issues of fact, law, or merger policy that need resolution in administrative litigation, (iv) an overall assessment of the costs and benefits of further proceedings , and (v) any other matter that bears on whether it would be in the public interest to proceed with the merger challenge."

7 "Assessing Part III Administrative Litigation: Interview with Timothy J. Muris," *Antitrust* 6, 9 (2006).

and in the fifteen years prior to 2007 the FTC never pursued a full administrative trial after the denial of a preliminary injunction.[8]

The FTC's new policy also flouts the 2007 Report of the bipartisan Antitrust Modernization Commission (AMC), which recommends that the FTC should not litigate its merger cases administratively following an injunction proceeding in federal court and in fact should be denied the power to do so.[9] Among the reasons cited by the AMC was to eliminate the disparity between the process followed by the FTC and the Department of Justice Antitrust Division ("DOJ"), which was undermining public trust in the merger enforcement process.[10] The FTC has now decided on two occasions since the AMC Report to ignore the AMC's recommendation and proceed with administrative adjudication after being denied a preliminary injunction.[11] If there should be any regulatory change to reform the administrative litigation process, it should be change that will implement, rather than ignore, the AMC recommendations and minimize, rather than exacerbate, the differences between FTC and DOJ merger enforcement. As with U.S. businesses, it is unlikely that foreign agencies understand this discrepancy in process and it certainly raises credibility issues when U.S. agencies make process recommendations to them.

<u>There is No Justification for the FTC's Proposed Rule Changes.</u>

A particularly troubling concern about the FTC's proposal is the lack of any apparent rationale for these consequential proposed rules.

A. Abandonment of Transactions

The FTC offers no evidence that shortening the process to the length contemplated by the proposals will make it any less likely that parties will abandon transactions. The FTC has had in effect for more than ten years a "fast track" procedure providing for a final FTC decision in 13 months. The FTC's current proposal, even under the most optimistic assumption about the length of time required for its own appellate opinion, would take nearly 18 months. If transactions are being abandoned despite a 13-month "fast" track, it is unlikely they will not be abandoned under an 18-month decision track. Whether 13 or 18 months, parties will abandon at times because both are long and they will think the odds are stacked against them. This means they will need to appeal, which typically takes a significant amount of time. Many of the time limitations, while laudable to make this go more quickly, should not be up to the FTC. The FTC

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

9 *Id*. at 139-140.

10 *Id.*

11 The FTC has pursued Part III adjudication in Equitable Resources, Inc., Dkt. No. 9322 (transaction abandoned by the parties) and Whole Foods Market, Inc., Dkt. 9324 (Order Rescinding Stay of Administrative Proceeding, Aug. 8, 2008).

will have had sufficient time of discovery in the second request process. If the parties think they need more discovery time or a longer trial, they should be able to make that argument to the ALJ and let the ALJ decide. In addition, the FTC has not placed a deadline or time improvement on the one portion of the process that they control completely—the time for a decision by the Commissioners, which is very often a source of substantial delay. The average time from initial ALJ decision to a final FTC decision is about 20 months, and these regulations do not propose to set a timeline on this important matter.

B. Eliminating "Non-Essential Discovery and Motion Practice"

The FTC also contends that its proposed regulations will eliminate "non-essential" motions and discovery. The changes are unnecessary as the concern is another non-issue. If discovery and motions are "non-essential," the ALJ has the power and discretion to—and should—deny them under the current rules. This is the fair and proper way to deal with the issue, rather than to simply crowd out what may be essential discovery by an arbitrary five-month deadline.

C. "Justice Delayed Is Justice Denied"

This slogan, invoked but not elaborated by the FTC, is no substitute for factual and logical analysis of the trade-off between efficiency and fairness, which the FTC does not attempt to perform in its Notice. The FTC's interest in remedying anticompetitive mergers in a timely fashion is best served by utilizing "high quality decision-making."[12] Moreover, the failure of the FTC to impose any definitive deadlines or timeframes on its own issuance of a final opinion makes such proclamations ring hollow.

<u>Given the Significant Changes Made in this Proposed Rule, the Time Allowed for Public Comment is Inadequate.</u>

Public comments have been requested to be submitted no later than November 6. Thirty days simply do not provide adequate time for the public to consider and comment intelligently on the serious impact of the FTC's proposals. The last time the FTC made significant changes to the adjudicative rules (in 1996) the FTC allowed 60 days for public comment, and the changes at issue at that time were less controversial than those in the present proposal.[13] Considering that the public comment period for far less significant amendments is often double or triple the length of time, the inadequacy of 30 days for the present proposals becomes apparent. An additional comment period of 60-90 days should be granted in order to encourage the production of thoughtful, high-quality public comment by all those impacted by the proposed changes.

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12 73 Fed. Reg. 58,833 (October 7, 2008).

13 61 Fed. Reg. 50,640 (September 26, 1996).

Conclusion.

The Chamber opposes the adoption of the FTC's proposed regulations in its current form. The Chamber appreciates all attempts to make the process more efficient and effective, but feel these changes infringe on due process rights and are not a proper approach.

Sincerely,

R. Bruce Josten