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Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development 06-Oct-2009

English text only

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/WD(2009)99
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ROUNDTABLE ON FAILING FIRM DEFENCE

-- Contribution by the United States --

This note is submitted by the Delegation of the United States to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 21 - 22 October 2009.

JT03271172

English text only

FAILING FIRM DEFENSE

-- Note by the United States --

1. In the United States, the acquisition of a firm that qualifies as "failing" is not subject to liability under Section 7 of the Clayton Act.[1] The United States Department of Justice and Federal Trade Commission (hereinafter, collectively referred to as the "Agencies") articulate the rationale for this defense and the framework they use to analyze whether a company qualifies for this defense in our *Horizontal Merger Guidelines* ("*Merger Guidelines*"), which were issued in 1992 and revised in 1997. This defense is also well established in our case law.[2]

2. The failing firm defense is narrow in scope and is rarely invoked in court or before the Agencies. When invoked, the defense is rarely successful. It has been upheld in only a few court decisions since 1930.[3] Moreover, in light of the strict legal standard, there have been few mergers in which this defense has been proffered and in which the Agencies have accepted it after investigation.

3. Part I of this submission provides a general overview of the framework the Agencies and U.S. courts employ when analyzing the failing firm defense. Part II discusses in detail each of the four requirements for satisfying the defense, as set forth in the *Merger Guidelines*. Part III of the paper addresses a related defense called the failing division defense, and Part IV covers a related consideration involving claims that the merging firm is "flailing" or is a weakened competitor. Finally, Part V of this submission discusses why the demanding standards required to qualify for the failing firm defense should not be relaxed in periods of economic distress.

1. Overview of the Analytical Framework for the Failing Firm Defense

4. The failing firm defense was first introduced into U.S. jurisprudence by the Supreme Court in 1930.[4] Pursuant to the case law that has developed since then, our courts will find that the defense applies if two conditions are met. First, the acquired firm must be in a failing condition, which means that it faces "the grave probability of business failure,"[5] such as when it is in, or is about to enter, bankruptcy or

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1 15 U.S.C. § 18.

2 *See generally* ABA Section of Antitrust Law, Antitrust Law Developments (6th ed. 2007) 363-68.

3 See, e.g., Int'l Shoe v. FTC, 280 U.S. 291 (1930); Sutter Health; Reilly v. Hearst Corp., 107 F. Supp. 2d 1192 (N.D. Cal. 2000); Culbro Corp.; FTC v. Great Lakes Chem. Corp., 528 F. Supp. 84 (N.D. Ill. 1981); United States v. M.P.M., Inc., 397 F. Supp. 78 (D. Colo. 1975); Granader v. Public Bank, 281 F. Supp. 120 (E.D. Mich. 1967); United States v. Md. & Va. Milk Producers Ass'n, Inc., 167 F. Supp. 799 (D.D.C. 1958).

4 *See Int'l Shoe v. FTC*, 280 U.S. 291 (1930).

5 *Citizen Publ'g Co. v. United States*, 394 U.S. 131, 137 (1969), quoting *Int'l Shoe*, 280 U.S. at 302. In *International Shoe*, in which the Supreme Court first articulated the failing firm defense, the Court seemingly grounded the defense in the avoidance of social costs of liquidation, specifically harm to shareholders of the failing firm and the communities in which its operations were located. This emphasis on social costs was not repeated in the Court's subsequent *Citizen Publishing* decision. The emphasis on

receivership.[6] Second, the acquired company must have had no other reasonable alternatives to the proposed merger that are less detrimental to competition.[7]

5. Regarding the financial condition of the firm, it is important to "distinguish between a firm 'merely' facing financial distress and a firm whose fundamental ability to compete effectively in the future is in doubt."[8] For example, when a firm has valuable assets that should allow it to compete efficiently but has difficulty meeting its financial obligations, or has too much debt, or needs new management and a new business strategy, it may well be able to emerge from its financial trouble as an effective competitor.[9] "The fact that a firm has been losing money does not mean that it is a 'failing firm' in an antitrust sense."[10] For example, "accounting losses do not necessarily correspond to true economic losses from ongoing operations, especially for firms that have taken on substantial debt."[11]

6. While the precise conditions in the *Merger Guidelines* are articulated slightly differently than in the case law, the analysis of whether a firm is failing is essentially the same. In particular, pursuant to the *Merger Guidelines*, "a merger is not likely to create or enhance market power or to facilitate its exercise, if imminent failure, as defined below, of one of the merging firms would cause the assets of that firm to exit the relevant market."[12] Importantly, the Agencies' analysis is forward looking. The four requirements of the failing firm defense are as follows:

1. the allegedly failing firm would be unable to meet its financial obligations in the near future;

2. it would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act;[13]

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social costs has been repudiated by many as mistaken, in that social costs of liquidation do not necessarily exceed social costs of alternative dispositions. *See, e.g.,* 3 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, ¶952c at 278 (2009) ("Note that potential conflict is not simply between stockholders on the one hand and employees and affected communities on the other. Jobs lost in one community will at least partially be matched by jobs gained in another. Thus, even if the stockholder interest were to be downgraded, the choice would be between one community and another, or (where there is some job loss because of consolidated operations) between a larger number of jobs in one place and greater efficiency elsewhere. There is no reason for antitrust enforcement agencies or courts to become enmeshed in issues of that kind, particularly where there is no warrant for considering any of these factors in the text of §7, except insofar as they pertain to the effect on economic competition."). In addition, *International Shoe*'s consideration of social costs appears to many as out of step with contemporary antitrust analysis, which recognizes competition as the paramount value served by antitrust laws. *Id.* ¶952c2 at 278 (2009). *See also* Anticipating the 21st Century, Competition Policy in the New High-Tech, Global Marketplace, Volume I, A Report by the Federal Trade Commission Staff (May 1996), at p. 115 ("Others noted that jobs are as likely lost through a merger as through no merger . . ."), *available at* http://www.ftc.gov/opp/global/report/gc_v1.pdf.

6 See United States v. Greater Buffalo Press, Inc., 402 U.S. 549, 555 (1971); Citizen Publ'g Co., 394 U.S. at 137-38; Int'l Shoe, 280 U.S. at 302.

7 *See Citizen Publ'g Co.*, 394 U.S. at 137.

8 Remarks of Carl Shapiro, Deputy Assistant Attorney General for Economics, Antitrust Division, U.S. Department of Justice, Prepared for Delivery to ABA Antitrust Symposium, Competition as Public Policy, *Competition Policy in Distressed Industries*, May 13, 2009 ("Shapiro Remarks"), p. 15.

9 *Id.*

10 *Id.* at 21.

11 *Id.*

12 *Merger Guidelines* § 5.0.

13 11 U.S.C. §§ 1101-1174 (1988).

3. it has made unsuccessful good-faith efforts to elicit reasonable alternative offers of acquisition of the assets of the failing firm[14] that would both keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger; and

4. absent the acquisition, the assets of the failing firm would exit the relevant market.[15]

7. If a firm meets these conditions, it satisfies the failing firm defense and the reviewing Agency will not challenge the proposed transaction. However, these conditions are quite demanding and the defense is construed narrowly. The merging parties must convince the reviewing Agency that the entity to be acquired qualifies as a failing firm. When defending against an alleged Section 7 violation in federal court, this is an affirmative defense that must be alleged in the defendant's answer to the complaint,[16] and the defendant bears the burden of proof.[17]

2. Analysis of *Merger Guidelines* Requirements

8. The four requirements set forth in the *Merger Guidelines* are discussed separately and in greater detail below.

2.1 Inability to Meet Financial Obligations

9. There is no fixed list of conditions that, if present, demonstrate that a firm cannot meet its financial obligations in the near future. This must be carefully analyzed and a judgment must be made about the financial health of a company on a case-by-case basis. One of the main factors the Agencies consider when determining whether a firm can meet its financial obligations is whether it has sufficient cash flow. The Agencies also examine whether total liabilities exceed total assets over a period of time[18] and whether a company's costs are greater than its revenues. A decline in sales or even negative current profits, by itself, is insufficient to demonstrate that the firm would be unable to meet its financial obligations.[19] The Agencies also look at the likely ability of the firm to obtain new revenues or new customers and whether the losses are short term and unlikely to be repeated.[20] In addition, the Agencies may consider whether the company's productivity is declining, whether its supply of key inputs is being exhausted, or whether it is simply being poorly run by current management.[21] Further, the Agencies may examine whether a company's financial problems are part of an irreversible downward trend or whether they are more attributable to the general, and temporary, depressed state of the economy. It is also

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14 Under the Merger Guidelines, "[a]ny offer to purchase the assets of the failing firm for a price above the liquidation value of those assets – the highest valued use outside the relevant market or equivalent offer to purchase the stock of the failing firm – will be regarded as a reasonable alternative offer." § 5.1, n. 39.

15 *Merger Guidelines* § 5.1.

16 *See Joseph Ciccone & Sons, Inc. v. Eastern Inds., Inc.*, 537 F. Supp. 623, 628 (E.D. Pa. 1982); *see also United States v. M.P.M., Inc.*, 397 F. Supp. 78, 95 (D. Colo. 1975).

17 *See United States v. Gen. Dynamics Corp.*, 415 U.S. 450, 507 (1974).

18 *See also California v. Sutter Health Sys.*, 130 F. Supp. 2d 1109, 1134-35 (N.D. Cal. 2001).

19 *See* Remarks of Kevin J. Arquit, Director, Bureau of Competition, Federal Trade Commission, Before the American Bar Association, *The Failing Firm Defense and Related Issues*, Apr. 12, 1991 ("Arquit Remarks"), p. 9.

20 *See* Ken Heyer and Sheldon Kimmel, *Merger Review of Firms in Financial Distress*, Economic Analysis Group Discussion Paper, Mar. 2009 ("*Merger Review*"), pp. 4, 6 (forthcoming in *Competition Policy International*).

21 *Id.*

important to consider whether the company's pre-merger, ordinary course of business documents reveal an imminent financial failure, or if the claims of failure appear to be invented to help defend the merger.[22]

2.2 Inability to Reorganize in Bankruptcy

10. Second, under the *Merger Guidelines*, to qualify for the failing firm defense, the firm must be unable to reorganize in bankruptcy.[23] To determine whether a company can reorganize in bankruptcy, the Agencies consider whether the elimination of the company's debt through the bankruptcy proceeding could correct the company's financial problems. If, for example, the company is unable to meet its current and expected operating expenses from its expected revenues, or capital has been exhausted, reorganization may not be possible. The Agencies may consider the company's projections for improving its condition and whether the company has a viable plan going forward. In addition, the Agencies may talk to the company's creditors to determine whether they can or will work out a plan to restructure the company's debts. It is insufficient to demonstrate that outstanding bank loans may be called in. Creditors may be willing to restructure loans, or loan additional funds, to keep a company in business if its future business prospects are encouraging.[24] Therefore, the Agencies investigate whether the firm has had discussions with its creditors and what the creditors plan to do in the absence of the merger.

2.3 No Reasonable Alternative Less Detrimental to Competition

11. Next, to demonstrate that there were no other reasonable alternatives less detrimental to competition, the *Merger Guidelines* and courts have required a firm to have made a good faith effort to seek "reasonable alternative" offers from other potential purchasers.[25] Any offer to purchase the assets of the failing firm for a price above the liquidation value of those assets—the highest valued use outside the relevant market or equivalent offer to purchase the stock of the failing firm—will be regarded as a reasonable alternative.[26] If the assets "would likely be purchased by a firm that presents no (or fewer) competitive problems and would continue being employed as an independent competitive force in the market, then the mere fact of current financial distress does not imply that the proposed merger is

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22 For example, in one of DOJ's cases, a firm was found to be failing when the firm suffered heavy losses year after year in the range of $4 to 5 million per year and the firm never earned a profit. In another case, DOJ found a company likely to be failing because its equipment essentially would cease to operate within a few years, it did not have sufficient funds to purchase new equipment, and it was not likely to find a source to fund that equipment.

23 By way of background, under Chapter 11 of the U.S. Bankruptcy Code, 11 U.S.C. § § 1101-1116, any company may initiate a bankruptcy reorganization proceeding. Once it files its reorganization petition, the company continues to operate, typically under the control of current management, and is given a wide variety of statutory powers to cancel or renegotiate contracts, use collateral to borrow additional funds, rescale its operations, and modify its debt and equity structure. Creditors may not initiate legal action against the company outside the bankruptcy process. Ultimately, the company will propose a plan of reorganization to keep its business alive and pay creditors over time. The court must approve the plan, and certain debts incurred prior to the filing of the bankruptcy petition will be discharged. The turnaround period may involve years of operation in Chapter 11 reorganization, until an economically viable business can be assured. If no feasible reorganization plan can be formulated, then, under a Chapter 7 liquidation proceeding, the assets of the company may be liquidated by a trustee, and the proceeds distributed pursuant the priorities set forth in Chapter 7 of the Bankruptcy Code. 11 U.S.C. § § 701-716.

24 *Merger Review*, p. 6.

25 *See Merger Guidelines* § 5.1; *see also Sutter Health*, 130 F. Supp.2d at 1136 (*citing United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

26 *See Merger Guidelines* § 5.1 n.39.

necessarily benign."[27] This is why the Agencies require the assets to be shopped before determining that a company is entitled to the defense.[28]

12. Determining whether a company sufficiently pursued alternative purchasers can be difficult. The solicitation of alternative offers ought to be such as to avoid discouraging any offers above the assets' liquidation value. For example, an offering solicitation ought not to suggest or imply that bids below a certain level will not be entertained, as this might discourage some bids above liquidation value.

13. The merging firms, of course, would prefer that their proposed transaction be permitted to go through. The required scope of the shop will depend on the nature and size of the relevant industry.[29] The Agencies require the following: that a number and variety of companies be contacted, including investment groups or companies from related industries; that sufficient information be provided to companies expressing interest; and that legitimate expressions of interest be pursued seriously.[30] Where an investment bank is retained to conduct the search, the investment banker must be given proper incentives to do an adequate job, and not, for example, be compensated with a share of the merger's transaction price if no alternative buyer is located.[31]

14. The burden is on the merging parties to demonstrate that there are no reasonable alternative purchasers less detrimental to competition. It is not the Agencies' obligation to find another willing purchaser. However, the fact that the Agency, through its investigation, cannot itself find another interested purchaser may be persuasive evidence that the merging firm's unsuccessful shop was adequate. General expressions of interest from alternative purchasers, without the extension of an actual offer, generally do not constitute reasonable alternative offers.[32] The Agencies also may agree to a supervised shop of the assets conducted by a broker over a period of time. If such a shop does not produce an alternative purchaser, and the other elements of the defense are met, the merger may be allowed to proceed.

2.4 Exiting Assets

15. Finally, the *Merger Guidelines* require that, absent the acquisition, the assets of the firm would exit the market. Simply because no alternative purchaser can be found does not imply that the allegedly failing firm would itself liquidate rather than continue to operate the assets in the market of competitive concern. It can be difficult to determine whether the assets would exit the market, in no small part because the evidence often rests largely in the hands of the allegedly failing firm.[33] The company should be able to provide the Agency with objective evidence sufficient to show that it is not more profitable for it to continue to operate the assets in the market than to have them employed elsewhere – such as through liquidation.

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27 *Merger Review*, p. 5.

28 *Id.*

29 For example, in one case the Department found that it was sufficient to contact only a few purchasers when the relevant market was small and unattractive to potential purchasers, the allegedly failing firm was not well established, and the firm had never earned a profit.

30 Arquit Remarks, p. 16.

31 Arquit Remarks, p. 16.

32 *See Sutter Health*, 130 F. Supp.2d at 1137; *United States v. Culbro Corp.*, 504 F. Supp. 661, 669 (S.D.N.Y. 1981).

33 *See* Arquit Remarks, p. 29.

3. The Failing Division Defense

16. The *Merger Guidelines* also enunciate a defense for failing divisions of otherwise healthy companies. The requirements of the failing division defense, as articulated in the *Merger Guidelines*, are as follows:

> First, upon applying appropriate cost allocation rules, the division must have a negative cash flow on an operating basis. Second, absent the acquisition, it must be that the assets of the division would exit the relevant market in the near future if not sold. Due to the ability of the parent firm to allocate costs, revenues, and intracompany transactions among itself and its subsidiaries and divisions, the Agency will require evidence, not based solely on management plans that could be prepared solely for the purpose of demonstrating negative cash flow or the prospect of exit from the relevant market. Third, the owner of the failing division also must have complied with the competitively-preferable purchaser requirement of Section 5.1.[34]

17. U.S. courts have recognized the failing division defense,[35] noting that limiting the failing defense to an entire firm might unduly limit a company's ability to sell assets associated with a failing business and inadvertently harm rather than protect the competitive process.[36]

18. The same basic principles that apply to analyzing the failing firm defense apply to the failing division defense as well. However, several additional difficulties arise when analyzing a failing division. First, a parent company has discretion to allocate costs among its divisions, which could allow it to cause one of its divisions to appear to be failing when it is not.[37] Accordingly, clear evidence demonstrating the division will be liquidated absent the merger is necessary.[38] And, as with the failing firm defense, the Agencies insist upon supporting evidence that is not based solely on documents that may have been prepared in order to demonstrate to the Agencies negative cash flow and the prospect of exit. Second, it is difficult to determine the amount of money the parent company can be expected to put into the subsidiary in the future.[39] The Agencies will therefore consider whether an independent lender or third-party investor with no incentive to merge anticompetitively with the prospective acquirer would put money into the division with the expectation that it eventually would operate profitably.

4. The "Flailing" Firm or Weakened Competitor

19. Even if a firm cannot satisfy the rigorous requirements of the failing firm defense, its financial position may still be relevant to determining whether the merger is anticompetitive.[40] This situation arises when a firm that is "flailing" may not be as competitive in the future as it was in the past. A firm's weakened financial condition may, but will not invariably, indicate that it is unlikely to compete effectively in the future. Where the firm is unlikely to be an effective competitor but for the merger, then it may well be the case that the merger will not substantially lessen future competition.

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34 *Merger Guidelines* § 5.2.

35 *See, e.g., FTC v. Great Lakes Chem. Corp.*, 528 F. Supp. 84, 96 (N.D. Ill. 1981); *United States v. Reed Roller Bit Co.*, 274 F. Supp. 573, 584 n.1 (W.D. Okla. 1967).

36 *See United States v. Lever Bros. Co.*, 216 F. Supp. 887, 899 (S.D.N.Y. 1963).

37 Arquit Remarks, p. 23.

38 *Id.*

39 *See id.*

40 *See* Shapiro Remarks, p. 22.

20. This argument is of course considered since merger analysis is properly forward looking. However, "[f]inancial weakness, while perhaps relevant in some cases, is probably the weakest ground of all for justifying a merger, and certainly cannot be the primary justification for permitting one."[41] Moreover, as one antitrust official noted, "[a]nyone who seeks to limit competition and pleads financial distress as a justification must make a convincing case that *consumers* will not be harmed by the proposed limitation on competition."[42]

21. U.S. courts have provided guidance for analyzing this issue. The Supreme Court first acknowledged in 1974 that a weakened, though not failing, status might affect the competitive impact of a transaction.[43] The Court made clear in that case that the merging firm – a coal production company – did not qualify as failing, but that the firm's lack of coal reserves rendered it a less effective competitor in the future for long-term contracts.[44] In addition, one court recently noted that, "[a] weak financial condition, or limited reserves, may mean that a company will be a far less significant competitor than current market share, or production statistics, appear to indicate."[45] Courts typically consider the financial weakness of a firm "as one relevant factor among many" to be considered when determining whether the merger will substantially lessen competition.[46]

22. The company's financial difficulties are "only relevant if the defendant demonstrates that this weakness undermines the predictive value of the government's market share statistics."[47] In other words, the financial weakness must affect its prospects as a future competitor. For example, in the FTC's 1997 investigation of Boeing Co.'s acquisition of McDonnell Douglas, the FTC determined that McDonnell Douglas' significance as an independent supplier of commercial aircraft had deteriorated to the point that it was no longer a competitive constraint on the pricing of Boeing and Airbus for large commercial aircraft, even though McDonnell Douglas was not a failing firm. McDonnell Douglas' decline in competitive significance stemmed from the fact that it had not made the continuing investments in new aircraft technology necessary to compete successfully against Boeing and Airbus, and many purchasers of aircraft indicated that McDonnell Douglas' prospects for future aircraft sales were close to zero. Staff's investigation failed to turn up any evidence that this situation was likely to be reversed, and the FTC closed the investigation without taking any action.[48]

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41 *FTC v. Arch Coal, Inc.,* 329 F. Supp. 2d 109, 154 (D.D.C. 2004), *quoting Kaiser Alum. & Chem. Corp. v. FTC*, 652 F.2d 1324, 1339, 1341 (7th Cir. 1981) (internal quotations omitted).

42 Shapiro Remarks, p. 19 (emphasis in original).

43 *United States v. Gen. Dynamics Corp.*, 415 U.S. 450, 509 (1974).

44 *See Gen. Dynamics*, at 508.

45 *Arch Coal*, 329 F. Supp. 2d at 153.

46 *Id.* at 157.

47 *Id.* at 154. Insofar as a firm's weakened financial condition generally is associated with poor sales, its weakened condition likely already is accounted for in the firm's market share. *See* Phillip E. Areeda & Donald F. Turner, Antitrust Law ¶ 935c at 141 (1980).

48 *See* Statement of Chairman Robert Pitofsky and Commissioner Janet D. Steiger, Roscoe B. Starek III and Christine A. Varney in the Matter of the Boeing Company/McDonnell Douglas Corporation, File No. 971-0051, July 1, 1997. Commissioner Mary L. Azcuenaga issued a separate statement, disagreeing, in part, with the majority's conclusions. *See* Statement of Mary L. Azcuenaga, File No. 971-0051, July 1, 1997.

5. Failing Firm Defense in a Distressed Economy

23. There recently has been much discussion as to whether it would be appropriate to relax the requirements of the failing firm defense in a distressed economic situation.[49] "While there is no theoretical or empirical basis for departing from the basic principles of competition policy during general economic downturns, financial distress at the industry or company level is certainly *relevant* to antitrust analysis. . . . [A]ntitrust enforcement should take account of real-world economic conditions."[50] But, because antitrust analysis looks at competition at the industry and company level, the issues considered are in no way unique to a recession.[51] As the head of the Department of Justice's Antitrust Division recently stated:

> We are likely to see firms consider consolidation to alleviate perceived financial weakness in a distressed economy. A down economy does not change the fundamental analysis, however, which looks to the effects of the merger on competition. We will need to stick to the basics with a clear application of our guidelines to each transaction. For instance, although we may see "failing firm" defenses asserted more often, the analysis should be the same as it was before—will the acquisition benefit consumers? Is the acquisition the only way to keep the firm's assets in the market? When to credit a failing firm defense is just one of the issues we will face in the coming months.[52]

24. Similarly, "[i]f a merger involving a failing firm or division really will benefit consumers by generating cognizable efficiencies, that merger will meet the stringent standards of the failing firm test in the Guidelines."[53] Properly applied, the requirements of the failing firm defense are appropriate even in a distressed economy,[54] and transactions that do not qualify for the defense "should be blocked in troubled economic times for the same reasons they should be blocked in more 'normal' times."[55]

6. Conclusion

25. The requirements of the failing firm defense, while strict, are based on sound economic principles. These requirements are designed to permit the merger of a failing firm or division if the outcome would benefit competition. The principles underlying this defense apply equally to healthy and distressed economies. In fact, history has taught that robust antitrust enforcement aids economy recovery[56] and is essential to a growing and healthy free market economy.[57] Therefore, while failing firm claims may in troubled economic times be asserted with greater frequency, antitrust analysis of them should not change. This will ensure that antitrust enforcement takes account of present economic realities and prevents those mergers that harm competition.

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49 *See generally Merger Review*.

50 Shapiro Remarks, p. 12 (emphasis in original).

51 *See id.* at 13.

52 Remarks of Christine A. Varney, Assistant Attorney General for Antitrust, International Competition Network–Merger Working Group, Zurich, Switzerland, June 3, 2009.

53 Shapiro Remarks, p. 21.

54 *Merger Review*, p. 1.

55 *Id.*

56 *See* Shapiro Remarks, p. 11.

57 Statement of Christine Varney, Nominee for Assistant Attorney General for Antitrust Before the United States Senate Committee on the Judiciary, 111th Cong. (Mar. 10, 2009).