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DO WE NEED A TRUST-BUSTER LIKE TEDDY ROOSEVELT?

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To address the question *Do We Need A Trust-Buster Like Teddy Roosevelt?* it is best to consider history and journey back to the years preceding Roosevelt's ascendance to the presidency, back to the Civil War years when the first American-based monopolies were in their infancy. Some say it is a myth that the Civil War years (1861 to 1865) offered significant opportunity for profiteering, but it is true that many men with varying degrees of knowledge, skills and abilities became wealthy overnight.

Many men such as John D. Rockefeller, Philip Armour, Andrew Carnegie, Andrew Mellon, Henry Flagler, J.P. Morgan, Cornelius Vanderbilt, among others became household names. As capitalists and adventurers who made the most of the gilded age, they benefitted from better-than-usual profits due to the demand for supplies in war time, and many went on to build large fortunes based on the finest businesses of their day.

The Succession War influenced basic, fundamental elements such as political culture and economic change, enabling many enterprising individuals to rise from virtual obscurity to national prominence. The building of the Transcontinental Railroad and the emergence of well-known industrialists like Singer and McCormick are valid examples. Even before the Civil War, many had projected the need for a railroad reaching to the Pacific Ocean. The discovery of gold at Sutter's Mill greatly enhanced California's growing notoriety and stature. New methods of transportation were needed as this west coast state developed into a highly desirable relocation point. It was during this time that many routes to the Pacific were surveyed, but several early government financing options failed in Congress. The main reason for the failure, ironically, was the inability to decide on the most appropriate route, but by 1861 many seats in Congress had

turned over and the Pacific Railroad Act was approved. This amendment provided a ground-floor opportunity for the first U.S. Transcontinental Railroad. Among other wealthy investors, Thomas Durant, Leland Stanford and Charles Crocker amassed great fortunes capitalizing on this monumental railroad construction project.

John D. Rockefeller gained significantly from war time profits. He leveraged the profiteering to finance his investments in Samuel Andrews' oil refinery which eventually led to the creation of Standard Oil and Rockefeller's legendary fortune. Rockefeller, among others, exerted considerable influence on state legislators and federal representatives to ensure there were very few laws regulating competition and almost no taxes levied on the profits of most businesses. Some viewed Rockefeller as a folk hero while others feared and despised him. The philosophy of the age was akin to Social Darwinism, the hallmark of which is 'survival of the fittest' as it pertains to human society. These beliefs supported the notion that rich, successful business owners were the 'fittest' of all. Without a doubt, the far-reaching effects of Rockefeller's unethical and even corrupt financial dealings pressed on the daily lives of millions of people in the United States. Even though people feared him and were intimidated by the power flaunted by Standard Oil, they still were in awe of his opulent, personal lifestyle. By 1879 the Standard Oil Company had absorbed enough smaller independent companies to become the first trust or monopoly. Others followed, and by 1890 giant American corporations were solidly in control of the food industry, clothing production and many other household necessities. The most successful business magnates of this era accrued previously unimaginable wealth. These "Lords of Industry" were politically astute and in a position to pull the strings of government to meet their every need.

To combat what the general public perceived as an awesome threat, a series of social movements began spreading across the United States. Farmers, co-ops, labor unions, populists, socialists and a new breed of investigative journalist known as "muckrakers" converged as new voices to limit the power of centralized capital. 1890 was also the year in which Congress attempted to challenge the growth of giant American corporations by enacting the Sherman Antitrust Act. The author, an Ohio Republican named Senator John Sherman, said, "The popular mind is agitated with problems that may disturb the social order." The law stated, "Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal…" It turned out that the wording, as deliberated in a court of law, was so loose that many historians believe that the Act was never designed to effectively limit capital accumulation at all. In fact, during the years immediately following its establishment, it appears that the Sherman Act was primarily used to ban labor unions, not to ensure competition among workers' employers.

By 1900 Andrew Carnegie governed every aspect of steel manufacturing and all the mega corporations dominated the nation's major railroads. A portion of this time period (1878 – 1889) is often referred to as the *Gilded Age*, an age distinguished by widespread immigration, dramatic industrial growth and extremes of wealth and poverty. The developing railroad system flourished, moving goods and supplies back and forth across the country. The resulting boom in commercial enterprise produced abundant wealth for a number of businessmen, not just John D. Rockefeller and Andrew Carnegie. Presented in satirical style, the 1873 novel *The Gilded Age: A Tale of Today* written by Mark Twain and Charles Dudley Warner explored the greed and political corruption in post-Civil War America. Legend has it that the authors were inspired by Shakespeare's *King John* (1595): "To gild refined gold, to paint the lily…is wasteful and

ridiculous excess," referring of course to the extravagant wealth and displays of excess demonstrated by America's upper class citizens.

While the second industrial revolution (1870 – 1914) brought practical innovations such as the invention of the telephone and mass production of the automobile, it also brought devastation to many rural communities. The market for locally produced goods and services dried up forcing families to relocate to large impersonal cities in order to find work. The entrepreneurs of this second industrial revolution flocked to the northeast creating industrial towns and cities with new factories. The influx of job opportunities supported by these factories contributed to the creation of an ethnically diverse industrial working class. During this time, critics branded the nouveau riche industrial leaders as "robber barons," people who made their fortunes through ruthless and unscrupulous business dealings. Accordingly, Samuel Gompers led the battle to organize impoverished American workers. The American Federation of Labor (AFL), founded in 1886, fought to eliminate hazardous working conditions, gain more control over jobs and bargain for fair compensation. It was this period in history that witnessed the emergence of a modern industrial economy. As the 19th Century came to a close national transportation systems grew and evolved, communication networks were created and large corporations evolved into the established form of trade. By 1900, industrial production and per capita income in the United States exceeded that of any other country in the world with the exception of Great Britain. More labor unions were formed to struggle against unsafe working conditions and long hours on the job, all in an attempt to provide opposition to the industrialists and the courts of law.

Theodore Roosevelt

Born in 1858, Theodore Roosevelt was a young boy when the likes of Andrew Carnegie and John D. Rockefeller were already developing plans for their businesses and fortunes. New York City was Teddy Roosevelt's birthplace. The Roosevelt ancestors settled on Manhattan Island in 1644. He was born to well-to-do parents, Theodore Roosevelt, Sr., a wealthy philanthropist, and Martha Bulloch Roosevelt, daughter of a rich southern plantation owner. A long line of Roosevelts and Bullochs enjoyed the aristocratic lifestyle.

Teddy Roosevelt's childhood was marked by severe asthma and acute nearsightedness. At the age of fourteen, he finally got eyeglasses for the first time. According to historical accounts, Teddy Roosevelt was a frail young man who was carefully supervised and tutored as he traveled extensively with his parents throughout the East Atlantic coast resorts as well as the European continent. Theodore Roosevelt, Sr. instilled in his children profound respect for discipline and duty. He was also very sympathetic to the special needs of his asthmatic son and built a gym for Teddy to practice his body-building program. Roosevelt, Sr. was described as "handsome, wealthy, and gregarious…equally at ease with millionaires and paupers, never showing a trace of snobbery…" (JSTOR: Presidential Studies Quarterly, Vol. 15, No. 3) Teddy Roosevelt's father was civic-minded and highly active in community affairs. He helped to establish the Metropolitan Museum and Museum of Natural History and he was a strong advocate for the New York Orthopaedic Hospital, Children's Aid Society and the Museum of Art. Among his other charities, Mr. Roosevelt gave generously of his time and money to rescue wayward children. Through his efforts many juvenile delinquents were saved from the pitfalls of city life and living on the streets and sent to work on farms out west. Most historians agree – Teddy Roosevelt's

father was the most influential force in his life – a living model of civil rights and equal opportunity.

Roosevelt loved books and reading and, for that matter, learning. By 1876 he had enrolled at Harvard University in Cambridge. During his third year at Harvard he met and fell in love with his first wife Alice Hathaway Lee. Teddy Roosevelt graduated from Harvard in 1880, the same year that he and Alice married. By 1881 he was elected to the New York State Assembly and quickly established himself as a reformer, opposed to the power of the political machine. In 1882 he published his first of 40 books, *The History of the Naval War of 1812*. Roosevelt served three terms as a New York legislator. Then, two days after the birth of their first child, Alice suffered kidney failure as a complication from childbirth and died. Tragically, Roosevelt's mother died from typhoid in the same house on the same day, just hours before his wife's death.

It was a stunning loss for Roosevelt. Shifting gears completely in an effort to recover, he resigned from the New York State Assembly at the end of his third term and traveled west to the open range of the Dakota Territory. There, he built a ranch known as Elkhorn and entered the cattle ranching business. By now, the infirmities of his youth were a distant memory and he tested his physical strength and stamina by rounding up cattle, hunting buffalo and living the exciting life of a cowboy. With his book *Hunting Trips of a Ranchman*, Roosevelt provided a diary of his experiences in the Dakotas.

During a trip to New York to visit his sister, Roosevelt became reacquainted with his childhood sweetheart Edith Carrow. The couple married in London the following year and settled in Oyster Bay, New York. As a way to become politically active again, he volunteered to campaign throughout the Midwest for Benjamin Harrison, Republican candidate for president in 1888.

Roosevelt had built a good reputation as a reformer when he served in the New York State Assembly and this led President Harrison to appoint him as head of the Civil Service Commission in 1889.

The Pendleton Civil Service Reform Act of 1883 created the Civil Service Commission. However, the law's jurisdiction was confined to federal jobs when it was corruption at the state and local levels that formed the groundwork for political machines. Roosevelt despised the "spoils system." As Commissioner he initiated reform programs, effectively using his position to investigate fraud and political abuse in government, thereby exposing corrupt public officials. For the next six years, national newspaper headlines consistently featured Teddy Roosevelt as one of the principal leaders in bureaucratic reform, and this acclaim furthered his political ambitions.

Roosevelt resigned from the Civil Service Commission in 1895 to accept the appointment as New York City Police Commissioner. Two years later, President McKinley offered him the opportunity to serve as Assistant Secretary of the Navy. In his new role, Roosevelt was charged with strengthening naval operations to be prepared for any possible threat. When war erupted between Spain and the United States, he was ready. In 1898 he ordered Admiral Dewey to attack the Spanish in the Philippine Islands. Before long, Roosevelt resigned his Navy post as well to organize and lead a volunteer regimen of the Army known as the Rough Riders. Under Roosevelt's leadership, this unique group of men defeated the Spaniards at San Juan Hill in Cuba. By July of 1898 the Spanish American War was over and Roosevelt drafted the "round robin" letter that initiated the end of Cuban occupation.

Roosevelt the War Hero, Governor, Vice President, President and Trustbuster

As the Spanish American War ended, Roosevelt's fame as a war hero grew exponentially. The people of New York welcomed him home and he became the obvious candidate for the gubernatorial office. The boss of the Republican political machine, Senator Thomas C. Platt, engineered the election in support of Teddy Roosevelt with the expectation that Roosevelt would knuckle under to his control. This did not happen and Platt's hopes quickly faded as he realized the newly elected Governor Roosevelt would continue to crusade for political reform. Unnerved by the audacity of Roosevelt, Platt devised a plan to get rid of him by nominating him for the office of vice president at the National Republic Convention of 1900. Still riding high on the crest of popularity, the war hero easily won the nomination. The team of McKinley and Roosevelt went on to defeat their opponent, William Jennings Bryant, and little more than six months later Theodore Roosevelt became president of the United States. President William McKinley was assassinated September 6, 1901.

As president, Roosevelt's nature and political strategy remained the same – a true progressive and reformer. He was committed to balancing the interests of big business and organized labor and focused considerable attention on domestic policy. Early on in his presidency his programs were portrayed as the "Square Deal." Even though Roosevelt had been born and bred into wealth and privilege, he hated the growing plutocracy in the United States. President Roosevelt utilized the Interstate Commerce Act of 1887 along with the Sherman Antitrust Act passed in 1890 as tools to direct the focus and stimulate support on reformation and the equitable balance between big business and labor.

The Interstate Commerce Act required interstate railroads to charge reasonable and just rates. Unfortunately this law had very little muscle because the Interstate Commerce Commission was charged with monitoring the railroads which left them very little authority to enforce the rulings. By 1895 the Supreme Court ruled that the Sherman Act could widen their sphere of influence by regulating interstate sales and transportation. The new authority allowed the Sherman Act to bar union strikes that interfered with interstate commerce. The Sherman Antitrust Act now converged on anything and everything that conspired to restrain trade. The Act made it a crime to combine or conspire to monopolize any part of the trade or commerce among the several states. In the years leading up to 1900, generally pro-business presidents did little to enforce it. Not surprisingly, it was during this period that more mergers occurred and trusts were formed at a rate higher than ever before. Roosevelt's greatest victories came when he successfully prosecuted the Northern Securities and Standard Oil companies under the Sherman Act. These early successes encouraged the Roosevelt Administration to file a total of forty-three lawsuits against a variety of trusts. But Roosevelt isn't the record holder for trustbusting.

Another Republican, William Howard Taft, president from 1908 to 1912, dissolved ninety anticompetitive trusts. Despite his unpopularity among pro-business conservatives, the Republicans renominated Taft for the presidency. Roosevelt's supporters established the Progressive Party and nominated him to run for a third term even though he had been out of office for more than three years. Both Roosevelt and Taft lost to the Democratic candidate Woodrow Wilson in the next presidential election. Although Wilson at first criticized Roosevelt's strategy of trustbusting, he eventually became known for eliminating monopolies by reviving vigorous competition through measures such as banking reform and tariff reduction. President Wilson relied on Congress rather than the court system to deal with monopolies.

The 20th Century

In 1914 Congress passed the Clayton Act, new antitrust legislation that more clearly defined the illegalities of anticompetitive business practices. The Clayton Act was designed to specifically address price discrimination, corporate purchases of stock in competitive firms, simultaneous membership on Boards of Directors of competing companies, and reciprocal sale of products. The laws had tightened. Anticompetitive behavior and trust building appeared to be a thing of the past. Or was it? The Supreme Court had already handed down the "rule of reason" in 1911. According to this principle (which was no new discovery, but an old doctrine of English common law), bigness in itself is not a crime; the concentration must only avoid imposing "unreasonable" restraints upon trade. This decision saddled the court system with the burden of determining what were, as well as what were not, "unreasonable" restraints upon trade. So long as the courts were generously inclined toward business combinations, the Sherman Act was likely to be ineffective. One very important goal of the Clayton Act was to define trade practices that are "unfair." In short, determine what is "unreasonable" restraints on trade.

While it wasn't altogether clear in 1890 that the Sherman Act would become a powerful tool for trustbusting, over the next 100-plus years it became the sacred text of the American antitrust policy. By 1912 The Sherman Act was used for anticompetitive behavior in matters as basic as a Bean and Walnut combine that was allegedly dictating prices into the market. The Sherman and Clayton Acts provided the foundation for antitrust law and President Wilson established the Federal Trade Commission in 1915 to serve as the enforcer and administering agency. Much of the history of the FTC is marked by the intersection of competitive policy and intellectual property. The Commission's first reported decisions included cases that charged respondents with conditioning the sale of patented goods upon the purchase of unpatented products. Other

early cases of note were largely about size. Both United States Steel and International Harvester survived court tests while trusts in tobacco and meatpacking were broken up. It was conceded that an organization that promoted public welfare should not be condemned solely on the basis of size or capitalization.

Although Teddy's cousin Franklin Roosevelt's New Deal encouraged collaboration among industrial firms both large and small, this effort to propel recovery after the Great Depression resulted in additional legislation. In 1936 the Robinson-Patman Act passed a Congressional vote. This Act strengthened discrimination laws in areas most prominently related to pricing, thereby influencing competitive behavior by larger competitors against small firms. As we entered the Eisenhower years, the Clayton and Sherman Acts were strengthened by the Celler-Kefauver Anti-Merger Act. This measure largely closed critical asset acquisition loopholes and addressed the shortcomings of both the Clayton and Sherman Acts.

Modern trustbusting began in 1950 and continued through subsequent decades encompassing several landmark activities and rulings, including the Pfizer-American Cyanamid patent battle over tetracycline. It was during this time that the government became much more aggressive in pursuing what some characterized as anticompetitive behavior in monopolistic and oligopolistic industries. For example, the Federal Trade Commission took action against the Xerox Corporation to loosen their perceived control of the photocopy industry. Many would agree that during the 1970s through the '90s trustbusting efforts were focused much more on policing what was identified as poor conduct rather than the break-up of monopolies.

After a highly critical report issued in the 1960s by an American Bar Association commission and a Ralph Nader study group, the FTC underwent extensive changes of personnel, organization

and programs. The 1960s through the early ‘70s were characterized by a series of management and organizational reforms in antitrust legislation. By the 1970s the fear of “cutthroat” competition had declined and the concept of a fully competitive market was emerging. Global competition accelerated and America’s best and most prosperous corporations were challenged by Japanese and European companies in a fierce battle for industry dominance. The focus shifted to consumers and the notion that monopolies provided fewer options and encouraged higher prices. The core of criticism also included the failure of the Federal Trade Commission to establish strong internal processes for setting priorities. The implication was that without an effective strategy for ranking potential projects and antitrust violations the cases were processed by default, vis-a-vis the arrival of the mail having no direct connection to the economic importance of the matter. All these relevant issues impacted the Federal Trade Commission greatly and central to the rationale for reform was the assumption that the FTC and the Department of Justice should not approach their work as antitrust agencies, but as competition agencies.

Antitrust Examples and Issues

Although there was a notable and significant resolution to break apart the giant Bell System a/k/a American Telephone and Telegraph a/k/a AT&T as early as 1974, the process actually took more than ten years. I have some firsthand knowledge of this trustbusting break-up as I spent the better part of my adult life as an AT&T employee and eventually as an executive. The action that began in 1974 led to Judge Green’s decision to divide the Bell System into several parts. On January 1, 1984 the bifurcation of the giant Bell System took place and the seven baby Bells were established. Much has changed since then. Ironically, a great deal of consolidation has occurred. According to Ben Scott, policy director for Free Press, “The local phone companies have all

merged now to the point where there are only three left and they operate in areas where they are huge, regional fiefdoms." There is great disagreement as whether or not the break-up of the Bell System monopoly also caused degradation to laboratory applied research. Bell Labs brought us cell phones, material science and digital switching, along with many other important developments in radar and sonar technology. On the other hand, there are many people who believe that the break-up of Ma Bell has led to greater innovation, particularly in the wireless market. One thing is for sure, the consumer has been the winner in this highly competitive international market. Clearly, we pay less for telecommunication services now than at any time in the last 50 years.

On November 5, 1999, a federal judge ruled that Microsoft was in violation of the Sherman Act. As a result, the giant corporation was split into two separate entities in perhaps the most famous contemporary antitrust case to date. As early as 1991, both the Federal Trade Commission and the U.S. Department of Justice began taking an interest in Microsoft's business practices. From initial inquiry to the first settlement, it was a slow process. Nevertheless, by July 15, 1994 Microsoft agreed to end contracts with other original equipment manufacturers which related to operating systems, licensing, and contracts that required per processor restrictions on industry collaborators. Although they consented not to tie other Microsoft products to the sale of Windows, they remained free to integrate additional features into the operating system.

The Department of Justice continued to monitor Microsoft and in the spring of 1998 *United States v. Microsoft* was set into motion. The D.O.J. and twenty U.S. states alleged that Microsoft abused monopoly power on Intel-based computers in its management of operating systems and web browsers sales. Microsoft was cited for unfairly restricting the market and establishing a monopoly to crush a list of competing companies such as Apple, Java, Netscape, Lotus Notes,

Real Networks and Linux. Microsoft vigorously defended their position and asserted that the merging of Windows and Internet Explorer was the result of innovation and competition in an open technology market.

After the corporation had been broken into two separate units, one to produce the operating system and one to produce other software components, the U.S. Department of Justice finally reached an agreement with Microsoft in 2001. The settlement required Microsoft to share its application programming interfaces with third-party companies. To ensure compliance, a committee was appointed to receive full access to Microsoft's systems, records and source code for five years.

To this day, Microsoft remains globally involved in antitrust actions and settlements. Over the years, continuing antitrust conflicts in Europe have resulted in the company being hit with fines of nearly $1.2 million euros. In its most recent encounter, the European Commission opened an investigation over the PC user's right to be offered an impartial choice between Internet Explorer and competing web browsers. Microsoft subsequently settled the antitrust issue by offering to introduce a browser "ballot screen" to its upcoming Windows 7 that would give European consumers the opportunity to select a rival program such as Mozilla Firefox and Google Chrome. Many consider Microsoft as a continuing monopoly of operating systems and applications. Surely there will be continuing antitrust investigations in the years ahead.

In 2003, AstraZeneca, Great Britain's second-largest pharmaceutical company, was issued a "civil investigative demand" by the United States Federal Trade Commission regarding the drug Nexium. The FTC suspected AstraZeneca of predatory pricing, dramatically slashing prices in order to attract patients who had previously used the Nexium formula under its old name, Losec.

With daily sales at $10 million Losec lost patent protection and the company was racing against time to convince users to try the old product with a new name before cheap generic versions flooded the market. It worked. According to their 2002 annual report, Sir Tom McKillop, AstraZeneca's chief executive, increased his salary and bonuses by 15%. Although the British pharmaceutical company consented to a U.S. inquiry, neither the FTC nor AstraZeneca offered any further comment.

November 7, 2005, Washington D.C. Attorney General Robert J. Spagnoletti along with the FTC and two states sued the Warner Chilcott Corporation and Barr Pharmaceuticals for entering into an agreement that prevented generic competition. It was alleged that Warner Chilcott paid Barr $20 million to keep it from marketing a generic version of their oral contraceptive Ovcon. Due to an existing option agreement between Warner Chilcott and Barr, Warner Chilcott exercised their prerogative to pay the agreed upon fee in exchange for Barr Pharmaceuticals withholding the generic formula.

On June 3, 2009, Richard Feinstein, Director of the Federal Trade Commission's Bureau of Competition, appeared before the members of the House Judiciary Subcommittee on Courts and Competition Policy. Testifying on behalf of the Commission regarding the need for legislation to prevent anticompetitive agreements between branded and generic drug firms that delay consumer access to generic drugs, Feinstein stated, "Since this issue first arose in 1998, every single member of the Commission, past and present – whether Democrat, Republican, or Independent – has supported the Commission's challenges to anticompetitive 'pay-for-delay' deals…" He also expressed his concern that the enormous costs that result from these agreements seriously threaten our nation's already-struggling healthcare system. "…Agreements to eliminate potential competition and share the resulting profits are at the core of what the antitrust laws prescribe,

and for that reason these ‘pay-for-delay’ settlements should be prohibited under the antitrust laws. But since 2005, court decisions have taken a lenient approach to such agreements in drug patent settlements. As a result, it has become increasingly difficult to bring antitrust cases…and such settlements have become a common industry strategy. As one investment analyst report put it, ‘the courts’ permissive approach to exclusion payments has ‘opened a Pandora’s box of settlements.’”

According to a report issued by the grassroots organization Health Care for America Now (HCAN):

- More than 94% of all insurance markets in the United States are highly concentrated
- The number of insurers has fallen by 20%
- Since 1999, employment-based health insurance premiums have increased 120% compared to cumulative inflation of 44% and cumulative wage growth of 29% during the same period
- Premiums increased by more than 87% from 2000 to 2007
- Private insurance spending is increasing at a rate 37% greater than spending for Medicare
- The number of uninsured has increased to more than 47 million, or more than one out of seven Americans, as premiums are simply out of reach for increasing numbers of individuals and small businesses
- In 2008, employer health insurance premiums increased by 5% – twice the rate of inflation
- Profits of the 10 largest publicly traded insurers increased 428% from 2000 to 2007, from $2.4 billion to $12.9 billion

During the past thirteen years there have been more than 400 mergers in the health insurance industry and some believe that private insurance companies have consolidated into monopolies or tight oligopolies and used that advantage to put profits ahead of patients.

In a letter dated May 19, 2009, HCAN has challenged the Department of Justice Antitrust Division to conduct a thorough investigation of health insurance mergers and initiate investigations of anticompetitive conduct by dominant insurance companies. Based on this analysis, HCAN is requesting a public report from the Department of Justice and the Federal Trade Commission on the state of competition in healthcare markets.

Upon taking office, President Obama stressed that antitrust enforcement was one of his major priorities. On April 20th of this year, the Senate confirmed Christine Varney as Assistant Attorney General in charge of the Antitrust Division of the Department of Justice. Ms. Varney has promised to reaffirm the government’s duty to police monopolistic and anticompetitive practices by powerful companies. Among other enforcement objectives, she has committed the Department of Justice to reevaluate the criteria used for consolidation and concentration in the financial markets.

There is a growing movement in the United States to limit the size of financial companies. Europeans are contemplating a similar resolution and the Bank of England has vowed to pressure three of their bailed-out institutions – Royal Bank of Scotland, Lloyds Banking Group and Northern Rock – to downsize. This viewpoint has been endorsed by former Federal Reserve Chairman Alan Greenspan as well as many prominent business analysts. Ben Bernanke, the current Chairman of the Federal Reserve, has much to say about financial reform and the possibility of restructuring the Central Bank’s authority and control over monetary policy. It is

clear that the system needs to be changed, but the question is: What type of change? Lessons of the past two years and the “too big to fail” debacle rightfully points some blame at the Federal Reserve. Preceding the crisis, they declined to employ all the measures in their power to curb the growing risk-taking behavior in the financial sector. The large loans made by the Federal Reserve to firms such AIG, Bank of America and Wells Fargo were justified by rationalizing that these organizations were too big to fail. Apparently the same wasn’t true of the all but forgotten Lehman Brothers who received no financial support. While there are a number of senators and other regulatory authorities who seek to decrease the scope and power of the Federal Reserve, Chairman Bernanke sees it differently. He believes that the Fed should have increased regulatory authority. He also believes that a restructured regulatory system requires holistic oversight. The question remains: If not the Federal Reserve than whom? A new regulatory body? Although some may advocate for this it raises yet another question: With all the change and innovation over the last twenty years, what should the financial industry look like? Does it make sense to reinstate the supervisory firewall of protection provided by the Glass-Stegall Act of 1933 which prohibited all alliances between commercial and investment banks?

Alternative views concerning financial reform include the observations of Simon Johnson, a professor at the Massachusetts Institute of Technology and former chief economist of the International Monetary Fund. “The era of the big bank is over,” comments Mr. Johnson, stressing that society has not benefitted from the sensational growth of financial companies over the last ten years. Fueled by the continued resentment over Wall Street bailouts and bonuses, the House Financial Services Committee voted to support an amendment authored by Pennsylvania Democrat Paul Kanjorski. In his proposed addendum, U.S. regulators would have the power to break up any large financial institution deemed as a “grave threat” to the financial stability of the

United States. Representative Kanjorski's measure goes one step further than Treasury Secretary Timothy Geithner's "Resolution Authority" to manage large, interconnected non-bank firms that fall outside the jurisdiction of the FDIC by calling for the ability to dissolve companies involved in precarious business practices well before they reach the point of failure. Geithner's proposal would allow the government to intervene and put the firm into conservatorship or receivership when bankruptcy has become the company's only option. Critics of the "break-up provision," such as the Financial Services Forum, favor tighter regulation instead. They are urging lawmakers to argue against the Kanjorski amendment, citing that only a handful of the world's largest financial companies are based in the U.S. and, because mega corporations need megabanks to administer their needs, the stakes are too high. Depending on forthcoming decisions, the future of the United States economy in the world marketplace is at stake.

The Department of Justice has also opened an inquiry into whether telecommunication companies such as Verizon and AT&T have abused their recently established market power. Although it's not a formal investigation, the comprehensive audit will examine everything from broadband access and traditional voice service to wireless. Most likely, the study will question whether big wireless carriers are undermining smaller competitors by restricting popular phones through exclusive agreements with equipment manufacturers, for example AT&T's exclusive right to provide service for Apple's iPhone. By the same token, Verizon serves as the exclusive provider of Research In Motion's touch-screen BlackBerry Storm. Big carriers warn that limiting exclusive deals would discourage innovation because exclusive agreements make it possible for them to take the risks necessary to bring products to market at discounted prices. Paul Roth, president of retail sales and service at AT&T, believes that there is plenty of competition in the wireless industry. In fact, last October he registered his concerns in front of Congress stating that

if the government is allowed to enforce intrusive restrictions on AT&T's services or the manner in which service providers and manufacturers collaborate, then the billions of dollars his company invests in its network and services would be put at risk. Perhaps a telephonic monopoly wasn't so bad after all.

Due to consolidation and market growth, AT&T and Verizon have emerged as the two major players with the most influence with equipment makers. Together they hold 90 million wireless subscribers in the United States and contribute significantly to support the World Wide Web. Jon Muleta, former wireless bureau chief of the FCC, cited an important related point. The Antitrust Division cannot pursue a case against big telecommunication carriers unless the major equipment manufacturers come forward to say they're being forced into signing agreements. "The equipment providers enter into these deals willingly," he said.

Non-Compete People Issues:

In an effort to try to stop employees or former employees from working for a competitor or disclosing company secrets, non-compete and non-disclosure agreements are becoming a more and more common business practice. However, several technology industries have come under investigation recently for the selective design of their employee contracts. Certain agreements may contain conditions and provisions which dictate that a computer programmer, for instance, cannot program computers for two years after leaving the company. Excessive measures such as this will prevent the computer programmer from earning a living in his or her chosen field. Under antitrust laws this constitutes an attempt to inhibit competition by amassing talent and skill sets, yet some courts will uphold non-compete clauses if they comply with acceptable standards. Of course, the definition of "acceptable standards" is debatable and subject to

situational application. Perhaps the old doctrine of English common law – the “rule of reason” is applicable to intellectual non-compete matters.

Taking the non-compete restrictions one step further, Motorola and Research in Motion Ltd. (RIMM) are feuding over the right to hire laid-off workers. These arch competitors entered into a contract stipulating that they would not hire each others employees. Research in Motion, a manufacturer of Blackberry mobile devices, is now suing Motorola for their attempt to block RIMM from hiring experienced workers that Motorola has had to let go for economic reasons. Court documents confirm that Motorola is trying to expand their agreement to include any Motorola employees that were laid-off or fired.

Google has been under fire lately for contracting to digitally publish books that are out of print but still protected by copyright law. They were also criticized for an attempt to enter into partnership with Microsoft/Yahoo. The failed partnership would have placed 90% of the search advertising market in Google’s hands. As it is, Google controls approximately 65% of the search market and that is considered by some to be a monopolistic portion. Then last May, the Federal Trade Commission disclosed plans to investigate a connection between the executive boards of Google and Apple, citing that Google CEO, Eric Schmidt, and Apple Corporate Director, Arthur Levinson, served on the boards of both companies. Although Schmidt initially spoke out against the charge, Levinson and Schmidt each stepped down from their respective board positions later in 2009. Apple CEO, Steve Jobs, confirmed that since Google has entered the operating system realm with Android and Chrome OS, Google’s profits are cutting into Apple’s core business. Jobs went on to say that Schmidt’s effectiveness as an Apple board member has been significantly diminished. Due to potential conflicts of interest, Schmidt would have to recuse himself from increasingly larger portions of the meetings. Sharing directors raises competitive

issues and although the FCC approves Schmidt's resignation it has vowed to keep investigating the strange relationship between Apple and Google. Not surprisingly, earlier this month Google launched the Nexus One "super phone" and, for the moment, its state-of-the-art functions rival Apple's iPhone.

Everyday our global business environment becomes more closely interconnected and technology is the matrix. The stage is being set for unique, even inconceivable, legal antitrust issues.

Dr. Shawn Berman, Associate Professor of Business and Society at the University of New Mexico, has identified three major questions challenging regulators during this century: 1) Is monopoly always bad, especially given global competition? 2) How do mergers and restraint of trade impact innovation? 3) How does the question of antitrust apply to high-tech businesses? Should new industries be governed by different forces of competition?

In his article "Non-Compete Pacts Called Bad for Tech Innovation," Chris Kanaracus discusses the future of innovation in a competitive environment. Innovative technological advances are most usually discovered by experienced, specialized professionals and these are the individuals most often recruited to help guide a startup company. In 2008, a Harvard University panel confirmed that the State of Massachusetts had smothered development of technology startups by aggressively enforcing employee non-compete agreements. The panel also pointed out a striking comparison: In California, where employee non-compete provisions are largely unenforceable, technology is experiencing cutting-edge industry expansion. Paul Maeder, general partner in the venture firm Highland Capital Partners, explains that one successful company has the potential to generate five thriving startup companies. Maeder doesn't believe the non-compete controversy will be resolved through legislation. Instead, he urges workers to become more discerning and

advises venture fund officials, like him, to become actively involved in educating companies about the global marketing risks associated with demanding non-compete agreements.

As to the question *Do We Need A Trust-Buster Like Teddy Roosevelt?* the answer is: *We may already have one*. Her name is Christine Varney, Assistant Attorney General for Antitrust. Just as Teddy Roosevelt did, Ms. Varney grew up following in her father's footsteps. John Varney also served as a living model of civil rights and equal opportunity when he worked as a lawyer for Bobby Kennedy's 1968 presidential campaign. After earning a law degree from Georgetown, Christine Varney volunteered at the Democratic National Committee, joining the organization full time as chief counsel in 1989. In 1992 Arkansas Governor Bill Clinton hired her to be chief counsel for his 1992 presidential campaign. When he became president, she remained on his staff as chief counsel for the Presidential Inaugural Committee, and later as Assistant to the President and Secretary to the Cabinet. President Clinton nominated her to serve on the Federal Trade Commission in 1994. In May 1997, Ms. Varney confirmed her ability and willingness to make tough, wide-ranging decisions with high stakes and serious consequences attached when she cast the deciding vote against the R.J. Reynolds Company's use of the "Joe Camel" cartoon character in cigarette advertising.

In recent speeches and public commentary, Assistant Attorney General Varney has suggested that relaxed antitrust enforcement has contributed to the current situation and that "too big to fail" is a failure of antitrust. She has stated on more than one occasion, "Antitrust enforcers can no longer sit on the sidelines." Ms. Varney is obviously referencing the Bush Administration and the fact that the antitrust division did not bring a single case to trial against a huge corporation for anticompetitive behavior against a smaller competing company. The previous presidential administration has a history of collaborating with Big Business. In fact, toward the end of

George Bush's presidency, the Justice Department's antitrust division published a new set of guidelines to protect monopolies. "To be illegal," the report stated, "a monopolist's actions to shut out a rival…would have to inflict damage 'disproportionately' greater than the benefits to consumers…[i.e.] Hammering a competitor by providing deep discounts to consumers would count as monopolistic only if the rival firm was wiped out completely." While judges and regulators worry about the harsh effects that aggressive enforcement of antitrust laws could have on consumers, the American court system still struggles with the "gray area" that separates anticompetitive behavior from true vigorous competition.

It seems clear that the Obama administration is interested and active in the realm of fair competition. The question remains as to the application of antitrust law and the value it brings to fairness and economic development in the United States and the world. You be the judge…

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