Donald Luskin, Chief Investment Officer
David Gitlitz, Chief Economist

THOUGHT CONTAGION

"Get the Hell Out of My Way!"

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Donald Luskin

That's what John Galt, the individualist hero of the novel *Atlas Shrugged*, -- Ayn Rand's great celebration of laissez-faire capitalism -- said to the federal bureaucrats. And there's no better message to send to Washington today.

That's what the market is saying in its powerful reaction to the possibility that the government is getting the hell out of Bill Gates' way, by negotiating a favorable settlement in the Microsoft antitrust case.

The antitrust laws amount to a retroactive capital gains tax imposed arbitrarily and unpredictably on investors in companies that achieve a certain level of success. Like any capital gains tax, antitrust laws reduce an investor's expected return on his investments. And when investors expect lower returns, they will insist on lower prices for stocks -- if they invest at all.

That raises the cost of capital across the economy, but it hits young technology companies the hardest. Those are the ones whose investors dream of "the next Microsoft." But if "the next Microsoft" is nothing more than the next corporate mega-success to get cut down to size by the antitrust laws, then what's the point of dreaming? Or investing?

The proof is in the pudding. In early April 2000, when Judge Thomas Penfield Jackson published the US District Court's Conclusions of Law in the Microsoft case -- the guilty verdict, in essence -- a correction in the NASDAQ turned into a crash. And the rest is history.

Were there other factors at work? Surely. But one less straw on the camel's back would just as surely have been a very good thing.

And it's not just Microsoft, nor is it just the application of antitrust laws to punish the abuse of purported monopoly power. What's worse is the government's blank check power under the Hart Scott Rodino Act to decide arbitrarily which mergers and acquisitions will get done and which won't -- based on an inevitably subjective judgment of whether a deal will reduce competition.

This 25-year old statute, passed in the same "do something" era that brought us wage and price controls and Whip Inflation Now buttons, permits the government to forbid deals that would simply reduce competition -- it doesn't have to be proven that a deal would result in a monopoly (which isn't a crime, anyway), or that such a monopoly would ever be abused (which would be a crime, but it hasn't been committed yet).

While the persecution of Microsoft under the antitrust laws was knocking one leg out from under the NASDAQ last year, a year of agonizing twist-in-the-wind Hart Scott Rodino review of the proposed merger of Sprint and MCI Worldcom -- which ended up with the deal getting aborted -- knocked the other leg out.

http://www.trendmacro.com
don@trendmacro.com
dgitlitz@trendmacro.com

325M Sharon Park Drive #325
Menlo Park CA 94025
Phone 650 429 2112
Fax 650 429 2112

42 Forest Drive
Parsippany NJ 07054
Phone 973 335 5079
Fax 973 335 8016

Just as investors want to believe that there are unlimited horizons of success for their tech companies, so too do they need to believe that there are exit strategies for their slower-growing companies in more mature industries. Merger is a classic means of extinguishing excess capacity in a mature industry, and reinvigorating earnings through realization of scale economies. When that strategy is taken off the table, mature companies have no means of exit. They are forced to walk the earth as the corporate undead, condemned to an eternity of unwinnable competition that doesn't do any good for consumers, shareholders, employees, or anyone else.

Merger activity in the 1980s was an essential part of the restructuring of corporate America. In some ways it was painful, and some critics might say that some elements were excessive or exploitive. But when it was over, America had emerged from its rust-belt malaise of the 1970s ready to lead a global growth explosion in the 1990s. And it was all made possible because the Reagan administration let deals sail through Hart Scott Rodino review.

Now America is entering into another period of restructuring -- as the record-breaking number of restructuring charges showing up in the earnings reports of S&P 500 companies attests every day. As we struggle to find a bottom in this recession, restructuring is every bit as critical for future growth as it was in the 1980s. And mergers and acquisitions could be as much a part of it today as they were in the 1980s -- if the Bush administration will take off the Hart Scott Rodino handcuffs put in place during the Clinton years.

The market is excited about an impending settlement with Microsoft, because it is potential evidence that the Bush administration intends to get the hell out of the way. More and better evidence would be an effortless journey through Hart Scott Rodino for EchoStar's deal to acquire DirectTV.

Of course even if Bush gets religion on relaxing antitrust enforcement there's still a nation full of eager state district attorneys looking to hang a billionaire's scalp on their belts. As of this writing, it seems that -- for the second time -- the states are getting in the way of a Microsoft settlement that the federal government could otherwise accept.

And then there's the rest of the world. Antitrust nabobs in the European Community have their own version of Hart Scott Rodino that can be every bit as punishing as our own -- as Jack Welch can tell you, after having General Electric's acquisition of Honeywell shot down in Europe.

But we'll be watching all this very carefully. For a new administration that hasn't gotten very much right so far on the economic policy front, this could be an important breakthrough that could have profound and lasting positive impact.