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Looking Forward: Merger and Other Policy Initiatives at the FTC[2]

I. INTRODUCTION

Thank you, Jan and Rich, and good morning. It is a pleasure to return to the Fall Forum, this time in a new role. Prior to the November 2 election, several folks wrote about what changes in antitrust enforcement and policy we might have expected had President Bush been defeated. In no piece that I read were major changes predicted, regardless of the election's outcome. That is because, as Jan McDavid said in her essay in the GLOBAL COMPETITION REVIEW, today's antitrust policy "was built on a broad consensus from prior Republican and Democratic administrations that has bipartisan support, shared to a large degree by both academics and the business community, which recognize the importance of well-grounded

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[1] The views expressed in this speech are my own. They do not necessarily represent the views of the Federal Trade Commission or any other individual Commissioner.

[2] I am grateful to Alden F. Abbott, Elizabeth J. Callison, Theodore A. Gebhard, and Sara Y. Razi for their contributions to this speech.

antitrust enforcement in keeping markets open, and see antitrust as an alternative to regulation."[3] That is not to say that all is perfect in the world of antitrust, and that we should sit back and turn on cruise control. Rather, given the broad consensus on the basics of antitrust enforcement, shifts in enforcement priorities generally should reflect shifts in consumer needs and market trends.

I arrived at the FTC during an interesting time of self-assessment, as we celebrated the agency's 90th anniversary by exploring its history, its successes, and its failures. At the same time, the Antitrust Modernization Commission is focusing all who work in antitrust on changes that could or should be made to improve enforcement. It is healthy to learn from the past and look toward the long-term future, but for now, I have been working to identify where the FTC's services currently are most needed. This morning, I will identify for you a few initiatives that the FTC will undertake in the coming months.

The downturn in merger activity since 2000 permitted the FTC, under the able leadership of my predecessor, Timothy Muris, to focus more resources in other important areas such as nonmerger investigations, advocacy, and policy research and development. I intend to continue devoting resources to these important endeavors (although a resource challenge may arise when the inevitable next merger wave hits). This morning, I will devote significant time to discussing merger-related initiatives. But, you should not take that as a signalnt arer.1Ilste ub7(e)-0.3(rger wave hits). This

[3] Janet McDavid, *What a Kerry Victory Means for Antitrust Law*, GLOBAL COMPETITION REV. (Oct. 30, 2004), *available at* http://www.globalcompetitionreview.com/news/news_item.cfm?item_id=2007.

II. MERGERS

Even in the absence of a merger wave, reviewing mergers remains a core function, as statutory obligations require. It should come as no surprise, then, that all aspects of merger review – that is, the substantive analysis, the review process itself, and the coordination with states and foreign authorities – will be high on the Commission's agenda under my leadership.

Merger activity does appear to be on the rise once again. The number of Hart-Scott-Rodino ("HSR") filings in fiscal year 2004 increased 42% from the prior year, going from 968 to 1377. Also, commentary in the business press suggests that, because many companies today are finding themselves particularly "cash-rich, " merger and acquisition activity can be expected to rise.[4] Indeed, several high-profile mergers recently were announced.

A. THE HORIZONTAL MERGER GUIDELINES COMMENTARY

As many of you know, last February the FTC and the DOJ jointly sponsored a three-day Merger Enforcement Workshop. The principal purpose of the workshop was to assess the practical efficacy of the 1992 Guidelines in light of twelve years of experience. Although relatively minor adjustments were made in 1997, no major changes to the analytical framework have been made since adoption of the 1992 Guidelines. The workshop provided an opportunity for agency officials to hear from leading antitrust practitioners and economists who have written and thought carefully about merger policy and the Guidelines' analytical framework. All sections of the Guidelines were discussed and critiqued with a focus on whether the analytical

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[4] *See, e.g., To the Victor the Problems*, FIN. TIMES BUS. LIMITED INVESTMENT ADVISOR, Oct. 11, 2004; Bill Deener, *With Firms Holding More Cash and Feeling the Need to Grow, Acquisitions Are On the Rise*, THE DALLAS MORNING NEWS, Oct. 14, 2004, at 1D.

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Guidelines.

A Commentary on the Guidelines, informed by the experience of the last twelve years, should bring greater transparency to the agencies' merger analysis and greater certainty to businesses and merger practitioners. We expect the Commentary to cover each major area of the Guidelines and to explain more fully how the Guidelines are applied in practice. We expect the Commentary will seek to clarify how the agencies apply individual provisions of the Guidelines in an integrated manner to answer the key question before us: Is the merger under review likely substantially to lessen competition?

Through "integrated analysis," questions of market definition, concentration, anticompetitive effects, entry, efficiencies, and other Guidelines' factors are not analyzed in a vacuum, or in a piece-meal fashion. Instead, each of these variables is considered in the context of the others. Instead of approaching the Guidelines' analysis simply as a linear step-by step progression through each issue, both the agencies and the private bar, when counseling businesses, must conceptualize those sections as making up an integrated whole. For example, rightly understood, efficiencies and entry analysis are integral parts of the competitive effects analysis. In this regard, it is somewhat inaccurate to think of an "efficiency defense," for example. That suggests that efficiencies are a defense against otherwise adverse competitive effects. Instead, within an integrated analysis, efficiencies should be properly considered as one of the determinants of competitive effects. Using our Commentary to explicate this integrated approach to merger analysis will, I hope, enhance the quality of communications between the government and merging parties during the merger review process.

We are, of course, just at the beginning stages of preparing the Commentary, and thus, the particulars of the final product are still to be determined. Undoubtedly, some of you will ask me why we do not just revise the Horizontal Merger Guidelines. We see a broad consensus that the Guidelines are sound not only in their overall analytical framework, but also in their practical usefulness to the private bar and business community and in their facility to guide the agencies to correct policy decisions. Significantly, courts look to the Guidelines framework in making merger decisions. Thus, the Commentary is not an effort to back away from the fundamental thrust of the Horizontal Merger Guidelines, but rather is an effort to explain how the Guidelines are applied in practice.

It is premature for me to announce a date when the Guidelines' Commentary will issue,

[6] *See* Antitrust Division Policy Guide to Merger Remedies (Oct. 2004), *available at* http://www.usdoj.gov/atr/public/guidelines/205108.htm.

[7] *See* Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies, *available at* http://www.ftc.gov/bc/bestpractices/bestpractices030401.htm; Frequently Asked Questions About Merger Consent Order Provisions,

provisions. Thus, when we look at what the

[9] *See* FTC Press Release, *With Conditions, FTC Allows Cephalon's Purchase of CIMA, Protecting Competition for Breakthrough Cancer Pain Drugs* (Aug. 9, 2004), *available at* http://www.ftc.gov/opa/2004/08/cimacephalon.htm.

[10] *See* Statement of the Federal Trade Commission, *Cephalon, Inc./Cima Labs Inc*., File No. 041-0025 (Aug. 9, 2004), *available at*

remedy was unwise and signaled a negative trend, I favor such efforts to fashion an appropriate remedy to the specific facts of the case at hand.

Both the FTC and the Division have had extensive experience with particular industries, such as oil and gas, petrochemicals, banking, pharmaceuticals, grocery retailing, trash hauling, and radio broadcasting, to name just a few. What "works" as a remedy in grocery retailing – full divestiture of all of one firm's assets within a metropolitan geographic market – may be unworkable in an industry such as petrochemicals, where the participants frequently operate joint ventures within the plants of other firms and rely extensively upon supply agreements, pipeline easements, and the like. Similarly, a divestiture in the pharmaceuticals industry will usually require the approval of the FDA, a process that will impose delay in ultimate achievement and will thus necessitate an interim supply agreement. A "clean" divestiture, therefore, may not be practical in such industries.

Because the FTC (and the Division) have such long-time experience in certain major industries, we have developed approaches to remedies that rely upon that experience and that recognize the particular structural differences that mergers in those industries present. These differences among industries may be the primary explanation for any variation in approach to remedy crafting, be it "fix-it-first," "up front buyer," the use of monitors, and the inclusion of crown jewel provisions. Such differences from industry to industry, rather than any fundamental difference in analytical approach to remedies, may best explain why it may appear that the FTC has had a "preference" for certain kinds of provisions as compared to the Division.

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http://www.ftc.gov/os/caselist/0410025/040809ftcstmt0410025.pdf.

Nevertheless, I do think that formalizing procedural consistency between the agencies is a worthwhile goal. We will, therefore, work closely with the Antitrust Division to see whether there is a need to bring our agencies into even greater conformity, and if so, how it can be done.

In addition to this collaboration with the DOJ, the FTC currently is considering a practice of informally reviewing all merger consent orders six to twelve months after they become effective to see how well they are working to restore competition. Such a practice will help us better understand what kinds of provisions are most and least effective and continually improve

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[11] *See, e.g.*, Deborah Platt Majoras, *Antitrust Going Global in the 21st Century* (Oct. 17, 2002), *available at* http://www.usdoj.gov/atr/public/speeches/200418.htm; Deborah Platt Majoras, *Merger Enforcement at the Antitrust Division* (Sept. 27, 2002), *available at* http://www.usdoj.gov/atr/public/speeches/200285.htm; Joe Sims & Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 65 ANTITRUST L. J. 865 (1997).

[12] *See* FTC Press Release, *FTC Announces Changes to 'Second Request' Review During Premerger Review* (Apr. 5, 2000), *available at* http://www.ftc.gov/opa/2000/04/hsrinits.htm.

specifications for, electronic production. Fourth, we are working to produce, and hope to release in the near future, an updated model Second Request, along with annotations that we hope will provide useful information to parties and practitioners. Other efforts likely will follow as we continue to review our current practices. As these and other projects proceed, I join Bureau management in encouraging staff to be flexible and to tailor Second Requests as closely as possible to the specific competitive concerns motivating the requests.

Anyone who has worked with me in the past few years knows that I am as tough on parties who choose the uncooperative road as I am on staff. I will work to improve the process, but it "takes two to tango." And if, for example, parties continue to move successfully to bar our discovery efforts in litigation on the ground that we "had our discovery" during the Second Request process, we will have no choice but to adapt accordingly. I welcome all thoughts as we work through this dilemma.

Finally, let me mention one last process-related reform. In 2003, the Bureau of

here and around the world. Cooperating with foreign competition agencies and promoting convergence toward best practices, both on a bilateral and multilateral basis, will continue to be key components of the FTC's enforcement program under my leadership. In addition, with antitrust regimes continuing to spread around the globe, the FTC will continue to devote significant resources to assisting new agencies as they strive to formulate and implement sound competition policy. The focus on so-called international issues that has captured the attention of the business community and the bar for the past several years is no fad. For enforcers, dealing with competition issues on a global basis is an imperative. This should be regarded as good news for the private sector, which benefits from cooperation between U.S. and foreign competition authorities to promote sound antitrust policy and enforcement.

It is equally critical to the integrity of antitrust enforcement and, most importantly, to the public we serve, that we work cooperatively with the state attorneys general to ensure as often as possible that our enforcement efforts are complementary and not conflicting. To this end, the federal-state cooperation working group that NAAG convened in 2002 continues to confer monthly, sharing ideas and experiences related to our joint efforts, with the goal of learning from past investigations to enhance future cooperation. Significantly, our discussions on such issues as protecting the confidentiality of shared materials, facilitating electronic discovery, and more seamless negotiation of remedies have contributed to continued effective cooperation in merger and nonmerger matters alike.

III. POLICY R&D

The FTC will continue to complement its enforcement authority through the use of

[14] FTC REPORT, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICIES (Oct. 2003),

We believe it likely that Congress will discuss patent reform in the next session. To help lay the groundwork for this discussion, we have structured our patent reform workshops as town meetings. To encourage broad participation from businesses, independent inventors, patent practitioners, and others, we will hold the town meetings in three different locations – San Jose, Chicago, and Boston – in February and March, 2005. We will conclude with a program in Washington, D.C., in June. We will shortly announce details on the FTC's website, and registration for the town meetings will be available at the AIPLA website.

2. Peer-to-Peer ("P2P") File-Sharing Workshop

Continuing the Commission's efforts to assess the impact of new and significant technologies on consumers and businesses, the FTC will host a public workshop entitled "Peer-to-Peer File-Sharing Technology: Consumer Protection and Competition Issues."[17] The workshop, scheduled for December 15 and 16, 2004, will provide participants with an opportunity to learn how P2P file-sharing works and to discuss current and future applications of the technology. It will also address the risks to consumers related to file-sharing activities, as well as self-regulatory initiatives, technological efforts, and legislative proposals. Competition issues such as the models for distributing music and the impact of file-sharing on copyright holders will also be discussed.

[17] More information about the file-sharing workshop may be found at http://www.ftc.gov/bcp/workshops/filesharing/index.htm.

advocacy we conduct. Recently, one CFTC Commissioner relied on the FTC's advocacy work in his decision to approve the United States Futures Exchange's application to open a futures trading market in the U.S.[19] In addition, the FTC recently commented on a California bill that was intended to increase cost transparency between pharmacy benefit managers and their health plan clients, provide more information with respect to certain drug substitutions, and ensure that

[19] *See* Statement of CFTC Commissioner Lukken (Feb. 4, 2004), *available at* www.cftc.gov/opa/press04/opausferemarks.htm.

[20] *See* Governor's Veto Message for the PBM Disclosure Bill, *available at* http://www.healthlawyers.org/hlw/issues/041001/Terminator_1960_veto.pdf.

[21] *See* CONSUMER FRAUD IN THE UNITED STATES: AN FTC SURVEY (Aug. 2004), *available at* http://www.ftc.gov/reports/consumerfraud/040805confraudrpt.pdf.

[22] *See* FEDERAL TRADE COMMISSION – IDENTITY THEFT S

to educating consumers and businesses about the problem, we held a workshop on the issue this fall, and last month brought our first case against some disseminators of spyware. In that law enforcement action, we challenged spyware that changed consumers' home pages, changed their search engines, and triggered a barrage of pop-up ads. According to our complaint, the spyware also installed additional software, including spyware that can track a consumer's computer use. As a result of the spyware and other software the defendants installed, many computers malfunctioned, slowed down, or crashed, causing consumers to lose data stored on their computers. Then, after having created these serious problems for consumers, the defendants offer to sell them a solution – for $30. We charged that these practices were unfair and violated the FTC Act.[26] A district court has granted our request for a temporary restraining order.

VI. CONCLUSION

I thank the ABA's Antitrust Section for inviting me to address you this morning, and I look forward to working with all of you on important enforcement and policy matters that come before the Commission. Thank you.

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[26] *See* FTC Press Release, *FTC Cracks Down on Spyware Operation* (Oct. 12, 2004), *available at* http://www.ftc.gov/opa/2004/10/spyware.htm.