Making the Grade? A Year at the FTC

Remarks of FTC Chairman Jon Leibowitz
As Prepared for Delivery
Fourth Annual Global Antitrust Enforcement Symposium
Georgetown Law Center
September 21, 2010

Thank you Jim, for that kind introduction.

One of the reasons why I really enjoy speaking at this conference is that it gives us an opportunity to take stock of what the Commission has done in the preceding year, and assess how well we've met our goals. In fact, some of you may recall that William Safire a number of years ago wrote a column in the *New York Times* in which he explained, in his usual clear and persuasive way, why Presidents should hold regularly scheduled press conferences – to make sure their administrations would work hard to accomplish the tasks they had set out for themselves.[1]

I don't want to suggest that the only reason we work hard is that we're afraid we'll be held to account at this conference – but we are a competition agency, and I'm reluctant to totally discount the impact of incentives, even on our highly motivated staff. So we're going to try to make Bill Safire proud, by using the time today to discuss what we have done, and if we've accomplished what we set out to accomplish.

Last September, I announced four major antitrust goals for the FTC: (1) ensuring a cooperative relationship between the FTC and the Department of Justice; (2) substantially revising the Horizontal Merger Guidelines for the first time since 1992 – a task Christine Varney and I announced a year ago, at this very conference; (3) changing the way we look at monopolization cases; and (4) expanding our use of Section 5 of the FTC Act to bring cases involving unfair methods of competition.[2] In addition, and just as important, I also promised to try to strengthen the FTC's partnerships with our counterpart agencies around the world.

Now, as many of you know, at the Commission we take very seriously our obligation to constantly critique ourselves and see how we measure up to the mission of protecting consumers and competition. So this is a good time for a report card. I'm going to give myself a report card right now – but you should all feel free to weigh in if you want to give me (or the agency) higher grades.

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[1] William Safire, *Question Time*, N.Y. TIMES, Feb. 15, 2001, at A31.
[2] FTC Chairman Jon Leibowitz, Remarks at the 36th Annual Conference on International Antitrust Law & Policy (Sept. 24, 2009), *available at* http://www.ftc.gov/speeches/leibowitz/090924fordhamspeech.pdf. o523.794 in jEMC ET82.apeed [Bottom]BB

Cooperation with the Department of Justice

When we set out this goal a year ago, the Department of Justice and the FTC had recently emerged from a period of major substantive disagreements. For example, many of our international colleagues took note of the DOJ-FTC fissure over the Section 2 Report when it was issued in late 2008.[3] And several years prior to that, our two agencies had been unable to agree on a *certiorari* petition in *Schering-Plough*, an early but important pay-for-delay case.[4]

Both Christine Varney and I are well aware of how important it is that our agencies cooperate — so that we can better aid consumers, better develop sound antitrust law, and better maintain the confidence of our international partners. And I am happy to say that today we are working together closely and cooperatively.

This cooperation starts in our day-to-day enforcement actions, where we've seen a decline in the number of clearance fights between our agencies – which, to be honest, were often exaggerated anyway. In any event, we are doing well on this front now. For example, in FY 2009 we had 716 HSR reportable mergers – of that total, one or both of the agencies made a clearance request in 92 of the cases, and all but 8 of them were cleared without being contested. Of those 8, they were resolved in an average of less than 6 days from the time the clearance dispute began. So as you can see we're doing better on clearance and in fact, we're cooperating all across the board, on some of the most significant issues we handle.

This cooperation extends to our highest priority issues. For example, one of the FTC's top priorities over the past year has been putting an end to pay-for-delay pharmaceutical settlements. In these deals, a brand-name pharmaceutical

should accept a motion for a rehearing in *Cipro*.[5] We were disappointed that the court declined to rehear the case *en banc*, but we continue to aggressively litigate other pay-for-delay cases, and it sends an important message to our partners in

Intel the proper course was to challenge the anticompetitive practices; in Google/AdMob the proper course was allowing a very controversial deal to proceed without challenge.

Unilateral conduct by companies with market power will continue to pose significant investigative, analytical, and jurisprudential challenges. I believe we have shown that we are up to facing those challenges, but there are always ways to improve. That's part of the reason why the FTC and the EC have directed our staffs to start a joint unilateral conduct discussion group. Together, we'll begin a comparative analysis of unilateral conduct under both U.S. and EU law and focus on the factors that the agencies consider in looking at predatory pricing, refusals to deal, tying and bundling, and conditional rebates. This work will complement similar efforts being undertaken in the International Competition Network's working group on unilateral conduct.

We hope that these discussions will broaden our perspective on unilateral conduct, improve our approaches, and help us lessen the differences between our antitrust regimes.

Section 5 ("Unfair Methods of Competition")

The Intel settlement also spotlights the rebirth of an old and valuable tool that is proving to be well-adapted to modern times: our authority under Section 5 of the

violations of the Sherman Act. Section 5 provided an appropriate vehicle to go after U-Haul's unilateral anticompetitive conduct.

As this example shows, Section 5 claims sweep more broadly than the Sherman Act, but its sanctions are less onerous. Section 5 does not have any civil penalties attached to it, and in addition, because it is by its own terms not an antitrust statute, it is not as likely to support follow-on private class actions for treble damages. Because there is no private enforcement of Section 5, many of the excesses of class action suits that have led courts to limit antitrust actions in recent years simply don't apply. The balance that Congress struck in drafting Section 5 makes it particularly useful in certain situations, and as our international partners consider creating a private right of action, we look forward to engaging in further dialogue, and sharing our thoughts about the pros and cons of private enforcement.

Conclusion

The fact that we are engaged in international dialogue over such issues as the private right of enforcement, pay-for-delay settlements or merger guidelines is striking for those of us who may have once assumed that these topics would be of little interest outside of the U.S. One might guess that such issues are creatures of unique regulatory context and specific interpretation of particular antitrust laws – but as competition laws all around the world continue to converge, more and more we are finding many conversations worth having across borders, and we will continue to have those conversations.

So that is my summary, and my plan for moving forward. I'm proud of the work the Commission has done so far – much of this work, by the way, continues the work of previous Commissions with previous chairmen from both parties – and I'm confident that we will continue to pr