



# Federal Trade Commission

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**Remarks by Deborah Platt Majoras<sup>1</sup>**

**Chairman, The Federal Trade Commission**

**Before the Chinese Academy of Social Sciences**

**“Promoting a Culture of Competition”**

**April 2006**

Thank you. I am delighted to be in Beijing and to address you today. My colleagues, former Federal Trade Commissioner Tom Leary and former Assistant Attorney General for the Department of Justice’s Antitrust Division Hew Pate, spoke to you in July 2004. This is my first trip to China as Chairman of the U.S. Federal Trade Commission (“FTC”), and I am grateful for

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challenging conduct that injures consumers. We also strive, through “competition advocacy,” to create a culture of competition in which federal and state policymakers, courts, and the public come to understand and support competition policy as the best way to protect consumers and promote economic growth.

## **I. Why Competition Advocacy Is Necessary**

Typically, the market system works well, and companies compete fiercely but fairly against each other, to the ultimate benefit of consumers. At times, however, private or government actions operate to thwart competition. Pure anticompetitive business conduct, such as cartels, anticompetitive mergers, and other anticompetitive practices can have harmful effects on competition and thus on consumers. When faced with these infrequent problems, our task is clear: we take enforcement action against this kind of private anticompetitive behavior under the antitrust laws.

We have been, for example, particularly active in the health care and pharmaceutical markets. Last year, the Commission investigated a transaction between Johnson & Johnson and Guidant, which had it gone forward, would have reduced competition in the markets for three life-saving medical devices for coronary artery disease patients. In another merger investigation, we entered an order that protects patients who require dialysis services from higher prices and reduced quality and service.<sup>2</sup> The FTC also brought and settled several cases charging groups of physicians with engaging in illegal agreements to set the prices they will accept from health

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<sup>2</sup>Davita, Inc., Docket No. C-4152 (Nov. 14, 2005) (decision and order), *available at* <http://www.ftc.gov/os/caselist/0510051/051118do0510051.pdf>.

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was partially responsible. One such observer was the then-Chairman of the Federal Trade Commission, Lewis Engman, who in 1974 gave a speech in which he tied some of the country's economic problems to its competition policy, specifically to burdensome federal transportation regulations. Engman discussed how the Civil Aeronautics Board raised prices for air travel by limiting the entry of new air carriers and controlling the distribution of airline routes. He also noted that the Interstate Commerce Commission effectively sanctioned price fixing among trucking companies. Engm

government regulatory structures, however. It also includes helping policymakers identify and resist attempts by private parties to obtain government action that further their own interests at the expense of

If the costs to competition are great and the benefits to consumers small, how can this be a successful strategy for companies to convince the government to adopt these restrictions? Can't legislators and other policymakers easily detect this imbalance between a regulation's benefits and its costs? The answer lies in the fact that the interests of the companies and the interests of the consumers are typically not well-balanced in this situation. The businesses who support these restrictions are usually well organized, have lobbyists with access to lawmakers, and have strong incentives to get the restriction enacted because they will reap all of the supracompetitive returns. By contrast, consumers who would be harmed by the restriction are often unlikely to know about it, are poorly organized, and have limited incentives to stop the restriction because it may only cost any individual consumer a small amount of money, even though it costs consumers a large amount in the aggregate. This is why consum

antitrust concern and the second is a traditional consumer protection topic, both are ultimately aimed at encouraging competition and promoting consumer choice.

## **II. Opposing Unnecessary Barriers to Entry**

Much of our activity involves commenting on state and federal regulations or legislation that erect barriers to entry. Often the rationale for legislation is the protection of consumers through restrictions on who may offer certain goods and services to consumers or (perhaps more honestly) the protection of traditional businesses by sheltering them from new forms of competition. While firms generally profess a desire to keep government from interfering with business, the instinct to seek protection from government is widespread. As one commentator put it, “calls to restrict competition, through government regulations and import barriers, are

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attempts to prevent, it will curtail other pro-competitive activity.

Third, does the consumer harm that the restriction seeks to prevent exceed the consumer loss from the restriction on competition? Here, we help perform the cost-benefit analysis that all policymakers should undertake, emphasizing that competition generally is more successful at protecting consumers than government regulation.

#### **A. Barriers to Internet commerce: Wine**

In July 2003, the FTC staff issued a report on state restrictions on the direct shipment of wine from out-of-state vendors to in-state consumers.<sup>6</sup> Direct shipment is a growing and potentially important alternative to the traditional tightly-regulated, three-tiered system of producers, licensed wholesalers, and retailers. Many states, however, have banned or severely restricted the direct shipment of wine to consumers, thereby creating an entry barrier for numerous, particularly small, wineries seeking to sell their products online.

The staff report, reflecting the unique interest and sensitivity of the Commission both to competition and consumer protection concerns, concluded that states could significantly enhance consumer welfare by allowing the direct shipment of wine as a purchase option. The report supported this conclusion with a study conducted by FTC economists, which showed that many wines available to consumers online are not available in local retail outlets and that consumers could save money if they purchased their more expensive wines online.<sup>7</sup>

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<sup>6</sup>POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE, REPORT OF THE STAFF OF THE FTC (Jul. 2003), *available at* <http://www.ftc.gov/os/2003/07/winereport2.pdf>.

<sup>7</sup>The study appears as an appendix to the FTC staff report. It was published separately as an FTC Bureau of Economics Working Paper, Alan E. Wiseman and Jerry Ellig, How Many Bottles Make a Case Against Prohibition? (Mar. 2003) ( FTC Bureau of Economics Working Paper No.



The report also examined concerns about the direct shipment of wine to consumers, given that underage drinking is a serious health and safety issue.<sup>8</sup> The report concluded, however, that there is no systematic evidence of problems of Internet-related shipments to minors. Moreover, the report noted that safeguards, such as checking identification at delivery, may address these concerns, and that, in fact, some states have successfully followed this less restrictive approach.

The issue of whether states could prohibit out-of-state sellers from shipping wine to consumers while allowing in-state wine producers to do so ultimately came before the Supreme Court. The United States Suprem

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information useful to consumers in making purchasing decisions.<sup>10</sup> Because dissemination of truthful and non-misleading information about products and services is also critical for competition, the Commission has been vigilant in preventing overly broad private and government restrictions on the provision of such information.<sup>11</sup> An approach that encourages the dissemination of accurate speech and tailors restrictions to prevent claims that are false or misleading, coupled with vigorous law enforcement, will result in greater dissemination of valuable information with benefits for both consumers and competition. In contrast, evidence indicates that broad restrictions on the dissemination of truthful commercial speech, while effectively stopping false or misleading information, can deprive consumers of useful information as well, thus impeding their ability to exercise informed choice in the marketplace.<sup>12</sup>

For example, comparative advertising claims can be particularly beneficial for consumers. The FTC, after conducting an extensive economic analysis, has concluded that comparative advertising, when truthful and non-deceptive, is a source of important information to consumers and assists them in making rational purchasing decisions. Comparative advertising

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<sup>10</sup>*See, e.g.*, FTC Policy Statement Regarding Advertising Substantiation, 49 Fed. Reg. 31000, 31000 (Aug. 2, 1984) (“The Commission’s determination of what constitutes a reasonable basis depends, as it does in an unfairness analysis, on a number of factors relevant to the benefits and costs of substantiating a particular claim.”) These factors include consideration of the benefits of a truthful claim and the costs of a false or misleading claim, thus expressly balancing the goal of preventing deception with the need to ensure access to truthful information and vigorous competition. *Id.*; *see also* JOHN E. CALFEE & JANIS K. PAPPALARDO, FTC BUREAU OF ECONOMICS, HOW SHOULD HEALTH C

encourages product improvement and innovation, and can lead to lower prices in the marketplace.<sup>13</sup>

**A. Food health claims information**

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expensive and risky. If producers cannot tout their advances in these areas, they will have little incentive to make the investments and take the risks.

## **B. Direct-to-Consumer drug advertising**

In another example of FTC advocacy on mandated information disclosure, FTC staff filed a comment with the FDA regarding direct-to-consumer (DTC) advertising of prescription drugs.<sup>16</sup> The comment analyzed the economic effects of such advertising and suggested changes to the FDA's regulatory scheme to communicate information to consumers in a more accessible way. Thereafter, the FDA issued several draft guidance documents designed to improve the information that consumers and health care practitioners receive in advertising about prescription drugs and certain medical devices. The FDA chose to permit advertisers to convey more limited and focused disclosure in DTC print advertisements for prescription drugs and to apply less burdensome regulatory standards to DTC broadcast ads for restricted medical devices. The FDA's decisions conform to the FTC staff's recommendations to allow advertisers to communicate information to consumers in a more accessible way.

## **VI. Advocating The Sound Development Of The Antitrust Laws**

Two primary characteristics of the U.S. legal system give rise to the need also to engage in competition advocacy: first, our common law system, through which courts develop the law through individual case decisions; and second, our system of private antitrust enforcement,

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<sup>16</sup>Comments of the FTC Staff Before the FDA In the Matter of Request for Comments on Consumer-Directed Promotion (Dec. 1, 2003), *available at* <http://www.ftc.gov/be/v040002text.pdf>; Comments of the FTC Staff Before the FDA In the Matter of Request for Comments on Agency Draft Guidance Documents Regarding Consumer-Directed Promotion (May 10, 2004), *available at* <http://www.ftc.gov/os/2004/05/040512dtcdrugscomment.pdf>.

through which private parties can bring claims of anticompetitive conduct against one another. Because private actions can present interesting legal questions that impact development of the antitrust laws, the FTC and DOJ often have a strong interest in those cases and, indeed, the United States Supreme Court and the federal appellate courts often seek our views in such cases.

One such case is *FTC v. Actavis*, which was recently decided by the Supreme Court.

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Commission's entire budget."<sup>18</sup> In fact, our advocacy program uses a very small percentage of our budget<sup>19</sup>, costing far less, we believe, than the savings to consumers it has provided. The recent advocacy program has had some fairly clear successes, and a few of those successes can be roughly quantified. We keep the quality high and the costs down through several means.

Many of our comments build on the experience and informationTc -ch-v ofTjETBT/TT0 1 g 0 0 12 72 680 0 60

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There are always those who oppose competition and view it as an inappropriate means of “organizing” the production and distribution of goods and services. Indeed, on almost every issue on which we comment, there are those who find our advocacy positions vexing. More dangerous are those who profess to favor competition but want to chip away at it when it does not produce a particular result.<sup>20</sup> W

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